THE REINSTATEMENT OF ISLAMIC LAW IN SUDAN UNDER NUMAYRI

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THE REINSTATEMENT OF ISLAMIC LAW IN SUDAN UNDER NUMAYRĪ

An Evaluation of a Legal Experiment in the Light of its Historical Context, Methodology, and Repercussions

BY

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[1] Weissbrod's dissertation on the religious and political teaching of Ḥasan al-Turābī was published in book form by the Moshe Dayan Center in 1999 (see Weissbrod, *Turabi*).

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PREFACE

The idea for this monograph suggested itself in September 1983 when President Muḥammad Jaʿfar Numayrī introduced the Islamist laws[1] 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 *sharʿī* 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 *ʿulamāʾ*.[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 ʿUmar 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

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[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 *ʿulamāʾ*, the authorized exponents of the *sharīʿa*. Also, statutory codification (in itself alien to the *sharīʿa* as a jurists' law) of selected domains of Islamic law, including matters of personal status—the very core of the *sharīʿa*—has been carried out in a patently Western style. Furthermore, the *sharīʿa* 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 *sharīʿa* 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 *sharīʿa* by codification and statutory legislation became for us a matter of primary interest. Reforms in Islamic law have been introduced by means of *sharʿī* mechanisms advanced by Modernists of the Muḥammad ʿAbduh school since the turn of the twentieth century. They aimed at conveying the impression of a genuine internal refurbishment of the *sharīʿa*, 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 *ʿulamāʾ* and *fuqahāʾ*—to statutory law, anchored in state sanctions. Therefore, modern reforms within the *sharīʿa* 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 *sharīʿa*. Moreover, the statutory codification of various domains of the *sharīʿa* and its application in Western-oriented *sharīʿa* and civil courts expose the *sharīʿa* 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 Ḥanafī Texts*; Hallaq, *Ijtihād Closed?*; *Islamic Law and Society* 3, no. 2 (1996), special issue on *Ijtihād* and *Taqlīd*.

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*, *Maḥkama*, 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 qaḍāʾiyya*) 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 absortion of pre-1983 sources of law in the Islamist legislation. Chapter Three examines the Islamization of the law—both *sharʿī* 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 uncodified *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 uncodified *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 uncodified *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 complimentary models to define the paradox of legal pluralism; these may be useful also to define the relations between the uncodified *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 othewise indicated, the citations of Qur'ānic verses in English translation are from Pickthall, *Glorious Koran* (see Bibliography).

LIST OF SUDANESE POLITICAL PARTIES AND ORGANIZATIONS

in alphabetical order of the abbreviations used in the book

DUP	Democratic Unionist Party (*al-ḥizb al-ittiḥādī al-dīmuqrāṭī*)
ICF	Islamic Charter Front (*jabhat al-mīthāq al-islāmī*)
ILM	Islamic Liberation Movement (*ḥarakat al-taḥrīr al-islāmiyya*)
NDA	National Democratic Alliance (*al-tajammuʿ al-waṭanī al-dīmuqrāṭī*)
NIF	National Islamic Front (*al-jabha al-islāmiyya al-waṭaniyya*)
NUP	National Unionist Party (*al-ḥizb al-waṭanī al-ittiḥādī*)
PDP	People's Democratic Party (*ḥizb al-shaʿb al-dīmuqrāṭī*)
RCC	Revolutionary Command Council (*majlis qiyādat al-thawra*)
SCP	Sudan Communist Party (*al-ḥizb al-shuyūʿī al-sūdānī*)
SDF	Sudan Defense Force (*quwwat al-difāʿ al-shaʿbī*)
SPLA	Sudan People's Liberation Army (*al-jaysh al-shaʿbī li-taḥrīr al-sūdān*)
SPLM	Sudan People's Liberation Movement (*al-ḥaraka al-shaʿbiyya li-taḥrīr al-sūdān*)
SSU	Sudan Socialist Union (*al-ittiḥād al-ishtirākī al-sūdānī*)

LIST OF ISLAMIST STATUTES AND COURTS
in alphabetical order of the abbreviations used in the book.[1]

Islamist Statutes

CivPA, 1983	the Civil Procedure Act (*qānūn al-ijrāʾāt al-madaniyya*), 1983
CivTA, 1984	the Civil Transactions Act (*qānūn al-muʿāmalāt al-madaniyya*), 1984
CrimPA, 1983	the Criminal Procedure Act (*qānūn al-ijrāʾāt al-jināʾiyya*), 1983
EvA, 1983	the Evidence Act {*qānūn al-ithbāt* (*qānūn al-murāfaʿāt*)}, 1983
JudA, 1983	the Judgments (Basic Rules) Act (*qānūn uṣūl al-aḥkām al-qaḍāʾiyya*), 1983
PC, 1983	the Penal Code (*qānūn al-ʿuqūbāt*), 1983
PrVPVA, 1983	the Propagation of Virtue and the Prevention of Vice Act (*qānūn al-amr biʾl-maʿrūf waʾl-nahy ʿan al-munkar*), 1983
RdTA, 1983	the Road Traffic Act (*qānūn al-murūr*), 1983
ZakTA, 1984	the *Zakāt* Tax Act (*qānūn al-zakāt waʾl-ḍarāʾib*), 1984

Courts

CAp	Court of Appeal (*maḥkamat al-istiʾnāf*)
CrimC	Criminal Court (*al-maḥkama al-jināʾiyya*)
CrimCAp	Criminal Court of Appeal (*maḥkamat al-istiʾnāf al-jināʾiyya*)
EmCC	Emergency Criminal Court (*maḥkamat al-ṭawāriʾ al-jināʾiyya*)
ProJC	Prompt Justice Court (*maḥkamat al-ʿadāla al-nājiza*)

[1] The list includes only the most important acts and courts mentioned in the book.

ProJCAp	Prompt Justice Court of Appeal (*maḥkamat al-ʿadāla al-nājiza al-istiʾnāfiyya*)
SupC	Supreme Court (*al-maḥkama al-ʿulyā*)
SupCC	Supreme Constitutional Court (*al-maḥkama al-dustūriyya al-ʿulyā*)

CHAPTER ONE

BACKGROUND TO ISLAMIZATION

In September 1983, President Muḥammad Jaʿfar Numayrī officially announced the restoration of the *sharīʿa* in Sudan which entailed among other things, the implementation of the Qurʾānic punishments (*ḥudūd*), and retribution (*qiṣāṣ*). In February and March 1984, the "Islamic economy" was launched; this involved the abolition of usury on internal transactions and the replacement of income and other taxes by the Islamist alms tax (*zakāt*). In June of that year Numayrī required all his officers to swear allegiance (*bayʿa*) to him personally as the Imām of the Sudanese *umma* (the Muslim community), just over a century after Muḥammad Aḥmad al-Mahdī had received the *bayʿa* from *abkār al-mahdiyya*, his first adherents.

In April 1985, less than three years after these new laws were imposed, Numayrī was overthrown and a year later the Sudan shifted from military rule to an elected democracy. With al-Ṣādiq al-Mahdī as prime minister it seemed likely that the Islamist laws would soon be abolished since he had denounced them as un-Islamic, when they were first applied. However, during his three years in office the new prime minister failed to abolish these laws, though he ordered that their application should be suspended. Finally, in June 1989, after a military-Islamist dictatorship had once again assumed power, the Islamist laws were restored with certain amendments. Though history does not repeat itself, one is tempted to wonder whether this new phase of Islamic radicalism, often resorting to violence, was not a reemergence analogous to the Islamic wave which swept Muḥammad Aḥmad al-Mahdī to power in the Sudan in 1881–1885. Consequently, an attempt to discuss the reasons leading to the Islamization of Sudan's legal system in 1983–84, cannot avoid an examination of the Mahdist heritage in Sudan. Although neither Numayrī nor his judicial assistants were guided by Mahdist methodology, the impact of the latter's historical heritage on all Sudanese Muslims, including anti-Mahdists, is so great that even Sudan's Islamist trend since the 1980s cannot be understood without a reference to its Mahdist origins.

1. The Mahdiyya: Setting the Stage for an Islamist Agenda

Muḥammad Aḥmad b. ʿAbdallāh, the Mahdī of nineteenth-century Sudan, was the founder of an Islamic messianic movement which sought to implement true Islam, under the banner of a revival and a renewal (*iḥyāʾ wa-tajdīd*). The Mahdī, as *khalīfat rasūl allāh*, played a central role within this movement. Without the attributes of a *mahdī*, which Muḥammad Aḥmad allegedly possessed, such a movement could not have started, let alone succeeded. Mahdism was consequently modelled, to a large extent, on the historical heritage of the Prophet Muḥammad and the four orthodox caliphs (*al-khulafāʾ al-rāshidūn*), which was the only period in Islamic history when the *umma* was undivided and followed a path conducive to the establishment of a just community of believers, based on the Qurʾān and the *sunna* (legally bindings precedents set by the Prophet Muḥammad). Sudanese Mahdism claimed to contain many of the elements inherent in this glorious period of pure and unblemished Islam. Consequently, the Mahdī and his followers undertook the *hijra* to Jabal Qadīr in the Western Sudan, in order to escape the revenge of the central government, just as the Prophet and his followers had undertaken the *hijra* to Yathrib (Medina) fleeing from their enemies some 1250 years earlier. The Mahdī's supporters were named *anṣār*, a term that had designated those of the Prophet. Following in the Prophet's footsteps, the Mahdī appointed four successors. These *khulafāʾ* were, according to the Mahdī, the successors of the four orthodox caliphs while he himself claimed to be the successor of the Prophet Muḥammad. The Mahdī's call for *jihād* (holy war) was also modelled on that of the Prophet. It was a holy war that sought to persuade unbelievers (from the Mahdī's standpoint), whether Muslims, Christians, or pagans, that there was only one just cause. Those who refused to join the true religion, as propounded by the Mahdī, were either imprisoned, killed in battle, or exiled from Sudan. They included many of the leading *ʿulamāʾ*, as well as heads of Ṣūfī orders and tribal *shaykh*s. However, the *jihād* aimed to liberate not only the Sudan but all the domains ruled by the corrupt Ottoman Sulṭān, starting with Egypt.[1]

[1] Abū Salīm, *al-Āthār al-kāmila*, I, 151–54; this warning was issued by the Mahdī on July 15, 1882, to Muḥammad al-Amīn al-Ḍarīr, head of Sudan's *ʿulamāʾ*, who had declared the Mahdī an impostor; also Holt, *The Mahdist State*, 50–55.

Announcing his manifestation (*zuhūr*), on June 29, 1881, Muḥammad Aḥmad based his claim to a large extent on his reputation as a Ṣūfī *shaykh* of the Sammāniyya order, with considerable following in the White Nile region. The Sammāniyya had predicted that the Mahdī would be one of its adherents and Shaykh al-Qurashī wad al-Zayn, one of its leaders, had supposedly stated that his tomb would be put up by the future Mahdī. Thus following the erection of this tomb by Muḥammad Aḥmad b. ʿAbdallāh the latter advised Shaykh Muḥammad al-Ṭayyib al-Baṣīr and other Sammānī leaders of the Ḥalāwiyyīn tribe, to free themselves "of all worldly affairs and be in readiness for a Godly mission." On the day of his manifestation, Muḥammad Aḥmad wrote once again to Shaykh al-Baṣīr informing him that the Prophet had instructed him "to shoulder the honorable mission of the Expected Mahdī." In his letter, the future Sudanese Mahdī described a vision in which the Prophet Muḥammad addressed him and several saints, mostly of the Sammāniyya order to the effect that: "[. . .] whoever does not regard his [Muḥammad Aḥmad's] Mahdi-ship as true is an unbeliever in God and His Apostle."[2] It was further emphasized that the Mahdī's office was eternal since, like the Prophet, he was created out of the "sacred light of God." Moreover, the announcement made during a Prophetic colloquy (*ḥaḍra nabawiyya*), emphasized that Muslims who did not follow the Mahdī or rejected his mission were heretics. The Mahdī therefore claimed to possess all the requisites and attributes (*al-shurūṭ wa'l-awṣāf*) demanded of the historic *mahdī* according to the Maghribī school. This enabled Muḥammad Aḥmad to claim that the Mahdiyya was one of the pillars of Islam, that those who refused to follow him were *kuffār* (heretics), and that his doctrine and judicial verdicts were thereby rendered infallible.[3]

Ṣūfī traditions played a predominant role in Sudanese Islam ever since the process of Islamization started. The propagators of this brand of popular Islam were in many cases members of "holy families" who had settled in the Sudan and established centers of learning for their followers. However, these Ṣūfī orders were on the whole

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[2] Abū Salīm, *al-Āthār al-kāmila*, I, 76–83; also Holt, *Islamic Millenarianism*, 340–41; and *idem*, *The Mahdist State*, 105–6.

[3] Ibrahim, *Mahdist Ideology*, 30–32, quoting Abū Salīm, *Manshūrāt*, I, 12; thus, for instance, a wife who had embraced Mahdism would be granted a divorce on the grounds that her husband, who had rejected the Mahdī's doctrine was an unbeliever. Cf. Layish, *Mahdī's Methodology and Adaptation*, 224–26.

rather small and limited to one tribe or village and their organization was in consequence diffuse. The newly emerging Ṣūfī movements of the eighteenth and nineteenth centuries were of greater significance for the emergence of Mahdism in Sudan. Among these the Sammāniyya was crucial since it initiated Muḥammad Aḥmad into the Ṣūfī heritage. However, other orders or holy families, such as the Majādhīb and the Khatmiyya, are also important for an understanding of Mahdism. First, because they introduced more authoritarian and centralized structures into Sudanese Sufism. Secondly, their brand of Sufism was on the whole more akin to orthodox Islam than that of the *fuqarā'* (dervishes) who had led the previous wave of popular Islam in Sudan. These earlier holy families had absorbed many of the local beliefs and superstitions imbibed from their new surroundings into their Ṣūfī teachings. The new *ṭuruq* (Ṣūfī orders) were much more outgoing and proselytizing in their approach but, at the same time, less flexible in their attitude to pre-Islamic traditions. Their emphasis on the *da'wa* (mission) also helped them to surpass the older established *ṭuruq*. One should not underestimate the importance of the support tendered by the well-organized, centralized orders to the Mahdī in the early stages of his movement since he was able to exploit their organizations to promote his mission among their members. First he relied on the support of his followers and fellow members in the Sammāniyya, whose *shaykh*s he recruited to attend his colloquy. Later, when he set out to extend his mission in the Western Sudan, he recruited followers of the Tijāniyya and Ismā'īliyya orders, while the Majādhīb helped him in gaining support among the Beja tribes in the Red Sea hills.[4]

It is not surprising then that among the Mahdī's early adherents there were many *shaykh*s and members of Ṣūfī orders who believed that the Mahdist militant brand of popular Islam would help rid them of the *'ulamā'* imported by the Turco-Egyptian rulers from al-Azhar. Of the important Ṣūfī orders, the Khatmiyya alone distanced itself from the Mahdist movement despite the Mahdī's repeated appeals. It did so, first of all, on account of its claim regarding the status of its leader, Sayyid Muḥammad 'Uthmān al-Mīrghanī, who

[4] Abū Salīm, *al-Āthār al-kāmila*, I, 76–81, in which the Mahdī orders Muḥammad al-Ṭayyib al-Baṣīr to give the *bay'a* to his Sammānī brethren and to undertake the *hijra* to Jabal Qadīr; see also Karrar, *Sufi Brotherhoods*, 93–102; Johnson, *Religious Paradigms*, 159–78.

was according to Khatmī tradition created out of the Prophet's light. Secondly, as part of the new urban class, the Khatmiyya's adherents controlled social and economic interests largely linked with those of the alien rulers. Offshoots of the Khatmiyya, such as the Ismāʿīliyya in Kordofan were, as already mentioned, among the earliest supporters of Muḥammad Aḥmad al-Mahdī. However, the Mahdist state later turned against its Ṣūfī allies since—once established—it would not tolerate their divided loyalties and demanded undivided submission first to the Mahdī and later to the Khalīfa. In a proclamation issued by the Khalīfa, early in 1884, he denounced—in the Mahdī's name—all Ṣūfī orders as divisive and called upon their adherents to disband them and grant their undivided loyalty to the Mahdiyya.[5] The Mahdī dealt in some detail with the relationship between Sufism and the Mahdist *daʿwa*. He compared Ṣūfī beliefs to "wells" from which the adherents drank so as to quench their [spiritual] thirst. However, now that a great sea of water [the Mahdiyya] had flooded them all, it no longer made sense to seek out the small wells engulfed within this sea. Quoting from Aḥmad al-Ṭayyib wad al-Bashīr, the Mahdī expressed this in a letter he wrote to Shaykh Muḥammad al-Ṭayyib al-Baṣīr, a Shaykh of the Sammāniyya order:

> [. . .] The *ṭarīqa* has [the following virtues:] humility, contrition, scant eating, scant drinking, patience, and pilgrimage to the saints (*al-sādāt*), making six [virtues . . .] The *mahdiyya*, too, has six: warfare, determination, resolution, trust [in God], reliance upon God, unanimity in doctrine. And these twelve [virtues] combine together in no one but in you.[6]

The Mahdī styled himself as the Prophet's successor but did not attempt to cite proof-texts from the Qur'ān or the *ḥadīth* to buttress his claim. It was only in later documents that such texts were cited. This omission was used against him by both Egyptian and Sudanese *ʿulamāʾ* who ridiculed him for failing to comply with the criteria indicated in the traditions regarding the "Expected Mahdī." But as mentioned above, it can be partly explained by Muḥammad Aḥmad's Ṣūfī background. His was a charismatic leadership in which *baraka*, implying an active power of holiness, played an important role. The

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[5] Abū Salīm, *Manshūrāt al-mahdiyya*, 61–65; the Mahdī also banned the use of Ṣūfī flags and forbade their ceremonial *dhikr* (rhythmical repetitive invocation of God's names; cf. Trimingham, *Islam in the Sudan*, Gloss.); see also Abū Salīm, *al-Ḥaraka al-fikriyya*, 228–29.

[6] Abū Salīm, *al-Āthār al-kāmila*, I, 78; al-Mahdī, *Yasʾalūnaka*, 173.

citing of texts from the *ḥadīth* was therefore of lesser significance to him and to the majority of Ṣūfī *shaykh*s in the Sudan, than to his antagonists the Azharite-trained *ʿulamāʾ*. The Mahdī denounced them as evil (*ʿulamāʾ al-sūʾ*), because of their exclusive dependence on the written texts and their unwillingness to accept him. He stated that "texts cannot bind God's will" and accused them of having become subservient to form while ignoring content. Above all, he did not forgive them for allying themselves with non-Muslims and acting in defiance of Islam at their masters' behest. They refrained from implementing the *sharīʿa* and even sanctioned the breaking of the fast of Ramaḍān by the pro-government troops in Khartoum, so that they could fight against the Anṣār, their excuse being that the Prophet had sanctioned the conquest of Mecca under similar circumstances. The Mahdī did not oppose the *ʿulamāʾ* for their learning, but for their subservience to texts, which they misused to denounce his mission and to justify their support of a corrupt government. In other words, the Mahdī contended that most of the *ʿulamāʾ* were limited by their scientific methods and lacked the tools inherent in Sufism to comprehend his mission.[7] It is interesting to note that even opponents, among the *ʿulamāʾ*, did not reject the idea of a *mahdī* but concentrated on proving that Muḥammad Aḥmad was a pretender. They did not denounce the concept of the *mahdī* as heretical, probably because this belief prevailed in the Ṣūfī traditions of the Sudan.

On the other hand, there were according to al-Ṣādiq al-Mahdī, the great-grandson of the Mahdī, many *ʿulamāʾ* both in the Sudan and Egypt who justified the Mahdī's call for a *jihād* against the Sulṭān (*al-khurūj ʿalā al-sulṭān*) from the very beginning for the following reasons. First, they regarded Tawfīq, the Egyptian Khedive, as unfit to rule and hence the Mahdī—like ʿUrābī in Egypt—had a duty to resist the Egyptian attempt to conquer Sudan. Secondly, every Muslim had a duty to rise against the Ottoman Sulṭān ʿAbd al-Ḥamīd II who had betrayed Islam through his support of Christian foreigners. The prerogative of Muslim unity and submission to the legitimate ruler therefore no longer held and the Mahdist uprising was justified. Thirdly, Islam required an active leader who would implement the laws of religion. It was immaterial whether this role was fulfilled by the Mahdī of Sudan or by someone else. Among the *ʿulamāʾ* who

[7] Al-Mahdī, *Yasʾalūnaka*, 223–26; Abū Salīm, *al-Ḥaraka al-fikriyya*, 50–62; Holt, *The Mahdist State*, 107–10.

sent messages of support to the Mahdī was Shaykh Aḥmad al-ʿAwwām, one of Aḥmad ʿUrābī's supporters, exiled from Egypt to Sudan and later imprisoned in Khartoum by General Gordon. His message of support was sent to the Mahdī from the besieged city in 1884 but failed to reach him until after the conquest of Khartoum in 1885. Similar views were expressed by Jamāl al-Dīn al-Afghānī and Muḥammad ʿAbduh and published in *al-ʿUrwa al-Wuthqā*.[8]

Allegiance, as expressed in the Mahdist *bayʿa*, was first enunciated by the Prophet as an oath of loyalty to the leader, and later became customary among some Ṣūfī orders. However, the Mahdī realized at an early stage that he had to define his movement and its supporters in a distinctive way so as to differentiate between them and the Ṣūfī orders scattered throughout the Sudan. While in the initial stages of his movement the support of the many Ṣūfī *shaykh*s and their followers was essential, it later became intolerable since in the Mahdiyya there could be only one central authority, namely, the Mahdī and later, the Khalīfa ʿAbdullāhi. The Mahdī's followers, who in the early stages of the revolt were called *fuqarāʾ*, following Ṣūfī custom, were thereafter named *anṣār*, in line with the precedent of the Prophet's supporters. The Mahdī's ostensible reason in issuing this decree was that since his followers were promised paradise as a reward for their faithful devotion and willingness to die in *jihād*, they could not go by their previous Ṣūfī titles which implied poverty. In addition, there were Ṣūfī *fuqarāʾ* who did not join the Mahdiyya and hence did not deserve paradise.[9]

The Mahdī's death, in June 1885, ended the so-called millennial stage of this religious movement. The task of consolidating the territories liberated by the Mahdist *jihād*, and setting up the autocratic state which was to follow was left to Khalīfat al-Ṣiddīq ʿAbdullāhi al-Taʿāʾishī, who after the Mahdī's death was officially designated Khalīfat al-Mahdī. The Mahdī's *khulafāʾ* were appointed by the Prophetic *ḥaḍra* (gathering, vision) which, according to Ṣūfī beliefs

[8] Al-Ṣādiq al-Mahdī summarized the views of the *ʿulamāʾ* opposing the Mahdī in *Yasʾalūnaka*, 145–49, and of those supporting him on pp. 149–53; al-ʿAwwām's message is explained in Abū Salīm, *al-Ḥaraka al-fikriyya*, 62–71; on al-ʿAwwām, see also Hunwick & O'Fahey, *ALA*, I, 332–33. Abū Salīm claims that al-ʿAwwām, ʿAbduh and al-Afghānī did not really support the religious message of the Mahdiyya but welcomed its military victories over the British forces.

[9] Abū Salīm, *al-Āthār al-kāmila*, II, 310–12, quoting a message addressed by the Mahdī to his followers, on April 17, 1884; see also Trimingham, *Islam in the Sudan*, 151–53; and Dietrich, *Der Mahdi*, 199–288.

resembled the *shūrā* (consultative council).[10] In line with these traditions, councils had been held in the Ghār Ḥīra cave in Mecca, under the chairmanship of the Prophet with other prophets and leading Ṣūfī *shaykh*s in attendance, and continued to take place under the Prophet's successors. The actual title Khalīfat al-Mahdī was only bestowed on ʿAbdullāhi al-Taʿāʾishī who was second to the Mahdī and hence sacred and infallible. As for the other two *khulafāʾ*, their title never implied actual succession or inheritance. However, both the *khulafāʾ* and the commanders of the armies (*umarāʾ*), were occasionally summoned in order to take part in the Supreme Consultative Council (*al-majlis al-aʿlā liʾl-shūrā*).[11]

This brief examination of early Mahdist ideology and politics clearly proves its relevance to the Islamist path enforced by Numayrī. His reliance on the support of his Ṣūfī mentors, his enforcement of the *bayʿa*, as well as his adoption of the title Imām, were all part of the Mahdist heritage. The fact that Numayrī, who had planned in 1969 to abolish sectarianism and to eliminate the neo-Mahdist Anṣār was, in 1983, glorifying Muḥammad Aḥmad al-Mahdī and the Mahdist revolution and was even praising the Anṣār's leader al-Ṣādiq al-Mahdī who had, on several occasions, attempted to overthrow him proves that he had realized that neo-Mahdism could not be dismissed and that his best way to survive politically was to gain the latters' support.[12]

2. Islam, Sectarianism and Politics

Islam and Sectarianism became synonymous in twentieth century Sudanese Islam and have dominated its political scene since independence. The following are the most important factors leading to

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[10] The reference is to the conclave appointed by the Caliph ʿUmar prior to the selection of the Imām; see Kerr, *Islamic Reform*, 160.

[11] Holt, *The Mahdist State*, 135–37; Ibrahim, *Mahdist Ideology*, 30–31; the Sunday and Thursday *dhikr* of the Khatmiyya were also called *al-ḥaḍra*, a common Ṣūfī usage; see also Abū Salīm, *Manshūrāt al-imām*, I, 30; Shuqayr, *Jughrāfiyya*, 934; Shuqayr states that ʿAbdullāhi al-Taʿāʾishī replaced the Mahdī in mid-June 1885 while the latter was still alive, following the Mahdī's *manshūr al-rāḥa* in which he requested not to be distracted by worldly problems during Ramaḍān. See also al-Mahdī, *Yasʾalūnaka*, 188–89, who quotes from the Mahdī's letter to the *umarāʾ* (emirs) written on Shaʿbān 22, 1302H (June 1885); Abū Salīm, *al-Ḥaraka al-fikriyya*, 42–43; the title of Khalīfat ʿUthmān was offered to Muḥammad al-Mahdī al-Sanūsī, who failed to respond. For details on the *shūrā* in al-Turābī's doctrine and legal methodology, see below, I.3.2. and II.1.3.

[12] Numayrī, *al-Nahj al-Islami li-mādhā?*, 218–23.

this phenomenon: First, the Mahdiyya had been the first expression of Sudanese nationalism and independent statehood. Its destruction by foreign imperialist powers had helped to glorify its heritage even in the eyes of its Muslim antagonists. Secondly, the Khatmiyya Ṣūfī order, which had been the only major Sudanese Muslim movement which had rejected the Mahdiyya even during its heyday, continued to oppose it and to fear its political ambitions during the Condominium. Consequently, the Sudan was burdened with rival Muslim movements, each claiming to represent the true message of Islam and since Islam and politics were inseparable they both emerged as political parties on the eve of independence. Thirdly, the fact that Sudan was ruled by a dual, Anglo-Egyptian administration, enabled these rival Muslim sects to seek support from one or the other of their colonial rulers so as to enhance its political and economic chances.[13]

Sayyid ʿAlī al-Mīrghanī, the leader of the Khatmiyya, was the first Sudanese to be awarded a C.M.G. by Queen Victoria and thus had a clear advantage over other Ṣūfī and Islamic leaders. Moreover, the Khatmiyya, despite the government's tendency to regard Sufism and especially local *fakī*s (a dialect-form of *faqīh*, religious teacher propagating Islam) as superstitious fanatics, received special treatment from the authorities, including financial aid, because of its anti-Mahdist propaganda since 1881 and its outspoken support for the new rulers. Sayyid ʿAlī al-Mīrghanī and the Khatmiyya were thus the favorites of the new regime. Here was a highly respected religious leader heading a centralized *tarīqa* (Ṣūfī order) whose influence had survived the Mahdiyya and was gaining new adherents throughout northern and eastern Sudan. Moreover, during his sojourn in Egypt, Sayyid ʿAlī had also cultivated close relations with Sir Reginald Wingate, who was to become Governor General of the Sudan from 1899 to 1916, as well as with other senior British and Egyptian officers. The authorities therefore recognized him as the Khatmiyya's supreme leader and as the most reliable supporter of British policy in the Anglo-Egyptian Sudan. Sayyid ʿAlī advocated, at that time, a complete rupture with Egypt, the expulsion of the Egyptians from government positions and the establishment of an Anglo-Sudanese

[13] For further details, see Warburg, *Sectarian Politics*, 89–104. The use of "sectarianism" in this context is misleading since it was employed by the British Condominium officials to denote *ṭā'ifiyya*. However, in modern Sudanese historiography it has become identified with the Anṣār-Khatmiyya conflict. In this context the term is used by Sudanese politicians, religious leaders, and academics alike.

administration.[14] This attitude was probably representative of the view of a wide cross-section of the older generation of Sudanese who had experienced Turco-Egyptian rule in the nineteenth century and believed that Turkish (Egyptian) colonial rule was to blame for many of their country's ills. Egyptian counter-propaganda made little headway with this generation of Sudanese. However, a younger generation was emerging which had been educated in government schools and taught by Egyptian teachers. These young Sudanese felt more akin with their fellow Arabic-speaking Egyptian Muslims, than with the more aloof and alien English-speaking Christian administrators.[15] To the dismay and fear of both the British authorities and the older traditional tribal and religious leaders, Egyptian nationalist propaganda appealed with increasing force to these younger elements. It was this fear which led to an aloof and at times hostile attitude toward the young pro-Egyptian intelligentsia and was partly responsible for the evolvement of a new policy toward the Anṣār on whose anti-Egyptian feelings the British authorities could rely.

2.1. *The Emergence of Neo-Mahdism*

It was not surprising that after the destruction of the Mahdist state in 1898, the gradual reemergence of Mahdism under the leadership of the Mahdī's posthumous son, Sayyid ʿAbd al-Raḥmān, assumed an ideology which presumed the unity of religion and state as unchallengeable. The leadership of the twentieth century neo-Mahdist Anṣār movement clearly demonstrates that—not unlike a Ṣūfī order—it passed exclusively within one family, that of Muḥammad Aḥmad b. ʿAbdallāh al-Mahdī. The Mahdī's son, Sayyid ʿAbd al-Raḥmān al-Mahdī, became the Imām of the Anṣār in 1914 and, from 1945, he was also the spiritual head of the newly founded Umma party. This was the result of his diplomacy, on the one hand, and of his control of the Mahdist *dā'ira* (domain), on the other hand. He thus succeeded to control the movement and head it both religiously and politically. Furthermore, he helped to oust Sayyid Fāḍil al-Mahdī from his position as his right-hand man in the Anṣār movement, in order to make room for his son al-Ṣiddīq al-Mahdī.

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[14] See, for example, Wingate to Cromer, February 24, 1915, SAD, Box 194/2. His attitude changed drastically as a result of the growing threat of neo-Mahdism; for further details, see below.

[15] Atiyah, *An Arab Tells His Story*, 137–38, 147–48.

According to al-Ṣādiq al-Mahdī, the Mahdī's great-grandson, Sayyid ʿAbd al-Raḥmān did not embrace the Shīʿī concept of the "hidden *imām*" nor did he accept its insistence that the *imāma* had to be inherited within the Hashemite-Fatimid families. On the other hand, the Mahdist *daʿwa* incorporated moderate aspects of Shīʿī heritage.[16] Al-Ṣādiq al-Mahdī argued that the only reason why his grandfather ʿAbd al-Raḥmān al-Mahdī assumed the *imāma*, was that the original *khulafāʾ* of the Mahdī had perished in battles with the Anglo-Egyptian forces and hence the mantle of leadership reverted quite naturally to the Mahdī's only surviving son.[17] Following the latter's death in 1959, his son al-Sayyid al-Ṣiddīq al-Mahdī became the Imām of the Anṣār, a post he held for two crucial years during which he led the opposition against the Sudan's first military regime under General Ibrāhīm ʿAbbūd. After al-Ṣiddīq's death, in 1961, the first rift occurred within the Mahdī's family. In line with the decision of the Anṣār's *shūrā*, Sayyid al-Hādī al-Mahdī, al-Ṣiddīq's younger brother, became the Imām of the Anṣār, whereas Ṣiddīq's Oxford-educated son, al-Ṣādiq al-Mahdī, became the leader of the Umma party. Al-Ṣādiq had not by then reached 30, the statutory age required for election to parliament. But a year later, having reached that age, he outmaneuvered his uncle and the then Prime Minister, Muḥammad Aḥmad Maḥjūb (Mahgoub), with the help of the National Unionist Party (NUP) and in July 1966 he became Prime Minister. Less than one year later Imām al-Hādī and Maḥjūb ousted al-Ṣādiq from office, again with the help of the NUP. When the split was finally healed, in April 1969, following an agreement between the two factions of the Mahdī's family, the Umma leader and ex-Prime Minister, Muḥammad Aḥmad Maḥjūb, commented bitterly but accurately: "They thus seemed to consider the rule of the state a booty to be inherited and divided between them to the exclusion of other members of the party who did not belong to the Mahdī family."[18]

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[16] Al-Mahdī, *Yasʾalūnaka*, 234–35, 239–42; this may also be of significance in examining Numayrī's claims to the *imāma* and the text of his *bayʿa*. According to Abū Salīm, *al-Ḥaraka al-fikriyya*, 78–79, the concept of the Sudanese Mahdiyya was Sunnī, with strong Ṣūfī undertones, but without Shīʿī elements.

[17] Al-Mahdī, *Mustaqbal al-islām*, 379–80; al-Ṣādiq al-Mahdī stresses this point in order to emphasize the difference between the Anṣār and the Ṣūfī orders where leadership and *baraka* (holiness, virtue as inherent spiritual power) usually passed within the founder's family.

[18] Mahgoub, *Democracy*, 224; this is reminiscent of the power struggle, in the Mahdī's lifetime, between the Ashrāf and the Khalīfa ʿAbdullāhi, when the Mahdī accused them of exploiting their family ties. The Khalīfa ʿAbdullāhi's sons were not

Under Numayrī, the Mahdist family was once again split. Al-Hādī al-Mahdī, who had retreated to Abā Island, the spiritual center of the Anṣār, was assassinated while attempting to escape, following the massacre of his supporters in March 1970. Al-Ṣādiq al-Mahdī went into exile, following his release from prison, and led the National Front opposing Numayrī together with al-Sharīf Yūsuf al-Hindī, one of the Awlād Hindī, a leading Ṣūfī family. Al-Ṣādiq remained in exile, attempting several anti-Numayrī coups, until he signed the "National Reconciliation" pact with President Numayrī, in July 1977. Some members of the Mahdist family were abroad while others remained in the Sudan and at times even collaborated with the military regime. Numayrī was of course aware of the internal animosities within the Mahdī's family and probably was not adverse to exploiting them to his own advantage. Since the Anṣār did not elect an Imām following al-Hādī al-Mahdī's assassination, the office of the next Imām of the Anṣār remained in abeyance. Moreover, Numayrī argued that according to Mahdist ideology the *imāma* was open to all believers and should not be inherited. If his claim to become Imām were to be accepted then he could exploit Mahdist popularity while eliminating its leadership. This was of course part of Numayrī's new Islamic order, with himself as Imām, which would have enabled him to become the unchallengeable legislator.[19]

As noted above, the Khatmiyya viewed the reemergence of the Anṣār as a major religious and political entity with great apprehension. Sayyid ʿAlī al-Mīrghanī who led the Khatmiyya until his death in 1968, viewed Sayyid ʿAbd al-Rahmān's predominant position with growing dismay; he accused his British friends of having betrayed him and in despair sought the support of Egyptian politicians. Consequently, a marriage of convenience led the Khatmiyya, who enjoyed overwhelming support in the northern provinces, to join

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even involved in this neo-Mahdist power struggle and one of his sons, ʿUmar al-Khalīfa, was an active member of the Khatmiyya Ṣūfī order, the Anṣār's main rival. According to Sudanese sources, the NIF has since 1989, been promoting the Khalīfa's family and helping them with their Mosque, probably in order to undermine the prestige of al-Ṣādiq al-Mahdī and the Anṣār.

[19] Zein, *Religion, Legality, and the State*, 196–97; in addition, Numayrī was told by his Ṣūfī mentor Shaykh Abū Qurūn that the second manifestation of the Mahdī would be from amongst his followers. This is reminiscent of the assertion made by the Sammāniyya adherents of Shaykh al-Qurashī wad al-Zayn, following his death in July 1878, that the "Expected *mahdī*" would be one of them, namely a Sammānī. See also el-Hassan, *Religion in Society*, 85–92.

forces with the more secular elite in the NUP and thus play a leading role during the years prior to independence. Many observers of the Sudanese scene mistook this temporary alliance as proof that Sudan led by Ismāʿīl al-Azharī was seeking a union with Egypt and that its educated classes had outmaneuvered the two leading sects and were heading for a secular state. In fact the two sects were not only in full control but had agreed already in 1954 to lead Sudan toward independence as an Islamic state. In achieving this goal they were aided both by their allies within the Sudan Defense Force (SDF) and by the fledgling Muslim Brothers, who had appeared on Sudan's political map in 1954.

2.2. *The Muslim Brothers*

The Muslim Brothers claim to present a modern alternative to the traditionalist (sectarian) Islam, propagated by the Khatmiyya and the Anṣār. The Brothers started among Sudanese students in Cairo in the 1940s.[20] They succeeded in setting up branches in several small Sudanese towns in the period 1947–1949 but were forbidden to act openly unless they declared their independence from the Egyptian Muslim Brothers who were at the time illegal. They founded the Islamic Liberation Movement (ILM) at Gordon College in 1947 in order to combat communism, and called for the establishment of a Socialist Islamic state. Adherents came primarily from the riverain rural regions of the northern Sudan and the ILM enabled them to adopt a modern Islamic ideology without cutting their ties with their families, most of whom were Khatmiyya adherents. This dual loyalty did not disturb the Khatmiyya since, at the time, it did not regard the Brothers as serious rivals. In 1952, ties between the ILM and the Egyptian Brothers were strengthened through the mediation of Ṣādiq ʿAbdallāh ʿAbd al-Mājid and other Sudanese living in Egypt. It was only in 1954 that the Sudanese Muslim Brothers were founded officially. Al-Rashīd al-Ṭāhir Bakr, a charismatic student leader, became the Movement's General Supervisor (*murāqib ʿāmm*). A politician and lawyer, al-Rashīd established close relations with Egypt's Free Officers, especially with Ṣalāḥ Sālim who was entrusted by the Egyptian RCC with all matters concerning the Sudan. This close relationship ended

[20] For details, see El-Affendi, *Turabi's Revolution*, 46–68; Aḥmad, *Ḥarakat al-ikhwān*, 13–99.

following the assassination attempt on President Nasser, in October 1954, when the Muslim Brothers in Egypt were persecuted and banned. The Sudanese Brothers demonstrated against Nasser and joined forces with the Anṣār-Umma bloc, which advocated Sudan's independence. The Movement was soon split between those recommending radical action, alongside spiritual and educational activities, and those advocating an emphasis on education headed by Ḥasan al-Turābī and Muddathir ʿAbd al-Raḥīm, both of whom had joined the Brothers in 1954 whilst under-graduates at Khartoum University.

After the military coup, led by Gen. Ibrāhīm ʿAbbūd in November 1958, the Muslim Brothers were allowed to continue their activities as a religious movement. Their weekly *al-Balāgh* was stopped only in June 1959 after they published an article criticizing the regime. On November 9, 1959, al-Rashīd al-Ṭāhir Bakr was apparently involved in a plot to overthrow the regime. He acted against the explicit instructions of the Brothers' leadership, helped by an illegal cell of Muslim Brothers within the army which had been founded by Bashīr Muḥammad ʿAlī in the early 1950s, in alliance with communists and others. The plotters were arrested and the Brothers lost their few cadres in the army as well as their leader.[21] Their recovery started only in 1964 when Ḥasan al-Turābī and some of his colleagues returned from their studies abroad.

2.2.1. *Ḥasan al-Turābī*

Ḥasan ʿAbdallāh al-Turābī was born in Kasala, on the Sudanese-Ethiopian boundary, in 1932. He received a traditional Muslim education from his father, a *qāḍī* in a *sharīʿa* court, and studied at Ḥantoub secondary school. He joined the ILM while studying at Khartoum University College, from where he graduated in 1955. Subsequently he studied in London and received his Master of Law degree in 1957. Returning briefly to Khartoum, al-Turābī was elected to the ILM executive. From 1959 to 1964 he studied in Paris where he submitted his Ph.D. dissertation on "The Power of the Executive under a State of Emergency in Constitutional Law."[22]

Upon his return to Sudan, shortly before the October 1964 civilian uprising, al-Turābī was appointed Professor of Law at the University. He proposed that rather than competing as a political

[21] Aḥmad, *Ḥarakat al-ikhwān*, 93–94.
[22] Hamdi, *Islamic Political Leader*, 1–11.

party the ILM should maintain its position as an elitist, non-partisan pressure group, primarily because it had failed in broadening its membership beyond the boundaries of the university and the few secondary schools. Moreover, many of its supporters reverted to their pre-student sectarian loyalties, usually to the Khatmiyya, following graduation. Al-Turābī believed that a small elitist group, seeking an Islamic state and the implementation of the *sharīʿa*, could bring pressure on the leading traditional Muslim sects, the Khatmiyya and the Anṣār, securing their support for these aims in Parliament. To eliminate any doubt with regard to the nature of their their views, Sayyid ʿAbd al-Raḥmān al-Mahdī and Sayyid ʿAlī al-Mīrghanī had issued, early in 1957, a joint statement in which they demanded that Sudan become an Islamic republic with the *sharīʿa* as its main source of legislation.[23] Al-Turābī's standing as a Western educated professor of law and later the Dean of his Faculty gave him the prestige that the Muslim Brothers had previously lacked. In a number of speeches made by him and by other faculty members belonging to the Brothers, they accused General ʿAbbūd's regime of being responsible for the southern debacle and demanded an immediate return to civilian rule. The Brothers' militancy rallied many of the students around their new leading star Ḥasan al-Turābī, whose entrance into national politics coincided with ʿAbbūd's downfall.

The way in which the Muslim Brothers succeeded to outmaneuver both the two dominant Muslim sects as well as the Communists, and to undermine the latter's predominance in the student unions and the professional associations exemplified al-Turābī's future tactics and his intensive anti-Communist crusade, especially in the universities. The Communists and the Muslim Brothers had much in common and competed for the support of similar constituencies. Both rejected the message of the traditionalists as reactionary and retrogressive. Both flourished first and foremost within urban population centers in which the traditional tribal and sectarian leadership was weak to begin with as well as in secondary schools, universities, and professional organizations such as trade unions, doctors' or teachers' associations, etc. Finally, both realized that if they wanted to attract popular support they had best conceal their real identity within front organizations. The need to combat Communism became apparent to the Muslim

[23] Cudsi, *Islam and Politics*, 38.

Brothers in the 1965 general elections, when 11 Communists were elected to the special graduates' constituencies as compared with only two won by the Brothers. Moreover, among the students, the Communists continued to present the only challenge to the Brothers.[24]

In order to resist Communism and to establish an Islamic state al-Turābī and his colleagues established, in 1965, an Islamic Charter Front (ICF), which was composed of Muslim Brothers, Anṣār al-Sunna, and several Ṣūfī orders such as the Tijāniyya, the Qādiriyya, and sections of the Sammāniyya. The ICF's Charter propagated the establishment of an Islamic state ruled according to an Islamic constitution.[25] In the March 1965 general elections the ICF had 100 candidates, including 15 in the graduates' constituencies. Its election platform included the establishment of an Islamic state, a peaceful solution of the southern problem and economic reforms. It won 11 seats including two graduates' constituencies of which one was won by al-Turābī, signalling his entry into national politics. Al-Rashīd al-Ṭāhir Bakr had also won a seat and became the ICF's spokesman in Parliament. But in July 1965 Bakr finally dissociated himself publicly from all ICF policies, resigned from the party and joined the NUP. Thus the last of the radicals who had run the Brothers since the 1950s was removed and Ḥasan al-Turābī's position at the top was secure.

Collaboration between the ICF and the Anṣār was propagated and executed under al-Turābī's guidance since 1965. He convinced the ICF to side with al-Ṣādiq al-Mahdī in fighting for an Islamic constitution. Al-Ṣādiq and al-Turābī were contemporaries at Khartoum University College and later both of them studied abroad. Their relationship was strengthened even further after al-Turābī married al-Ṣādiq's sister. Following al-Ṣādiq's appointment as Prime Minister in 1966, he rewarded al-Turābī's ICF by implementing several Islamist laws and appointing three of its members to the Constitution Committee. When the Committee made its recommendations in January 1968, it transpired that the ICF members had succeeded in influencing its decisions to some degree. However, in the 1968 elections it became quite clear that the ICF had backed the loser. Al-Ṣādiq's faction of the Umma party was crushed by its rivals and al-Ṣādiq was defeated in his own constituency. The ICF did not fare any better and out of its 29 candidates only five were elected to Parliament and al-Turābī,

[24] Warburg, *Islam, Nationalism, and Communism*, 113–20.
[25] For details, see Aḥmad, *Ḥarakat al-ikhwān*, 105–10.

like al-Ṣādiq, was defeated. The ICF's relative success in the 1965 parliamentary elections may thus be attributed to the boycott of these elections by the Khatmiyya-PDP bloc. Once the latter reappeared on the political scene in the 1968 elections, the ICF lost most its seats in Parliament to Khatmiyya backed candidates. It may therefore be concluded that when Numayrī and the Free Officers overthrew the Sudan's democratically elected government and assumed power, the only two political combatants of any substance on the Sudanese scene were the Mahdist-supported Umma party, and the DUP led by the Khatmiyya.[26]

3. Islamist Views on the Islamic State

As already noted, the concept of an Islamic state in Sudan had been propagated ever since it became independent and the arguments regarding an Islamic constitution and the Islamization of Sudan's legal system had been central political issues. In the following chapter we will concentrate on the ideas of the two most prolific Islamist thinkers and writers: al-Ṣādiq al-Mahdī and Ḥasan al-Turābī both of whom belonged to the younger generation of Sudanese Islamists. Born in the 1930s, they had enjoyed the benefit of both a traditional Islamic education and of a Western academic one, first in England, during the late 1950s, and later, al-Turābī wrote his Ph.D. in France. They thus mastered both classical Arabic and Islamic studies, as well as Western languages and academic disciplines. Finally, both of them devoted their careers to Islamist politics, al-Ṣādiq as leader of the Umma party and acting Imām of the Anṣār, al-Turābī, as leader of the Muslim Brothers, since 1964, and as the unofficial ideologue of the 1989 Islamist military coup.

3.1. *Al-Ṣādiq al-Mahdī and the Anṣār*

The Anṣār are an activist, revivalist, Islamic movement, seeking to convert Muslims to their concept of an Islamic state through political action rather than mystical actions characteristic of the Ṣūfī orders. They seek the recreation of the Mahdiyya and view themselves as

[26] El-Affendi, *Turabi's Revolution*, 74–80; see also Khalid, *The Government They Deserve*, 213–27.

representative of true Islam. Al-Ṣādiq al-Mahdī's concept of an Islamic state is of considerable interest since it represented, until the June 1989 military coup, the view of the single largest political bloc and was therefore liable to implementation in the event that the Anṣār regained power, either by democratic or other means.

Islam, according to al-Ṣādiq, is in a better position to give spiritually and morally based answers to all basic requirements of modern statehood and thereby bring about its revival as a major political force. This can be achieved only if the whole legal corpus will be reviewed on the basis of the textual sources of the Qurʾān and *ḥadīth*, the formulations of the four schools of Sunnī Islam, and an awareness of current social problems and of other legal systems. Consequently, the emergence of a new "contemporary Islamic legal system" could bring about a "revival of the Islamic legislative credibility." The modern formulation of *sharīʿa* should be entrusted to universities, with lay scholarly supervision, otherwise "*sharīʿa* will wither away and we shall finally have abdicated our trust."[27]

According to al-Ṣādiq, a single system of government defeats the aim of generality in Islamic constitutional law. Islamic states may be traditional, modernizing or revolutionary, as long as they abide by Islamic constitutional principles, their legal systems are based on the *sharīʿa* and they treat human beings with honor and justice. The view prevailing in Western society that Islam does not accommodate social change is totally mistaken. It is based on three historical encounters between Islam and Christianity: the Andalusian, the Crusades, and the Ottoman, which led to fear and misunderstanding. Another factor which led to misconceived ideas of Islam is Orientalism, which studied Islam in the Colonial context and as part of its encounter with the West, but without attempting to understand it. The prevalent Western view is that Islam is fatalistic and encourages despotism and stagnation. This idea has changed gradually since the Second World War as a result of a more objective attitude on the part of the West. The poor performance of Westernizing elites, whether civilian or military, in the Muslim states, has finally proven that Islam is the only way to reconstruct these states and to remedy their ills. To this, one may add the growing eloquence by which Muslim thinkers such as Jamāl al-Dīn al-Afghānī,

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[27] This account is based primarily on al-Mahdi, *The Concept of an Islamic State*, quoted from 130–31; al-Mahdi, *Islam, Society and Change*, 230–40.

Muḥammad Iqbāl and ʿAlī Sharīʿatī, expressed the dynamism and universality of Islam. Finally, the exposure of the fallacy of capitalism and Communism and the predominant place of Islam in the South-North encounter, have brought about a realization that Islam is indeed dynamic and capable of reinterpretation.[28]

Al-Ṣādiq further argues that reasoning and reinterpretation of the textual sources (*ijtihād*) were historically manipulated by despotic Muslim rulers for their own purposes. In order to prevent these rulers from manipulating *ijtihād* and to avoid divisive tendencies, it was replaced by the uncritical adoption of legal decisions through *taqlīd*, that is, adherence to a school of law or a *mujtahid*. Al-Ṣādiq believes that "the regime of *taqlīd* is responsible for destroying the inner vitality and purposefulness of the Islamic *ummah* and so preparing it for foreign domination." He quotes the Imām Ibn Ḥanbal who stated that: "[T]hose who follow others in religious matters uncritically are feebleminded."[29] He demonstrated the flexibility of Islam in various spheres and claimed that in Islamic government only two general conditions had to be applied. First, a set of general principles such that are required to organize society politically. Secondly, the requirement to apply Islamic law. "Any system which fulfills those two conditions is entitled to be called Islamic." In the legal sphere, Islam can accommodate change due to the fact that out of 6,000 verses of the Qur'ān, only 245 deal with aspects of social norms. Of these, 70 are concerned with matters of personal status; 70 with civil and financial matters; 30 with criminal offenses; 30 with adjudication and attestation; 10 with economic affairs; 10 with constitutional issues; and 25 with international affairs. "Thus in Islam while religion is integral to politics and society, there is a distinction between that which is immutable and that which is subject to change and development."[30] A high degree of flexibility is possible even when deriving rules that are based on explicit textual sources of the Qur'ān and the *ḥadīth*, such as the *ḥudūd* (Qur'ānic punishments) or the *farā'iḍ* (the heirs' prescribed shares in an estate). In both there are circumstantial considerations which qualify their application. Consensus (*ijmāʿ*), analogy (*qiyās*), or preference (*istiḥsān*), can be applied by learned jurists in order to override, postpone or qualify application.[31]

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[28] Al-Mahdi, *Islam, Society and Change*, 230–32.
[29] *Ibid.*, 235.
[30] *Ibid.*, 233.
[31] *Ibid.*, 238. Cf. below, II.2.2.3.

In the economic sphere there was also no definitive Islamic system but two principles had to be applied. First, that wealth is collectively owned by mankind and that private ownership is only legitimate if accumulated through one's efforts, while society is bound to provide for the poor. Secondly, the establishment of special injunctions such as *zakāt* (alms tax levied on cattle and crops authorized by the *sharīʿa*), inheritance laws, the prohibition of usury, etc.[32] Thus there is no contradiction between an economic system which is both Islamic and modern. As for international relations, Islam, according to al-Ṣādiq, preaches peaceful co-existence with other people and justifies war only to deter aggression and not as a way to enforce Islam. Even pagans are not to be converted by force. "Those who claim that *jihād* is enforced Islamization cite Sūra 9:5 for support: '[. . .] slay the idolators whenever ye find them [. . .].'" But, claims al-Ṣādiq, this Sūra refers to a particular "treacherous group of pagans who betrayed the Prophet and initiated violence." Islamic international relations are generally based on five principles: human brotherhood; the supremacy of justice; all contracts and trusts are binding; and reciprocity in the conduct of relations.[33] Al-Ṣādiq therefore concludes:

> There is no particular system of government, nor system of economy in Islam. There are certain Islamic political principles—for example, consultation (*shūrā*), justice and so on—and Islamic economic principles—for example the duty of developing production and fair distribution—to guide the system which Islamic society adopts.[34]

Finally, al-Ṣādiq emphasized the wide gap separating Mahdism from the ideology preached by the Muslim Brothers and other Islamists:

> Muslim Brothers think of Islam in terms of the traditional pattern. They seek to revive the past image [. . .] They are a branch of a movement which originated and developed outside Sudan. We [Anṣār] have developed in Sudan and would give it a leading role in the revival of Islam.

The Brothers were an elitist group, obsessed with their struggle against Communism, whilst the Anṣār were a popular mass movement. Al-Ṣādiq insisted that the main problems facing the Sudan in the 1980s were the quest for identity and modernization:

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[32] *Ibid.*, 237. Cf. below, IV.2.2.2.1.
[33] *Ibid.*, 237–38.
[34] Al-Mahdi, *Second Birth*, 46.

> The communists and the secularists want modernization at the expense of identity. The Muslim Brothers are concerned with identity at the expense of modernization. Only the Anṣār satisfied both quests.

Al-Ṣādiq defined Mahdist ideology as a bridge between the Sunnī, Shīʿa, and Ṣūfī schools of thought.[35]

Al-Ṣādiq rejected military rule even as a temporary ally leading to an Islamic state. He claimed that military regimes of whatever brand, be they Communist or Islamist, have excelled only in bloodshed and oppression and have failed in other respects.[36] However, it should be noted that the Umma party had supported the first military coup in 1958, in order to overcome its political foes. Al-Ṣādiq himself was willing to employ violence in 1975–1976, when he sought to overthrow the Numayrī regime. But he rejected violence, as practiced by the Bashīr regime after June 1989, as well as the radicalism and brutality preached by Islamic extremists in various Muslim countries. More recently al-Ṣādiq denounced the relationship between Sudan's democratic political system and the armed forces, as one of the major failures leading to autocracy.[37] Islam, he claimed, is a religion of moderation and compromise in which radicalism and fanaticism are the exception, not the rule. Circumstances prevailing in the Arab and Islamic world helped, according to al-Ṣādiq, to understand how fanaticism, an alien phenomenon in Islam, had emerged. First, whereas Islam since its inception pioneered freedom and human rights, it has dropped behind other religions in modern times, due to historical circumstances. Secondly, the Arab-Muslim world today leads in social injustice and the gap between rich and poor is greater than elsewhere. Thirdly, whereas Muslim sensitivities to honor and self-esteem were always important, this was overshadowed by the cultural and ideological attacks launched against it. Hence, while other nations have moved toward stability and moderation, the Muslims were left behind and were craving for stability. Fourthly, the Muslims in the poor South, are discriminated against in all spheres by the rich North. Finally, the robbing of Palestinian, Arab and Muslim rights by Zionist aggression has led to continuous anger in the Arab Muslim world. These five causes have, according to al-Ṣādiq, bred radicalism and fanaticism, and there are those who clothe violence

[35] Al-Sadiq al-Mahdi, *Forum*, 64 (February 1980), 38–41.
[36] Al-Mahdī, *Mawqif al-Mahdī; Sudan Weekly*, 43 (19 January 1993), 9–10.
[37] Al-Mahdi, *Second Birth*, 25.

in a religious garb. Moreover, Islamist regimes in some of the Arab countries, have seized power by military force and have torn the body politic apart. This has led to frustration and increased injustice, thus enabling the international community to justify intervention.[38]

3.2. *Ḥasan al-Turābī and the Muslim Brothers*

Dr. Ḥasan al-Turābī has led the Muslim Brothers since 1964 and despite the many upheavals experienced by the movement and by himself their adamant belief in an Islamic state has remained unaltered. It might therefore be of use to listen to al-Turābī's views as expressed in a number of interviews held between 1987 and 1997, by a Tunisian journalist who researched the modern Islamist movements in his post-graduate studies. The author states that having collaborated with Numayrī in the years 1977–85 al-Turābī's subsequent support of 'Umar Ḥasan al-Bashīr's military coup in June 1989 should have come as no surprise. Since the NIF sought to establish an Islamic state in Sudan the fact that the military helped to achieve this goal was welcome. Al-Turābī viewed al-Bashīr as a "symbol of this enlightened Sudanese personality" and regarded the fact that Islam had emerged victorious as a result of military intervention, as unimportant:

> I never dreamt that Islamists would be in power in my own lifetime. For this to come about through someone else is a most pleasant result, and if I were to pass away now, I should die contented in the knowledge that the cause for which I have worked all my life has been fulfilled and that Islam will continue to be strong and well established in the Sudan.[39]

Al-Turābī propagated the following Islamist policy both in Sudan and in other Muslim states:

> For the future, Islamic movements will need to aim at bringing all life back to the service of the One God, by re-emphasizing the concept of tawheed [*tawḥīd*], in philosophy, economics, learning, culture, art, social life, and international affairs as a practical alternative to modern versions based on secularism, greed, materialism, titillation, convention, and injustice.[40]

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[38] Al-Mahdī, *al-Iʿtidāl wa'l-taṭarruf*, 20–3.
[39] Hamdi, *Islamic Political Leader*, 60.
[40] *Ibid.*, 115. On *tawḥīd*, see below, II.1.3.

In order to "establish Islam as a real power in the world again in the early decades of the twenty-first century," al-Turābī insisted that the codes of the *sharīʿa* would have to be consolidated, "the belief in the One God, His messages, and the Day of Judgement," have to be revitalized so that they can be spread among largely secularist cultures all over the world. An intellectual revival of Islam is essential and Muslims should "work toward closing the gap between the intellectual and legal legacy of Islam and the urgent requirement of the present, a task approaching a total revolution."[41] In fact, what is required is the building of a new civilization, a new educational system which will lead to a cultural revolution. The liberation of women is of major importance in this regard. However, this could only be achieved if Islamic movements are allowed to take charge and lead Muslim societies toward progress, enabling women to play a major role.[42] Islamic economics leading to political action comes next and is viewed by al-Turābī as a first priority since Islam has to remove "the oppressive secular regimes now ruling over Muslim societies."[43] Only after this has been achieved will Islamists be able to establish the Islamic state.

> While Islamic movements have no inherited model for exercising political power, they will not mimic modern examples blindly. There are many delicate issues at stake here: how to ensure the sovereignty of Islamic *sharīʿa*; how to set up an equitable and effective legal system; how to protect people's rights and personal sanctities while asserting their obligations and responsibilities; how to expand the scope of *shūrā* [consultation] beyond a routine activity or the monopoly of a privileged few; how to rearticulate the political and ruling system for a future society.[44]

Finally, al-Turābī stressed the need for reasserting the leading role of Islam in the next generation. "Muslims in the 1990s are a weakened nation [. . .] and their role in the world is negligible." To overcome this Islamic movements should first strive for unity and next bring about the liberation of Muslim lands from domination of all kind in order "to establish the sole authority of God's order." This might help to overcome the "wide gap between us [Islamists] and the people in the West, caused by their ignorance and prejudices

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[41] Hamdi, *Islamic Political Leader*, 116–17.
[42] *Ibid.*, 119.
[43] *Ibid.*, 120.
[44] *Ibid.*, 121. On *shūrā*, see below, II.2.1.3.

against us and their arrogant belief that their's is the ultimate civilization and the end of history."[45]

As stated, the Muslim Brothers' quest for an Islamic state started before al-Turābī emerged as their leader in 1964. The Islamic Constitution, first proposed by the Muslim Brothers in 1956, was largely patterned on the ideas of the *Jamaat Islami* in Pakistan. It sought the establishment of an Islamic Republic, under a Muslim head of state, with a parliamentary democracy based on Islamic law and legislating in conformity with the *sharīʿa*. Muslims would thus be able to shape their lives according to the dictates of their religion and to uproot social evil and corruption. A period of five years was set for the state to be fully Islamized and for all its laws to comply with the *sharīʿa*.[46] After the October 1964 revolution a different approach emerged, this time influenced by Ḥasan al-Turābī, who had assumed the Brothers' leadership. The newly formulated Islamic Charter (*al-mīthāq al-islāmī*) was based on the premise that Islam was the only force in Sudan capable of mobilizing the masses and leading them to a just and prosperous society. It proposed the setting up of a presidential, rather than parliamentary, system, for the sake of greater stability. Al-Turābī's pragmatic approach was highly distinctive by reason of his complete revision of personal status law in order to grant full rights to women, including equal pay. Also the religion of the head of state was not mentioned in the Charter. However, the most significant departure from Muslim Orthodox thinking was the Charter's proclamation regarding the Muslim state and the rights of non-Muslims within it:

> Reality requires that even though Muslims are one community—a Muslim state should be set up which encompasses only Sudan and no Muslim outside Sudan should be included in it, while [resident] non-Muslims be citizens with equal standing, guaranteed the freedom of religion, decentralization and public rights.[47]

Al-Turābī admitted that there was an inherent contradiction between the Islamic *umma* and a Muslim State. He argued that in Islam there is total obedience to God and therefore the Islamic *umma* cannot be

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[45] Hamdi, *Islamic Political Leader*, 123.

[46] El-Affendi, *Turabi's Revolution*, 152.

[47] Osman, *Muslim Brotherhood*, 356, 481; the Charter was published in Omdurman under the title: "li-mādhā nunādī bi'l-islām niẓāman li'l-ḥayāt?" (Why do we advocate Islam as a way of life?); the quotation is from p. 21 of the Charter; see also, Aḥmad, *Ḥarakat al-ikhwān*, 107–10.

stopped at some arbitrary national border. However, viewing Islamic history, he concluded that since the Abbasid Caliphate the Muslim world, while maintaining the unity of the *umma*, has been politically divided. Hence, one may strive for cultural, social and economic unity, while maintaining existing political territorial boundaries. Of special significance, according to al-Turābī, were the founding of multinational economic and financial companies encompassing several Muslim states. In a way, al-Turābī viewed the European community as a model for Islamic economic cooperation leading to unity. Once the existing nation-states become Islamic states the likelihood of their unification may, according to al-Turābī, increase. Yet until then al-Turābī and other Islamists do not view territorial states as a temporary phenomenon or as un-Islamic. Furthermore, he views the future Islamic *umma* as a decentralized entity within which the existing territorial states will continue to function. He compares this process to that of the continuous well being of an individual within a family and of the family within society. Thus an Islamic state will have open borders and welcome all Muslims who wish to visit or settle there.[48]

In his theoretical works on Islam and democracy al-Turābī stated clearly that he is opposed to both Western liberal democracy and to people's democracies, established under Soviet guidance. According to al-Turābī, both forms of democracy were governed by men and hence led to repression. In the people's democracies people might have enjoyed economic equality but suffered from political repression. In liberal democracies, free expression exists but as a result of market economy and exploitation political power is monopolized by the rich while the mass of the people hold no real power. Hence, only *ḥākimiyyat allāh*, the sovereignty of God, guarantees both the peoples rights as well as their freedom. Does this imply that Islam and democracy cannot coexist? According to al-Turābī, as long as people have an input into the way they are governed through *shūrā*, *ijtihād*, and *istikhlāf* (God's appoinment of a deputy on earth), it may be considered an Islamic democracy.[49] *Shūrā* was, according to al-Turābī, all-embracing since it involved direct consultation with the people through the medium of referendums etc.[50] Al-Turābī advocated democratic interpretation of Islam confirmed by a popular consensus (*ijmāʿ*)

[48] Weissbrod, *Turabi*, 91–94.
[49] *Ibid.*, 34–35.
[50] *Ibid.*, 34–35; this is largely based on al-Turābī, *Islamic State*, 241–51.

since, in his view, individual freedom is the most basic principle of Islam. In the past a select learned elite was entrusted with the task of reinterpreting Islam on account of the ignorance of the masses. Education and learning have made this elitist approach unnecessary and consequently the *shūrā*, the Islamic way of democratic decision-making, had become an open popular process which, unlike secular democracy, was based on the sovereignty of God and on Islamic morality and was thus free from secular distortions and manipulations.[51] However, al-Turābī granted the freedom of expression only to those who were not outspoken proponents of secularism. His anti-Communist crusade in the 1960 was a case in point.[52] Al-Turābī insisted that *shūrā* was superior to Western democracy since it dealt efficiently with problems such as prostitution, drugs, betting, etc. while Western liberal democracy was unable to cope with them.

Islam, through its process of renewal (*tajdīd*), will also overcome sectarian divisiveness, inherent throughout its history, and establish the just society based on its tenets. To use al-Turābī's words: "The correct method is to guide men gently from darkness to light, instead of standing apart and waiting for some miracle to achieve this for you." Al-Turābī, along with other Muslim leaders, therefore opposed the implementation of the *ḥudūd*, in 1964–68, claiming that they should only be applied in an ideal Muslim society, based on total justice and freedom from want. The fact that in 1983 he supported Numayrī's Islamist policy and the implementation of the *ḥudūd* was due to his political pragmatism rather than to a change in ideology. He justified this shift by claiming that the *ḥudūd* in themselves were part of an educational process whereby the state hoped to improve the morals of its citizens. "Ideals are of such a nature that they can never be achieved, but forever remain beyond our grasp," was the new motto advocated by al-Turābī and his followers.[53]

Al-Turābī also advocated ideological flexibility, or pragmatism, in order to reach alliances (*taḥāluf*) with other political forces such as al-Umma or the DUP in the years 1964–77. His alliance with President Numayrī in the years 1977–84 was based on a similar tactical approach namely that such cooperation (*mushāraka*) would enable

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[51] On *shūra* and *ijmāʿ* in al-Turābī's legal methodology, see below, II.1.3.

[52] El-Affendi, *Turabi's Revolution*, 81–84; see also Weissbrod, *Turabi*, 33–35.

[53] Osman, *Muslim Brotherhood*, 410–13; the quotations are from an interview the author had with al-Turābī on December 25, 1987.

the Islamists to gain power both economically and within the armed forces, where they were allowed to preach freely with the Government's blessing. This cooperation was criticized both within the movement and by Islamists from other countries. It was one thing to form a tactical alliance with a political movement such as al-Umma, and quite another thing to cooperate with a leftist military dictator such as Numayrī, even if he had shed his former leftist ideology. However, once Numayrī openly embraced the Islamic path and implemented the *sharī'a*, in 1983, many of al-Turābī's critics embraced him and his tactics enthusiastically. Fellow Islamists such as al-Ghannūshī published learned articles justifying *mushāraka* and *taḥāluf* by bringing examples from Islamic history, including the life of the Prophet, where Muslims cooperated with non-believers out of necessity, (*fiqh al-ḍarūrāt*).[54]

Al-Turābī, as noted in the interviews he granted during the 1990s, refused to be committed to the observance of legality and peaceful transition to an Islamic order. He defended this position claiming that Islamists, like him, would not be allowed to reach power by democratic means. Secondly, he did not trust his fellow Muslim leaders, like al-Ṣādiq al-Mahdī or Muḥammad 'Uthmān al-Mīrghanī, whom he regarded as heads of undemocratic dynasties and whose brand of Islam he viewed as outdated and traditionalist. Consequently, many Sudanese Muslims, whether Ṣūfīs or Anṣār, regarded the Islamists of al-Turābī's brand as arrogant and viewed them with suspicion. This view was further confirmed by the Muslim Brothers' collaboration with the military, both under Numayrī and Bashīr. This collaboration was vindicated by al-Turābī and others on the ground that the victory of Islam was so crucial that it had to be achieved whatever the cost. To quote one of their spokesmen:

> [T]he modern Islamist movement looks like the only hope for rescuing modern Muslim societies from the endemic cycle of instability caused by the inherent illegitimacy of the secular political systems ruling over them [. . .]. For a worldview that remains unchallenged theoretically, that places its adherents at the centre of the universe as the divinely-sanctioned leaders of humanity, replacements are hard to find, especially if they all entailed third- or fourth-class membership in the community of nations.[55]

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[54] Sidahmed, *Politics and Islam*, 130–32; Weissbrod, *Turabi*, 121–23.
[55] El-Affendi, *Turabi's Revolution*, 164, 185–86, quoted from p. 185.

Another argument used by the Islamists to justify their willingness to achieve their goal through collaboration with the military was that in abiding by Western democratic principles they would in effect have been committing themselves to a secularist frame for political action. Furthermore, they argued that even when Islamists succeeded to gain power democratically they were not granted legal recognition or power, as illustrated both in the Sudan and in Algeria. Alternatively they could act by force, stage their revolution, and impose their Islamic norms on society. El-Affendi's conclusion is that "When your opponents do not play by the rules, the temptation to reciprocate is hard to resist." As for al-Turābī himself he advocated the use of force quite openly in an interview with *al-Ḥayāt* on May 14, 1992, saying that the Islamic movement had the full right to assume power by all means, including military force.[56]

At a "Roundtable" meeting with American academics, held in Florida in 1992, al-Turābī claimed that the reason why Islam became revolutionary and at times undemocratic, was its repression by Western powers:

> People have come to believe that it seems democracy would never breed Islam, and if it threatens to do so, it will be aborted by someone, from outside or inside [. . .]. Today if you want to assert indigenous values, originality and independence against the West then Islam is the only doctrine that has become the national doctrine [. . .]. Iran has now Islamized revolution and created an alternative to nationalist and socialist revolutions. This applies to elections as well. Some thought that liberal political parties would compete in Algeria but instead Algeria proves that if you want to avoid Islam you have to avoid the ballot box.[57]

Al-Turābī's justification for supporting the military regime since 1989 was that it saved the Sudan from relinquishing the Islamic path; it was also the will of the vast majority of Sudanese. Al-Turābī viewed the victory of revolutionary Islam in Algeria as a forerunner for other Islamist movements. Furthermore, he pointed to the Gulf War as the main reason for the success of the popular, as opposed to the traditional, Islamic movements. This popular awakening, which was the result of mass protests against the Western dominated anti-Iraqi

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[56] *Ibid.*, 186–67; for al-Turābī's interview, see Peter Nyot Kok, "Hasan Abdallah al-Turabi," *Orient* 33, no. 2 (1992), 188.

[57] Turabi, *Islam and the West*, 51–52.

coalition, brought about a world-wide Islamic resurgence. What frightened the enemies of Islam, according to al-Turābī, was the fact that following the success of the Islamic revolution, in Asia and Africa, its victory in Algeria on the threshold of Western Europe, was a clear indication of its force and vitality and of its threat to the status quo. In the case of Europe, al-Turābī emphasized the historical dimension since Islam originally came to that continent as a victorious conqueror. Furthermore, Europe has had its own Crusading experience against this Muslim world and had assumed wrongly, according to al-Turābī, that it had succeeded to tame the Muslims and to domesticate them. Now it has to face a religious revival and is unable to cope with it. Islam should try to persuade the West that it is seeking peaceful co-existence and does not constitute a threat. Islamism is neither violent nor revolutionary. Revolution leads to excess and violence while Islamists seek merely to "express Islamic values and correct the inequities of the status quo." This is a legitimate, non-subversive, aim and should therefore be accepted by the West. If the West attempts to stop this process by force, it will lead to violence and *jihād*.[58]

The world is big enough to contain more than one culture and one way of life, was Turābī's message when he appeared before the House Committee on Foreign Relations in 1992. He claimed that Islam sought to achieve power only through peaceful measures, unless circumstances forced it to take the revolutionary path. He asserted that there was no military or political Iranian involvement in Sudan. When asked whether Islam accepted non-Muslim governments, al-Turābī responded: "Islam believes in co-existence with non Muslim groups [. . . be they] Christians, Jews, or with no religion."[59] The Islamic revolution can and will, according to al-Turābī, be easily exported to other countries and continents, both in Asia and Africa. But the West had nothing to fear because Islamic international relations with non-Muslim states are governed according to the *sharīʿa* and thus will be peaceful.

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[58] *Ibid.*, 55.

[59] Hearing Testimony of Ḥasan al-Turābī, May 20, 1992, Subcommittee on Africa of the Committee on Foreign Affairs, House of Representatives, *Islamic Fundamentalism in Africa and Implications for U.S. Policy* (Washington: Government Printing Office, 1993).

4. Numayrī's Shift from Anti-Sectarianism to the Islamic Path

In the sixteen years that they were in power, Numayrī and his colleagues had brought the Sudan full circle back to its "sectarian" starting point. When the Sudanese Free Officers came to power in May 1969, there were very few issues on which they were in full agreement. One of these was their conviction that sectarianism had to be destroyed. This led to the massacre of the Anṣār on Abā Island in March 1970 and the confiscation of Mahdist property in the months that followed. Though lands belonging to the Khatmiyya were also appropriated in July 1970, the latter were treated less harshly than their Anṣārī rivals for the simple reason that they constituted no political threat. This "secular-radical" phase came to an end following the abortive Communist coup of July 1971, and was replaced by a period of minor reforms. Numayrī later claimed that his "return to Islam" started in July 1971, while he was imprisoned by his ex-colleagues who staged the Communist coup. Though Numayrī was not a Communist he had exploited their support in the early stages of his regime. Following his return to power after the abortive coup, he performed the *ḥajj* (the official Muslim pilgrimage to Mecca) and during his stopover in Jedda he met with leaders of the Sudanese Muslim Brothers who had escaped from the Sudan following the May 1969 Revolution. While in the Saudi capital, Numayrī also had long discussions with King Fayṣal regarding the new Islamic phase which he now envisaged, probably hoping that this would lead to massive financial help. Although there was no immediate follow-up with regard to the return of the Muslim Brothers to active politics, these meetings paved the way for the new Constitution of May 1973. According to one report, Numayrī had promised King Fayṣal that this constitution would turn Sudan into an Islamic state, but he was opposed by some of his closest advisers who objected to his proposed pact with the Muslim Brothers. The amended version of the constitution which was finally approved, did not satisfy the Saudis. Hence, the Sudan, then bankrupt, had to manage without the aid previously promised by King Fayṣal.

The ideological gap between Numayrī, the secular leader of the May Revolution and the Imām Muḥammad Jaʿfar Numayrī, reinstating the *sharīʿa* by means of Islamist laws in September 1983, seemed remarkable.[60] Manṣūr Khālid, one of Numayrī's allies in the

[60] The account on Numayrī's Islamic shift following the July 1971 coup is based

early years when he was instrumental in forging the Addis Ababa Agreement, in February 1972, defined his character as "a hotchpotch of Islam, superstition and witchcraft," long before the introduction of the Islamist laws which, in Khālid's view, were politically motivated, with Islam playing a minor role. According to Khālid, Numayrī regarded himself as divinely guided and hence he firmly believed that he was the "Expected Mahdī" or Imām:

> [A]ll Nimeiri's public utterances on Islam oscillate on the irrational and the superstitious, albeit always interspersed with verses from the Qur'an, misread, misunderstood and misconstrued [. . .]. Nimeiri's ignorance of Islam is matched only by his ignorance of economic management.[61]

Though the Islamist laws ranked high among the reasons leading to Numayrī's downfall in April 1985, neither the transitory military government nor its civilian successors came out with any clear pronouncement with regard to the future of the Islamist laws. General ʿAbd al-Raḥmān Suwār al-Dhahab and his colleagues promised to deal with the ailing economy, to end civil war in the South, to reintroduce civil rights and democracy to Sudan, and to reestablish cordial relations with all "law-abiding nations," headed by Libya and Ethiopia. But when asked whether the new regime would reexamine the restoration of the *sharīʿa*, the response was either negative or evasive. According to Suwār al-Dhahab and Prime Minister al-Jizūlī Dafʿallāh, the Islamist laws enjoyed the support of the vast majority of Sudanese and they required only minor revisions. But even in this respect they shied away from intervening since, as a non-elected transitional government, they did not want to become involved in what was bound to evolve into a major political controversy. To this, one may add that the NIF, founded by the Muslim Brothers after Numayrī's downfall, was well organized and financed. It had considerable influence within the Military Council and both Suwār al-Dhahab and al-Jizūlī Dafʿallāh were devout Muslims and the latter had openly announced his support for the September 1983 laws when they were first promulgated.[62]

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on a series of articles written by a close associate of Numayrī; see Ghandūr, *Qiṣṣat al-jaysh*; see also Warburg, *Islam and State*, 400–13. On the Communist coup and its aftermath see *idem*, *Islam, Nationalism and Communism*, 120–40.

[61] Khalid, *Nimeiri and Revolution*, 259–61; quotation from p. 260.

[62] On the Muslim Brothers' infiltration of the army, where Suwār al-Dhahab is mentioned as one of their recruits, see Ḥaydar, *al-Ikhwān wa'l-ʿaskar*, 61–63. According to some Sudanese sources, both Suwār al-Dhahab and al-Jizūlī Dafʿallāh were in fact supporters of the NIF. According to one source, Suwār al-Dhahab, Bashīr

The democratically-elected civilian government which assumed power after the 1986 election also feared to make any far-reaching amendments to these laws. Al-Ṣādiq al-Mahdī, Sudan's Prime Minister and the leader of the Anṣār and the Umma party, had openly denounced the Islamist laws, following their promulgation, in September 1983, stating that it was a crime against Islam to cut off the hand of a hungry thief for stealing a loaf of bread.[63] Social justice, claimed al-Ṣādiq, had to be established before the Qur'ānic punishments were implemented. Yet when elected to power in 1986 he was either unwilling or unable to deal with these laws as he had previously promised. Instead their implementation was temporarily suspended while a revised version of the Islamist laws was being hammered out by the various contenders for power. In addition to the Umma party and the Democratic Unionists, the two sectarian parties which had dominated Sudanese politics since independence, the NIF emerged for the first time as a major political force. In these circumstances, the abolition of the September laws demanded by the South and by many northern Sudanese Muslims, stood little chance of success. In an interview on Thames Television, several months prior to Numayrī's downfall, al-Turābī, a consistent supporter of the Islamist laws, had stated: "We think it preferable to amputate a few hands than expose society to a rising wave of crime [. . .]." He did not modify his views after Numayrī's downfall. Though he consented to a possible revision of these laws, he insisted that they should neither be abolished nor suspended as long as a revised agreed-upon version was not introduced to replace them.[64] It is therefore no wonder that in the ensuing three years of democratic government the September laws, though not implemented, remained on the statute books and provided the Sudan with a major bone of contention. As stated by many observers of the contemporary Sudan, "the question of the *sharīʿa*, like that of peace, had become a pawn in the struggle for power."[65]

Muḥammad ʿAlī, ʿAbdallāh al-Ṭāhir, and ʿAbd al-Raḥmān Faraḥ were members of a secret Muslim Brothers cell within the SDF in the late 1950s. See ʿAlī, *Azmat al-islām al-siyāsī*, 60–63.

[63] Al-Ṣādiq al-Mahdī denounced the September laws in his Friday *khuṭba* (Muslim sermon) on September 17, 1983 at Bayt al-Imām al-Mahdī, in Omdurman, following their announcement. Under Sections 320(2) and 321(2) of the PC, 1983, amputation cannot be effected unless the precondition of *niṣāb* (minimal value of the stolen object) has been met. See below, II.2.1.4.

[64] *Al-Taḍammun*, May 17, 1986; the *Thames T.V.* interview is quoted from *The Horn of Africa* 8, no. 1 (1985), 35.

[65] Sidahmed, *Politics and Islam*, 177–78.

4.1. *The Islamic Path*

If one examines Numayrī's Islamic path (*nahj*) starting with National Reconciliation in 1977 and ending with the arrests of al-Ṣādiq al-Mahdī in September 1983 and Ḥasan al-Turābī in March 1985, one is struck by the fact that by the time that Numayrī was removed from office, in April 1985, he had lost the backing of almost all his one-time supportes including the Anṣār, the Khatmiyya, the Muslim Brothers, as well as his southern allies.

Numayrī's Islamic beliefs and policies were described in three books, two of which were ascribed to his authorship. The first, *al-Nahj al-islāmī li-mādhā?* (the Islamic way—why?), was published in Cairo in 1980. It describes the reasons for Numayrī's shift from secularist, nationalist and leftist tendencies in the early years, to strict observance of Islam since the mid-1970s. The second book, also attributed to Numayrī's authorship, entitled *al-Nahj al-islāmī kayfa?* (the Islamic way—how?), was scheduled to be published in August 1983 one month prior to the implementation of the Islamist laws. Ironically it appeared only in April 1985, the month of Numayrī's removal from power. It was supposed to explain and illustrate how the Islamic path was to be implemented; however, since it was published after the events it may serve a greater purpose when read as postmortem. The third book contains the proceedings of an international Islamic conference which was held in Khartoum in September 1984, to celebrate the first anniversary of the implementation of the Islamist laws and to eulogize the Imām, Muḥammad Ja'far Numayrī. It was published by the Sudanese parliament under the presumptuous title: *'Ām 'alā taṭbīq al-sharī'a al-islāmiyya fī 'l-sūdān* (a year since the implementation of the Islamic *sharī'a* in the Sudan).[66]

Numayrī's shift from leftist secularism to an Islamist policy and his implementation of the Islamist laws were attributed to many factors, some of which have been noted explicitly by witnesses directly involved in the process, others have been noted by outside observers.[67] It may be useful to summarize these factors in an analytical manner before we present the views of some of the observers. First,

[66] Numayrī's books were generally attributed to 'Awn al-Sharīf Qāsim, one of Sudan's leading scholars and the author of several books on Islamic issues, who was closely associated with Numayrī. Others attributed them to Muḥammad Maḥjūb his Egyptian adviser and speech writer.

[67] For a general analysis of the factors, see El-Affendi, *Turabi's Revolution*, 119–24; Sidahmed, *Politics and Islam*, 134ff.

Numayrī's alliance with leftist officers within the SDF was based on common political aims rather than on ideology. He required Communist assistance in eliminating sectarianism and he believed in regional autonomy as a way to solve the conflict with the South. Having accomplished both these aims to his satisfaction, Numayrī felt free to rid himself of his leftist allies. In his first book, Numayrī ascribes the beginning of his shift to an Islamic path to the abortive Communist coup of July 1971 which opened his eyes to the truth. Secondly, Numayrī's reconciliation with the Muslim Brothers and the Anṣār, his erstwhile sectarian enemies, in 1977, was no coincidence. It occurred at a time when secular Nasserist Arab nationalism and leftist ideologies, which had fed the May 1969 revolution, were at a low ebb. The impact of the rise of militant Islamist groups in Iran and other countries, such as the Muslim Brothers and al-Jamāʿa al-Islāmiyya (student groups) in Egypt, was felt in Sudan as elsewhere in the Muslim world.[68] Thirdly, popular Islam, be it Ṣūfī or Mahdist, could not be ignored in the Sudan, as Numayrī had realized following repeated attempts to overthrow his regime, especially that of July 1976.[69] The "nationalization" of Islam thus seemed the ideal solution since it enlisted religion in serving the needs of the regime. By implementing the Islamist laws and by adopting an "Islamic Way" (*nahj*), Numayrī was seeking to make the Anṣār and the Khatmiyya superfluous. The leaders of the Muslim Brothers led by al-Turābī, thereby became his closest allies. Holding leading positions in the newly established *sharīʿa* courts they helped to implement the September 1983 laws. Even though they too were put behind bars in 1985, they continued to support the Islamic path which they viewed as their most important contribution to Sudan's future. The implementation of the Islamist laws, and especially the PC, 1983, was meant to crush Numayrī's opponents by declaring them apostates (as in the case of Maḥmūd Muḥammad Ṭāhā) and facilitate his political survival. In addition, Numayrī's fundamentalist image served as a tool for suppressing non-Muslim opposition and diverting attention from his failure to solve the problem of the South. For this purpose he established

[68] Warburg, *Sharīʿa and Implementation*, 626; Gordon, *Legal Revolution*, 798.

[69] In his book, *al-Nahj al-islāmī li-mādhā?*, 218–23, Numayrī glorified thenineteenth-century Mahdiyya and his founder Muḥammad Aḥmad al-Mahdī as the most important leader of the Sudan.

emergency courts authorized to hear criminal and civil cases and to control public morality.[70] Finally, Sudan's economy was in crisis since the October 1973 war. Lacking natural resources and primarily oil, Sudan was in a deep need and required massive economic aid. Help could come primarily from two sources: the United States and the oil-rich Arab countries, especially Saudi Arabia. To receive aid from either of them Sudan had to rid itself internally from its leftist-secular image and externally from its dependence on Soviet aid. The Islamic path seemed an ideal solution since it was acceptable to both the Saudis and the United States. Numayrī's meeting with King Fayṣal during the pilgrimage (*ḥajj*) to Mecca in 1971 and his attempted reconciliation with the Sudanese Muslim Brothers, who were living in exile in Saudi Arabia, may be seen as a first step in this direction.[71] Once again, the similarity with President al-Sādāt's policy in the early 1970s is striking, since he too embraced the anti-Nasserist Muslim Brothers and rid Egypt of Soviet patronage, in order to be accepted both by his oil-rich neighbors and by the United States.

Numayrī's "return to Islam" was ascribed by some observers to his close association with the marginal Abū Qurūn Ṣūfī family which regarded the fifteenth century of the *hijra* as a turning point in the history of Islam. They believed in a "Second Manifestation" of a great *mahdī* who would be one of their adherents. Francis Deng, in his political novel, *Seed of Redemption*, described the President's "encounter" with God, in which he was ordered to reform his ways and to return to the true path of a believer. On the following morning, the President sent for his "local spiritual leader" in order to receive his guidance:

> 'Mr. President,' said the mystic, 'by revealing Himself, it is clear that God has chosen you to be the leader of this country. You are President, but you are also the Imam of God. He will change you as He desires. I am but a tool of His will. The power to transform you has already descended from God.'[72]

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[70] Abdelmoula, *Ethnicity*, 49–51; Köndgen, *Das islamisierte Strafrecht*, 81–82; Fūda, *Qabla al-suqūṭ*, 131–35; Khālid, *al-Fajr al-kādhib*, 46, 48; 'Alī, *Azmat al-islām al-siyāsī*, 88–89; Zein, *Religion, Legality and the State*, 4, 208–9. See below, III.1.1. and IV.2.

[71] Warburg, *Sharī'a and Implementation*, 625–26.

[72] Deng, *Seed of Redemption*, 205–7; the author states that all characters in his novel are "purely imaginary" but their identity is all too clear.

Numayrī's association with Shaykh Abū Qurūn led to his subsequent cooperation with his son, al-Nayyal ʿAbd al-Qādir Abū Qurūn and his fellow student, ʿAwaḍ al-Jayyid Muḥammad Aḥmad, who had graduated from the faculty of law in the 1971. Following Numayrī's initiation into their Ṣūfī order, he appointed them first as judicial assistants in the Presidential Palace and in 1983 he promoted ʿAwaḍ al-Jayyid to the post of Minister for Judicial Affairs and Attorney General.[73] While Numayrī's spiritual inclination toward Sufism was well known, it is nonetheless difficult to assess the extent of its impact on his politics. Was it a mystical tendency toward Sufism, so dominant in Sudanese Islam, or yet another pragmatic step based on his reading of the political map?

A favorable view regarding Numayrī's Islamist policy was presented by two of his main supporters who were involved in executing the Islamist laws, al-Mukāshifī Ṭāhā al-Kabbāshī, member of the Supreme Court and President of the Criminal Court of Appeal in Khartoum in 1984, and Chief Justice Dafʿallāh al-Ḥājj Yūsuf, the President of the Supreme Council for Religious Affairs and Awqāf at the time. In their opinion, the policy of Islamization was intended to bring about a "legal revolution" (*thawra qaḍā'iyya*), that is, the reorganization of the legal system with special regard to considerations of legal efficiency; elimination of conflicts of laws (*taḍārub*) and superfluous laws; and the promotion of justice. Al-Kabbāshī views the purification and "decolonialization" of the law as a major aim of Numayrī's policy. The desire to get rid of the legacy of British rule in the realm of law was, according to al-Kabbāshī, one of the major factors behind the Islamist legislation. Thus, for example, he defines the policy of Islamization in these words: "Purification (*taṭhīr*) of Sudanese society from all manifestations of the Jāhiliyya and from the vestiges of imperialism (*istiʿmār*), which are contrary to Allāh's *sharīʿa*."[74] He vents his wrath in particular against "the laws of English imperialism," which were morally corrupting in permitting prostitution, consumption of wine, and usury.[75] In support of his view al-Kabbāshī cited a memorandum from Attorney General al-Rashīd

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[73] Shāmūq, *Muʿjam al-shakhṣiyyāt*, 320; al-Qaddāl, *al-Islām wa'l-siyāsa*, 180–81, 185, 221; Jacobs, *Islamization*, 206; Simone, *In Whose Image?*, 26; Khalid, *Nimeiri and Revolution*, 277. Mansour Khālid dismissed the two colleagues as "legal upstarts"; for his assessment of the Islamic path, see *ibid.*, 254–71.

[74] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 45–46. Cf. Mayer, *Law and Religion*, 183–84.

[75] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 35.

al-Ṭāhir Bakr, a one-time leader of the Muslim Brothers, to President Numayrī in 1405/1984 which states, *inter alia*:

> [. . .] since the imperialist assault (*ghazw*), which expanded the rule of its Western culture, as well as its laws (*qawānīn*) and its economic and political organizations, the role of Islam in the life of Islamic societies has diminished. Despite the Islamic countries' return to political independence, the manifestations of this [imperialist] exploitation have not been eliminated through the liberation of their [Islamic countries'] economic road (*nahj*) and their cultural, teaching, legal (*qānūniyya*), and judicial (*qaḍā'iyya*) institutions from [colonial] domination, and they continue to act as if it were the imperialist period, and to move along [the imperialist] roads, and to resort to litigation according to [imperialist] laws, and to imitate the legal adjudication (*ḥukm*) [of the West]. Those nationalist circles who took over the reins of power following the demise of imperialism, and who have become prisoners of Western culture and thought, also contribute to this [. . .].[76]

According to this view, Islamist legislation (*tashrīʿāt*) was intended to restore the Sudan's Islamic identity, and to prevent once and for all its conversion to a national identity (*qawmiyya*) or any other ideology, either Eastern or Western.[77] This view was shared by Numayrī who declared that the policy of reinstating the *sharīʿa* was strongly inspired by the desire "to uproot the English law that has been dominating the Sudan for seventy years."[78] Ḥasan al-Turābī viewed the impact of Western legal system in terms of "legal and cultural colonialism" (*istiʿmār*) which still dominates Sudan. The Sudan, he maintained, should rid itself of Western laws in order to achieve real independence.[79]

Chief Justice Dafʿallāh al-Ḥājj Yūsuf maintains that colonialism left behind in the Sudan a Western "cultural order" (*niẓām thaqāfī*),

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[76] Cited in *ibid.*, 49; *al-Ṣaḥāfa*, October 22, 1983, p. 6, col. 1. Al-Rashīd al-Ṭāhir Bakr, leader of the Muslim Brothers after independence, was involved in an attempted coup against ʿAbbūd's military regime in 1959. Under Numayrī al-Rashīd al-Ṭāhir was Deputy President and Prime Minister (1976–79), and Attorney General (1983–85). See Shāmūq, *Muʿjam al-shakhṣiyyāt*, 168–69. Cf. "legal imperialism" in Shalabī, *al-Fiqh al-islāmī*, 3, 183; Layish, *Modernists*, 273.

[77] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 121. In his review of the Civil Transactions Act [CivTA], 1984, al-Kabbāshī takes pains to note that its main inspiration is the Ottoman Mejelle and the civil laws of Arab countries, and that the law was not influenced by Anglo-Saxon or Latin [continental?] law. al-Kabbāshī, *Taṭbīq al-sharīʿa*, 19. Cf. Khalil, *Legal System*, 624; Zein, *Religion, Legality, and the State*, 202–3. For details on CivTA, 1984, see below, II.2.2.1.2.

[78] *Al-Ṣaḥāfa*, July 5, 1984, p. 3.

[79] Al-Sharīf, *Ḥasan al-Turābī*, 71; al-Turābī, *Udīn al-ʿunf*, 26; *al-Ṣaḥāfa*, September 30, 1984, p. 3, cols. 1–5 (al-Turābī's address in the World Islamic Conference).

the most important component of which is law (*qānūn*). The restoration of Islamic law by means of *tashrīʿ*, that is, statutory legislation, should be regarded as a great "cultural challenge" (*al-taḥaddī al-ḥaḍārī*). Similarly, the Iranian revolution exemplifies in his view, emancipation from imperialist legal heritage.[80] Al-Ṣādiq al-Mahdī who, as mentioned, opposed the 1983 laws, stated nonetheless, that European imperialism is not only a manifestation of political domination; it is in actual fact a kind of intellectual (*fikrī*) and cultural (*thaqāfī*) assault (*ghazw*).[81] Professor ʿAwn al-Sharīf Qāsim, closely associated with Numayrī, also maintained that the colonial powers "raided" the Muslim world so as to dissociate the Muslims from their religion by undermining their ideas and culture, an essential part of which is law. The imposition of Western laws on Muslim countries brought about the latter's moral corruption. A case in point is intercourse out of wedlock which is not prohibited in Western laws and hence prevailed in Muslim countries as a result of legal colonization. Political emancipation from imperialism is not enough; emancipation should also be sought in cultural and legal terms.[82] Other observers maintained that imperialism imposed on the Sudanese people its ideas, culture and statutory legislation (*tashrīʿ*) with a view to ensuring its supremacy by depriving the Sudanese nation of its cultural heritage. It is further claimed that British colonialism managed to impose on the Sudanese nation statutes totally alien to its values which remained in force even after the Sudan obtained independence in 1956.[83]

The purification and "decolonialization" of the legal system probably articulated latent desires—barely submerged since the end of the Mahdist state—to restore the *sharīʿa*'s status which emerged only after the Sudan was liberated from colonial rule and attained independence. Evidence of such aspirations can be found in Numayrī's speech of September 22, 1984 to the Conference on the Application of the *Sharīʿa* in the Sudan.[84] Numayrī devoted part of his speech to the southern problem which, in his view, had been caused and perpetuated as the result of an imperialist plot. It was not a matter of religious rivalry between southern and northern Sudanese since the number

[80] *Al-Ṣaḥāfa*, October 22, 1983, p. 6, col. 2.
[81] Al-Mahdī, *al-ʿUqūbāt*, 10.
[82] *Al-Ṣaḥāfa*, October 8, 1983, p. 5, cols. 2–3.
[83] Sālim, Ḥawbāt & al-Nūr, 16; Khālid, *al-Fajr al-kādhib*, 20–21, 57.
[84] Numayrī, *ʿĀm ʿalā taṭbīq*, 19ff.; Esposito, *Islamic Experiment*, 197–98; Gordon, *Legal Revolution*, 798.

of Muslims in the South exceeded that of Christians while the majority of the population were neither Muslims nor Christians but adhered to their own indigenous religions. The Islamist legislation had therefore no implications for the South where everybody could freely practice his religion without interference.[85] In one of his last interviews, Numayrī claimed that as the Imām of the Sudan, to whom total obedience was dictated by Islam, it was he alone who could interpret laws and decide whether they were compatible with the *sharīʿa*. This idea of supreme leadership, embraced by Numayrī, can be traced to his interpretation of Mahdist ideology.[86] First, prior to the manifestation (*ẓuhūr*) of Muḥammad Aḥmad as Mahdī, in June 1881, Shaykh al-Qurashī wad al-Zayn, a spiritual leader of the Sammāniyya order to which Muḥammad Aḥmad belonged, allegedly appointed him as his successor and told his followers that the "Expected Mahdī" would be one of his adherents, obviously indicating Muḥammad Aḥmad.[87] Numayrī's subsequent appointment as Imām by Shaykh Abū Qurūn indicated his attempt to follow in the Mahdī's footsteps. Secondly, al-Ṣādiq al-Mahdī claimed that Mahdism—both in its nineteenth century origins and at present—acted as a bridge between the Shīʿa and the Sunna. He thereby inadvertently legitimized Numayrī's claim, made several years later, to an all-embracing Shīʿī concept of leadership. Lastly, since the assassination of the Imām of the Anṣār, al-Hādī al-Mahdī, in 1970, this post had been kept vacant and al-Ṣādiq al-Mahdī had claimed on more than one occasion that it was not reserved exclusively for members of the Mahdī's family. While it is certain that al-Ṣādiq al-Mahdī would have gagged at the thought that his ideological formulations of Mahdist leadership would be interpreted by Numayrī to his own advantage, this might in fact have happened.[88]

Under these circumstances it is hardly surprising that Numayrī was indifferent to the fact that certain elements within the Islamist legislation were inconsistent with the 1973 Constitution. He attempted, in June 1984, to receive the endorsement of the People Assembly

[85] Numayrī failed to mention that millions of non-Muslim Sudanese were living in the northern Sudan and were thus effected by the Islamist laws; on the Islamist laws and the South, see also Khalid, *Nimeiri and Revolution*, 283–90.

[86] See above, I.2.1.

[87] Shuqayr, *Jughrāfiyya*, 642–43; also Khalid, *Nimeiri and Revolution*, 279–83.

[88] Zein, *Religion, Legality, and the State*, 73–75; for al-Ṣādiq al-Mahdī's views, see al-Mahdi, *Interview*, 40.

for certain constitutional amendments, which involved 123 out of a total of 225 articles. Significantly, one of the articles involved was the one granting the Southern Sudan regional autonomy (Regional Government Act, 1972, Article 8). Another proposed amendment involved Article 16, in which Numayrī proposed to replace the reference to "Christianity and noble aspects of spiritual beliefs [i.e., tribal animist religions] by an unequivocal reference to 'religious freedoms.'" Other amendments involved the articles dealing with the President's titles, powers, and duties. In addition to becoming Imām and head of state, for life, to whom all citizens had to give an oath of allegiance (*bayʿa*), he now requested that he be granted constitutionally the title *qāʾid al-muʾminīn* (commander of the faithful). Finally, the People's Assembly (*majlis al-shaʿb*) was to become instead a Consultative Council (*majlis al-shūrā*), whose selected members were to swear total loyalty to the President.[89] Needless to say, the proposed amendments met with fierce opposition in the Assembly, not only from southern members. Numayrī therefore had to withdraw his request once he realized that there was no two-thirds majority, as required by the Constitution. In order to overcome this difficulty Numayrī had declared a state of emergency, already in April of that year, which enabled him overcome the restrictions imposed by the Constitution. Thereafter, discrepancies between the Constitution and the Islamist laws could be easily overcome by the special powers granted to the President under the State of Emergency Regulations.

Al-Kabbāshī expressed this view on the application of the *sharīʿa* in the Sudan explicitly:

> The Muslim *sharīʿa* has not been a part of the lives of people in the Sudan for about a hundred years, that is, since the fall of the Muslim Mahdist state in the Sudan at the end of the eighteenth [*sic.*] century A.D. It has been replaced by English imperialism (*istiʿmār*), which imposed its culture, law (*qānūn*), and judgements (*aḥkām*) on the residents of the Sudan until September 1983, when Islamist legislation (*tashrīʿāt*) was declared.[90]

Against the background of these aspirations, Numayrī's experiment in restoring the *sharīʿa* is neither an anomalous phenomenon nor a break in the secularization process affecting Islamic law in the Middle

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[89] Sidahmed, *Politics and Islam*, 136–37; the President, under these rules, would swear an oath of loyalty to God alone.

[90] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 7.

East since the mid-nineteenth century, but rather an attempt to reinstate an Islamic theocracy based on the Mahdist model. In this connection Numayrī's rapprochement with the Ṣūfī order of Shaykh Abū Qurūn may be significant. However, the source of inspiration is probably from the Mahdist state. Numayrī's religious transformation has been attributed to the deterioration of his health by some observers. Others claim that the intensive integration of the Ṣūfī orders into the Sudanese political system created an opportunity and an aspiration for the realization of an Islamic state based on the Mahdist model.[91] However, as we shall see below, the mechanisms for reinstating the *sharī'a* under Numayrī may not have been inspired by the Mahdī's legal methodology.[92]

4.2. *The Role of the Muslim Brothers*

The anti-secular and especially the anti-Communist bias of the Muslim Brothers was fundamental in their early opposition to Numayrī whom they, like many others, regarded as pro-Communist when he first came to power in May 1969. But the Brothers were hardly in a position even to demonstrate against the coup, since the students, their sole power base, were away on their summer vacation. Hence, many of the Muslim Brothers' leaders were arrested, some fled to Abā Island and joined al-Hādī al-Mahdī, the Imām of the Anṣār, while others left the country and joined Sharīf Yūsuf al-Hindī who was organizing the National Front against Numayrī's regime. The Brothers who had escaped to Abā Island took part in the Anṣār's attempt to stop Numayrī from landing, in March 1970, and some of them including Muḥammad Ṣalāḥ 'Umar were massacred by Numayrī's army. Others attempted to cross the border into Ethiopia with the Imām al-Hādī, and Muḥammad Ṣādiq al-Kārūrī was arrested while trying to escape.[93]

Officially, the Brothers remained part of the opposition until 1977. However, Numayrī's association with the Muslim Brothers was initiated as early as 1971 when he met some of their exiled leaders in the Saudi capital. Real cooperation started after 1977 when Ḥasan al-Turābī and his colleagues returned to active politics. As both chairman of

[91] Esposito, *Islamic Experiment*, 202; al-Karsani, *Beyond Sufism*, 144–47.
[92] See below, II.2. and V.1.
[93] El-Affendi, *Turabi's Revolution*, 86–88; also Aḥmad, *Ḥarakat al-ikhwān*, 141–44.

the committee entrusted to bring the laws of the Sudan into line with the *sharīʿa* and the Sudan's Attorney-General, al-Turābī was in a position to influence government policy to an extent which exceeded the political power of the Muslim Brothers, at that time, supported by an important but relatively small section of the urban elite.

As already mentioned, al-Turābī's collaboration with Numayrī came to an end when the former's usefulness to the regime outlived itself. In his last *volte face* in March 1985, Numayrī, relying on Iraqi intelligence sources, accused the Muslim Brothers of attempting to seize power with Iranian revolutionary aid, following which al-Turābī and about one hundred of his colleagues were put behind bars. In retrospect, this probably helped the Muslim Brothers after Numayrī's fall since it enabled al-Turābī to put the blame for all the ills of the latter's policies, squarely on the shoulders of his former benefactor.[94]

Why was the Muslim Brothers' collaboration so important for Numayrī when he set out on his Islamic path? In the political realities of the Sudan, as seen by Numayrī since his rise to power in May 1969, the main dangers to its stability and unity derived, as mentioned above, from the sectarian parties, primarily the Anṣār. His first allies following his coup were therefore the Communists who—due to their elitist character—had a considerable following among the intelligentsia and within the Sudanese army's officers corps. They shared with Numayrī the determination to annihilate sectarianism and also aspired to help him in his attempts to reach an accommodation with the southerners. This honeymoon ended, however, in July 1971 when, following an abortive military coup headed by pro-Communist officers with the tacit support of the SCP, Numayrī executed most of the party's cadre including its Secretary General, ʿAbd al-Khāliq Maḥjūb, and started the second phase of his regime.[95] If we accept Numayrī's own evidence, this marked the beginning of his adoption of the Islamic path. While the 1977 National Reconciliation was hammered out with al-Ṣādiq al-Mahdī, the most prominent Mahdist leader, its other partners included both the Democratic Unionists [DUP] and the Muslim Brothers. The Muslim Brothers, not unlike the Communists, were also an elitist movement whose support came primarily from within the University of Khartoum and its graduates, as well as the

[94] *The Horn of Africa* 8, no. 1 (1985), 7, 16.
[95] For details, see Warburg, *Islam, Nationalism and Communism*, 93–140.

urban intelligentsia in the towns of the central northern Sudan.[96] Hostility between the Muslim Brothers and Numayrī gradually subsided as a result of political developments, both in the Sudan and in President al-Sādāt's Egypt. First came Numayrī's clash with the Communists in July 1971, which ended in the annihilation of the SCP's leadership. Secondly, given that Numayrī's anti-sectarianism had not subsided over the years, the Muslim Brothers were his natural allies, because their political future—despite their marriage of convenience with the Anṣār—depended on the termination of sectarian supremacy. Under President al-Sādāt, the Egyptian Muslim Brothers—once the Free Officers' most outspoken opponents—had become important allies of the regime against the pro-Nasserist left and later against the radical Muslim student groups. Despite the different conditions prevailing in the two parts of the Nile Valley, a marriage of convenience with the Muslim Brothers made sense to Numayrī in his attempt to neutralize the Anṣār and to promote an Islamic state. The Muslim Brothers had advocated an Islamic state, based on the *sharī'a* and had collaborated with the Anṣār in formulating an Islamic constitution for the Sudan. According to al-Turābī, there had been strong reservations among his colleagues who were opposed to cooperation with Numayrī. However, they had later realized that it had worked to their advantage. Al-Turābī viewed Numayrī as a "tolerant" leader whose "conversion" had helped to eliminate secularism. However, al-Turābī warned that "if Islam were to be repressed in the Sudan the possibility of a Khumaynī-like revolt should not be excluded." When asked about the chances of al-Ṣādiq al-Mahdī becoming a political leader, al-Turābī stated that the latter should confine his leadership to the Anṣār and not strive for national leadership since "Nimairi knows that there is only one seat at the top."[97]

Following the July 1977 National Reconciliation, the Muslim Brothers were consequently fully integrated within the governing bodies of the Sudan Socialist Union (SSU), the People Assembly and, most importantly, the Government. For them National Reconciliation was thus a most welcome decision since it fitted into their

[96] Osman, *Muslim Brotherhood*. The thesis formed the basis for El-Affendi, *Turabi's Revolution*, 46–103.

[97] The following, unless otherwise indicated, is based on al-Turābī, *Eliminated Secularism*. We have used the version published in Durán, *Islam und Politischer Extremismus*, 71–73 (quoted from p. 72).

new strategy which was based on their disappointment with the other opposition groups and especially with the Anṣār. Hence they had decided, following the dismal failure of the July 1976 coup, to go it alone and to support Numayrī for as long as it would take them to build up a power-base in the Sudan enabling them to challenge its current military rulers from within. Numayrī's Islamic policy, which started taking shape in the mid-1970s, encouraged some of the ex-Brothers to support him even before reconciliation was finally hammered out. The appointment of al-Rashīd al-Ṭāhir Bakr as Deputy President and Prime Minister in 1976 was also a clear sign of a change in policy. Since Bakr, though no longer a member of the Brothers, was identified ideologically as an adherent by the population, his inclusion in top government positions was a clear sign as to where the regime was heading. Therefore, once reconciliation became the official policy the Brothers had no difficulty in taking over whatever positions the Government offered. Their strategy required that they prepare themselves for their future role as governors of the Islamic Republic and the opportunities offered by Numayrī seemed ideal. While a minority within the Brothers' Shūrā Council constantly opposed this pragmatic approach, the vast majority led by al-Turābī became fully identified with the regime. Al-Turābī himself was appointed Attorney General in 1979 while many of his colleagues accepted positions in the judiciary and even in the SSU. This close collaboration did not, however, promote the Muslim Brothers' quest for supremacy among the students. Al-Turābī wisely allowed the student leadership of the Brothers to maintain their anti-Numayrī opposition posture, despite their elders' collaboration with the regime. But the illegal SCP and the Republican Brothers were quick to seize the opportunity and denounced the Brothers' duplicity. Consequently, in the 1980 elections to the student union the Muslim Brothers were defeated.[98]

In an interview with *Sudanow* in March 1982, al-Turābī declared that reconciliation with the Muslim Brothers had been fully accomplished and it was now time to deal with such crucial issues as the constitution within the existing political system and with strengthening the legislative institutions in particular. When asked about the relationship between his movement and the Ṣūfīs or the Mahdists, al-Turābī stated:

[98] El-Affendi, *Turabi's Revolution*, 113–16; Sidahmed, *Politics and Islam*, 203–4.

> There is fortunately no conflict between the modern Islamic movement and the traditional-based on the ideologies of the Sufis or the Mahdists. Hence these will form a base, a form of Islamization which combines the modern and the traditional [. . .]. Our program is religiously comprehensive excluding only non-religious ideologies such as Marxism or secularist creeds and those opinionated movements which claim to hold direct mandates from God.[99]

The vehemence of al-Turābī's anti-Communist stance was criticized by some participants at a conference on "Islam in the Sudan" held in Khartoum in November 1982 by the Society of Islamic Thought and Civilization (*jamāʿat al-fikr waʾl-thaqāfa al-islāmiyya*). At that conference al-Turābī maintained that Islamization was the central issue in the Muslim Brothers' policy and he regarded the reform of Sudanese law, in conformity with the *sharīʿa*, as the most urgent task. The final communiqué of the conference was in general agreement with the ideas put forward by the Muslim Brothers in the course of the few years preceding that conference and constituted, in fact, an agreed platform for future action. It advocated essential social reforms which should precede the gradual restoration of the *sharīʿa*. However, al-Turābī's promise to act within this agreed platform, was broken less than a year later when he openly collaborated with Numayrī's reinstatement of the Qurʾānic punishments (*ḥudūd*) in September 1983.[100]

Al-Turābī divided the Islamic *daʿwa* (mission) into the following main areas of activity: students, women, the urban poor, the economy, publications, and the army. He justified collaboration with a regime, although it was generally believed to be corrupt, on the grounds that it was the fastest way to build up the movement's ranks and develop experienced cadres. The first area in which the movement had long experience were the students. Here they built up their support under the name *al-ittijāh al-islāmī* (the Islamic orientation), both in universities and other institutions of higher learning. Indeed their success, especially after the decline of the Communists, was remarkable and in January 1982, during the popular uprising (*intifāḍa*) in which, according to official estimate, 58 citizens lost their lives, their student organization gave extremely useful assistance to the government's security forces, under the guidance of the Minister of the Interior Aḥmad ʿAbd al-Raḥmān Muḥammad, a veteran Muslim

[99] *Sudanow* (March 1982).
[100] ʿAbd al-Raḥīm & al-ʿĀbidīn, 427–36.

Brother.[101] However, students were by definition a rather small, socially mobile, and elitist group which could never be strong enough to enable the Muslim Brothers to assume power. Although some of these graduates played leading roles in the Sudan's educational system, its economy, bureaucracy, and in the Brothers' *daʿwa* organizations, they remained a politically marginal minority. Consequently, al-Turābī's newly proposed strategy, aimed at recruiting other sections within society, was executed by the Muslim Brothers with great success since 1977. They first targeted the women and the urban poor, who consisted largely of migrants from the countryside who had lost their family roots and were consequently no longer bound by sectarian loyalties. Together these two groups accounted for more than 50 percent of the population and though al-Turābī realized that his sectarian rivals were also attempting to recruit the same sectors, the modernist Muslim Brothers had a clear advantage in not being bound by old traditions and by being more willing to adapt Islam to the needs of modern society.

There were, however, two additional groups whose help to the Brothers was even more important; these were the Sudanese "guest workers" in Arab countries known as *mughtaribīn* (expatriates), and the army officers' corps.[102] The phenomenon of emigration of male workers from the Sudan to the Arab oil-producing countries, assumed large proportions in the 1970s and 1980s and it was estimated that in 1985, the year Numayrī was removed from power, some two-thirds of the professional and skilled Sudanese male workers, were employed for long periods outside the country. This was a heaven-sent blessing for the Muslim Brothers since those in exile included many of their university adherents who were eager to find social and cultural ties in which they could overcome their isolation. If we take into account the fact that these migrants earned good salaries and that their financial assets were partly smuggled back into Sudan to help their families, it is easy to comprehend their importance not only for the ailing economy of their country, but also for propagating the Islamist *daʿwa* among the women and the poor urban population, whom al-Turābī had targeted as the Brothers' future supporters. The remittances smuggled annually into Sudan, largely through infor-

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[101] Ḥaydar, *al-Ikhwān waʾl-ʿaskar*, 53–54.

[102] For details, see Sidahmed, *Politics and Islam*, 195–97; see also Warburg, *Military Force*, 20–25.

mal channels, by means of this "hidden economy" were estimated, according to a survey conducted in 1984–85, to exceed US$ 3 billion. The considerable fortunes, which were consequently put at the disposal of the NIF, after 1985, explain to a large extent their unexpected success in the 1986 elections. Their most remarkable achievement, however, was in the financial field in which the NIF started from scratch and achieved control of some 500 companies by 1980. Al-Turābī himself explains this remarkable breakthrough as a result of developments within the Muslim-Arab world which, from the mid-1970s onward, entailed a policy of establishing Islamic banks as well as Islamic financial companies in the fields of insurance, development, investments etc. By 1989 the companies under direct or indirect NIF control, both in the Sudan and other Muslim countries, had accumulated some US$ 800 million, an amount which could play an important role both in the social, economic and political fields. A good example is the NIF's success in mobilizing merchants and other entrepreneurs to further its cause. Another outcome of this affluence was the setting up of several propaganda organizations, under NIF guidance, to promote the Islamic *daʿwa*, such as the Islamic African Center, which ostensibly sought to bring together all those concerned with research and studies of Islam in Africa. The Islamic Daʿwa Organization is another example of the exploitation of financial affluence for the promotion of Islam, as propagated by the NIF.[103]

The Brothers' planned infiltration into the army was more problematic for two main reasons: first, the army is part and parcel of the regime and hence rather sensitive to politicizing trends; secondly, Sudanese officers and soldiers viewed attempts undertaken by political parties to propagate their views within the army rather unfavorably. However, since the Brothers and later the NIF, realized that their infiltration into the army was crucial if they hoped to achieve power, they naturally devoted considerable efforts to attain this objective. This was openly admitted by Rashīd al-Ghannūshī, one of their leaders, during a University debate in Khartoum in 1979. He stated that an unacceptable regime should be overthrown by military force, if this could not be achieved through reasoning or other peaceful means. Secondly, he asserted that the use of force to attain power was often resorted to by others and hence the Islamists had every right to exert force if other methods failed. Since, according to the Islamists, their

[103] Sidahmed, *Politics and Islam*, 207–10.

route to the top by peaceful means was blocked by the ruling elite, both civilian and military, the use of force was justified.[104]

Their opportunity to infiltrate the ranks of the SDF presented itself in a legitimate manner following President Numayrī's "National Reconciliation" in July 1977. The Muslim Brothers, led by al-Turābī, undertook a concerted effort, at the invitation of Numayrī, to gain a foothold within the military. Their superior level of education, concerted organization, and financial affluence ensured the Brothers' success in the army. First, they undertook voluntary religious teaching and conducted prayers in the army, with the blessing of the SDF's high command; secondly, in order to gain support among the officers, they urged their graduates to join the officers' corps, following the conclusion of their medical, engineering, accountancy or other university studies. A third method entailed the search for ex-Muslim Brothers or their relatives, serving in the SDF, in order to lure them back into the movement's activities. All these efforts were undertaken during the years 1978–85, when conditions within the Sudan, including the SDF, were ripe for revolt in the context of a deteriorating economy, growing corruption and, from 1983, renewed civil war. Basically the Brothers had two aims: first, the creation of conditions within the army which would enable them to impose an Islamic state by force of arms, if other methods failed; secondly, to lay the foundations of an Islamic army so as to supersede the SDF when the time came. This second reason was central, since the Brothers viewed the existing armies in the Muslim world as supporters of the *status quo* and hence as the last resort of secularism.[105]

Al-Turābī's collaboration with Numayrī was regarded by many observers of the Sudanese political scene both as proof of his duplicity and of his being the power behind Numayrī. Thus when in March 1985, al-Turābī and some of his followers were accused of treason and put behind bars, it seemed an illogical step, since by discrediting his few remaining allies Numayrī was in fact undermining his own credibility. However, many of al-Turābī's critics, including those who had left the Muslim Brothers in protest against his collaboration with Numayrī, were not sorry at his imprisonment. Others, who had followed Numayrī's relations with the Muslim

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[104] Ḥaydar, *al-Ikhwān wa'l-'askar*, 54–57.

[105] For details, see Warburg, *Sudan under Islamist Rule*, 25–42; see also Ḥaydar, *al-Ikhwān wa'l-'askar*, 61–63.

Brothers closely, were less surprised since they had regarded this uneasy alliance as a temporary "marriage of convenience."[106]

One of the Muslim Brothers who had been closely associated with Numayrī's Islamic experiment was Dr. al-Mukāshifī Ṭāhā al-Kabbāshī, who in his book *Taṭbīq al-sharīʿa al-islāmiyya fī ʾl-sūdān bayna al-ḥaqīqa waʾl-ithāra* (the application of the *sharīʿa* in the Sudan between truth and provocation), fully justified the promulgation of the Islamist laws.[107] Though the author was briefly imprisoned in April 1985 with other leading Muslim Brothers, he continued to regard the Islamist laws as an appropriate step for an Islamic country. Moreover, for him Numayrī's support of these laws was purely pragmatic since the Muslim Brothers alone constituted the true Islamic movement in the Sudan. The next step in that direction, according to al-Kabbāshī, should have been Islamization at the political level, probably inspired by the Iranian model. This, of course, was unacceptable to Numayrī since it could have entailed a change of leadership. But for al-Kabbāshī and his colleagues there was never any doubt as to the Sudan's Islamic identity which implied the *jāhilī* (pagan of pre-Islamic times) status of all non-Muslims. Even the Sudan's armed forces would accordingly become an Islamic army fighting the enemies of Islam, "Communists, Crusaders, Zionists, Free Masons" or their Sudanese supporters, who have united forces against the *sharīʿa*.[108]

The internal rift within the Muslim Brothers was never really healed since some of the older leaders, such as ʿAbdallāh ʿAbd al-Mājid and Jaʿfar Shaykh Idrīs, continued to attack al-Turābī's strategy and tactics from their exile in the Gulf states. They were closely associated with the Egyptian Muslim Brothers and following the release from prison, in 1973, of Ḥasan al-Hudaybī, the leader (*murshid ʿāmm*) of the Muslim Brothers in pre-revolutionary Egypt, they advocated joining the world organization of Muslim Brothers under

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[106] El-Affendi, *Turabi's Revolution*, 126–30; the author describes this "crackdown" as a gradual process brought about by growing animosity between some of Numayrī's corrupt aides and the Muslim Brothers who, in many cases, sentenced them in the *sharīʿa* courts. However, according to El-Affendi, the final blow was the result of United States pressure, following Vice-President George Bush's visit in Sudan in March 1985.

[107] Al-Kabbāshī, *Taṭbīq al-sharīʿa*. The author, a member of a prominent Ṣūfī family of the Qādiriyya order, was first trained as *qāḍī*. In 1987 he received his Ph.D. from the University of Umm al-Qurā in Mecca. For further details, see Shāmūq, *Muʿjam al-shakhṣiyyāt*, 440–41.

[108] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 8. See below, III.1.3.

his leadership. They criticized al-Turābī's un-Islamic views regarding the role of women in society[109] and denounced his intimacy with Numayrī and his regime. All their suggestions were defeated in the Shūrā Council and though ʿAbd al-Mājid was offered the deputy leadership upon his return to the Sudan in the late 1970s, as an act of conciliation, he refused the offer and the rift remained unhealed. A number of opposition leaders, headed by Dr. al-Ḥibr Yūsuf Nūr al-Dāʾim, professor of Arabic literature at the University of Khartoum, were dismissed from the movement and any further association with them was forbidden. The expelled members, who were later joined by ʿAbdallāh ʿAbd al-Mājid, formed their own independent Muslim Brothers' movement and this caused a split within the student organization. In 1986 they competed under their own banner in the general elections against al-Turābī and the NIF but without success.[110]

4.3. *The Anṣār and the Islamic State*

The Anṣār, or neo-Mahdists, were according to some estimates the largest sect in the Sudan and had numbered over three million on the eve of independence. Their commitment to their Imām was all-embracing and presented a major obstacle to the emergence of real democracy in the Sudan. Since this loyalty embraced both religion and politics, the Anṣār obeyed their Imām's orders absolutely. During General Ibrāhīm ʿAbbūd's military regime there was no doubt as to who led the opposition. Sayyid al-Ṣiddīq al-Mahdī, who became Imām of the Anṣār following Sayyid ʿAbd al-Raḥmān's death in 1959, assumed this role and led it successfully until his death in 1961. One of the high points of the anti-ʿAbbūd struggle was an armed clash between the Anṣār and the army during the mass celebration of the Prophet's birthday (*mawlid al-nabī*), in 1961. But following this incident, in which several lives were lost, al-Ṣiddīq vehemently opposed a suggestion made by Ismāʿīl al-Azharī to launch an armed attack against the regime and assassinate its military leadership. This position was inspired by the fear that the Anṣār's resort to violence against the rulers of the Sudan could make their rise to

[109] See below, IV.3.1.

[110] El-Affendi, *Turabi's Revolution*, 118–19; according to El-Affendi, the membership of this splinter group did not exceed a few hundred members in 1987.

power ineluctable thereby harming the future prospects of democracy in the Sudan.[111]

Ja'far Numayrī was well aware that the Anṣār were a major threat to his regime and he therefore attempted to annihilate their political power by ordering the bombardment of their center on Abā Island in March 1970. Their Imām, al-Hādī al-Mahdī, was killed with several of his followers when he tried to cross the border to Ethiopia in the same month. Most of the other Mahdist leaders were by then either under arrest or stood aside following the massacre. Following al-Hādī's death, al-Ṣādiq al-Mahdī fulfilled the dual role of acting Imām of the Anṣār and leader of the Umma party and spent the next seven years in exile. While many observers, both in the Sudan and abroad, claimed that the Anṣār's political power had been destroyed, al-Ṣādiq and his followers rebuilt the movement in the refugee camps in Ethiopia and Libya. From there the National Front launched its most daring revolt against Numayrī in July 1976. Numayrī's survival was at least in part responsible for the National Reconciliation which started exactly one year later. Both he and al-Ṣādiq probably realized that they could not easily defeat each other and hence decided to join forces. Either antagonist believed that he could neutralize his foe through political maneuvering. Indeed, al-Ṣādiq thought that it was possible to decide the matter at the ballot-box. However, two years later it became quite clear that, as far as the Anṣār were concerned, reconciliation had not been achieved. The gap between them and the regime widened and when Numayrī announced his "Islamic path" in September 1983, al-Ṣādiq did not hesitate to denounce his policy as un-Islamic.

What did the Anṣār achieve as a result of National Reconciliation? According to al-Ṣādiq, they achieved the following: First, a reconciliation with the Sudanese army which since the July 1976 uprising had been led to believe that the Anṣār were its enemies. Secondly, between 1970 and 1977 the Anṣār had been in disarray in the Sudan, since most of their leaders and active cadres were in exile. Having returned to the Sudan, al-Ṣādiq was able to devote his time to rebuilding the movement and to overcoming the internal rift, which

[111] Mukhtār, *Kharīf al-faraḥ*, 30–3, 164–65. There may be an additional explanation, based on Sayyid al-Ṣiddīq's pragmatism and his fear that the Anṣār might be decimated in further such clashes.

had prevailed since he went into exile in 1970. He insisted that the Anṣār were, as a result of his return to the Sudan after reconciliation, more united and stronger than at any time in their recent history.

Al-Ṣādiq al-Mahdī's criticism of Numayrī's policies was practically all-embracing and included his rejection of Numayrī's economic and internal policies as well as his opposition to the latter's support for al-Sādāt's peace initiative with Israel and his acceptance of the Camp David Accords. Al-Ṣādiq's rejection of Numayrī's concept of an Islamic state was probably of even greater significance. As a great-grandson of the Sudanese Mahdī and the leader of the most popular Islamic movement in the Sudan, al-Ṣādiq al-Mahdī might have been expected to advocate a very rigid and uncompromising brand of Islam. However, in defining his concept of an Islamic state he first of all rejected the *taqlīd*, the uncritical acceptance of Islamic doctrines, which he thought had served a useful purpose historically but was now outdated and hence a source of rigidity within Muslim society. Since, according to al-Ṣādiq, the basis of Islam was accommodation to change rather than its denial, he propagated social change within the Islamic state, even at the expense of introducing far-reaching reforms within the traditionally accepted Islamic way of thinking.[112]

Al-Ṣādiq al-Mahdī's concept of an Islamic state thus left the door wide open to the introduction of innovations. The Anṣār, under al-Ṣādiq, seemed to be moving toward profound compromise with modernity, viewing the inherent rigidity in contemporary Muslim thought and politics as a major threat to the future of Islam. This concept was clearly expressed by al-Ṣādiq al-Mahdī when he was asked to define the differences between the Anṣār and the Muslim Brothers:

> The Muslim Brothers think of Islam in terms of the traditional pattern [. . .]. We think in terms of constructing a new pattern on an Islamic basis. They conform to the Sunni school of thought and are bound by the four Sunni schools of law. We draw from all schools of Muslim thought and we are not bound by any school of law. We recognize the original texts and seek new formulation, conscious of changes in time and place. They are a branch of a movement which originated and developed outside Sudan. We have developed in Sudan and would give it a leading role in the revival of Islam.[113]

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[112] Al-Mahdi, *Islam, Society and Change*, 236–39.

[113] For further details, see Warburg, *Mahdism and Islamism*, 221–24; al-Mahdi, *Interview*, 38–41; this interview was conducted amidst rumors that al-Ṣādiq al-Mahdī would be appointed Prime Minister of the Sudan by President Numayrī.

Al-Ṣādiq al-Mahdī ended this elaborate description by elluding to the elitist nature of the Muslim Brothers as opposed to the popular appeal of the Anṣār. Finally, he emphasized the difference between the movements with regard to reconciliation: "Their attitude to National Reconciliation is to accept what there is and work within it. Our attitude is that Reconciliation means the development of alternative institutions and policies."[114]

Given his intellectual position as presented here, al-Ṣādiq al-Mahdī's outspoken opposition to Numayrī's decrees in September 1983 imposing the *ḥudūd* is hardly surprising. In several public speeches held at the Mahdist mosques in Omdurman and on Abā Island, the Anṣār's spiritual center, al-Ṣādiq specified the conditions which had to prevail in a Muslim society before the *ḥudūd* could be implemented. These included first and foremost social justice, individual liberty and civil rights, as well as an independent legislative authority. In a country, which, according to al-Ṣādiq, was based on tyranny, wherein the bulk of the population enjoyed neither civil rights nor the means to support itself, the implementation of the *ḥudūd* was in contravention of the dictates of true Islam. To use al-Ṣādiq's words in a sermon preached at the Anṣār's mosque in Omdurman, immediately following the new decrees:

> To cut the hand of a thief in a society based on tyranny and discrimination is like throwing a man into the water, with his hands tied, and saying to him: beware of wetting yourself.[115]

Al-Ṣādiq al-Mahdī was willing to support the ban on alcoholic drinks and prostitution but he openly denounced Numayrī's policy as an act of desperation for which the Sudan was not ready. In a pamphlet entitled, "The Sudanese Regime and Its Islamic Experiment, 1983–85" (*al-niẓām al-sūdānī wa-tajribatuhu al-islāmiyya, 1983–85*), the Anṣār assessed Numayrī's Islamic experiment and criticized it bitterly. Its author, probably al-Ṣādiq himself, denounced Numayrī's experiment as un-Islamic and expressed his hope that its ultimate and inevitable failure would not be blamed on the "modern Islamic revival movement," to which the Anṣār belonged. In his view, Numayrī's false Islamic policy was nothing but a desperate political attempt to suppress his opponents both in the North and the South in order to save his regime and his neck. Under these circumstances,

[114] Al-Mahdi, *Interview*, 38–41.
[115] Al-Mahdī, *al-Khuṭba*.

it was therefore not surprising that al-Ṣādiq and several other leaders of the Anṣār were periodically detained, especially after September 1983, and thus excluded from active participation in politics.

Analyzing the reasons behind the popular uprising against Numayrī, in April 1985, and the army's decision to step in and join the people, al-Ṣādiq offered the following as crucial factors: the catastrophic economic crisis; the Islamic experiment, which had led to totally negative results; and the challenge of the southern rebellion, which had reached dangerous dimensions. However, according to al-Ṣādiq, the single most important factor which had enabled the popular uprising to succeed was the fact that the monopoly of the Muslim Brothers within the student movement had been broken. The students had played a leading role in previous popular uprisings. But they had been neutralized since 1977 through al-Turābī's decision to collaborate with Numayrī unconditionally. Al-Ṣādiq accused al-Turābī of having joined forces with Numayrī, although he knew that Numayrī's Islamic order was nothing but a political ploy.[116]

Al-Ṣādiq al-Mahdī himself had, as mentioned above, openly denounced the Islamic policy as false when nearly none of the other main Muslim leaders had the courage or the conviction to follow in his footsteps. The sole exception were the Republican Brothers, who opposed what they regarded as a false Islam even more vehemently and whose leader, Maḥmūd Muḥammad Ṭāhā, was executed on the charge of apostasy in January 1985.[117] Al-Ṣādiq al-Mahdī was again arrested a few days before Numayrī's downfall, on 5 April 1985, for speaking out against the regime at the Hijra Mosque in Wad Nubawī. He denounced what he viewed as Numayrī's false Islamic policy in strong terms and called upon the army to join the people and topple Numayrī's regime. On the following Friday al-Ṣādiq al-Mahdī's *khuṭba* (public address) was preached in the famous mosque of Bayt al-Imām al-Mahdī and, with Numayrī deposed, he became even more outspoken. He analyzed the five major legal pronouncements of Numayrī's Islamic system, proving to his listeners that all of them constituted a corruption of Islam. He also denounced the legal decisions reached on the basis of the Islamist statutes as un-Islamic, both in their spirit and in their execution. Apart from his total rejection of the way in which the *ḥudūd* were implemented, he singled out

[116] *Al-Majalla*, April 20, 1985.
[117] For details, see below, I.4.4 and III.2.2.2.1.

Numayrī's "Islamic economy" explaining that it did not conform to a true understanding of Islam. However, not unlike Sayyid Muḥammad ʿUthmān al-Mīrghanī, the leader of the Khatmiyya, al-Ṣādiq, supported the creation of an Islamic state provided it was based on the integral application of the *sharīʿa* in all political issues and on social justice in its economic policy. The implementation of the *sharīʿa* was to be based on the renewal of the jurist's right to exercise *ijtihād*, which takes into account present conditions and derives its judgment from the Qurʾān and the *sunna*.[118]

4.4 *The Trial and Execution of Maḥmūd Muḥammad Ṭāhā*

On January 18, 1985, Maḥmūd Muḥammad Ṭāhā, founder and leader of the Republican Brothers, was publicly hanged in Khartoum in the presence of some 3,000 onlookers shouting: "death to the enemy of God!." The trial and subsequent execution of this 76 year-old teacher and leader was probably the single most notorious execution allegedly performed in accordance with the September 1983 laws. Who was Maḥmūd Muḥammad Ṭāhā and why was he executed for apostasy?[119]

Ṭāhā had appeared on the Sudan's political scene in 1945 when he and several of his colleagues founded the Republican party. A civil engineer, employed by the then Anglo-Egyptian administration, Ṭāhā and his colleagues were opposed both to the sectarian-dominated parties—headed by the Anṣār and the Khatmiyya—as well as to the more secular pro-Egyptian Sudanese Graduates led by Ismāʿīl al-Azharī. They advocated a fully independent Sudanese republic, free from both British and Egyptian tutelage, guided by the teachings of Islam. Though politically rather insignificant, the Republicans were from the outset a group to be reckoned with primarily on account of their intellectual standard and their outspoken charismatic leader. Ṭāhā was arrested twice by the British authorities, in the late

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[118] The above is based on mimeographed texts of al-Ṣādiq al-Mahdī's *khuṭba*s and on his interview in *al-Muṣawwar*, April 26, 1985. Elsewhere al-Ṣādiq al-Mahdī approves of the two other sources of law—*qiyās* (analogical reasoning) and *ijmāʿ* (consensus of the jurists), as well as legal mechanisms such as *istiḥsān* (a discretionary opinion in breach of strict analogy) and *istiṣlāḥ* (taking the public interest into account). See al-Mahdi, *Interview*, 38–41. For further details on al-Ṣādiq al-Mahdī's legal methodology, see below, II.1.3.

[119] The following, unless otherwise stated, is based on: Rogalski, *Die Republikanischen Brüder*; Stevens, *Republican Brothers*, 133–44; Mangarella, *The Republican Brothers*, 14–24.

1940s, because of his outright opposition to their interference in what he regarded internal Sudanese affairs. Upon his release from prison, on November 30, 1951, Ṭāhā resumed his fight for an Islamic, non-sectarian, independent republic. From now on the Republicans' mission was not that of a political party but rather of an Islamic political *daʿwa* movement. They did not participate in elections nor in other party-political activities. Yet they openly expressed their views on all internal or external political matters of interest both through the media and in their own publications. The Republicans supported an independent nation state in the Sudan, within the Condominium borders. They advocated a presidential federal socialist republic, with freedom of religion and equality before the law, for all inhabitants. Ṭāhā therefore opposed the restoration of the *sharīʿa*, claiming that the Islamic principles of the state could be preserved by ensuring individual freedom and justice for all.

During the ʿAbbūd years the Republicans met in private homes for discussions but the main venue for their principal activities was the university. Here the Communists and the Muslim Brothers competed for student support with the latter advocating an Islamic state with the *sharīʿa* as its law. The Republicans succeeded in marshalling considerable student support for their humane non-legalistic view of Islam and statehood. Hence, despite their anti-Communist views they supported the leftist-dominated transitional Government after the October 1964 revolution, hoping that it would overcome sectarianism. However, it was a short-lived episode since the sectarian parties were back in power by 1965 with part of the Umma party, led by al-Ṣādiq al-Mahdī, advocating an Islamic state based on the *sharīʿa* and collaborating with al-Turābī's ICF. The Republicans felt compelled to attack the Umma on account of their opposition to sectarianism and their ideological opposition to the discriminatory aspects of an Islamic state, vis-à-vis women and non-Muslim minorities. The Umma under al-Ṣādiq joined forces with the Muslim Brothers, adopting the latter's legalistic view of an Islamic order. Not surprisingly, Ṭāhā published his major works on this topic, attacking the political-legalistic Islam, in the years 1966–67. His first book, *Ṭarīq Muḥammad* (Muḥammad's way), in 1966, was followed by his most important work, *al-Risāla al-thāniya min al-islām* (The Second Message of Islam), in 1967. One year later Ṭāhā was accused of apostasy and found guilty by the Supreme Sharīʿa Court in Khartoum. He was sentenced in absentia since he refused to acknowledge the court's right

to decide in matters of personal belief. The sentence remained on paper because the jurisdiction of *sharīʿa* courts at the time was limited to matters of personal status. The court consisted of two judges, propagating ideas similar to those of the Muslim Brothers. One of the two, Ḥusayn Muḥammad Zakī, continued to demand throughout the Numayrī years that Ṭāhā be executed for apostasy so that the spreading of his anti-Islamic message would be stopped.[120]

Following the May 1969 military coup, when all political parties were outlawed, Ṭāhā was compelled to transform his party into a movement called "the Republican Brothers." It is, however, understandable that the Republicans viewed Numayrī's early years with approval. He fought against sectarianism, eliminated Communism, preached tolerance, and promulgated a constitution based on religious, ethnic, and cultural pluralism. Furthermore, the Republicans regarded the 1972 Addis Ababa Agreement as a vindication of their view about a federal solution which they had propagated since 1951. This, however, changed as a result of Numayrī's Islamic policy and his reconciliation with the Anṣār and the Muslim Brothers in 1977. The Republicans, along with various secular groups, regarded the new trend as endangering the Sudan's unity but they avoided an open clash with the regime and attacked instead the Muslim Brothers and their leader, al-Turābī, whom they regarded as being the power behind the Islamist trend.

In March-April 1983 Muḥammad Najīb al-Muṭīʿ, a fanatic Egyptian Muslim preacher who had been involved in the anti-Coptic agitation at the al-Ḥamrāʾ Mosque near Cairo, was allowed to air his views on Sudanese television. He used this privilege in order to arouse his audience against the Christians in the South who, he claimed, were oppressing the Muslims. Furthermore, in his preaching at the Kubar Mosque as well as in his television broadcasts, he called for the immediate arrest of the heretical Republican Brothers.[121] The Republicans retaliated and called upon General ʿUmar al-Ṭayyib, Numayrī's first Vice-President and Chief of Security, to put an end to the fanatical hatred preached by Shaykh al-Muṭīʿ. The result, as might have been expected, was the arrest of Ṭāhā and some fifty

[120] Rogalski, *Die Republikanischen Brüder*, 35–36; Zakī published his accusations in his *al-Qawl al-faṣl.*

[121] *Neue Züricher Zeitung*, October 21, 1983, reprinted in Durán, *Islam und politischer Extremismus*, 75.

of his adherents who were kept in prison without being charged until December 1984.

It was while they were in prison that the September laws were promulgated and the Qur'ānic punishments imposed on those found guilty. Upon their release, the Republicans published their denunciation of the Islamist laws under the title: "*hādhā . . . aw al-ṭūfān*" (This . . . or the flood). They claimed that the Islamist laws violated the *sharīʿa*, distorted Islam, and jeopardized the Sudan's unity, and therefore should be immediately repealed. Islamic enlightment should come through the *sunna* and not the *sharīʿa*. In one of the first leaflets published by the Republicans following their release from prison, these views were clearly articulated, in the face of government disapproval:

> The September 1983 Laws [. . .] have distorted Islam in the eyes of intelligent members of our people and in the eyes of the world [. . .]. These laws violate the Shariʿa and violate religion itself. They permit, for example, the amputation of the hand of one who steals public property, although according to Shariʿa the appropriate penalty is the discretionary punishment (*taʿzir*) and not the specific (*hadd*) penalty for theft [. . .]. Moreover, the enforcement of the specified penalties (*hudod* and *qassas*) [*sic.*] presupposes a degree of individual education and social justice which are lacking today. These laws have jeopardized the unity of the country and divided the people in the north and south [. . .] by provoking religious sensitivity, which is one of the fundamental factors that has aggravated the southern problem [. . .]. It is futile for anyone to claim that a Christian person is not adversely affected by the implementation of Shariʿa [. . .]. The rights of southern [non-Muslim] citizens in their country are not provided for in Shariʿa but rather in Islam at the level of fundamental Qur'anic revelation, that is, the level of Sunnah.[122]

As a result, Ṭāhā was rearrested and, together with four of his colleagues, sentenced to death for apostasy (*ridda*). They were accused of suggesting that women were entitled to equal shares with men in the Islamic law of inheritance. Moreover, they were charged with renouncing the Muslim duties of *jihād* and the daily prayers. Another charge was that Ṭāhā had rejected the dictates of the *ʿulamā'* and the *fuqahā'* and declared them not binding. According to Judge al-

[122] The translation is quoted from Taha, *The Second Message*, 10–11; Professor An-Naʿim, who wrote an introduction to this book and translated it, is a well-known Sudanese legal authority. He was among the Republicans arrested in June 1983 and was kept in prison without trial until December 1984; see also Rogalski, *Die Republikanischen Brüder*, 44–45; Shāmūq, *Muʿjam al-shakhṣiyyāt*, 262.

Mukāshifī Ṭāhā al-Kabbāshī, Ṭāhā asserted that he had bridged the gap between God and the Prophet and thereby had brought about the personification of God. Al-Kabbāshī therefore claimed that in sentencing Ṭāhā to death he was fully abiding by the jurisdiction of Sunnī Islam.[123] According to Rogalski, this may be viewed also as part of the ongoing conflict between jurist and mystic within Islam, a conflict which has reemerged with neo-Sufism. Aḥmad Ibn Idrīs' rejection of political Islam and his insistence that every Muslim had the right to define Islam according to his own faith and to redefine the *sharīʿa*, was articulated by Maḥmūd Muḥammad Ṭāhā and his followers and led to their being charged with apostasy.[124]

In the context of Sudanese politics, Ṭāhā's execution was also a pragmatic move to rid the regime of one of its outspoken critics without endangering itself, thereby warning other prospective enemies, who enjoyed greater popular support, that their disobedience too might cost them their life. On the Islamic international front Numayrī received the blessings of the Islamic World League, based in Mecca, whose most prominent *faqīh*, Shaykh Ibn al-Bāz, congratulated Numayrī on ridding the Muslim World of the atheist and enemy of God, Maḥmūd Muḥammad Ṭāhā. Others reacted less favorably and accused Numayrī of misusing the *sharīʿa* to commit murder. Following Ṭāhā's public execution, on January 18, 1985, his corpse was whisked away by the security forces, probably in order to avoid his funeral turning into a mass demonstration against Numayrī and his regime.[125] Indeed, it was Ṭāhā's execution, so some sources claim, that finally convinced President Mubārak of Egypt that Numayrī no longer warranted Egypt's support. Mubārak had explicitly asked Numayrī for clemency, but his request, like those of other world leaders, was rejected by Numayrī. According to Manṣūr Khālid, the Sudan's Minister of Foreign Affairs in the years 1971–78, Numayrī deliberately chose Ṭāhā as an example to others with more popular support who opposed him. But, as claimed by Khalid:

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[123] Al-Kabbāshī, *Tatbīq al-sharīʿa*, 94–95.

[124] Rogalski, *Die Republikanischen Brüder*, 46–47. Cf. Voll & Voll, 156–57. See below, III.2.2.2.1.

[125] This is somewhat reminiscent of General Kitchener's act, after the battle of Omdurman in 1898, when he removed the Mahdī's skull from his destroyed grave. The ostensible reason was to stop Qubbat al-Mahdī from becoming a center for Mahdist pilgrims and renewed fanaticism; Ṭāhā was of course neither as popular as the Mahdī nor could he be accused of fanaticism. The similarity is limited to the ruler's fear that the funeral or place of burial would become a center of opposition.

> [. . .] The tragedy is greater than the loss of one man. Taha's death symbolizes the end of hope for Nimeiry's May Revolution which only ten years ago was seen by the world to have peace, unity and development within its grasp.[126]

However, there were other voices both in Egypt and the Sudan that rejoiced at Ṭāhā's execution and regarded it as a great victory for Islam against a dangerous heretic. In an article published in *al-Nūr*, on February 6, 1985, the editorial celebrated the fact that the four Republican Brothers who had been sentenced to death together with Maḥmūd Muḥammad Ṭāhā had repented and renounced their previous erroneous beliefs and had returned to the fold as true believers.[127]

4.5. *The Islamist Statutes and the South*

Hostilities broke out once again in southern Sudan in May 1983, before the September laws were implemented, as a result of internal, regional, and international factors. However, it is generally admitted that the imposition of these laws aggravated the situation further. Until 1983, the Addis Ababa Agreement of February 27, 1972 had been regarded as the most important achievement of the Numayrī regime. It had put an end to seventeen years of internecine strife and had courageously granted recognition to the pluralistic nature of Sudanese society which required a new approach. In awarding the South regional autonomy, the Muslim dominated regime acknowledged that culture, race, religion and economics dictated a new approach to the internal structure of the Sudan. This was in fact part of a plan to decentralize the Sudan, especially in the sphere of economic development, which had been aired by the Numayrī regime since 1971. The size of the Sudan, the immense differences between its regions, and the concentration of economic and political power in the hands of a minority northern elite, had brought about demands for decentralization. Strong criticism of the preferential treatment granted to the central northern Sudan at the expense not only of the South but also of Darfur and Kordofan in the West and the Beja tribes of the Red Sea Hills in the East, had been the cause of

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[126] See Mansour Khalid's letter to the *London Times*, February 9, 1985; see also *al-Waṭan al-ʿArabī*, April 13, 1985.

[127] *Al-Nūr*, February 6, 1985. On the legal aspects of the trial, see below, III, 2.2.2.1.

several attempts by ethnic groups in these outlying regions to gain at least partial autonomy.[128]

The Addis Ababa Agreement had provided for the equality of all citizens regardless of race, color, or religion. It recognized southern cultural identity and hence proclaimed its right to legislate in accordance with its customs. Free elections to the Southern Regional Assembly were decreed and this Assembly was empowered to elect its own president. Numayrī later announced on more than one occasion, that the Addis Ababa Agreement was neither a Qur'ān nor a Bible and hence admissible to amendments. However, the proviso stating that a majority consisting of three-quarters of all members of the People Assembly was required in order to amend this Agreement, seemed sufficient to reconcile even the most suspicious southern leaders. The seemingly unalterable foundation of this concept was expressed in the Permanent Constitution of the Sudan promulgated in May 1973. Articles 6 and 7 of that Constitution specified the principles of decentralization and promised that the details of this new system of government would be issued in the near future. Article 8 established regional self-government in the South on a permanent basis which could only be amended in accordance with the provisions of the Self-Government Act of 1972. Not less significant was the provision that non-Muslims would be governed by their own personal status laws. Unlike the constitutions of other Muslim states, the Sudan's Constitution did not declare Islam as the religion of the state. The pluralism of Sudanese society, including its multi-religious composition, was dealt with in Article 16 as follows:

> (a) In the Democratic Republic of the Sudan Islam is the religion and the society shall be guided by Islam being the religion of the majority of its people and the State shall endeavor to express its values.
>
> (b) Christianity is the religion in the Democratic Republic of the Sudan, being professed by a large number of its citizens who are guided by Christianity and the State shall endeavor to express its values.[129]

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[128] See Rondinelli, *Administrative Decentralization*; for details on Numayrī's southern policy, see Khalid, *Nimeiri and Revolution*, especially 41–62.

[129] All quotations are from the official English text of *The Permanent Constitution* (see Constitutions and Charters). Following the end of Numayrī's regime in April 1985, the Constitution was repealed.

It also promised equal treatment to all followers of "religions and spiritual beliefs" and ended by stating that "[. . .] the abuse of religions [. . .] for political exploitation is forbidden [. . .]." This was again emphasized in Article 38, which stated that all Sudanese were equal in rights and duties "irrespective of origin, race, locality, sex, language or religion." Southern politicians were by and large opposed to the Constitution since it specified that "Islamic Law and Custom shall be main sources of legislation" (Article 9) and that Arabic would be the "official language" of the Sudan. Yet if we take into account both the realities prevailing in the Sudan and the radicalization of Islam in surrounding countries, including Egypt, the 1973 Constitution was less discriminatory than other Muslim constitutions. Not only did it guarantee complete equality to all Sudanese regardless of race, sex or religion, it also promised an almost equal status for Islam and Christianity in so far as their values were concerned.

All this came to an end following Numayrī's unconstitutional act of dissolving the Southern Regional Assembly and its Government in February 1980. This was followed by the Decentralization Act, aiming to divide the South into three separate regions, and by the Regional Government Act of 1980, which divided the Sudan, excluding the South, into five regions.[130] This act was probably the result of the unrest in the outlying areas, especially Darfur, and Numayrī's desire to shift responsibility to regional governments. However, in the South it was interpreted as an outright assault on its newly discovered wealth, since it coincided with the discovery of oil in the South which should, in accordance with southern views, have been used for the benefit of its inhabitants. But it is noteworthy that the loyal ally who supported Numayrī in all these actions was the Sudan's Attorney General, Ḥasan al-Turābī who, according to Bona Malwal, regarded the weakening of the South as an essential step toward the imposition of the *sharīʿa*. Many southern leaders and intellectuals viewed al-Turābī as their major antagonist during the last years of Numayrī's rule. If there had been justice in the Sudan, claimed Bona Malwal, al-Turābī should not only have lost his post as Attorney

[130] The Regional Government Bill, 1980 sought to establish five regional governments in the Sudan, each with its own governor and minister; attached to the bill was a map in which, so it was claimed, the boundary between Kordofan and Baḥr al-Ghazāl had been moved so as to include the newly-discovered oil fields in the North; see Khalid, *Nimeiri Revolution*, 205–10; see further Alier, *Southern Sudan*, 215–27; Woodward, *Sudan, 1898–1989*, 141–46.

General, but should have been "charged with plotting to overthrow the legally constituted government of the state" since he openly advocated an Islamic coup. Southern leaders had equal fears of renewed Anṣār power, since their experience with the Umma-Anṣār governments in the 1960s had taught them that the traditional sectarian leadership was no better than that of the Muslim Brothers. Indeed according to Malwal, al-Ṣādiq al-Mahdī had stated as early as 1966 that

> [. . .] the failure of Islam in the southern Sudan would be the failure of Sudanese Muslims to the international Islamic cause. Islam has a holy mission in Africa and southern Sudan is the beginning of that mission.[131]

In 1985–86, following Numayrī's removal and prior to the 1986 general elections, al-Ṣādiq al-Mahdī published a number of pamphlets and articles dealing primarily with problems emanating from Islam in its relation with the South.[132] Al-Ṣādiq blamed British policy for the evils prevailing in the southern Sudan through its "Southern Policy" which sought to put an end to the spread of Islam and the Arabic South of latitude 10°. The Umma party had recognized, as early as 1966–67, that the formation of a nation-state required a common language and religion, both of which were missing in certain parts of the South. Hence it advocated granting limited autonomy to the South and to other non-Arab regions of the Sudan. But the Umma party had rejected the clause in the Permanent Constitution of 1973 which had granted Islam, Christianity and tribal religions equal status and respectability but mentioned only Islam and tribal law as sources of legislation. Al-Ṣādiq devoted the major part of his treatise to the future of Islam in the relationship between North and South. He rejected the separation of "Church and State," as unacceptable in Muslim society. He also declined the preservation of the September 1983 Islamist laws, since they were un-Islamic and unconstitutional. Al-Ṣādiq agreed with southern grievances against these laws, which made them into second-class citizens in their own country. Modern Islam provided for flexibility in the imposition of Islamist

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[131] The above is based on Malwal, *Second Challenge*, 30–37; *idem, Secularism*, quoted in Durán, *Islam und Politischer Extremismus*, 73–74; Malwal, *People and Power*, especially 41–2; Bona Malwal was a one-time minister of culture and information under Numayrī. He resigned from the government in protest against the Islamist policy and lives in England; see also Alier, *Southern Sudan*, 235–37.

[132] Al-Mahdi, *al-Islām wa-mas'alat janūb al-sūdān*, 1–22; al-Mahdī, *Mustaqbal al-islām*, 417–20.

laws so as not to infringe on the equal rights of non-Muslim citizens. In May 1986, realizing the advantages gained by the Muslim Brothers' NIF as a result of its better organization, finances and tactics, the Umma and the DUP signed the Sudanese Charter of National Unity calling for the adoption of an Islamic constitution and demanded

> the abrogation of all the laws passed by the May [Numayrī] regime [. . .] particularly the laws of September 1983 which were promulgated in the name of Islam and which were a falsification of Islam, the expression of absolutist power and an affront to human dignity.

Religious laws such as the prohibition of alcoholic beverages and the consumption of pork, should be imposed only on Muslims. Taxes should be levied on all citizens according to one non-religious law, decreed by the state. *Zakāt* should be imposed on Muslims only and discriminatory taxes such as the *jizya* (poll tax levied on non-Muslims), should be abolished. But Islam should be declared the religion of the state and the *sharīʿa* be the major source of legislation, since the majority of Sudanese were Muslims. Al-Ṣādiq agreed to maintain traditional [that is, pre-1983] sources of positive law, but insisted that the *sharīʿa* was superior and hence more suited to the cultural and social realities of the Sudan, including its non-Muslim minorities. Furthermore, al-Ṣādiq viewed the future of the South as fully Arabized and Islamized. This, he stated, would come about as a result of the assimilation of tribes, the impact of Muslim Ṣūfīs, jurisprudents and merchants settling in the South and economic projects emanating from the North and benefiting the South. Finally, the massive settlement of southerners in northern Sudan and their recognition that Sudan's common enemy was Imperialism, would bring about their Islamization.[133]

In August 1992 al-Ṣādiq al-Mahdī, now in opposition, published a new brochure listing the lessons to be learnt from the conflict between North and South and his proposals for a just peace in Sudan. First, the religious, ethnic, and cultural plurality of the Sudan has to be recognized, respected and taken into account in order to ensure coexistence. Secondly, the colossal loss of the Sudan in terms of casualties, refugees, economic and social devastation, lack of development and political instability, have caused Sudan to lose its inter-

[133] Al-Mahdī, *Mustaqbal al-islām*, 419–20; al-Mahdi, *al-Islām wa-mas'alat janūb al-sūdān*, 16–20; see also Woodward, *Islam and Politics*, 5–6.

national reputation and were likely to invite direct foreign intervention. Finally, since no single group in Sudan had the right to claim "exclusive authority over the others," all citizens have equal rights, including the right to elect their government and demand its regular accountability. Al-Ṣādiq proposed a seven-point program leading to peace. He suggested a plebiscite to determine the extent of decentralization, with a choice between regionalism, federation, or confederation. Legislation is visualized as a democratic process, respecting the limits set by decentralization. The regime, based on genuine democracy, will thereby avoid the mistakes of the past. Development is to be planned in accordance with regional and sectional needs and all national groups will be invited to participate in administration, defense and security, taking into account the needs of "technical competence." Foreign policy is to be based on regional and international charters, and upholding "Arab, African, and Islamic solidarity [. . .] in a balanced way."[134] The following points in al-Ṣādiq's 1992 "Blue Print for a Just Peace in the Sudan" should be noted. First, al-Ṣādiq refrained from listing the expansion of Islam in the South, which he had advocated in the past and which the NIF continued to enforce as an essential goal. Whether this was a change in policy or an opportunistic attempt to seek southern support, remained unclear. Secondly, the proposed Bill of Rights, suggested by al-Ṣādiq, seemed to guarantee the equality of Muslims and others regardless of religion, ethnicity, and culture. Finally, unlike the NIF, al-Ṣādiq continued to reject Sudan's partition as one of the options, claiming that it was unacceptable to the majority of Sudanese and would inevitably lead to the emergence of two hostile states. According to al-Ṣādiq, the vast majority also rejects any Islamic assertion if it deprives Sudanese citizens of their human and citizen rights.

The Muslim Brothers, who founded the NIF in 1985, presented their platform on the southern Sudan question in May 1985, at a conference attended by some 100 of its southern supporters.[135] A brief historical introduction gave a factual survey, as seen by the authors. Points of significance include the claim that while Arabic and Dinka are the most widely spoken languages in the South,

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[134] Al-Mahdī, *Salām ʿādil fī ʾl-Sudan*; an English translation of this brochure, titled "Blue Print for a Just Peace in the Sudan", was sent to some southern political leaders in exile; quotations are from the English translation.

[135] The following, unless otherwise indicated, is based on the NIF's publication: *The Southern Sudan Question* (see Constitutions and Charters).

English should be considered the official language. Even more noteworthy is the religious composition of the southern population which according to NIF consisted of some 5,371,296 people. Out of these, some 65 percent were defined as "non-religious," 17 percent as Christians, and 18 percent as Muslims. All ills prevailing in the South were blamed on the West and primarily on Great Britain which had ruled the region both under the Turks in the nineteenth century and during the Condominium. It was Britain who was blamed for the slave trade which became the most significant trade in the South. Mahdist neglect was, according to the NIF, responsible for opening the door to neo-colonialism, which started with the Belgian invasion of the region. In other words, the NIF absolved northern Sudanese and other Muslims from all failings, in their dealings with southerners prior to 1956. It was the British southern policy that had isolated the South and made it feel ethnically and culturally distinctive. "It instilled in their minds the idea that the northerners are slave-traders and aroused hatred and fued [*sic.*] between them." According to the NIF there were no objective reasons leading to hatred prior to independence. While the brochure mentions certain shortcomings of the Sudan's governments since independence and has special criticism of General Ibrāhīm 'Abbūd's southern policy, the Muslim Brothers are listed as the most significant political force in the Sudan, striving for a just solution. It was, according to the authors of this document, the Muslim Brothers' ideas which prevailed at the Round Table Conference in 1965 and provided the blue-print for future negotiations. There follows an analysis of the Addis Ababa Agreement which is described as a "provisional peace" since it failed to tackle the Sudan's "national dimensions." The renewal of hostilities since 1983 is blamed on a wide range of factors, starting with corruption and budgetary difficulties and culminating in internal ethnic strife among the southerners themselves. The discovery of crude oil in the South is not even mentioned in this brochure while the re-division of the South into three regions is listed as one of the factors which helped John Garang to overcome southern opposition to his leadership of the rebellion.

As for the future, the NIF insisted that southern Muslims, who were a significant minority in the South and who had suffered for so long at the hands of their non-Muslim neighbors, should at last be granted their rightful share of power. Secondly, it hailed the rapid Islamization of the South, which was taking place under the guid-

ance of the Islamic Association of the Southern Sudan. Lastly, the NIF asserted that "a general system based on the Islamic Shari'a is a religious and political necessity to every Muslim." The *sharī'a*, according to this brochure, is closer than any other legal system to the African cultural heritage and since it "protects the entity and the culture of the non-Muslims," it should be maintained as the law of the Sudan which through its flexibility will guarantee the compromises required by non-Muslims. These views were upheld by al-Turābī and his colleagues throughout the Sudan's third democratic interlude when they consistently opposed any meaningful change in the Islamist laws and in their implementation. Al-Turābī insisted that one of the reasons for the NIF's success in the 1986 elections was the massive support of the southern Muslims. He therefore dismissed the outcry against the *sharī'a* as emanating from the West, which sought thereby to separate the Sudan from its Arab and Muslim brothers. He also asserted that John Garang's demand to abolish these laws had nothing to do with religion and was based on pure Marxist principles.[136]

In the "Sudan Charter," which was adopted and published in 1987 by the NIF, the principles guiding its southern policy were listed explicitly. It guaranteed the rights of all religious minorities, including African religions, to adhere to the laws and customs of their religion and to propagate them freely. Under the heading: the "Sphere of Law," the charter states that "Islamic jurisprudence shall be the general source of law: [since] it is the expression of the will of the democratic majority." However, the charter

> recognizes the principles of religious freedom and equality [. . .] and allows for partial legal multiplicity in regard to religious affiliation of persons or to the predominance of non-Muslims in any particular area [. . .].[137]

In the sphere of education, the charter states that: "Every parent is entitled to bring up his issue in the religious manner of his liking." In order to determine Sudan's future constitution and government, a constitutional conference, open to all national political forces will prepare

[136] The above is also based on Ḥasan al-Turābī's interviews in *al-Muṣawwar*, July 1, 1987; *Awrāq 'Arabiyya* 7 (1988), 62–76.

[137] *Sudan Charter*, 3.

> a national concord and the program for its implementation [. . .]. The resolutions of the conference shall be adopted by unanimity, while recommendations may be adopted by majority.[138]

5. The End of Numayrī's Regime

On April 6, 1985 Numayrī was overthrown while en route from Washington D.C. to Cairo. Among the many reasons for his downfall, presaged by the mass demonstrations and the popular uprising in Khartoum, the 1983 Islamist laws seem to have contributed in no small measure; thus while the Sudan's grave economic crisis was not brought about by the "Islamic economy," it was definitely exacerbated by it. The renewed outbreak of the civil war in the South can also be attributed to numerous factors, but it was principally Southern fears of Islamization, especially since 1983, that led to further aggravation of the general malaise. Finally, the Islamic agenda was exploited by Numayrī to crush major opposition groups to his regime. By appealing to the popular sentiments and beliefs of the majority of Sudanese Muslims, Numayrī first of all aimed at discrediting all leftist or nationalist opposition groups, such as the Communists and the Ba'th. Secondly, by means of Islamist legislation he intended to "nationalize" Islam and harness it to serve his interests. He hoped thereby that such popular Muslim movements as the Anṣār or the Khatmiyya would become superfluous. Even the Muslim Brothers' leaders, who throughout this period had been his main allies, were arrested in March 1985 on charges of treason. Therefore, when Numayrī set out on his last presidential trip to the United States in March 1985, he had run out of political allies. He depended for his survival on Western support, the loyalty of the army and the security forces, and on the perception that his political antagonists, both in the North and the South, were in such disarray that they would be unable to unite in a popular front against him. In retrospect we now know that he was wrong on all counts. Numayrī's regime was brought to an end by a wide coalition made up of trade unions, professionals, student organizations, and certain political groups. This scenario was in many respects not unlike that attending the downfall of General Ibrāhīm 'Abbūd's regime in October

[138] *Ibid.*, 10–11.

1964, which also started as an uprising led by students, associations of professionals, and trade unions. Both in October 1964 and in April 1985 the army refused to intervene once it realized that the use of force would lead to a bloodbath. But here the similarity ended since in 1964 the army officers returned to the barracks and even General Ibrāhīm ʿAbbūd was forced to resign on November 14, after a brief period as President. In contrast, after the April 1985 uprising, the army remained in control of Sudanese politics for a whole year, with the tacit blessing of the popular front of professionals, students and other groups who had marched together against Numayrī.

The anti-Numayrī front included the Anṣār and the Khatmiyya order, the two most popular religious-political movements in the Sudan.[139] However, the Islamic path survived Numayrī's deposal and remained on Sudan's statute books during the brief democratic interlude led by al-Ṣādiq al-Mahdī. The reasons seem easy to comprehend, namely: it is one thing to criticize Numayrī's Islamist laws, as al-Ṣādiq al-Mahdī did on more than one occasion, it is quite another thing to abolish them altogether. The overwhelming majority of the supporters of the three popular Islamist parties: al-Umma, the DUP and the NIF, are Muslims who may have preferred a different version of the Islamist laws or even viewed them as superflous, but they could hardly be expected to vote for their abolition.

[139] For details on the evolvement of the anti-Numayrī front, see Jādīn, *Taqyīm al-tajriba al-dīmuqrāṭiyya*, 56–65.

CHAPTER TWO

THE ISLAMIZATION OF SUDANESE LAW

1. Introduction

1.1. *The Role of the* Sharīʿa *in the Pre-1983 Legal System*

Until the Mahdist period, the *sharīʿa* played only a limited role in the Sudan. The Islamization of the Muslim population in the northern areas of the country had not yet been completed, in the sense that the *sharīʿa* had not yet become a binding way of life. The application of the *sharīʿa* by the *qāḍīs* was limited to the cities, and even there it was in competition with customary law. Outside the cities, custom enjoyed unassailable sovereignty, beyond the control of the *sharīʿa*. The process of institutionalizing the *sharīʿa* in the Sudan began after the Egyptian-Ottoman conquest in 1821–22 which brought the Sudan within the orbit of orthodox Islam and its institutions. *Sharīʿa* courts were established and given jurisdiction mainly over matters of personal status and inheritance, and the Ḥanafī school of law was imposed on these courts, even though the local population followed the Mālikī school.[1] The impact of these courts was limited when compared to that of the civil and tribal judiciary. The civil judiciary was established on Egyptian patterns following the legal reforms introduced in Egypt. The Tanzimat period was also reflected to a certain extent in Sudanese law. As has been demonstrated in detail elsewhere, in the short Mahdist period there were impressive instances of the revival of the *sharīʿa*, though in a unique version not compatible with orthodox *sharīʿa*. Various domains of law, such as marriage, divorce and succession, Qur'ānic punishments (*ḥudūd*), and the alms tax (*zakāt*) on cattle and grain, were applied in daily life. The *sharīʿa*, in the Mahdī's version, thus became the exclusive legal system of the Sudan in the Mahdist state. An attempt was made, through

[1] Holt, *The Mahdist State*, 21–22; Trimingham, *Islam in the Sudan*, 120–21; al-Rashīd, *al-Islām wa-ḥayātunā al-qaḍā'iyya*, 137 (and the sources indicated there); Lowrie, *Turabi*, 46.

a *sharʿī* judiciary headed by a Qāḍī al-Islām, to eradicate customs that contravened the *sharīʿa*, and civil courts were abolished. The legal methodology of the Mahdī recognized only the textual sources of the *sharīʿa*—that is, the Qurʾān and the *sunna* of the Prophet (which meant, in effect, a return to the early days of Islam), and rejected other legal sources—that is, analogical reasoning (*qiyās*) and the jurists' consensus (*ijmāʿ*). These sources were replaced by Prophetic inspiration (*ilhām*). The Mahdī also ignored all the schools of law (*madhāhib*), which implies that Mahdist law does not necessarily correspond to the doctrine of any of the orthodox schools.[2] Some of the *qāḍī*s, graduates of al-Azhar and the *ʿulamāʾ* who had supported the Turco-Egyptian authorities, were removed by the Mahdī.[3]

The period of the Anglo-Egyptian Condominium preserved the *sharīʿa's* status as it had been before the Mahdiyya, except for changes resulting from a change of regime. In the Sudan the British did not reduce the *sharīʿa* to the level of a variant of "native law and custom;" rather, they recognized it as an autonomous independent legal system with a status equal to that of other legal systems. This policy, which differed from their own in the other territories they ruled in Africa,[4] was in keeping with their aspiration to strengthen orthodox Islam, institutionalized and hierarchical, with patterns common in Egypt, as a means to be used against the Ṣūfī *ṭarīqa*s and as a tool for providing *sharʿī* legitimacy to their rule.[5] The *sharīʿa* courts were granted jurisdiction, alongside the civil and tribal courts, in matters of personal status, succession, gifts, and other domains. The *sharʿī* judiciary was organized along the lines of the judiciary in Egypt. Almost all the reforms effectuated in Egypt in matters relating to the organization

[2] Layish, *Mahdī's Legal Methodology*, 37–47; *idem*, *Mahdī's Methodology and Adaptation*, 228–41. The Mahdī's legal methodology and its application in the Sudan (1881–85) on the basis of proclamations (*manshūrāt*), rulings (*aḥkām*), warnings (*indhārāt*) visions (*ḥaḍrāt*), etc. will be dealt with in a separate study by A. Layish.

[3] Köndgen, *Das islamisierte Strafrecht*, 16–17, 80; Safwat, *Islamic Laws*, 237–36 and the sources indicated there; Khalil, *Legal System*, 627, 632; Warburg, *Religious Policy*, 98–99; Fluehr-Lobban, *Islamic Law and Society*, 31–32 and the sources indicated there.

[4] In colonial Northern Nigeria Islamic law was applied under the comprehensive umbrella of "native law and custom." See Anderson, *Future of Islamic Law*, 626; Schacht, *Introduction*, 86–87.

[5] Fluehr-Lobban, *Islamic Law and Society*, 35–36, 52 and the sources indicated there; Warburg, *Religious Policy*, 89–90, 95–96, 109ff. Cf. al-Rashīd, *al-Islām wa-ḥayātunā al-qaḍāʾiyya*, 140 (the author claims that the British treated the *sharīʿa* as customary law).

and procedure of the courts were also introduced in the Sudan. Again, the impact of the *sharīʿa* courts was in any case limited to the cities. In the villages and nomadic areas, customary law prevailed.[6]

The British placed at the head of the *sharʿī* legal system the Grand Qāḍī (*qāḍī al-quḍāt*), who became a central instrument for adapting the *sharīʿa* to the changing conditions of the time, under the normative control of the colonial rulers. The Grand Qāḍī headed the *sharīʿa* court of appeals, sometimes referred to as the Court of Revision (*maḥkamat al-tamyīz*),[7] but his main significance to the *sharīʿa*'s status in the Sudan resulted from his authority to issue "legal circulars" (*manshūrāt qaḍāʾiyya*). This institution is unique to the Sudan, and was apparently intended to create among the indigenous Muslim population a sense of the continuity of the religious establishment following the failure of the Mahdī's rebellion. The fact that the circulars were issued by the Grand Qāḍī, rather than by a non-Muslim body or official, seems to have facilitated their acceptance by the Muslims.[8] It is interesting to note in this regard that the Mahdī, too, issued *manshūrāt* to clarify his positions on questions of religious law, relying on the Qurʾān, the *sunna*, and Prophetic *ilhām*.[9] The Grand Qāḍī's authority to issue legal circulars is anchored in Section 8 of the Muhammadan Law Courts Ordinance, 1902, which provides that he is entitled, with the approval of the Governor General, to make rules from time to time for the regulation of jurisprudence, procedure, the constitution, jurisdiction, and the functions of the *sharīʿa* courts.

Section 53 of the Muhammadan Law Courts Organization and Procedure Regulations, 1915, provides that the jurisprudence of the *sharīʿa* courts be based on the authoritative opinion of the Ḥanafī jurists, unless the Grand Qāḍī decides that it be based on other opinions of the Ḥanafī or other jurists.[10] This section had far-reaching effects: it allowed the Grand Qādī to introduce reforms in Islamic law on the basis of the eclectic expedient (*takhayyur, talfīq*), that is,

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[6] Anderson, *Recent Developments*, 92; Khalil, *Legal System*, 628ff.; Warburg, *Religious Policy*, 99ff.; Köndgen, *Das islamisierte Strafrecht*, 80f.; Safwat, *Islamic Laws*, 239; al-Nur, *Native Courts*, 79. Cf. Abu Shouk, *Dār Bidayriyya Nazirate*, ch. 5.

[7] Khalil, *Legal System*, 631–32; Warburg, *Religious Policy*, 99.

[8] Anderson, *Adaptation*, 160.

[9] Layish, *The Mahdist Legal Methodology*, 37ff.; Safwat, *Islamic Laws*, 234–35.

[10] Anderson, *Recent Developments*, 91–92; *idem*, *Africa*, 304; al-Ḍarīr, *Muḥāḍarāt*, 5; Khalil, *Legal System*, 632.

adoption of legal doctrines from the Ḥanafī and other schools of law insofar as they correspond to specific reforms whose goals are fixed in advance.[11] The Grand Qāḍīs made extensive use of their authority to issue legal circulars. Prior to the abolition of the institution of the Grand Qāḍī in 1979, more than 60 circulars were issued, some of which were later rescinded. Most deal with administrative matters, but a not insignificant number deal with reforms in substantive law. Some, such as those on divorce, are quite daring, and aim at adapting the *sharīʿa* to local conditions. Until the Sudan attained independence in 1956, the Grand Qāḍīs were recruited from among the senior *ʿulamāʾ* in Egypt, and they gave some of the reforms a "trial run" in the Sudan before introducing them in Egypt. In some instances, reforms were introduced in the Sudan following their adoption in Egypt, and in others, the Sudan introduced reforms that had no parallels in that country.[12]

It is very tempting to assess the reforms introduced in Islamic law in the Sudan through the use of legal circulars as a development within the *sharīʿa*.[13] In material terms, it is true that they are based on legal doctrines culled from the orthodox schools of law and, especially, the Mālikī school,[14] to which most Sudanese Muslims adhere. Moreover, the source of inspiration for the reforms was to a great extent derived from the circles of reformist *ʿulamāʾ* in pre-independent Egypt, and the connection with these circles continued afterward as well.[15] Nevertheless, it should be noted that the reforms were carried out through the institution of the Grand Qāḍī, which was anchored in a statute, and that the legal circulars had to be formally approved by the British Legal Secretary. The need for his approval gave him the opportunity to exercise normative control over their contents.[16] The Grand Qāḍī's recognized authority in matters of religious law undoubtedly gave additional religious and moral force to state sanctions by virtue of which it was possible to enforce the circulars, but this does not change the legal circular's status as an act of auxiliary

[11] For further details on the eclectic expedient, see below, II.2.2.1.1.

[12] Anderson, *Recent Developments*, 92–93; *idem*, *Africa*, 301ff.; *idem*, *Adaptation*, 160–61; Khalil, *Legal System*, 632–33; Hawley, *Law in the Sudan*, 45; Fluehr-Lobban, *Islamic Law and Society*, 37; Nataloni, *Codice Penale*, 350.

[13] Cf. Fluehr-Lobban, *Islamic law and Society*, 239–40.

[14] Anderson, *Adaptation*, 160.

[15] Anderson, *Africa*, 311.

[16] Khalil, *Legal System*, 641; Fluehr-Lobban, *Islamic Law and Society*, 240.

legislation in every respect. From the perspective of the regime, the circulars had the advantage of legitimizing the reforms in the eyes of the wider public by creating a sense that they were being carried out by authorized exponents of the *sharīʿa*.

The institution of the Grand Qāḍī remained intact after independence. The 1902 ordinance was abolished, but not the legal circulars, which remained in force. The Grand Qāḍī's status was reestablished in Section 8 of the *Sharīʿa* Courts Act, 1967 and the separation of the two judiciaries, *sharʿī* and civil, also remained intact. Their heads, the Grand Qāḍī and the Chief Justice, respectively, were appointed to their posts by the Supreme Judicial Council on the Prime Minister's recommendation, by virtue of the Judiciary Act, 1959, which was enacted after the military coup of November 1958. Section 5 of the *Sharīʿa* Courts Act, 1967, reaffirmed the scope of the jurisdiction granted the *sharīʿa* courts by the 1902 ordinance: matrimonial relations provided the marriage contract had been concluded according to the *sharīʿa* and the parties were all Muslims. Moreover, their jurisdiction in matrimonial matters was extended to cases where one of the parties adhered to one of the revealed religions, that is, Christians and Jews.[17]

After the army seized power in May 1969 and annulled the Constitution, the *sharʿī* and civil judiciaries were subordinated to the Revolutionary Command Council, which appointed their superiors, the Grand Qāḍī and the Chief Justice. This was done on the basis of the Judicial Act, 1969. In 1971 the *sharīʿa*'s status as a source of law to be applied in case of a lacuna was established. Section 4 of the Civil Code, 1971 provides that, in the absence of an applicable provision in the law, the court will hand down its decision in accordance with the *sharīʿa*. As we shall see later, the technique of granting the uncodified *sharīʿa* the status of a source of law in the event of a lacuna was used extensively in Islamist legislation and judicial practice.[18] The Permanent Constitution of 1973, however, provides that *sharīʿa* and custom (*ʿurf*) are the basic sources for legislation (Section 9).[19]

In 1980 a reorganization of the Sudanese judiciary was undertaken with a view to integrating the *sharīʿa* courts into the civil judi-

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[17] Al-Ḍarīr, *Muḥāḍarāt*, 7; Khalil, *Legal System*, 628ff.
[18] See below, II.2.2.2 and III.2.2.2.1.
[19] See below, II.3.3.

ciary.[20] The two judiciaries, civil and *shar'ī*, were unified under the Chief Justice, who until then had been head of the civil judiciary. One of his four deputies was placed in charge of the *shar'ī* chamber, and the Sharī'a Court of Appeals was abolished. Appeals on issues that had been under the jurisdiction of the *sharī'a* courts before the merger were adjudicated in the Supreme Court, two of whose members were scholars trained in Islamic law. Judges in both civil and *sharī'a* courts were supposed to apply civil law and *shar'ī* law in accordance with the subject matter of the suit brought before them. The institution of Grand Qāḍī was effectively eliminated and, after Shaykh Muḥammad al-Jizūlī resigned in 1979, no one was appointed to replace him. The Chief Justice continued to issue "legal circulars," but they were not based on the *sharī'a*. In contrast, the position of Muftī, second in importance only to that of Grand Qāḍī, was not eliminated, but was merged with that of Adjunct Advisor to the Attorney General's office.[21] The process of merging the judiciaries into one integrated system had not yet been completed when Numayrī declared his policy of Islamizing the Sudanese legal system. As we shall see below, along with the reinstatement of the *sharī'a* by means of codification and statutory legislation, a substantial amount of judicial circulars were issued by the Chief Justice Daf'allāh al-Ḥājj Yūsuf with a view to guiding the courts in the application of the Islamist statutes in a manner compatible with the *sharī'a*.[22]

1.2. *The Policy of Islamizing the Law*

In 1977, soon after the National Reconciliation Agreement, President Numayrī appointed a special committee composed of Sudanese and non-Sudanese experts in the *sharī'a*, for the "revision of the laws so as to make them compatible with the *sharī'a*" (*lajnat murāja'at al-qawānīn li-tatamashshā ma'a al-sharī'a*), with Dr. Ḥasan al-Turābī as its chairman. It was entrusted, as its title suggests, with the task of bringing the Sudan's statutory legislation into full harmony with the *sharī'a*.

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[20] The status of the *sharī'a* in civil courts in matters of personal status, succession, *waqf*, and gifts pertaining to Muslims was recognized as early as the Civil Justice Ordinance, 1929. Khalil, *Legal System*, 625; Anderson, *Africa*, 307–8.

[21] Fluehr-Lobban, *Islamic Law and Society*, 51, 65, 73, 251, 278, 280; Nataloni, *Codice Penale*, 341.

[22] See below, II.2.1.2.

According to one source, the committee was guided at the same time by the desire to mitigate the harshness of the *sharīʿa* "by making prohibitions permissible" (*ibāḥat al-ḥarām*) provided they were not anchored in the Qur'ān and the *sunna*, and by "neglecting obligatory duty unless prescribed by necessity" (*taʿṭīl al-wājib bi-ghayr al-ḍarūra*). The reference here is to "the five religious qualifications" (*al-aḥkām al-khamsa*). The guiding principle in the policy of mitigation is: "necessity makes prohibited things permitted" (*al-ḍarūrāt tubīḥ al-maḥẓūrāt*).[23] Al-Rashīd al-Ṭāhir Bakr, the Attorney-General, explains that the committee was also guided by the desire to end the "subordination" (*tabaʿiyya*) of positive law (*waḍʿiyya*), alien to Muslim and Arab society, that had been imposed on the Sudanese legal system by imperialist powers.[24] Chief Justice Dafʿallāh al-Ḥājj Yūsuf, on the other hand, argues that the committee found that 85 percent of the existent statutes did not contradict the *sharīʿa* due to their procedural nature, and the same applied to the civil code except for the provisions pertaining to transactions entailing usury (*ribā*).[25]

The committee drafted seven bills on matters such as alms tax (*zakāt*), unlawful enrichment, prohibition of alcoholic beverages, usury and gambling. Other draft bills were concerned with the restoration of the *ḥudūd*—Qur'ānic punishments prescribed for theft, illicit intercourse and the like. But most important was the draft bill on "The Judgments (Basic Rules)" (*uṣūl al-aḥkām al-qaḍā'iyya*) since it was meant to provide the court with the "principles of interpretation" with a view to applying the uncodified *sharīʿa* in cases of lacunae in the statutory legislation. But Numayrī was in no hurry to approve these new bills. In the first five years of the committee's work, only the bill regulating the payment of alms tax was approved, probably because it was the least controversial (the payment was on a voluntary basis). The committee disbanded in 1980 after differences of opinion emerged on issues such as prohibiting usury and enforcing Qur'ānic punishments.[26]

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[23] Khālid, *al-Fajr al-kādhib*, 34. For further details on the members of the committee and its goals, see *ibid.*, 32ff.; Sālim, Ḥawbāt & al-Nūr, 16. Cf. Schacht, *Introduction*, 84, 120–21.

[24] *Al-Ṣaḥāfa*, October 11, 1983, p. 2 col. 2. Al-Rashīd al-Ṭāhir Bakr was an erstwhile leader of the Muslim Brothers between 1953 and 1959. He was Prime Minister and Deputy President between 1976 and 1979 and Attorney General between 1983 and 1985 (Shāmūq, *Muʿjam al-Shakhṣiyyāt*, 168–69).

[25] *Al-Ṣaḥāfa*, October 22, 1983, p. 6 cols. 1 and 5.

[26] *Al-Ṣaḥāfa*, October 10, 1983, p. 6 col. 4 (interview with Prof. ʿAwn al-Sharīf

More than three years elapsed before Numayrī announced his "Islamic Path." Following its unanimous endorsement by the SSU's National Congress, the process of actual legislation started in earnest in July-August 1983, when Numayrī appointed a new "Commission for Legislation and Legal Affairs" (*lajnat al-tashrīʿ waʾl-shuʾūn al-qānūniyya*), presided over by ʿAlī ʿUthmān Ṭāhā and consisting of three lawyers loyal to him, who were entrusted with the task of effectuating a "legislative revolution" (*thawra tashrīʿiyya*), that is, transforming the Sudan's legal system into an Islamic one.[27] The acts drafted by this commission, based in part on those of al-Turābī's commission, were enacted into Provisional Republican Orders and confirmed by the People's Assembly in its November 1983 session without any debate.

In the period 1983–84, some two dozen laws and regulations were passed dealing with a wide range of social, religious, and economic issues. The most important of these laws are the Penal Code, 1983 [hereafter: PC, 1983], which incorporates *sharʿī* norms in the definitions of existing statutory offenses and imposes Qur'ānic punishments (*ḥudūd*) and discretionary punishments (*taʿzīr*); the Criminal Procedure Act, 1983 [CrimPA, 1983], which deals with these punishments; the Civil Transactions Act, 1984 [CivTA, 1984], which deals with topics such as obligations, contracts, torts (private claims for injury or damage), unjust enrichment, sales, gifts, partnerships, loans, and agency; and the Civil Procedure Act, 1983 [CivPA, 1983], which also deals with issues of personal status and with procedure not regulated by other laws. One of its most important sections (Section 110) prohibits usury; the Evidence Act, 1983 [EvA, 1983] deals with civil and criminal matters; the *Zakāt* Tax Act, 1984 [ZakTA, 1984], turns a religious obligation into a statutory income tax collected by the state and distributed at its discretion; the Judgments (Basic Rules) Act, 1983 [JudA, 1883], grants the judge the right, in the case of

Qāsim); Gordon, *Legal Revolution*, 802; Safwat, *Islamic Laws*, 241; Nataloni, *Codice Penale*, 341; An-Naʿim, *Apostasy*, 197–224; *idem*, *Islamic Constitution*, 333.

[27] *Al-Ṣaḥāfa*, October 27, 1983, p. 1. Al-Turābī, the then Attorney General, was not a member of this commission. Al-Nayyal Abū Qurūn and ʿAwaḍ al-Jayyid mentioned above (see above, I.4.1) were instrumental in drafting these laws; see al-Mahdī, *al-Dīmuqrāṭiyya*, 99; Khalid, *Nimeiri and Revolution*, 277–79; Abdelmoula, *Ethnicity*, 49. ʿAlī ʿUthmān Muḥammad Ṭāhā, who presided over the commission, had served as *qāḍī* in numerous cities and was a member of Majlis al-Shaʿb between 1978 and 1985 (Shāmūq, *Muʿjam al-Shakhṣiyyāt*, 304).

lacuna in any given statute, to exercise independent judgment (*yajtahid ra'yahu*)—which seems to imply *ijtihād*[28]—and makes it possible to apply the uncodified *sharīʿa*; and the Propagation of Virtue and the Prevention of Vice Act, 1983 [PrVPVA, 1983], which revived the institution of the *muḥtasib* (inspector of the market).[29] The September Laws were issued by a presidential decree according to Article 106 of the Constitution, which empowers the President to do so whenever Parliament is not in session or whenever the subject matter of the legislation is of an urgent nature. Neither of these conditions existed when Numayrī issued the presidential decrees.[30] The actual process by which these "foundations of the Islamic state" were laid down was described by Numayrī in his opening speech to the International Islamic Conference in Khartoum on September 22, 1984.

It seems that Numayrī had no intention to replace the existing legal system exclusively by the orthodox *sharīʿa* with a view to reinstating a theocracy in the full sense of the term. Rather, his policy of Islamization was less ambitious; it was meant to achieve the following objectives:

(1) revision of the existing legal system with a view to making it compatible with basic *sharʿī* norms.

(2) purification, motivated by national and religious considerations, of the Sudanese legal system from the impact of English law.[31] As will be seen below, this implies the integration of non-Muslim sources of law within the context of *sharʿī* legal methodology to be applied only in cases of lacunae in Islamist statutes.

(3) mitigation of various domains of the *sharīʿa*, especially the civil law, and its adaptation to modern requirements with a view to facilitating its application by the broad public.

As will be demonstrated later in this study, these goals were meant to be achieved by a variety of techniques and methods, the most important of which are: codification of the *sharīʿa*, legal circulars,

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[28] See below, II.2.2.3.
[29] See below, III.1.3.
[30] Abdelmoula, *Ethnicity*, 50–51; al-Mahdī, *al-Niẓām*, 28–29.
[31] See above, I.4.1.

"constitutional provision" making the validity of statutory provisions conditional on their conformity with the uncodified *sharīʿa*; the incorporation of *sharʿī* norms into statutory provisions, the eclectic expedient, the resort—in the case of lacuna—to the Qur'ān and the *sunna* and, most important—to judicial *ijtihād*.

To what extent did Numayrī succeed in implementing his Islamization policy? This issue will be examined in the study, especially in Chapter Three which deals with the application of the Islamist legislation. In any case, the institution of legislature, the vast majority of the statutes ostensibly not repugnant explicitly to the *sharīʿa*, and the non-Islamic sources of law—in other words, the main features of pre-1983 legal system—were meant from the start to remain intact in spite of the alleged "legislative revolution."

As already mentioned, following Numayrī's downfall on April 6, 1985, the Islamist laws were suspended by al-Ṣādiq al-Mahdī's government for several years, but in 1989, following the June coup, they were reinstituted by the regime. During this intermediate period Qur'ānic punishments, such as amputation, were not carried out, and the accused waited in jail until their fate was decided. A commission was established to revise the Islamist legislation and, as a result, changes were made, most of them cosmetic. In 1991 a new penal code was passed which is closer to the *sharīʿa* than the PC, 1983.[32]

1.3. *Ḥasan al-Turābī's Legal Methodology*[33]

Ḥasan al-Turābī was a key figure behind the experiment of the Islamist legislation under Numayrī's regime.[34] His views on the *sharīʿa* and statutory legislation are therefore of some importance for a better understanding of the motives behind this experiment and its technique. The intellectual movement initiated by al-Turābī may be defined as a liberally-oriented reformist (*iṣlāḥī*) movement striving to find solutions for Sudanese problems by means of a modern version

[32] Penal Law No. 8, 1991, *Official Gazette* No. 1548, February 20, 1991; Köndgen, *Das islamisierte Strafrecht*, 68–71, 83–85; Peters, *Islamization of Criminal Law*, 21; Fluehr-Lobban, *Islamization*, 620.

[33] The survey below concentrates exclusively on al-Turābī's views concerning the renewal of the *sharīʿa*. For a brief analytical critique of his legal methodology, see Hallaq, *Legal Theories*, 226–30. For a general survey on his thought, see El-Affendi, *Turabi's Revolution*. On al-Turābī's education, see above, I.2.2.1.

[34] Cf. Mayer, *Law and Religion*, 161 fn. 75.

of the doctrine of *tawḥīd*[35] and a new legal methodology (*uṣūl al-fiqh*) and legal rulings (*furūʿ*).[36]

Al-Turābī maintains that there is an essential need for a new legal methodology capable of functioning as an instrument for an Islamic renaissance (*nahḍa*). The traditional (*taqlīdī*) knowledge or science of legal methodology (*ʿilm al-uṣūl*) is inadequate for modern requirements since it reflects the historical circumstances in which it developed and became consolidated. Having flourished for a time, the classical science of legal methodology (*al-fiqh al-uṣūlī*) has ended up in a state of deadlock (*jumūd*).[37] Attempts to bring about a renewal (*tajdīd*) of Islam have, in his view, failed on account of the fanaticism of the schools (*madhāhib*) and adherence to the Ṣūfī orders.[38] Since the consolidation of classical legal methodology, circumstances have changed and the boundaries of human knowledge have been considerably extended.[39] Al-Turābī maintains that the *sharīʿa* displays a remarkable measure of flexibility such that Islam can be accommodated to any time and place. He, moreover, advocates resorting to the experimental, social and natural sciences in the European tradition and, in particular, its legal methodologies (*manāhij al-fiqh*).[40] The traditional *fiqh* with its focus on the literature of texts of legal treatises, commentaries and super commentaries and on the schools of law, has failed to generate a comprehensive approach to the intentions inherent in the provisions of the law.[41]

Al-Turābī maintains that historical *fiqh* reached stagnation resulting in the closure of the door of *ijtihād* and in common acceptance

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[35] The term which has theological denotation (unity of God) has been extended by al-Turābī to the mundane-political sphere (the unity of Muslim community) and to the legal sphere (see below, p. 82). For details see al-Turābī, *Qaḍāyā al-tajdīd*, 33, 274; *idem*, *Manhajiyyat al-fiqh*, 10–11; *idem*, *Islamic State*, 241, 243, 247; El-Affendi, *Turabi's Revolution*, 169–70; Moussalli, *al-Turabi*, 55–62; Weissbrod, *Turabi*, 35; Sidahmed, *Politics and Islam*, 128.

[36] Turābī, *al-Ḥaraka*, 224, 274–5, 285–86. Cf. El-Affendi, *Turabi's Revolution*, 173. Al-Turābī has recently initiated a new commentary of the Qur'ān, based on *ijtihād* and his doctrine of *tawḥīd*, with a view to adapting the commentary to modern conditions. See al-Turābī, *al-Tafsīr al-tawḥīdī*, no. 1, 1–2. Until 1998 he published the commentary on the first three chapters of the Qur'ān. See al-Turābī, *al-Tafsīr al-tawḥīdī*, nos. 1–3.

[37] Al-Turābī, *Qaḍāyā al-tajdīd*, 195, 201; *idem*, *Manhajiyyat al-fiqh*, 5.

[38] Al-Turābī, *Tajdīd al-fikr*, 98.

[39] Al-Turābī, *Qaḍāyā al-tajdīd*, 191.

[40] Al-Turābī, *Ḥiwār*, 22; *idem*, *Qaḍāyā al-tajdīd*, 272. Cf. El-Affendi, *Turabi's Revolution*, 172–73; Abdelmoula, *Fundamentalism*, 43; Moussalli, *al-Turabi*, 53.

[41] Al-Turābī, *al-Ḥaraka*, 210.

of the view that no one coming after the generation of the Forefathers (*al-salaf*), was authorized to express an independent view on a matter not mediated by them. The assumption here was that free exercise of the mind would generate errors and cause division among the people. In al-Turābī's view, the stagnation of the law itself is much more serious than that of the legal methodology.[42] The reopening of the gate of *ijtihād* is essential for accommodating the traditional *sharīʿa* to the changing conditions of place and time. In fact, al-Turābī maintains that people were never inhibited from exercising a measure of *ijtihād*.[43] He visualized the new *ijtihād* as covering the domain of legal methodology and the law itself,[44] to bring about a renewal tantamount to a genuine legal revolution.[45]

Since it is generally feared that personal *ijtihād* might cause legal innovations with no basis in the doctrine of the ancestors,[46] some balance is required between *taqlīd* and *ijtihād*.[47] Al-Turābī makes a clear distinction between legal methodology (*uṣūl al-fiqh*)—which in this context seems to imply hermeneutics—pertaining to the law (*furūʿ*) which is a product of human *ijtihād*, and hermeneutics pertaining to the major issues of religion. The former hermeneutics can be accommodated to the requirements of the present time while the latter is eternal and therefore unchangeable.[48] In the domain of religious practices and rites (*ʿibādāt shaʿāʾiriyya*) and that of personal status, the legal material (*al-mādda al-fiqhiyya*), that is, the legal rules, leaves enough scope for maneuvering; in fact, some revision is required in the law of marriage and divorce. On the other hand, a comprehensive *ijtihād* is mandatory in public law pertaining to domains such as the rule of government (*ḥukm*), economy, and foreign relations, which have been neglected for centuries.[49] To qualify for the exercise of *ijtihād* one needs, in addition to a good knowledge of the

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[42] *Ibid.*, 266; *idem, Qaḍāyā al-tajdīd*, 231ff., 242; *idem, Manhajiyyat al-fiqh*, 5. Cf. El-Affendi, *Turabi's Revolution*, 171.

[43] Al-Turābī, *Nazarāt*, 156; *idem, Ḥiwār*, 6; Lowrie, *Turabi*, 85; al-Ghannūshī & al-Turābī, 56; Abdelmoula, *Fundamentalism*, 43; Sidahmed, *Politics and Islam*, 128–29.

[44] Al-Turābī, *al-Ḥaraka*, 216.

[45] Al-Turābī, *Qaḍāyā al-tajdīd*, 218; *idem, Manhajiyyat al-fiqh*, 5 (*thawrat al-ijtihād*). Cf. El-Affendi, *Turabi's Revolution*, 170–72.

[46] Al-Turābī, *Qaḍāyā al-tajdīd*, 217; *idem, Tajdīd al-fikr*, 93.

[47] Al-Turābī, *Qaḍāyā al-tajdīd*, 269–71.

[48] Al-Turābī, *Manhajiyyat al-fiqh*, 7.

[49] Al-Turābī, *Tajdīd al-fikr*, 97; *idem, Qaḍāyā al-tajdīd*, 202. Cf. Hallaq, *Legal Theories*, 227.

sharīʿa, a knowledge of the Arabic language and of the Muslim legacy, as well as a reasonable command of the natural and social sciences. For this purpose al-Turābī recommends the establishment of a research institute for the *ʿulamāʾ*.[50]

Al-Turābī's legal methodology (*manhaj al-aḥkām* or *uṣūl al-fiqh*) is based on the following sources in this order of importance:[51]

(1) The textual sources of the *sharīʿa*, that is, the Qurʾān and the *ḥadīth*. These are the primary sources for deriving legal rulings (*aṣl al-uṣūl liʾl-aḥkām*); the *sharīʿa*, as embodied in the Qurʾān and the *sunna*, is the "mother" of all legal sources. Quite often they are designated as *uṣūl waḍʿiyya*.[52] To al-Turābī's way of thinking, social conditions in the Sudan call for radical change in world-view tantamount to a comprehensive "cultural revolution" yet without infringement of legal sources and rulings.[53] The *mujtahid*, seeking a solution to any given problem, should start with the textual sources, then resort to the rules of interpretation. In this context, the *mujtahid* should, in al-Turābī's view, aim at a balance between the literal (*ẓāhir*) and the inner (*bāṭin*) meanings of the textual sources with a view to expanding the scope of options available to him in the process of deriving legal rulings.[54] The balance visualized here is, in fact, one of the manifestations of al-Turābī's doctrine of *tawḥīd*.[55] However, since the legal rulings in the textual sources (*nuṣūṣ*) dealing with everyday life are scarce, the rulings of exegesis (*qawāʿid tafsīr*) are inadequate for providing solutions in all eventualities.[56]

(2) The heritage of classical legal methodology (*al-turāth al-uṣūlī*). This undoubtedly refers, in addition to the textual sources, to *ijmāʿ*, *qiyās* and other legal mechanisms, such as the following:

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[50] Al-Turābī, *Qaḍāyā al-tajdīd*, 212, 214, 216, 222; *idem*, *Tajdīd al-fikr*, 93. Cf. Hallaq, *Legal Theories*, 230.

[51] Al-Turābī, *Qaḍāyā al-tajdīd*, 272–74. Cf. Moussalli, *al-Turabi*, 54–55; Abū Jābir, *al-Turābī*, 66ff.; Sidahmed, *Politics and Islam*, 128.

[52] Not to be confused with the technical term *waḍʿiyya* that signifies statutory legislation or positive law (*waḍʿ al-bashar*); see al-Turābī, *Qaḍāyā al-tajdīd*, 249–50.

[53] Al-Ghannūshī & al-Turābī, 74.

[54] Al-Turābī, *Qaḍāyā al-tajdīd*, 201, 258–59, 272–74; *idem*, *Qaḍāyā al-tajdīd*, 201, 258, 274; *idem*, *al-Ḥaraka*, 22; Abdelmoula, *Fundamentalism*, 39. Cf. Schacht, *Introduction*, Glossary.

[55] For other manifestations of this doctrine within the legal context, see al-Turābī, *Manhajiyyat al-fiqh*, 10–22.

[56] Al-Turābī, *Qaḍāyā al-tajdīd*, 203–4.

a. Consensus *(ijmāʿ)*

Al-Turābī maintains that since the Qur'ān deals only seldom with the formulation of the law, it is left to the people to specify their will by means of consensus (*ijmāʿ*). In historical perspective, *taqlīd* and *jumūd* (stagnation) are at the bottom of the fanaticism of the schools, and this has in turn hampered the individual's freedom and blocked his creative *élan* for the development of law.[57] The doctrine of *ijmāʿ* rests on the sovereignty (*sulṭān*) of the Muslim community (*jamāʿa*) by means of its representatives, the *ʿulamāʾ*. The *ijmāʿ* is the culmination of a process of consultation (*shūrā*). Once agreement has been reached on a certain view, this becomes an irrevocable (*lāzim*) legal ruling. In this sense, al-Turābī maintains, *ijmāʿ* is essentially a form of democracy. Indeed, he uses the concepts *shūrā* and democracy as synonyms although he admits that there are essential differences between the two, the most important being that in Islam democracy cannot be separated from religion.[58]

Al-Turābī's attempt to present consultation as a democratic process and consensus as a mechanism for expressing the will of the people should be assessed in terms of apologetics.[59] In any case, his definition of democracy is not compatible with liberal democracy since it seems to lack vital elements such as basic liberties of speech, assembly, and religion (as in the case of apostasy, *ridda*). In other words, within a formalistic-minimal definition we are here dealing at best with "illiberal democracy." The same applies to *ijmāʿ*. This mechanism rests—according to the traditional concept—on the consensus of the *fuqahāʾ* within each of the orthodox schools of law and occasionally within a restricted geographical area rather than the will of ordinary people.[60]

During the 1960s, the *shūrā* became central in al-Turābī's doctrine.[61] The bill of Islamic constitution of 1968 provided for the

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[57] *Ibid.*, 272; *idem*, *Ḥiwārāt fī ʾl-islām*, 45–46; *idem*, *Ḥiwār*, 5; cf. al-Ghannūshī & al-Turābī, 61, 72; Abdelmoula, *Fundamentalism*, 43.

[58] Al-Turābī, *Qaḍāyā al-tajdīd*, 193; *idem*, *al-Shūrā*, 11–15; *idem*, *Islamic State*, 243–44; Hallaq, *Legal Theories*, 229–30; Weissbrod, *Turabi*, 34–36; Abū Jābir, *al-Turābī*, 53. Cf. above, I.3.1.

[59] Cf. Riḍā, *al-Khilāfa*, 57–61 (*ahl al-ḥall waʾl-ʿaqd*), 80 (*majlis al-shūrā al-ʿāmma*); Hourani, *Arabic Thought*, 6, 144 (Muḥammad ʿAbduh), 234 (Rashīd Riḍā), 300; Layish, *Modernists*, 226.

[60] Cf. Zakaria, *Illiberal Democracy*, 22ff. We owe this reference to our colleague Professor Emmanuel Sivan. Cf. Schacht, *Introduction*, 60ff.; Coulson, *History*, 76–77.

[61] For a detailed description of the institution, its background, election and functions and its relations with democracy, see al-Turābī, *al-Ḥaraka*, 85–86, 97ff.; *idem*, *Qaḍāyā al-ḥuriyya waʾl-waḥda*, 39–82 Cf. Abdelmoula, *Fundamentalism*, 44; El-Affendi, *Turabi's Revolution*, 161, 170–71; Moussalli, *al-Turabi*, 54, 57–62.

establishment of the *shūrā*.[62] In our context, its main function—according to al-Turābī—is to bridge the gap between extreme views in Sudanese society so as to smooth differences of legal opinion. The law in day-to-day practice should be formulated by the *fuqahā'* by means of *shūrā* and *ijmā'*. Moreover, the *shūrā* should play a role in the procedure of state codification and legislation by incorporating legal opinions culled from various schools and specific jurists, in the statutory legislation.[63]

b. Analogical reasoning (*qiyās*)

Al-Turābī maintains that since legal rulings in the textual sources of the Qur'ān and the *sunna* are scarce, the traditional *qiyās* cannot meet the requirements of a modern society that has been exposed to the "cultural assault" of the West. The classical strict *qiyās* based on a specified *'illa*,[64] may be appropriate for renovating matrimonial law, morals (*ādāb*), and religious rites (*sha'ā'ir*). However, for the broad domains of religion a natural (*fiṭrī*) *qiyās* is required in terms of legal discretion. This is a comprehensive version of *qiyās* or *qiyās al-maṣāliḥ al-mursala* in the sense that, while shaping the legal norm, it takes the general public interest (*maṣāliḥ 'āmma*) into consideration without being restricted by or bound to the textual sources of the Qur'ān and *ḥadīth*.[65] Once the textual sources and the rules of interpretation have been exhausted, the *mujtahid* should resort to the public interest and the *istiṣḥāb*, another traditional method of legal reasoning.[66]

c. Auxiliary mechanisms and methodological rules

Other mechanisms mentioned by al-Turābī in this context are the ruler's decree (probably referring to the doctrine of *siyāsa shar'iyya*), *istiḥsān*, a discretionary opinion in breach of strict analogy, and the doctrine of necessity (*ḍarūra*).[67] Al-Turābī also enlists methodological

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[62] Abdelmoula, *Ethnicity*, 45.

[63] Al-Turābī, *Qaḍāyā al-tajdīd*, 193, 211, 215; al-Turābī, *Islamic State*, 246.

[64] I.e., the effective cause or rationale that lies behind the original ruling in the textual sources of the Qur'ān and *ḥadīth*. See Coulson, *History*, 79.

[65] Al-Turābī, *Qaḍāyā al-tajdīd*, 204–7. For further details, see below, p. 93 and the references indicated in fn. 113.

[66] Al-Turābī, *Qaḍāyā al-tajdīd*, 208–9, 262–63. *Istiṣḥāb* is a subsidiary principle of legal evidence—the presumption that a state of affairs known to exist in the past continues to exist until the contrary is established. See Coulson, *History*, 92–93; Schacht, *Introduction*, 299; Hallaq, *Legal Theories*, 228–29.

[67] Al-Turābī, *Nazarāt*, 152. Cf. Hallaq, *Legal Theories*, 230–31; Schacht, *Introduction*, Glossary; Vogel, *Siyāsa shar'iyya*.

rules forefronting the status of intention (*niyya*) in human actions at the expense of the status traditionally attaching to the textual sources of the Qur'ān and the *ḥadīth*; in other words, stressing his preference for the spirit of religion over the letter, i.e., the literal meaning of the text.[68]

(3) The sciences of humanities, the experimental, social and natural sciences, and especially [Western] legal methodologies (*manāhij al-fiqh*). To this end al-Turābī advocates a comparative analysis of [Western] legal methodologies having regard to Islamic values (*qiyam*) and norms (*sunan*).[69] In other words, al-Turābī has no inhibition against adopting elements of European culture (to the extent that it can be isolated from Christianity) and integrating them into Islamic culture. In his view, such a synthesis has a precedent in Muslim history. Thus he maintains that traditional *qiyās* was strongly inspired by what he calls the "first cultural assault"—the reference seems to be to Greek philosophy, especially logic, during the formative period of Islamic law—which was much more extensive than the contemporary impact of the West with respect to modern trends or schools of thought.[70]

Al-Turābī maintains that the reforms based on the new legal methodology should be carried out by means of statutory legislation (*tashrīʿ waḍʿī*). The task of introducing the "revolutionary *ijtihād*" should be entrusted simultaneously to both the *fuqahā'* and the state (*dawla*). Extensive *ijtihād* can be achieved only by means of the state with the cooperation of a great number of knowledgeable *mujtahidūn* and *ʿulamā'*.[71] A "*Sharīʿa* State" implies, in this context, a state where the *sharīʿa* is applied by means of statutory codification rather than by jurists' law as applied in a theocracy. In such a state, al-Turābī argues, the legislature—be it a council or a parliament—has no absolute authority, since the source of authority with respect to legal norm (*ḥukm*) is vested exclusively in the *sharīʿa*. In other words, the legislator is subject to the normative control of the *sharīʿa*, which represents the will of God. For this reason the *ʿulamā'* should be involved as advisors in the process of legislation. Yet, the *ʿulamā'*

[68] Al-Turābī, *Manhajiyyat al-fiqh*, 6.
[69] Al-Turābī, *Qaḍāyā al-tajdīd*, 272. Cf. El-Affendi, *Turabi's Revolution*, 173.
[70] Al-Turābī, *Qaḍāyā al-tajdīd*, 202–4. Cf. Weissbrod, *Turabi*, 36; Schacht, *Introduction*, 19–22; Coulson, *History*, 27ff.
[71] Al-Turābī, *Nazarāt*, 157.

should be experts not only in the *sharīʿa* but also in the social and natural sciences, and in philosophy.[72]

Significant in this context is another of al-Turābī's inspired innovations introduced by Numayrī, i.e., replacement of the People's Assembly by a *majlis al-shūrā* (consultative council) with the President of the Republic at its head. The members of this council must swear an oath of allegiance (*bayʿa*) to the President in his capacity as the recently self-proclaimed Imām of the Sudan.[73] Mālik Ḥusayn Ḥāmid, chairman of the commission responsible for the celebration of the first anniversary of the application of the *sharīʿa* in the Sudan, maintains that the Islamist laws were intended to construct a *shūrā* as a "genuine democratic experiment based on Islam, reality and our values."[74]

Al-Turābī identifies *ahl al-ḥaqq* [*al-ḥall?*] *waʾl-ʿaqd*, the jurists authorized to issue religious-legal permissions and prohibitions,[75] with *ahl al-shūrā*, the representatives of the *umma*. In his view, the latter's functions should be fulfilled nowadays by the parliament or consultative council. A distinction, however, should be made between what is due to consultative bodies and what has been delegated to rulers by virtue of their constitutional and administrative ranks.[76] He seems to be referring here to the doctrine of *siyāsa sharʿiyya*, the ruler's power to take administrative steps within the boundaries of the *sharīʿa*. Moreover, the reopening of the door of *ijtihād—fiqh ijtihādī*, to use al-Turābī's own words—can be attained by statutory consensus (*ijmāʿ tashrīʿī*), i.e., legislation or governmental decree.[77] Needless to say, such an institutionalized *ijtihād* deviates from the classical *ijtihād* of independent *fuqahāʾ*. It is interesting to note, in this connection, that in al-Turābī's view, the absence of an official governmental agency charged with the unification of the legal system was what caused the closure of the door to *ijtihād* to inhibit the proliferation of private rulings liable to endanger the integrity of the *sharʿī* legal system.[78] Al-Turābī maintains that statutory legislation sanctioned by the ruler is an appropriate solution for those who fear—the reference being probably to the orthodox *ʿulamāʾ*—that uncontrolled *ijtihād* could bring

[72] Al-Turābī, *Ḥiwārāt fī ʾl-islām*, 45; *idem*, *Islamic State*, 242, 245.
[73] Sidahmed, *Politics and Islam*, 136–37.
[74] Sālim, Ḥawbāt & al-Nūr, 12–13.
[75] Cf. Riḍā, *al-Khilāfa*, 70, 79; Layish, *Modernists*, 265ff. and the sources indicated there.
[76] Al-Turābī, *Qaḍāyā al-tajdīd*, 225; Turabi, *Islamic State*, 243, 248.
[77] Al-Turābī, *Qaḍāyā al-tajdīd*, 211.
[78] Al-Turābī, *Islamic State*, 246.

about methodological chaos and severe differences of opinion within the schools of law together with innovations incompatible with the doctrine of the Forefathers (*al-salaf*).[79] Al-Turābī opposes the idea of establishing an institutionalized *majlis iftā'* (council for issuing *fatwā*s) and prefers to have the *'ulamā'* integrated in a parliament participating in the process of legislation.[80] He notes in this connection that, in any case, the *qāḍī*s and the *fuqahā'* prefer to apply statutory provisions rather than legal reasoning (*'aql, ra'y*).[81]

As already mentioned above, the *shūrā*'s main function is to incorporate *shar'ī* doctrines into the statutory legislation (*taqnīn*). Al-Turābī maintains that literary works (*muṣannafāt*) such as private collections of law, *fatwā*s and treatises of exegetics articulated in a clear language, are tantamount to a modern corpus of statutes (*mudawwanāt qānūniyya*) [sic!]. The ruler (*sulṭān*) of the country should monitor the *shar'ī* system,[82] which probably implies the imposition of the codified *sharī'a* on state and society by means of the doctrine of *siyāsa shar'iyya*.

In other words, al-Turābī proposes the eclectic expedient (*takhayyur*), widely practiced in modern legislation, as the main method for codifying the *sharī'a* by means of statutory legislation. He argues that although the Mālikī school is dominant among the *'ulamā'*, the Sudanese people are tolerant (*tasāmuḥ*) and openminded enough toward other schools to treat them as equally relevant and without fanatic attachment to a specific school.[83] Furthermore, differences of opinion between the schools should be regarded as a blessing, since the variety of legal options and the abundance of legal material available to the *shūrā* and the jurists can be used for the public benefit.[84] Al-Turābī advocates comparative study of all schools of law with a view to reaching an authentic perspective on the legal methodology of the *sharī'a*, with no intention, however, of creating another school of law.[85]

It is interesting to note, in this connection, some substantial similarities between the legal methodology advocated by al-Ṣādiq al-Mahdī, the acting Imām of the Anṣār and the leader of the Umma Party,[86]

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[79] Al-Turābī, *Qaḍāyā al-tajdīd*, 216–17; *idem*, *Tajdīd al-fikr*, 93; *idem*, *Manhajiyyat al-fiqh*, 6.
[80] Lowrie, *Turabi*, 39.
[81] Al-Turābī, *Qaḍāyā al-tajdīd*, 266–67.
[82] *Ibid.*, 215–16. Cf. Fadel, *Taqlīd and Mukhtaṣar*.
[83] Al-Turābī, *al-Ḥaraka*, 152.
[84] Al-Turābī, *Qaḍāyā al-tajdīd*, 211.
[85] Al-Turābī, *al-Ḥaraka*, 215; Lowrie, *Turabi*, 83.
[86] Warburg, *Sharī'a and Implementation*, 631. See above, I.3.1 and I.4.3.

and that of al-Turābī. Al-Ṣādiq al-Mahdī denounces the *taqlīd* as the main cause for stagnation in the "movement of legislation" (*ḥarakat al-tashrīʿ*)—that is, the development of the *sharīʿa* by means of *ijtihād*. He suggests a socio-national convenant based on five principles, the first three of which are: 1. the Qurʾān and the *ḥadīth*; 2. an uninterrupted *ijtihād*; and 3. mutual responsibility (*takāful*), probably in terms of compatibility between the *sharīʿa* and reality (*al-ḥaqīqa*). A critical review of traditional Islamic thought is found necessary in order to ensure an understanding of the Qurʾān and the *sunna*.[87]

In order to adjust the *sharīʿa* to changing circumstances, al-Ṣādiq al-Mahdī suggests a variety of mechanisms for deriving rules from the textual sources of the Qurʾān and the *ḥadīth*—such as *qiyās, ijmāʿ, istiṣlāḥ* (taking the public interest into account) and other variants of *maṣlaḥa*, such as "removal of impediment and prevention of damage" (*rafʿ al-ḥaraj wa-manʿ al-ḍarar*), *istiḥsān* (a discretionary opinion in breach of strict analogy), *istiṣḥāb* (a method of legal reasoning), *murāʿāt al-maqāṣid* (taking intent into account), *naskh* (abrogation), and *ḍarūra* (necessity).[88] However, al-Ṣādiq al-Mahdī's version of *ijtihād*, similarly to that of al-Turābī, deviates from the classical one since it is to be incorporated in the process of codification and statutory legislation. Individual *ijtihād*, not even by an infallible (*maʿṣūm*) Imām, is inadequate for modern needs. Rather, *ijtihād* should be the product of collective efforts of statutory bodies: one in charge of collecting legal doctrines propounded by *mujtahidūn* of past generations; another, consisting of a body of *ʿulamāʾ* and *fuqahāʾ* well versed in statutory, positive law (*qānūn waḍʿī*), economic, political, and social sciences, and in international relations. This body is expected to derive rules (*aḥkām*) from the Qurʾān and the *ḥadīth* and to prepare a comprehensive codification of penal, civil, private, and international law. Finally, there should also be a representative legislature (*hayʾa tashrīʿiyya*) promoting lawmaking on the basis of the corpus of statutes (*dīwān al-qawānīn*) in conformity with the *sharīʿa*. The legislature's function is to control the process of codification and to review from time to time *sharʿī* rules embodied in statutory codification while taking into account legal precedences of the judiciary,[89] which in itself is alien to the orthodox *sharīʿa*.

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[87] Al-Mahdī, *Mustaqbal al-islām*, 323–24, 407–8.
[88] *Ibid.*, 39, 408; *idem, al-Ṣaḥwa*, 19. Cf. Schacht, *Introduction*, Glossary.
[89] Al-Mahdī, *ʿUqūbāt*, 150–51, 160.

The statutory codification should be implemented by means of the eclectic device (*takhayyur*), there being no room for fanaticism on the basis of school affiliation (*madhhabiyya*). There should be no inhibition against adopting doctrines from any of the four Sunnī schools of law or from the Shīʿī, the Ibāḍī, the Ẓāhirī and the Ṣūfī [sic!] schools. The mechanism of *takhayyur* is much more than a technical matter; al-Ṣādiq al-Mahdī calls for a complete fusion (*tawḥīd*) between the Sunna and the Shīʿa. Moreover, he seems to recommend extending the technical device even to Western law. For this purpose he suggests initiating a comparative study on traditional *sharʿī* rules and modern statutory laws that are not contradictory to the "roots" (*uṣūl*) of Islam.[90] In other words, al-Ṣādiq al-Mahdī seems to share in many respects al-Turābī's legal methodology.

In his aspiration to modernise the legal system, al-Turābī seems to have been inspired by two main sources: Islam and the West. This combination coincides with al-Turābī's educational and cultural background. He was brought up on orthodox Islamic learning and Ṣufism and obtained his legal and scientific education in the West.[91]

Al-Turābī derived his inspiration from both classical and modern Islam. Exposed to legal literature pertaining to the Qur'ān and the *ḥadīth*, to treatises on exegetics (*tafsīr, shurūḥ*), and basic texts of all schools of law, he is also familiar with Islamic popular culture of various kinds, such as works dealing with the festivities of the Prophet's birthday, the Forefathers (*al-salaf*) and mysticism (*taṣawwuf*). Al-Turābī was also strongly influenced by modern Islamic schools of thought, reformist *salafī* movements (i.e., that venerated the first generation of the Prophet) all over the Muslim world, in particular the Egyptian Muslim Brothers. The Khumaynī revolution also left its imprint on his thinking.[92]

To what extent was al-Turābī inspired by Muḥammad Aḥmad al-Mahdī's legal methodology? Both of them share the view that the Qur'ān and the *sunna* are the primary textual sources of law; beyond this point they have nothing in common. Moreover, the Mahdī,

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[90] Al-Mahdī, *Mustaqbal al-islām*, 39, 410, 424–25; *idem, al-Ṣaḥwa*, 19; cf. Ibrāhīm, *al-Hawiyya*, 11.

[91] For further details, see Lowrie, *Turabi*, 11; Abdelmoula, *Ethnicity*, 43ff.; above, I.2.2.1.

[92] Al-Turābī, *al-Ḥaraka*, 153–54, 204, 225–26, 239–40. Cf. Abdelmoula, *Fundamentalism*, 16ff.; El-Affendi, *Turabi's Revolution*, 152–53; Hourani, *Arabic Thought*, 37, 149, 230.

in contrast to al-Turābī, totally rejected the doctrine of *ijmāʿ* and *qiyās* and ignored all schools of law. The Prophet's inspiration (*ilhām*), which is an essential part of the Mahdī's methodology, is not recognized by al-Turābī. And finally, it is inconceivable that the Mahdī would have admitted Western sources of law.[93]

In fact, the Mahdī is hardly mentioned in al-Turābī's writings and his references to him occur mainly in a political context. Against the background of the conquest of the Sudan by Muḥammad ʿAlī, the Mahdī is presented as a Ṣūfī, reformist, *mujtahid* and warrior of *jihād* determined to purify the Sudan from heresy, the reference here being apparently to the conquest by "corrupt" Muslims. The Muslim Brothers were inspired by the Mahdist spirit of *jihād*[94] and the Mahdiyya is conceived by contemporary Sudanese nationalists as a national revolutionary movement par excellence though strongly tied to the notion of the Islamic state.[95] One may conclude from these references that al-Turābī is not substantially impressed by the Mahdist legal reformism.[96]

In addition to his receptivity to classical and modern Islamic sources, al-Turābī was also inspired by a variety of European trends of thought ranging from religious to non-religious, from a democratic, liberal and rationalistic philosophy to materialistic and Communist ideas and ideologies.[97] Al-Turābī maintains that Sudan can benefit a great deal from the legal experience of the West in terms of practicing justice (*ʿadāla*) and equity (*qisṭ*). He regards international law as an essential part of the *sharīʿa*. He strongly recommends the integration of Western social and comparative legal methods into the new Islamic legal methodology. Statutory legislation (*tashrīʿ*) requires, in his view, solid knowledge in the social and natural sciences.[98] The time is ripe for such a transformation since the young Islamic elite

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[93] Layish, *The Mahdī's Legal Methodology*.

[94] Al-Turābī, *al-Ḥaraka*, 22, 150, 236.

[95] El-Affendi, *Turabi's Revolution*, 152–53; Jacobs, *Islamization*, 206. This view is shared by both secular nationalists and Western-oriented Islamists such as al-Turābī.

[96] However, this may also be attributed to al-Turābī's ongoing attempts to discredit the neo-Mahdism of the twentieth century, for political reasons. On one occasion he declared that the Sudan was initiated into Islam neither by the Mahdiyya nor by the *ʿulamāʾ*, but rather by the University of Khartoum, which in his view, is the cradle of Islam. Lowrie, *Turabi*, 57.

[97] Al-Turābī, *al-Ḥaraka*, 204, 217, 226, 242–43; Abdelmoula, *Fundamentalism*, 41, 45–46; El-Affendi, *Turabi's Revolution*, 49.

[98] Al-Turābī, *Qaḍāyā al-tajdīd*, 253, 255, 257; *idem*, *Ḥiwārāt fī ʾl-islām*, 53. Cf. Viorst, *Sudan's Islamic Experiment*, 53.

nowadays has been brought up on a Western type of education.[99] Moreover, even some of the *'ulamā'* went as far as to adopt foreign, including left-wing, views thus detaching themselves from traditional Islamic society.[100]

At the same time al-Turābī is ambivalent toward the West and accuses Western imperialism of having caused the destruction of Muslim institutions and replacing the *sharī'a* and the theory of Islamic law by statutory (*waḍ'iyya*) legislation and Western legal methodology. In principle, he would prefer the reopening of the door of *ijtihād* rather than resorting to Western legal systems. The Muslim response to the impact of the Western "cultural assault"[101] culminated in an Islamic awakening calculated to bring about the emergence of a reformist movement that in al-Turābī's view is to be compared with the Reformation in Christianity.[102]

It will be recalled that in 1977 al-Turābī was appointed chairman to the Committee for the Revision of Statutes with the aim of bringing them in line with the *sharī'a*. The committee drafted several bills and was disbanded in 1980 with no concrete results.[103] In an interview held in 1986 al-Turābī admits to having prepared a draft for the gradual application of the *sharī'a*, starting with the prohibition of wine drinking and the imposition of the *ḥudūd* penalties on theft. He claims, however, that al-Numayrī rejected the draft and replaced it by other proposals. Al-Turābī denies having had any responsibility for the drafting of the Islamist statutes which—so he claims—were prepared by some of his graduate students at the Law Faculty.[104] Moreover, he maintains that they had been instructed by Numayrī to keep him (i.e., al-Turābī) out of the picture. When they reached the stage of drafting the statutes, al-Turābī was dismissed from his office as Attorney General and transferred to the Ministry of Foreign Affairs.[105] In a lecture delivered in 1978 on the problems of applying the *sharī'a*, al-Turābī estimated that the time was not yet ripe

[99] Al-Turābī, *Ḥiwārāt fī 'l-islām*, 37.
[100] Al-Turābī, *al-Ḥaraka*, 152–53.
[101] Cf. "legal imperialism" (*istī'mār qānūnī*) in Shalabī, *al-Fiqh al-islāmī*, 3, 183; Layish, *Modernists*, 273 and the sources indicated there.
[102] Al-Turābī, *Ḥiwārāt fī 'l-islām*, 26–27, 43–44; *idem*, *al-Ḥaraka*, 18–22; *idem*, *Qaḍāyā al-tajdīd*, 204, 246; *idem*, *Tajdīd al-fikr*, 98; *idem*, *Manhajiyyat al-fiqh*, 5. Cf. al-Ghannūshī & al-Turābī, 15.
[103] See above, II.1.2.
[104] See above, I.4.2.
[105] Al-Sharīf, *Ḥasan al-Turābī*, 70–71.

for restoring the entire *sharīʿa*.[106] In the early 1980s the Muslim Brothers supported the immediate application of the *sharīʿa* in a comprehensive manner in the domains of penal, civil and constitutional law.[107] In 1983, a new committee for the transformation of the Sudan's legal system into an Islamic one drafted several acts that became known as the "September Laws." In a lecture delivered in September 1984, al-Turābī stated that the purpose of the JudA, 1983 was to transform the Sudanese legal system based on various sources of law from statutory English law into a solid *sharʿī* legal system.[108]

Nevertheless, a thorough examination of the September laws shows beyond reasonable doubt that they were strongly inspired either directly or indirectly by al-Turābī's ideas on Islamic law and legal methodology. This is particularly the case with JudA, 1983 which, according to some observers, was drafted by al-Turābī himself[109] and includes basic rules for the interpretation of the Islamist statutes. Section 3 states that in cases of lacunae, a judge is to apply the *sharʿī* rule as established by the Qur'ān and the *sunna*. In the absence of such a rule, he may exercise *ijtihād* by resorting to defined legal sources and basic principles in a specified order: the consensus of *fuqahāʾ* (*ijmāʿ*), analogy (*qiyās*), the public interest, presumption of innocence (*barāʾa*), a permissive approach (*ibāḥa*) toward human acts, and leniency in imposing [God's commandments] (*al-yusr fī ʾl-taklīf*), Sudanese judicial precedents (*sawābiq al-ʿamal al-qaḍāʾī*), custom (*ʿurf*)—provided it does not contradict the *sharīʿa* or the principles of natural justice (*al-ʿadāla al-fiṭriyya*)—, and the principle of justice (*ʿadāla*) acknowledged by human laws, and the rules of justice and equity (*qisṭ*) enshrined in good conscience (*wijdān salīm*).[110]

The Explanatory Note to JudA, 1983[111] emphasizes the importance of *ijtihād* for the development and elaboration of the *sharīʿa* and its accommodation to the changing circumstances of time, place and cultural factors over the centuries. It further maintains that *ijtihād* should

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[106] Al-Turābī, *Nazarāt*, 143, 146ff., 152–53, 159; Abdelmoula, *Fundamentalism*, 47–48.

[107] Al-Turābī, *al-Ḥaraka*, 36–37, 213, 215. Al-Turābī drafted the version of the penal law which was enacted in March 1991. Mayer, *An-Naʿim*, 43, 52.

[108] *Al-Ṣaḥāfa*, September 30, 1984, p. 3 col. 5. Cf. *ibid.*, October 29, 1983, p. 11 cols. 7–8 (al-Shaykh al-Walī).

[109] Abdelmoula, *Ethnicity*, 50; Mayer, *Law and Religion*, 169, fn. 90.

[110] The act was also published in *al-Ṣaḥāfa*, September 29, 1983, p. 2 cols. 1–3. For a full translation of the act, see Gordon, *Legal Revolution*, 814–15. See below, II.2.2.3.

[111] Issued by al-Maktab al-Fannī of the SupC on October 3, 1983 and published in *al-Ṣaḥāfa*, October 6, 1983, p. 3. The following citations are from this source.

be regarded as a *sharʿī* duty incumbent on anyone capable of exercising it; the abandonment of *ijtihād* and its replacement by *taqlīd*, "imitation," i.e., adherence to a school of law, was one of the main reasons for the stagnation of the *sharīʿa*, its "lagging behind the caravan of life," and its replacement by European laws. Although the judge is not immune from making mistakes, *ijtihād* nevertheless is preferable to *taqlīd*.

While applying comprehensive legal principles culled from jurists' treatises for the purpose of *ijtihād*, the judge is not bound by the doctrines of any particular school. In other words, the Explanatory Note advocates the use of *takhayyur*, as a means for bringing about a "legal revolution."

The doctrine of public interest has been raised to the status of a *sharʿī* recognized benefit (*maṣlaḥa muʿtabara*), an ignored or "unrestricted"[112] benefit (*maṣlaḥa mursala*), and the principle of seeking benefit and averting corruption (*jalb al-maṣlaḥa and darʾ al-mafsada*).[113] The principle of presumption of innocence—the phrasing of which seems to be inspired by English law—is claimed to be compatible with the *sharīʿa*. The Note extends the principle of permissiveness to the point that anything not explicitly forbidden in the Qurʾān and the *ḥadīth* or in legislative provisions is presumed permissible (*mubāḥ*).

As to human laws regarded as a source of law, the Note explains that the Sudanese judiciary has been afforded the opportunity to benefit from the accumulated legal experience of the civilized nations through comparative study of modern legal systems on the basis of equality rather than by slavish imitation of foreign laws. The Note claims that acquaintance with these laws is liable to enrich the Sudanese legal system.

In "Reflections on the Judgments (Basic Rules) Act" written by ʿAbd al-Munʿim ʿUthmān Muḥammad Ṭāhā, Advisor in the Office of the Attorney General,[114] the author maintains that in the absence of a statutory provision, the uncodified *sharīʿa* should be regarded as the basic legal norm (*aṣl*) and hence binding, and that the consensus (*ijmāʿ*), the first legal source to be applied in cases of lacunae, is in fact the *shūrā*, the principle of consultation.[115] Analogy (*qiyās*) is

[112] By *ʿilla*, efficient cause in the procedure of analogy.

[113] The recognized benefit is a more reliable basis for analogy than the ignored, unrestricted one. For further details, see Zysow, *Economy of Certainty*, 394–99; Kerr, *Islamic Reform*, 67, 70, 74; Vogel, *Saudi Arabia*, 52, 343; Mayer, *An-Naʿim*, 46.

[114] *Al-Ṣaḥāfa*, March 11, 1984, p. 5.

[115] Cf. *shūrā* in Riḍā's legal methodology in Kerr, *Islamic Reform*, 160. See above, I.3.2.

the principal means for exercising *ijtihād* and its scope has been expanded beyond its conventional boundaries [probably to meet modern requirements]. Legal precedents antecedent to the Islamist legislation are valid as a source of law for *ijtihād*, provided they do not contradict the *sharīʿa*. Ṭāhā regards custom as the most dominant component in Sudanese law. The legislator included in the judicial *ijtihād* the principles of natural justice and good conscience with a view to benefiting from the experience of English law.

To sum up, the similarity emerging between al-Turābī's legal methodology and the JudA, 1983 is manifested in two domains: the combination of methodological elements culled from both the Islamic classical theory of *uṣūl al-fiqh* and Western legal principles, and the attempt to shape a new version of Islamic law by means of statutory codification and legislation based on the eclectic method of *takhayyur*. In a debate in the People's Assembly as early as March 1984, al-Turābī admits that the JudA, 1983 is not based exclusively on the *sharīʿa*; rather it is a combination of certain principles of Islamic and Western law and of human experience shared by Muslims and non-Muslims.[116]

2. Techniques of Reinstating the Sharīʿa

2.1. *Methods of Introducing the* Sharīʿa *in the Legal System*

2.1.1. *Codification of the* Sharīʿa

The instrument chosen for reinstating Islamic law in the Sudan was codification, by means of statutory legislation, of selected domains from the *sharīʿa*. Codification was implemented in an explicitly Western style, that is, by organizing the legal material within each domain by chapters and sections, logical classification, and legal phrasing. The usual term for this technique is *taqnīn*, and ʿAbd al-Munʿim ʿUthmān Muḥammad Ṭāhā, the Advisor in the Office of the Attorney General, and al-Mukāshifī Ṭāhā al-Kabbāshī define it thus:

> Drafting (*ṣiyāgha*) *fiqh* into statutory provisions (*mawādd qānūniyya*) along the lines of modern laws, criminal, civil, and the like, and requiring

[116] *Al-Ṣaḥāfa*, May 1, 1984, p. 1.

> the judge to apply them without the possibility of resorting to other [sources of law].[117]

Al-Kabbāshī states explicitly, albeit apologetically, that the Sudanese legislator sought to benefit from the Western experiment in statutory legislation, and from legal precedents that left their imprint on the manner of classification into chapters, and on the formulation of discretionary punishments (*taʿzīr*). He sees nothing wrong in drawing inspiration in this area from the West, unlike those who object to this technique of reinstating Islamic law. He believes that the *sharīʿa* is not incompatible with this method as long as the discretionary punishments do not deviate from their natural framework.

Ṭāhā, al-Kabbāshī and al-Zakī enumerate several advantages of codification:

(1) The application of the eclectic expedient (*takhayyur*), that is, adopting in the codification appropriate doctrines from the Qurʾān and the *ḥadīth*, from early jurists dating back to the Companions of the Prophet Muḥammad (*ṣaḥāba, aṣḥāb*), in accordance with the needs of the time, without being bound by the dominant school in the Sudan.[118]

(2) Codification according to subject matter makes it easier to locate the statutory provisions. This spares the judges and the litigants the necessity of wading through the intricacies of traditional Islamic law. Ṭāhā argues that *qāḍīs* in previous generations, unlike contemporary *qāḍīs*, were more competent to cope with the complicated legal literature because they qualified to practice *ijtihād* to the point of being considered as "legislators" (*musharriʿ*).

(3) Clarity and uniformity (*tawḥīd al-aḥkām*) in the statutory legislation with no conflicts and differences of opinions. This contrasts strikingly with the vagueness and diversity of the religious legal literature, which leaves the judge wide discretion in choosing the appropriate rule. Thus, for example, there are those who decide according to the authoritative opinion (*qawl rājiḥ*), and others who decide according to the non-authoritative opinion (*qawl marjūḥ*).

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[117] *Al-Ṣaḥāfa*, May 1, 1984, p. 5 col. 1; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 13. See also Gordon, *Legal Revolution*, 801.

[118] For further details, see below, II.2.2.1.1.

(4) The easy identification of the Islamist statutes, even by those not well versed in the *sharīʿa*. This tends to facilitate legal proceedings and save time for all involved. Thus Mustafa maintains that Sudanese lawyers seem to agree that "codification is about the only practical solution they can think of [for appropriate orientation in Islamic law]."

(5) Codification can be easily accommodated to changing social conditions and prevailing customs (*aʿrāf*), as in the case of statutory law.[119]

(6) Chief Justice Dafʿallāh al-Ḥājj Yūsuf maintains that one of the goals of the Islamist acts was to bring about simplification of the judicial procedure with a view to dispensing justice.[120]

Some, like ʿAbd al-Munʿim Ṭāhā, object to codification on the grounds that the legislator cannot foresee all eventualities, and as a result too much discretion is left to the judge to decide in cases of lacunae. In addition, codes have to be under a continual process of amendment and revision in order to remain relevant to a changing world.[121]

Codification, however, is not merely a formal technical matter; it has far-reaching substantive significance. There is no concept of a legislature in Islam, and codification is alien to Islamic law, which is a jurists' law par excellence, that is, a law shaped by individual jurists outside the establishment, anchored only in their learned authority. Furthermore, even when codification is materially based exclusively on the *sharīʿa*—and as we shall see below, this is not quite the case in the Sudan—this implies severance from the extensive sources, such as private collections of legal opinions (*fatāwā*), commentaries, and the like.

From the strictly orthodox *sharʿī* point of view, the codification itself inevitably implies the transformation of the *sharīʿa* from jurists' law to statutory law. The statutory provisions have an autonomous existence based on state-imposed sanctions, and the *sharʿī* elements should only be interpreted within the framework of the national-territorial statutes. In other words, on the level of the basic norm (which represents the primary legal norm in modern Arab states),

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[119] *Al-Ṣaḥafa*, May 1, 1984, p. 5 col. 1; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 18; al-Zakī, *al-Islām wa-ḥayātunā al-qaḍāʾiyya*, 152; Mustafa, *Common Law*, 245.

[120] *Al-Ṣaḥafa*, December 8, 1983, p. 5 cols. 3–4.

[121] *Al-Ṣaḥafa*, May 1, 1984, p. 5 col. 2. On the opposition of the Saudi *ʿulamāʾ* to codification, see Vogel, *Saudi Arabia*, 359ff.

codification results in a complete departure from the religious-legal literature (unless, in cases of lacunae, the judge is directed by the legislator to resort to the uncodified *sharīʿa*). On the level of interpretation, however, the judge is not debarred from consulting religious-legal literature (or any other source) provided it does not contravene statutory provisions. Moreover, codification brings about total disruption of the *sharʿī* legal methodology (without a new doctrine taking its place), of the corpus of *sharʿī* legal rules as consolidated in the schools of law, and of the legal professional class of the *fuqahāʾ* and *muftī*s, the authorized exponents of the *sharīʿa*.[122] The severance from the *sharʿī* literature should, of course, be qualified as far as the Sudan is concerned, because the JudA, 1983 enables the judge to apply, in the event of a lacuna in the law, rules from the *sharīʿa* that have not undergone codification, to resort to the Qurʾān and the *ḥadīth*, and to exercise *ijtihād*.[123]

In an effort to legitimize the notion of codification, Ṭāhā and al-Zakī cite the abortive effort initiated by the Abbasid Secretary of State, Ibn al-Muqaffaʿ (d. 139/756), to introduce the concept of codification and legislation. Ibn al-Muqaffaʿ had proposed to the Caliph al-Manṣūr the following steps: codification of his judicial decisions (*tadwīn al-aḥkām al-qaḍāʾiyya*), the enactment of a code (provided it is based on the Qurʾān and the *ḥadīth*) and its imposition on the *qāḍī*s with a view to bringing about the unification of the material law and its exclusive application throughout the state. He visualized the revision of the code by successive caliphs.[124]

There is good reason to believe that Ṭāhā, al-Kabbāshī and al-Zākī are fully aware of the fact that codification is a modern invention starting with the Mejelle, the Ottoman Civil Code of 1876, and followed by codes of personal status and succession and the civil code promulgated in the twentieth century. To justify codification, however, they assert that the *mutūn* (i.e., religious legal treatises without marginal commentary) and the *mukhtaṣarāt* (i.e., compendia of these treatises) are shaped "in the form of articles" (*shakl mawādd*). In other words, with respect to formulation and organization they

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[122] Layish and Shaham, *Tashrīʿ*; Layish, *Jurists' Law and Statutory Law*; Peters, *Islamization of Criminal Law*, 254.

[123] See below, II.2.1.3, 2.2.2–3.

[124] *Al-Ṣaḥafa*, May 1, 1984, p. 5 cols. 2–3; al-Zakī, *al-Islām wa-ḥayātunā al-qaḍāʾiyya*, 152; cf. Schacht, *Introduction*, 55–56.

are kindred to codification.[125] This resemblance is of course only technical, since the personal treatises were not binding on anyone and were not anchored in state sanction. Codification in the conventional sense of the word is a new phenomenon. The Mejelle, based on the Ḥanafī doctrine, was the first Western-inspired codification of Islamic law, and some consider it to be the most important legal reform of the nineteenth century.[126] Codification became the chief instrument for adapting Muslim family laws to modern conditions, and while reforms in laws of personal status are ostensibly based on *shar'ī* mechanisms and material, Muslim scholars view them as a development *outside* of the *sharī'a*. Thus al-Ṣādiq al-Mahdī argues that codification is a political process requiring the participation of jurists, members of parliament, and even non-Muslims.[127] In An-Na'im's view, "*shari'a* cannot be enforced as positive legislation and remain the source of a religiously sanctioned normative system." Moverover, he holds that

> the pretence of enforcing *shari'a* through positive legislation (as claimed by the present governments of Iran, Afghanistan, Saudi Arabia and Sudan, or advocated by Muslim political activists in many other countries), is a dangerous form of simple-mindedness, if not a cynical manipulation of the sentiments of Muslims.[128]

2.1.2. *Islamist Legal Circulars*

We mentioned earlier that during the Anglo-Egyptian Condominium the Grand Qāḍī became a central instrument for adapting the *sharī'a* to the changing conditions of the time by means of "legal circulars." More than 60 circulars were issued until the abolition of the institution of the Grand Qāḍī in 1979.[129] Between October 1983 and May 1984 Chief Justice Daf'allāh al-Ḥājj Yūsuf issued a dozen legal circulars, most of them pertaining to criminal matters. The impetus for issuing these circulars came from the desire to guide the courts in the application of the new Islamist statutes in a manner compatible with the *sharī'a*, in its codified version, and to mitigate the

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[125] *Al-Ṣaḥafa*, May 1, 1984, p. 5 col. 1; al-Kabbāshī, *Taṭbīq al-sharī'a*, 13; al-Zakī, *al-Islām wa-ḥayātunā al-qaḍā'iyya*, 152. Cf. Fadel, *Taqlīd* and *Mukhtaṣar*.

[126] Coulson, *History*, 151–52.

[127] Zein, *Religion, Legality, and the State*, 8. Cf. Layish, *Maḥkama*, 40–42; Layish & Shaham, *Tashrī'*.

[128] An-Na'im, *Shari'a and Positive Legislation*, 29, 30.

[129] See above, II.1.1.

harsh consequences of the Qur'ānic punishments and retribution.[130] In this respect the circulars may be regarded as complementary to the Islamist legislation. The juristic basis for the Islamist circulars are the Qur'ān and the Prophetic *sunna*, Ḥanafī doctrine, judicial *ijtihād*, custom and, most importantly, the eclectic expedient (*takhayyur, talfīq*)[131] which was extensively applied in the circulars pertaining to amputation of limbs, and the averting of Qur'ānic punishments.[132] Chief Justice Yūsuf explains that the circulars are not bound by any particular school of law and that he has no inhibitions whatsoever to adopting legal doctrines from any school provided they are "in harmony with the [uncodified] *sharī'a* and the Islamist statutes."[133]

A special circular instructs the judges to resort to the JudA, 1983 with a view to "deriving rules (*istinbāṭ al-aḥkām*) on particular points of the law." This is a clear reference, in the absence of a statutory provision, to the judge's right of *ijtihād* on the basis of the traditional *shar'ī* and other sources of law.[134] Chief Justice Yūsuf also instructs judges to apply the Islamist statutes in a manner compatible with "justice" (*'adl*).[135] This seems to imply "justice" within the meaning of Section 3(b)(vii) of the JudA, 1983 (justice, equity and good conscience).[136] Custom as a source of inspiration for the legal circulars is manifested in a statement by Deputy Chief Justice Aḥmad Muḥammad 'Uthmān to the effect that blood price is no negative innovation (*bid'a*) in the Sudanese legal system. Rather, it is based on local customs (*a'rāf*) all over the country, though at the same time it is merged with Islamic values (*qiyam*) anchored in the Qur'ān and the *sunna*.[137]

Several circulars on criminal law deal with amputation of the right hand on grounds of theft entailing Qur'ānic punishment (*sariqa ḥaddiyya*) and alternate amputation (*al-qaṭ' min khilāf*). The amputation should be executed with due regard to the perpetrator's well-being with a

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[130] *Al-Ṣaḥāfa*, October 22, 1983, p. 1; October 29, 1983, p. 4, col. 6; November 1, 1983, p. 1. We were unable to consult the official publication of these circulars.

[131] See below, II.2.2.1.1.

[132] *Al-Ṣaḥāfa*, October 27, 1983, p. 1; November 1, 1983, pp. 1–2; May 16, pp. 1–2.

[133] *Al-Ṣaḥāfa*, November 16, 1983, p. 1. On the eclectic expedient, see below, II.2.2.1.1.

[134] *Al-Ṣaḥāfa*, October 27, 1983, p. 1. For further details on the JudA, 1983, see below, II.2.2.3.

[135] *Al-Ṣaḥāfa*, October 22, 1983, p. 1; November 1, 1983, p. 1.

[136] See below, II.3.1.

[137] *Al-Ṣaḥāfa*, November 16, 1983, p. 1.

view to preventing the damage from extending to other parts of the body.[138] Annex No. 1 to Circular No. 89 reaffirms the prohibition of tying (*taʿlīq*) the amputated limb to the thief's neck.[139] Ṣiddīq ʿAbd al-Ḥayy, Director of the Judiciary Personnel (*al-jihāz al-qaḍāʾī*), explains that though this practice is based on the opinions of some *fuqahāʾ*, it was decided to prohibit it in order to avoid further medical complications.[140] Circular No. 89 instructs that in executing amputation of the thief's hand the authorities should "be assisted by medical and scientific facilities," that is, by modern-trained physicians or surgeons, in order to prevent unnecessary physical harm.[141] A physician should be consulted before amputation is carried out regarding the medical condition of the convicted.[142] The alternate amputation should start with the right hand and the left foot, in the order prescribed in the Qurʾān (5:33) and a Prophetic *ḥadīth*.[143] Criminal Circular No. 2 provides that sentences entailing amputation, alternate amputation, and other *ḥudūd* on offenses such as theft, illicit intercourse, and robbery, as well as sentences pertaining to retribution entailing amputation or breaking of limbs, can be appealed.[144] A special circular provides that flogging be inflicted moderately especially with respect to women.[145]

Some of the criminal circulars deal with doubts (*shubhāt*) averting Qurʾānic punishments on offenses such as theft (No. 98),[146] robbery (*ḥirāba, qaṭʿ al-ṭarīq*) (No. 93),[147] illicit intercourse (No. 100),[148] and retribution (*qiṣāṣ*) (No. 94).[149] Criminal Circular No. 43 requires that a judgment pertaining to retribution should be brought, prior to execution, before the SupC for revision.[150]

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[138] *Al-Ṣaḥāfa*, November 1, 1983, p. 1.
[139] *Al-Ṣaḥāfa*, November 28, 1983, p. 1. Cf. Zaydān, *al-Mufaṣṣal*, V, 244–45.
[140] *Al-Ṣaḥāfa*, December 27, 1983, p. 3 col. 5.
[141] *Al-Ṣaḥāfa*, November 1, 1983, p. 1.
[142] *Al-Ṣaḥāfa*, May 16, 1983, pp. 1–2.
[143] Q. 5:33: "The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. [. . .]." For the *ḥadīth* and a reference to the sources, see Wensinck, *Concordance*, V–VI, 421, line 46.
[144] *Al-Ṣaḥāfa*, October 6, 1983, p. 3.
[145] *Al-Ṣaḥāfa*, November 1, 1983, pp. 1–2. Cf. Zaydān, *al-Mufaṣṣal*, V, 144ff.
[146] *Al-Ṣaḥāfa*, December 6, 1983, p. 1; September 20, 1984, p. 2 cols. 5–6. Cf. Peters, *Criminal Law*, § 0.1.1.1 (*shubha*).
[147] *Al-Ṣaḥāfa*, November 28, 1983, p. 1.
[148] *Al-Ṣaḥāfa*, December 6, 1983, p. 1.
[149] *Al-Ṣaḥāfa*, November 28, 1983, p. 1.
[150] *SLJR*, 1986, 146.

Other circulars deal with homicide, damages, and private claims. The treatment in these circulars of issues such as blood price and *niṣāb* (the minimal value of the stolen object that is a precondition for effecting amputation) and insurance (*ḍamān*) applicable in private claims and road accidents, pledge or deposit (*rahn*) of immovables (*ʿaqārāt*) as a security in favor of the Government, victims or injured parties, and bank deposits (*waḍāʾiʿ*; sing. *waḍīʿa*) by the defendant—reflects a clear tendency to adjust the *sharīʿa* to the requirements of a modern society.[151]

Several administrative circulars deal with rules of judicial procedure with a view to facilitating them.[152] A special circular provides that statutes pertaining to criminal and civil procedure have retroactive validity.[153] The rules of evidence are also undergoing a process of adjustment to modern requirements; thus, Circular No. 93 provides that the averting of a Qurʾānic punishment for robbery (*ḥirāba, qaṭʿ al-ṭarīq*) does not exempt the robber from discretionary punishment (*taʿzīr*), provided there is some proof or circumstantial evidence (*qarāʾin*) justifying punishment.[154] Generally speaking, circumstantial evidence (with few exceptions) is not recognized under the *sharīʿa*.[155]

2.1.3. *The Conformity of Statutory Provisions with the* Sharīʿa *(the "Constitutional Provision")*

The legislator granted the judge wide discretion, in the process of passing judgment, to make the validity of statutory provisions conditional on their conformity with the *sharīʿa*. Section 2 of the JudA, 1983 provides that in interpreting legislative provisions, unless such provisions have already been interpreted or given a definite clear meaning:[156]

(a) a judge shall presume that the legislator did not intend to contradict the *sharīʿa* by neglecting a definite religious-legal duty or by making something legally permissible that is clearly prohibited. He is instructed to honor the *sharīʿa*'s directives in matters which are recommended or reprehensible. In other words, to pay attention to the

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[151] See below, IV.1.1.
[152] *Al-Ṣaḥāfa*, May 14, 1984, p. 1; February 3, 1985, p. 3 col. 4.
[153] *Al-Ṣaḥāfa*, November 2, 1983, p. 1.
[154] *Al-Ṣaḥāfa*, November 28, 1983, p. 1.
[155] See below, III.1.4.
[156] Cf. al-Mahdī, *al-ʿUqūbāt*, 120; Sālim, Ḥawbāt & al-Nūr, 40; Bälz, *The Secular Reconstruction of Islamic Law*, 236.

doctrine of the scale of five religious-legal qualifications in Islam: *wājib* (obligatory), *mubāḥ* (permissible or indifferent), *ḥarām* (prohibited), *mandūb* (recommended) and *makrūh* (reprehensible).[157]

(b) a judge shall interpret general concepts and discretionary expressions in accordance with the rules, principles (*mabādi'*), and general spirit of the *sharī'a*.

(c) a judge shall interpret the technical legal terms and the religious legal expressions in the light of basic legal principles or norms (*qawā'id uṣūliyya*), and the linguistic rules of the Islamic science of the *sharī'a* (*fiqh*).[158]

Section 2 resembles the interpretation, by the Egyptian Supreme Constitutional Court [SupCC] of Article 2 of the Egyptian Constitution in its amended version of May 22, 1980 to the effect that the principles of the *sharī'a* are "*the* [rather than *a*, under the original Article of the 1971 Constitution] principal source of legislation."[159] The Egyptian SupCC summarized the scope of Article 2 as follows:

> No legislative enactment may contravene the provisions of Islamic law, which are definite in terms of their immutability and their meaning. Because they are the only rules regarding which *ijtihād* is prohibited.

For the purpose of *ijtihād*, Bälz notes that the SupCC makes the basic distinction between immutable, "divine" sources of Islamic law, on the one hand, and "worldly" interpretation, on the other: only rules which belong to the immutable core of Islamic law are beyond the scope of *ijtihād*, because

> they represent the general principles (*al-mabādi' al-kulliyya*) of the Islamic *sharī'a* and its immutable sources, which cannot be interpreted or altered. Therefore it is beyond imagination, that their interpretation is subject to change depending on time and clime. They, therefore, cannot be amended. To deviate from them or to alter their meaning is not permissible.[160]

The Egyptian SupCC's interpretation of Article 2 of the Constitution corresponds in substance, technical formulation, and spirit to Section

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[157] Cf. Schacht, *Introduction*, 120ff.; Coulson, *History*, 83–84.

[158] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 25; cf. Gordon, *Legal Revolution*, 814–15; Safwat, *Islamic Laws*, 244–45; Köndgen, *Das islamisierte Strafrecht*, 129.

[159] Peters, *Divine Law*, 236 (emphasis added by Peters).

[160] See Bälz, *The Secular Reconstruction of Islamic Law*, 236 (the citations are from SupCC, May 18, 1996, 1031–32). For a discussion on *ijtihād*, see below, II.2.2.3.

2 of JudA, 1983. In this respect, Section 2 amounts to a constitutional provision making the validity of statutory provisions conditional on their conformity with the *sharīʿa*.

The Sudanese SupCC, consisting of members of the SupC Dr. ʿAlī Ibrāhīm al-Imām, Dr. al-Mukāshifī Ṭāhā al-Kabbāshī, Dr. Ibrāhīm Khālid and Aḥmad Maḥjūb Ḥājj Nūr, rejected on one occasion a petition to abrogate some statutory provisions of the Islamist legislation on grounds of unconstitutionality. The petition was concerned with the issue of full equality between men and women with respect to testimony. The petition was rejected on the formal grounds that the claimant had "no right, interest or direct involvement," that is, *locus standi*, the right of appearance in court, in the case under review. The court ruled that according to Article 9 of the Permament Constitution, the *sharīʿa* was a principal source for legislation and hence no substantive constitutional right had been violated by the Islamist legislation.[161]

Section 458(1)(a) of the PC, 1983, too instructs the judge, in interpreting provisions of that code, to ascertain that the provision applicable to the offense, especially an offense entailing Qurʾānic punishment (*ḥadd*), conforms to *sharʿī* standards. Subsection (5) instructs the judge not to interpret any provision in a manner contravening *sharʿī* basic principle or "root" (*aṣl*). This implies that the statutory provisions are subject to the normative control of the *sharīʿa* at the judge's discretion.

Likewise, Section 215(2) of the CrimPA, 1983 provides that the Attorney General is not permitted to terminate criminal proceedings under any circumstances if this contravenes the *sharīʿa*, and Section 257 restricts the authority of the President of the Republic to waive punishment, commute a sentence, or cancel a conviction of a crime if the action contravenes *sharʿī* rules.

Section 6(2) of the CivPA, 1983, too provides that on issues in which there are no statutory provisions, the courts will apply the *sharīʿa*, and also—and this is an essential difference from the JudA—principles established through court precedents in the Sudan, custom, justice (*ʿadāla*), and good conscience (*wijdān salīm*). In other words, the *sharīʿa* does not enjoy an exclusive status as a source of law, although it has priority over other sources. The legislator here

[161] *Al-Ṣaḥāfa*, November 4, 1984, p. 2 col. 4.

opens the way to alternative sources of law, in the order previously mentioned, in the event it proved impossible to find an appropriate provision in the *sharīʿa*. These sources were copied from Section 6(2) of the CivPA, 1974 (which was abrogated) with this difference: that there the legal precedents preceded the *sharīʿa*. This fusion of elements from various legal systems is liable to generate legal uncertainty.[162]

2.1.4. *The Incorporation of* Sharʿī *Norms into Statutory Legislation*
Another method of introducing the *sharīʿa* in the legal system is through incorporation of *sharʿī* principles or doctrines into the existing statutory legislation rather than the restoration of entire domains based on the uncodified *sharīʿa*. The technique of incorporation was intended to create the impression that traditional law was being reinstated, even though from a substantive point of view there need be no real conformity between the *sharʿī* term and its definition in the law.[163] The PC, 1983 provides numerous examples of this. This law is based mainly on the PC, 1974 which is ultimately based on the Indian penal code drafted by Lord McCaulay and greatly influenced by English law on the principles of criminal liability and the method of punishment, though it was not entirely alien to Islamic law and had been adapted to the special conditions obtaining in the Sudan.[164]

In *sharʿī* "penal" law there is a basic distinction between three categories of punishment, not all of which are in the realm of public law:[165]

(1) bodily harm and damage to property are offenses (*jināyāt*) creating liability for torts (a private claim for injury or damage), which is in the realm of private law (*ḥaqq ādamī*). They entail retribution (*qiṣāṣ*) or, alternatively, payment of blood price (*diya*).

(2) crimes against religion (*ḥaqq allāh*), which are in the realm of public law. These crimes are illicit intercourse (*zinā*); false accusation of illicit intercourse (*qadhf*); wine drinking (*shurb al-khamr*); theft (*sariqa*);

[162] Gordon, *Legal Revolution*, 801.
[163] Cf. Köndgen, *Das islamisierte Strafrecht*, 42f.
[164] Mustafa, *Common Law*, 46; Khalil, *Interview* of January 10, 1990; Köndgen, *Das islamisierte Strafrecht*, 91; An-Naʿim, *Reformation*, 127.
[165] Peters, *Criminal Law*, § 0.1–0.1.1.1, 0.1.3; *idem*, *Codification*, 211ff.; *idem*, *al-Ghazza*, 85; Schacht, *Introduction*, 175ff.; Anderson, *Homicide*, 811ff.; El Awa, *Punishment*, 1ff., 43ff., 69ff., 96ff.

and highway robbery (*ḥirāba, qaṭʿ al-ṭarīq*). They entail Qur'ānic punishments (*ḥudūd*): death (by lapidation, crucifixion, or the sword), mutilation, or flogging. According to the Mālikīs (and the Ḥanbalīs, but not the Ḥanafīs and Shāfiʿīs), apostasy (*ridda*) is also regarded as a crime that entails *ḥadd* punishment.[166]

(3) offenses that entail punishment at the discretion of the *qāḍī* (*taʿzīr*), in cases where imposition of Qur'ānic punishments is not possible. The discretionary punishments include reprimands, lashes, and imprisonment (*ḥabs*).[167]

Incorporation of *sharʿī* norms into the PC has blurred these categories to such an extent that the punishment is often incongruous with the offense in question, with the result that the original meaning of the *sharʿī* terms and definitions has been lost.[168] This policy seems to have been adopted with a view to extending the scope of Qur'ānic punishments to offenses falling outside the category of the traditional *ḥadd* crimes. To this end, the rules of evidence have been mitigated; thus, for instance, witnesses technically non-qualified under the *sharīʿa* as well as circumstantial evidence were considered admissible in the application of the *ḥadd* punishments.[169] We shall review below the results of the Islamization of the PC in relation to the degree of the normative integration of the two legal systems:

(1) The allocation of separate sections for the same offense, once in the sense of the PC, 1974, which entails statutory non-*sharʿī* punishment, and once in the *sharʿī* sense, which entails *sharʿī* punishment. An outstanding example of this situation is theft. Section 320(1) defines theft in the terms of the PC, 1974: taking an object from the possession of another person with evil intent and without his consent. Subsections (2–3) define "theft entailing Qur'ānic punishment" (*sariqa ḥaddiyya*) in common *sharʿī* terms such as *niṣāb*, the minimal value of a stolen object for which punishment is prescribed, and *ḥiyāza*, private possession, although other vital *sharʿī* doctrines pertaining to theft are missing.[170] Section 321 specifies separate punishments for

[166] Peters, *Criminal Law*, § 0.1.2.6; El-Awa, *Punishment*, 1–2.
[167] Al-Mahdī, *al-ʿUqūbāt*, 109ff.
[168] Cf. Köndgen, *Das islamisierte Strafrecht*, 42–44.
[169] Peters, *Islamization of Criminal Law*, 263–65.
[170] For further details, see below, IV.1.3.

the two different types of theft: subsection (1) imposes the punishments of flogging (an innovation when compared to the PC, 1974), a fine, or imprisonment, while subsection (2) imposes the Qur'ānic punishment of amputation (*qaṭ'*) for theft in the *shar'ī* sense. The "good defenses" based on *shubhāt* (doubts), spelled out in Section 323 which avert execution of Qur'ānic punishment, also conform with *shar'ī* norms: the blood relationship existing between the thief and the victim, between relatives within the forbidden degrees for marriage (*maḥārim*), between spouses, and "doubt as to private ownership" (*shubhat milk*), i.e., uncertainty on the part of the thief as to whether or not he was entitled to the stolen property.[171]

(2) The imposition of *shar'ī* punishments for non-*shar'ī* offenses, sometimes in addition to the original statutory punishments (flogging, fine, or imprisonment).[172] Thus, for example, Section 64 of the PC, which specifies punishments that may be imposed under the code, is actually the original list of punishments from the 1974 code to which *shar'ī* punishments have been mechanically added. The *shar'ī* "punishments" (some of which are rather within the domain of private law) are: execution (*i'dām*), with or without crucifixion (*ṣalb*); lapidation (*rajm*); alternate amputation (*al-qaṭ' min khilāf*); payment of blood price (*diya*), full or partial; retribution (*qiṣāṣ*) for injury; amputation of limbs (*qaṭ'*); and banishment (*nafy, taghrīb*). The punishments originating in the 1974 code are: fine (*gharāma*); expropriation of property (*tajrīd*); compensation (*ta'wīḍ*); flogging (*jald*); imprisonment (*sijn*); and confinement in institutions for moral correction.[173] Flogging is recognized as both a Qur'ānic and a discretionary punishment. In the *sharī'a*, imprisonment is not considered a punishment (unless imposed as a *ta'zīr*), but rather a coercive measure intended to encourage repentance (*tawba*).[174] However, the source of inspiration for these punishments is the 1974 code. The period of incarceration is left to the judge's discretion. Imprisonment combined with banishment is imposed only when this conforms with the *sharī'a* {Subsection (3)}. This punishment is a sort of synthesis of English law (imprisonment)

[171] Peters, *Criminal Law*, § 0.1.1.1 (*shubha*); Schacht, *Introduction*, 176, 179–80; Köndgen, *Das islamisierte Strafrecht*, 114.

[172] Cf. An-Na'im, *Reformation*, 127–28; Safwat, *Islamic Laws*, 243; Zein, *Religion, Legality, and the State*, 202.

[173] Köndgen, *Das islamisierte Strafrecht*, 42f.; 92.

[174] Schacht, *Introduction*, 175–76.

and Islamic law, which recognizes banishment as a preventive or punitive measure for reasons of public policy (*siyāsa*).[175] Sections 262–67 of the PC, 1983 that deal with causing an abortion with or without the woman's permission are taken from the PC, 1974.[176] Nevertheless, in addition to the imposition of flogging, a fine, or imprisonment, a perpetrator is also required to pay blood money (*diya*), which reflects a *sharʿī* conception of torts, as distinct from punishment, in the case of loss of human life (the foetus's or the mother's) (see, for example, Sections 262, 263). Section 267 provides that an action causing the death of a live foetus in the mother's womb is tantamount to the crime (*jarīma*) of homicide, and entails payment of blood money. There are cases in which blood money completely replaces non-*sharʿī* punishments.[177] Section 279 provides that a person causing deliberate harm while using a weapon or other dangerous means will be subject to payment of blood money, in addition to flogging and incarceration. Among the "dangerous means" are poison and animals, which in the *sharīʿa* belong to the category of indirect killing (*qatl bi-sabab*) entailing payment of a small amount of blood money.[178]

In the *sharīʿa*, highway robbery (*ḥirāba* or *qaṭʿ al-ṭarīq*) that results in homicide entails execution and crucifixion; highway robbery not resulting in homicide entails alternate amputation if property has been taken away. The PC applies this *ḥadd* to a variety of offenses which have nothing to do with taking property by force or causing homicide. Thus Section 318a provides that for running a brothel or performing forbidden sex acts, the offender is subject to flogging, a fine, or imprisonment. However, if he repeats the same offense, he is subject to execution, crucifixion, or alternate amputation. Similarly, Section 457 imposes the sanction reserved for highway robbery on participation in a criminal organization whose actions endanger persons, property, and disrupt public order, etc. In other words, *sharʿī* corporal punishments are apparently used by the regime as an instrument for controling domestic life.[179]

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[175] *Ibid.*, 187; Köndgen, *Das islamisierte Strafrecht*, 93.

[176] Köndgen, *Das islamisierte Strafrecht*, 99–100.

[177] See, for example, PC, 1983, Sections 264, 266, 267.

[178] For further details, see Anderson, *Homicide*, 821–22; Peters, *Criminal Law*, § 0.1.3.1.

[179] Peters, *Islamization of Criminal Law*, 248–49, 264, 270; *idem*, *Criminal Law*, § 0.1.2.2 (*ḥirāba*); al-Mahdī, *al-ʿUqūbāt*, 45–46; an-Naʿim, *Reformation*, 110, 129; Khālid, *al-Fajr al-kādhib*, 70; Schacht, *Introduction*, 180–81.

(3) Incorporation of *sharʿī* norms and terms in non-*sharʿī* offenses, and the imposition of *sharʿī* punishments for them.

Numerous examples of this technique may be found with offenses related to homicide. The definition of homicide (*qatl*) (Section 246) is taken from the PC, 1974. Section 247 lists three types of homicide with a clear *sharʿī* connotation: a. "deliberate" (*ʿamd*); b. "quasi-deliberate" (*shibh ʿamd*); and c. "accidental" (*khaṭaʾ*). However, the definition of these types of homicide in the following sections generally conforms with the definitions in the equivalent sections of the PC, 1974, and not with those of the *sharīʿa*. In other words, the legislator merely gave a veneer or—to use al-Ṣādiq al-Mahdī's wording—*shakl*, "outward appearance"[180] of *sharʿī* terminology to existing statutory offenses. For example, Section 248, in conformity with the 1974 code, provides that "deliberateness" can be established on the basis of two elements: a. intention (*qaṣd*) to commit homicide; b. knowledge that death is almost certainly (*rājiḥa*) a result of the action, and not just a possible result. All the schools except the Mālikī school hold that "deliberateness" can be established if both the act against the victim and his death were intended; intention to kill is established if the weapon or means used by the offender are intrinsically lethal.[181] The Mālikīs define deliberateness where an intrinsically lethal weapon is used. If no such weapon is used, intention can be established in circumstances where anger, hatred, and the like can be justly ascribed to the offender. Section 249, in conformity with the 1974 code, defines quasi-deliberate homicide as death caused in a state where loss of self-control occurs after a sudden severe provocation, whether the victim or another person is the cause of the provocation, as a result of a mistake (*khaṭaʾan*) or coincidence (*muṣādafatan*).[182] All the schools except the Mālikī school, which subsumes the category of quasi-deliberate homicide within that of deliberate homicide, classify under this rubric cases of death caused by an offender intending to hit but not to kill the victim, and in any case, without resorting to an intrinsically lethal weapon.[183] Homicide resulting from the use of more force than is necessary to defend one's person and property, and homicide resulting when a govern-

[180] Al-Mahdī, *al-Nizām*, 32–33.

[181] Anderson, *Homicide*, 819; Peters, *Criminal Law*, § 0.1.3.1; *idem, Murder on the Nile*, 103–4; *idem, al-Ghazza*, 85; al-Mahdī, *al-ʿUqūbāt*, 80ff., 129; El-Awa, *Punishment*, 71ff.

[182] Accidental homicide is a separate category in the *sharīʿa*. see below, 109.

[183] See Peters, *Criminal Law*, § 0.1.3.1; al-Mahdī, *al-ʿUqūbāt*, 84. See also below, 110.

ment employee exceeds his authority, are also classified in the code as quasi-deliberate homicide (Section 249) (were it not for the excesses specified in these two cases, homicide under these circumstances would not involve criminal liability at all) as is homicide under other circumstances falling outside the aforementioned *sharʿī* category. Under the *sharīʿa*, killing (or wounding) in defense of one's life, honor or property or one's family is lawful and does not entail retribution or liability for the blood price.[184] In other words, there is no direct connection between the content of the section and the *sharʿī* title given to it.[185]

Section 255, which was not included in the 1974 code, defines accidental (*khaṭaʾ*) homicide as death resulting from a misdeed or negligence not intended to cause death or injury to the victim. In the *sharʿī* category of accidental homicide, a distinction is made between an error in the intention (one intends to kill an animal and hits a Muslim) and an error in the act (one aims at a target and kills someone else by mistake).[186] The "error in an act" appears in Section 250, which discusses deliberate homicide (as defined in Section 248) in which the victim was a person other than the one the offender intended to kill.

Section 49 of the Road Traffic Act, 1983 [RdTA, 1983] provides payment of blood money in a case of accidental homicide or bodily damage. Accidental homicide is defined in terms of the statutory law: negligence on the part of the driver to take reasonable precaution to avoid an accident, etc. (Section 23). Under the uncodified *sharīʿa*, accidental homicide entails blood money and religious expiation (*kaffāra*), regardless of whether the killer was careful to take all the precautionary measures to avoid an accident, while under the statutory definition, if he took these precautionary measures, he is exempt from punishment.[187]

In any case, the punishments for the various kinds of homicide conform to the general principles of the *sharīʿa*, and this is the main substantive innovation in comparison with the PC, 1974.[188] Thus,

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[184] Peters, *Criminal Law*, § 0.1.1.1 (*ikrāh*).

[185] Cf. Köndgen, *Das islamisierte Strafrecht*, 42, 95.

[186] Anderson, *Homicide*, 821; Köndgen, *Das islamisierte Strafrecht*, 97; al-Mahdī, *al-ʿUqūbāt*, 83–84.

[187] Al-Mahdī, *al-Nizām*, 33; *idem*, *al-ʿUqūbāt*, 88; for details on *kaffāra*, see Schacht, *Introduction*, 181f.

[188] Köndgen, *Das islamisierte Strafrecht*, 96f.

for example, Sections 251 and 253 impose the death penalty or payment of blood money on a person who deliberately or quasi-deliberately causes someone's death. In the first instance, payment of blood money is made conditional on the consent of the blood avenger (*walī [al-dam]*). All the schools hold that in the case of deliberate homicide, the victim's relatives have the option of choosing between retribution and receipt of blood money. As noted above, authoritative opinion in the Mālikī school does not recognize the category of "quasi-deliberate," and subsumes it under the category of "deliberate" with the legal consequences that this category entails. The other three schools do not recognize the option of retribution in the case of undeliberate homicide.[189]

The PC does not address the question of depriving the killer of his rights to the victim's estate either in testate succession, that is, transmission of the estate by means of a will (if the killer is a legatee) or intestacy, that is, transmission of the estate in accordance with the *sharʿī* rules of inheritance (if he is a legal heir of the victim), which is a disputed issue among the schools. Likewise, there is no specific mention of the status of the *ʿāqila*—the killer's male agnates that are collectively responsible for his actions[190]—in the procedure for settling payment of blood money.[191] Section 252—which imposes the death penalty (with no option of paying blood money) for *qatl ghīla*, an aggravated form of deliberate homicide intended to facilitate a further offense, such as robbery or illicit intercourse—adopts the Mālikī school's view on this issue.[192] Section 256 imposes the requirement of paying blood money in cases of accidental homicide (without an option of retaliation), which is in conformity with the *sharīʿa*.[193]

Sections in the law that deal with causing bodily harm (*jirāḥ*) also phrase the offenses in *sharʿī* terms of deliberate and accidental, although the substance of the definitions conforms to the 1974 code. The punishments, in any event, conform to the *sharīʿa*. Thus, for example, Sections 273 and 274 define causing deliberate (*ʿamdan*) bodily harm

[189] For further details, see below, II.2.2.1.1.

[190] For details, see below, III.2.2.5.2.

[191] Anderson, *Homicide*, 819–20; Peters, *Criminal Law*, § 0.1.3; al-Mahdī, *al-ʿUqūbāt*, 83–84; Köndgen, *Das islamisierte Strafrecht*, 96–97; Nataloni, *Codice Penale*, 344. See below, IV.1.3.

[192] Anderson, *Africa*, 361; Peters, *Criminal Law* § 0.1.3. For further details, see below, II.2.2.1.1.

[193] Anderson, *Homicide*, 818.

or harm to a limb as an act which combines two elements: intention to injure and awareness that the action taken is likely to cause injury. There is no indication of the nature of the weapon used to carry out the act.[194] Section 279 discusses lethal weapons, most of which are modern (firearms, inflammable chemicals, explosives, and electricity), and the source of inspiration appears to be alien, not *sharʿī*. Section 275 defines accidental injury as any injury or amputation of a limb that is not intentional in the sense of the previous two sections. Needless to say, this definition is not in conformity with the *sharīʿa*. In any case, the legal consequences of causing bodily harm or amputation of a limb, deliberately or accidentally, are mainly in conformity with the *sharīʿa*: retaliation (*qiṣāṣ*) or payment of blood money, either partial (*nāqiṣa*) or full (*kāmila*).[195]

(4) Incorporation of *sharʿī* into non-*sharʿī* norms in both definitions of offenses and legal consequences.

These norms reflect opposing legal doctrines, and the gap between them is seemingly unbridgeable. Thus, for example, Section 281 provides that a person deliberately causing bodily harm (*jarḥ*) or the loss of limbs for various reasons (not anchored in the *sharīʿa*) spelled out in subsection (1), which deals in a general way with causing bodily harm (*adhan*), is subject to retaliation (*qiṣāṣ*) or the payment of blood money, as well as flogging, a fine, or imprisonment. Retaliation and payment of blood money are based on the concept of torts, which is in the realm of private law, while flogging, fines, and imprisonment reflect a public law concept of crime in which the idea of punishment is incorporated.[196]

The Sections in the law pertaining to illicit intercourse (*zinā*) are another example of the mixing of norms in the definitions of both offense and punishment. The traditional *sharʿī* definition of illicit intercourse was broadened to include not only intercourse out of wedlock (Section 316), rape (*ightiṣāb*), and sexual intercourse with a blood relative within the forbidden degrees for marriage (*maḥārim*) (Section 432), but also all kinds of forbidden sexual relations, whether through seduction, forgery of marriage documents, kidnapping, concealment,

[194] Cf. Peters, *Criminal Law*, § 0.1.3.1. See above, Section 248.

[195] See, for example, PC, Sections 277, 278, 284. Cf. Schacht, *Introduction*, 181–82, 185–86; Köndgen, *Das islamisierte Strafrecht*, 102f.

[196] Cf. Anderson, *Homicide*, 811, 812ff. Cf. Peters, *Criminal Law*, § 0.1–0.1.1.1.

and illegal detention, or through physical violence and sodomy. The punishment, which is dependent on the marital status and religion of the offender (cf. Sections 425, 428–31) conforms in its general principles with the *sharīʿa*, but incorporates alien principles as well. Section 318 provides that if an offender is "immune" (*muḥṣan*), that is, if he is married or was married and the marriage was consummated, he will be subject to execution, but it does not state explicitly that he will be executed by lapidation (*rajm*). A woman who is a virgin (*bikr*) will be subject to one hundred lashes, and a man who is a virgin will be subject to imprisonment and banishment (*taghrīb*) in addition. Banishment of men alone accords with the view of the Mālikī school. Imprisonment, on the other hand, is a norm anchored in old legislation.[197]

The sections in the law dealing with intoxication reflect a normative mixture in terms of both offenses and punishments. Section 443, which deals with wine drinking (*shurb al-khamr*), is entirely anchored in the *sharīʿa*, albeit by means of the eclectic expedient. A Muslim who commits this offense will be subject to the sanction of forty lashes (which corresponds with the Shāfiʿī view). The odor of wine alone is sufficient to prove the offense.[198] Section 444, on the other hand, expands the definition of wine drinking, incorporating principles from the 1974 code: for Muslims, offending the sensitivities of another person under the influence of alcohol entails forty lashes (as in the previous section), as well as incarceration. Section 445 explains that wine, for the purposes of Sections 443–49, is any drink which, when drunk in large quantities, causes intoxication. This definition applies also to wine made from dates or raisins (*nabīdh*), which is permissible according to the Ḥanafī school.[199]

Normative mixing is also resorted to in the provisions of the PC pertaining to interpretation. Section 458 sets up two systems of proof: one is *sharʿī*, and applies to offenses entailing *ḥadd* punishments, and the other is non-*sharʿī*, and applies to the other offenses in the code. However, the boundary between these two systems is fuzzy. Thus,

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[197] Schacht, *Zinā*, 1227–28; *idem*, *Introduction*, 177, 178f.; Anderson, *Africa*, 380; Peters, *Criminal Law*, § 0.1.2.3; Köndgen, *Das islamisierte Strafrecht*, 104f. For further details, see below, II.2.2.1.1.

[198] Schacht, *Introduction*, 179; Anderson, *Africa*, 375; Peters, *Criminal Law*, § 0.1.2.5; Köndgen, *Das islamisierte Strafrecht*, 111f. For further details see, below, II.2.2.1.1.

[199] Anderson, *Africa*, 375. Cf. *ha-Mizrah he-Hadash*, 19 (1969), 224.

for example, Section 458(1)(a) provides that proof of the offenses, especially those entailing *ḥadd* punishments, must be in accordance with *sharʿī* standards. Similarly, subsection (c) provides that for any offense entailing *ḥadd*, the process of establishing *sharʿī* proof (*bayyina*) should be fully exhausted, and that doubt—any reasonable doubt—averts punishment (*yudraʾ al-ḥadd biʾl-shubha*). It is not clear whether this applies only to offenses that entail *ḥadd* punishments according to the *sharīʿa*, or also to those that do so by virtue of the code. Averting execution of *ḥadd* punishment on account of doubt is a *sharʿī* norm, but it appears that "reasonable doubt" is an alien norm that in actual fact gives the judge wide discretion exceeding that given to him by the *sharīʿa*.[200]

Section 458(3) of the code provides that if execution of *ḥadd* punishment is averted because of doubt, it is permissible to impose any other discretionary punishment (*ʿuqūba taʿzīriyya*), even if this is not stated explicitly in the code. Moreover, a lacuna in the code does not avert the imposition of *ḥadd* punishment. In other words, the section creates a state of legal uncertainty by granting the judge great freedom to impose discretionary punishments in situations where he is prevented from imposing *ḥadd* punishment for offenses entailing such punishments according to the *sharīʿa* or under the code. What is even more serious is that the judge is granted discretion to impose *ḥadd* punishments for offenses not even mentioned in the code, that is, offenses that have not undergone a process of codification. Köndgen rightly claims that this harms the principle that punishment should not be administered for an offense not anchored in the law. As we will see below, this section was actually used in the trial of Maḥmūd Ṭāhā, who was executed for the offense of apostasy (*ridda*), which does not exist in the code.[201]

Section 458(5) provides that no statutory provision should be interpreted in a way that contradicts a *sharʿī* "root," basic principle or basic legal norm (*aṣl*). On the face of it, this means that the section also applies to provisions whose source of inspiration is extraneous to the *sharīʿa*. This may cause confusion, since many sections of the code—both definitions of offenses and punishments for them—were

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[200] Peters, *Criminal Law*, § 0.1.1.1 (*shubha*); Köndgen, *Das islamisierte Strafrecht*, 128. See below, IV.4.2.

[201] Köndgen, *Das islamisierte Strafrecht*, 128. See below, III.2.2.2.1.

copied from the PC, 1974. Other examples of normative mixing can be found in the CivTA, 1984. As we shall see below, this act is based mainly on the Jordanian civil code, which ultimately draws its inspiration from the Mejelle, the Ottoman civil code of 1876. Section 3 of the act instructs the courts, in applying statutory provisions, to interpret technical terms mentioned in the act in the light of *sharʿī* principles. These principles also come into force in the event of a lacuna in the act. And in Section 5 of the act there is a long list of fundamental principles intended to guide the courts in applying the statutory provisions. Many of them can be identified in the Mejelle with slight changes in wording and style.[202] There are cases, however, in which *sharʿī* norms have been merged with other norms. Thus, for example, Section 165(1) defines the term "prohibited enrichment" (*tharāʾ ḥarām*), which is taken from a *sharʿī* context of usury,[203] in terms borrowed partly from the *sharīʿa* and partly from existing statutory legislation. Prohibited enrichment is defined as enrichment achieved as a result of unlawful appropriation (*ghaṣb*) of another person's property, or through a void contract, or in violation of the statutory provisions. Subsection (a) specifies the means of attaining prohibited enrichment: open robbery (*nahb*), theft (*sariqa*), fleecing (*ibtizāz*), taking an object through fraud (*iḥtiyāl*), taking an object while its owner's attention is diverted (*ikhtilās*), bribery (*rishwa*), smuggling (*tahrīb*), forgery (*tazwīr*), and the like, and any action that violates this law or contradicts good conscience (*wijdān salīm*). Several of these terms may be identified in the uncodified *sharīʿa*, though sometimes with a slightly different meaning,[204] but they originate in the existing statutory legislation, which derives in turn from different sources.[205] Similarly, Section 237 of the PC, in describing games of hazard (*maysir*) forbidden by the Qurʾān,[206] uses a wide-ranging definition that includes gambling houses, lotteries, and the like, even though sanctions against them are not anchored in the *sharīʿa*.

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[202] See below, II.2.2.1.2.
[203] Schacht, *Introduction*, 145–46.
[204] *Ibid.*, 180.
[205] For a more detailed explanation, see subsections (b)–(d).
[206] Schacht, *Introduction*, 12f., 146. See below, IV.2.2.2.1.

2.2. *Methods of Identifying* Sharʿī *Doctrines for Introduction into Statutory Provisions*

2.2.1. *The Eclectic Expedient*

2.2.1.1. Selecting from Various Interpretations of the *Fiqh*

The main method of reinstating the *sharīʿa* through statutory codification was the eclectic expedient (*takhayyur*). The main idea of this method is to select a doctrine from the legal heritage of the dominant school or other schools; from the opinions of jurists who preceded the consolidation of the schools; or from later jurists, provided this doctrine conforms with the objective to which the legislator aspires. The theoretical justification for this expedient is the ruler's authority to instruct the *qāḍī*, his delegate, to apply a certain doctrine and ignore others, while bearing in mind considerations of public policy (*siyāsa*). Additional support for this expedient was found in the idea that Muslims are not bound by a particular school; indeed, in major cities in which courts representing different schools (sometimes as many as four) functioned simultaneously, people tended to resort to the court whose doctrine assured them the most favorable results on the issue on which they were bringing suit.[207] Muḥammad ʿAbduh, leader of the Modernists in Islam, seems to have been the source of inspiration for the application of the eclectic expedient; he was guided by pragmatic considerations in suggesting reforms in the *sharʿī* judiciary in Egypt.[208]

Al-Kabbāshī defines the eclectic expedient as *ijtihād fiqhī*, legal reasoning, or as shaping a legal rule without being bound by a particular school and, nevertheless, not going beyond the scene of the existing legal interpretations (*ijtihādāt fiqhiyya*),[209] that is, the various legal provisions as consolidated by *taqlīd*. The Explanatory Note to the PC, 1983 argues that although "the differences of opinions between the jurists is blessing for mankind" (*ikhtilāf al-fuqahāʾ raḥma liʾl-ʿibād*), once the legislator selects an adequate opinion from the legal heritage of various schools by means of such an "*ijtihād*" and absorbs it in a statutory provision, the judge is bound by that

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[207] Paret, *Innerislamischer Pluralismus*, 523–29; Anderson, *Law Reform*, 13; Anderson, *Africa* 304; an-Naʿim, *Reformation*, 45. Cf. (in Egypt) Peters, *Divine Law*, 237.

[208] ʿAbduh, *Taqrīr*, 15.

[209] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 15, 137.

provision.[210] This expedient was widely applied in the preparation of the Mejelle, the Ottoman civil code, and in the Middle East and North Africa, in modern legislation on matters of personal status, succession, and *waqf*. The Mejelle's range of selection was limited to the Ḥanafī school, though not necessarily to the authoritative view. There were cases in which a non-authoritative view was adopted for the sake of the public interest.[211] With other laws, the legislator did not hesitate to resort to schools besides the dominant one, including even Shīʿī doctrine.[212]

Although Sudan's Muslims belong mostly to the Mālikī school, the Ḥanafī school enjoys preeminence.[213] This is the legacy of Turco-Egyptian rule in the Sudan; it lasted into the period of the Anglo-Egyptian Condominium, and continued even after Sudan gained its independence. The eclectic expedient was applied in the Sudan in the period of the Anglo-Egyptian Condominium through the "legal circulars" issued by the Grand Qāḍī in which he instructed *qāḍī*s to apply a doctrine other than that dominant within the Ḥanafī school. This practice continued after independence, until the abolition of the institution of Grand Qāḍī in 1979.

The Islamist legislation in the Sudan is not limited to the realm of the Ḥanafī school. The legislator expanded the realm of choice to the four Sunnī schools, and according to al-Kabbāshī, did not hesitate to adopt legal opinions that had been current at any time in the past, going as far back as the Ancestors (*al-salaf*), the Companions of the Prophet (*ṣaḥāba, aṣḥāb*), the Followers (*tābiʿūn*), that is, the second generation after the Companions who had met the Prophet, and the Founders (Imāms) of the schools of law. The reason for this freedom is that the Ḥanafī school is not sufficient, in terms of legal options, to meet the changing and constantly developing needs of the time. The legislator was guided by the public interest (*maṣlaḥa*) and the need to adapt the legal norm to the multi-tribal makeup of the Sudan, where customs and traditions differ from tribe to tribe. In Kabbāshī's opinion, in these circumstances there is no place for fanatical adherence to one school or another.[214] Section

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[210] *Al-Ṣaḥāfa*, October 16, 1983, p. 5 col. 2.

[211] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 13, 122, 130.

[212] Coulson, *History*, 205, 222; Anderson, *Law Reform*, 151–52.

[213] See above, II.1.1.

[214] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 14, 122, 130; cf. *al-Ṣāḥāfa*, October 22, 1983, p. 6 col. 5 (Yūsuf al-Khalīfa Abū Bakr, Head of the Supreme Council for Religious Affairs and Waqf).

307 of the CrimPA, 1983, authorizes the Chief Justice (*ra'īs al-qaḍā'*), who replaced the Grand Qāḍī following the abolition of the office,[215] to issue from time to time circulars (*manshūrāt*) setting down the doctrine of the particular school or schools that the courts will be required to adopt when applying Islamist provisions. This section provides the juridical basis for the eclectic expedient as a means for adapting criminal law to the changing needs of Sudanese society. It does so by requiring civil judges to honor these instructions even if they deviate from the Ḥanafī school by which the judges are bound.[216]

Section 16(a) of the Second Schedule to the CivPA, 1983, provides that on matters of personal status requiring application of the *sharī'a*, this application will be in accordance with the most authoritative opinion of the Ḥanafī *fuqahā'*. However, an exception is to be made concerning questions on which the Supreme Court [SupC], sitting as a court chamber on matters of personal status, issues legal circulars requiring the application of non-authoritative doctrines of the Ḥanafī *fuqahā'* or doctrines of *fuqahā'* from other schools.[217] In other words, this section expands the juridical basis for application of the eclectic expedient to matters of personal status. This expedient was intended to allow the domain of family law, which is the very core of the *sharī'a*, to be adapted to changing conditions in the post-colonial period, without having to resort to explicit direct statutory legislation, liable to elicit objections from Muslim orthodoxy. The SupC has exclusive authority to adjust the *sharī'a* in this way to changing circumstances; this authority is anchored in the tradition of the legal precedent dating back to the period of the Anglo-Egyptian condominium, which is, of course, alien to Islamic law. The section cited from the Second Schedule to the CivPA is in the spirit of Section 6 of the *Sharī'a* Courts Act, 1967, which replaced Section 53 of the Muhammadan Law Courts Organization and Procedure Regulations, 1915, which in turn replaced Section 8 of the Muhammadan Law Courts Ordinance, 1902. The difference between the section from the Second Schedule to the CivPA and Section 6 of the *Sharī'a* Courts Act, 1967 is that prior to 1979, the authority to issue legal circulars was vested in the Grand Qāḍī.[218]

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[215] See above, II.1.1.
[216] Cf. Köndgen, *Das islamisierte Strafrecht*, 130.
[217] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 151.
[218] Al-Ḍarīr, *Muḥādarāt*, 5; Zein, *Religion, Legality, and State*, 201.

Naturally, at the level of legislation, it would seem that there is a very clear preference for the Mālikī school, at least in criminal legislation. The PC, 1983 provides numerous examples of the application of the eclectic expedient (*takhayyur* and *talfīq*) in Islamist legislation. Section 252 imposes the death penalty for *qatl ghīla*. As previously noted, this is an aggravated form of deliberate homicide intended to facilitate the commission of another offense, such as robbery or illicit intercourse, and it contains an element of cunning, as when a murderer persuades his victim to accompany him to a certain place and then commits his crime. With this kind of homicide there can be no pardon or renunciation of retribution by the victim's relatives. This section reflects the view of the Mālikī school.[219]

On the matter of blood money the PC does not make a distinction between men and women. In most of the schools the predominant opinion about blood money for a woman is that it is half the amount paid for a man. In cases of grevious bodily harm, the Mālikīs (and following them al-Shāfiʿī) hold that this norm (i.e., half the amount due for a man) applies only when the actual amount due for the harm exceeds one-third of the full blood money; if it is less, then the blood money for a woman equals that for a man. This egalitarian norm in the statutory provision derives its inspiration from the view of the Mālikīs.[220]

The sections in the PC that deal with illicit intercourse (*zinā*) provide additional examples of *takhayyur*. Section 316(2)—in accordance with the Mālikī law—states that the offense of illicit intercourse may be proved in one of the following ways: the testimony of four eyewitnesses to the very act; an explicit and unretracted admission; and pregnancy [of an unmarried woman]. The Ḥanafīs (and Ḥanbalīs) hold that one admission is insufficient, and that it must be repeated on four separate occasions. Moreover, all schools hold that the admission may be retracted. Proof by means of the pregnancy of an unmarried woman who had sexual relations in circumstances in which good faith was lacking is recognized by the Mālikī school, but not by the Ḥanafī school (or the Shāfiʿī school). As for the severity of the punishment, Section 318—again, in accordance with the Mālikī law—

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[219] Anderson, *Africa*, 361; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 16; Köndgen, *Das islamisierte Strafrecht*, 97. See above, II.2.1.4.

[220] Tyan, *Diya*, 341ii; Anderson, *Africa*, 360–61; Peters, *Criminal Law*, § 0.1.3.3.3; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 16.

makes a distinction on the basis of the offender's religion and gender: (1) A Muslim (male or female) who has sinned will be subject to the death penalty if "immune" (*muḥṣan*), that is, has previously consummated a marriage, and one hundred lashes if the person is a virgin (*bikr*). (2) A male virgin will be subject to imprisonment and banishment for a year, in addition to lashes. The Mālikīs (but not the Ḥanafīs) hold that only men are subject to exile. The exemption given to non-Muslims from the two *sharʿī* sanctions (lapidation and lashes) is also based on the Mālikī school.[221]

Several vital preconditions, recognized by all schools, are missing from the definition of theft entailing Qur'ānic punishment (*sariqa ḥaddiyya*) under Section 320(2). These are clandestine (*khafā'*, *khafiyya*, *sitr*) removal of the article, private ownership of the article, and appropriate custody (*ḥirz*) of the stolen goods on the part of its owner (e.g., in a closed house) or under guard. (In addition, no reference is made in the PC concerning the issue of restoration of the stolen object and its legal and financial consequences.) The omission of these preconditions expands the definition of theft to *nahb*, open robbery; to *ikhtilās*, snatching something without the owner noticing (as in pick pocketing), and embezzlement (*khiyāna*) of public property. None of these are included in the traditional *sharʿī* definition of theft, and thus they do not entail *ḥadd* punishments. As will be seen below, al-Kabbāshī, the President of the CrimCAp of Khartoum, derives support for this "stretching" of the definition of theft from the view of some Ẓāhirī *fuqahā'*, who adopt literal, external interpretation of the Qur'ānic verse relating to theft (5:38).[222] The *niṣāb*, the minimal value of the stolen object, which is a precondition for effecting amputation in the PC, is one-quarter dinar of gold or three dirhams of silver. This, too, is based on the view of the Mālikī school. According to the Ḥanafīs, it is ten dirhams.[223]

Ḥirāba and *muḥāraba* are terms synonymous with *qaṭʿ al-ṭarīq*, highway robbery, which is a combination of theft and homicide. Murder

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[221] Peters, *Criminal Law*, § 0.1.2.3; Schacht, *Zinā*, 1227ii, Schacht, *Introduction*, 127, 178f.; Anderson, *Africa*, 380; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 15, 24, 122; Köndgen, *Das islamisierte Strafrecht*, 104ff.; Nataloni, *Codice Penale*, 348.

[222] "And the thief, male and female: cut off the hands of both, as a recompense for what they have earned, and a punishment exemplary from God." See below, III.2.1.

[223] Peters, *Criminal Law*, § 0.1.2.1; Heffening, *Sāriḳ*, 173ii–174i; Schacht, *Introduction*, 160, 179–80; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 15, 74–75, 122, 130, 135, 137–38, 143; Anderson, *Africa*, 374, 361; Köndgen, *Das islamisierte Strafrecht*, 113–17.

committed in the course of highway robbery is closer to a crime than to a tort, and therefore the punishment is harsher. There is no possibility of a pardon or of settlement of the dispute through payment of compensation or blood money to the blood relatives. Punishments vary in accordance with the circumstances of the case: for plundering—as long as the share of each participant is not less than the *niṣāb* applying to theft—the offender will be subject to the amputation of his right hand and left foot. If the only offense committed was murder, he will be subject to execution by the sword. If he committed both robbery and murder, he will be subject to execution by crucifixion, and his crucified body will be displayed in public for three days. If the criminal repents before arrest, the *ḥadd* punishment is averted, but the claim for compensation and retaliation remains intact.[224]

The PC has no section that explicitly deals with *ḥirāba*, though it is possible to find the Qur'ānic sanctions applying to this crime, alongside non-*sharʿī* statutory sanctions, in various sections, as we shall see later. Al-Kabbāshī denies al-Ṣādiq al-Mahdī's claim that the PC is based on a statutory, i.e., positive law (*qānūn waḍʿī*) that has nothing to do with the *sharīʿa*; he claims that the essential elements of *ḥirāba* have been absorbed, through the eclectic expedient, into various sections of the PC; for instance, Section 332 deals with *nahb* in terms of "armed theft," that is, theft accompanied by homicide or damage or the threat thereof. Section 318a deals with running an establishment for the perpetration of sex crimes. According to the Mālikī school, desecrating a woman's honor in sexual terms is tantamount to *ḥirāba*, even though according to the PC, only a *repeated* offense entails execution, crucifixion, and amputation of alternate limbs. Section 457 deals with the offense of organizing crime networks. Al-Kabbāshī claims that even this section concerns *ḥirāba* because of the element of group organization involved. Sections 393–96, 398, and 399 deal with crimes involving ambush (*al-taʿaddī maʿa al-taraṣṣud*), or assault (*saṭw*) at night for various purposes. They, too, include elements of *ḥirāba*: intimidation and terror under cover of darkness. However, they are applicable in inhabited areas and not only in the desert, as required under traditional doctrine. Al-Kabbāshī finds support for this deviation in the writings of the

[224] Heffening, *Sārik*, 173ii–174i; Schacht, *Introduction*, 180–81; Anderson, *Africa*, 363; Peters, *Criminal Law*, § 0.1.2.2.

Ḥanbalī, Ẓāhirī, Mālikī, and Shāfiʿī *fuqahāʾ*, as well as of jurists such as al-Awzāʿī (d. 157/774), Layth b. Saʿd (175/791), and even Abū Yūsuf (d. 182/798), who, unlike other Ḥanafīs, do not insist that *ḥirāba* can take place only in the desert and at a distance from an inhabited area. Section 362 deals with *nahb* through fraud (*iḥtiyāl, ghashsh, khadīʿa*). Al-Kabbāshī also includes this offense in *ḥirāba*, basing himself on the Mālikīs, the Shāfiʿīs, and the Ẓāhirīs, who hold that the bearing of arms is not a precondition for *ḥirāba*, since it is possible, through fraud, to achieve the same results: homicide, the taking of property, threats, and intimidation. Similarly, the Mālikīs and the Ẓāhirīs, unlike the Ḥanafīs, the Shāfiʿīs, and the Ḥanbalīs, do not consider publicness (*mujāhara*) to be a precondition for *ḥirāba*. The Mālikīs exclude the use of coercion (*qahr*) from the set of preconditions. In sum, all the sections mentioned above—according to al-Kabbāshī, who relies mainly on the Mālikī and Ẓāhirī schools—have elements of *ḥirāba: nahb* is tantamount to armed theft; running an establishment for the perpetration of sex crimes may be regarded as harmful to a woman's honor; and this applies to organized crime as well as the various kinds of assault that need not transpire in the desert or at some distance from an inhabited area and do not require publicness, coercion, or the use of weapons.[225]

Section 443 of the PC, 1983 states that the sanction against Muslims for drinking wine is forty lashes. This number reflects the view of the Shāfiʿī school, which is unique in its liberal approach to this issue. The other three schools hold that the sanction applicable to a free, mature, sane Muslim who has committed this offense is eighty lashes (forty for a slave).[226] The EvA, 1983, which deals with methods of proof in matters concerning civil and criminal law, also provides several examples of the application of the eclectic expedient in the Islamist legislation. Thus the Sudanese legislator "stretched" the definition of circumstantial evidence (*qarīna*) as a means of proving offenses entailing Qur'ānic punishments, and also accepted the testimony of women in matters involving illicit intercourse and other offenses, if this was necessary in order to prove them. It did this mainly by relying on the view of the Mālikī and Ḥanbalī schools.[227]

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[225] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 16, 140–45.

[226] Anderson, *Africa*, 375; Schacht, *Introduction*, 179; Peters, *Criminal Law*, § 0.1.2.5; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 19; Köndgen, *Das islamisierte Strafrecht*, 111–12.

[227] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 24.

The definitions of homicide in the PC provide a clear example of the eclectic expedient of *talfīq*, patching. This is a sophisticated version of *takhayyur*: legal doctrines culled from different schools and often contradicting each other have been brought together within the framework of a set of statutory provisions dealing with one specific topic. The expedient is guided by pure pragmatic considerations. As noted previously, Section 247 of the code makes a distinction between three types of homicide (*qatl*): deliberate (*'amd*), quasi-deliberate (*shibh 'amd*), and accidental (*khaṭa'*). These categories, which in traditional law are distinguished from one another by tests of intention to kill a particular person and of the weapon used to this end,[228] are acceptable to all schools except the Mālikī, in which the dominant opinion (shared by Mālik and other jurists) rejects the category of "quasi-deliberate," and recognizes only the other two. Even those Mālikī jurists (a minority), who in theory recognize the intermediate category, in effect assimilate it into the category of "deliberate" which implies that the option of retaliation is still available. According to the authoritative opinion in three of the schools (the Mālikī school being the exception), only in the case of deliberate homicide is there an option of retaliation, while in other cases, the conflict must be settled by payment of blood money. Deliberate homicide (provided the victim's relatives have chosen to forego retaliation and quasi-deliberate homicide) entail enhanced blood money (*diya mughallaẓa*), that is, one hundred camels of more valuable specification than in the case of accidental homicide.[229]

Nevertheless, the sanction set down in the PC for quasi-deliberate homicide does not conform to the position of three of the schools, as noted previously. Section 253 allows the court discretion to punish the offender by execution or, alternatively, to require him to pay blood money. In other words, even in this category of "quasi-deliberate" there is an option of retaliation (albeit at the court's discretion, which reflects a fundamental principle of criminal punishment from the realm of public law).[230] In the PC the only difference between deliberate homicide and quasi-deliberate homicide in terms of legal consequences is that in the first instance the payment of blood money is conditional on the consent of the victim's avenger (*walī* [*al-dam*])

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[228] See above, II.2.1.4.
[229] Anderson, *Homicide*, 818, 821; Peters, *Criminal Law*, § 0.1.3.3.2; Tyan, *Diya*, 341.
[230] See below, IV.1.2 and 4.2.

(Section 251). Al-Kabbāshī explains that in the case of quasi-deliberate homicide, the sanction of execution, along with payment of blood money, is a combination, a synthesis of the position of the Mālikī school, which allows the option of retaliation, and the position of most of the *fuqahā'* (from other schools), who require that the dispute be settled through payment of blood money.[231] In effect, we are here dealing with the eclectic expedient of *talfīq*: on the issue of the offense of quasi-deliberate homicide (though its definition does not correspond to the uncodified *sharīʿa*),[232] the view of the Ḥanafī school has been adopted over that of the Mālikī school in its authoritative version, and on the issue of legal consequences, the view of the Mālikī school has been adopted over that of the Ḥanafī and other schools. The combination of these two doctrines, perhaps intended to appease jurists from all schools, is not supported by any of the schools except, as noted, the minority opinion in the Mālikī school. The expedient of *talfīq* is applied in the modern reformist legislation in the Arab countries. The best example of this is to be found in the Egyptian *Waqf* Law of 1946.[233]

2.2.1.2. Selecting from Modern Codifications of Islamic Law

Another method of reinstating the *sharīʿa* is the adoption of *sharʿī* norms from modern codifications in Arab countries. Already in 1970 the Minister of Justice advocated the adoption of a set of codes from Egypt, Syria, or Iraq that would cover various domains of law. He seems to have been inspired by the concern to replace the common law which was applicable to these domains.[234] The work of adapting the *sharīʿa* to the conditions of modern times had already been carried out in the Arab countries by codification, either through use of the eclectic expedient[235] or through other methods. The only task left for the Sudanese legislator was to select from these compilations the material required to adapt the *sharīʿa* to the particular conditions obtaining in the Sudan. A classic example of this technique is the CivTA, 1984 which is based mainly on the Jordanian Civil Code of 1976, and to a certain extent on the Iraqi Civil Code. Both of

[231] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 16. Cf. Köndgen, *Das islamisierte Strafrecht*, 96–97.
[232] See above, II.2.1.4.
[233] Coulson, *History*, 199–200; Anderson, *Legal Reform*, 58; Hallaq, *Talfīḳ*; Layish, *Talfīḳ*.
[234] Mustafa, *Common Law*, 243–44.
[235] See above, II.2.2.1.1.

these in turn are derived from the Mejelle, the Ottoman civil code of 1876, which is based on the *takhayyur* method, exclusively within the Ḥanafī doctrine, and to a certain extent also on the civil codes of other Arab countries, such as Egypt,[236] which are less committed to the *sharīʿa* than is the Mejelle. Well-known sections of the Mejelle were copied verbatim into the Sudanese civil code.

As we shall see below, Section 3 of the CivTA instructs the courts—in the event of a lacuna in the law—to decide in accordance with *sharʿī* principles. Nevertheless, in order to spare the court the inconvenience of identifying these principles in the extensive religious legal literature, with all its intricacies, the legislator assembled in Section 5 a long list of fundamental principles (*qawāʿid asāsiyya*) intended to guide the courts in applying the provisions.[237] Many of these are taken from the Mejelle with slight changes in wording and style. Thus, for example, Section 5(b) states: "One should not eliminate damage by causing similar damage" (*al-ḍarar lā yazāl bi-mithlihi*) (cf. Mejelle, Section 25), and in another form: "One should not cause damage, and there is no reciprocity in causing damage" (*lā ḍarar wa-lā ḍirār*) (cf. Mejelle, Section 19). In the context of contracts, "damage" means unfair loss caused to one of the parties.[238] Section 5(j) states: "Custom is an arbitrator whether it [the custom] is general or particular [to a specific area]" (*al-ʿāda muḥakkama ʿāmma kānat aw khāṣṣa*). We have here a resort to custom as a source of law in the absence of an explicit provision in the law (cf. Mejelle, Section 36). Section 5(h) states: "Hardship brings about leniency (*al-mashaqqa tajlib al-taysīr*) (cf. Mejelle, Section 17). Section 5(w) states: "One cannot deny that as times change, legal rules change" (*lā yunkar taghayyur al-aḥkām bi-taghayyur al-azmān*) (cf. Mejelle, Section 39). Section 5(z) states: "Everything known according to custom is as if stipulated [by the parties]" (*al-taʿyīn biʾl-ʿurf ka-taʿyīn biʾl-sharṭ*), or, in other words, custom is tantamount to an agreed stipulation between the parties (cf. Mejelle, Section 45). Section 5(dh) states: "Necessity makes lawful the prohibited, provided it does not invalidate the right of another party" (*al-ḍarūrāt tubīḥ al-maḥẓūrāt ʿalā anna al-iḍṭirār lā yubṭil ḥaqq al-ghayr*) (cf. Mejelle, Sections 21 and 33). It is evident that some of these rules are intended to demonstrate the importance of custom,

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[236] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 19.
[237] *Ibid.*, 20.
[238] Coulson, *Commercial Law*, 91; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 20.

the nature of which changes, as a mechanism for adapting the *sharīʿa* to the conditions of time and place.

The Sudanese Civil Code of 1971, which was abrogated in 1973 (when the Civil Code of 1929 was reinstated), drew inspiration from the civil codes of Egypt, Iraq, Libya, Kuwait, Syria, and other countries. The impact of the *sharīʿa* on these codes was very limited because the Mejelle was not in force in these countries, except for Iraq.[239]

2.2.2. *Direct Resort to the Qurʾān, the* Sunna, *and the Uncodified* Sharīʿa In analyzing the characteristics of the Islamist legislation, al-Kabbāshī states that the principle guiding the Sudanese legislator in codifying the *sharīʿa* was that provisions must be based on the Qurʾān and the *sunna*, as well as the *fiqh* of the ancient jurists (dating back to the Medinese period). In other words, it would appear that we have here a trend toward preferring the textual sources of the *uṣūl al-fiqh* and the early *fiqh*, to the systematically established law of the four orthodox schools.[240] This trend finds explicit expression in Section 3(a) of the JudA, 1983 which provides that notwithstanding any provisions in any other law, and in the absence of a legislative provision regulating an event, that is, in the event of a lacuna, a judge shall apply the uncodified *sharīʿa* as established in the texts of the Qurʾān and the *sunna*. Section 3 of the CivTA, 1984 follows the JudA stating that, in applying the provisions of the code and interpreting the legal terms and expressions in it, and also in the event of a lacuna in the code, the courts are to be guided by the principles (*mabādiʾ*) of the *sharīʿa* and the provisions of the JudA. This implies that under these circumstances the Qurʾān and the *ḥadīth*, and the uncodified *sharīʿa* have been elevated to the status of a source of law.[241]

To illustrate his assertion regarding the Qurʾān and the *sunna*, al-Kabbāshī points out that Qurʾānic punishments, which were absorbed into the PC, 1983, are the same punishments mentioned in the Qurʾān and the Prophetic *sunna* for offenses such as illicit intercourse, false accusation of illicit intercourse (*qadhf*), theft, highway robbery, and intoxication {*sukr* (*shurb al-khamr*)}. The punishments are listed in Section 64, and, in the context of the various offenses, from

[239] Gordon, *Legal Revolution*, 807; Safwat, *Islamic Laws*, 240–43; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 19.

[240] Cf. Ḥasan al-Turābī's legal methodology above, II.1.3.

[241] Cf. Köndgen, *Das islamisierte Strafrecht*, 129.

Section 251 onward. Similarly, he claims that retaliatory sanctions (*qiṣāṣ*) in the law are based on verses from the Qur'ān.[242] Al-Kabbāshī's assertion is perhaps valid only in the sense that one may find normative support in the Qur'ān for offenses and punishments. As we have already noted, sometimes there is no conformity, from a *sharʿī* point of view, between the statutory offense and the punishment. In terms of legal norm it appears that the Sudanese legislator does not rely directly on the Qur'ān, but on jurists from the various Sunnī schools, while making use of the technique of *takhayyur*.[243] There are, moreover, cases in which the Qur'ānic norm is integrated into a norm from the statutory legislation that preceded the Islamist legislation.[244]

Similarly, al-Kabbāshī seeks to anchor the provision concerning prohibited enrichment from Section 165 of the CivTA, 1984 in *ḥadīth*s attributed to the Prophet and his Companions. Here, too, there is support for the term itself in the *ḥadīth*, but the section is worded with the terminology of the statute.[245] Al-Kabbāshī also claims that the EvA, 1983 derives from the textual sources of the Qur'ān and the Prophetic *sunna*, as well as from the Venerable Forefathers (*al-salaf al-ṣāliḥ*), especially 'Umar b. al-Khaṭṭāb. However, he, too, acknowledges that the law is anchored in legal precedents from the Sudanese legal system, accumulated over a long period of time, but only those that do not contravene the *sharīʿa*.[246]

Al-Kabbāshī claims also that even the JudA (Section 3 of which grants the right of *ijtihād* to a civil judge in the event of a lacuna in the statute)[247] draws its inspiration from a Qur'ānic verse and a well-known *ḥadīth*. The verse (Q. 4:59) instructs that differences of opinion on any issue should be brought before Allāh and his messenger; the *ḥadīth* states that in the absence of a provision in the Qur'ān, the Prophetic *sunna* should be consulted, and in the absence of a provision there, resort should be made to *ijtihād*.[248]

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[242] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 15–16. Q. 5:45: "And we prescribed for them therein: The life for life, and the eye for the eye, and the nose for the nose, and the ear for the ear, and the tooth for the tooth, and for wounds retaliation [. . .]."; 2:179: "And there is life for you in retaliation, [. . .]."

[243] See above, II.2.2.1.1.

[244] See above, II.2.1.4.

[245] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 22. See above, II.2.1.4.

[246] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 23.

[247] See below, II.2.2.3.

[248] Q. 4:59: "O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the messenger [. . .];" Wensinck, *Concordance*, vol. I–II, 390i. See al-Kabbāshī, *Taṭbīq al-sharīʿa*, 28.

Al-Kabbāshī explains that if the legislator, while drafting a statute, ignores a *sharʿī* provision, intentionally or through genuine or feigned forgetfulness; or if a new situation has arisen that is not regulated in the statutory provisions, then the judge must resort to the "disregarded" (*matrūk*), that is, uncodified, *sharʿī* rule. Thus, for example, there is no punishment in the PC, 1983 for charging usury (*ribā*). According to al-Kabbāshī, however, one should not therefore infer that usury is legally permitted, since it is forbidden in all revealed religions, and all Muslim jurists are agreed that it is forbidden, and that anyone charging usury will be subject to discretionary punishment (*taʿzīr*). And indeed, as we shall see below, in applying the PC the courts relied in several cases on the principle, anchored in Section 3(a) of the JudA, of "the *sharʿī* rule that has been disregarded" (*al-ḥukm al-sharʿī al-maskūt ʿanhu*).[249]

Another example of the uncodified *sharīʿa*'s status as a source of law may be seen in Section 458 of the PC, whose purpose is to guide the judge in applying the statutory provisions. Subsection (3) provides that if Qur'ānic punishment (*ḥadd*) has been averted on the grounds of doubt or mistake (*shubha*),[250] it is lawful to impose discretionary punishment (*ʿuqūba taʿzīriyya*), even if such a provision is not explicitly indicated in the code. A lacuna in the law is likewise not sufficient to prevent the imposition of any Qur'ānic punishment (*ʿuqūba ḥaddiyya*).

2.2.3. *The Judge's Statutory Right of* Ijtihād

Section 3(b) of the JudA, 1983 provides that in the event of a lacuna in a statute and in the absence of a *sharʿī* rule as established in the the Qur'ān and the *sunna* {Section 3(a)} the judge shall exercise independent judgment (*ijtihād*) in deriving a judicial rule on the basis of the legal sources and principles, in the following order, having regard to their complementarity (*takāmul*), priority (*awlawiyya*) and preponderance (*tarjīḥ*):

(i) paying due regard to what has been approved by the consensus (*ijmāʿ*) of the *fuqahāʾ*, the exigencies of the general concepts of the *sharʿī* rules, its general principles, and *sharʿī* directives with respect to questions of detail in the matter;

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[249] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 27–28. See below, III.2.2.2.1.
[250] Cf. Peters, *Criminal Law*, § 0.1.1.1.

(ii) analogy (*qiyās*) with rules of the *sharīʿa* on the basis of the effective causes or rationale (*ʿilal*)[251] or following its example or comparing with its method in rendering justice;

(iii) paying due regard to "what produces benefit and averts corruption," which is a nuance of *maṣlaḥa*, the public interest, in conformity with the goals of *sharīʿa* and the objectives of life in the present circumstances provided they do not invalidate *sharʿī* rules;

(iv) presumption of innocence (*barāʾa*),[252] a permissive approach (*ibāḥa*) toward human acts,[253] and leniency in imposition of [God's commandments] (*al-yusr fi'l-taklīf*);[254]

(v) Sudanese judicial precedents (*sawābiq al-ʿamal al-qaḍāʾī*), as long as they do not contravene the *sharīʿa*, the opinions of *muftī*s on legal matters, and *sharʿī* rules as determined by *fuqahāʾ*;

(vi) custom (*ʿurf*), as long as it is consistent with the *sharīʿa* or the principles of natural justice (*ʿadāla fiṭriyya*);

(vii) principles of universal justice (*al-ʿadāla*) prescribed by noble human laws (*al-sharāʾiʿ al-insāniyya*), and equity (*qisṭ*) enshrined in good conscience (*wijdān salīm*).[255]

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[251] The rationale behind the application of the principle of analogy can be concretely illustrated by the Muslim prohibition on usury (*ribā*). For instance, commodities on which usury is forbidden by the *sharīʿa* are traditionally categorized in terms of weight and measures, kind of foodstuffs, etc.; cf. Coulson, *History*, 79.

[252] The principle is recognized also in Islamic law. Cf. Mejelle, Section 8.

[253] In other words, the presumption that human acts are legally permissible (in terms of *al-aḥkām al-khamsa*, the scale of five religious-legal qualifications which guides the individual's behaviour; see Schacht, *Introduction*, 120ff.), unless there is evidence to the contrary.

[254] Cf. Section 8 of the Mejelle (a person is presumed innocent) and Section 17 (hardship brings about leniency). However, Chief Justice Dafʿallāh al-Ḥājj Yūsuf maintains that presumption of innocence is an English principle of law that serves as basis for the application of the *sharīʿa*. See below, II.3.1.

[255] Equity is justice administered according to fairness as contrasted with the strictly formulated rules of common law. Good conscience is a synonym of equity. See Black, *Law Dictionary*, s.v. "Conscience" and "Equity." Judicial precedents, custom, justice and good conscience are also sources of law applicable, alongside the *sharīʿa*, in the event of a lacuna in the CivPA, 1983. See al-Zakī, *al-Islām wa-ḥayātunā al-qaḍāʾiyya*, 150.

Chief Justice Fu'ād al-Amīn ʿAbd al-Raḥmān maintains that the *sharīʿa* regards the *qāḍī*—and the reference seems to be to a *sharʿī qāḍī*—as a *faqīh* and *mujtahid*, which implies that he must be well versed in the theory of Islamic law and possess sufficient knowledge of the technique for deriving rules from legal sources. He further argues that the new Islamist laws have widely opened the door of *ijtihād*. Thus, for instance, the PC, 1983 left the definition of punishments other than those entailing *ḥudūd* and retribution (*qiṣāṣ*) to the discretion of the judge who is expected to hand down appropriate punishments in accordance with the *sharʿī* rules having regard to the JudA, 1983.[256]

The Egyptian SupCC's interpretation of Article 2 of the Egyptian constitution in its amended 1980 version may be very helpful with regard to the issue of judicial *ijtihād*. As noted earlier, the SupCC makes the basic distinction between immutable, "divine" sources of Islamic law, on the one hand, and "worldly" interpretation, on the other: only general principles (*al-mabādiʾ al-kulliyya*), which belong to the immutable core of Islamic law, are beyond the scope of *ijtihād*; they cannot be interpreted or altered in accordance with changing circumstances of time and place. Otherwise, however, rules based on interpretation (*aḥkām zanniyya*) that are not absolutely firm in terms of their immutability or meaning, are permissible to *ijtihād* in accordance with the changing circumstances of time and place, provided *ijtihād* is exercised within the framework of the general sources of the *sharīʿa*. The implication of SupCC's approach is that the latter rules are not bound to a specific interpretation of Islamic law; in fact, this approach paved the way to "nationalization" of Islamic law by means of codification and statutory legislation.[257]

Similarly, Section 5(ẓ) of the CivTA, 1984, whose purpose is to guide the court in applying and interpreting statutory provisions, provides that the court may not exercise independent judgment (*ijtihād*) when there is a statutory provision applicable to the matter before the court, which implies that, in the event of a lacuna, the court may exercise *ijtihād*.

Al-Kabbāshī maintains that Section 3(b) of the JudA, 1983 provides the judge with wide discretion to create new rules by means

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[256] *Al-Ṣaḥāfa*, June 11, 1984, p. 3 col. 2.

[257] See Bälz, *The Secular Reconstruction of Islamic Law*, 236–37 (based on SupCC, May 18, 1996: 1031–32); see above, II.1.3.

of *ijtihād*, thereby "opening the door to the revival and renewal of the *sharīʿa*." He believes that application of *ijtihād* is not only the judge's right, but also his duty, provided that the rule produced by *ijtihād* does not contravene the *sharīʿa*. Sālim, Ḥawbāt & al-Nūr maintain that the JudA, 1983 is intended to strengthen the adherence of the Sudanese legal system and jurists to Islamic jurisprudence (*fiqh*), its sources, technical terms and language as a means for deriving *sharʿī* rules with a view to bringing about a revolution in Islamic jurisprudence (*thawra fiqhiyya*).[258] The call for the reopening of the door of *ijtihād* presumes that the door had indeed been closed.[259] This implies that the *fuqahāʾ* were bound by *taqlīd*, the adherence to the established law of the schools, and prohibited from resorting directly to the textual sources for the purpose of deriving new rules by means of *ijtihād*.

Despite its similarity to the classic *ijtihād* and the Modernists' *ijtihād*, the Sudanese *ijtihād* differs on several very important matters, making it a unique model. *Ijtihād* in the classic sense of the Middle Ages means producing legal rules by reliance on the textual sources of the Qurʾān and the *ḥadīth* by means of analogical reasoning (*qiyās*), and on those views on which the early jurists were in agreement.[260] In the *ijtihād* of the Modernists belonging to the school of Muḥammad ʿAbduh and Muḥammad Rashīd Riḍā, the principle of the public interest (*maṣlaḥa*) replaced analogy as a source of law through a tacit understanding on the part of these Modernists, and consensus became an institutionalized legal authority—a kind of parliament of *fuqahāʾ*—providing immediate validity to innovations in law. In both cases, the classic and the modernist, the *fuqahāʾ*—the creators and exponents of the religious law—have exclusive charge of the mechanism of *ijtihād*. The reformist parliamentary legislation that purports to apply the mechanism of *ijtihād*, ostensibly relies on the teachings of the Modernists. Legislature is alien to Islam; a parliament reflects a concept of secular national sovereignty. Strictly speaking, the *sharīʿa* is undergoing a transformation from jurists' law to statutory law.[261]

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[258] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 26, 152–53; Sālim, Ḥawbāt & al-Nūr, 40.

[259] This issue is disputed by Western scholars. So far it has been debated on the level of legal theory (*uṣūl*) rather than law (*furūʿ*). See, e.g., Meron, *Legal Thought in the Ḥanafi Texts*; Hallaq, *Ijtihād Closed?*.

[260] Schacht, *Introduction*, 37, 69ff.; Hallaq, *Ifta' and Ijtihad*.

[261] Layish, *Modernists*, 264–67; *idem*, *Maḥkama*, 40–42; Layish & Shaham, *Tashrīʿ*; Hallaq, *Legal Theories*, chaps. 6–7 and the sources indicated there; Peters, *Ijtihād and Taqlīd*. On the significance of this process, see above, II.2.1.1.

Saudi Arabia, which seeks to adapt the *sharīʿa* to the conditions of modern times, does so by having the *fuqahāʾ*, the authorized exponents of the *sharīʿa*, issue religious legal opinions intended to provide support for reforms. This is being done through the institutionalization of the *fuqahāʾ*, who in the Middle Ages enjoyed independence from the establishment. The Royal House established for this purpose an institution for issuing legal opinions (*dār al-iftāʾ waʾl-ishrāf ʿalā al-shuʾūn al-dīniyya*) that works on a collective basis; this does not correspond with the traditional concept of a personal legal opinion.[262]

Ijtihād in the Sudanese legislation is a mixture of Muslim and Western sources of law and legal principles and, as will be seen below, its outcome is controversial among Muslims. From the classic *ijtihād*, the Sudanese legislator took the four sources of law (*uṣūl al-fiqh*): the two textual sources, the Qurʾān and the *ḥadīth*; the rational mechanism of analogy (*qiyās*); and the authoritative source of the *fuqahāʾ*, as reflected in their consensus (*ijmāʿ*). Sudanese *ijtihād*, like the Modernists' *ijtihād*, also integrates the principle of the public interest (*maṣlaḥa*). However, in Sudanese *ijtihād*, in contrast to the Modernists' *ijtihād*, this principle is not intended to replace the *qiyās*, but to exist alongside it. In the teachings of the Modernists, the intention was to turn the *maṣlaḥa* into a source of law in its own right without being bound to the textual sources: social motivation alone is sufficient to make the reform legally permissible. By way of contrast, in the Sudanese Islamist legislation the *maṣlaḥa* must be consistent with the goals of the *sharīʿa* on the one hand, and with the "objectives of the *sharʿī* life" in the present circumstances, on the other, provided they are compatible with the *sharīʿa* {Section 3b(iii) of the JudA}. The *maṣlaḥa* in this synthesis is, therefore, a subsidiary source that cannot stand alone, and in this sense it comes close to the traditional concept. In the theory of Muslim jurisprudence the doctrine of *maṣlaḥa* has no status (although it enjoys a special status in the Mālikī school),[263] and it is integrated in the *qiyās*. In other words, social motivation is directed into the formal channels of analogy. In Sudanese *ijtihād* there is a place for custom, too—apparently in consideration of the ethnic diversity of Sudanese society—provided it does not contravene the *sharīʿa* or the doctrine of natural justice.[264]

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[262] Layish, *ʿUlamāʾ*, 34–35; *idem*, *Saudi Arabian Legal Reform*, 126–29; Vogel, *Iftāʾ and Qaḍāʾ*, 262ff.

[263] Schacht, *Introduction*, 61; Coulson, *History*, 144.

[264] See below, II.3.3.

The principles of justice, equity, and good conscience originate in English law. These principles were intended to place normative supervision over the finished product of the *ijtihād.* Such supervision is, of course, alien to the *sharīʿa.* The resort to legal precedent is also the legacy of British rule in the Sudan. It is restricted in that it may not contravene the *sharīʿa*, the opinions of *muftīs* on legal matters, and *sharʿī* rules as determined by *fuqahāʾ* {Section 3 b(v)}, but this restriction does not make the resort to precedent legally permissible from a *sharʿī* point of view. Applying the mechanism of *ijtihād* through judicial jurisprudence of civil courts trained in the principles of English law, is alien to the orthodox *sharīʿa. Sharʿī* judicial practice has never been recognized as a source of law. The *sharīʿa* reflects a conception of ideal jurists' law, as opposed to realistic law that is a product of judges who confront social reality every day. The Mālikī *ʿamal*, judicial practice, is an outstanding example of the development of realistic law in North Africa from the fifteenth century to the seventeenth century, when the need arose to bridge the profound gap between orthodox *sharīʿa* and customary law with a view to bringing the local population within the orbit of the *sharīʿa.* The significance of this experience is, however, disputed among scholars.[265]

Khalīl, too, makes a distinction between personal *ijtihād* in the traditional sense and judicial *ijtihād* on the basis of the Islamist legislation. In his opinion, *ijtihād* is not a right available exclusively to *ʿulamāʾ*; it is also available to any person from any discipline who is well versed in Islamic law and is capable of using his discretion or judgment to this end while having due regard to the public interest. Nevertheless, he confirms that personal *ijtihād* in the civil judiciary is liable to cause anarchy, which seems to imply judicial uncertainty, since there is no guarantee that the judge's innovations in the realm of religious law will actually be accepted by all concerned. Echos of the claim that application of *ijtihād* in the civil courts would be harmful may be found also in al-Kabbāshī's response to this criticism.[266]

Al-Ṣādiq al-Mahdī considers the JudA as

> one of the most dangerous laws because it authorizes *qāḍīs* [i.e., civil judges] to act as *mujtahidūn* and legislators (*musharriʿūn*) although their education does not qualify them for *ijtihād* or for legislation.

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[265] Berque, *ʿAmal*, 427–28; Milliot, *Introduction*, 156–69, 167–78; Coulson, *History*, 143ff.; Schacht, *Introduction*, 61–62.

[266] Interview with Khalil; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 152.

The Act, in his view, does not lay down a clearly defined methodology for the interpretation of the Islamist statutes, the unavoidable result of which is confusion in the application of these statutes. The decisions handed down by the *qāḍīs* are a real cause for concern since the matter cannot be solved by legal circulars issued by the Chief Justice[267] intended to clarify and interpret the Islamist legislation because this will inevitably turn the Chief Justice into an exclusive Islamic *mujtahid* and legislator. Al-Ṣādiq al-Mahdī prefers the current tendency in the Muslim world to bring about the application of the *sharīʿa* by means of statutory codification of various domains of the *sharīʿa* to be prepared by fully qualified experts and imposed on the judiciary. Khālid fully shares this criticism: the judge has been authorized by the JudA to independently derive rules directly from the legal sources and, in actual fact, he acts as legislator; moreover, he has replaced the legislature although the Sudanese Constitution acknowledges the principle of separation of authorities. Most of the judges are not qualified for *ijtihād*, and some of them, including females, are not qualified even for the position of judge. Fūda estimates that the JudA presents a serious threat to the *sharīʿa*.[268] Ḥasan al-Turābī strongly criticizes the judge's right to exercise *ijtihād* in the event of lacuna in matters relating to Qur'ānic punishments by resorting directly to the uncodified *sharīʿa*, the more so since most of the judges do not qualify for *ijtihād*; their sentences regarding amputation of limbs make a mockery of the *sharīʿa* and Islam.[269]

3. Absorption of pre-1983 Sources of Law in the Islamist Legislation

3.1. *Justice, Equity and Good Conscience*

English law has also left its imprint on the Islamist legislation. The source of its status is the Anglo-Egyptian Condominium, established in 1899, which determined that Egyptian law would be applicable in the Sudan, but that the British Governor-General would be the

[267] See above, II.2.1.2.

[268] Al-Mahdī, *al-ʿUqūbāt*, 16; *idem*, *al-Niẓām*, 37–38; Khālid, *al-Fajr al-kādhib*, 99–100, 288–89; Fūda, *Qabla al-suqūṭ*, 139.

[269] Al-Turābī, *Udīn al-ʿunf*, 24–25.

supreme legislative authority.[270] As will be seen below, this had far-reaching consequences for the shaping of legal norms in the Sudan. Three sources of law functioned simultaneously during the period of the Condominium: common law, which was a poor replica of English law in India, and was adapted to the conditions of Sudanese urban society; customary law (*ʿurf*) in rural areas; and the *sharīʿa*, which applied to issues of personal status involving Muslims.[271]

Section 9 of the Civil Justice Ordinance, 1929 provides that in the event of a lacuna in the law, the court should hand down its decisions in accordance with the principles of equity, justice, and good conscience. This section enabled the Civil High Court, whose judges had been recruited since the beginning of the the twentieth century from the ranks of English lawyers or lawyers trained in English common law, to introduce English law into the Sudan in the guise of these principles. They did, however, have discretion to apply rules from other systems of jurisprudence if they deemed them to conform better to the principles of justice, equity, and good conscience, while taking into account the local social and economic conditions. The ordinance did not impose the *sharīʿa* in the event of a lacuna; this was in consideration of the large non-Muslim minority living in the Sudan, and because the *sharīʿa* was—according to the Sudan's rulers—unable to adjust itself to the needs of modern times.[272] Similarly, the Native Courts Ordinance, 1932, initiated following the decision on the Indirect Rule,[273] regulates the establishment of various customary courts authorized to hand down rulings on the basis of native law and custom already existing in the area or among a certain tribe, insofar as it is not repugnant to justice, morality, or order. The British sought to impose normative control on the *sharīʿa* courts as well. Sir Donald Hawley, who served on the Sudanese judiciary between 1947 and 1955, confirms this view as follows:

> [T]he Legal Secretary could be regarded as the guardian of the administration's conscience and ultimate insurer of the strictly legal standards throughout the whole sphere of government.[274]

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[270] Guttman, *Reception of Common Law*, 402–3.

[271] Zein, *Religion, Legality, and the State*, 2; Khālid, *al-Fajr al-kādhib*, 25; Warburg, *Sudan under Wingate*, 124–27.

[272] Guttman, *Reception of Common Law*, 409–10; 412, 414; Khalil, *Legal System*, 624, 637, 639; Mustafa, *Common Law*, 1–3, 55, 229.

[273] For details on Indirect Rule, see Daly, *Empire on the Nile*, 360–79.

[274] Hawley, *Law in the Sudan*, 39. See also *ibid.*, 50 ("The concept of the Legal Department being custodian of the conscience [. . .]").

Thus, for example, the British opposed the institution of *bayt al-ṭāʿa*, forced obedience (which was abolished only in 1969), the custom of circumcizing women, slave trading, and the blood feud.[275] The Code of Criminal Procedure and the Penal Code of 1899 were based on colonial law that had been adjusted to the needs of India under British rule. As noted earlier, these statutes were adopted in the Sudan after being adapted to the country's special needs.[276] Commercial law was also drawn up with English common law as its inspiration, and to a certain extent Sudanese jurisprudence and local custom as well.

Following independence, in 1956, civil court judges, trained in common law, continued to apply English law. They deviated from it only where this was necessary in the interests of justice, equity, and good conscience; moreover, they not only applied principles of English law, but also English statutes. The Penal Code and Criminal Procedure Code approved in the Sudan following independence were completely free of the influence of Islamic law. The civil code based on English common law was replaced in 1971 by a civil code based on the Egyptian Civil Code of 1949, which was prepared by ʿAbd al-Razzāq al-Sanhūrī, and reflected a continental European (French) conception more than the tradition of English common law. In 1973, however, the Civil Justice Ordinance of 1929 was reinstated. Section 4 of this ordinance adopts the principles of justice, equity, and good conscience—concepts that originated in India under British rule—as a means of normative control over indigenous laws. Thus, for example, Section 3 of the Civil Justice Ordinance recognizes customary law insofar as it is not repugnant to good conscience in matters concerning succession and the like.[277] English concepts penetrated the Sudanese legal system not only through legislation but also through court decisions and judicial circulars. A case in point in this regard is the abolition of the compulsory marriage of adult daughters valid under the Mālikī school.[278] Despite Numayrī's declared policy of Islamizing the

[275] On one occasion the inspector of these courts ordered that money demanded by Muslim "holy men" for using charms to get back lost livestock should not be collected by force. Anderson, *Africa*, 308, 320–21; *idem*, *Adaptation*, 161; Hawley, *Law in the Sudan*, 32, 40–41; al-Nur, *Native Courts*, 79–80; Fluehr-Lobban, *Islamic Law and Society*, 241.

[276] Mustafa, *Common Law*, 21; Hawley, *Law in the Sudan*, 41–42; al-Rashīd, *al-Islām wa-ḥayātunā al-qaḍāʾiyya*, 139.

[277] Guttman, *Reception of Common Law*, 405–6; Khalil, *Legal System*, 624, 637; Khalil, *Interview*; Safwat, *Islamic Laws*, 238–40; Köndgen, *Das islamisierte Strafrecht*, 18, 21–22; Mustafa, *Common Law*, 183ff., 201.

[278] Anderson, *Adaptation*, 161.

law, instances of English law's special status in the Sudan may still be found in the Islamist legislation.[279] As we saw previously, Section 3(b)(vi) of the JudA, 1983, provides that in the event of a lacuna in the law, the judge shall take custom into account in transactions in a manner not contravening *sharʿī* rules or the principles of natural justice (*ʿadāla fiṭriyya*). Subsection (vii) provides that the judge shall consider the notions of justice as prescribed by human laws, and the rules of equity (*qisṭ*) enshrined in good conscience (*wijdān salīm*). In other words, as noted above, in the event of a lacuna, these notions are meant to serve as sources of law alongside the *sharīʿa*, although they do not have equal status. In the past, these notions were used to introduce principles of English law. In Numayrī's Sudan, they could also be used to introduce other legal principles. It remains to be seen whether these English-oriented concepts were shaped and interpreted in the Sudanese judicial practice in Islamic fashion.[280]

Section 165 of the CivTA, 1984 gives specific examples of "prohibited enrichment," the definition of which is worded in general terms in Section 164. Section 165(1)(a) provides, *inter alia*, that enrichment resulting from any action not allowed by good conscience will be considered prohibited enrichment. Similarly, Section 165(1)(b) provides that unlawfully taking advantage of influence derived from an official position, even in the form of gifts that are unacceptable according to custom or not in keeping with good conscience, will be considered "prohibited enrichment." Section 5(b) of the CivPA, 1983 provides that the law applicable in civil courts to non-Muslims in matters of personal status, succession, gifts, and *waqf* is the custom common among the parties to the extent that it does not contravene the principles of justice, equity (*inṣāf*), and good conscience. It appears that "custom" means primarily tribal law. The source of inspiration for this section is the Civil Justice Ordinance of 1929.[281] Similarly, Section 6(1) of the same Act provides that in the event of a lacuna on procedural issues, the court will apply principles insuring that justice is done. In contrast, Section 6(2) of the law provides that on matters regarding which there is no statutory provision, the courts will apply the *sharīʿa*, Sudanese judicial precedents, custom, and the principles of justice and good conscience, in that order.

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[279] Abdelmoula, *Ethnicity*, 49; Khālid, *al-Fajr al-kādhib*, 22–24.
[280] We owe this observation to Ruud Peters; see below, III.2.2.5.2.
[281] Anderson, *Africa*, 307–8.

Even al-Kabbāshī, who supports the methods of Islamist legislation, confirms that the discretionary punishments (*taʿzīr*) in the PC, 1983 are modelled along the lines of the PC, 1974, whose source of inspiration is English. He states that there is no normative contradiction between the *sharīʿa* and statutory legislation as far as the substance of the offenses is concerned. The differences relate only to the punishments. According to the *sharīʿa*, flogging is a basic punishment for all vice crimes, while in statutory legislation the punishment for such crimes is a nominal prison sentence or fine. He acknowledges that the Sudanese legislator was able to benefit from Western legal experience and from judicial precedents concerning the drafting of discretionary punishments. Unlike the opponents of Islamist legislation, he sees nothing wrong with this from a *sharʿī* point of view.[282]

In assessing the place of English law in the Islamist legislation in the area of substantive and procedural law, Zein states that the process of adapting the *sharīʿa* to the conditions of post-colonial Sudan did not necessarily require departure from common law, as long as the latter did not openly contravene Muslim principles. According to Zein, even al-Nayyal Abū Qurūn and ʿAwaḍ al-Jayyid Muḥammad Aḥmad were against a radical change in the law, and allowed only abolition of statutory provisions contravening the *sharīʿa*. English law was given a special status in the Islamist legislation in consideration of the non-Muslim population in the Sudan. In other words, common law was retained as a legal infrastructure while being purified of non-Muslim elements. There are those who go so far as to claim that despite Numayrī's declaration to establish the *sharīʿa* in all spheres of life, he did not actually replace the English legal system.[283] Even if this claim is exaggerated, there is no doubt that English law can still be considered an important source of law in the Islamist legislation. It is interesting to note in this connection that Dafʿallāh al-Ḥājj Yūsuf, Chief Justice at the time of the promulgation of the Islamist statutes, maintained that English principles of law such as "fair trial, presumption of innocence of the defendant until guilty is proved beyond reasonable doubt are the basis of the application of Sharia Law."[284]

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[282] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 18.

[283] Zein, *Religion, Legality, and the State*, 201–2; Esposito, *Islamic Experiment*, 193.

[284] Yūsuf, *Interview*, 12. One should bear in mind, however, that "presumption of innocence" is also a *sharʿī* principle. See Mejelle, Section 8.

3.2. *Judicial Precedent*

Judicial precedent is alien to Islamic law, which does not recognize the jurisprudence of *sharīʿa* courts (or, obviously, of civil courts) as a source for the development of law. Traditional Islamic law developed in the Middle Ages through independent jurists who were not part of the establishment. The *muftī*, not the *qāḍī*, is the authorized exponent of the *sharīʿa*.[285] Precedent was a central source of law during the period of the Anglo-Egyptian Condominium. The fact that Sudanese law had not undergone a complete process of codification facilitated receptivity to English law, which in turn was immersed in English precedents, as well as precedents of the local courts. This process continued even after Sudan gained its independence.[286]

Numayrī's Islamist legislation, which made the *sharīʿa* a main source of law and interpretation, reduced the importance of precedent as a source of law, though not to the extent of totally eliminating it. Precedent has a standing in this legislation only in the event of a lacuna, and even then only on condition that it does not contravene the *sharīʿa*. As noted previously, Section 3(b)(v) of the JudA, 1983 provides that the judge, in the absence of a provision in the Qurʾān and the *sunna* may exercise *ijtihād* and pronounce a legal rule on the basis of the traditional sources of law. Only after having exhausted all these sources may he resort to judicial precedents (*sawābiq al-ʿamal al-qaḍāʾī*) in the Sudan, as long as they are not repugnant to the *sharīʿa* and to the legal opinions and principles of law issued by the *fuqahāʾ*.[287]

Similarly, the EvA, 1983, which was intended to clarify methods of proof for verifying transactions and to regulate criminal affairs, places precedent last among the sources of law, which are as follows: the Qurʾān and the *sunna*; the instructions of the Venerable Forefathers (*al-salaf al-ṣāliḥ*) to their *qāḍī*s; and the judicial precedents applied for a long time in Sudanese (civil) courts, provided they do not contravene the *sharīʿa*. Precedent also served as a source of inspiration in the drafting of discretionary punishments for the PC, 1983. While flogging (*jald*) is a basic punishment in the *sharīʿa* for vice crimes, the punishments of imprisonment and the fine drew their

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[285] Schacht, *Introduction*, 73–75; Coulson, *History*, 142–43; Masud, Messick & Powers, *Muftīs and Fatwās*, 3ff.

[286] Mustafa, *Common Law*, 220; Amin, *ME Legal Systems*, 343–44.

[287] See above, II.2.2.3.

inspiration not only from Western positive law—specifically the Penal Code, 1974—but also from the cumulative experience of precedential jurisprudence by the Sudanese courts pertaining to systematic classification and the drafting of discretionary punishments. Al-Kabbāshī sees nothing wrong with this, as long as this inspiration does not exceed the bounds of *taʿzīr* punishments in the *sharīʿa*.[288]

In the event of a lacuna, the precedential jurisprudence of civil courts in the Sudan serves as a source of law second in importance only to the *sharīʿa*. Section 6(2) of the CivPA, 1983 provides that in matters for which there is no statutory provision, the courts will apply the *sharīʿa*; "the principles established in jurisprudence," that is, judicial precedents, as well as custom, justice, and good conscience. This section corresponds to Section 3(b)(v) of JudA, 1983. The experience of the civil courts is also a source of inspiration for the CivTA, 1984.[289] Section 3 of this act instructs the courts to apply the statutory provisions and interpret them in accordance with the principles of the *sharīʿa* and the JudA, 1983, which in turn also refers the judge to judicial precedent in the Sudan, insofar as it does not contravene the *sharīʿa*. The same also applies in the event of a lacuna.[290]

2.3. *Custom*

Custom (*ʿurf, ʿāda*) is not formally recognized as a source of law in the theory of Islamic law;[291] nevertheless, from a historical point of view, it has undoubtedly contributed a great deal as a material source during its formative period. However, the theoreticians were interested not in the historical aspect, but in the methodological aspect, and the *ijmāʿ* of the jurists, including the Mālikīs, consciously rejected recognition of custom which was denied a status of a source of law because of the revelational nature of the *sharīʿa*. Nevertheless, custom received de-facto recognition as a material source of the *sharīʿa*, especially in the realm of commercial law, and it functioned as a subsidiary source of law. Along with the legal device (*ḥīla*), whose purpose was to adjust the *sharīʿa* to the changing situation, custom

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[288] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 18, 23.

[289] *Ibid.*, 13.

[290] See above, II.2.1.3.

[291] ʿAbd al-Munʿim ʿUthmān Muḥammad Ṭāhā, Advisor in the Office of the Attorney General, on the other hand, regards custom as a recognized source of law within the theory of *uṣūl al-fiqh*. *al-Ṣaḥāfa*, March 11, 1984, p. 5.

was absorbed into the *sharīʿa* through its assimilation into the *sunna* and *ijmāʿ*, and into legal principles such as *istiḥsān* ("approval," a discretionary opinion in breach of strict analogy for reason of public interest or convenience) and *istiṣlāḥ* (taking the public interest into account). In theory, custom cannot contravene the text of the Qurʾān and the *sunna*, but in practice, local customs often survived and were applied by the courts. The medieval Mālikī *ʿamal* (judicial practice) in North Africa endeavored to bring custom within the purview of the *sharīʿa*.[292]

Because the Sudan is a pluralistic state with tribes and ethnic groups having differing customs, great importance was attached to custom as a source of law during the period of the Anglo-Egyptian Condominium provided it was not "repugnant to the good conscience," that is, stood the test of the British administration's normative control.[293] Custom even retained its recognized status following Sudanese independence. Thus, for example, Article 9 of the 1973 Constitution provides that *sharīʿa* and custom shall be the main sources of legislation, and non-Muslims held that the two sources of law had equal status. Ḥāfiẓ al-Shaykh al-Zakī explains that the compromise with custom was a result of the Arab tribes' ignorance of the *sharīʿa*.[294] According to this Constitution, Islam is the majority religion, not the state religion, and Christianity the minority religion (part II, Article 16). Articles 9 and 38 of the Constitution guarantee non-Muslims judicial autonomy in matters of personal status according to their religious laws, as well as equal rights and obligations without regard to origin, race, sex, or religion.[295] Custom left its mark mainly in legislation concerning land. In the northern and southern provinces of the Sudan, along with the *sharīʿa* courts, there existed customary courts that applied "native law and custom." After the introduction of the Indirect Rule policy, the customary courts enjoyed wide-ranging authority in civil and criminal matters, but their decisions had to be

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[292] Schacht, *Introduction*, 37, 60–62; Coulson, *History*, 143; Anderson, *Africa*, 378; Libson, *Custom as a Source of Law*, 131–55. Contemporary Libyan *qāḍīs* still resort to *ʿamal* manuals. See Layish, *Shahādat naql.*

[293] Hawley, *Law in the Sudan*, 42.

[294] *Al-Ṣaḥāfa*, September 24, 1984, p. 3; October 29, 1984, p. 4 (interview with the Chief Justice Daf'allāh al-Ḥājj Yūsuf); Safwat, *Islamic Laws*, 240; Amin, *ME Legal Systems*, 344; Köndgen, *Das islamisierte Strafrecht*, 21–22; al-Mahdī, *al-Niẓām*, 28–29; also *The Permanent Constitution* (See Constitutions and Charters).

[295] *The Permanent Constitution*, Part III, Article 38; see below, IV.3.2.

in accordance with the principles of justice, morality, and order and were subject to the normative control of the central government. Thus in Darfur, customary law was applied by *ajāwīd*, mediators. Observers claim that custom there was stronger than both the *sharīʿa* and the statutory legislation. In *sharīʿa* courts, too, custom was firmly established.[296]

Custom has a recognized status in the Islamist legislation as well, though not on an equal footing with the *sharīʿa*. Thus, for example, Section 5(b) of the CivPA, 1983 provides that in matters of personal status, succession, gifts, and *waqf* involving non-Muslims, "prevailing custom" (*al-ʿurf al-jārī*) will apply between the parties, provided it does not contravene the principles of justice, equity, and good conscience or the statutory legislation. Section 6(2) of the same act provides that in the event of a lacuna in the procedure, the courts will apply custom (as well as principles of justice) after exhausting the *sharīʿa* and Sudanese judicial precedents. The same act, which prohibits usury under any circumstances (Section 110), is more permissive concerning agrarian regimes in which custom retains its established status. Section 127(2) of the act provides that the provisions of Subsection (1) dealing with settling accounts with a pledgee in connection with his profits from the pledge (which are considered disguised usury) will not apply to "pledges given according to custom" (*ruhūnāt ʿurfiyya*) for agricultural lands, provided the parties are Sudanese.

Similarly, custom has been recognized as a source of law in the CivTA, 1984 though it is last on the list of sources of law, that is, after the *sharīʿa*, the civil codes of Arab countries, and the jurisprudence of Sudanese civil courts. Thus, for example, one of the forms of prohibited enrichment in the civil act is illegal use of official influence in order to receive gifts, insofar as they are not acceptable according to custom or good conscience {Section 165(1)(b)}. As already noted,[297] Section 5 of the CvTA, 1984 provides a long list of basic principles intended to guide the courts in applying the statutory provisions. Some of these principles clearly demonstrate the status of custom as a source of law, and its significance as a mechanism for adapting the *sharīʿa* to the changing conditions of time and place.

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[296] Khalil, *Legal System*, 627, 639–40; Fluehr-Lobban, *Islamic Law and Society*, 13–14.
[297] See above, II.2.2.1.2.

Finally, Section 3(b)(vi) of the JudA, 1983 instructs the judge, in the event of a lacuna in the law, after first having exhausted the option of *ijtihād* by resorting to the Qur'ān and the *sunna, ijmāʿ* and *qiyās* and other subsidiary sources such as *maṣlaḥa*, presumption of innocence, and Sudanese judicial precedents, to rule according to custom, as long as it does not contravene to the *sharīʿa* or the principles of natural justice.[298]

[298] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 19, 26. For further details, see above, II.2.2.3.

CHAPTER THREE

APPLICATION OF ISLAMIST LEGISLATION AND LEGAL CIRCULARS

1. The Court System

1.1. *Organization, Jurisdiction, and the Law Applicable*

The CivPA, 1983 (Sections 2, 16–20) and the CrimPA, 1983 (Sections 2, 8) which replaced the counterpart laws of 1974, completed the *sharʿī* judiciary's integration into the national courts. Two judicial systems, civil and criminal, were established consisting of a hierarchy of instances: judicial council (*majlis al-quḍāt*), court for petty cases (*al-maḥkama al-juz'iyya*), court of the province (*maḥkamat al-mudīriyya*), court of appeal (*maḥkamat al-isti'nāf*) [CAp], and the Supreme Court (*al-maḥkama al-ʿulyā*) [SupC].

To facilitate the application of the September laws Numayrī declared a state of emergency and criminal and civil emergency courts (*maḥākim al-ṭawāri'*) known later as "prompt justice courts" (*maḥākim al-ʿadāla al-nājiza*) [ProJC] were established. In addition to criminal jurisdiction, the ProJCs have incidental jurisdiction in civil matters while handling criminal matters.[1] These were in fact military courts presided over by judges sympathetic to the new cause.[2] The Judiciary Act, 1983 provides for the integration of many kinds of courts within the ProJCs. Special ProJCAps for matters of personal status were established in Khartoum.[3] The president of a ProJC, by virtue of an emergency order issued by Numayrī, was responsible directly "before Allāh and the President of the Republic" to ensure that the decisions handed down by the courts were compatible with the *sharīʿa* and the law, that is, with Islamist statutes. In cases of a difference of opinion between the president and the members of a ProJC, the

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[1] *Al-Ṣaḥāfa*, November 24, 1984, p. 2 col. 3.

[2] Abdelmoula, *Ethnicity*, 53; *al-Ṣaḥāfa*, June 13, 1984, p. 1 (civil emergency courts); May 2, 1984, p. 7 (criminal emergency courts); July 8, 1984, p. 8 col. 1.

[3] *Al-Ṣaḥāfa*, August 26, 1984, p. 1.

president was empowered to decide the matter alone and to have the decision sent to the ProJCAp for revision.[4]

A number of laws, such as the Judiciary Act, 1983, the Attorney General Act, 1983 and the Bar Act, 1983 were designed to reorganize the legal system[5] and Fu'ād al-Amīn ʿAbd al-Raḥmān was nominated Chief Justice.[6] The Judiciary Act provides for the appointment of judges by the President of the Republic after consultation with the Supreme Judicial Council (*majlis al-qaḍā' al-ʿālī*). Hunud Abia Kadouf, former Justice of CAp, notes that this procedure was followed only during the initial period of the Islamization of the legal system when judicial nominations were inspired by professional considerations. However, such appointments did not pass as a matter of course. Some of these judges were confronted with political and ideological malpractices which they could not endure and consequently chose to resign their posts. According to Kadouf, a number of his colleagues on the bench, who had been appointed to the ProJCs, clashed with the regime and after being reprimanded publicly had to resign their posts. Moreover, some of the judges were appointed to the judiciary on the basis of ideological considerations and political affiliation. A more serious matter was the appointment of a number of police and army officers with almost no legal education and experience to fill the ensuing gaps in order to handle the welter of criminal cases relating mainly to vendetta. These officers were not only appointed to preside over ProJCs, EmCCs but also to sit on judicial panels of CrimCAps. A fair number of employees from the Attorney General's Chamber and from the Bar were also appointed to the judiciary because of their political affiliation.

Kadouf observes that it is very difficult to determine categorically whether or not the judges were committed to apply the September laws. During Numayrī's presidency there were mixed feelings among professional judges, the majority being disaffected by the political or ideological nature of the Islamist laws; but at the same time they

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[4] *Al-Ṣaḥāfa*, September 3, 1984, p. 1; November 6, 1984, p. 3 col. 1.

[5] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 8, 15, 18–30; Amin, *ME Legal Systems*, 336, 339–40; Fluehr-Lobban, *Islamic Law and Society*, 280; Safwat, *Islamic Laws*, 242, 244; Gordon, *Legal Revolution*, 794–96 (a detailed list of Islamist statutes), 807–8; al-Mahdī, *al-Niẓām*, 27; Esposito, *Islamic Experiment*, 193–94; Köndgen, *Das islamisierte Strafrecht*, 39–40; Sidahmed, *Politics and Islam*, 132; Sālim, Ḥawbāt & al-Nūr, 19ff., 24, 32, 34, 37, 49.

[6] *Al-Ṣaḥāfa*, October 1, 1984, p. 1 (see there nomination of the members of the SupC and judicial personnel).

were in duty bound to apply the existing law of the country. Most of the SupC judges endeavored to preserve their judicial integrity and thus appeared more professional in handling cases. However, Kadouf claims, it is difficult to assume, under the then prevailing circumstances, unqualified impartiality on the part of the SupC judges. He concludes that Numayrī fully controlled the judiciary. Judges, including the Chief Justice, were appointed and dismissed by him without consultation of the Supreme Judicial Council. Furthermore, the Judiciary Act was amended in order to facilitate Numayrī's control of the judiciary.[7]

According to the 1983 Act, the Attorney General, as the legal advisor of the state, is entitled to issue legal opinions (*fatāwā*) the observance of which is incumbent on state officials unless the President of the Republic has decided otherwise.[8] In other words, we are dealing here with an innovative combination of the public prosecutor, which is alien to Islam (this function was partially fulfilled in practice by the *muḥtasib*, the "inspector of the market"),[9] and an institutionalized version of the *muftī*, which is equally alien to classical Islam.[10]

The immunity of judges with respect to causing unintentional homicide, that is, by handing down a wrong decision, as it existed in the pre-1983 legislation was abolished; a judge in such circumstances is required to pay blood price to the victim's relatives. The Explanatory Note to the PC, 1983 states that cancellation of the immunity is "compatible with the spirit of the *sharīʿa*," and seems to place homicide under private, rather than public, law.[11]

The CivPA, 1983 extends the national civil courts' jurisdiction to matters of personal status, such as marriage, divorce, succession, and testamentary dispositions (*waṣiyya*), as well as gifts (*hiba*) and *waqf*—domains that traditionally came under the jurisdiction of the *sharīʿa* courts {Section 5(a); the Second Schedule, Sections 7, 9, 13–15}. Criminal Circular No. 1 of 1983 provides, on the basis CrimPA, 1983, that the criminal and higher courts, but not the judicial councils, are authorized to adjudicate matters pertaining to offenses entailing Qur'ānic punishments (*ḥudūd*) and retribution (*qiṣāṣ*). The Mudīriyya

[7] Kadouf. See Bibliography, Interviews.
[8] Sālim, Ḥawbāt & al-Nūr, 43.
[9] Schacht, *Introduction*, 190. See below, III.1.3.
[10] Cf. Repp, *Shaykh al-Islām*.
[11] *Al-Ṣaḥāfa*, October 16, 1983, p. 5 col. 6. See above, II.2.1.4 and below, III.1.2.

judge may impose the following penalties: execution, amputation of limbs (*qaṭ'*), payment of blood money (*diya*), retribution, imprisonment (up to one year), flogging (up to forty lashes), fines or compensation (the CrimPA, Section 17).[12]

The SupC deals with: 1. cases brought before it by the civil and criminal CAps; 2. the constitutionality of statutes; 3. interpretation of the constitution and statutory provisions at the request of the General Attorney or on the initiative of the party concerned; and 4. preservation of rights and freedoms anchored in the Constitution (The CivPA, Sections 16–20, 370).

In disputes pertaining to marriage, divorce, relations between members of the family, succession, testamentary dispositions, gifts and creation of *waqf*—matters that prior to 1983 had been under the jurisdiction of the *sharī'a* courts—the law applicable in the national civil courts is the *sharī'a*,[13] provided the parties to the dispute are Muslims or the marriage has been performed according to the *sharī'a*. Otherwise, the law applicable is custom (*'urf*) prevailing among the parties involved, provided it is not repugnant to justice (*'adāla*), equity (*inṣāf*), and good conscience (*wijdān salīm*). In the event of a lacuna, the court is to apply the [uncodified] *sharī'a*, and the legal principles that have been firmly established in Sudanese judicial practice, as well as custom, justice, and good conscience (The CivPC, 1983, Sections 5 and 6). As noted previously, the codified *sharī'a* is not the exclusive source of law applicable in state courts. Statutes that survived the Islamist legislation and sources of law originating from the pre-1983 legal system, i.e., justice, judicial precedent, and custom are still applicable in the national courts. Their weight in the formulation of the legal norm in these courts depends to a very large extent on the judge's discretion.[14]

In matters pertaining to criminal offenses, homicide, and injury, the law applicable in the criminal courts is the Islamist legislation and legal circulars issued by the Chief Justice. The Annex to the

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[12] Criminal Circular No. 1 defines the jurisdiction of the CrimCs to impose punishments of imprisonment (up to six months), fines (up to £S 12,000) and flogging (up to 25 lashes). *al-Ṣaḥāfa*, October 6, 1983, p. 3.

[13] That is, codified *sharī'a* within the framwork of legal circulars and (since 1991) statutory legislation. Cf. al-Ḍarīr, *Niẓām al-aḥwāl al-shakhṣiyya*; Layish & Shaham, *Nikāḥ; Qānūn al-Aḥwāl al-Shakhṣiyya*, No. 42, 1991, Sudanese Official Gazette, No. 1554, 25 July 1991; *al-Ṣaḥāfa*, October 29, 1983, p. 11 col. 4.

[14] See above, II.1.2 and 3.1–3.

CrimPA, 1983 provides that the Chief Justice may decide the school or schools of law to be adhered to by the courts while applying the principles of the [uncodified] *sharīʿa* as well as the amounts of the blood price of various categories. The rates may be applicable uniformly throughout the country or be restricted to specific provinces or regions provided these rates are in harmony with the *sharīʿa*.

The policy of Islamization was also aimed at the rules of evidence and procedure applicable in the national courts. Thus, for example, the EvA, 1983 spells out the methods of proof to be implemented in civil and criminal matters. These are based first and foremost on the uncodified *sharīʿa*: admission (*iqrār*), testimony (*shahāda*) of witnesses, and oath (*yamīn*). Nevertheless, the act also contains daring innovations in the realm of evidence inspired by statutory legislation, such as circumstantial evidence (*qarīna*, pl. *qarāʾin*), written documents (*mustanadāt*), and expert's evidence (*khibra*).[15] Thus Section 316(2) of the PC, 1983 provides that illicit intercourse must be proved through four eyewitnesses (*shuhūd ʿiyān*) to the very act, or an explicit, unretracted confession, or [an unmarried] woman's pregnancy, which constitutes circumstantial evidence. Section 443(2) provides that the odor of wine constitutes sufficient evidence to prove the offense of wine drinking. All these are anchored in the uncodified *sharīʿa*.[16] Section 458(1)(c) provides that witnesses (*bayyina*) are required for every offense entailing Qurʾānic punishment, and that a defense based on *shubha*, doubt due to [the crime's] resemblance to a lawful act, averts Qurʾānic punishment. The section extends the meaning of *shubha* to any kind of reasonable doubt (*shakk maʿqūl*).[17]

The CivPA, 1983 is applicable to the procedure of civil and personal status matters as well as those not regulated by other laws {Section 3(1)}. The provisions of the Second Schedule of the CivPA are applicable to matters of personal status of Muslims {Section 3(2)}. The Second Schedule of the CivPA provides that written documents—both official and non-official (*awrāq ʿurfiyya*)—are, contrary to classical doctrine,[18] admissible in court and may be regarded as legal proof for any practical purpose. Moreover, in certain matters, an official document is a precondition for any legal proceeding. Thus

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[15] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 23–24.
[16] *Ibid.*, 23–24; Anderson, *Africa*, 375; see above, II.2.2.1.1.
[17] For further details, see below, IV.4.2.
[18] See Layish, *Shahādat naql* and the sources indicated there.

if the existence of a *waqf* or any of its stipulations is denied by someone, no pertinent claim can be heard in court unless the *waqf* and its stipulations have been established by an official attestation (*ishhād*) issued by an authorized court, and no *waqf*-deed created henceforth may be effectuated (*lā yuʿmal bi-ḥujja*) unless it has been properly registered in court (Sections 41–44).

1.2. *Precedents of the Supreme Court*

Case law, that is, law settled by precedent,[19] was never recognized by Islamic legal theory as a source of law. Islamic law developed as an expression of a religious ideal on the theoretical plain as elaborated in legal treatises completely detached from the realities of daily life.[20] However, as noted previously, Section 3(b)(v) of the JudA, 1983 provides that in the event of a lacuna a judge may exercise independent judgment or judicial *ijtihād* on the basis of legal sources and principles according to a specified order, and be guided by Sudanese judicial precedents (*sawābiq al-ʿamal al-qaḍāʾī*), as long as they do not contravene the *sharīʿa*, and by legal opinions (*fatāwā*) and *sharʿī* rules issued by *fuqahāʾ*. In other words, the judicial precedents set by the SupC may be resorted to only after one has exhausted the rules as established in the Qurʾān and the *ḥadīth*, and independent judgment based on consensus, analogical reasoning, the public interest, and presumption of innocence. Judicial precedent is recognized as a source of law also in the EvA, 1983 and the CivPA, 1983.[21]

There is ample evidence to the effect that the SupC regards itself bound by its own precedents.[22] In one case the defendant, on the basis of his confession, was found guilty of committing quasi-deliberate homicide under Section 249 of PC, 1983. He claimed that the homicide was caused following a provocation on the part of the victim and that he, the defendant, had acted in self-defense under Section 249(2), but his claim was rejected by the court. Section 253 provides that the court has the discretion to decide either on the death penalty or blood price. In the case under review the court preferred the death penalty. Later on the convicted retracted his

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[19] For definition, see Black, *Law Dictionary*, 216.
[20] Schacht, *Introduction*, 19–22; Coulson, *History*, 28–35; Layish, *Qāḍī's Role*, 85–86.
[21] For further details, see above, II.3.2.
[22] *SLJR*, 1986, 94–95.

confession. The SupC ruled, on the basis of judicial precedent dating back to 1976, that is, prior to the Islamization of the legal system initiated by Numayrī, that a confession that had been retracted should be substituted by a testimony of witnesses and circumstantial evidence. The court replaced the death penalty by blood price on the basis of another precedent of the SupC dating back to 1981. Having regard to this precedent, the SupC may, by virtue of its discretion under Section 256(b) of the CrimPA, 1983, replace a death sentence by life imprisonment on the basis of Section 251 of the PC.[23] In a another case, a policeman shot a person while searching for unlawful wine production in the latter's house. It was established in court that the victim assaulted the policeman while the latter was on duty. The policeman was acquitted on grounds of self-defense. The SupC endorsed the decision and ruled, on the basis of precedents dating back to 1971 and 1974, that the apprehension of an assault on the part of the victim, not even an actual assault, is enough to constitute a case of self-defense.[24]

In yet another case, the SupC ruled that a confession (*iqrār*) should meet all the necessary requirements in order to qualify as proof of an offense entailing retribution. *Inter alia*, confession should be given voluntarily without coercion in accordance with Section 24 of the EvA, 1983. To support its ruling the SupC brought reference from a *ḥadīth* attributed to 'Umar and from a previous decision handed down by the SupC. It further ruled that retribution should not exceed the damage caused to the victim, failing which it should be averted. In this connection the SupC quoted from a previous decision, handed down by itself, which maintains that the *'ulamā'* commend averting retribution in the event of bone breaking since disproportion between the damage caused to the victim and retribution may result in injustice to the assaulter.[25]

To sum up, although English-inspired case law is totally alien to Islamic law it seems nonetheless to have firmly consolidated itself in the Sudan notwithstanding the explicit policy of Islamization of the legal system.

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[23] *SLJR*, 1984, 112–16.
[24] *SLJR*, 1986, 104–09. For further details, see below, III.2.2.5.2.
[25] *SLJR*, 1986, 146, 150–51, 155.

1.3. *The* Ḥisba *as an Instrument Enforcing Islamist Legislation*[26]

The Byzantine institution of inspector of the market was adopted in Islam in the early Abbasid period. The position of *muḥtasib* took on a religious-ethical character underpinned by various Qur'ānic verses, each with its own style and wording, that command Muslims to propagate virtuous acts and prevent vicious acts (*al-amr bi'l-maʿrūf wa'l-nahy ʿan al-munkar*) (3:104, 110, 114; 7:157; 9:71, 112; 22:41; 31:17). It has also a solid basis in the *ḥadīth* and the legal literature.[27] The role of the *muḥtasib* encompassed, in addition to the supervision of weights, measures, and the like in markets, the task of securing law and order with special emphasis on offenses against public morals. The institution of public prosecutor is not recognized in Islam, and the *qāḍī* was authorized to take legal steps on issues affecting public law (*ḥaqq allāh*). In a certain sense the *muḥtasib* served as a public prosecutor, even though his concerns were religious. In theory, he acted as the representative of the Muslim community, and his function was perceived as a collective religious duty (*farḍ kifāya*) (as opposed to an individual duty—*farḍ ʿayn*) that the entire community was absolved from fulfilling because the *muḥtasib* implemented it in their stead. During the Ottoman period it was the role of the *qāḍī*, assisted by the *muḥtasib*, to exercise control over public morals. The institution survived in several Muslim countries into the modern period[28] and, as we shall see below, was even revived in Saudi Arabia.

The Propagation of Virtue and the Prevention of Vice Act, 1983 [PrVPVA, 1983] in effect amounts to revival of the institution of *muḥtasib* in the Sudan in a form adapted to modern conditions and the needs of the government.[29] The law defines the moral concepts "virtue" and "vice" and the corresponding permissible and prohibited acts. It also lays down the manner whereby the virtuous acts are to be promoted and specifies the individuals and functionaries authorized to promote virtuous acts and proscribe vicious ones. The law prohibits any act that contravenes the *sharīʿa* or causes harm to

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[26] On the *ḥisba* as an instrument of state control over public morals, see below, IV.2.1.

[27] *Al-Ṣaḥāfa*, September 10, 1984, p. 6 cols. 2–3.

[28] Schacht, *Introduction*, 25, 52, 92, 189–90, 207. Cf. Crone, *Islamic Patronate*, 11, 107–8.

[29] Provisional Order No. 41 of 1983. It was published also in *al-Ṣaḥāfa*, September 10, 1984, p. 6. Unless otherwise indicated, the analysis of the act below is based on Gordon, *Legal Revolution*, 796f.

an individual or a group of people {Section 4(1)}. Among the acts it defines as vicious (*munkar*) are: disobedience to the authorities, failure to respect public order or that of public places, and practices inimical to the wellbeing of society, such as demanding excessive dower, or usurpation of orphans' property {Section 4(2)}. The responsibility for "propagating virtue and preventing vice" rests not only with official functionaries such as *qāḍī*s and legal advisors, political leaders, public organizations, religious guides, *imām*s of the mosques and places of retirement (*khalāwin*), shaykhs of dervish orders (*ṭuruq*), and *'ulamā'* (Section 7); rather, it is the responsibilty of the entire society—in the best tradition of the *ḥisba*. In cases where a *shar'ī* or moral principle has been violated, every individual may sue the sinner in court even though the suer is not a party to the case in question and may not be in a position to derive personal benefit.[30] The reference seems to be to the doctrine of *locus standi*, that is, the right to appear in court. Thus "an association of persons" or individual persons who have witnessed the perpetration of vicious acts have the authority to prevent these acts (Section 6). This provision conforms with orthodox *sharī'a* which, as already noted, does not recognize the institution of the public prosecutor, and it also reflects the limited role of public authority in Islam.[31] Section 3 of the Act defines in a constructive manner, from the perspective of the authorities, the range of virtuous deeds (*ma'rūf*) whose performance should entail: work and production, fair practices in buying and selling (this appears to be a veiled reference to weights and measures, which are within the realm of the *muḥtasib*'s supervision), and obedience to the authorities. Under the Act, however—in contrast to the traditional Muslim conception of the institution of the *ḥisba*—the *muḥtasib* does not have jurisdiction, much less authority, to impose the various discretionary punishments (*ta'zīr*). His role is restricted to noting an infraction and passing the matter on to the court for its exclusive handling (Section 10). The *muḥtasib* enjoys immunity like that granted the court with a view to enabling him to fulfill his duty without being personally threatened in any way.[32] This implies that a person who interferes in a *muḥtasib*'s performance of his duties or acts contemptuously toward him is subject to the punishment imposed for contempt of

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[30] Sālim, Ḥawbāt & al-Nūr, 56; cf. al-Mahdī, *al-'Uqūbāt*, 114.

[31] Cf. Schacht, *Introduction*, 52, 207.

[32] Bakrī Ismā'īl al-Bilī, a CAp's justice, *al-Ṣaḥāfa*, November 20, 1983, p. 1 col. 1.

court. However, the *muḥtasib* has no immunity if he commits an offense or violates the *sharīʿa* or the law while fulfilling his duty (Section 8). The *muḥtasib* is a volunteer; he is neither paid nor compensated; he may expect God's reward in the hereafter (Section 11). The propagation of virtuous acts and the prevention of vicious acts are objectives meant to be achieved by gentle means, wisdom, and judicious religious exhortation, provided no offenses entailing Qurʾānic punishment have taken place, in which case, the transgressors must be brought to trial (Section 5).[33]

1.4. *Circumstantial Evidence*

The uncodified *sharʿī* rules of evidence pertaining to the application of Qurʾānic punishments and retribution for manslaughter and grievous bodily harm are stricter than those obtaining for other branches of law. Proof can be obtained by the testimony (*shahāda*) of eyewitnesses (*bayyina*), confession (*iqrār*), and by oath (*yamīn*). Circumstantial evidence (*qarīna*) is not recognized in principle.[34] However, there are some exceptions to this. Thus, for example, the pregnancy of an unmarried woman is considered (under the Mālikī doctrine) circumstantial proof of illicit intercourse (*zinā*);[35] in the absence of eyewitnesses, something connecting the suspect to the homicide, such as a strong suspicion (*lawth*), is sufficient to initiate the *qasāma* procedure; and the odor of wine (at least in the Mālikī doctrine) is sufficient to prove the offense of wine drinking (*shurb al-khamr*).[36]

Only in rare cases did the CrimCAp regard itself bound by the uncodified *sharʿī* rules of evidence. In some cases where the charge

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[33] It is worth mentioning in this connection that the army too serves as an instrument of Islamization. The People's Armed Forces Act (*qānūn al-quwwāt al-musallaḥa*), 1983 provides religious slogans for soldiers for times of war (*allāhu akbar*) and peace (*lā ilaha illā allāh*), as well as a hymn that begins each verse with a call for prayer and battle, and with which the workday is to be begun and ended. The army's function is to exalt Allāh's honor and to fight a holy war for him until Judgment Day and the achievement of the goals of Islam, that is, expansion of the borders of *dār al-islām* at the expense of *dār al-ḥarb*, and imposition of the *sharīʿa*. Furthermore, according to al-Kabbāshī, the army has functions besides that of defending the homeland (*waṭan*) and its territorial integrity (*waḥdat turāb*): defense of religion and its spiritual, political, and social values; see al-Kabbāshī, *Taṭbīq al-sharīʿa*, 30–31; see above, I.4.2.

[34] For further details, see Peters, *Criminal Law*, § 0.1.1.3; Schacht, *Introduction*, 193–95; Anderson, *Africa*, Glossary, *qarīna, qasāma, yamīn*.

[35] See also Section 316(2) of the PC, 1983.

[36] Anderson, *Africa*, 194 n. 1, 375; Peters, *Criminal Law* § 0.1.1.3; *idem, Qasāma*. See also Section 443(2) of PC, 1983.

of theft was proved in a CrimC on the basis of circumstantial evidence, and the perpetrator sentenced to amputation, the CrimCAp overruled these sentences on the grounds that circumstantial evidence (*bayyināt ẓarfiyya, qarā'in*) was not sufficient for imposing *ḥadd* punishments, and instead sentenced the perpetrator to discretionary punishments (*taʿzīr*), such as flogging, imprisonment, and a fine.[37] In most cases, however, the CrimCAp upheld sentences of amputation for theft on the basis of circumstantial evidence, the most important of which was the fact that the stolen property was found in the possession of the accused. Occasionally circumstantial evidence was supported by eyewitnesses or the confession (*iʿtirāf*) of the perpetrator, but the court made it clear that circumstantial evidence in itself was sufficient for conviction. The CrimCAp maintains that decisions based on circumstantial evidence are legally valid; moreover, to the extent that crimes entailing Qur'ānic punishments are concerned, a "clear decisive circumstantial evidence is stronger than confession or testimony [of witnesses]" (*al-qarīna al-wāḍiḥa al-qāṭiʿa aqwā min al-iqrār wa'l-shahāda*) unless the accused proves his innocence or there arises some doubt which averts the *ḥadd* punishment. The CrimCAp derives support for this view from the Qur'ānic passage prescribing the amputation of a thief's hand,[38] from the *sharʿī* law, and from the opinions of the founders of the Mālikī and other schools of law, the orthodox caliphs (*al-khulafā' al-rāshidūn*) and the Companions of the Prophet (*ṣaḥāba*). The latter are cited by Ibn Qayyim al-Jawziyya to the effect that crimes of illicit intercourse and wine drinking can be established and hence become punishable by *ḥadd* on the basis of circumstantial evidence, such as the pregnancy of an unmarried woman and the odor of wine, respectively. In addition, the EvA, 1983 explicitly recognizes the *qarīna* of pregnancy and the refusal to testify in court (*nukūl*) in *liʿān* procedure (whereby the husband accuses his wife of illicit intercourse but is unable to prove it), as well as circumstantial evidence in crimes entailing *ḥudūd*.[39]

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[37] *Al-Ṣaḥāfa*, July 12, 1984, p. 2 (the stolen property was found in the perpetrator's possession); July 31, 1984 (*al-bayyināt al-ẓarfiyya [. . .] lā takfī li-iqāmat al-ḥadd ʿalyahi*); August 5, 1984, p. 2 (the CrimCAp upheld the discretionary punishment handed down by the CrimC); August 12, 1984 (the theft took place in a mosque).

[38] Q. 5:38: "As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah. [. . .]."

[39] *Al-Ṣaḥāfa*, July 29, 1984, p. 2; August 19, 1984, p. 2 cols. 3–5; October 8, 1984, p. 2 col. 3 {the CrimCAp ruled that even if the perpetrator retracted from confession there was no way to waive the *ḥadd* punishment due to the fact that the

There is ample evidence in court decisions examined for this study to the effect that circumstantial evidence (*bayyināt ẓarfiyya, qarā'in al-aḥwāl*) is commonly admitted in cases of homicide (*qatl*) and highway robbery (*ḥirāba*). However, it is usually admitted alongside the perpetrator's confession and eyewitnesses. In all these cases, sentences, including the death penalty and alternate amputation, handed down by a lower court were upheld by the CrimCAp. The circumstantial evidence was treated as auxiliary, rather than as independent, evidence.[40] In one case, the CrimCAp cancelled a death sentence handed down by a lower court under Section 251 of the PC, 1983 on the following grounds: the only eyewitness was a minor; the perpetrator had retracted his confession, and the circumstantial evidence was weak. The available evidence, however, sufficed to impose on the perpetrator flogging and imprisonment under Section 179 of the PC.[41]

The SupC, on the other hand, seems generally to be bound by the uncodified *shar'ī* rules of evidence pertaining to the application of Qur'ānic punishments and retribution for manslaughter and grievous bodily harm. Thus in one case, two men were charged with pick pocketing (*nashl*) under Sections 76 and 322(2) of the PC and were sentenced to amputation of the right hand. The conviction was based on the complainant's testimony, on the testimony of a policeman who was an eyewitness to the pick pocketing, and on circumstantial evidence (the stolen money was found on the person of one of the accused). The CrimCAp upheld the conviction and the sentence on the basis of the above mentioned evidence. The SupC, however, ruled that the procedure adopted by the courts was contradictory to the *shar'ī* rules of evidence which provide that the crime of theft entailing *ḥadd* punishments be obtained either by voluntary confession or the testimony of two male witnesses of good character (*'adl*) (or equivalent combinations if females are involved). In one

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conviction was based on a decisive circumstantial evidence (*qarīna qāṭi'a*), that is, the presence of the stolen property in his possession}; October 15, 1984, p. 2 cols. 7–8 {the CrimAp cancelled the discretionary punishment handed down by the CrimC and ruled amputation under Section 322(2) of the PC unless the accused proved that he had bought the stolen property from somebody in which case the *ḥadd* punishment was to be averted due to *shubha*}; November 11, 1984, p. 2 cols. 3–4. See also May 30, 1984, p. 2; July 25, 1984, p. 2; August 16, 1984, p. 2; September 17, 1984, p. 2 col. 5; October 22, 1984, p. 2 cols. 1–2; October 28, 1984, p. 2 col. 2; October 31, 1984.

[40] *Al-Ṣaḥāfa*, August 7, 1984, p. 2; August 9, 1984, p. 2; August 21, 1984, p. 2.

[41] *Al-Ṣaḥāfa*, November 25, 1984, p. 2 cols. 1–4.

case, the accused totally denied the charge brought against them: there was only one eyewitness (the policeman); a complainant's testimony is unacceptable under the *sharīʿa*, and this applies also to the testimony of the police investigator which is tantamount to hearsay. Consequently the SupC cancelled the sentence of amputation and instructed to charge the accused in accordance with a section other than *sariqa ḥaddiyya*.[42]

In a similar case a man was charged with *ḥirāba*, highway robbery, under Section 339 of the PC and was sentenced to alternate amputation. The conviction and the sentence were upheld by the CrimCAp. The SupC, however, ruled that the requirements of the *sharʿī* evidence necessary for the establishment of such a crime under Section 78 of the EvA, 1983, that is, the perpetrator's confession or, in its absence, two eyewitnesses, had not been fulfilled. The accused denied the charge and the CrimC based the conviction on the testimony of the single eyewitness to the theft. The SupC ruled that the evidence of one witness sufficed only in the case of a regular theft which does not entail a *ḥadd* punishment. For *ḥadd* punishment two eyewitnesses are mandatory; hearsay (*samāʿiyya*) or circumstantial evidence are not acceptable under the uncodified *sharīʿa*. Consequently, the SupC decided that the crime of *ḥirāba* under Section 339 had not been proven and hence the sentence of alternate amputation was invalid. A discretionary punishment was recommended instead.[43]

A different view of this matter is taken by one of the SupC's judges, Justice ʿAlī Yūsuf al-Walī, who claims that circumstantial evidence is recognized by the *sharīʿa*. In one case, following a dispute between tribes regarding pasture for cattle, two men were killed and others were injured. The incident took place prior to the enactment of the PC, 1983. Al-Walī ruled that the CrimC should have applied the procedure laid down in Criminal Circular No. 5 intended to solve tribal disputes. In his view, this procedure, based on sworn testimonies of the participants, is compatible with the *sharīʿa* and has been ratified by Section 203 of the CrimPA, 1983. Moreover, the judiciary usually strengthens this procedure by means of direct and indirect evidence, [the latter indicating circumstantial evidence] in cases of severe crimes

[42] *SLJR*, 1983, 97–99.
[43] *SLJR*, 1984, 63–64, 67–68, 71.

> out of precaution, having regard to the principle that a person is innocent (*barā'at al-dhimma*) [. . .], unless the opposite is proved and to implementation of justice (*ʿadāla, inṣāf*).

This procedure derives support from Section 3(b)(v) of the JudA, 1983 which provides that a judge "may be guided by judicial precedents insofar as they are not inconsistent with the *sharīʿa*." Al-Walī ruled that the CrimC could legally pronounce judgment in the case under review on the basis of circumstantial evidence, and totally dismissed the appellants' allegation that circumstantial evidence was unacceptable under the *sharīʿa*. In addition, Section 18(d) of the EvA, 1983, which derives inspiration from the *sharīʿa*, allows circumstantial evidence as one of the legal methods of proof, and Section 52 of the same act states that the *qarīna* is "the inference of an unestablished fact from an established one on the basis of probability." The *qarīna* is recognized both by legislation (Section 53 of the same act) and judicial practice (Section 54). This is why all crimes, including those entailing Qur'ānic punishments and retribution can be proved by means of circumstantial evidence. Thus Section 37(3) of the EvA specifies that illicit intercourse can be proved by pregnancy of an unmarried woman, the pregnancy itself being the *qarīna*. Similarly, Section 79 of the EvA provides that the odor of wine, itself a *qarīna*, is sufficient to establish the crime of wine drinking. The *qasāma,* the procedure of taking fifty accusatory oaths in order to prove homicide, also belongs to this category, the *lawth*, the strong suspicion, being the *qarīna*. In the case under review the SupC instructed the CrimC to resort to the procedure of solving the dispute between the tribes which admits circumstantial evidence.[44]

In several cases the SupC treated medical reports as auxiliary evidence to crimes entailing Qur'ānic punishment or bodily harm. Thus in one case, a man claimed that on his return home after an absence of thirteen months he found his wife in a state of advanced pregnancy by a stranger. The wife was convicted under Section 318(1) of the PC, 1983 and sentenced to lapidation on the basis of her confession and pregnancy, as required under Section 27 of the EvA, 1983. A medical report was instrumental to this end. The CrimC instructed the wife to be examined by a physician and the latter's

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[44] *SLJR*, 1986, 132–36. For the procedure of the *qasāma* and definition of *lawth* see *SLJR*, 1984, 123–24. Cf. Peters, *Criminal Law*, § 0.1.1.3; idem, *Qasāma*; Schacht, *Introduction*, 193 (*qasāma* does not belong systematically to the context of evidence); Anderson, *Africa*, Glossary, *qasāma* Q 372.

report stated that the wife was approximately in the seventh month of her pregnancy. The SupC accepted both the wife's confession and the medical report. It treated the report as "additional evidence" (*bayyina ukhrā*) that aided the court in reaching its conclusion with respect to the conviction. Pregnancy is regarded as "independent evidence" (*bayyina munfaṣila*), the reference being to circumstantial evidence, for proving the *zinā* of an unmarried woman. However, the case under review is different; the woman was married when illicit intercourse took place and she admitted having her menstruation several times after her husband's departure. Hence, there is no doubt that the wife was not pregnant at the time of her husband's departure. The court concludes that

> it is well known and established by medicine and science that a pregnant woman cannot menstruate which implies that the wife had been impregnated by someone other than her husband.

Since the situation of a married woman whose husband has been absent for a long period resembles that of an unmarried woman who becomes pregnant, it is appropriate to conclude, by way of analogy, that the same rule should apply in both cases, that is, lapidation.[45]

The testimony of a physician in the form of a medical report is also quite a common practice in cases of homicide. The court summons medical witnesses in order to ascertain the causes of death which might be essential to establish the criminal liability of the perpetrator and, consequently, the appropriate punishment.[46] The medical report is also essential to enable the court decide whether there obtain legal grounds, that is, doubt that may exempt the perpetrator from crimiminal liability. To this end the court summons specialists on mental and nervous diseases.[47] In one case, where a death sentence had been pronounced, a medical report revealed that the witnesses had been beaten. Hence, the CrimCAp ruled that a doubt

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[45] *SLJR*, 1986, 91–93, 95.

[46] *Al-Ṣaḥāfa*, July 10, 1984, p. 2 (the medical report corroborated the witnesses' testimony in that the victim had been stabbed with an "unusual" knife which implies a weapon intrinsically likely to kill); August 16, 1984, p. 2 (a death sentence was handed down under Section 251 of the PC, 1983 on the basis of eyewitnesses and a physician's testimony); September 20, 1983, p. 2 cols. 4–5 {on the basis of eyewitnesses and a medical report the court ruled that the perpetrator should have known that the death was a most likely result of his act, which implies deliberate homicide under Section 248(b) of the PC, 1983}; November 20, 1984, p. 2 cols. 13 (the death was caused by cutting of the arteries and jugular veins).

[47] *Al-Ṣaḥāfa*, September 28, 1984, p. 2 (the victim's heirs insisted on retribution).

had been created as to the validity of their testimonies whereupon the death sentence was repealed.[48] We also have evidence that medical reports are instrumental in proving charges of bodily assault, such as breaking a tooth.[49]

To sum up, although circumstantial evidence is, generally speaking, unacceptable under the *sharīʿa*, there is ample evidence to the effect that the courts, with the exception of the SupC, take account of circumstantial evidence even with respect to crimes entailing Qur'ānic punishments or retribution. Some of the judges even ascribe to circumstantial evidence greater importance than to a perpetrator's confession or witnesses. We also noted that medical reports have become auxiliary evidence acceptable by the court alongside circumstantial evidence.

1.5. *Retroactive Application of Islamist Statutes*

The issue of retroactive application of legal rules is irrelevant to Islamic law on account of its nature as jurists' law that does not acknowledge statutory legislation and codification. This issue is a product of Western-inspired legal systems. On several occasions the CrimCAp reiterated its adherence to the principle that Islamist statutes cannot be applied retroactively (*ʿadam rajʿiyya*). In one case, the accused was charged with fraudulent sale of grain. Although the offense took place prior to the Islamist legislation, the court of first instance, on the basis of the CrimPA, 1983, refused to release the accused on bail. The CrimCAp overruled the sentence and instructed to release the accused in accordance with the Criminal Procedure Code, 1974. The CrimCAp derived support for its decision from the Qur'ān, 17:15: "We never punish until We have sent a messenger" (*wa-mā kunnā muʿadhdhibīn ḥattā nabʿatha rasūlan*), from the legal systems of the revelational religions and from Section 3 of the CrimPA, 1983 which states that it is not legally permissible to impose on someone a punishment severer than the one due under the law applicable at the time the offense took place.[50]

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[48] *Al-Ṣaḥāfa*, October 8, 1984, p. 2 cols. 1–2 (there was also a doubt as to the identification of the victim).

[49] For details on the case, see below, III.2.2.2.2.

[50] *Al-Saḥāfa*, October 24, 1983, p. 1–2.

In another case, the accused was charged with the rape of his minor daughter under Section 317 of the PC, 1974. Nevertheless he was sentenced to Qur'ānic flogging (*jald ḥaddiyya*) of one hundred lashes, three years' imprisonment and banishment (*taghrīb*) under Section 317 of PC, 1983 (which treats rape as *zinā* under Section 318). The CrimCAp ruled that the application of PC, 1983 was wrong and violated the principle of *ʿadam rajʿiyya* of the Islamist statutes, and that the CrimC exceeded its jurisdiction under various Sections of the CrimPA, 1983.[51]

Although the SupC is guided by a basic principle (*qāʿida uṣūliyya*) that criminal statutes cannot, as a rule, be applied retroactively, there is some evidence in court decisions to the effect that Section 251 of the PC, 1983 rather than 1974 was applied regarding crimes that had occurred prior to the 1983 enactment. This procedure conformed to the principle whereby the new law was the "more favorable" (*aṣlaḥ*) for the perpetrator in the sense that pardon (with blood price) under the PC, 1983 is preferable to the death sentence under PC, 1974,[52] to judicial precedents,[53] and to normative compatibility (with respect to the death sentence) between Section 251 of the PC, 1974, and the *sharīʿa*.[54]

In an attempt to enlist support for the amendment of Article 9 of the 1973 Constitution to the effect that the *sharīʿa* is "*the* basic source" (*al-maṣdar al-asāsī*) instead of "*a* principal source" (*maṣdar raʾīsī*) (alongside custom) of legislation, it was revealed that over ten years prior to the Islamist legislation courts used to settle disputes by applying various domains of the uncodified *sharīʿa*. Thus, for instance, with respect to compensation by an insurance company for homicide caused in a traffic accident, a CAp ruled in 1976 that the *sharʿī* blood price was an equitable compensation and that it should be applied. The court further ruled that the blood price of an accidental homicide was appropriate under the circumstances. To support its decision the court cited references from the Qur'ān and the

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[51] *Al-Saḥāfa*, December 13, 1983, p. 2.

[52] *Al-Ṣaḥāfa*, September 20, 1984, p. 2 cols. 4–5; October 14, 1984, p. 2 cols. 3–4 (the CrimCAp held that it was quite common to apply the *sharīʿa*, that is, in its codified version of the PC, 1983 to cases of homicide that had taken place prior to the Islamist legislation). For examples from the SupC decisions, see below, III.2.2.4.

[53] *Al-Ṣaḥāfa*, August 2, 1984, p. 2; August 6, 1984, p. 2; October 30, 1984, p. 2 cols. 3–5.

[54] *Al-Ṣaḥāfa*, August 6, 1984, p. 2. See below, III.2.2.4.

fiqh literature as well as from the aforementioned Article 9 of the Constitution. The courts were careful to apply the *sharīʿa* in a manner that did not contradict the statutory legislation.[55]

To sum up, although the basic attitude of the SupC is that the Islamist laws should not be applied retroactively—an attitude which may find support in the Qurʾān—there seem to be deviations from this attitude having regard to the welfare of the defendant. Moreover, even prior to the Islamist legislation, there is some evidence of the application of the uncodified *sharīʿa*.

2. Islamization of the Law Applicable through Judicial Practice

The survey below does not aim at presenting a systematic analysis of the Sudanese judicial judgments according to subject matter; such a task calls for a special study. Rather, it seeks to delineate salient characteristics noted in the application of the Islamist legislation and legal circulars here illustrated by selected decisions handed down by the SupC and the daily report of the decisions of the CAps.[56]

2.1. *Application of the Eclectic Expedient*

The eclectic expedient is clearly manifested in the famous trial of al-Fātiḥ ʿAbd al-Raḥmān Aḥmad, the bookkeeper from the high school in Wād Sidna, who was accused late in 1983 of embezzling (*ikhtilās* in its statutory connotation)[57] from the Public Treasury. The charge was based on Sections 362, 351, 408 and 410 of the PC, 1983. The EmCC in Umdurman, presided over by al-Kabbāshī, viewed the embezzlement as theft entailing Qurʾānic punishment (*sariqa ḥaddiyya*) within the definition of Sections 320(2) and 321(2) of the

[55] *Al-Ṣaḥāfa*, July 11, 1984, p. 3 (see there a reference to the *Majallat al-Aḥkām al-Qaḍāʾiyya, SLJR*).

[56] The decisions of SupC were published in *SLJR* in the years 1983, 1984 and 1986. The decisions handed down in CAps were surveyed in *al-Ṣaḥāfa* between September 1983 and March 1985.

[57] *Ikhtilās* has two connotations: under the uncodified *sharīʿa* the term means "snatching things unawares" (as in the case of pick pocketing) (Schacht, *Introduction*, 180). In statutory context the term means "embezzlement" {see Section 320(1) of the PC, 1983}. The distinction between the two connotations is not always clear from the argumentation presented below. See al-Kabbāshī, *Taṭbīq al-sharīʿa*, 74 and the references to jurists' treatises and to a *sharʿī* definition of *mukhtalis* in notes 1–4.

PC. The court sentenced him to amputation of the right hand and payment of a fine. The palm of his hand was amputated, and as he was unable to pay the fine, he petitioned the CrimCAp to cancel it. The court ruled that the punishment was "appropriate and reasonable."[58] The sentence elicited sharp public criticism on three points:

1. Most of the *fuqahā'* agree that embezzlement (*ikhtilās*) does not fall within the strict *sharʿī* definition of theft. Moreover, they enlist an explicit Prophetic *ḥadīth* to the effect that the hand of a *mukhtalis* should not be amputated and al-Ṣādiq al-Mahdī shares this view. He explains that the fusion of the two terms, the *sharʿī* and the statutory, in the PC enabled the court to define theft in its statutory connotation and at the same time to apply the *ḥadd* punishment. Moreover, he maintains that under the dominant view in the *sharīʿa* it is not permissible to combine *ḥadd* punishment with fines or any other punishment.[59]

2. Since there is a specific statutory provision in the PC applicable to the case under review, the reference being—as we shall see below—to Section 347 which deals with embezzlement, the court had no discretion to rule amputation by exercising *ijtihād*. The reference here is probably to Section 3 of the JudA which allows *ijtihād* only in the event of a lacuna.[60]

3. The court's decision regarding amputation also contradicts the *sharīʿa* because this case relates to public money, a factor which creates a "doubt or mistake as to private ownership" (*shubhat milk*).[61] Al-Ṣādiq al-Mahdī also concurs with this criticism and proceeds to draw an analogy with another case of theft of public property.[62]

Al-Kabbāshī countered these three allegations with legal and linguistic arguments anchored in the eclectic expedient. As previously

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[58] *SIJR*, 1986, 175; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 27, 70–79; *al-Ṣaḥāfa*, May 25, 1984, p. 3; June 2, 1984, p. 1; Fūda, *Qabla al-suqūṭ*, 127–28.

[59] Al-Mahdī, *al-Niẓām*, 44.

[60] Al-Kabbāshī, *Taṭbīq al-sharīʿ*, 74. On judicial *ijtihād* see below, III.2.2.3.

[61] Cf. Schacht, *Introduction*, 180; Heffening, *Sārik*, 173; Peters, *Islamization of Criminal Law*, 264; *idem*, *Criminal Law*, § 0.1.2.1.

[62] Numayrī announced the decision before it was pronounced by the court. al-Mahdī, *al-Niẓām*, 43–44 cites *al-Ṣaḥāfa*, May 20, 1984.

mentioned, the PC, 1983 contains two sections dealing with theft. Section 320(1), following the PC, 1974, defines a thief as a person who, with evil intent, takes movable property owned by someone else, against the owner's will, gets something by crooked means or embezzles (*yakhtalis*), etc. Section 321(1) states that the sanction for this statutory theft is flogging, a fine, or incarceration. Section 320(2) defines a thief, in the context of theft entailing Qur'ānic punishment, as one who takes (*ya'khudhu*) from another person's possession, against his will and with evil intent, a movable commodity whose value is recognized and protected by law and therefore, compensable in commercial contracts (*māl mutaqawwim*),[63] and which is owned by that person, provided the value is not less than a known minimum (*niṣāb*). Section 320(3) defines the value of the *niṣāb* in terms conforming with the view of the Mālikī school.[64] The sanction set down in Section 321(2) for this type of theft is amputation (*qaṭʿ*).

Al-Kabbāshī maintains that the court addressed the meaning of the term *ikhtilās* not in the context of Section 320(1), in which embezzlement is explicitly mentioned, but in the context of Section 320(2), which deals with theft entailing Qur'ānic punishment. Al-Kabbāshī notes that the court was aware of the authoritative opinion shared by all the schools according to which amputation is not the appropriate punishment for *ikhtilās* in the *sharʿī* sense. The court, however, had relied in this case on a minority opinion favoring amputation, whose most prominent advocate is Iyās b. Muʿāwiya (d. 122/739), a *faqīh* from the Followers (*tābiʿūn*), the second generation after the Companions (*aṣḥāb, ṣaḥāba*), who had known the Prophet personally. Iyās b. Muʿāwiya is referred to, in this context, by jurists such as the Mālikī scholar Ibn Rushd (d. 520/1126) in his *Bidāyat al-mujtahid*, the Ḥanbalī scholar Ibn Qudāma (d. 620/1223) in his *al-Mughnī*, and the Ẓāhirī scholar Ibn Ḥazm (d. 456/1065) in his *al-Muḥallā*. Advocates of Ibn Iyās' opinion stretched the definition of theft to include, among other things, *ikhtilās, nahb* (robbery in broad daylight), *ghaṣb* (taking another person's property by unlawful appropriation), and *khaṭf* (forcible seizure). Hence, al-Kabbāshī concludes, amputation on grounds of embezzlement is neither contradictory to the *sharīʿa* nor to a legal view anchored in the consensus (*ijmāʿ*) of the *fuqahā'*. In other words,

[63] Johansen, *Casuistry*, 143ff.
[64] For details, see above, II.2.2.1.1.

we are dealing here with a case in which the eclectic expedient (*takhayyur*) was applied through the court's jurisprudence.[65]

As previously noted, the first part of Section 320(2) states: "Anyone who takes (*ya'khudhu*) movable property with evil intent." Al-Kabbāshī claims that the word "takes" is phrased in a general way in order not to restrict it linguistically or substantively to theft, but to include in it the elements of taking something surreptitiously (*sitran*) or openly (*mujāharatan*), e.g., forcible seizure; unlawful appropriation; robbery in broad daylight; and *khalsa*, taking an object while its owner is distracted. Had the legislator wished to adhere to the view of the majority of *fuqahā'* regarding the strict definition of theft, he would have specified explicitly in Section 320(2) only "surreptitiously," but he chose to adopt instead the view of Iyās b. Mu'āwiya.[66]

Similarly, al-Kabbāshī maintains that Section 320(2) does not represent the position of most *fuqahā'*, who make *sariqa ḥaddiyya* conditional on the existence of custody (*ḥirz*), but rather the view of the Ẓāhirīs (*ahl al-ẓāhir*) and of a group of Traditionists (*ahl al-ḥadīth*). The Ẓāhirī school, headed by Dāwūd ibn Khalaf (d. 270/884), holds that the Qur'ān and the *sunna* should be interpreted according to the literal, evident meaning of the text, in preference to legal reasoning. This group of Traditionists believes in the formal traditions of the Prophet, and not in the "living tradition" of the ancient schools, or in the emphasis on reasoning of the *ahl al-ra'y* group.[67] The Ẓāhirīs and some of the Traditionists impose the punishment of amputation for theft regardless of whether the object stolen was or was not in someone's custody (*ḥirz*), since this condition is not mentioned in Qur'ān, 5:38, provided the requirement of the *niṣāb* has been met. Al-Kabbāshī supports his claim with citations from the expositions of Ibn Qudāma and Ibn Ḥazm.[68] This is another clear manifestation of the eclectic expedient, through the court's jurisprudence, based, in this case, on the view of the Ẓāhirī school.

As to the issue of the public nature of the money embezzled in the case under review, al-Kabbāshī's response is that the appropriateness of amputating a hand for theft or for *ikhtilās* of public money

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[65] See above, II.2.2.1.1.

[66] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 74–75. On the word *akhadha* in connection with theft that constitutes *shubha*, see Peters, *Islamization of Criminal Law*, 253.

[67] Schacht, *Introduction*, 34; Coulson, *History*, 61, 71.

[68] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 76.

is disputable. Abū Ḥanīfa, al-Shāfiʿī and Ibn Ḥanbal hold that the punishment of amputation does not apply to a person who steals from *bayt al-māl*, the Public Treasury, which according to the orthodox *sharʿī* conception constitutes public money. This view was transmitted from ʿUmar and ʿAlī and was shared by the transmitter of *ḥadīth* al-Shaʿbī (d. 103–110/721–728)[69] and Ibrāhīm al-Nakhaʿī (d. 95 or 96/713–15).[70] Mālik, along with certain other jurists, holds—on the basis of the literal meaning of the aforementioned Qur'ānic verse (5:38)—that amputation does apply in such a case. The Ẓahirī scholar Ibn Ḥazm upholds this view on the grounds that neither the Qur'ān nor the *ḥadīth* make any distinction between a person who steals from *bayt al-māl*, in which he has a portion, and one who steals from somebody else's property. In his view, the omission of such a distinction is not coincidental but intentional.[71] Al-Kabbāshī further argues that the legal circular issued by the Chief Justice defining *shubhāt al-milk* by virtue of which the *ḥadd* punishment is averted, does not include "doubt as to public property" within this category since it takes modern life into account as well as public interest.[72]

A short time after al-Kabbāshī retired from his office, the aforementioned bookkeeper complained to the SupC accusing al-Kabbāshī, *inter alia*, of adding to the original charge the additional one of a theft entailing Qur'ānic punishment under Section 320(2) with evil intention of causing the amputation of the bookkeeper's hand. He further claimed that in order to justify the inclusion of embezzlement within the definition of that section al-Kabbāshī resorted to the Mālikī doctrine, that is, by way of *takhayyur* although according to a Prophetic *ḥadīth* embezzlement does not entail amputation, and the fraudulent person is subject to discretionary punishment alone. The bookkeeper moreover claimed that al-Kabbāshī deviated from the law applicable in court by disregarding a statutory provision [pertaining to embezzlement] and ignored Article 70 of the Permanent Constitution which prohibits a judge from handing down a punishment not anchored in a statutory provision.[73]

The SupC accepted the bookkeeper's allegation that al-Kabbāshī had deviated from a statutory provision by imposing the Qur'ānic

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[69] Juynboll, *al-Shaʿbī*.
[70] Schacht, *Introduction*, 27.
[71] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 78.
[72] *Ibid.*, 79. See above, II.2.1.2 (Criminal Circular No. 98).
[73] *SLJR*, 1986, 175–76.

punishment pertaining to theft on a case of embezzlement and forgery. The court further ruled that there was no justification for the exercise of personal *ijtihād* within the meaning of Section 3 of the JudA, 1983 in the presence of an explicit, clear statutory provision pertaining to the specific offenses in the case under review. The court also ruled that al-Kabbāshī had acted wrongly in adhering to Iyās b. Muʿāwiya's legal opinion prescribing amputation as a compulsory punishment for embezzlement, and to Mālik's like-minded view whereby a theft from spoils, the Public Treasury, and public money entails amputation. In either case, the goods in question fall into the category of public property, creating a *shubha* (doubt or mistake as to private property) that averts *ḥadd* punishment. Furthermore, the court concluded that al-Kabbāshī's reliance on Iyās b. Muʿāwiya and Mālik contradicted the views of the majority of the *fuqahāʾ* and the Imāms (the nominal founders of the orthodox Sunnī schools of law) and deviated from a statutory provision the formulation of which is the sole prerogative of the legislator. In effect, the latter is assumed to be well acquainted with the range of views held by the *fuqahāʾ* and the Imāms, and that it is up to him to decide which of these is the most appropriate for incorporation into a statutory provision.[74] It is most likely that the SupC's objection to the application of the eclectic expedient—a common practice in the Islamist legislation—by al-Kabbāshī was motivated by the desire to avoid the execution of harsh Qurʾānic punishments.[75] Formally, the SupC treated al-Kabbāshī's decision as an unjustified exercise of judicial *ijtihād* under Section 3 of JudA, 1983.

In one case a divorced woman was impregnated by a stranger. She was charged with adultery (*zinā*) and sentenced, under Section 318(1) of the PC, to lapidation (*rajm*) which is the appropriate punishment for a *muḥṣana*, that is, a woman who has consummated a valid marriage. The file was submitted to the SupC for substantiation in accordance with Section 237 of the CrimPA and the Criminal Circulation No. 3 of 1983. This procedure is meant to verify the validity of a decision and its compatibiliy with the *sharīʿa*. The SupC

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[74] *SLJR*, 1986, 176–77. On judicial *ijtihād*, see below, III.2.2.3. The SupC nevertheless granted al-Kabbāshī judicial immunity and freedom from personal liability for causing by wrong judgment the amputation of the bookkeeper's hand. See above, III.1.2.

[75] See below, IV.4.3.

concluded that all the schools of law concur in the view that the consummation of a valid marriage creates the status of *iḥṣān* entailing lapidation. Surprisingly enough, the SupC adopted, by way of eclectic expedient, the view of the Imām al-Ṣādiq of the Imāmī Shīʿa and some contemporary Sunnī jurists that is in glaring contradicton to that of the Sunnī schools in this matter. The Imām al-Ṣādiq went so far as to maintain that the adulteress must be under matrimonial authority (*ʿiṣma*), that is, married at the time the illicit intercourse took place.[76] This view is shared by Muḥammad Abū Zahra and Rashīd Riḍā who maintain that once the adulteress has been divorced she ceases to be *muḥṣana*. They further maintain that discrimination against an adulterine *thayyib*, a deflowered woman, is unjustified on grounds of loss of virginity and dissolution of marriage. In other words, her liability to lapidation should be conditional on her being married; otherwise she is subject to one hundred lashes like a virgin who has committed fornication. In addition, there is no explicit statutory provision condemning to lapidation a divorced woman who has committed illicit intercourse, which in its turn creates a doubt averting the Qur'ānic punishment. Hence, the SupC ruled that divorce prior to illicit intercourse excludes the woman from the category of *iḥṣān*.[77] The possibility that the SupC used the eclectic expedient here as an instrument to avert harsh Qur'ānic punishments cannot, of course, be ruled out.

In another case, a man was convicted of causing deliberate homicide under Section 251 of the PC, 1974. The avengers (*awliyā'*) of the victim submitted to the court a petition stating that the two parties, being of the same tribe, had reached an amicable settlement (*ṣulḥ*) in which the avengers waived their right to retribution in return for an agreed blood price and compensation "in accordance with the current tribal custom (*ʿurf*)." The file was sent to the SupC with a recommendation to commute the death sentence. On the basis of legal precedents[78] it was decided that Section 251 of the PC, 1983 was to be applied in this case. According to this revised section, deliberate homicide entails the death sentence or blood price provided the avenger of the victim agrees. The SupC approved the

[76] The judgment reads that the adulteress must be married to the adulterer, but this makes no sense and seems to be a typographical error. See below.

[77] *SLJR*, 1986, 129–31.

[78] See above, III.1.2.

customary tribal reconciliation. The only question that remained to be solved was whether the offender should be released on the spot following the reconciliation or, alternatively, be penalized by discretionary punishment. The *fuqahā'* express conflicting opinions on this question: Mālik and al-Layth (d. 94/713)[79] maintain that the Sulṭān is entitled to punish the offender, notwithstanding the reconciliation, by discretionary punishment consisting of one hundred lashes and a year's imprisonment. On the other hand, al-Shāfiʿī, Ibn Ḥanbal and other jurists maintain that neither the Sulṭān nor any other ruler is entitled to impose such a punishment. The SupC adopted the Mālikī doctrine in the case under review having regard to the fact that the Sudanese legislator is generally inclined to this doctrine. The same line was taken by Criminal Circular No. 94 of 1983 pertaining to doubts averting retribution. The circular instructs that the perpetrator who has been forgiven by the victim's avengers or has managed to obtain reconciliation is still subject to *ḥaqq allāh* or *al-ḥaqq al-ʿāmm*, that is, a claim within the domain of public law entailing discretionary punishment: a year's imprisonment and one hundred lashes in accordance with the Mālikī doctrine.[80] In addition to it, the SupC recommended that the perpetrator impose on himself a religious expiation (*kaffāra*): two successive months of fasting as required by the Mālikī school and the opinions of some Shāfiʿī and Ḥanbalī jurists or, alternatively, in case the perpetrator cannot fast—feeding of sixty poor men as required by some Shāfiʿī and Ḥanbalī jurists.[81]

In yet another case the court charged the perpetrator with quasi-deliberate homicide (*al-qatl shibh al-ʿamd*) and sentenced him to payment of blood price under Section 253 of the PC, 1983. This section leaves the court the discretion to choose between the death sentence and blood price. The CrimCAp sustained the sentence while explaining that this section is a combination of Mālikī doctrine and that of the rest of the *fuqahā'*. As noted earlier, the Mālikī doctrine recognizes only two categories: deliberate homicide and accidental homicide, the intermediate category of quasi-deliberate homicide being subsumed in deliberate homicide, which implies that the option of retribution is left intact. The doctrines of other schools disallow the

[79] Al-Layth b. Saʿd, a Traditionist belonging to the Followers (*tābiʿūn*). See Merad, *al-Layth*.

[80] See above, II.2.1.2.

[81] *SLJR*, 1983, 100–8; Schacht, *Introduction*, Glossary, *kaffāra*.

option of retribution in categories other than deliberate homicide; the intermediate category of quasi-deliberate homicide only creates a liability for the enhanced (*mughallaẓa*) blood price. In fact, this amounts to a conflation of conflicting doctrines, that is, the eclectic expedient of *talfīq*.[82]

In the case of pick pocketing (*nashl*) already discussed above, the CrimC ruled that pick pocketing should be considered a theft entailing Qurʾānic punishment. The decision was sustained by the CrimCAp. The SupC, however, overruled the decision on the grounds that it opposed *sharʿī* rules of evidence requiring that a theft be proved either by voluntary admission or two witnesses of good character. To support its decision the SupC quoted the view of Ḥanbalī and Mālikī jurists that amputation of a limb cannot be executed unless the offense has been established by admission or by the testimony of two qualified witnesses.[83]

To sum up, the aforementioned cases indicate that the judges do not deem themselves bound to any particular school of law. Jurists from all schools, including the Ẓāhirī school and ancient jurists dating as far back as the Companions of the Prophet (*ṣaḥāba*) and their Followers (*tābiʿūn*) are resorted to in order to support judicial decisions motivated by what seems to be the desire to avoid the implementation of harsh Qurʾānic punishments. Naturally enough, there is a marked inclination to enlist Mālikī jurists. The eclectic device is thus applied not only at the level of legislation and legal circulars, as we noted earlier, but also at the level of judicial practice. In the case of the bookkeeper, the EmCC applied the eclectic device in such an extreme fashion that the court incurred the condemnation of the SupC for exercising *ijtihād*.

2.2. *Statutory Rules of Interpretation: The Judgments (Basic Rules) Act, 1983*

2.2.1. *Interpretation of Statutory Provisions*

We have already noted that the legislator granted the judge wide discretion, in the process of passing judgment, to make the validity of statutory provisions conditional on the extent of their conformity with the *sharīʿa*. Section 2 of the JudA, 1983 provides that in inter-

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[82] *Al-Ṣaḥāfa*, September 17, 1984, p. 2 cols. 3–4. For further details, see above, II.2.2.1.1.

[83] *SLJR*, 1983, 97–99. For further details, see above, III.1.4.

preting legislative provisions, the judge shall (a) presume that the legislator did not intend to contradict the *sharʿī* scale of five religious-legal qualifications; (b) interpret general concepts and discretionary expressions in accordance with the rules, principles, and general spirit of the *sharīʿa*; and (c) interpret the technical legal terms and the religious legal expressions in the light of basic principles (*qawāʿid uṣūliyya*), and the linguistic rules of the Islamic science of the *sharīʿa*. Similarly, Section 458(1)(a) and (5) of the PC, 1983, instructs the judge, in interpreting provisions of that code, to ascertain that the provision applicable to an offense, especially one entailing a Qurʾānic punishment, conforms to *sharʿī* standards, and to refrain from interpreting any provision in a manner contravening *sharʿī* principles.[84]

The courts seem to be fully aware of these sections. In one case, the defendant was convicted under several sections of the Order of the Organization of Movement of Commodities (*amr tanẓīm ḥarakat al-silaʿ*), 1971. He was sentenced to imprisonment and confiscation of some goods. The sentence was sustained by the CAp and the defendant resorted to the SupC claiming that the sentence was "contradictory to the basic principles (*uṣūl*) of the *sharīʿa*, the state law, and its application and interpretation and the weight of evidence." The SupC was requested to revise the sentence having regard to Section 239(1) of the CrimPA, 1983 which states that

> The SupC or the CAp may request [for the purpose of revision], on its own initiative, minutes pertaining to procedure pursued by any court subordinated to its authority provided it deems the procedure repugnant to the rules of the Islamic *sharīʿa*.

The SupC ruled that this section deals with contradictions to *sharʿī* rules (*aḥkām*) rather than basic principles (*uṣūl*) of the *sharīʿa*, and that a clear distinction should be made between the two: *uṣūl sharʿiyya*, or more explicitly, *qawāʿid uṣuliyya* are the principles used for deriving practical *sharʿī* rules on legal matters (*furūʿ fiqhiyya*) out of its detailed elaborate manuals. *Qawāʿid uṣūliyya* (to be distinguished from the theory of legal methodology, *ʿilm uṣūl al-fiqh*) are laws (*qawānīn*), which here constitute legal principles rather than statutes—intended to generate rules inspired by these manuals. The *qawāʿid uṣuliyya* are based on the sciences of the *sharīʿa*, theology, and linguistics {this refers to Section 2(c) of the JudA, 1983} and adhere to the goals of the *sharʿī* legislation in the sense that they take into consideration

[84] For further details, see above, II.2.1.3.

exigencies required for the protection of religion, life, progeny, property and the mind. The SupC provides a variety of *qawāʿid uṣūliyya* and principles derived therefrom, some of which have been assembled in Section 5 of the CivTA, 1984 under the title of "fundamental principles" (*qawāʿid asāsiyya*).[85]

In the case of the bookkeeper from Wād Sidna whose hand had been amputated on grounds of embezzlement, we noted that the first part of Section 320(2) states: "Anyone who takes (*yaʾkhudhu*) movable property with evil intent." Al-Kabbāshī claims that in giving a broad interpretation to the word "take," the EmCC was applying Section 2 of the JudA, 1983. The court interpreted expressions and technical terms in the light of the basic principles of Islamic law and the linguistic rules of the science of the *sharīʿa*, thereby exhausting Section 2(c). Hence, there was no intention on the court's part of embarking on legal innovation. This is meant to refute the contention that the court exercised *ijtihād* in the presence of a "legislative provision governing an event" within the meaning of Section 3 of JudA.[86]

In another case, a man was convicted for committing highway robbery (*ḥirāba, qaṭʿ al-ṭarīq*) and sentenced to life imprisonment and exile in accordance with Section 396 of the PC, 1983. Later the charge was replaced by Section 321(2), that is, theft entailing Qurʾānic punishment, and the perpetrator was sentenced to amputation of his right hand. Section 396 provides that anyone committing aggression under the cover of night combined with an ambush, or breaking into a place for the sake of committing a crime entailing Qurʾānic punishment is subject to capital punishment, or alternate amputation, or life imprisonment and banishment. The SupC ruled that the statutory definition of *ḥirāba* was not compatible with *sharʿī* norms. Although there is an element of theft in *ḥirāba*, one should make a clear distinction between the crimes. The basic principle (*rukn*) in theft is the taking of property secretly (*khufyatan*), while the basic principle in *ḥirāba* is assault (*khurūj*) with the intention (*bi-qaṣd*) of taking property by forceful means (*mughālaba*). The intention, rather than the actual taking of the property, is a precondition for liability though there may be aggravating circumstances (such as taking the property of the victim and/or killing him) that are taken into account

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[85] *SLJR*, 1984, 80–87.

[86] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 75–76. See above, III.2.1. For Section 2 of JudA, see above, II.2.1.3.

when administering punishment as specified in the Qur'ān (5:33). The SupC questioned the legality of the punishment applicable to the crime under Section 396 since it amounted to the same punishment applicable to *ḥirāba* under the uncodified *sharīʿa*, and ruled that the lower court was prohibited from imposing a Qur'ānic punishment for a crime which did not meet the definition of that crime under the *sharīʿa*. The SupC based its rule on Section 458(5) of the PC, 1983 and Section 2(a) of the JudA, 1983.[87]

In another case, a married woman was charged with adultery under Section 318(1) of the PC, 1983 and was sentenced to lapidation (*rajm*) on the basis of her confession (*iqrār*) and pregnancy. The man with whom the woman claimed to have had illicit intercourse was charged under Section 429(2) of the PC. She failed to prove her claim and hence she was charged with false accusation of illicit intercourse (*qadhf*) and sentenced to eighty lashes under Section 434 of the PC. The woman requested the SupC to commute her sentence, but she nevertheless did not retract her confession. Such a retraction would have created *shubha*, a doubt or mistake, which averts punishment. The SupC ruled that the confession was valid and acceptable. It further ruled that *iḥṣān*, "immunity [against the charge of illicit intercourse]," obtained by consummation of a valid marriage, was a precondition for liability to the punishment of lapidation. Section 432(2) provides that a married woman who commits illicit intercourse is subject to punishment "in accordance with the Islamic *sharʿī* rules." Since the PC does not define *iḥṣān*, the SupC resorted to the uncodified *sharīʿa* as manifested in a variety of jurists' views of all schools. The court sustained the conviction of the adulterous woman and the capital punishment on the basis of Section 458(5) of the PC and Section 2(a-c) of the JudA, 1983.[88]

As noted above, two separate sections have been allocated in the PC, 1983 for the offense of theft: Section 320(1) defines theft as in the PC, 1974. Subsections (2–3) define "theft which entails Qur'ānic punishment" (*sariqa ḥaddiyya*) in common *sharʿī* terms such as *niṣāb*, the minimal value of a stolen object for which punishment is prescribed. Section 321 specifies separate punishments for the two different

[87] *SLJR*, 1984, 72–77. Cf. Peters, *Criminal Law*, § 0.1.2.2; Anderson, *Africa*, Glossary, *sariqa*.

[88] *SLJR*, 1986, 91–101. Cf. Peters, *Criminal Law*, § 0.1.1.1 (*shubha*), 0.1.2.3; Anderson, *Africa*, Glossary, *zinā*.

types of theft: Subsection (1) imposes punishments of flogging, fines, or imprisonment, while Subsection (2) imposes the Qur'ānic punishment of amputation. The doubts (*shubhāt*) spelled out in Section 323, which avert Qur'ānic punishment, such as "doubt as to private ownership" (*shubhat milk*), also conform to *shar'ī* norms.[89] It seems that as a matter of policy the prosecution and the court did everything in their effort to charge and convict the perpetrator under Sections 320(2–3), Section 321(2) and 322(2) (burglary) of the PC, 1983, that is, on grounds of *sariqa ḥaddiyya*, provided all the *shar'ī* requirements are met. Thus in one case, the CrimC ruled while handing down a sentence of amputation, that there was strong and direct evidence: eyewitnesses and confession in the presence of judge; that the stolen property was found in the perpetrator's possession; that the value of the stolen property exceeded the *niṣāb*; and that there was no *shubha* averting the *ḥadd* punishment. The CrimCAp sustained the sentence without interfering in the matter.[90] Occasionally the CrimCAp replaced a discretionary punishment handed down by CrimC by amputation.[91]

Conviction on grounds of *sariqa ḥaddiyya* failed in the following circumstances:

(1) The theft took place prior to the enactment of the the PC, 1983;[92]

(2) The value of the stolen property was below the *niṣāb*;[93]

(3) Doubts, such as the thief's retraction of his confession, averted the *ḥadd* punishment;[94]

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[89] For further details, see above, II.2.1.4.

[90] *Al-Ṣaḥāfa*, February 14, 1984, p. 2. See also July 12, 1984, p. 2.

[91] See, e.g., *al-Ṣaḥāfa*, August 9, 1984, p. 2.

[92] *Al-Ṣaḥāfa*, July 17, 1984, p. 2. On the retroactive application of Islamist statutes, see above, III.1.5.

[93] *Al-Ṣaḥāfa*, November 12, 1984, p. 2 cols. 2–3; September 17, 1984, p. 2 cols. 1–2 (the theft had been committed jointly by a number of perpetrators. They claimed that the value of the stolen property after it was divided between them, was below the *niṣāb*, but the CrimCAp ruled that the value of the property should be assessed prior to its division); July 29, 1984, p. 2 {the nature of the stolen property—bedspread of a mosque—as public property, which creates doubt (*shubhat milk*), was not discussed}.

[94] *Al-Ṣaḥāfa*, July 16, 1984, p. 3 (the CrimCAp, however, was anxious to clarify that the crime had been established by means of eyewitnesses and hence there was no room for *shubha*); August 23, 1984, p. 2. Cf. August 13, 1984, p. 2 (the CrimCAp

(4) Circumstantial evidence proved to be insufficient for imposing *ḥadd* punishment;[95]

(5) The perpetrator was below the age of puberty (*ḥulum*).[96]

(6) The stolen property was restored to its owner.[97]

Only when the prosecution failed to prove the charge of *sariqa ḥaddiyya* did the court resort to discretionary punishment. Thus in one case, the court ruled that the charge of *sariqa ḥaddiyya* had not been proven due to the absence of two witnesses to the confession by the accused. However, there was no problem in proving a "regular" (*ʿādiya*) theft, and the court sentenced the perpetrators to discretionary punishments of flogging, imprisonment, and a fine under Sections 353 and 356 (keeping stolen property in someone's possession) of the PC. In another case, the CrimCAp ruled that the reliable evidence submitted to the court sufficed to convict the accused with theft that does not entail Qur'ānic punishment under Section 322(1). However, this evidence "does not rise to the level of a proof that is required under the *sharīʿa* and law to apply the *ḥadd*." In yet another case, the court ruled that the value of the stolen property was below the *niṣāb* and one of the accused claimed that he had bought a certain item of the stolen property from a third party thus creating *shubhat milk* averting the *ḥadd*. Consequently the court charged the accused with *sariqa ghayr ḥaddiyya*.[98]

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sustained a sentence of amputation on the grounds that the theft took place in a private residence, and hence there arose no *shubhat milk*); May 31, 1984, p. 2 {the court issued a sentence of amputation under Section 322(2). Although the property was stolen from Jāmiʿat Khartoum, no reference was made with respect to its nature as public property which creates *shubhat milk*}.

[95] *Al-Ṣaḥāfa*, November 22, 1984, p. 2 cols. 4–5; October 24, 1984, p. 2 cols. 5–6 (the accused retracted from his confession; the circumstantial evidence was weak). On the circumstantial evidence as appropriate means to establish crimes entailing *ḥudūd*, see above, III.1.4.

[96] *Al-Ṣaḥāfa*, August 7, 1984, p. 2 {The criminal punishment was replaced by disciplinary punishment (*taʾdīb, tahdhīb, tarbiya*) in an institute for moral correction (*iṣlāḥiyya*)}; September 28, 1984, p. 2 cols. 1–2; October 18, 1984, p. 2; November 12, 1984, p. 2 cols. 3–4.

[97] *Al-Ṣaḥāfa*, August 31, 1984, p. 2; September 16, 1984, p. 2 col. 3 {the CAp ruled that the plaintiff's renunciation (*tanāzul*) of the stolen property, its donation (*hiba*) or disposition (*taṣarruf*) thereof after the matter had been transmitted to the court, did not create *shubha* that averted the *ḥadd*}.

[98] *Al-Ṣaḥāfa*, July 10, 1984, p. 2; August 7, 1984, p. 2 col. 6; and October 7, 1984, p. 2 col. 3, respectively. See also July 12, 1984, p. 2; July 17, 1984, p. 2; July 29, 1984, p. 2 {the CrimCAp cancelled amputation under Section 321(2) because the plaintiff could not identify the accused and charged them with keeping

In some cases, conformity with the *sharīʿa* was required in matters pertaining to procedure. Thus in one case, the accused was charged with theft entailing Qurʾānic punishment under Section 322(2) of the PC, 1983 and sentenced to amputation of his right hand and the tying (*taʿlīq*) of the amputated limb to his neck. The CrimCAp sustained the amputation but cancelled the tying of the amputated limb. The SupC ruled that the accused had no right to appeal since Section 235(2) of the CrimPA, 1983 states the finality of the decisions handed down by a CrimCAp. However, by virtue of Section 239 of that act, the SupC court deemed itself authorized to examine the protocol of the judicial proceedings on the grounds that some measure taken by the court contravened the *sharʿī* rule of procedure.[99]

To sum up, the courts seem to be fully aware of Section 2 of JudA, 1983 and Section 458(1)(a) and (5) of the PC, 1983 which guide the judge to interpret statutory provisions, both substantive and procedural, in conformity with the principles and norms of the uncodified *sharīʿa*. In cases where two punishments are reserved for the same offense, one based on the *sharīʿa* and the other on pre-1983 statute, as with regard to theft, the court as a rule endeavors to exhaust the option of the *sharʿī* punishment before resorting to the alternative.

2.2.2. *Resort to the Qurʾān and the* Ḥadīth

2.2.2.1. Recourse to the Textual Sources in the Event of a Lacuna As already noted, Section 3(a) of the JudA, 1983 provides that in the absence of a statutory provision the judge should apply the *sharʿī* rules established by the Qurʾān and the *sunna*. We also noted that this Section actually grants the uncodified *sharʿī* law, to the extent that it is anchored in the textual sources, a status as a source of law.[100]

The case of the Indian merchant Lālīt Rātinlāl Shāh provides clear evidence to this effect. He was convicted of making money changing and banking transactions worth millions in foreign currency without a government licence, of lending money at an exorbitant

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stolen property in their possession under Section 353}; September 12, 1984, p. 2; November 13, 1984, p. 2 col. 1 (the value of the stolen property was less than the *sharʿī niṣāb* and the perpetrator was castigated by discretionary punishments); November 16,1984, p. 2 col. 3).

[99] *SLJR*, 1983, 89–91.

[100] See above, II.2.2.2.

usury rate (105% a year), of smuggling hard currency out of the country, thereby causing serious damage to the economy, and of carrying out commercial transactions without the license required of a foreign national. He was convicted of violating various sections of the PC, 1983; Section 9 of the Prohibited Enrichment Act, 1983; Section 51 of the Bank of Sudan Law, 1959; and a long list of economic laws.[101] We will concentrate here on usury, which is the relevant issue in the context of this discussion.

For taking usury, Rātinlāl Shāh was sentenced to ten years in prison, ninety lashes, and the confiscation of profits from the usury. This was done even though Sudanese legislation has no criminal sanctions for usury, as was pointed out, in the event, by those who denounced the verdict. The ban on usury is treated in the uncodified *sharīʿa* as a matter of civil contract law rather than a matter of criminal law; the Sudanese PC does not regard the taking of usury as a crime. Furthermore, Article 70 of the Sudanese Constitution stipulates that no criminal penalty can be applied for an act not defined by the law as a crime at the time the act was committed.[102] In the statutory legislation, sanctions for taking usury are limited to the legal results of the transaction in which usury was taken, and the offender is not incriminated. Thus, for example, when excessive profit (*manfaʿa zāʾida*) has been stipulated as a condition for making a loan, that is, illegal profit in *sharʿī* terms, the condition is void but the contract remains valid according to Section 281 of the CivTA, 1984. Section 165(1) of the CivTA, in accordance with Section 9 of the Prohibited Enrichment Act, 1983, defines as prohibited enrichment (*tharāʾ ḥarām*) any profit accruing to unlawful appropriation (*ghaṣb*) of another person's property, or an invalid contract. The expressions "excessive profit" and "prohibited enrichment" naturally conjure up associations with usury.[103] Due to contradictions in the witnesses' testimony in the case under review, the court was unable to apply Section 98 of the PC, 1983 dealing with causing harm to the national economy, in order to punish the Indian merchant, even for the crime of smuggling merchandise. This section prescribes two kinds of punishments

[101] For further details, see al-Kabbāshī, *Taṭbīq al-sharīʿa*, 97–98; *al-Saḥāfa*, October 18, 1984, p. 2; November 8, 1984, p. 1; November 9, 1984, p. 8; December 3, 1984, p. 2.

[102] Mayer, *Law and Religion*, 169–70. Cf. Peters, *Islamization of Criminal Law*, 265.

[103] For further details, see below, IV. 2.2.2.1.

for causing harm to the national economy: the Qur'ānic punishment of death, crucifixion, and alternate amputation for causing corruption (based on the Qur'ānic verse 5:33), which under the uncodified *sharīʿa* is reserved for *ḥirāba* or *qaṭʿ al-ṭarīq*, and the discretionary punishment of imprisonment and confiscation of property.[104]

Under the circumstances the court had recourse to Section 3(a) of the JudA with a view to deriving support for the legal sanction against taking usury. Subsection (a) provides that in the absence of a statutory provision regulating a specific event, the judge shall apply uncodified *sharʿī* rules as established in the Qur'ān and the *sunna*. The court cited two Qur'ānic verses that prohibit the charging of usury.[105] It also found support for the prohibition on usury in collections of *ḥadīth*s.[106] As mentioned earlier, the prohibition on usury is a purely civil matter: a transaction in which usury has been charged is considered an invalid or unenforceable contract. In the absence of a criminal sanction in the textual sources, the court presumed that it had wide discretion to identify "a *sharʿī* provision that has been disregarded" (*al-ḥukm al-sharʿī al-maskūt ʿanhu*) in the *sharʿī* legal literature, and thus counteracting the oversight of the PC that caused this lacuna. In fact, support was found in the writings of the neo-Ḥanbalī jurist Ibn Taymiyya (d. 728/1328) and the Shāfiʿī jurist Māwardī (d. 450/1058), who treat usury as a religious sin (*maʿṣiya*) entailing discretionary punishment. According to Ibn Taymiyya, the offender is subject to the punishment of flogging and a fine, which entails the confiscation of the unlawful enrichment. This was, in fact, the view which provided the juridical basis for the sanction imposed on the Indian merchant.[107]

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[104] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 101–2. Cf. Peters, *Criminal Law*, § 0.1.2.2.

[105] Q. 2:275: "Those who swallow usury cannot rise up save as he ariseth whom the devil hath prostrated by (his) touch. That is because they say: Trade is like usury; whereas Allah permitteth trading and forbiddeth usury. He unto whom an admonition from his Lord cometh, and (he) refraineth (in obedience thereto), he shall keep (the profits of) that which is past, and his affair (henceforth) is with Allah. As for him who returneth (to usury)—Such are rightful owners of the Fire. They will abide therein."

Q. 2:278: "O ye who believe! Observe your duty to Allah, and give up what remaineth (due to you) from usury, if ye are (in truth) believers."

[106] Coulson, *History*, 12; *idem*, *Commercial Law*, 11–12; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 102.

[107] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 27, 97–103, 108; Köndgen, *Das islamisierte Strafrecht*, 58; Peters, *Islamization of Criminal Law*, 265; Gordon, *Legal Revolution*, 813.

The famous trial of Maḥmūd Muḥammad Ṭāhā, leader of the "Republican Brothers" (*al-ikhwān al-jumhūriyyūn*),[108] who opposed Numayrī's policy of reinstating the *sharīʿa*, provides further evidence to the effect that the uncodified *sharīʿa* as established in the Qurʾān and the *sunna*, has been raised to the status of a source of law in the absence of an explicit statutory provision regulating a specific charge against the defendant. On January 18, 1985, he was executed after a CrimC had sentenced him and four other Brothers to death; the CrimCAp upheld the ruling. The defendants were convicted of propagating the teachings of Maḥmūd Ṭāhā calling for a new understanding of Islam. Ṭāhā argued that the *sharīʿa*, in the form in which it existed at the time of the Prophet in the seventh century, that is, the legal rulings as established in the Qurʾān, did not offer solutions to the problems of the twentieth century. Solutions were to be found only in the *sunna*, the practice (*ʿamal*) of the Prophet, which constitutes the "roots" (*uṣūl*) of the Qurʾān.[109] The defendants admitted having published a pamphlet in which they called for the repeal of the September laws of 1983 on the grounds that these laws contravened the *sharīʿa*. They pleaded guilty and were convicted of violating Sections 96(ṭ) and (k) and Section 105 of the PC, 1983, which provide that harm to the Constitution and incitement to rebellion against the state are crimes entailing the death penalty, life imprisonment, or incarceration for a shorter period and confiscation of property. They were also convicted of violating Section 20(a) of the State Security Act, 1983. Alongside the death penalty Maḥmūd Ṭāhā was given three days to repent (*tawba*), and the other four Brothers were given a month. The court also ruled that Ṭāhā's property should be confiscated and that its ownership be transferred to the entire Muslim community, that Ṭāhā should not be buried in a Muslim cemetery, and that the publications of the Brothers should be confiscated. Maḥmūd Ṭāhā did not recognize the court's authority to sentence him; he also refused to present a defense or to repent, and he was executed. The other Brothers repented and their lives were spared.[110]

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[108] See above, I.4.4.

[109] See Taha, *The Second Message*, 34–35; al-Mahdī, *Mustaqbal al-islām*, 383; An-Naʿim, *Islamic Constitution*, 337–38; Mahmoud, *Taha's Second Message*; ʿAlī, *Maḥmūd Ṭāhā*; Fūda, *Qabla al-suqūṭ*, 125.

[110] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 80–96; *al-Ṣaḥāfa*, January 7, 9, 1985; January 16, 1985, p. 3 col. 1 (presents the entire sentence of the CrimCAp); January 17, 1985, p. 3; January 19, 1985, p. 1 (*ʿulamāʾ* request to meet the convicted Brothers

The attempt to save Ṭāhā by preventing execution of the verdict on the basis of Section 247 of the CrimPA, 1983, which provides that the death penalty will not be imposed on a person seventy years of age or older and on Article 70 of the 1973 Constitution was rejected on the grounds that the section does not apply to Qur'ānic punishments. Relying on the consensus of the *fuqahā'*, al-Kabbāshī determined that advanced age could not be considered "doubt" that averts execution of Qur'ānic punishment.[111] Ṭāhā had been convicted on the charge of apostasy, with an option to repent, already in 1968. The decision had been handed down by the CrimCApl, in Ṭāhā's absence.[112]

The defendants' conviction does not constitute a legal problem as far as State Security Act is concerned. However, conviction on grounds of apostasy raises two questions, which the CrimCAp presided over by al-Kabbāshī discusses in detail, as to (a) whether the activities attributed to Ṭāhā and his colleagues constituted apostasy, and (b) whether the *shar'ī* crime of apostasy (*ridda*) is punishable under the PC. The court answers the two questions in the affirmative: The Muslim jurists regard as apostasy any act performed by a Muslim, a word expressed by him or a belief adopted by him that is absolutely not compatible with Islam, or any denial of "something that ought to be regarded as an article of faith that one must necessarily know" (*mā 'ulima min al-dīn bi-ḍarūra*), e.g., by denying religious duties such as prayer, alms tax, fasting [during the Ramaḍān] and the pilgrimage.[113] The CrimCAp analyzed Ṭāhā's teachings on questions such as prayer, the alms tax, *jihād*, and matters of personal status and succession, status of women, as well as on theological questions such as free choice and predestination, and incarnation (*tajsīd*). It concluded that Ṭāhā had become an "apostate" (*murtadd*) in thought and deed, and that his teachings called for the destruction of the entire basis of the Islamic religion. The CrimCAp garnered support

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in order to persuade them to repent); January 20, 1985, pp. 1–2 {the four Brothers repent and declare Maḥmūd Ṭāhā as *kāfir* (infidel) and *murtadd* (apostate)}. All efforts to persuade Ṭāhā to repent are in vain. He refuses to pronounce the *shahāda*); January 23, 1985, p. 8 (documents pertaining to Ṭāhā's apostasy submitted to court). On *tawba*, see al-Mahdī, *al-'Uqūbāt*, 49–50, 64.

[111] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 90; Taha, *The Second Message*, 13; Mayer, *Law and Religion*, 180.

[112] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 82; *al-Ṣaḥāfa*, January 22, 1985, p. 10.

[113] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 82; Peters, *Criminal Law*, § 0.1.2.6; *idem*, *Idjtihād and Taqlīd*, 139.

for this conclusion from the extensive religious legal literature; hence, the court viewed the publications and ideological platform of the Republican Brothers as heretical acts equivalent to apostasy and the creation of a "new religion."[114]

As for the second question, there is no explicit provision in the PC under which apostasy is punishable. However, the court, relying on Section 3 of the JudA, 1983, placed repentance (*tawba*) (which implies apostasy) in the category of "a [*shar'ī*] provision that has been disregarded" i.e., has not been codified. The court argues, on the basis of Section 3(a and b) of JudA, that the rule concerning apostasy, that is, a crime entailing the Qur'ānic punishment of death, is anchored in the *sunna* and the *ijmā'* of the great *'ulamā'* throughout the generations. More accurately, all schools of law maintain that apostasy is punishable by death. However, only the Mālikīs and Ḥanbalīs regard apostasy as a Qur'ānic crime which entails *ḥadd*, while the Ḥanafīs and Shāfi'īs apply the death penalty (according to the Ḥanafīs—to men only) for apostasy on grounds of lack of *'iṣma*, that is, protection of life as a result of the apostate's unbelief (*kufr*). After apostasy has been established in court, the apostate is granted a delay of three days to repent; if he declines, the death sentence is implemented.[115]

Furthermore, in the amended indictment, the prosecution relied on Section 458(3) of the PC which states, *inter alia*, that the absence of a provision in the code does not prevent the judge from applying Qur'ānic punishment. Expressed in positive terms, the section allows the defendant's conviction for uncodified *shar'ī* offenses and the imposition of punishments appropriate according to the *sharī'a*. The CrimCAp, however, admitted that some mistakes were made during the trial. Thus the prosecution had to clearly define the crime of apostasy while resorting to Section 3 of the JudA, and the CrimC, in its turn, had to clarify the charge of apostasy while convicting the defendants with *ridda* and giving them an opportunity to repent. It stands to reason that CrimCAp was referring to the natural right of the accused to be acquainted with the substance of the charge against

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[114] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 82–96. Cf. Peters, *Islamization of Criminal Law*, 265. Numayrī, however, regarded the Republican Brothers not as an intellectual, but rather as a political group with far-reaching goals behind their heretical teaching. See *al-Ṣaḥāfa*, January 18, 1985, pp. 3–4.

[115] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 81; al-Mahdī, *al-'Uqūbāt*, 145–47; Peters, *Criminal Law*, § 0.1.2.6; *idem, Islamization of Criminal Law*, 249–50; Schacht, *Introduction*, 187.

them well ahead of time in order to properly prepare their defense. Moreover, Section 289 of the CrimPA lays down that sentences pertaining to criminal matters must specify the section on which the conviction is based.[116]

It is interesting to note that Ḥasan al-Turābī shares the view that Maḥmūd Ṭāhā should be regarded as an apostate on grounds of having replaced the orthodox *sharīʿa* by a version of his own. However, he claims that it was wrong to convict Ṭāhā on a charge of apostasy since there is no such a provision in the PC. Ṭāhā was arrested on the charge of sedition against the state, and the court decided, with no justification, to apply the uncodified *sharīʿa* pertaining to apostasy. Al-Turābī further maintains that the PC, 1983 was poorly drafted. In al-Turābī's draft of the bill which was intended to replace the PC 1983, apostasy had been incorporated as an offense punishable by death, but this was later withdrawn.[117] On April 25, 1986 the JudA was amended to the effect that the propogation of a new interpretation of Islam should not be regarded as apostasy.[118]

2.2.2.2. Textual Sources in Support of Judicial Practice

Section 3(a) of JudA, 1983 which provides that in the absence of a statutory provision the judge shall apply *sharʿī* rules established by the Qur'ān and *sunna*, was resorted to by the SupC quite often either explicitly or implicitly, in most cases in matters pertaining to procedure and evidence. Thus in one case, the applicant claimed that the defendants snatched money from his pocket while diverting his attention. The CrimC found the defendants guilty and sentenced each of them to amputation of the right hand and payment of monetary compensation in accordance with Sections 78 and 321(2). The sentence was based on the testimonies of the complainant and two witnesses. The CrimCAp upheld both the conviction and the punishment. The SupC cancelled the sentence on the following grounds:

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[116] Al-Mahdī, *al-Dīmuqrāṭiyya*, 101; Peters, *Islamization of Criminal Law*, 261, 265; Mayer, *Law and Religion*, 180; An-Naʿim, *Reformation*, 130; *idem*, *Islamic Constitution*, 337, n. 25; Taha, *The Second Message*, 13.

[117] Al-Turābī, *Udīn al-ʿunf*, 24–25; Lowrie, *Turabi*, 42, 44; Abdelmoula, *Ethnicity*, 44, 59–60. On November 18, 1986 the SupCC declared, on grounds of procedural defects, unconstitutional the death sentence against Maḥmūd Ṭāhā on charge of apostasy handed down by the CrimCAp. The court seems to refer to the *nulla poena* rule. See below, IV.4.4 and above, III.1.2.

[118] Peters, *Islamization of Criminal Law*, 265 n. 47; An-Naʿim, *Reformation*, 130, n. 88; al-Qaddāl, *al-Islām wa'l-siyāsa*, 228.

1. the complainant's testimony was unacceptable under the *sharīʿa*. 2. one of the witnesses was below the age that qualifies him for testimony. Hence, the court ruled that the Qur'ānic requirements pertaining to witnesses (*niṣāb al-shāhada*) (2:282) had not been met.[119]

In another case, cows reported lost were found in the possession of someone who claimed to have found them wandering in a field. There were no eyewitnesses to testify that the accused had taken the cows from the plaintiff's possession though there was strong circumstantial evidence to this effect. He was charged with theft and was sentenced to amputation in accordance with Section 321(2) of the PC, 1983. The CrimCAp upheld the sentence. Section 76 of EvA, 1983 provides that offenses entailing *ḥudūd* should be proved on the basis of at least one confession in court or two male witnesses and, if necessary—one male and two females or four female witnesses. The SupC ruled that the admission by the accused of having led away the stray cows should not be regarded as a confession (*iqrār*) within the context of theft under Section 320. The court further ruled that circumstantial evidence in itself was not enough for proving crimes entailing Qur'ānic punishments due to the doubt (*shubha*) involved. The court based its ruling on a Prophetic *ḥadīth* that states: "Avert Qur'ānic punishments on grounds of doubts" (*idraʾū al-ḥudūd biʾl-shubuhāt*). In the event, the SupC abrogated the sentence of amputation.[120]

In yet another case, the SupC ruled, despite a decision handed down by a CrimCAp, that in crimes that did not entail Qur'ānic punishments or did not require more than one witness to be proved under the provisions of any statute, it was legally permitted, under the uncodified *sharīʿa*—in accordance with all schools of law except the Ḥanafī school—and the general law, to convict the accused on the basis of the complainant's oath and the testimony of one witness. However, in order to qualify for testimony the witness must fulfill

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[119] *SLJR*, 1984, 108–11. None of the courts noted that snatching things unawares (*ikhtilās*) is not considered a theft entailing Qur'ānic punishment. See Schacht, *Introduction*, 180. Q. 2:282: "[. . .] And call to witness, from among your men, two witnesses. And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses, so that if one erreth (through forgetfulness) the other will remember. And the witnesses must not refuse when they are summoned. [. . .]."

[120] *SLJR*, 1984, 105–7. Cf. Wensinck, *Concordance*, III–IV, 64 (*bāb [. . .] daf*ʿ *al-ḥudūd biʾl-shubuhāt*). Cf. *SLJR*, 1986, 132–35 {the court based its ruling on the same Prophetic *ḥadīth*; for details, see above, III.1.4 (a dispute between tribes relating to pasture for cattle)}.

the qualifications of *ʿadāla*, that is, good character, as set down in the Qurʾān and the Prophetic *ḥadīth* as well as in the treatises of the schools of law. In the case under review, where a woman accused a man of sexual harassment, the court decided that she did not qualify for testimony since she had entered the defendant's house in the absence of his relatives without calling for help during the alleged harassment.[121]

In another case, a man was charged under Section 278 of the PC, 1983 with intentionally breaking someone's tooth and was sentenced to retribution on the basis of matching: a tooth for tooth. The complainant insisted on carrying out the retribution and declined to offer pardon or accept blood price. The file was sent to the SupC by virtue of the Criminal Circular No. 43 of 1983 in order to verify the validity of the sentence of retribution and for the reassurance of the faultless interpretation and correct application of both the [uncodified] *sharīʿa* and the PC, 1983. The SupC ruled that the CrimC had not exhausted all the avenues pertaining to grounds averting retribution, and that the conviction under Section 278(1) concentrated solely on the confession of the accused supported by the testimony of the complainant, on circumstantial evidence, and the medical report. Since the accused retracted his confession and there were no eyewitnesses to the assault, the SupC cancelled the sentence of retribution and decided that the accused was subject solely to discretionary punishment. The court further ruled that the testimony of the complainant was unacceptable under the *sharīʿa* since he was a party to the dispute and a suspected person whose testimony was dubious. The court derived support for this ruling from a Prophetic *ḥadīth* to the effect that the testimony of a party to a dispute and that of a suspected person (*ẓanīn*) are not acceptable under the *sharīʿa*.[122]

In another case, the CrimC charged the defendants with deliberate homicide (*qatl ʿamd*) under Section 251 of the PC, 1983 and sentenced them to death. The conviction was based solely on the evidence of the dying victim (*muḥtaḍar*) given shortly before he passed away. At the stage of the appeal the accused claimed that the evidence of a dying person was not valid either under the EvA, 1983 or the *sharīʿa*. The SupC ruled that the CrimC should have confirmed the

[121] *SLJR*, 1984, 125–30. For further details, see below, III.2.2.5.2.
[122] *SLJR*, 1986, 146–50, 155.

dying person's accusation by other evidence in addition to circumstantial evidence including, for instance, the presence of the accused at the scene of the crime and the marks of the blows on the victim's head. The reference was to the *shar'ī* procedure of the *qasāma*, the accusatory oath. The court maintained that the *qasāma* was an oath (*yamīn, ḥilf*) enjoined by the Prophet to be adopted later by the founders of all schools of law. The Mālikīs regard this procedure as an independent *sunna*. In the case under review, the SupC ruled that the dying person's evidence created a strong suspicion (*lawth*) or doubt (*shubha*) as to the murderer's identity which justified the application of the procedure of the *qasāma*. In other words, it was incumbent on the avengers (*awliyā' al-dam*) of the victim to provide fifty oaths to the effect that the accused had murdered the victim. Had they done so, they would have been entitled to avenge his blood (*qiṣāṣ*) or, alternatively, had they waived their right to retribution, they would have been entitled to blood price. Again, the SupC pointed out that these options were based on a *ḥadīth* to the effect that the Prophet instructed the Anṣār: "Take fifty oaths and you will be entitled to avenge the blood of your associate or murderer" (*a-taḥlifūn khamsīn yamīnan wa-tastaḥiqqūn dam ṣāḥibikum aw qātilikum*).[123]

The CrimCAp resorted quite often to the Qur'ān and the *sunna* in matters pertaining to substantive law such as retribution and blood price. Thus in cases where a perpetrator has been convicted of deliberate homicide of his wife under Section 251 of the PC, 1983 the CrimCAp seeks support in the textual sources for its ruling that a son cannot exercise his right to retribution against his father, the right being averted due to the sacredness of paternity.[124] In one case, the court handed down a death sentence on the request of the victim's heirs as pronounced in a *shar'ī* order of succession. The CrimCAp ruled that the order of succession was wrong and contradictory to the Qur'ān and the *sunna* since the victim's brothers should have been excluded from the inheritance by the presence of his father. In another case where a death sentence had been handed down under Section 251, the families of both the perpetrator and the victim decided to settle the dispute by blood price in accordance

[123] *SLJR*, 1984, 118–24; Cf. Wensinck, *Concordance*, II, 148i. Cf. Peters, *Criminal Law*, § 0.1.1.3; *idem*, *Qasāma*; Anderson, *Africa*, Glossary, s.v. *lawth, qasāma*.

[124] *Al-Ṣaḥāfa*, August 1, 1983, p. 2; September 30, 1983, p. 2.

with the Qur'ānic verse 17:33 which recommends that in the case of unintentional homicide the avenger should not insist on excessive retribution.[125]

To sum up, on the basis of the aforementioned decisions, the Qur'ān and the *sunna* appear to have indeed acquired in judicial practice the status of sources of law as prescribed by Section 3(a) of the JudA, 1983. Moreover, the judges resort to these sources not only in the event of a lacuna, but also where there are explicit statutory provisions designed to deal with the event under review. It seems that this practice is intended to enlist the religious-legal sanction anchored in the textual sources to support the judges' decisions.

2.2.3. *Judicial* Ijtihād

As already noted, Section 3(b) of the JudA, 1983 states that, in the event of a lacuna in a statute and in the absence of a *sharʿī* rule as established in the Qur'ān and the *sunna* {Section 3(a)}, the judge shall exercise independent judgment (*yajtahid raʾyahu*)—which seems to imply *ijtihād*—in deriving a legal rule on the basis of the legal sources and principles, in the following order: (i) consensus (*ijmāʿ*) of the *fuqahāʾ*; (ii) analogy (*qiyās*); (iii) public interest in the light of modern requirements; (iv) presumption of innocence, a permissive approach (*ibāḥa*) toward human acts, and leniency in imposition of [God's commandments] (*al-yusr fiʾl-taklīf*); (v) Sudanese judicial precedents; (vi) custom; and (vii) principles of universal justice prescribed in human laws and equity enshrined in good conscience. We have also noted that Chief Justice Fu'ād al-Amīn ʿAbd al-Raḥmān argues that a *qāḍī* is expected, under the *sharīʿa*, to qualify for *ijtihād*, that is, to be competent to independently derive rules from the *uṣūl al-fiqh* and that in fact the Islamist legislation has widely reopened the door of *ijtihād*.[126] We stated earlier that a special circular instructs the judges to resort to the JudA, 1983 with a view to "deriving rules on particular points of the law." This is a clear indication of the judge's statutory right of *ijtihād* on the basis of the *sharʿī* legal methodology and other sources of law in the absence of a statutory provision.[127]

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[125] *Al-Ṣaḥāfa*, September 18, 1984, p. 2; and September 30, 1983, p. 2 col. 2, respectively. Q. 17:33: "And slay not the life which Allah hath forbidden save with right. Whoso is slain wrongfully, We have given power unto his heir, but let him not commit excess in slaying. Lo! he will be helped."

[126] For further details, see above, II.2.2.3, II.3.1–3, and below, 279–80.

[127] See above, II.2.1.2.

At the trial of the Baʿth Arab Socialist Party, held in 1984 in a CrimC presided over by al-Kabbāshī, several party members were charged with membership in an illegal organization, with maintaining a printing press, and with distributing party publications. The indictments were based on various sections of the PC, 1983, the State Security Act, 1983, and the Emergency Regulations, 1984.[128] The main issue facing the court in this trial was the ideological platform of the Baʿth Party and its position on Islam. The court made use of reports by political science professors from Sudanese universities, and was left with the impression that the Baʿth Party platform contravened Islam, sometimes in a camouflaged manner (to avoid antagonizing the devout masses) and sometimes in an explicit fashion. The Baʿth's preaching of secularism (*ʿalmāniyya*) reduces Islam to being just one component in the Arab national identity (*qawmiyya*), whose historical heritage goes back to the Jāhilī period, and the Baʿth's call for the separation of religion (*dīn*) and state (*dawla, siyāsa*) threatens to dispossess Islam of one of its most important attributes, sovereignty (*ḥākimiyya*). Islam is a "complete way of life (*minhāj*) that regulates all political, economic, and social issues" of the state, or put differently, Islam is dogma (*ʿaqīda*), law (*sharīʿa*), religion (*dīn*), state, and way of life. The court sought support for this position from various Qurʾānic verses whose moral is that a person who does not believe this is an infidel (*kāfir*).[129] Thus the very call for separation of religion and state borders on heresy (*kufr*). Moreover, the court felt that the teachings of some of the Baʿth leaders also contain explicit instances of heresy or apostasy. For example, they deny the Day of Judgment and the existence of paradise and hell, at the same time, turning nationalism into a dogma and a religion.[130]

The court convicted the defendants of "spreading damaging and false rumours" (*nashr al-shāʾiʿāt al-ḍārra al-kādhiba*). Since there is no explicit statutory provision concerning this offense, the court relied on Section 3(b)(ii) of the JudA, 1983 which provides that in the event of a lacuna in the law and in the absence of a *sharʿī* rule established in the Qurʾān or the *sunna*, the court will exercise *ijtihād*, making

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[128] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 109–10; *al-Ṣaḥāfa*, January 16, 1985, p. 3 col. 1; February 13, 1985, p. 1; February 22, 1985, p. 1.

[129] See, for example, Qurʾān, 5:44: "[. . .] And barter not My revelations for a little gain. Whoso judgeth not by that which Allah hath revealed: such are disbelievers."

[130] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 109–20. The citation is from p. 113.

use, *inter alia*, of the mechanism of analogical reasoning (*qiyās*).[131] As a basis for the application of *qiyās*, the court had recourse to the Qur'ānic punishment of eighty lashes imposed for drinking wine.[132] According to one *ḥadīth*, when Caliph ʿUmar asked ʿAlī about this *ḥadd*, ʿAlī said:

> If he was intoxicated he spoke foolish words, and if he spoke foolish words he was fabricating, and he should receive the punishment befitting a fabricator (*ḥadd al-muftarī*).

Therefore, through analogical reasoning, one may conclude that the fabrications of the Baʿth Party members should be treated as an offense entailing the punishment for falsehood (*ḥadd al-firya*). In noting the punishment imposed for this offense (*ḥadd al-firya*) through analogical reasoning, the court sought to impose a discretionary punishment on the defendants, which apparently meant fewer than eighty lashes, since discretionary punishment cannot be more severe than the Qur'ānic punishment for the same crime.[133] This is a clear case where *ijtihād* in the strict sense of the classical term was exercised by a Sudanese court. It is the only clear evidence of judicial *ijtihād* that we have come across though it is conceivable that other instances of this kind occurred. Needless to say, the imposition of criminal sentence by virtue of an act in the absence of an explicit statutory provision that makes that act punishable, offends the *nulla poena* rule and cannot be justified on the basis of judicial *ijtihād*.[134]

On several occasions the SupC declined to allow judges freedom of *ijtihād* where a statutory provision governing a specified event existed, on the grounds that such freedom might cause complete legal chaos. We have discussed above the case of the bookkeeper from Wād Sidna whose hand had been amputated on grounds of embezzlement (*ikhtilās*). The court presided over by al-Kabbāshī ruled, on the basis of the eclectic device, that embezzlement should be regarded as theft entailing Qur'ānic punishment. The bookkeeper appealed to the SupC against al-Kabbāshī on the grounds that the court had exceeded its jurisdiction, and the SupC speculated that al-Kabbāshī, "under a flood of enthusiasm," had deemed himself not bound by statutory provisions, thus claiming for himself the right to

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[131] See above, II.2.2.3.

[132] Cf. Peters, *Criminal Law*, § 0.1.2.5.

[133] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 119 (there is no indication as to whether the punishment of flogging was upheld and carried out); Schacht, *Introduction*, 175.

[134] For details, see below, IV.4.4.

exercise personal *ijtihād*. The SupC ruled that there was no justification to exercise *ijtihād* in the presence of an explicit statutory provision pertaining to this offense.[135]

In the public debate following the trial it was claimed that *ikhtilās* is tantamount to a breach of faith by the depositary (*khiyānat al-amāna*), that is, embezzlement, which is defined, in Section 347 of the PC, as the act of a trustee (*amīn*) or a supervisor of property who illegally transfers it to his private ownership, exploits it for his personal benefit, uses it with evil intent in a manner repugnant to the law, or to what is required by the deposit, or allows another person to carry out one of these things. Such a person is deemed to have committed a breach of faith, and to be subject to a discretionary sanction under Section 348. Al-Kabbāshī rejects this claim as intrinsically untenable on the grounds that in the event of a breach of faith by the depositary, the money rests in the possession and under the control and supervision of the trustee. In fact—so he claims—most of the *fuqahā'* agree that under these circumstances, the punishment of amputation cannot be imposed. By way of contrast, in the case of *ikhtilās*, the money embezzled is in the possession and under the control of its owner, and the *mukhtalis* cleverly and cunningly exploits the owner's inattentiveness in order to take control of it. In this case, the bookkeeper obtained authorization from the school principal through fraudulent means that enabled him to lay his hands on the money. The law does not state explicitly that amputation should not be imposed on the *mukhtalis*, nor does it address this issue in connection with the offenses of breach of faith, fraud, or forgery (Sections 408, 410). It cannot, therefore, be claimed that the court "exercised *ijtihād* in the presence of a statutory provision." Rather, the court applied in a literal fashion Section 320(2) of the PC, 1983 pertaining to theft entailing *ḥadd* punishment.[136]

To sum up, it seems that judicial *ijtihād* is not a common practice in criminal law.[137] To the extent that Section 3(b) of the JudA

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[135] *SLJR*, 1986, 176–77. For further details, see above, III.2.1.

[136] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 74, 77. For details, see above, III.2.1. In any case, under the *sharī'a*, embezzlment is not regarded as a theft since the article embezzled may not have been entrusted to the perpetrator. See Peters, *Criminal Law*, § 0.1.2.1. See also *SLJR*, 1986, 164, 172 (The SupC ruled that there was no room to apply Section 3, that is, to exercise judicial *ijtihād*).

[137] Cf. Vogel, *Saudi Arabia*, 115 (the Saudi *qāḍīs*, "despite their protestations of free ijtihād, they are highly conformist, adhering to traditional Ḥanbalī views in general and to the views of their seniors in particular"); ch. 4 (Ijtihād in the Saudi Courts), 118ff.

is resorted to, *ijtihād* is interpreted not in the classical sense of deriving new rules from the traditional legal sources but rather as a judicial discretion of a judge to adopt legal doctrines from classical and modern literature. In other words, the Qur'ān, the *sunna* and the *ijmāʿ* are being resorted to in order to obtain support for court decisions rather than to derive new rules from these sources.

2.2.4. *Application of the Public Interest* (Maṣlaḥa)

Istiṣlāḥ, that is, "having regard to the public interest (*maṣlaḥa*)," is a recognized subsidiary source of law in classical theory, especially in that of the Mālikī school.[138] We noted earlier that the doctrine of *maṣlaḥa* has become a source of law in its own right in the legal methodology of the Modernists in Islam. The JudA, 1983 raised *maṣlaḥa* to the status of a source of law in judicial *ijtihād*. Section 3(b) states that in the event of a lacuna in a statute and in the absence of a *sharʿī* rule as established in the Qur'ān and the *sunna*, the judge shall exercise *ijtihād* in deriving a legal rule on the basis of legal sources and principles in a specified order. Public interest is placed in this order immediately after consensus of the *fuqahāʾ* and analogy. Subsection 3(b)(iii) defines public interest as follows: paying due regard to "what produces benefit and averts corruption," which is a nuance of *maṣlaḥa*, in conformity with the goals of *sharīʿa* and the objectives of life in the present circumstances provided they do not invalidate *sharʿī* rules.[139]

It seems that the doctrine of public interest inspired the judicial practice in the Sudan in the period under review though it is not always easy to prove that this was done consciously. Thus the SupC justifies the punishment of amputation for theft on two grounds. First, the sanction, anchored in the Qur'ān (5:38), is *ḥaqq lillāhi*, the right or claim of God, that is, within the domain of public law. Being the right of God implies that the sanction cannot be pardoned on the initiative of individuals or the public. Second, the punishment as a right of God is deemed obligatory whenever it serves the public interest (*maṣlaḥa ʿāmma*) with a view to combating corruption (*fasād*) from society and safeguarding their welfare.[140]

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[138] Schacht, *Introduction*, 61; Coulson, *History*, 91; Khadduri, *Maṣlaḥa*.
[139] See above, II.2.2.3.
[140] *SLJR*, 1983, 94. Cf. Schacht, *Introduction*, 176, 84.

We have already discussed the case of a divorced woman charged with adultery and sentenced, in accordance with Section 318(1) of the PC, to lapidation (*rajm*). The SupC, surprisingly enough, rejected the doctrines of all the Sunnī schools according to which the consummation of a valid marriage creates the status of *iḥṣān*, "immunity" against temptations resulting from experience of sexual relations within wedlock, the precondition for effecting lapidation. Instead the SupC adopted the doctrine of the Imām al-Ṣādiq of the Imāmī Shī'a, shared by some contemporary Sunnī jurists, to the effect that the adulteress must be married at the time the illicit intercourse took place in order to be considered *muḥṣana*; once the adulteress is divorced she ceases to be *muḥṣana* whereupon she is subject to one hundred lashes. The SupC justifies its decision by claiming that the traditional doctrine of the *fuqahā'* may cause hardship in modern times when people are constantly exposed to temptations and corruption. This is a clear instance of a liberal-reformist approach to the issue of *iḥṣān* exclusively inspired by *maṣlaḥa*. The SupC upheld the conviction of the woman but replaced the punishment of lapidation by a discretionary punishment of two years imprisonment starting after the delivery of the child.[141]

As noted above, Section 251 of the PC, 1983 provides that whoever commits a crime of deliberate homicide is subject to the death sentence or payment of the blood price provided the victim's avenger agrees to the latter. Section 253 provides that whoever commits quasi-deliberate homicide is likewise subject to the death sentence or blood price (regardless of the avenger's consent). These sections, and especially Section 253, leave a wide discretion to the court to interfere in shaping the final result of the dispute having regard to the interest of the parties involved and to other human considerations. Indeed there is ample evidence in court decisions to the effect that the judge does all in his power to ensure that the dispute is settled by pardon (*'afw*) and blood price rather than by retribution. Thus he often summons the victim's avengers, his heirs, to a court session with a view to persuading them to give up their right to retribution (under Section 251) and agree instead to settle the dispute by reconciliation and blood price. Occasionally the judge tries to enlist to this end the mediation of *shaykh*s, *khulafā'* (founders of branches

[141] *SLJR*, 1986, 129–31. Cf. Peters, *Criminal Law*, § 0.1.2.3; Schacht, *Introduction*, 125, 178. See above, III.2.1.

of Ṣūfī orders) and Ṣūfīs (*rijāl al-ṭuruq*).[142] The *fuqahā'*'s view is enlisted to legally validate the blood price in amicable settlements.[143] Even in cases where the avengers rejected the judge's reconciliation and insisted on retribution the judge often handed down a death sentence to be substantiated by the President of the Republic and advised the avengers that they could at any time prior to execution waive their right to retribution.[144] The court is also anxious to rule that the minor heirs' guardian has no right to renounce the minors' share in the blood price and that this right cannot be waived unless and until the minors become of age and personally waive their share in the blood price out of their own free will.[145]

In a case already discussed above, a man was charged with deliberate homicide under Section 251 of the Penal Code, 1974, which provides that the perpetrator is subject to the death penalty or life imprisonment with an option of a fine as additional punishment. The avengers of the victim submitted to the court a petition to the effect that the two parties had reached an amicable settlement (*ṣulḥ*) in return for blood price and compensation. Under these circumstances the court recommended mitigation of the death penalty. A death sentence becomes final and executable only after it has been upheld by the SupC and the President of the Republic, a procedure intended to allow time for reconsideration in the light of the special circumstances of the case and thus avoiding irrevocable injustice to the convicted. In the case under review the SupC decided to apply retroactively Section 251 of the PC, 1983, justifying the decision on two grounds: legal precedents in similar cases and the "[the new law being] more favorable for the accused" (*aṣlaḥ li'l-muttaham*).[146] The

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[142] *Al-Ṣaḥāfa*, December 11, 1983, p. 1; August 9, 1984, p. 2; August 14, 1984, p. 3; November 20, 1984, p. 2 cols. 1–3; Trimingham, *The Sufi Orders*, Glossary, s.v. *khalīfa*.

[143] *Al-Ṣaḥāfa*, September 30, 1984, p. 2 col. 2; and September 17, 1984, p. 2 cols. 3–4, respectively.

[144] *Al-Ṣaḥāfa*, July 30, 1984, p. 2; August 6, 1983, p. 2; August 13, 1984, p. 2 (the *qāḍī* explains that *ṣulḥ* has support in the Qur'ān and the *sunna*); September 12, 1984, p. 2; September 18, 1984, p. 2 col. 1.

[145] *SLJR*, 1986, 128; *al-Ṣaḥāfa*, August 1, 1984, p. 2; September 30, 1984, p. 2; October 30, 1984, p. 2 cols. 3–5 (in the meantime, the minors' share in the blood-price is used for their maintenance or kept under the court's control).

[146] This is a common provision in transitionary criminal law originating in Western law. As a rule, new laws have no retroactive effect except if the application of the new law is more favorable to the accused. We owe this remark to Ruud Peters. See above, III.1.5.

latter ground implies that from the point of view of the perpetrator the application of the new penal code has many advantages over the alternative under the old penal code, though the perpetrator is still subject to discretionary punishment. The SupC, however, explains that the resort to the principle "more favorable for the accused" is derived from interpreting the PC, 1983 and the CrimPA, 1983 in the light of Subsection 2(a) of the JudA, 1983. This subsection provides that in interpreting statutory provisions, a judge is to presume that the legislator did not intend to contradict the *sharīʿa* by neglecting the scale of the five religious qualifications.[147] In other words, a Western-inspired principle is being assimilated into a *sharʿī* context. *Maṣlaḥa* (public interest) may provide a reasonable *sharʿī* substitute to the principle "more favorable for the accused."[148]

In a similar case, it was established in court that the perpetrator caused the death of the victim while the latter was asleep, that is, *qatl ghīla*, an aggravated form of deliberate homicide under Mālikī law intended to facilitate the commission of another offense, such as robbery or illicit intercourse. The court sentenced the perpetrator to the death penalty under Section 251 of the PC, 1974. The SupC upheld the sentence explaining that had it not been for a homicide under aggravating circumstances it would have been possible to commute the sentence by retroactively applying Section 251 in its revised version under the PC, 1983. As already noted above, this section enables settlement of a dispute by blood price, in which case, the perpetrator is only subject to discretionary punishment. Here, too, the SupC interprets the PC, 1983 in the light of Section 2 of the JudA, 1983 which implies that the convicted has the free option to settle the dispute by means of pardon and reconciliation (*taṣāluḥ*) in return for blood price through the court or at any stage prior to the execution of the death penalty.[149]

In the case already discussed above, where a man was sentenced to retribution after having deliberately broken the complainant's tooth, the SupC decided that in order to obtain conviction on the basis of a confession by the accused, no element of doubt (*shubha*) should be attached to the confession. Such a doubt would be created by its

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[147] See above, II.2.1.3.

[148] *SLJR*, 1983, 100–5. For further details, see above, III.2.1. Cf. Peters, *Criminal Law*, § 0.1.3.1; Schacht, *Introduction*, 121.

[149] *SLJR*, 1983, 108–16.

retraction any time prior to the execution of retribution. This view was based on Section 3(b)(iii) of the JudA, 1983 which provides that in the event of a lacuna the judge shall exercise *ijtihād* having regard to the doctrine of public interest in the light of modern conditions. In the case under review, however, there was no element of doubt, the accused did not retract his confession, and there was an abundance of supporting circumstantial evidence.[150]

An insurance agreement is a speculative transaction and hence prohibited in the uncodified *sharīʿa*. As will be shown below, the CivTA, 1984 provides that until a special law is enacted that will accommodate insurance to the *sharīʿa*, the existing statutory provisions regarding insurance remain intact. In other words, the law adopts the Western-inspired insurance agreement with respect to risks against damage caused to life, body and property.[151]

The insurance agreement is defined in terms of contractual relations between the insurer and the insured. The SupC regards the regular insurance agreement reached between the two parties on a voluntary basis valid and effective as a *sharʿī* contract regardless of its speculative nature. However, with respect to obligatory insurance, the SupC deviates from the *sharʿī* concept which confines the contractual relations solely to the two parties concerned, and extends its application to "the third party," the injured. This seems to be inspired by considerations of public interest (*maṣlaḥa*).

Thus in one case,[152] an unlicensed driver caused a road accident. The court of first instance convicted the driver in accordance with Section 17 of the RdTA, 1983 and decreed a fine and compensation to the claimant for the damage caused to his car payable by the insurance company and the driver jointly or separately in accordance with provisions of the obligatory insurance. The insurer requested the CAp to release him from liability toward the third party on the grounds that according to the insurance certificate the liability ceases if the driver does not possess a valid driving license.

The SupC overruled the decision handed down by the CAp on the grounds that it was contradictory to the law and established judicial practice with respect to obligatory insurance. The SupC rein-

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[150] *SLJR*, 1986, 146–47, 150–53. For further details on the case, see above, III.1.4 and 2.2.2.2.

[151] See below, IV.2.2.2.1.

[152] *SLJR*, 1986, 156–63.

stated the decision handed down by the court of the first instance. It maintained that Section 58 of the RdTA which provides that it is not permissible to drive a car without a valid insurance certificate, implies that the legislator intended, by the mere drawing of the insurance policy, to create a "virtual legal and contractual linkage" (*ʿalāqa qānūniyya wa-taʿāqudiyya ḥukman*) between the insurer and the third party which in turn creates liability on the part of the insurer for any damage caused to the life, body or property of the third party. The SupC further claimed that obligatory insurance, in contrast to a regular (i.e., voluntary) insurance contract in which there is no third party, was not bound by the *sharʿī*-inspired doctrine that "a contract [creates liability as if it were sanctioned by] the *sharīʿa* [solely] with respect to the contracting parties" (*al-ʿaqd sharīʿat al-mutaʿāqidīn*), the reference here being to Section 5(th) of the CivTA, 1984.[153] More precisely, obligatory insurance is not bound by the doctrine which maintains that the contractual liability is solely confined to the two parties to the contract to the exclusion of a third party. In this regard, Section 62 of RdTA explicitly states that any condition in the insurance certificate that removes liability on the part of the insurer [toward a third party] as a result of an act or omission by the insured—is null and void.

The SupC supports its decision by reference to a judicial precedent of the same court stating that the purpose of the obligatory insurance, unlike that of voluntary insurance, is to protect the welfare (*maṣlaḥa*) of the injured third party, that is, to insure the life, body, and property of innocent pedestrians against the risks of road accidents. The third party is entitled to indemnification regardless of the violation of any condition of the policy insurance by the insured, as in the present case of the unlicensed driver. The violation does not cancel, under any circumstances, the liability of the insurer toward the third party. The case under review reveals that the SupC adopts the obligatory insurance which is totally alien to the uncodified *sharīʿa* by deviating from the contractual nature of the insurance agreement (which within this concept may find support in the *sharīʿa*). In the present case, the rights of third parties against the insurer of third-party liability do not derive from contractual obligation (because the third party does not have a contract with the insurer) but rather

[153] This rule seems to be based on Section 103 of the Mejelle {*al-ʿaqd iltizām* (liability) *al-mutaʿāqidīn*}.

from the RdTA, 1983. The SupC's innovations are, surprisingly enough, justified by considerations of public interest (*maṣlaḥa*) which are anchored in the *sharīʿa*.

To sum up, the SupC's liberal approach with respect to "immunity" (*iḥṣān*) of divorced women is formally based on Shīʿī doctrine and contemporary Sunnī jurists. The assimilation within *sharʿī* context of Western-inspired principles such as "more favorable for the accused" and obligatory insurance seem to be all motivated by social considerations which may be closely connected to *maṣlaḥa*. The SupC's consistent concern to avoid application of retribution may also be inspired by the same considerations.[154] Nevertheless, *maṣlaḥa* has not been raised to the status of a source of law in judicial *ijtihād* as designated in Section 3(b)(iii) of the JudA, 1983.

2.2.5. *Application of Pre-1983 Sources of Law*

2.2.5.1. Custom

As noted above, custom has a recognized status in the Islamist legislation—though not on an equal footing with the *sharīʿa*—manifested in various sections of the CivPA, 1983, the CivTA, 1984 and, most importantly, Section 3(b)(vi) of the JudA, 1983 which instructs the judge, in the event of a lacuna in the law, after first having exhausted the judicial *ijtihād* from the textual sources, the principles of the public interest, presumption of innocence, and judicial precedents, to rule according to custom, as long as it is not repugnant to the *sharīʿa* or the principles of natural justice.[155]

While discussing *uṣūlī* and *fiqhī* principles as sources for deriving statutory provisions within the context of the CrimPA, 1983, the SupC refers to custom as an arbitrator for establishing the legal norm (*al-ʿāda muḥakkama*) (Cf. Mejelle, Section 36), custom being a norm with which people have become familiar. The *sharīʿa* acknowledges the prevailing custom (*taʿtabir al-ʿurf al-jārī*) among the people in matters pertaining to transactions (*taʿāmul*). This is manifested in the legal recognition granted by all the *fuqahāʾ* to sale based on exchanging commodity and price (*al-bayʿ bi'l-taʿāṭī*) and the insertion of well-known stipulations in contracts, even though these stipulations may be contradictory to the purport of the contract and have not been

[154] Cf. Vogel, *Saudi Arabia*, 134–35, 273–74.
[155] For further details, see above, II.2.3.3.

dealt with in any textual source, that is, the Qurʾān and the *ḥadīth*. The SupC further explains that custom as an arbitrator for establishing the legal norm cannot contradict the *sharīʿa*, nor legally permit something which is legally prohibited, nor prohibit something which is permitted. Similarly, the *sharīʿa* cannot acknowledge a morally bad custom. This results in another principle: "The true state of affairs [in legal respect] is conditional on what is indicated by custom" (*al-ḥaqīqa tutrak bi-dalālat al-ʿāda*) or, in other words: "What has been established as custom is tantamount [in terms of validity] to what has been stipulated [between the parties to a contract]" (*al-maʿrūf ʿurfan kaʾl-shurūṭ sharṭan*). What is implied here is that custom has become a source of law in its own right.[156]

There is ample evidence in court decisions to the effect that the victim's avengers often insist on exercising their right to retribution. The SupC recognizes the right of the victim's avengers, after their status as his heirs has been established in a *sharʿī* order of succession, to choose between retribution, pardon, and blood price.[157] In many cases they rejected all attempts by the court to settle the dispute by pardon or blood price.[158] Though formally the right to retribution is based on a statutory provision anchored in the *sharīʿa*, taking into account the tribal character of the Sudan one suspects that the avengers were motivated primarily by custom. Support for this impression can be found in cases where the court explicitly refers the parties to a customary norm as a basis for settling a dispute. Thus in one case, the judge instructed the *shaykh* of a certain district to decide the issue of the blood price "in accordance with the prevailing custom (*al-ʿurf al-sāʾid*)" there and to fix the amount of the blood price according to the special circumstances of the case. In another case, the avengers waived their right to retribution and agreed to "blood price of an amicable settlement" (*diyat ṣulḥ*) which consisted of cattle, sheep, and a sum of money. Such a blood price may be in conformity with the *sharīʿa*, but the settlement seems to

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[156] *SLJR*, 1984, 80, 85–86. Cf. Section 5 of the CivTA, 1984 and the references to Sections 36 and 43 of the Mejelle. See above, II.2.2.1.2.

[157] *SLJR*, 1986, p. 128.

[158] *Al-Ṣaḥāfa*, July 30, 1984, p. 2 (the victim's heirs, both his mother and full sister, insisted on retribution); July 31, 1984, p. 2 (the victim was killed by his paternal cousin. The avengers first insisted on retribution but later were ready to consider blood price); August 1, 1984, p. 2 (retribution by a woman's children was averted on grounds of blood relationship between ascendant and descendant); September 20, 1984, p. 2 cols. 4–5 (the victim's avengers are his father, his co-wives and children).

have been achieved on the basis of custom. The judge, in any case, was anxious to point out that the blood price was "legally permitted (*jā'iza*) under the *sharī'a* and sanctioned by the *fuqahā'*."[159]

Section 251 of the PC, 1983 provides that whoever commits a crime of deliberate homicide will be subject to the death sentence or payment of blood price provided the victim's avenger agrees. In other words, the avenger has the option to exercise his right to retribution. We have earlier observed that the Islamic law of homicide and grievous bodily harm is located within the domain of private rather than public law. This concept originates from pre-Islamic customary law though it has been mitigated in various respects in Islam.[160]

Indeed, it seems that the SupC takes tribal custom into consideration in its judicial practice. In one case already discussed above, a man was charged with homicide and sentenced to death under Section 251 of the Penal Code, 1974. The victim's avengers submitted to the CrimC a petition in which they claimed that the parties had reached a reconciliation (*ṣulḥ*) with a view to settling the dispute by payment of agreed blood price and compensation (*ta'wīḍ*) "in accordance to the prevailing custom (*ḥasb al-'urf al-jārī*) among the members of the tribe (*qabīla*)": twenty cows and £S 1,500. The victim's brother in his capacity as an avenger (*walī amr*) confirmed in writing, in the presence of witnesses, that the avengers had "renounced (*tanāzala*) the victim's blood," that is, gave up the option of retribution, and that they had already received the customary blood price. Whereupon the court decided to commute the death sentence under Section 251 of the PC, 1974 and to have the file sent to the SupC for approval. Since the reconciliation had taken place before a final decision was handed down, the SupC decided to uphold the reconciliation in accordance with Section 251 of the PC, 1983 which grants the judge discretion to punish the convicted either by means of the death penalty or blood price provided the victim's avenger agrees to accept the latter. The court's decision was based on a consensus of the *fuqahā'* to the effect that pardon is to be preferred to retribution. The court sustained the "customary reconciliation" (*al-taṣāluḥ al-'urfī*) between the parties in return for blood price "in accordance with the local customs of the tribe."[161]

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[159] *Al-Ṣaḥāfa*, July 30, 1984, p. 2; and September 30, 1984, p. 2 col. 2, respectively.

[160] Peters, *Criminal Law*, § 0.1.3. For further details, see above, II.2.1.4.

[161] *SLJR*, 1983, pp. 101–7. For further details on the case, see above, III.2.1 and 2.2.4.

To sum up, though custom is acknowledged as a subsidiary source of law in the JudA, 1983, there is no evidence to the effect that custom provides a basis for judicial *ijtihād*; nevertheless, it is taken quite often into account in judicial practice.

2.2.5.2. Justice, Equity and Good Conscience

As noted earlier, Section 3(b) of the JudA, 1983 provides that in the event of a lacuna in a statute and in the absence of a *sharʿī* provision in the Qur'ān and the *sunna*, a judge may exercise *ijtihād* in formulating a new legal rule on the basis of the legal sources and principles in a certain order. First, he has to resort to the classical sources: (i) consensus of the *fuqahā'*; (ii) analogy; (iii) public interest; and (iv) presumption of innocence (which is also recognized in Islamic law). Having exhausted these sources he may resort to non-Islamic English-inspired principles in the following order: (v) Sudanese judicial precedents, as long as they do not contravene the *sharīʿa*; (vi) custom, as long as it is not inconsistent with the *sharīʿa* or the principles of natural justice (*ʿadāla fiṭriyya*); (vii) principles of universal justice (*ʿadāla*) prescribed in human laws (*sharā'iʿ insāniyya*), and equity (*qisṭ*) enshrined in good conscience (*wijdān salīm*). Similarly, Section 6(2) of the CivPA, 1983 instruct the judge, in the event of a lacuna in the law to apply the uncodified *sharīʿa* and legal principles that have been established in Sudanese judicial practice (the reference seems to be to legal precedent), custom, justice, and good conscience.[162]

There is some evidence to the effect that Sudanese courts are being inspired by non-Islamic principles of law to the extent of using them for formulating new rules within the meaning of Section 3 of the JudA, 1983. This implies that the judge may interpret these principles in an Islamic fashion. Thus the Western-inspired principle "more favorable to the accused" is being assimilated in *sharʿī* context by means of the doctrine *maṣlaha*.[163] In one case already discussed above, a woman claimed in court that a man who had previously promised to betroth her, attempted sexual harassment and stole her gold after having intoxicated her in his home. The SupC pointed out that there was no direct testimony to substantiate the woman's allegation though neither the *sharīʿa* nor the statutory law exclude the possibilty of conviction on the basis of the complainant's

[162] For further details, see above, II.2.2.3. For judicial precedents, see above, III.1.2 and for custom—III.2.2.5.1.

[163] See above, III.2.2.4, and below, IV.2.2.2.1 (obligatory insurance), and V.1.

testimony alone provided the crime does not entail a Qur'ānic punishment or that the law does not require proof of the charge by means of more than one witness. The SupC ruled, *inter alia*, that since the consecutive law, extant in the Sudan prior to the enactment of the Islamist statutes, did not contradict the principles of natural justice (*ʿadāla fiṭriyya*), there was no reason why this law could not serve as a juristic basis for a court decision in the case under review in conformity with Section 3(b)(vi) of the JudA, 1983. It goes without saying that we have to do here with an English, rather than Islamic, concept of justice. In fact, the judicial practice in the Sudan reveals that the courts do not hesitate to convict the accused on the basis of the complainant's testimony and the testimony of one witness provided the court is satisfied with the *ʿadāla* (good character) of the witness, that the accused is not protected by the benefit of doubt (*shubha*), and that no irrelevant considerations are involved. In the present case, however, the court was not satisfied with the *ʿadāla* of the woman and her claim was thus rejected.[164]

In another case, the avengers of the victim appealed against the acquittal of a policeman who had been charged with homicide in accordance with Section 251 of the PC, 1983. They argued that the policeman was not entitled to acquittal on grounds of self-defense, and that according to the *sharīʿa*, shedding the blood of a human being cannot under any circumstances be in vain, that is, unprotected (*hadaran*); hence they requested the court to oblige the policeman to pay blood price as compensation for the homicide caused regardless of criminal intention. The SupC rejected the claim for blood price on the grounds that the innocence of the accused in the sense that he used his right of self-defense in good faith had been established. It maintained that the avengers' claim "offends against the principle requiring conformity with the prevailing basic principles (*uṣūliyya*) of the *sharīʿa* and the principles of natural justice (*ʿadāla fiṭriyya*)." Natural justice—so argues the SupC—provides that a court decision cannot be handed down unless the accused is summoned to appear in court and defend himself. Likewise, Section 4(1) of the EvA, 1983 provides the fundamental principle of presumption of innocence (*barā'at al-dhimma*) of the defendant unless the contrary has been established by the claimant by means of testimonial evidence,

[164] *SLJR*, 1984, 125–30. For further details, see above, III.2.2.2.2.

and Section 4(2) provides that the accused is deemed innocent unless his conviction has been established beyond reasonable doubt.[165] Both "presumption of innocence" and "natural justice" are mentioned in the JudA, 1983 as legal sources for judicial *ijtihād* in the event of a lacuna {Section 3(b)(iv) and (vi), respectively}. There can be no doubt as to the English origin of the principles of natural justice and presumption of innocence {in Section 3(b)(vii), justice (*ʿadāla*) appears alongside equity (*qisṭ*), and good conscience (*wijdān salīm*)}. The principle of presumption of innocence with some vital variations may find support in the *sharʿī* rules of evidence.[166]

Al-Kabbāshī mentions some cases of "jurisprudence by means of *ijtihād*" (*aḥkām ijtihādiyya, ijtihādāt fiqhiyya*) that rely on Section 3 of the JudA without going into detail. The possibility that the jurisprudence was inspired by sources outside the *sharīʿa*—and this must, of course, be proved in each of these cases—cannot be ruled out. In one case, the CrimCAp ruled that the state must pay blood price for accidental homicide or injury (*jarḥ*) caused by a public servant who took the necessary precautions to avoid such an occurrence while performing his duties.[167] Even though there is an entire chapter (13) in the PC, 1983 dealing with offenses committed by civil servants, the law does not regulate the issue of criminal liability for accidental homicide or injury caused by them in the line of duty, not even within the statutory sense of "accidental," which, as noted before, does not correspond with the *sharʿī* meaning.[168] In both cases the punishments fit the *sharʿī* conception, which is completely within the realm of private law: a person causing homicide or injury will pay blood price in proportion to the damage caused (Sections 255

[165] *SLJR*, 1986, 104, 111–12. The SupC's decision regarding the blood price is contrary to the *sharīʿa* since liability for *diya* does not depend on fault, but on causation. We owe this remark to Ruud Peters. Cf. Peters, *Criminal Law*, § 0.1.1.1 (Self-defense).

[166] Equity is justice administered according to fairness in contrast with the strictly formulated rules of common law, which is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments. The common law derives its authority solely from usages and customs of immemorial antiquity. Good conscience is a synonym of equity. Presumption of innocence in English law is a principle of criminal law which implies that the prosecution bears the burden of proving every element of crime beyond a reasonable doubt while the defendant does not have to prove his innocence. For full definitions of the English legal terms, see *Black, Law Dictionary*, 276ii, 303ii, 540i, 1186ii. For the principle of presumption of innocence within the domain of Islamic civil law, see Mejelle, Section 8.

[167] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 27.

[168] See above, II.2.1.4.

and 256, 275 and 284, respectively). The law mentions civil servants only in the context of quasi-deliberate homicide. Section 249(3) provides that if a civil servant charged with overseeing public justice (which apparently means a policeman or a judge) exceeds his authority not in good faith and causes death, he will be charged with quasi-deliberate homicide. Section 253 provides that the punishment for this offense—in accordance with the strict view of the Mālikī school—is the death penalty or blood price. Although it is not stated explicitly, one may assume on the basis of the *sharʿī* norm on this issue that had he not exceeded his authority, he would have been exempt from criminal liability and from payment of blood price to the victim's relatives as well.[169]

The CrimCAp's decision to the effect that in the event of accidental homicide or injury the state has to pay the blood price to the victim or his relatives signifies a revolutionary transfer to public law of a concept pertaining to private law. In traditional Islamic law homicide and injury are classified as torts, and the *ʿāqila*, the mutually responsible group based on the offender's male agnates, is not exempt from payment even in the extenuating circumstances of accident. It should be noted in this connection that in Saudi Arabia there are cases in which blood money is paid by the state, but this is done by virtue of royal act: the Ministry of Labor and Social Affairs pays the blood money to the victim's heirs in the event that it is not possible for the *ʿāqila* to pay.[170] Al-Kabbāshī gives no indication as to the legal method used by the court requiring the state to pay blood money, though support for this decision may be found in an authoritative Ḥanafī opinion in cases where the offender has no *ʿāqila*. The *sharīʿa* allows exemption from criminal liability and *diya* in cases such as carrying out a death penalty by virtue of a court's decision, or causing homicide in self-defense (in both instances the homicide is legal).[171] Al-Kabbāshī claims that "jurisprudence by means of *ijtihād*" in the event of a lacuna in the law, with reliance on Section 3 of the JudA, is very common.[172]

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[169] Anderson, *Homicide*, 824; Peters, *Criminal Law*, § 0.1.3, 0.1.3.3.2.

[170] Layish, *Saudi Arabian Legal Reform*, 105, 108, 111. Cf. Tyan, *Diya*, 342 I; Peters, *Criminal Law*, § 0.1.3, 0.1.3.3.1.

[171] For further details, see Peters, *Criminal Law*, § 0.1.1.1, 0.1.3.3.2; Anderson, *Homicide*, 824ff.

[172] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 27, 153. Al-Kabbāshī hints at another example of "jurisprudence by means of *ijtihād*" in terms of Section 3(b) of the JudA.

In the public debate following the sentence of amputation in the case of the bookkeeper from Wād Sidna,[173] it was claimed that the PC, 1983 does not deal explicitly with theft or embezzlement (*ikhtilās*) of public money. Section 323 provides, *inter alia*, that the punishment of amputation in the event of a theft is averted on grounds of "doubt or mistake as to ownership" (*shubha bi'l-milk*). This is a vague definition that does not specifically address the issue of theft of public funds. Since this is a controversial issue, the Chief Justice issued a legal circular[174] intended to prevent an overly comprehensive interpretation of the doubts averting Qur'ānic punishment. The circular defines the doubts on grounds of *shubha bi'l-milk* in a restricted manner: theft of property in which the thief is a partner (*māl al-shirāka*); property for which the victim owes the thief money (*māl al-madīn*),[175] and theft committed in distress in the event of an unexpected calamity, such as drought. The defense on grounds of "doubt as to public money" (*shubhat al-māl al-ʿāmm*) is not included in the list of defenses on grounds of "doubt as to ownership" mentioned in the circular. This, according to al-Kabbāshī, reflects the spirit of the time, since the institution of *bayt al-māl* has ceased to exist. In addition, considerations of public interest (*maṣlaḥa ʿāmma*)—"eliminating the causes of evil is preferable to bringing about benefits [i.e., correcting them]" (*dar' al-mafāsid muqaddam ʿalā jalb al-maṣāliḥ*)—require that public money be protected from those who covet it. Therefore, "doubt as to public money" cannot avert the Qur'ānic punishment of amputation,

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This has to do with the interpretation of the term *ʿāqila* within the context of "insurance company" (*shirkat ta'mīn*) or "trade unions" (*niqābāt al-ʿamal*). Since the relevant court decision is not available to the present writers, only tentative general remarks on this issue can be presented here. It appears that we are dealing here with an attempt to translate the ancient legal term *ʿāqila*, which originated in an agnatic tribal society, into a term implying a modern social framework of mutual responsibility {al-Kabbāshī, *Taṭbīq al-sharīʿa*, 27; Schacht, *Introduction*, 186; Coulson, *History*, 49; Peters, *Criminal Law*, § 0.1.3 (*ʿāqila*), 0.1.3.1 (*ʿāqila*), 0.1.3.3.1}. In other words, the court intended to legitimize insurance—which involves an element of *gharar*, risk, and hence forbidden in Islamic law (Coulson, *Commercial Law*, 43f.; Saleh, *Unlawful Gain*, 50)—from a *sharʿī* point of view by treating it as a partnership agreement (*shirka*) between the insurance company and the client for the purposes of mutual responsibility. Similarly, it is not inconceivable that the court's decision was an attempt to legitimize the institution of the trade union by superimposing it on the mechanism of the *ʿāqila*. In other words, all members of the professional union are responsible for each other in the realm of the union's goals and activities. On Insurance, see above, III.2.2.4 and below, IV.2.2.2.1.

[173] See above, III.2.1, 2.2.1 and 2.2.3.

[174] See above, II.2.1.2.

[175] Cf. Schacht, *Introduction*, 155–56; Peters, *Criminal Law*, § 0.1.2.1.

and the CrimC acted accordingly. Al-Kabbāshī adds that the harsh sentence is in conformity with modern times: some countries in the Communist bloc and the third world impose the death sentence for theft of public funds.[176] It should be mentioned incidentally that in the case under review the indictment against one of the defendants was dropped in return for his consent to become a state's witness (*shāhid li'l-ittihām*). The institution of state's evidence is alien to Islamic law in that it is repugnant to the conception of the *ʿadāla*, the integrity, required from a witness. The source of inspiration for this innovation is probably English law.[177]

There is some evidence of "independent judgment" within the meaning of Section 3(b) of JudA, 1983 that is not bound by any legal source—*sharʿī* or pre-1983 sources of law. Moreover, it is not conditional on the absence of a statutory provision as required by Section 3. In fact, this "independent judgment" is tantamount in every respect to judicial reasoning or discretion in the wide sense of the term rather than to judicial *ijtihād*. Thus in one case, the court charged the defendant with issuing an uncovered check and delaying payment of a debt under Sections 362(b) and 56 of the PC, 1983. The plaintiff had given the accused £S 8,000 with a view to investing it profitably (*istithmār*) in commerce, the nature of which the court was unable to clarify. The accused delayed the payment of the debt several times and each time he was required by the plaintiff to pay another 35 percent of the capital until the total amount reached £S 18,000 within a couple of months. Within that period the defendant issued several uncovered checks. The court ruled that the case was a pure trade of *ribā* and undoubtedly prohibited: "Allāh has launched a war against eating *ribā*." A reference is made in this connection to the Qurʾānic verses 2:278–279.[178] The court further ruled that the plaintiff's involvement with *ribā* was not compatible with the *sharʿī* textual sources, that is, the Qurʾān and the *ḥadīth*, and the Prohibited Enrichment Act, 1983. Since the plaintiff repented to God (*tāba*) and renounced the unlawful gain (*fawāʾid*) being fully satisfied to regain his capital, the court con-

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[176] Al-Kabbāshā, *Taṭbīq al-sharīʿa*, 78–79.

[177] *Ibid.*, 70; Schacht, *Introduction*, 125; Anderson, *Africa*, 357; Black, *Law Dictionary*, 1409.

[178] Q. 2:278: "O ye who believe! Observe your duty to Allah, and give up what remaineth (due to you) from usury, if ye are (in truth) believers."

victed the defendant under Section 456 of the PC, 1983 and with due regard to Section 3 of the JudA which authorizes a judge to exercise "independent judgment," sentenced the accused to flogging, a fine which would be paid to the plaintiff, and confiscated the amount of the usury for the public welfare. There was no question of a lacuna in the PC and the court's "independent judgment" was not inspired or guided in any way by the sources indicated in Section 3(b), which implies that we are here dealing essentially with independent judicial reasoning.[179] In some respects this independent judgment resembles what Naveh defines as "judicial discretion in legislative interpretation" in the Egyptian national courts following the abolition of the *sharīʿa* courts.[180]

To sum up, the cases cited above, though admittedly few, indicate that pre-1983 principles of law were applied within the context of Section 3(b) of the JudA. Principles, such as presumption of innocence and natural justice, though they may have some support in Islamic law, are closer to the English concepts. Al-Kabbāshī tends to raise the meaning of independent judgment or *ijtihād* to the level of judicial reasoning which is occasionally exercised in the presence of explicit provision regulating the case under review and without being bound by any source of law.

2:279: "And if ye do not, then we warned of war (against you) from Allah and His messenger. And if ye repent, then ye have your principal (without interest). Wrong not, and ye shall not be wronged."

[179] *Al-Ṣaḥāfa*, October 22, 1984, p. 2 cols. 4–5.

[180] Naveh, *Tort Injury*, 19; see below, IV.4.2.

CHAPTER FOUR

AN ASSESSMENT OF THE SUDANESE LEGAL EXPERIMENT

1. The Impact on the Uncodified Sharīʿa

What practical results emerge from the reinstatement of Islamic law by means of codification, legislation, and other methods discussed above, and of the application of the Islamist statutes and the legal circulars in national courts? In what follows we shall examine these issues primarily from the perspective of the orthodox *sharīʿa*.

1.1. *Adapting the* Sharīʿa *to Modern Times*

There is ample evidence to the effect that the Sudanese legislature and judiciary were inspired by the desire to accommodate the uncodified *sharīʿa* to contemporary conditions. Thus, for example, as noted previously,[1] regardless of whether a homicide was deliberate, quasi-deliberate, or accidental homicide, it is the offender who is obliged to pay blood money (Section 256 of the PC) rather than his male agnates (*ʿāqila*), who under the *sharīʿa* are required to pay it collectively in the event of quasi-deliberate and accidental homicide. Al-Kabbāshī defends this deviation by claiming that the *ʿāqila* no longer exists in contemporary Sudanese society, implying that there has been a transformation of the traditional social structure and the norms associated with it.[2] Holding the offender personally responsible for his actions in such circumstances reflects a change in norms and values from the legal standpoint of the *sharīʿa*. Although the treatment of homicide and blood money is still within the realm of torts, a conception of crime entailing punishment on the basis of personal liability (under the *sharīʿa* personal liability exists only in the event of deliberate homicide), falling in the realm of public law, is gaining ground.[3] Similarly, Section 55a of the ZakTA, 1984 pro-

[1] See above, III.2.2.5.2.
[2] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 16.
[3] Cf. Anderson, *Homicide*, 811ff.; Tyan, *Diya*, 342i; Peters, *Criminal Law*, § 0.1, 0.1.1.

vides that expenditures from *zakāt* revenues will be undertaken for the purposes set down in the Qur'ān. Nevertheless, slaves—mentioned explicitly in the Qur'ān (2:177)[4]—were left out of the order of beneficiaries. Al-Kabbāshī justifies this deviation by alleging that there are no more slaves in the Sudan because the institution of slavery has been abolished.[5]

The mode of paying blood money under Islamist legislation, too, reflects a certain mitigation of the *sharʿī* laws. Section 64(2) of the PC provides that full payment of blood money is one hundred camels, or the equivalent in Sudanese currency. One hundred camels is actually a *sharʿī* norm, but the section does not specify the types of camels by age and sex, as required by the *sharīʿa*. Similarly, the *sharīʿa* instructs that blood money be paid in gold or silver coins.[6] These two departures may represent an attempt to adapt the *sharʿī* institution of blood money to the conditions of contemporary Sudanese economy or tribal law.[7] Likewise, Section 320 defines the *niṣāb*, the minimal value of a stolen object in connection with theft entailing the Qur'ānic punishment of amputation in monetary terms as one quarter dinar of gold or three dirhams of silver, or the equivalent in Sudanese currency. Support for payment of blood money in gold or silver coins in these amounts can be found in the Mālikī doctrine.[8] There are naturally objective difficulties in determining the real value of the dinar and dirham in Sudanese currency, since their nominal value was originally determined in the religious-legal literature.

Another example of adaptation of the *sharīʿa* to present-day conditions occurs in the realm of liability for negligence. The third chapter of the CivTA, 1984 discusses personal liability for causing damage and the respective compensation required. *Sharʿī* norms are incorporated into various sections of this chapter; thus, for example, Section 142, relying on the *sharʿī* principle that "necessity makes the prohibited

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[4] Q. 2:177: "[. . .] but righteous is he who believeth in Allah [. . .] and giveth his wealth, for love of Him, to kinsfolk and to orphans and the needy and the wayfarer and to those who ask, and to set slaves free; [. . .]."

[5] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 16. The abolition of the institution of slavery does not necessarily prove that there are no slaves in the Sudan; see, for instance, the reports on the existence of slaves in Southern Kordofan, in Mahmud & Baldo, *Human Rights*.

[6] Tyan, *Diya*, 341i; Peters, *Criminal Law*, § 0.1.3.3.2.

[7] See also section 278(2) pertaining to blood money in return for the amputation of a limb.

[8] Heffening, *Sāriḳ*, 173ii; Peters, *Criminal Law*, § 0.1.2.1 (*niṣāb*); al-Kabbāshī, *Taṭbīq al-sharīʿa*, 15.

permissible" (*al-ḍarūrāt tubīḥ al-maḥẓūrāt*), releases a person causing damage from liability in so far as his action was required to defend himself or his honor, or to protect his property.[9] Sections 156–57 provide that in the event of homicide or injury, blood money is due in accordance with the provisions of the PC and the JudA, 1983. The fifth chapter of the CivTA (Sections 160ff.) deals with the personal liability of a person employed by another, and of members of the liberal professions (doctors, lawyers, engineers), for damage they cause through negligence in performing their professional duties. Al-Kabbāshī explains that functional and professional liability is an important aspect of financial liability (*ḍamān*) in modern society, because of the expertise required in many professions. This area, he claims, has been neglected in legislation (he appears to be implying the *sharīʿa* as well), and this legal lacuna has in turn occasioned loss of financial rights. These recent innovations (*mustajiddāt*), to use his wording, were intended to complement the *sharīʿa* and adapt it to the conditions of present-day Sudan.[10]

Legal circulars issued by the Chief Justice and *fatwā*s by certain Sudanese bodies—adapting vague terms and concepts in the Islamist legislation, in particular the CivTA, to modern conditions—became an important means for clarifying them.[11] Thus, for example, Section 307(b) of the CrimPA, 1983 authorizes the Chief Justice to publish from time to time legal circulars setting the reduced (*nāqiṣa*) and full (*kāmila*) amounts for blood money for homicide and bodily harm in the entire country or in certain geographical areas. The amount of blood money is left totally to the discretion of the Chief Justice provided the *sharīʿa* is taken into account. In fact, there is evidence that blood money is adjusted in various places through legal circulars, and that local custom is taken into account.[12] The blood price is based on the Qur'ān[13] and its value, in terms of camels, on the *ḥadīth*.[14] On the basis of the average amounts of blood price in nine different

[9] Peters, *Criminal Law*, § 0.1.1.1 (self defense).

[10] For further details, see al-Kabbāshī, *Taṭbīq al-sharīʿa*, 21.

[11] Gordon, *Legal Revolution*, 795.

[12] Nataloni, *Codice Penale*, 351.

[13] Q. 4:92: "[. . .]. He who hath killed a believer by mistake must set free a believing slave, and pay the blood money to the family of the slain, unless they remit it as a charity. [. . .] If he [the victim] cometh of a folk between whom and you there is a covenant, then the blood money must be paid unto his folk [. . .]."

[14] *Wa-anna fī 'l-nafs mi'a min 'l-ibil*. For the sources of this *ḥadīth*, see Wensinck, VI, 507, line 20.

districts throughout the Sudan, a special criminal circular provides that an "enhanced" (*mughallaẓa*) blood price amounts to £S 30,000. The same applies to *niṣāb*, the minimal value of the stolen object required for the application of amputation. Criminal Circular No. 86 of 1983 specifies the *niṣāb* in terms of modern currency: £S 100.[15]

A circular of February 12, 1984 defines various types of guarantee (*ḍamān*) applicable in private claims and road accidents in case the defendant is not able to pay the damages imposed on him by court. Such a guarantee makes it possible for him to obtain release from custody on bail (*kafāla*). The policy of insurance on cars is intended to cover payment of damages caused to person or property by the defendant under Section 271(2) of the CrimPA, 1983. A pledge or deposit (*rahn*) of immovables as a security in favor of the Government, a victim, or some injured party equivalent to the damages imposed on the defendant by court, and bank deposits (*waḍā'i'*; sing. *waḍī'a*) protected by the bank's guarantee are legally acceptable.[16] According to orthodox *sharī'a*, in the event of undeliberate homicide or bodily damage entailing liability to payment of blood price, it is the *'āqila*, solidarity group based (according to the Mālikī school) on male agnates that must pay it.[17] The personal liability of the offender, rather than the *'āqila*, for the payment of blood price marks the adaptation of the doctrine of blood price to the changing conditions of modern society, where solidarity based on blood relationship is weak.

Criminal Circular No. 89 of 1983 provides that in executing amputation of a thief's hand the authorities should "be assisted by medical and scientific facilities," that is, by modern physicians or surgeons, in order to prevent unnecessary bodily impairment.[18] In other words, though the motivation to prevent such impairment is anchored in the *sharī'a*, the legislator does not hesitate to enlist Western technology and medicine—in themselves not necessarily in conflict with *sharī'a*—to this end.

Judicial practice too reflects the process of adaptation of the *sharī'a* to modern times. Under the *sharī'a*, liability for blood price is created in cases where someone has unintentionally or quasi-deliberately

[15] *Al-Ṣaḥāfa*, October 24, 1983, p. 1.
[16] *Al-Ṣaḥāfa*, February 12, 1984, p. 2.
[17] Cf. Peters, *Criminal Law*, § 0.1.3.3.1.
[18] *Al-Ṣaḥāfa*, November 1, 1983, p. 1.

caused a person's death or bodily harm, or if these were caused deliberately but for some reason a sentence of retribution was not pronounced under certain conditions. The *ʿāqila*, solidarity group, bears the burden of paying the blood price. As noted above, under the Mālikī school the *ʿāqila* consists of the perpetrator's male agnates. In the Ḥanafī school the *ʿāqila* was adapted to the urban and military milieu of Iraq. According to this concept, the blood price is a kind of compensation for damage caused and forms part of the private law of torts. It has nothing to do with criminal law, which is within the domain of public law.[19] There is some evidence in Sudanese judicial practice that the *diya* and *ʿāqila* are undergoing a process of adaptation to modern conditions. Thus in one case, the court for traffic felonies charged a driver with causing homicide by car accident, convicted him under Sections 23 and 49 of the RdTA, 1983 and ordered him and his insurance company to pay a blood price of £S 20,000 to the victim's heirs. The insurance company appealed to the CAp for deliverance from that decision claiming that the blood price should be conceived as a "personal punishment" imposed on the driver alone. The CAp upheld the decision and rejected the company's request as contradictory to both the legal methodology and Islamic law. The CAp ruled that the *diya* resulting from undeliberate homicide "is closer to the concept of compensation than to punishment" (*fa-hiya aqrab ilā al-taʿwīḍ minhā ilā al-ʿuqūba*). However, the CAp admitted that Sudan was in a "transitional stage," which seems to imply the necessity to accommodate traditional legal institutions to modern concepts. A case in point is Section 477 of the CivTA, 1984, which requires the insurance company to pay the *diya* by virtue of the contract of insurance. The *ʿāqila*, on the other hand, is bound to pay the *diya* by virtue of blood relationship. The definition of the solidarity group of the *ʿāqila* is undergoing constant transformation: from *ʿaṣaba* or male agnates, to *ahl al-dīwān*, that is, soldiers belonging to the same unit, or the *niqāba*, guild of traders in ancient times, to insurance company, etc. in modern times. In other words, this is an explicit admission on the part of the CAp of the necessity to adapt the traditional institution of *ʿāqila* to modern economic conditions.[20]

[19] For further details, see above, II.2.1.4.

[20] *Al-Ṣaḥāfa*, November 6, 1984, p. 2, cols. 2–3; see above, III.2.2.5.2. On obligatory insurance, see III.2.2.4.

In a similar case, a driver and an insurance company were required to pay £S 33,000 following the driver's conviction under Sections 23 and 49 of the RdTA, 1983. The insurance company appealed to the CAp and the latter ruled that the driver bore responsibilty for negligence and its consequences. The *diya* was to be paid to the victim's father; since the victim's mother had renounced her right to *diya* from the accused, her share was to be deducted. The CAp nevertheless ruled that the mother should have been informed that the insurance company was to benefit from her renunciation. In other words, the mother was given an option to reconsider her renunciation, which implies that the insurance company bears the financial consequences resulting from the driver's negligence.[21]

In another case, a traffic court convicted a driver and sentenced him to a fine and imprisonment under the RdTA, 1983. An insurance company, which represented the driver (probably with a view to exempting itself from financial liability), appealed to the CAp. The CAp found the driver, under Section 443 of the PC, 1983, guilty of being drunk while driving the car. Hence, it was decided to follow the procedure of implementing the *ḥadd* punishment prescribed for wine drinking, which seems to imply that in this particular case (but not otherwise) the insurance company was exempted from financial liability.[22]

It is interesting to note in this connection that the Sudanese Majlis al-Iftā' (the Sudanese council for deliverance of formal legal opinions) makes a clear distinction between commercial insurance (*ta'mīn tijārī*) and cooperative (*taʿāwunī*) insurance. The Majlis prohibits, in the best tradition of Islam, all kinds of commercial insurance, including life insurance, since it is based on the "unknown state of affairs and illegal consumption of the people's money," the reference being to the element of risk (*gharar*).[23] However, commercial insurance may be permitted under "irresistible necessity" which reflects an awareness on the part of the Majlis of the necessity to adapt the *sharīʿa* to modern economic requirements. On the other hand, cooperative insurance is permitted without any hesitation since it entails an

[21] *Al-Ṣaḥāfa*, December 31, 1984, p. 2, last col.

[22] *Al-Ṣaḥāfa*, October 30, 1984, p. 2, cols. 2–3. On obligatory insurance, see above, III.2.2.4.

[23] See below, IV.2.2.2.1.

element of charity (*birr, khayr*). This kind of insurance is compatible with the spirit of Islam since its goal is "social solidarity" (*takāful ijtimāʿī*), i.e., a kind of statutory social insurance, rather than profit (*ribḥ*). Mawlānā Ibrāhīm Aḥmad 'Uthmān of Majlis al-Iftā' maintains that the Islamic insurance companies in the Sudan are of this kind.[24]

1.2. *The Transition from Private Law to Public Law*

As already noted, the *sharīʿa* does not view homicide and grievous bodily harm as being within the realm of public-criminal law, whose focus is crime and punishment; they are considered as torts, which fall in the realm of private law (*ḥaqq ādamī*). They create liability to retribution (*qiṣāṣ*) for crimes committed against the person, and liability to compensation or blood price (*diya*), for the torts caused in place of retribution. They give rise to private (not state) prosecution.[25] This approach has basically been adopted by the CivTA, 1984. Thus Section 156 regards blood price as a financial right caused by virtue of homicide or bodily injury and regulated with respect to its rates by the provisions of the PC, 1983 on the basis of *sharʿī* principles, and the JudA, 1983. Moreover, the victim may renounce his right, prior to his death, and his heirs (in case of intentional homicide) are bound by this renunciation, which implies that the state is not a party to the dispute. On the other hand, offenses against religion entailing Qur'ānic punishments (*ḥaqq allāh*) can be classified as public law. These are illicit intercourse (*zinā*), false accusations of illicit intercourse (*qadhf*), wine drinking (*shurb al-khamr*), theft (*sariqa*), and highway robbery (*qaṭʿ al-ṭarīq, ḥirāba*). The punishment of flogging may be applied in cases where a *ḥadd* punishment is not applied, or at the *qāḍī*'s discretion (*taʿzīr*). The insertion of *sharʿī* norms into criminal statutory legislation (the Penal Code, 1974) within the PC, 1983 does not fundamentally alter the status of criminal law as a domain of public law as conceived in the West, and certainly not for those offenses and punishments on which the *sharīʿa* did not leave its mark. On the contrary, there are signs that the status of criminal law as public law is being extended to the offenses and punishments into which *sharʿī* principles and norms have been assimilated.

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[24] *Al-Ṣaḥāfa*, August 31, 1984, p. 3. Cf. Schacht, *Introduction*, 135, 146–47.

[25] For further details, see Peters, *Criminal Law*, § 0.1.3; Anderson, *Homicide*, 811ff.; Schacht, *Introduction*, 160, 176.

This assimilation occurs in both the definition of the offense and in its legal consequences.[26]

The expansion of the judge's discretion[27] signifies a transition of the *sharʿī* criminal law from private to public law. By transferring from the *walī al-dam* to the court the option to choose between the death penalty and payment of blood money in the event of quasi-deliberate homicide, Section 253 of the PC, 1983 removes from the scene the victim's agnates, who may be highly motivated to retaliate (their status is still intact in the event of deliberate homicide under Section 251). It can reasonably be assumed that the death penalty in such cases—if the court in fact chooses this option—will be perceived by the court as punishment for a crime, rather than retribution.

The judicial practice of the SupC with respect to homicide and grievous bodily harm reveals a clear tendency toward transition from private to public law. Thus in one case already discussed above, the accused was charged with deliberate homicide under Section 251 of the PC and was sentenced to death. An amicable settlement (*ṣulḥ*) had been reached between the two parties on the basis of blood price and compensation "in accordance with the current [tribal] custom." The avengers, having received the blood price, renounced their right to retribution. Hence, the court recommended that the death sentence be commuted. The SupC upheld the conviction and having regard to the tribal amicable settlement decided to cancel the the death sentence. A tribal *ṣulḥ* implies that once the blood price is paid the dispute is solved and of course there is no question of punishment by the state. The SupC, nevertheless, felt that some discretionary punishment was required, which implies that homicide and grievous bodily harm should be regarded not only as a domain of private law but also as a domain of public, that is, criminal, law concurrently. In order to support this trend the SupC resorts to differences of opinion within the schools of law. Most schools of law maintain that the ruler has no authority to punish by *taʿzīr* once the victim's avengers have pardoned the perpetrator. The SupC, however, adopted the view of Mālik and al-Layth (d. 175/791) according to which the ruler may impose discretionary punishment of one hundred lashes and a year's imprisonment. Earlier, the Criminal Circular No. 94 of 1983 too adopted this view. It provides:

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[26] For further details, see above, II.2.1.4.
[27] See below, VI.4.2.

> [. . .] hence, if the avengers renounce their claim (*ḥaqq*) [to retribution] by means of pardon or amicable settlement there still remains the second (that is, the claim of Allāh or the public claim, *al-ḥaqq al-ʿāmm*) whereby the perpetrator is subject to discretionary punishment—imprisonment and flogging on the basis of the Mālikī school.

In the case under review the SupC sentenced the convicted person to one hundred lashes, imprisonment for one year, and *kaffāra*, religious expiation.[28]

As noted, the CrimCAp ruled in one case that the state must pay blood money to the victim or his relatives for accidental homicide or injury caused by a public servant while on duty, provided the public servant took all necessary precautions. This ruling may mark a transition from a conception of private law to one of public law,[29] since, as stated above, in traditional Islamic law homicide is considered to be purely a matter of torts, and the *ʿāqila*, the offender's male agnates, are collectively responsible for paying the blood money for any undeliberate homicide or injury which the offender may commit. (The question as to whether the offender himself should share the expenses is a disputed point between the schools.)[30] We also saw previously that in Saudi Arabia, the state, by virtue of royal act rather than judicial practice, pays the blood money in the event that it is not possible for the *ʿāqila* to pay. In the Sudan, in contrast, this issue has been decided (regardless of the *ʿāqila*'s ability to pay) through a court ruling that was apparently inspired by sources outside the *sharīʿa*.[31]

The RdTA, 1984, which deals with homicide, injury, damages (*ḍarar*) and destruction (*itlāf*) resulting from road accidents, refers to the offenses in terms of both public and private law: the offender is subject to payment of blood money, full or partial, and to compensation for damages caused by him, as well as to criminal sanctions. The traffic judge has exclusive authority to consider all the civil and criminal aspects of traffic accidents.[32] Since traffic accidents are viewed as acts caused unintentionally, retribution is not an option

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[28] *SLJR*, 1983, 100–8. See above, II.2.1.2 and III.2.1 and 2.2.5.1. This was also nineteenth-century Egyptian practice. We owe this remark to Ruud Peters.

[29] This conclusion requires a reservation to the effect that liability to pay blood money may also be incurred by a private employer if the employee causes death while on duty. We owe this remark to Ruud Peters.

[30] Anderson, *Africa*, 359; Peters, *Criminal Law*, § 0.1.3.3.1.

[31] For further details, see above, III.1.2, 2.2.5.2.

[32] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 31.

according to the *sharīʿa*. Nevertheless, viewing homicide and bodily harm in a traffic accident in terms of criminal law signifies a transition from private to public law. A similar phenomenon has been observed in Saudi Arabia: the state is playing an increasing role in matters involving homicide and attack, damage to property, and so on. Because of the state's desire to maintain public order and internal security, it is not prepared simply to settle violent conflicts between the parties involved, by amicable settlements; payment of blood money is not sufficient today to end a conflict, and the offender is subject to a statutory sanction as well.[33]

Deputy Chief Justice Aḥmad Muḥammad ʿUthmān argues that the blood price is not only a type of compensation in consideration for damage caused; it consists also of an element of reprimand (*zajr*) to the perpetrator which is manifested in the expropriation of part of his property in return for the damage caused to a soul or a limb.[34] This implies that we are dealing here with a combination of private law, which is the traditional concept of the blood price, and public law, which is manifested in the concept of punishment.

Usually the court treats road accidents as undeliberate homicide with everything that this implies under the *sharīʿa*. Thus in one case where bodily injury was caused by a road accident, the CAp ruled that "unintentional injury can never be caused in vain" (*al-jurḥ al-khaṭaʾ lā yuhdar abadan*) which implies that the perpetrator had to pay blood price to the injured for the physical damage caused.[35] In an analogous case, the court ruled that since the driver and the victim in the road accident were not acquainted with one another it was obvious that there was no intention to kill or to cause bodily harm. Nevertheless the court ruled that "injury to the rights of human beings is not caused in vain" and hence blood price should be offered as compensation.[36] In several cases the victim's parents waived their right to blood price "for the sake of God, be He exalted."[37]

The cases of road accidents were dealt in court simultaneously under both Section 256 of the PC, 1983, that is, undeliberate homicide within the domain of private law, and under various sections of the RdTA within the domain of public law. Thus in one case,

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[33] Layish, *Saudi Arabian Legal Reform*, 110ff.
[34] *Al-Ṣaḥāfa*, November 16, 1983, p. 1; *SLJR*, 1984, p. 124.
[35] *Al-Ṣaḥāfa*, October 25, 1984, p. 2, cols. 4–5.
[36] *Al-Ṣaḥāfa*, October 18, 1983, p. 5, col. 4.
[37] *Al-Ṣaḥāfa*, August 7, 1984, p. 2; August 24, 1984, p. 2.

the perpetrator was sentenced to seventy lashes, two years' imprisonment and blood price of £S 20,000 payable to the victim's avengers.[38] In another case, the accused was sentenced to pay blood price of £S 20,000 to the victim's avengers. The court, however, added, at its discretion, that the perpetrator be imprisoned until the payment of the blood price is effected or until the victim's relatives waived their right to blood price.[39] Section 256 does not mention imprisonment as an option. It seems that the judge enlists a sanction from the public criminal domain in order to facilitate the enforcement of an element deriving from private law (blood price).

The Explanatory Note to the PC, 1983 instructs that retribution be carried out—in the presence of the injured party—by the state in its capacity as the general guardian (*wilāya ʿāmma*), the same way it executes any other statutory punishment. Such a procedure is compatible with the practice in the Sudan since its independence. A deviation from this practice might cause difficulties in the execution of punitive sentences handed down by courts. The Note expresses special concern that if the injured party (or the victim's blood avenger—in the event of homicide) is allowed to carry out the retribution himself this might strengthen the traditional nature of the *qiṣāṣ* as retaliation at the expense of punishment. It goes without saying that this innovative instruction shifts retribution from the domain of private to public law.[40]

1.3. *Deviations from the* Sharīʿa

The incorporation of *sharʿī* norms into the Islamist legislation led in many cases to far-reaching deviations from the predominant *sharʿī* doctrine.[41] The PC, 1983 provides several clear examples of such distortions. The definition of theft entailing Qurʾānic punishment lacks certain essential *sharʿī* elements, without which a Qurʾānic punishment cannot be applied, such as *ḥirz*, the object's being in custody or in a safe place, and secrecy (*khafāʾ*, *sitr*).[42] In other words, the

[38] *Al-Ṣaḥāfa*, August 22, 1984, p. 2.
[39] *Al-Ṣaḥāfa*, August 14, 1984, p. 2; October 7, 1984, p. 2, col. 5.
[40] *Al-Ṣaḥāfa*, October 16, 1983, p. 5, col. 4.
[41] See above, II.2.1.4. Cf. Taha, *The Second Message*, 10–11; Köndgen, *Das islamisierte Strafrecht*, 82f.
[42] Al-Mahdī, *al-Dīmuqrāṭiyya*, 100; Heffening, *Sārik*, 173ii; Schacht, *Introduction*, 179f.; Peters, *Islamization of Criminal Law*, 264; *idem*, *Criminal Law*, § 0.1.2.1; Köndgen, *Das islamisierte Strafrecht*, 113f.; El-Awa, *Punishment*, 6–7.

definition of theft that entails the Qur'ānic punishment of amputation diverges significantly from the orthodox doctrine. The Explanatory Note to the PC, 1983 states that the legislator adopted the Ẓāhirī doctrine which, in contrast to that of all other *fuqahā'*, does not consider *ḥirz* a precondition for *sariqa ḥaddiyya*. Instead, the legislator contented himself with taking something from the possession (*ḥiyāza*), rather than custody, of someone.[43] Al-Kabbāshī holds that the stretching of the definition is an example of religious-legal (*fiqhī*) *ijtihād*, which in this context is synonymous with the eclectic expedient.[44]

Section 332 defines *nahb* as theft in which the offender caused or intended to cause death or injury to a person, or to imprison him illegally, or to intimidate him by threatening to effectuate all these things. This definition is based in general terms on the Penal Code, 1974. Section 334, however, provides that the perpetrator of this offense is subject to the death penalty, with or without crucifixion (*ṣalb*) or alternate amputation (*al-qaṭ' min khilāf*), or life imprisonment with banishment. This punishment is also imposed on causing damage deliberately while committing or attempting to commit robbery (Section 336), or on robbery jointly committed by several people (Sections 333, 337–39). According to the *sharī'a*, *nahb* is robbery in broad daylight in a place where help is available (as opposed to *qaṭ' al-ṭarīq* or *ḥirāba*). It is not considered theft, and therefore does not entail amputation; it entails discretionary punishment (*ta'zīr*).[45] The punishment imposed on *nahb* in the PC indicates that the Sudanese legislator considers this offense equal to highway robbery (*qaṭ' al-ṭarīq*), which entails a variety of penalties, depending on the circumstances.[46] As noted above,[47] eliminating "secrecy" (*khafā'*, *sitr*) stretches the definition of theft, making it applicable to *nahb* as well. Banishment (but not life imprisonment) is recognized in the *sharī'a*, though there are certain differences between the schools.[48] The offense of *qaṭ' al-ṭarīq* did in fact undergo codification as a combination of homicide and robbery, but since it is based on various sections adopted from the PC, 1974, it was not formulated in *shar'ī* terms.[49]

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[43] *SLJR*, 1984, 105–6.

[44] Al-Kabbāshī, *Taṭbīq al-sharī'a*, 15, 138–40; Köndgen, *Das islamisierte Strafrecht*, 115. See above, II.2.2.1.1.

[45] Heffening, *Sāriḳ*, Schacht, *Introduction*, 180.

[46] Peters, *Criminal Law*, § 0.1.2.2.

[47] See above, II.2.2.1.1.

[48] For further details, see Köndgen, *Das islamisierte Strafrecht*, 117–18.

[49] See above, II.2.2.1.1; al-Mahdī, *al-Dīmuqrāṭiyya*, 100; Köndgen, *Das islamisierte Strafrecht*, 44.

Again, al-Kabbāshī seeks to make excuses for the fact that the highway robber (*muntahib*), the person who unlawfully appropriates another's property (*ghāṣib*), and the embezzler (*mukhtalis*) are considered thieves (*sāriq*) under the PC,[50] by relying on the opinion of some of the *fuqahā'*. He considers this, too, to be an instance of religious-legal *ijtihād*, though according to the predominant opinion in the *sharīʿa*, these types of transgressors are not thieves subject to *ḥadd* punishment.[51]

Other examples of deviation from the *sharīʿa* may be found in the realm of blood price. The PC (from Section 251 on) does not distinguish between the blood price of a Muslim and that of a non-Muslim, or between a male and a female.[52] While support can be found in Ḥanafī doctrine for ignoring the confessional distinction between Muslims and non-Muslims,[53] there is no support in any of the schools or in any jurist's opinion for ignoring the distinction between the sexes. According to the *sharīʿa*, the *diya* paid for homicide is different from that paid for causing bodily harm. In both cases, however, the amount paid for a female victim is one-half the amount paid for a male.[54] According to the *sharīʿa*, the *ʿāqila*, a group of male agnates in the offender's tribe—a conception adopted from tribal law—is collectively responsible for paying the blood money in the event of accidental and quasi-deliberate homicide. In the case of deliberate homicide (if the option of retaliation has not been exercised), the offender himself must pay.[55] However, according to the PC (Sections 251ff.), in any circumstances in which blood money must be paid, whether the offense was committed deliberately, quasi-deliberately, or even accidentally, payment is imposed on the offender personally and not on the *ʿāqila*. Of course, one should bear in mind that in spite of the similarity of the terminology, the definitions of the statutory categories of homicide do not correspond to those in the *sharīʿa*.[56]

According to traditional Islamic law (with some differences between the schools), when the option of retaliation is not exercised in the

[50] See, for example, Section 320(1).
[51] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 15; Schacht, *Introduction*, 180.
[52] Cf. al-Kabbāshī, *Taṭbīq al-sharīʿa*, 16.
[53] See below, IV.3.2.
[54] For further details, see below, IV.3.1.
[55] Anderson, *Homicide*, 814; Anderson, *Africa*, 361; Schacht, *Introduction*, 186; Tyan, *Diya*, 342II; Peters, *Criminal Law*, § 0.1.3 (*ʿāqila*), 0.1.3.3.1.
[56] See above, II.2.1.4.

case of deliberate homicide, and when this option does not exist in the case of quasi-deliberate homicide (which is not recognized by the Mālikī school) and accidental homicide, the offender must perform, in addition to the payment of blood money and expiation (*kaffāra*), a religious duty, such as manumitting a Muslim slave or fasting for two consecutive months. In addition, if the murderer is the legal heir of the victim, he will be excluded from the estate. Sections 251 and 253, which adopt the terminology (but not the definitions) of the *sharʿī* category of deliberate and quasi-deliberate homicide, make no reference to the issue of expiation and disinheritance of the offender from the victim's estate in both transmission by will or in accordance with the *sharʿī* rules of inheritance.[57]

Deviations from traditional *sharīʿa* have been observed also in Islamist circulars and judicial practice. Annex No. 1 to Circular No. 89 prohibits the *sharʿī* doctrine of tying (*taʿlīq*) the amputated limb to the thief's neck in order to avoid medical complications. The CrimCAp deems itself bound by this Annex and occasionally repeals sentences of tying the amputated limb to the thief's neck handed down by the CrimC. Thus in one case, a CrimC found the accused guilty of theft entailing Qur'ānic punishment under Section 322(2) of the PC, 1983, and decided that the palm of his right hand be amputated and tied to his neck. The CrimCAp upheld the amputation but repealed the *taʿlīq*. The SupC endorsed the the latter's decision. In reference to the *taʿlīq*, the SupC took pains to note that although this procedure was anchored in the *fiqh*, Annex No. 1 to Criminal Circular No. 89 makes no mention of it, which implies that the procedure is prohibited.[58] In another similar case, the SupC ruled that the *taʿlīq* procedure was contradictory to the circular and its annex—though not to the [uncodified] *sharīʿa*—and hence prohibited.[59]

Another innovative deviation from traditional *sharīʿa*, motivated by public interest, pertains to the status of *iḥṣān*, "immunity," in the case of illicit intercourse which entails lapidation. All the Sunnī

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[57] However, Sections 317(w) and 350 of the Law of Personal Status for Muslims, No. 42, 1991 provide that deliberate homicide constitutes an impediment to testamentary succession and inheritance, respectively. Cf. Anderson, *Homicide*, 819; Schacht, *Introduction*, 181f., 185; Peters, *Criminal Law*, § 0.1.3. (*kaffāra*); Köndgen, *Das islamisierte Strafrecht*, 96–97; Nataloni, *Codice Penale*, 344.

[58] *SLJR*, 1983, 89, 93–95. On the source of *taʿlīq* in the *ḥadīth*, see Zaydān, *al-Mufaṣṣal*, vol. 6, 244–45. See above, II.2.1.2, III.2.2.1.

[59] *SLJR*, 1983, 95–96.

schools maintain that the consummation of a valid marriage creates *iḥṣān* regardless of the marital status of the adulterer or adulteress at the time the illicit intercourse took place. The SupC, however, rejects this doctrine and adopts instead a Shīʿī doctrine shared by some contemporary Sunnī jurists, to the effect that the adulteress must be married at the time the illicit intercourse took place in order to be considered *muḥṣana*.[60]

The Islamist legislation also deviates from the *sharʿī* rules of evidence and procedure. The EvA, 1983, contains several innovations not supported in traditional law. Al-Kabbāshī, in fact, admits that the law is based not only on Islamic sources of law, but also on legal precedents that accumulated in the Sudan over a long period of time and that allegedly do not contravene the *sharīʿa*. The section dealing with methods of proof applicable in courts contains several innovations not recognized in the *sharīʿa*, such as documents (*mustanadāt*), circumstantial evidence (*qarāʾin*), the court's visit to the scene of the crime (*muʿāyana*), and an expert's testimony (*khibra*).[61] Written documents (*ṣakk, wathīqa*) are not recognized in Islamic legal theory, and the Qurʾānic verses that prescribe adhering to written documents[62] are interpreted as recommendations. The documents serve as aids to memory and are valid only insofar as they have been confirmed by witnesses' testimony, even though they are widely used in everyday practice. The modern reformist legislation validated the use of written documents; moreover, in some instances the *sharʿī qāḍī*s' jurisdiction to hear a certain case has, through a procedural device, been made conditional on presentation of documentary evidence.[63] The CivTA, 1984 goes even further, making the validity of civil transactions conditional on written documents. Section 91(2) of the act provides that a contract (*ʿaqd*) will be deemed null and void (*bāṭil*) if the act stipulates that it has to be made in writing and has

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[60] See below, III.2.1 and 3.2.2.4.

[61] Cf. al-Kabbāshī, *Taṭbīq al-sharīʿa*, 23–24; see above, III.1.1.

[62] Q. 2:282: "O ye who believe! When ye contract a debt for a fixed term, record it in writing. Let a scribe record it in writing between you in (terms of) equity. No scribe should refuse to write as Allah hath taught him, so let him write, and let him who incurreth the debt dictate [. . .]. Be not averse to writing down (the contract) whether it be small or great, with (record of) the term thereof. [. . .]." Cf. Q. 24:33: "[. . .]. And such of your slaves as seek a writing (of emancipation), write it for them, [. . .]."

[63] Schacht, *Introduction*, 82f., 193; Anderson, *Legal Reform*, 45–46, 66–68, 161, 163; ʿAbduh, *Taqrīr*, 34; Layish, *Shahādat naql* and the sources mentioned there.

not yet been put into writing at the time of its conclusion, and the contract will be valid only from the date of its written form. Similar stipulations were included in the act in connection with gifts (*hibāt*), loans (*qirḍ*), hiring and leasing (*ijāra*), disposition (*taṣarruf*) of lands and buildings, and partnerships (*sharikāt*).[64] Al-Kabbāshī's explanation for this innovation is that the written document is the best means for protecting rights, and that it also renders possible avoidance subpoenaing witnesses to court and stops the fabrication of evidence.[65]

The Sudanese legislator turned circumstantial evidence, which formally is not recognized by the *sharīʿa*, into a sweeping means of proving offenses entailing Qur'ānic punishments,[66] almost certainly under the inspiration of legal precedents in the Sudan, which in turn were imbibed from English law.[67] The court's visit to the scene of the crime for the purpose of acquiring a first-hand impression of incriminating evidence is also an innovation, probably inspired by English law. Similarly, the testimony of an expert witness whose areas of competence are connected to the offense that is the object of the legal proceeding has been recognized as a legitimate method of proof. Section 212 of the CrimPA, 1983 which refers to experts in the fields of science and medicine, also reflects this recognition. The testimony of an expert is viewed as circumstantial proof. Thus, for example, a memorandum by an expert on wine drinking relies on the circumstantial evidence of odor.[68] We noted above that the medical report based on modern medicine (though this in itself is not necessarily in conflict with the *sharīʿa*) has become an essential auxiliary evidence almost tantamount to circumstantial evidence.[69] The English-inspired state's witness is alien to Islamic law in that it is repugnant to the conception of the *ʿadāla*, the integrity, required from a witness.[70] There is ample evidence to the effect that the Sudanese courts deem themselves bound by precedents of the SupC although case law was never recognized by Islamic legal theory.[71] The Islamist criminal codes are being applied retroactively when this is "more

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[64] Chs. 6–8, 10.
[65] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 22–23.
[66] *Ibid.*, 24; see above, III.1.4.
[67] See above, II.3.2.
[68] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 23–24.
[69] See above, III.1.4.
[70] See above, III.2.2.5.2.
[71] See above, III.1.2.

favorable to the accused"—also an English legal principle.[72] Retroactive application of the law is totally irrelevant under the *sharīʿa*.[73]

To sum up, the enrichment of methods of proof described above makes it easier to prove offenses for which it might have been impossible to obtain a conviction on the basis of *sharʿī* rules of evidence and procedure. In this sense, the PC is stricter than the *sharīʿa*. On the one hand, the law adopted the stringent Qurʾānic punishments, and on the other, deprived the offender of the possibility of evading them by making him subject to the civil laws of evidence and procedure that existed in pre-Islamist legislation.[74]

These deviations from the *sharīʿa* in Islamist legislation and judicial practice are to some extent an outcome of the desire on the part of the legislator and the judge to adapt the *sharīʿa* to changing social and economic conditions in modern Sudan.

2. Extending State Control of Public Morals

2.1. *Jamʿiyyāt al-Amr biʾl-Maʿrūf waʾl-Nahy ʿAn al-Munkar*[75]

By virtue of PrVPVA, 1983 (Section 9) associations for the "Propagation of Virtue and the Prevention of Vice" were established. These associations, which are subject to the control of the Supreme Council for Religious Affairs and *Awqāf*, are located throughout the Sudan; each region has its own *muḥtasib*. In addition, rules were made to monitor the activities of these associations. A supreme advisory institution was established consisting of the *ʿulamāʾ*, the functionaries charged with implementing the law, and the *mashāʾikh* of the Ṣūfī orders. A Secretariat General (*amāna ʿāmma*) directs the activities of the associations, which were established in order to assist the ProJCs and work together with them.[76]

There is some evidence of the activities of these associations in decisions handed down by CrimCs. Following complaints by these associations women were charged under Sections 179, 318, 319, 443

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[72] See above, III.2.2.4.

[73] See above, III.1.5.

[74] Cf. Köndgen, *Das islamisierte Strafrecht*, 43f.

[75] On the institution of the *ḥisba* as an instrument of Islamization and PrVPVA, 1983 see above, III.1.3.

[76] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 31; Zein, *Religion, Legality, and the State*, 216, 228.

and 449 of the PC, 1983 with running houses for conducting immoral acts, and drinking of and trading in alcoholic beverages. Consequently, they were sentenced to imprisonment, fines, and flogging. The houses where these acts took place were confiscated on behalf of the state in accordance with a ruling attributed to the "Venerable Forefathers" (*al-salaf al-ṣāliḥ*). The court praised the associations (and the police) for their help toward "uprooting these reprehensible activities displeasing God and His Messenger."[77]

It is highly likely that the immediate source of inspiration for this law is the Councils for the Propagation of Virtue and the Prevention of Vice (*hay'āt al-amr bi'l- maʿrūf wa'l-nahy ʿan al-munkar*) operating in Saudi Arabia. These are known in the West as committees for public morals or "religious police." The institution of the *ḥisba* in the classic sense was preserved in Mecca and Medina until the early twentieth century. Its powers on weights and measures were then transferred to municipalities, while religious-ethical issues were transferred to committees for public morals. These committees, established in the 1930s as part of ʿAbd al-ʿAzīz's efforts to bring the Bedouin within the orbit of the *sharīʿa*, originally had police powers and judicial authority. The committees functioned in markets and encouraged the wider public to observe religious and ritual commandments, and to avoid prohibited customs such as consumption of tobacco and alcohol, betting, prostitution, and Western-style entertainment. In the face of public criticism of the committees' harsh *modus operandi*, the power to judge and to punish was taken away from them in 1962. Since then they have been required to act in concert with the regular police in order to bring to court offenders against public morals.[78] This model of morals committees lacking jurisdiction and bearing the same name, was adopted in the Sudan.

The application of the law aroused severe public criticism. Thus it was maintained that the *imāms* of the mosques, the religious guides and the associations for "the Propagation of Virtue and the Prevention of Vice" persecuted—probably on grounds of moral behavior—women and certain places of entertainment in a manner which is contrary to religion; it was also demanded that the behavior of soldiers in the battlefield be the concern of the military police rather than of religious preachers (*wuʿāẓ*), and that religious guidance (*irshād*)

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[77] *Al-Ṣaḥāfa*, October 26, 1984, p. 2, cols. 5–6; October 28, 1984, p. 1.
[78] For further details see, Layish, *ʿUlamā'*, 35–36.

and enlightment (*tanwīr*) in a modern state should be the functions of the broadcasting service, television and press rather than that of the religious preachers and the *imāms* of the mosques.[79] One observer claims that these associations functioned as a civil extension of the regime that penetrated all layers of society threatening any potential opposition and criticism while relying on courts of inquiry and networks of gangs.[80]

Evidence in court decisions suggests that the judges regard themselves as the guardians of public morals at large by virtue of their commission to apply the Islamist legislation and the uncodified *sharīʿa*. Their moral integrity and inner conviction of fulfilling public missions is in the best tradition of the *muḥtasib*. In other words, the judge regards himself as responsible for enforcing Islamic morals and behavior in the Muslim community. As noted earlier, such a function is incumbent upon any individual who seeks religious merit by his zeal for the *sharīʿa*.

The court's role as a *muḥtasib* is reflected in various ways. In one case, the court for road traffic delicts sentenced the accused under Section 22 of the RdTA, 1983 to a fine and imprisonment for causing unintentional death. The victim's father renounced his right to blood price. The victim's wife, however, appealed for revision of the sentence. Her appeal was rejected on formal grounds. The CAp nevertheless decided to proceed with the hearing of the case in its capacity as a *muḥtasib* (*min bāb al-ḥisba waʾl-amr biʾl-maʿrūf*) having regard to the rights of the minor and orphaned children and being inspired by the Qurʾānic verse 4:10.[81] The CAp ruled that the renunciation by the victim's father of his right to blood price was valid only with respect to himself, not with respect to minors and orphans, and instructed the perpetrator to pay them an appropriate compensation "to exonerate himself before God."[82] In another case, a land dispute was settled by mutual consent of the parties and became effective by court decision. The court was inspired by the Qurʾānic prescription to "propagate virtue and prevent vice." Later one of the parties changed his mind but the judicial decision was upheld by the CAp on the grounds that "the statutory law and the *sharīʿa* autho-

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[79] Khālid, *al-Fajr al-kādhib*, 299–301.

[80] ʿAlī, *Azmat al-islām al-siyāsī*, 88.

[81] Q. 4:10: "Lo, Those who devour the wealth of orphans wrongfully, they do but swallow fire into their bellies, and they will be exposed to burning flame."

[82] *Al-Ṣaḥāfa*, November 22, 1984, p. 2, col. 3.

rize [the court] to combine the office of the judge with the function of the *muḥtasib* (*al-jamᶜ bayna wazīfatay al-qaḍāʾ waʾl-ḥisba*)."[83] In another case, the court regarded its role as complementary to that of the *muḥtasib*. The CrimC, presided over by al-Kabbāshī, ruled in the famous trial of the Baᶜth Socialist Party members that though the *ḥisba*'s role is in the realm of a collective duty (*farḍ kifāya*), the moment someone takes this role upon himself, it becomes an individual duty (*farḍ ᶜayn*); the task of inflicting punishment remains, however, the court's.[84]

2.2. *Penalties and Their Execution*

The CrimPA, 1983 sets regulations concerning punishments with a view to mitigating them. Thus it is not permissible to inflict a punishment harsher than the statutory punishment which was in force at the time the offense was committed {Section 3(a)}. A decision of execution may be carried out only after it has been approved by the SupC and the President of the Republic (Section 246); it cannot be carried out if the perpetrator is over seventy; if the perpetrator is a pregnant woman, the execution will be carried out only two years after the termination of suckling (Sections 246–247).

The punishment of flogging should be carried out in the presence of a *qāḍī* {Section 252(1)}. If the perpetrator's health does not allow flogging, the court may, after having consulted a medical report, substitute it by another punishment {Section 253(1)}. The SupC and a CAp may, at their initiative, request any subordinate court to provide them with a report pertaining to the legal proceedings that took place in that court if it has been established that the proceedings contravened the *sharīᶜa*, and may use their authority to make good these proceedings (Section 249).

Numayrī instructed the courts, already in November 1983, to suspend the execution of death sentences that had been ratified by the President of the Republic prior to the enactment of the PC, 1983, and advised them to summon the victim's avengers to court to explore the option of settling the dispute by pardon and blood price in accordance with the provisions laid down in the PC, 1983. Only in the

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[83] *Al-Ṣaḥāfa*, August 5, 1984, p. 2. On the Libyan *qāḍī*'s role as a *muḥtasib*, see Layish, *Qāḍī's Role*, 93.

[84] Al-Kabbāshī, *Taṭbīq al-sharīᶜa*, 31, 121. Cf. Schacht, *Introduction*, 121.

event that they insisted on retribution were the death sentences to be executed. Subsequently, the head of the Judiciary Personnel ordered the courts to carry out this instruction in accordance with the *sharīʿa* which recommends the settlement of disputes of homicide by pardon and blood price.[85] In some cases the CrimCAp and the SupC cancelled death sentences on the grounds that the witnesses did not qualify to testify, that there was some doubt as to the identification of the victim, that the conviction had been based on weak circumstantial evidence, and that the testimony of the victim shortly before his death created a *lawth* (strong suspicion), which required the application of *qasāma* procedure (a procedure of fifty accusatory oaths).[86] Occasionally the President of the Republic witheld his endorsement of the death sentence and returned the file to the CrimC for revision.[87] However, in most cases the death sentence seems to have been endorsed by Numayrī,[88] though the present writers have no concrete data as to the execution of these sentences. The head of the Judiciary Personnel published, as early as December 1983, a list of 14 men awaiting their execution in the jail of Khartoum pending endorsement by Numayrī.[89]

2.2.1. *Offenses Entailing Qurʾānic Punishments under Uncodified* Sharīʿa

The PC, 1983 contains many sections dealing with vice crimes,[90] the punisnment of some of which falls within the realm of the traditional functions of the *muḥtasib*. The solid core of the crimes is anchored in the uncodified *sharīʿa*, but often the definitions of crimes are formulated in legal language more appropriate to modern times. These definitions tend to uproot tribal or modern customs that contravene *sharʿī* norms on issues involving illicit intercourse and morals. In imposing control over public ethics, the legislator is guided by considerations of public policy as he understands this concept. Finally, the sanctions imposed for vice crimes are a mixture of the *sharīʿa*—Qurʾānic (*ḥudūd*) and discretionary (*taʿzīr*) punishments—and statu-

[85] *Al-Ṣaḥāfa*, November 27, 1983, p. 1; and December 11, 1983, p. 1.

[86] *Al-Ṣaḥāfa*, October 8, 1984, p. 2, cols. 1–2; November 25, 1984, p. 2, cols. 1–4; *SLJR*, 1984, 118–24. On *lawth* and *qasāma*, see above, III.2.2.2.2.

[87] *Al-Ṣaḥāfa*, August 29, 1984, p. 2

[88] *Al-Ṣaḥāfa*, August 16, 1984, p. 2.

[89] *Al-Ṣaḥāfa*, December 11, 1983, p. 1.

[90] Cf. Gordon, *Legal Revolution*, 805; Simone, *In Whose Image?*, 26.

tory legislation, in accordance with the offense. In the following sections we survey the main vice crimes, arranged by categories, along with the relevant sanctions.

2.2.1.1. Illicit Intercourse and False Accusation of Illicit Intercourse According to the traditional *sharʿī* conception and statutory law, the punishment for illicit intercourse (*zinā*) is death if the offender is "immune" (*muḥṣan*), that is, someone who already had sexual relations within a valid marriage bond—and one hundred lashes if the offender is a virgin (*bikr*) {a male is also subject to imprisonment and banishment (*taghrīb*) for a year (Sections 316, 318)}. This sanction is in conformity with the Mālikī doctrine.[91] Among the kinds of illicit intercourse entailing *sharʿī* punishment (for Muslims) are: for a man, having marital relations with a woman under the false pretense that she is married to the claimant (Sections 425, 428); having marital relations with another man's wife (or for a woman, with another woman's husband); and having marital relations with a woman within the forbidden degrees for marriage (*maḥārim*) (Sections 429, 430, 432). The crime of illicit intercourse has a wide-ranging definition in the law, and also includes rape and sodomy (*liwāṭ*), although under the uncodified *sharīʿa*, these are totally different crimes.[92]

Having marital relations with a girl who is a minor is tantamount to rape (*ightiṣāb*),[93] which in turn entails the sanction applying to illicit intercourse (Section 317). The proof of illicit intercourse also conforms with the *sharīʿa*: four eyewitnesses to the very act; a confession (*iqrār*) provided the offender has not retracted it by the time the verdict is carried out; and the pregnancy of an unmarried woman {Section 316(2)}. According to the EvA, 1983, illicit intercourse may also be proved by means of the procedure of *mulāʿana* or *liʿān*, that is, dissolving the marriage following a procedure of denial of paternity in which the husband cannot prove the accusation of adultery against his wife while she does not acknowledge it. The wife's declining to take an oath as to her innocence during this procedure is considered as tantamount to a confession.[94] Unproved accusation of

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[91] Schacht, *Zinā*, 1227–28; *idem*, *Introduction*, 177ff.; Peters, *Criminal Law*, § 0.1.2.3; Anderson, *Africa*, 380; for further details, see above, II.2.1.4, III.2.1, 2.2.1, 2.2.4.

[92] Al-Mahdī, *al-Niẓām*, 34. Cf. Safwat, *Islamic Laws*, 243.

[93] Cf. Peters, *Criminal Law*, § 0.1.2.3 (*mustakraha*).

[94] Safwat, *Islamic Laws*, 245–46; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 24. Cf. Layish, *Qāḍī's Role*, 93–97.

illicit intercourse (*qadhf*) entails a *sharʿī* sanction of eighty lashes (PC, Sections 433–34).[95]

Less serious offenses relating to sexual morality entail the discretionary punishments of flogging, a fine, and imprisonment: running a child prostitution ring or for any other immoral purpose (Section 310); running a brothel {but if the offender commits the same crime again, he is subject to the death penalty, crucifixion, or alternate amputation—Qur'ānic punishments usually reserved for highway robbery (*ḥirāba* or *qaṭʿ al-ṭarīq*) (Section 318a)};[96] indecent acts on the body of a person or animal; attempted illicit intercourse[97] or rape (Section 319); seducing a married woman or confining her in a hiding place in order to have sexual relations with her (Section 431); and kidnapping a woman in order to force her to marry against her will or to have sexual relations (Section 307).

Newspapers provide daily information on court decisions pertaining to offenses of illicit intercourse and the punishments imposed on the perpetrators. The police undertook surprise visits at "suspected places for conducting activities contradictory to good manners" to find couples "in one room and one bed [. . .] without being attached to each other by a contract of marriage."[98] The police seems to have been guided to these places by informants, including associations for "the Propagation of Virtue and the Prevention of Vice."[99] In one case, a woman was married to two husbands at one and the same time thereby creating a ground for a charge of illicit intercourse under Sections 318 (punishment for *zinā*) and 430 (*zinā* of a married woman) of the PC, 1983.[100] In a similar case, a Muslim woman was sentenced to imprisonment. Section 426 provides that a second marriage is deemed null and void if the first spouse is still alive, and the offender is subject to flogging, a fine, or imprisonment. Subsection (2) releases Muslims from this provision when it is a polygamous

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[95] Cf. Peters, *Criminal Law*, § 0.1.2.4.

[96] Cf. Peters, *Criminal Law*, § 0.1.2.2.

[97] Cf. Safwat, *Islamic Laws*, 244.

[98] See, e.g., *al-Ṣaḥāfa*, June 4, 1984, p. 2, col. 4.

[99] *Al-Ṣaḥāfa*, September 3, 1984, p. 2 (the head of the association was the Imām of the mosque of a certain quarter). For further details on the activities of these associations, see above, IV.2.1.

[100] *Al-Ṣaḥāfa*, November 12, 1984, p. 2, cols. 3–5 {the court ruled that the fact that one of the two marriages was invalid did not create "doubt" (*shubha*) averting the *ḥadd* punishment}. See also *al-Ṣaḥāfa*, June 26, 1984, p. 2 (a married woman ran away with another man in order to marry him before being divorced by her husband); cf. Layish, *Tajdīda*.

marriage recognized by the *sharīʿa*, but not when it is a polyandrous marriage. In any event, Numayrī and the Attorney General intervened and ordered that the woman be released. Rumours spread that she was a relative of Numayrī's, and that in order to assuage public opinion, Numayrī ordered the release of all female prisoners in the country.[101] In another case, the perpetrator had sexual intercourse with a woman after making her believe, in a deceptive manner, that they were married to each other by a *sharʿī* contract.[102] The court regards rape as illicit intercourse and punishes the perpetrator under Section 317 entailing the *ḥadd* of *zinā*.[103]

In some cases the accused were acquitted from the charge of illicit intercourse after proving in court that they were married to each other "in accordance with their tribal customs (*taqālīd qabaliyya*)," or that their marriage had been concluded by the Fātiḥa in the presence of witnesses though without being documented, that is, not conducted by a marriage registrar.[104] In several cases the perpetrators married each other probably with a view to being acquitted from the charge of illicit intercourse, but the CrimCAp ruled that a marriage at that stage did not create a "doubt" (*shubha*) averting the *ḥadd* of *zinā* and hence there was no ground to cancel or commute the punishment, or to submit a plea for mercy.[105]

The offense "attempted (*shurūʿ*) adultery" (Section 319) is loosely worded. Abdelmaula maintains that it is meant to apply to

> men and women caught escorting each other who could not prove that they enjoyed the type of relationship that would render a sexual intercourse between them incestuous.

Indeed, there is evidence to the effect that the police sometimes stopped couples in the street and checked their identity cards; if they were not married to each other they were charged with attempted illicit intercourse, and after being convicted they were publicly flogged.[106]

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[101] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 55–56.

[102] *Al-Ṣaḥāfa*, October 18, 1984, p. 2, col. 3.

[103] *Al-Ṣaḥāfa*, June 24, 1984, p. 2.

[104] *Al-Ṣaḥāfa*, June 4, 1984, p. 2, col. 4, and November 6, 1984, p. 2, cols. 1–2, respectively.

[105] *Al-Ṣaḥāfa*, July 22, 1984, p. 2; August 8, 1984, p. 2; August 26, 1984, p. 2; October 14, 1984, p. 2, col. 5; June 24, 1984, p. 2 (the court mitigated the sentence because the perpetrator had not had sexual intercourse with the woman though he had been in direct contact with her).

[106] Abdelmola, *Ethnicity*, 50; Safwat, *Islamic Laws*, 244.

Al-Ṣaḥāfa reports that during the second half of 1984 only two death sentences by hanging were handed down by court for illicit intercourse. In the first case, the conviction was under Section 318(1) of the PC, 1983. After the death sentence had been upheld by the President of the Republic the perpetrator retracted his confession and married his partner to the illicit intercourse whereupon the court replaced the death sentence by forty lashes and a fine of £S 150. In the second case the conviction was under Section 430(2) which provides that a married woman who commits adultery is subject to punishment "in accordance with the *sharī'a*" (the sentence mentions that the woman was *muḥṣana*). Her partner to the *zinā* was convicted under Section 319 (detestable conduct) and was sentenced to flogging, imprisonment and a fine which seems to indicate that he was not *muḥṣan*.[107]

In all other cases the partners to the *zinā* were not *muḥṣan* or *muḥṣana*. The court seemed to be fully aware of the issue of *iḥṣān*. Thus the court was anxious to mention that the fornicatress was a virgin (*bikr*) other than *muḥṣana* and imposed on her *ḥadd* punishment accordingly. In one case, a husband accused his wife of committing adultery under Section 318 with her former husband. The woman proved that her previous marriage had not been consummated and hence she should be regarded as *bikr*. Thereupon the court sentenced her to a hundred lashes and warned her that if she repeated the offense she would be subject to execution with crucifixion.[108] The sentences imposed in cases where the partners to illicit intercourse do not belong to the category of *iḥṣān* are in accordance with Section 318(2), that is, one hundred lashes with respect to a fornicatress, and a year's incarceration and banishment, in addition to one hundred lashes, with respect to a fornicator.[109] In several cases the CrimCAp cancelled sentences of incarceration and banishment imposed on women by lower courts.[110]

In most cases the charge of illicit intercourse was proved on the basis of the confession of the accused. In one case, the perpetrator insisted on five confessions although the court advised that four confessions were sufficient following the model of the Prophet Muḥammad.

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[107] *Al-Ṣaḥāfa*, June 20, 1984, p. 1; and November 16, 1984, p. 2, col. 4, respectively.

[108] *Al-Ṣaḥāfa*, June 24, 1984, p. 2, and November 9, 1984, p. 2, cols. 1–2 (crucifixion is usually reserved for highway robbery).

[109] *Al-Ṣaḥāfa*, June 20, 1984, p. 2, col. 2; August 7, 1984, p. 2; October 14, 1984, p. 2, col. 5.

[110] *Al-Ṣaḥāfa*, July 22, 1984, p. 2; October 8, 1984, p. 2, col. 2.

Consequently, the court imposed on him a *ḥadd* punishment hoping thereby to enhance his morality, and recommended *kaffāra*, religious expiation, to wipe out his sin.[111] In several cases the perpetrator retracted his confession thereby creating *shubha*, doubt, which averted the *ḥadd* punishment.[112] In one case a virgin woman acknowledged illicit intercourse and was sentenced to flogging under Section 318(2). Her partner, however, declined to confess. Since there were not four witnesses to the *zinā*, the court sentenced him under Section 319 (detestable conduct) to a year's imprisonment, thirty-five lashes and a fine of £S 100.[113]

In several cases where the crime of *zinā* had been committed prior to the enactment of the Islamist statutes the accused requested to be charged "in accordance with the *sharīʿa*," that is, Section 318 of PC, 1983 rather than Penal Code, 1974. The court complied with their request because it served their interest on the principle of the Islamist law being "more favorable" (*aṣlaḥ*) for the perpetrator.[114] According to the 1974 Code the punishment for illicit intercourse is obligatory imprisonment up to ten years with an option of a fine at the court's discretion while under Section 318 of 1983 Code, in the event that the perpetrator is *bikr*, that is, not *muḥṣan*, the punishment is one hundred lashes and, with respect to a male—imprisonment and banishment for one year in addition to one hundred lashes.[115] In cases where the fornicatress was pregnant the court ruled that the flogging be deferred until after the birth of the child and she was then released on bail by her relatives.[116] The punishment of flogging is carried out in public in order to deter potential perpetrators.[117]

There is ample evidence from court decisions to the effect that perpetrators were charged with running brothels (*manzil liʾl-daʿāra, maḥall liʾl-zinā*) and with detestable and immoral acts under Sections 318a and 319 of the PC, 1983.[118] These included acts against minor

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[111] *Al-Ṣaḥāfa*, November 1, 1983, p. 2, cols. 7–8.
[112] *Al-Ṣaḥāfa*, June 20, 1984, p. 1; June 24, 1984, p. 2.
[113] *Al-Ṣaḥāfa*, June 27, 1984, p. 2, cols. 7–8.
[114] See above, III.1.5.
[115] *Al-Ṣaḥāfa*, June 24, 1984, p. 2; September 19, 1984, p. 2, cols. 3–4.
[116] *Al-Ṣaḥāfa*, June 27, 1984, p. 2, cols. 7–8; July 11, 1984, p. 2; November 9, 1984, p. 2, cols. 1–2 (the court instructed that the woman be examined by a physician to verify that she was pregnant and disqualified for flogging); November 21, 1984, p. 2, cols. 5–6.
[117] *Al-Ṣaḥāfa*, June 29, 1984, p. 1.
[118] *Al-Ṣaḥāfa*, July 17, 1984, p. 2; August 2, 1984, p. 2; August 14, p. 2.

children and attempts to abduct and rape women.[119] The court strongly denounced these crimes. They are regarded as an attack against the sacrosanct things (*muqaddasāt*) of society, its ideals, values and the True [Islamic] Religion (*al-dīn al-ḥanīf*). Brothels and detestable acts endanger society by causing corruption of young girls' characters by immoral behavior; the rationale underlying the *sharʿī* prohibition on privacy of a man and a woman not bound to each other by marriage contract is the need to protect human values and maintain society intact.[120]

In most cases the perpetrators are sentenced to discretionary punishments of flogging, fines or imprisonment.[121] Occasionally the court warns perpetrators that if they commit the crime a second time, they become liable to the death sentence, crucifixion, or alternate amputation under Section 318a.[122] These sanctions are ordinarily reserved under the uncodified *sharīʿa* for highway robbery (*ḥirāba* or *qaṭʿ al-ṭarīq*). Women too are being sentenced to imprisonment, fines or flogging,[123] but the CrimCAp may mitigate the sentence having regard to the young age of a girl. Thus in one case, the court released a girl from prison before she had exhausted the entire period originally imposed on her, and after she had been flogged and had paid a fine; the girl's full brother guaranteed her good conduct for two years. In another case, the CrimCAp, having regard to the young age of a girl, cancelled the punishment of imprisonment but, on the other hand, doubled the number of lashes imposed on her by adding another thirty.[124] Occasionally the court imposes obligatory punishment of flogging and leaves the perpetrator the option of either a fine or imprisonment.[125] The court also confiscates the place where the detestable acts took place.[126] In one case, the perpetrator was a member of *Jamʿiyyat al-Amr biʾl-Maʿrūf* and he was convicted of committing an unidentified "abominable act" probably sexual in nature. The court sentenced him to fifty lashes and £S 500 or a year's

[119] *Al-Ṣaḥāfa*, July 16, 1984, p. 2; July 18, 1984, p. 2; July 22, 1984, p. 2; August 21, 1984, p. 2; November 5, 1984, p. 2, col. 5.
[120] *Al-Ṣaḥāfa*, July 22, 1984, p. 2; August 2, 1984, p. 2; October 5, 1984, p. 2, col. 4.
[121] *Al-Ṣaḥāfa*, August 2, 1984, p. 2; August 13, 1984, p. 2.
[122] *Al-Ṣaḥāfa*, May 10, 1984, p. 2; May 21, 1984, p. 2.
[123] *Al-Ṣaḥāfa*, August 14, 1984, p. 2.
[124] *Al-Ṣaḥāfa*, September 17, 1984, p. 2, cols. 2–3; October 15, 1984, p. 2, col. 3.
[125] *Al-Ṣaḥāfa*, November 15, 1984, p. 2, col. 7.
[126] *Al-Ṣaḥāfa*, November 16, 1984, p. 2, col. 3.

imprisonment, and ruled that it was inconceivable that such a man be a member of that association or fulfill any public function.[127]

There were only isolated cases pertaining to *qadhf*, false accusation of illicit intercourse. In one case already discussed, a man returned home after 13 months of absence to find his wife pregnant by a stranger with whom the wife admitted to having had sexual relations. The stranger and the wife were charged under Sections 429(2) and 430(2), respectively of the PC, 1983 which state that they are subject to the punishments prescribed by the *sharī'a*. A medical report conducted on the court's initiative revealed that the wife was in her seventh month of pregnancy. The stranger was released due to lack of evidence against him. The wife, on the other hand, having confessed illicit intercourse and being *muḥsana*, was sentenced to lapidation under Section 318(1). She was also sentenced to eighty lashes under Section 434 on the charge of *qadhf* against the stranger though the latter did not submit such a claim against the woman. The wife pleaded to the SupC to commute her sentence. The SupC adopted the Shāfi'ī doctrine according to which it is possible to convict one of the partners to illicit intercourse on the basis of his confession even if the other partner denies the charge. As to the charge of *qadhf*, the SupC maintained that according to all Sunnī and Shī'ī schools the punishment for *qadhf* should be applied, even if the person who was the object of the false accusation of illicit intercourse had not submitted such a charge to the court (but provided that someone else who deemed himself hurt by the false accusation had done so in his stead), the reason being that this crime pertains to a claim of God (*ḥaqq allāh*), that is, a case of public law. However, the SupC ruled, on the basis of Section 149 of CrimPA, 1983 and with due regard to the view of the entire *fuqahā'*, that the charge of *qadhf* under Section 434 should be cancelled since no claim by anyone had formally been submitted to the court, and the latter was not allowed to initiate such a charge.[128]

In a similar case, a man accused his wife of being impregnated by an unidentified stranger. She was charged under Sections 318(1) and 430(1) of the PC, 1983. Since the husband could not prove his accusation the CrimC first decided that a procedure of *li'ān*, that is,

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[127] *Al-Ṣaḥāfa*, August 20, 1984, p. 2. See above, IV.2.1.

[128] *SLJR*, 1986, pp. 91–93, 103. For further details, see above, III.2.2.1. We have no information as to whether the sentence of lapidation was carried out.

dissolution of the marriage through a procedure of mutual imprecation, should be initiated. Later on, the wife admitted being impregnated by someone she identified by name. The stranger, however, denied the accusation and was released. Hence, the court decided that since the wife had acknowledged the charge, there was neither room to initiate the *liʿān* procedure nor ground for the *ḥadd* punishment pertaining to *qadhf*. The SupC cancelled the death sentence handed down by the CrimC, adopting the view of Abū Ḥanīfa, according to which if a woman acknowledges illicit intercourse while her partner denies it, the *ḥadd* is averted on grounds of *shubha*, but the woman nevertheless is subject to discretionary punishment. After the death sentence had been sent to the SupC for approval, the husband pleaded to commute the sentence on the grounds that he had lied previously and that in actual fact his wife was pregnant by him. The wife, on her part, claimed to not having understood the charge of *zinā* due to her ignorance. Hence, the SupC ruled that both spouses should be punished by discretionary, rather than *ḥadd*, punishment.[129]

In yet another case, a man accused his former wife of illicit intercourse under Section 318 of the PC, 1983. The court acquitted the woman and her alleged partner of that charge and the plaintiff appealed to the CrimCAp. It was established by witnesses that the accused and her partner had been married to each other by means of the al-Fātiḥa without having the marriage registered by a marriage registrar. The couple concealed the marriage so as not to deprive the woman of the custody (*ḥaḍāna*) on her minor children by her former husband, the plaintiff. The CrimCAp ruled that had it not been for the concealment of the marriage the plaintiff would have been subject to the *ḥadd* of *qadhf*, that is, eighty lashes due to the disgrace caused to the woman and her children by both the plaintiff and the present husband.[130] Other cases involved detraction from either the wife's or the husband's reputation with no connotation of illicit intercourse under Sections 364, 435 and 441 of the PC, 1983 which entail discretionary punishments rather than *ḥudūd*.[131]

In several cases, men were convicted in court for attempted illicit intercourse. They were punished by flogging, fines, and imprisonment. Al-Ṣādiq al-Mahdī criticizes these decisions on the ground that

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[129] *SLJR*, 1984, pp. 99–100. On the *liʿān* procedure see Layish, *Qāḍīs' Role*, 94–95.
[130] *Al-Ṣaḥāfa*, November 6, 1984, p. 2, cols. 1–2.
[131] *Al-Ṣaḥāfa*, September 21, 1984, p. 2; November 12, 1984, p. 2, col. 5.

no crime has been committed under the *sharīʿa* so long as the very act of illicit intercourse has not adequately been proven. Moreover, an accusation of *attempted zinā* is tantamount to the *sharʿī* crime of *qadhf*. Anything below *zinā*, as in the case of *khalwa* (privacy) between *maḥārim*, i.e., relatives within the forbidden degrees for marriage, though prohibited by the *sharīʿa* is punished by *taʿzīr* (discretionary punishment) rather than by *ḥadd*.[132]

2.2.1.2. Wine drinking

A Muslim who drinks intoxicating beverages (*shurb al-khamr*) is subject to forty lashes, as in the Shāfiʿī doctrine.[133] Alcoholism and offending other people's sensibilities by consumption of intoxicating beverages entail imprisonment in addition to flogging (Sections 443–45, 448 of the PC, 1983). The production of and trade in intoxicating beverages, and the consumption of drugs entail flogging, a fine, or imprisonment (Sections 446–47, 449).[134]

There is ample evidence in court decisions that the offense of wine drinking entailing Qur'ānic and statutory punishments was widespread. Between 1983 and 1984 dozens of men and women were charged under Sections 443 (wine drinking), 444 (wine drinking coupled with disturbance), and 449 (manufacture of and trade in wine) of the PC, 1983.[135] Section 444 was applied in cases where the perpetrator disturbed people in places such as public transportation, or threatened his relatives at home in a state of drunkenness.[136] The charge was usually proved by confession (*iqrār, iʿtirāf*).[137] In one case where the perpetrator was a former Minister of Housing, the drunkenness charge was proved by two medical committees appointed by the President of the Republic.[138] Section 443(2) provides that the odor of wine is sufficient for proving the charge. Manufacture of and trade in wine was very common among women. Occasionally they were assisted by their husbands or other men. In several cases,

[132] Al-Mahdī, *al-Nizām*, 45–46, cites *al-Ayyām*, May 13, 1984 and May 22, 1984 and *al-Ṣaḥāfa*, May 9, 1984.

[133] For further details, see above, II.2.2.1.1.

[134] Cf. al-Mahdī, *al-Nizām*, 34.

[135] *Al-Ṣaḥāfa*, July 5, 1984, p. 2 (five cases of trade in wine); July 23, 1984, p. 2; August 31, 1984, p. 2 (the perpetrator was caught in a state of severe drunkenness with jerrycans of wine in his possession); October 15, 1984, p. 2, cols. 1–2 (a woman was charged with producing wine in her residence).

[136] *Al-Ṣaḥāfa*, August 17, 1984, p. 2; November 22, 1984, p. 2, col. 2.

[137] *Al-Ṣaḥāfa*, August 5, 1984, p. 2; November 20, 1984, p. 2, col. 5.

[138] *Al-Ṣaḥāfa*, August 29, 1984, p. 2.

the CrimCAp ruled that it was the husband who had induced his wife to engage in wine production and, being the real beneficiary of this enterprise, he too should be charged under Section 449 as an accessory in the crime. Moreover, the court ruled that the husband neglected his duty, as the guardian (*walī*) of his wife, to look after her and the family and hence he was responsible for anything occurring in his home that contravened the *sharī'a*.[139]

In most cases the perpetrators charged with wine drinking were sentenced to forty lashes in accordance with Section 443(1). Perpetrators charged with trade in wine were sentenced to flogging, fines, and imprisonment. However, in cases of repetition of the crime the CrimCAp would aggravate the sentence. This applies also to cases where the court ruled that "corruption and destruction of moral values had been caused to our society."[140] In one case, where the perpetrator had caused damage while in a state of drunkenness the plaintiff waived his claim for damage. The court, however, ruled that the crime of wine drinking can never be waived.[141] In one case, a judge was discharged from his office after having been found drunk in his office. Numayrī made it clear that no one, regardless of one's status and position, was immune against this charge and that full justice should be implemented.[142] In another case, a subject from the United Arab Emirates was sentenced to discretionary punishment under Section 449. The CrimCAp upheld the sentence and ruled that the perpetrator should have known that trade in wine was prohibited in the Sudan.[143] Quite often, however, the court mitigates the punishment having regard to the perpetrator's poor health and family condition,[144] or to the perpetrator's pregnancy and minor children.[145] In

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[139] *Al-Ṣaḥāfa*, November 16, 1984, p. 2, cols. 1–2; November 20, 1984, p. 2, cols. 4–5.

[140] *Al-Ṣaḥāfa*, August 29, 1984, p. 2; October 29, 1984, p. 2, cols. 5–6.

[141] *Al-Ṣaḥāfa*, October 23, 1984, p. 2, col. 1.

[142] *Al-Ṣaḥāfa*, June 20, 1984, p. 1.

[143] *Al-Ṣaḥāfa*, November 13, 1984, p. 2, col. 3.

[144] *Al-Ṣaḥāfa*, July 16, 1984, p. 2 (the punishment of flogging was cancelled and the period of imprisonment was shortened); August 29, 1984, p. 2 (the flogging of the former Minister of Housing was deferred due to his health condition).

[145] *Al-Ṣaḥāfa*, August 29, 1984, p. 2 (the perpetrator's imprisonment under Section 449 was cancelled due to the fact that her husband worked far away and harm could have been caused to the minor children); October 15, 1984, p. 2, cols. 1–2 (the period of imprisonment was shortened to two months); November 1, 1984 (the imprisonment of the pregnant woman was substituted by a fine); November 20, 1984, p. 2, cols. 4–5 (the period of imprisonment was shortened by half though

one case, two pilots were convicted under Section 449 and sentenced to a month's imprisonment, a fine of £S 200 each and forty lashes. The CrimCAp, at the request of the Sudanese airlines, reduced the period of imprisonment to one week, increased the fine to £S 500 and added a discretionary punishment of twenty-five lashes to the *ḥadd* punishment of flogging—having regard to the fact that it was the pilgrimage season (*ḥajj*) to Mecca and the pilots were desperately needed to transfer masses of pilgrims.[146] The CrimCAp ruled that menstruation was not a sufficiant ground for delaying flogging.[147]

2.2.1.3. Theft and Highway Robbery

As observed earlier, the PC, 1983 has separate provisions for statutory non-*sharʿī* theft which entail discretionary punishments of flogging, fines, or imprisonment {Sections 320(1) and 321(1)} and "theft entailing Qur'ānic punishment" (*sariqa ḥaddiyya*), that is, amputation of limbs starting with the right hand, although some vital components, such as *ḥirz* (custody) and *khafā'* (secrecy), required under the *sharʿī* definition, are missing in the statutory version.[148] There is ample evidence, almost on a daily basis, of discretionary and Qur'ānic punishments in court decisions. Naturally, we shall concentrate below on *sariqa ḥaddiyya.*

Usually, the perpetrators are charged under Sections 321(2) and 322(2) relating to theft from residential homes. The CrimC rules that there is direct and solid evidence, including confession, for conviction; that the value of the stolen property is above the minimum (*niṣāb*) required under the *sharīʿa*; that the stolen property has been found in the perpetrator's possession; and that there is no *shubha*, doubt, averting punishment. Thereupon the court hands down a sentence of amputation of the right hand from the joint (*mafṣil*) of the palm of the hand and has the sentence sent to the CrimCAp for endorsement.[149] When the perpetrator is sentenced to discretionary punishment under a different section, in addition to *sariqa ḥaddiyya*,

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the punishments of flogging and a fine remained intact); November 22, 1984, p. 2 col. 5 (the period of imprisonment was shortened so as to enable the woman to provide maintenance for her children).

[146] *Al-Ṣaḥāfa*, August 8, 1984, p. 2.

[147] *Al-Ṣaḥāfa*, July 22, 1984, p. 2.

[148] See above, II.2.1.4 and IV.1.3.

[149] *Al-Ṣaḥāfa*, February 14, 1984, p. 2; August 13, 1984, p. 2; September 14, 1984, p. 2, col. 5; September 17, 1984, p. 2, col. 5 {charged under Sections 322(2) and 78 (theft jointly with others)}; October 28, 1984, p. 2, cols. 1–2.

the court is anxious to ensure that the discretionary punishment does not exceed the *ḥadd* in severity.[150]

The *ḥadd* of amputation is averted when the value of the stolen goods is below the *niṣāb*;[151] *shubha* arises after the perpetrator's retraction of a confession in the absence of witnesses;[152] circumstantial evidence alone is available, in the absence of other evidence;[153] and when the perpetrator is under age.[154] In all these cases the *ḥadd* punishment was replaced by discretionary punishments. The SupC ruled on one occasion that *shubha* reduces the *al-sariqa al-ḥaddiyya* to *al-sariqa ghayr al-ḥaddiyya*, that is, theft entailing discretionary punishment.[155]

Nashl (pick pocketing), the most common use of *ikhtilās* (in the *sharʿī* sense), snatching things unawares, does not enter within the uncodified *sharʿī* definition of theft entailing Qurʾānic punishment since some of the vital components, such as *ḥirz* (custody) and *khafāʾ* (secrecy) are missing.[156] In actual fact, however, pick pocketing enters within the statutory definition of *sariqa ḥaddiyya* under Section 320(2) of the PC, 1983. There is significant evidence in court decisions pertaining to this offense. In some cases, the courts treated pick pocketing as a regular theft that does not entail Qurʾānic punishment (*al-sariqa ghayr al-ḥaddiyya*) within the definition of Section 320(1), and the punishments inflicted in these cases were flogging, fines, or imprisonment as required under Section 321(1).[157] In most other cases, however, the courts treated *nashl* as *sariqa ḥaddiyya* and sentenced the perpetrators to amputation of the right hand under Section 321(2).[158] They seem to have been guided by aggravating circumstances such as previous

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[150] *Al-Ṣaḥāfa*, October 15, 1984, p. 2, cols. 5–6.

[151] *Al-Ṣaḥāfa*, July 29, 1984, p. 2; November 12, 1984, p. 2, cols. 2–3 (the CrimCAp cancelled the *ḥadd* of amputation and instructed the CrimC to assess the value of the stolen goods and to examine whether the theft was a result of excessive need, in which case, the *ḥadd* should be averted).

[152] *Al-Ṣaḥāfa*, July 16, 1984, p. 3; August 23, 1984, p. 2 (the court did not take account of the confession).

[153] *Al-Ṣaḥāfa*, July 12, 1984, p. 2; August 5, 1984, p. 2; August 12, 1984, p. 2.

[154] *Al-Ṣaḥāfa*, September 28, 1984, p. 2; October 18, 1984, p. 2.

[155] *SLJR*, 1986, p. 138.

[156] Peters, *Criminal Law*, § 0.1.2.1; Schacht, *Introduction*, 179–80. See above, II.2.1.4.

[157] *Al-Ṣaḥāfa*, July 9, 1984, p. 2; October 8, 1984, p. 2, col. 6; October 19, 1984, p. 2, col. 6; November 5, 1984, p. 2, col. 5.

[158] *Al-Ṣaḥāfa*, May 16, 1984, pp. 1–2 (the amputation was substantiated by a judge of the SupC and the President of the CrimCAp in Khartoum); November 11, 1984, p. 2, cols. 3–4.

convictions for the same or another offense.[159] Only in one case did the CrimCAp cancel amputation due to insufficient evidence.[160]

The court maintains that amputation on grounds of theft cannot be amenable to pardon since the offense is one of the *ḥudūd allāh* prescribed in the Qur'ān; the court has no right to mitigate or replace a *ḥadd* by another punishment.[161] In one case, the court ruled that there was no justification to commute the *ḥadd* even if the perpetrator retracted his confession because the theft had been proven by decisive circumstantial evidence (*qarīna qāṭiʿa*), that is, the existence of the stolen goods in the possession of the perpetrator. On another occasion the CrimCAp ruled that the raison d'être of amputation was to deter potential perpetrators.[162] In an *istiftā'* (request for a formal legal opinion) to Majlis al-Iftā', a surgeon asks whether it is legally permitted to reinstate the amputated limb after the execution of the *ḥadd* has been accomplished. He adds that the reinstatement of the limb is very easy from a medical point of view. According to Mawlānā Ibrāhīm Aḥmad 'Uthmān, the Majlis' *fatwā* on the issue maintains that the purpose of the *sharʿī* punishment is to see to it that the perpetrator gets the penalty he deserves for the offense committed by him, especially with respect to offenses entailing *ḥudūd* prescribed by the Lawgiver, and hence it is not permitted to commute or pardon a *ḥadd* nor delay its execution unless on *sharʿī* grounds. The *fatwā* enlisted to this end a Prophetic *ḥadīth* to the effect that had Fāṭima, the daughter of the Prophet, committed a theft her hand would have been amputated. The *fatwā* further emphasizes the deterrent effect of the *ḥadd* on potential perpetrators and concludes that the reinstatement of the amputated limb may frustrate the rationale of the *ḥadd*.[163]

Usually the court rules that the perpetrator must return the stolen goods or its value to the owner, failing which he must pay a fine

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[159] *Al-Ṣaḥāfa*, June 11, 1984, p. 2, cols. 1–2; June 13, 1984, p. 1 (the perpetrator tore the pocket); June 21, 1984, p. 2 (the perpetrator was caught in the court hall when flogging was being inflicted on one of the accused); November 22, 1984, p. 2, col. 4 (the CrimCAp ruled that amputation was appropriate for this offense and supported by the Qur'ānic verse, 5:38).

[160] *Al-Ṣaḥāfa*, December 15, 1983, p. 1.

[161] *Al-Ṣaḥāfa*, August 16, 1984, p. 2; September 16, 1984, p. 2, col. 2; October 28, 1984, p. 2, cols. 1–2 (*al-ḥudūd laysat maḥallan li'l-shafāʿa wa'l-istirḥām*);

[162] *Al-Ṣaḥāfa*, October 8, 1984, p. 2, col. 3; and October 17, 1984, p. 2, col. 6.

[163] *Al-Ṣaḥāfa*, August 31, 1984, p. 3.

or be imprisoned.[164] On several occasions it was agreed between the parties that the stolen goods be returned to the owner before notification of the theft to the police.[165]

A sentence of amputation requires endorsement by the CrimCAp and the President of the Republic. The execution is performed in public and attended by a senior military officer.[166] *Al-Ṣaḥāfa* provides a detailed description of the amputation of the hands of two perpetrators carried out in the jail of Khartoum after the sentences had gone through all stages of appeal and scrutiny up to the SupC. The amputation was carried out by watchmen of the jail under the medical control of hospital surgeons. The convicted were bound to chairs on a high platform and their eyes were covered. At the time the amputation was carried out they were anesthetized. The procedure started with recitation of Qur'ānic verses. Following the amputation the convicted were taken to hospital for surgical operation in order to avoid complications and then brought back to the platform to be exposed, together with their amputated limbs, to the public gathering in the Justice Square shouting in support of the application of the *sharīʿa*. Dr. Kamāl Zakī, a specialist of bones in charge of the convicted, certifies that they had been checked by the physicians of the jail and found to be in good health before the amputations were carried out. He further affirms that had any of the convicted been ill, the amputation would have been deferred until his recovery. Once the procedure of amputation is over the convicted are put under medical care in a hospital until their full recovery. Dr. Zakī further informs that the watchmen are skilled functionaries well trained by surgical specialists and that they fulfill their duty with no inhibitions since they have been commissioned with the implementation of the *sharīʿa* of Allāh.[167] Ṣiddīq ʿAbd al-Ḥayy, Director of the Judiciary Personnel, reports that the amputation is performed with a "medical knife [. . .] in a manner closest to perfection [. . .] in order to

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[164] *Al-Ṣaḥāfa*, July 25, 1984, p. 2.

[165] *Al-Ṣaḥāfa*, August 31, 1984, p. 2; September 11, 1984, p. 2 (the court confirmed that had the perpetrator returned the stolen goods *qabla al-balāgh*, the *ḥadd* would have been averted).

[166] *Al-Ṣaḥāfa*, August 8, 1984, p. 2; June 13, 1984, p. 1 (the head of the Judicial Personnel ruled that there was no need to send the file to the SupC prior to execution since all the *sharʿī* requirements pertaining to theft had been met).

[167] *Al-Ṣaḥāfa*, December 10, 1983, p. 1.

accomplish the amputation quickly and without torture."[168] The same procedure applies with respect to alternate amputation.[169]

There is some evidence in court decisions to the effect that the amputated hand was to be tied to the perpetrator's neck for some time, but we have no evidence that these sentences were carried out. On the contrary, the CrimCAp abrogated this practice which originates in the *sharīʿa*. In any case, as already observed, this practice has been totally prohibited in Annex No.1 to the Criminal Circular No. 89.[170]

Ḥirāba or *qaṭʿ al-ṭarīq*, banditry or highway robbery, consists of the following components: exposure of drawn weapons with a view to frightening people travelling on a public road and preventing them from continuing their journey. Aggravating circumstances include taking the victims' property and/or killing them. An essential component is the assaulters' superior strength such that the victims cannot escape or obtain help (*ghawth*). Hence, the Ḥanafī doctrine holds that to qualify as *ḥirāba* the crime must take place in the countryside far away from human habitation. The Qur'ānic *ḥadd* includes four penalties: capital punishment, crucifixion, alternate amputation and banishment. According to Ḥanafī, Shāfiʿī and Ḥanbalī doctrine, there is a precise correlation between the severity of the offenses and the gravity of the punishment: if the crime consists in holding-up the victim, the punishment is exile or imprisonment; if the perpetrator takes property of a minimal value (*niṣāb*) required for the punishment of theft, he is subject to alternate amputation; if a person has been killed, then the robber is subject to the death sentence; finally, if the robber has both plundered and killed, he is subject to death and crucifixion. A homicide committed in the course of highway robbery is regarded as a crime rather than a tort, and is therefore more severely punished, and may not be pardoned, even at the request of the victim's heirs. According to the Mālikī doctrine the judge has a wider discretion in applying these penalties: if someone has been killed, the punishment must be the death penalty or crucifixion; if property of whatever value has been taken, the perpetrator must be punished with at least alternate amputation; and

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[168] *Al-Ṣaḥāfa*, December 27, 1983, p. 3, col. 5.

[169] *Al-Ṣaḥāfa*, June 6, 1984, p. 2, cols. 6–7 (the procedure was attended by the President of the Judicial Personnel and Dr. Kamāl Zakī); June 21, 1984, p. 1.

[170] *Al-Ṣaḥāfa*, October 27, 1983, p. 1; November 13, 1983, p. 1. See above, II.2.1.2, IV.1.3.

if there has been only a holdup, the perpetrator can be sentenced to any of the four penalties.[171]

Nahb, robbery, in the PC, 1983 is the closest offense to *ḥirāba*, though there are essential differences between the two. Section 332 provides that theft (*sariqa, ibtizāz*) becomes robbery (*nahb*) when the perpetrator causes or attempts to frighten someone with deliberate homicide, injury, or unlawful detention for the purpose of committing the theft, etc. Section 334 provides that the perpetrator of a crime of *nahb* is subject to the death sentence with or without crucifixion, alternate amputation, or life imprisonment with banishment. Section 336 provides the same penalties for causing intentional injury in the course of committing *nahb*.

The SupC treats section 332 as an offense of *ḥirāba* entailing both *ḥadd* and discretionary punishments. It holds that *ḥadd* can be imposed only in cases where the minimal conditions (*niṣāb*) required for a *sharʿī* evidence have been met. It further maintains that the legislator adopted the Mālikī view in that the vital component in *ḥirāba* is the impossibilty of obtaining help (*ighātha*) regardless of whether the assault has taken place on a highway or within a house. Mālik identifies *nahb* with *ḥirāba* entailing the Qurʾānic *ḥadd*. In order to avoid misunderstanding, the SupC recommends the introduction in the PC of separate sections for offenses that entail *ḥadd* and offenses that do not entail such a punishment as has been done with respect to theft.[172]

On another occasion the SupC ruled that the vital component in *ḥirāba* is the taking of property by means of combat (*mughālaba*) regardless of whether the property has been taken without causing homicide, or homicide has been incurred without loss of property, or property has been taken with concomitant homicide. The SupC further ruled that a judge may not contradict a statutory provision by increasing or decreasing the scope of *ḥadd* punishment, the more so by imposing *ḥadd* on an offense that does not entail *ḥadd* or impose a *ḥadd* reserved for one offense on another which has its own prescribed *ḥadd*. The offense of *ḥirāba* mentioned in the Qurʾān (5:33) has its clearly defined punishments: capital punishment, crucifixion, alternate amputation, or banishment. A judge may not legally impose any of these punishments on someone who has been convicted of *sariqa ḥaddiyya* because the *ḥudūd* of Allāh have been clearly specified

[171] Peters, *Criminal Law*, § 0.1.2.2; Anderson, *Africa*, Glossary, *ḥirāba*.
[172] *SLJR*, 1984, 63–65, 69–71.

in the texts of the Qur'ān and the Prophetic *ḥadīth*. Thus the offense of *sariqa* coupled with housebreaking should be regarded as aggravating the offense of theft entailing *ḥadd*, but this in itself does not justify the replacement of the offense of theft by the offense of *ḥirāba* under Section 396 of the PC, 1983 {assault on a place during the night coupled with an ambush (*taraṣṣud*), or housebreaking during the night for the purpose of committing an offense entailing *ḥadd*}. Finally, the SupC rules that it is possible to validly retract the confession at any stage prior to the execution of the *ḥadd* punishment; such a retraction creates *shubha* which averts the *ḥadd*.[173]

In one case, the court charged the perpetrator under Sections 333 (a*l-nahb bi'l-ishtirāk*, robbery jointly with others) and 339 (robbery jointly with others with attempted homicide or severe injury) and sentenced him to alternate amputation. The conviction and the sentence were upheld by the CrimCAp. The SupC ruled that the offense under review was *ḥirāba* and that the punishment of alternate amputation was justified on the grounds that the mere existence of a gang consisting of at least five members clearly proved that the conditions of combat and the openly declared hostility had been met, thus establishing their criminal intention to take property by means of robbery (*nahb*), and by using force if necessary. The SupC further ruled that every member of the gang shared joint liability for any offense that had been committed by any of them during the robbery and hence was subject to the *ḥadd* punishment imposed on the perpetrator under Section 339.[174]

There is ample evidence in court decisions of sentences of alternate amputation. In several cases the perpetrators were charged with breaking into and stealing from shops and stores under Sections 322 and 396 of the PC, 1983.[175] In one case, the perpetrators were charged under Sections 221 (theft), 371 (destruction of electricity current), 457 (running a net for organized crimes), 98b (destruction of the economy), and 353 (possession of stolen goods). In another case the perpetrators were charged, under Sections 390 and 457 of the PC, 1983, with breaking into a residential home in the "last third of the night" during the month of Ramaḍān. The CrimC sentenced

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[173] *SLJR*, 1984, 72–79.

[174] *SLJR*, 1984, 88–93.

[175] *Al-Ṣaḥāfa*, October 24, 1983, p. 1; May 10, 1984, pp. 1–2; May 21, 1984, p. 2; August 7, 1984, p. 2; August 13, p. 2.

them to seven years' imprisonment, fifty lashes and a fine of £S 500. The CrimCAp ruled that it was more appropriate to sentence them under Sections 395 and 396 entailing the death sentence, alternate amputation, or life imprisonment with banishment. In a similar case, the CrimCAp ruled that in the event of proof by witnesses that the crime had taken place during the night this would have created aggravating circumstances entailing *ḥadd* punishment under Sections 395 and 396.[176] In one case, the perpetrator was charged under Section 339 of the CrimPA, 1983 and various Sections of the Weapons, Ammunition and Explosives Law, 1932. He pretended to be associated with the state security services and under this guise robbed someone in a cab at gunpoint. The CrimCAp ruled that threatening someone with a gun is more serious than highway robbery (*qaṭ' al-ṭarīq*) because in the former case the man under threat cannot run away. Consequently the court decided to sentence the perpetrator to alternate amputation. In another case the perpetrator was charged under Sections 305 (kidnapping) and 334 (robbery) of the PC, 1983. He too was sentenced to alternate amputation.[177] In one case, the perpetrators were charged under Sections 321(theft), 334 (robbery), 339 (robbery jointly with others), and 457 (running a network for organized crimes). However, since there was not sufficient evidence for the application of the *ḥadd*, they were sentenced to flogging, imprisonment, and a fine under Sections 341 and 457. The court warned the perpetrators that in case of repeated offense they would be sentenced to death with crucifixion or alternate amputation.[178] In several other cases the perpetrators were sentenced to alternate amputation under Section 334 after the court took into consideration previous convictions on the same charge and the fact that the punishment of imprisonment had not been sufficient to deter the perpetrator. The CrimCAp ruled that the sentences were valid and appropriate having regard to the welfare of society and its security.[179] In several other cases the perpetrators were charged, under

[176] *Al-Ṣaḥāfa*, May 20, 1984, p. 1; July 24, 1984, p. 2; July 29, 1984, p. 2; July 30, 1984, p. 2; August 13, 1984, p. 2.

[177] *Al-Ṣaḥāfa*, January 15, 1984, p. 2 (the case was dealt also by the SupC; see *SLJR*, 1984, 63ff.); and August 21, 1984, p. 2; August 23, 1984, p. 2 {The CrimCAp cancelled the *ḥadd* (alternate amputation) under Sections 305 and 334 after the perpetrators had withrawn their confession but sentenced them to discretionary punishment}.

[178] *Al-Ṣaḥāfa*, August 22, 1984, p. 2.

[179] *Al-Ṣaḥāfa*, June 6, 1984, p. 2, cols. 3–4; August 5, 1984, p. 2.

Sections 334 and 336, with armed robbery, leading an armed gang, and causing intentional injury during the *nahb*.[180]

To sum up, there is ample evidence that courts in the Sudan mete out penalties for offenses entailing Qur'ānic and discretionary punishments under the Islamist laws. Most of the offenses involve manufacture of and trade in alcoholic beverages or drugs, theft, embezzlement, illicit intercourse, prostitution, or price gouging. The punishments imposed for these offenses include fines, imprisonment, flogging, and amputation.[181] Al-Kabbāshī reports that the ProJC over which he presided handed down sentences of hand amputation in only four cases, including that of the bookkeeper from Wād Sidna. The other cases pertain to thieves who stole cars loaded with merchandise. No question of hunger, *niṣāb*, minimal value of the stolen goods set down by law (one-quarter dinar of gold or three dirhams of silver {Section 320(3)}, *shubha*, doubt, that averts *ḥadd* punishment, or the thief being under age was involved in these cases.[182] Fūda reports on one case in which the court sentenced the defendant to alternate amputation for the theft of electrical wires. He argues that since electrical wires are public property, the doctrine of *shubhat milk* should have applied, implying that it was improper to carry out the punishment of amputation, and in any case only one limb may be amputated for theft.[183] Mayer maintains that there have been many executions on grounds of illicit intercourse (*zinā*), though she doubts that the convictions met the *sharʿī* requirements of testimony.[184]

2.2.2. *Other Offenses*

2.2.2.1. The Prohibition on *Ribā* and Games of Hazard

The source of the Islamic prohibition on *ribā*, usury, is the Qur'ān. The Qur'ānic prohibition, however, is not reinforced by legal sanctions (the person taking *ribā* is required only to give the *ribā* to the

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[180] *Al-Ṣaḥāfa*, August 1, 1984, p. 2 (in spite of *shubha* following differences between the witnesses, the perpetrator was sentenced to life imprisonment and banishment which is also a *ḥadd*); May 13, 1984, p. 2; June 27, 1984, p. 1; August 29, 1984, p. 2 (life imprisonment with banishment); October 26, 1983, p. 1.

[181] Gordon, *Legal Revolution*, 806; Fūda, *Qabla al-suqūṭ*, 133, 137.

[182] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 57–59; Interview with Muhamed Ibrahim Khalil; Heffening, *Sārik*, 173.

[183] Fūda, *Qabla al-suqūṭ*, 126–27; Schacht, *Introduction*, 179–80.

[184] Mayer, *Law and Religion*, 174, n. 103. Cf. al-Mahdī, *al-Dīmuqrāṭiyya*, 101; Qaddāl, *al-Islām wa'l-siyāsa*, 216f.; Jacobs, *Islamization*, 208.

poor as charity), but by ethical sanctions (a reward in the world to come) (2:275–280; 3:130; 4:161; 30:39).[185] At a later stage in the development of Islamic law, *ribā* became a purely civil matter: a transaction in which *ribā* was charged was considered an invalid or unenforceable contract. The concept of *ribā* took on a wider meaning: any illicit gain or unjustified enrichment and benefit. The various forms of betting, speculative transactions, and similar risks were considered *ribā*.[186] The prohibition on *ribā*, however, is a restriction that naturally causes difficulties in daily economic life. Therefore, quite soon devices (*ḥiyal*) verging on legal fictions developed that were intended to adapt the *sharīʿa* to the economic situation, and more specifically, to circumvent substantive provisions in the *sharīʿa* in order to meet daily practice halfway. Such devices—particularly well suited to the formalistic Ḥanafī doctrine—were pledge (*rahn*) with the right to enjoy use (usufruct) of the property given as a security for the debt, sale with the right of redemption (*bayʿ biʾl-wafāʾ*), and double sale (*bayʿatān fī bayʿa*).[187]

Ribā was not explicitly prohibited by Numayrī's Islamist civil legislation and in fact *ribā* continued to be charged on both governmental and private levels.[188] Section 110 of the CivPA, 1983, states categorically that under no circumstances will the court award *fāʾida* (gain, usury). This section is worded vaguely, but other sections of the same law that deal with realization of the pledge by the lender {Sections 127(1), 128(1), 131(1)} make it clear that the court will not impose conditions requiring that usury be paid on loans.[189] Administrative Circular No. 40 of 1983 precludes the courts from

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[185] See, e.g., Q. 2:275: "Those who swallow usury cannot rise up save as he ariseth whom the devil hath prostrated by (his) touch. That is because they say: Trade is just like usury; whereas Allah permitteth trading and forbiddeth usury. He unto whom an admonition from his Lord cometh, and (he) refraineth (in obedience thereto), he shall keep (the profits of) that which is past, and his affair (henceforth) is with Allah. As for him who returneth (to usury)—such are rightful owners of the fire. They will abide therein."

Q. 2:276: "Allah hath blighted usury and made almsgiving fruitful. Allah loveth not the impious and guilty."

Q. 3:130: "O ye who believe! Devour not usury, doubling and quadrupling (the sum lent). [. . .]."

[186] Saleh, *Unlawful Gain*, 13ff.; Saeed, *Islamic Banking and Interest*, 17–40 (*ribā* in the Qurʾān, *sunna* and *fiqh*); Schacht, *Introduction*, 145–46; Coulson, *Commercial Law*, 11–12; *idem*, *History*, 12, 38.

[187] Schacht, *Introduction*, 78–79; Coulson, *History*, 139ff.

[188] Mayer, *Law and Religion*, 169.

[189] For further details, see Gordon, *Legal Revolution*, 812.

handing down decisions in matters pertaining to *fā'ida* in civil disputes between commercial banks and their agents.[190]

The Combat Against the Prohibited Enrichment (*tharā' ḥarām*) Act, 1983 is intended to protect the public wealth (*māl ʿāmm*). Section 8 of this act authorizes the court to confiscate any profit obtained by prohibited enrichment. The term "prohibited enrichment" is borrowed from the *sharʿī* context of *ribā*. Thus Section 281 of the CivTA, 1984 provides that if excessive profit (*manfaʿa zā'ida*) has been stipulated in a loan contract (*ʿaqd qirḍ*), the excessive profit is invalid but the contract is valid.[191] A similar provision concerning usury was promulgated in the same year (1983) in Iran, with the difference that the stipulation of usury also invalidates the contract itself.[192] There is no direct evidence, however, that this was the source of inspiration for the Sudanese legislation. Nevertheless, the CivTA, even in its previous version (1966), extended the meaning of the term "prohibited enrichment" beyond this context in a manner intended to apply to acts of corruption such as theft, fraud, bribery, and forgery, which are, in al-Kabbāshī's words, signs of the times.[193] Section 165(1) of the CivTA conceive *tharā' ḥarām* as an illegal enrichment which is a result of usurpation (*ghaṣb*) of another person's property, invalid contract (*ʿaqd bāṭil*), or an act contrary to the provisions of this law. The offenses included in this section have been drawn mainly from pre-1983 statutes and sources of law, such as custom (*ʿurf*) and justice (*wijdān salīm*). Section 164(1) provides that anyone who has been convicted of illegal enrichment is liable, in additon to penal sanctions, to pay compensation tantamount to the extent of enrichment and the damage caused.

The law, however, not only prohibits usury and unjustified enrichment; it also provides means for circumventing these prohibitions. The most important of these is the *muḍāraba*, joint venture. Section 266 defines such a partnership as a contract (*ʿaqd*) in which one party provides capital and the other party, the *muḍārib*, provides labor (*saʿy, ʿamal*) (of a professional expertise) with the goal of attaining profits (*ribḥ*). Sections 267–73 define the conditions under which the *muḍāraba* is valid, the kinds of *muḍāraba*, the rights and obligations

[190] *Al-Ṣaḥāfa*, February 3, 1985, p. 3, col. 4.
[191] Gordon, *Legal Revolution*, 812.
[192] Amin, *ME Legal Systems*, 340.
[193] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 21, 41.

of the *muḍārib*, the division of profits and losses (*khasāra*) between the parties, and the termination of the partnership. In other words, this tool is intended to convert the relationship between depositor and bank into a legitimate partnership framework with a division of profits and losses between the parties that will allow the depositor to enjoy "unjustified" profits without explicitly violating the prohibition on *ribā*.[194]

Likewise, Section 186 of the CivTA permits the use of the mechanism known as *murābaḥa*, sale (*bayʿ*) of any commodity at the original price paid by the seller plus a certain profit (cost-plus profit contract). The *murābaḥa* is essentially a form of trade credit: the bank buys everything the customer orders it to buy, and afterward sells it to the customer upon receipt of the larger amount agreed upon in advance. In any event, legally speaking, the buyer does not have to buy what the bank bought on his behalf.[195] There are those who hold that in such a contract the line between legitimate trade and illegal usury is blurred. This is especially true in the case of a *murābaḥa* sale with deferred payment, the amount of which is higher compared to that of immediate payment. According to some jurists, the difference in price resulting from the delay is akin to usury. Another device for circumventing the prohibition of usury is the *mushāraka*. This is a joint venture between the bank and the creditor in which each partner supplies part of the capital and has a proportional share in the profits or losses.[196]

*Fatwā*s issued by Majlis al-Iftāʾ are also used for circumventing the *sharʿī* prohibition of *ribā*. The *fatwā* pertaining to *salafiyyāt*, free loans, is intended to enable governmental officials to take loans with usury for the purpose of buying real and movable property. Though the *fatwā* rules that any *fāʾida*, gain, taken on loans is prohibited, it nevertheless states that in case realistic fees are taken in consideration for specific services, then it is legally permitted to include these fees in the original loan. Another *fatwā* pertains to commutation of a pension (*istibdāl al-maʿāsh*), probably for allowances with some kind of gain. The *fatwā* rules that it is legally permitted under the *sharīʿa*

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[194] Cf. Coulson, *Commercial Law*, 94ff.; Schacht, *Introduction*, 156f.; Saeed, *Islamic Banking and Interest*, 51ff.; Amin, *ME Legal Systems*, 340–41; Shaaeldin & Brown, 22; Gordon, *Legal Revolution*, 811; Ḥamdī, *al-Bunūk al-islāmiyya*, 122; Stiansen, *Islamic Banking*, 103; Kamāl ʿAbd al-Qādir Billa [?] in *al-Ṣaḥāfa*, July 1, 1984, p. 4.

[195] Saleh, *Unlawful Gain*, 94; Saeed, *Islamic Banking and Interest*, 76ff.; Shaaeldin & Brown, 23; Stiansen, *Islamic Banking*, 103.

[196] Saleh, *Unlawful Gain*, 89, 91ff., 94–95; Saeed, *Islamic Banking and Interest*, 59ff.

although there is some "risk of lack of knowledge," that is, uncertainty (*gharar jahāla*). The *fuqahā'* allow slight risk in transactions other than sale. The *istibdāl* is valid according to the pension laws of 1919 and 1962, but is invalid under the Pension for [Public] Service (*maʿāshāt al-khidma*) Law, 1975 because it includes a 4 percent gain of usury. It should be amended in order to be compatible with the *sharīʿa*.[197]

In some cases merchants and commercial banks were charged in court with violating the prohibition on *ribā* and prohibited enrichment. In one well-known case, the owners of twenty-five bakeries in Khartoum, among the richest men in the Sudan, were suspected of violating various sections of the Prohibited Enrichment Act, 1966. For a long time the prosecutor refrained from bringing them to trial. Eventually, in 1984, the CrimCAp, with al-Kabbāshī presiding, ruled—having regard to public welfare and justice—that they be tried for violating Section 192(a) of the PC, 1983.[198]

In another famous case, discussed in detail above, the Indian merchant Lālīt Rātinlāl Shāh was convicted in CrimC for engaging in money changing and banking transactions worth millions in foreign currency without a government license, and of lending money at an exorbitant usury rate. He was sentenced to ten years in prison and ninety lashes. The CrimCAp made it clear that the prohibition on *ribā* is essential in order

> to purge Sudanese society of all manifestations of the Jāhiliyya and the vestiges of imperialism, which are contrary to *sharīʿat Allāh* [. . .] the prohibition (*ḥarām*) [on *ribā*] is a prohibition until the resurrection of the dead; granting a permit or approval for commerce with interest is not sufficient to make it permissible [from a *sharʿī* point of view] (*ḥalāl*).

The court ruled that the prohibition on *ribā* is anchored in explicit provisions in the Qur'ān and the *ḥadīth*. Furthermore, *ribā* is prohibited in all the revealed religions. Therefore, a person who charges *ribā*, with or without a permit, while doing business is subject to criminal sanctions on the basis of the law of the state and the *sharīʿa*.[199]

After handing down its verdict, the court ordered the Governor of the Bank of Sudan to eliminate *ribā* in local and foreign banks, and to institute in its stead the *muḍāraba*, the *murābaḥa*, and the

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[197] Mawlānā Ibrāhīm Aḥmad ʿUthmān, *al-Ṣaḥāfa*, August 31, 1984, p. 3.
[198] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 40–42; *al-Ṣaḥāfa*, June 4, 1984, p. 1.
[199] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 46–47, 103; Köndgen, *Das islamisierte Strafrecht*, 58.

mushāraka (financial partnership).[200] As already pointed out, the ban on *ribā* in the *sharīʿa* is a matter of civil rather than penal law and the PC, 1983 has no provision that defines taking interest as a crime entailing punishment.[201]

Following this trial, *ribā* was, in fact, eliminated in Sudanese banks, and an Islamic banking system, based on the mechanisms mentioned above, developed in its place. The outstanding representative of this banking system is the Fayṣal Islamic Bank. The bank professes to work on the basis of *sharʿī* economic and social principles, which are: a. refraining from charging *ribā* in all transactions; b. business and commercial activity on the basis of fair and permissible profit; c. giving alms tax (*zakāt*); d. avoiding monopolies; e. while taking public welfare into account, allowing any business transaction so long as it is not explicitly forbidden by the *sharīʿa*.[202]

There are those who hold that the bank was motivated to a large extent by economic and political considerations rather than religious-ideological ones, and that the Government was in fact the largest usurer (*murābīn*) in the state.[203] It should be noted, however, that the banks customarily have "service charges" instead of usury. The Government was in the habit of granting the Fayṣal Bank various advantages, such as exemption from taxes and laws pertaining to insurance, in order to encourage the Islamic banking system (the exemption was abolished in February 1984).[204]

The Qurʾān prohibits a certain game of hazard (*maysir*)[205] alongside the prohibition of taking *ribā* with a view to establishing moral norms rather than legal rules. In other words, the *maysir* games of hazard and taking of *ribā* are prohibited though the transgressors are not subject to any penal sanction in this world. Closely connected to them

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[200] Saleh, *Unlawful Gain*, 91ff.; Shaaeldin & Brown, 22; Amin, *ME Legal Systems*, 341; Stiansen, *Islamic Banking*, 103. For definition of the *muḍāraba*, the *murābaḥa* and *mushāraka*, see above, 245–46.

[201] See above, 243ff.

[202] ʿAwn al-Sharīf al-Qāsim in *al-Ṣaḥāfa*, October 10, 1983, p. 6, col. 5; the Attorney General al-Rashīd al-Ṭāhir Bakr in *al-Ṣaḥāfa*, October 11, 1983, p. 2, col. 2; Shaaeldin & Brown, 18; Ḥamdī, *al-Bunūk al-islāmiyya*, 116; Stiansen, *Islamic Banking*, 106ff.

[203] Shaaeldin & Brown, 33; al-Kabbāshī, *Taṭbīq al-sharīʿa*, 107. Cf. Gordon, *Legal Revolution*, 811.

[204] Gordon, *Legal Revolution*, 811–12; Amin, *ME Legal Systems*, 329; Esposito, *Islamic Experiment*, 194; Saleh, *Unlawful Gain*, 94f.; 115f.; Coulson, *Commercial Law*, 94f.

[205] Q. 2:219: "They question thee about strong drink and games of chance. Say: In both is great sin, and (some) utitlity for men; but the sin of them is greater than the usefulness [. . .]."

is the doctrine of prohibition of *gharar*, risk, uncertainty or speculation.[206]

Section 471 of the CivTA, 1984 provides that any agreement concerning gambling (*muqāmara*) and bet (*rihān*) is deemed null and void; the loss in such an agreement is reimbursed and the gain is considered as an enrichment without justification. Insurance agreement is another manifestation of speculative transaction: the obligation of one party to the agreement is suspended upon the occurrence of an uncertain future event or condition. As noted earlier, the CivTA, 1984 borrowed vital components from the Jordanian Civil Code, which in its turn is based on the Mejelle, the Ottoman civil code of 1876.[207] The CivTA recognizes and regulates insurance (Section 475), and regards it as a contract compatible with the *sharīʿa*. Section 476 provides that a special law will be enacted with a view to regulating the various aspects of the insurance agreement in such a way that

> will implement the cooperative ends (*ahdāf taʿāwuniyya*) of the insurance and will not contravene the definite rules and basic principles of the Islamic *sharīʿa*.

Section 478 provides that insurance may be sought against risks originating from personal accidents (*ḥawādith shakhṣiyya*) which seems to imply life insurance, work accidents (*ṭawāriʾ al-ʿamal*), theft, embezzlement, cars, civil liability, and "all unseen events which are insured by virtue of custom and special statutes."[208] We noted earlier that life insurance is a common practice in the Sudan and cases of road accidents, entailing liability of insurance companies, are often tried in court.[209]

Games of hazard are treated as criminal offenses under the PC, 1983. There is ample evidence of court decisions pertaining to various kinds of games of hazard, such as playing cards with a view to gaining beverages and money. The perpetrators were charged under Section 237(1) (game of hazard etc.) of the PC. In some cases the house or the coffee-house where these games were carried out had been

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Q. 5:90: "O ye who believe! Strong drink and games of chance and idols and dividing arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may succeed."

Q. 5:91: "Satan seeketh only to cast among you enmity and hatred by means of strong drink and games of chance, and to turn you from remembrance of Allah and from (His) worship. Will ye then have done?"

[206] Saleh, *Unlawful Gain*, Index; Schacht, *Introduction*, 12–13, 146; Coulson, *Commercial Law*, 43–44.

[207] See above, II.2.2.1.2.

[208] For a detailed discussion, see K.R. Bälz, *Versicherungsvertragsrecht in den arabischen Staaten* (Karlsruhe, 1997). We owe this reference to Ruud Peters.

[209] See above, III.2.2.4 and IV.1.1.

under the strict surveillance of the police, the associations for the "Propagation of Virtue and the Prevention of Vice," and the neighbors before the transgressors were arrested and brought to trial. The court ruled that the game of hazard contravened the *sharīʿa* and Islamic moral values. The transgressors were sentenced to discretionary punishments of imprisonment, flogging, and fines, and the house where the prohibited games took place was confiscated by the state. Transgressors who had already been convicted on the same charge previously received aggravated punishments.[210] The CrimCAp ruled on one occasion that no licenses should be given for hazard games.[211]

In a *fatwā* issued by Majlis al-Iftāʾ al-Sharʿī, Mawlānā Ibrāhīm Aḥmad ʿUthmān expresses the view that *al-yā-naṣīb*, a kind of lottery that was common at the time of the Jāhiliyya and was later prohibited under Islam, should in its present form (whereby only few gain while the vast majority lose) remain prohibited.[212]

ZakTA, 1984 was enacted with a view to Islamizing the taxation system by institutionalizing the alms tax and turning it into a statutory tax in both method of collection and method of distribution to the needy.[213] The Qurʾānic injunction pertaining to alms tax (2: 215; 9: 60)[214] has a notion of voluntary tax. Later on it was elaborated

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[210] *Al-Ṣaḥāfa*, June 12, 1984, p. 2, cols. 6–7; July 23, 1984, p. 2; July 31, 1984, p. 2; August 7, 1984, p. 2; August 14, 1984, p. 2; September 3, 1984, p. 2; October 17, 1984, p. 2, col. 1; October 25, 1984, p. 2, cols. 2–3. Cf. Layish, *Mahdī's Methodology and Adaptation*, 235.

[211] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 44.

[212] *Al-Ṣaḥāfa*, August 31, 1984, p. 3 (see there details on the *al-yā-naṣīb*). Another *fatwā* issued by the Majlis at the request of the association of the sea scouts pertains to games that are conducted at the association's charity markets. The *fatwā* rules that these markets should serve as an instrument for educating the youth on moral values and physical culture by means of beneficial sport. The *fatwā* further rules that there is no *sharʿī* prohibition to charge entrance fees to the sights of entertainment, that motion pictures are not prohibited by the *sharīʿa* provided they are of scientific and educational nature and that males and females do not intermingle. The same applies to games where rifles and arrows are used and to fishing, since all these games are meant to improve the physical education of the scouts which in itself is beneficial. Games of seesaw for infants too are not prohibited by the *sharīʿa* (*al-Ṣaḥāfa*, August 31, 1984, p. 3).

[213] Cf. Mayer, *Law and Religion*, 168 and the reference to the literature mentioned in fn. 87.

[214] Q. 2:215: "They ask thee, (O Muhammad), what they shall spend. Say: That which ye spend for good (must go) to parents, and near kindred and orphans and the needy and the wayfarer. And whatsoever good ye do, lo! Allah is Aware of it."

Q. 9:60: "The alms are only for the poor and the needy, and those who collect them, and those whose hearts are to be reconciled, and to free the captives and the debtors, and for the cause of Allah, and (for) the wayfarers; a duty imposed by Allah. Allah is Knower, Wise."

into a religious compulsory tax. In practice, however, it survived in the form of voluntary distribution to the poor.[215] This act was intended to replace direct taxation (21 direct taxes were abolished).[216] Ḥasan al-Turābī regards the *sharʿī* alms tax (*zakāt*) as an instrument for promoting social justice (*ʿadāla*). On the initiative of the Muslim Brothers, the alms tax has been converted into a fiscal tax by means of statutory legislation. Al-Turābī nevertheless admits that there is nothing in Islam that forbids the government from imposing, from time to time, taxes other than *zakāt* having regard to the welfare of the community.[217] ʿAbd al-Qādir Aḥmad ʿUthmān shares this view and derives support for it from Muḥammad Shaltūt, the former Shaykh al-Azhar and other modern jurists.[218]

2.2.2.2. Blasphemy and Disgraceful Behavior

In several cases people were charged with blasphemy under Section 242 (*sabb al-ʿaqīda*, cursing one's faith) of the PC, 1983 and were sentenced to flogging, imprisonment, and a fine.[219] Offending moral values {Section 76(b) of the PC}; indecent or immoral acts in a public place, such as dress that offends public sensibilities (Section 234); distributing immoral material (books, movies, and the like), or obscene songs (Section 236); all entail discretionary punishments of flogging, fines, or imprisonment. The CrimCAp ruled on one occasion that mixed dancing contravenes the *sharīʿa* and the law, and that offenders are subject to a criminal sanction.[220]

3. The Impact on the Status of Women and Non-Muslims

3.1. *Women*

In general, the approach toward women in the Islamist legislation reflects discrimination in the area of rules of evidence, as specified by the *sharīʿa*, and equality to men on issues relating to the substance

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[215] Schacht, *Introduction*, 105; Coulson, *History*, 19.

[216] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 29, 154; Sālim, Ḥawbāt & al-Nūr, 52–53; Esposito, *Islamic Experiment*, 194. For further details see, above, II.1.2.

[217] Al-Turābī, *Naẓarāt*, 160; *idem*, *al-Ḥaraka*, 163, 174; *idem*, *Islamic State*, 246.

[218] *Al-Saḥāfa*, October 25, 1983, p. 7. Cf. Sidahmed, *Politics and Islam*, 140.

[219] *Al-Ṣaḥāfa*, July 22, 1983, p. 2; September 14, 1984, p. 2; October 26, 1984, cols. 2–3; November 16, 1984, p. 2, cols. 4–5; November 20, 1984, p. 2, col. 1.

[220] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 44.

of offenses.[221] According to the uncodified *sharīʿa*, a woman's testimony is generally tantamount to half that of a man, even though in certain areas pertaining exclusively to women, such as birth and virginity, only their testimony is acceptable.[222] This norm is clearly manifested in Section 3 of the EvA, 1983 and is applied in practice.[223] On issues of criminal procedure such as proof of illicit intercourse, four male witnesses are required whilst women's testimony is not accepted at all.[224] These norms were transferred to the Islamist legislation; for example, Section 316(2) of the PC, 1983 provides that illicit intercourse must be proved through four eyewitnesses to the very act of full sexual intercourse. The law does not mention whether the witnesses must be male or female, apparently because this is not necessary given the known *sharʿī* norm and having regard to Section 2(a) of the JudA, 1983 which provides that a judge shall presume that the legislator did not intend to contradict the *sharīʿa*.

As noted earlier, the Sudanese SupCC rejected a petition to abrogate some statutory provisions of the Islamist legislation on grounds of unconstitutionality. The petition was referring to the testimony and other rights of women and non-Muslims with a view to bringing about full equality between men and women with respect to testimony. The petition was rejected on the formal grounds that the petitioner had no right to appeare in court (*locus standi*) in the case under review. The SupCC ruled that according to Article 9 of the Permament Constitution, the *sharīʿa* was a principal source for legislation and hence no substantive constitutional right had been violated by the Islamist legislation. The court seems to be referring to the inequality between the sexes in the domain of the rules of evidence.[225]

On the other hand, the offenses are worded in a manner reflecting an egalitarian approach to men and women. The law does not refer to the status of the offender or victim in terms of his gender. Thus, for example, the offense of having extra-marital sexual relations is largely formulated on the basis of equality between the sexes (and

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[221] Section 16(2) of the Second Schedule to CivPA, 1983 provides that the legal circulars (which introduced some important reforms in matters of personal status) shall remain intact unless abrogated or amended by enactment. The Law of Personal Status for Muslims No. 43 of 1991 replaced most of these circulars and introduced further reforms in the status of women.

[222] Schacht, *Introduction*, 193.

[223] Abdelmoula, *Ethnicity*, 50.

[224] Schacht, *Introduction*, 198; Peters, *Criminal Law*, § 0.1.1.3.

[225] *Al-Ṣaḥāfa*, November 4, 1984, p. 2, col. 4. See above, II.2.1.3.

without reference to their religion). However, for Muslims there are differences in the severity of the punishment meted out to the sexes: if a man has sexual relations with a married woman or a married woman has sexual relations with another man (there is no symmetry regarding the marital status in the two cases), this will be considered illicit intercourse. If they are non-Muslims, they will receive the discretionary punishment of flogging, a fine, or imprisonment, or another form of punishment set down in the adulterer's religion. If they are Muslims, they will be subject to the *sharʿī* punishment applicable to this offense (Sections 429–30). The law states that if the couple are *muḥṣan*, that is, have already experienced lawful sexual intercourse within wedlock, at the time the crime was committed, both are subject to execution. However, if they were "virgins" (*bikr*), then they are subject to the punishment of one hundred lashes, and the man is also subject to imprisonment and banishment for one year (Section 318). The punishment of banishment is in keeping with the Mālikī doctrine, while incarceration is a statutory addition intended to deal severely with the man in such circumstances.[226] With regard to polygamy, however, the discrimination against women qua women, as far as Muslims are concerned, remains intact. Section 426 of the PC prohibits polygamy and polyandry and imposes legal and criminal consequences on the basis of equality between men and women. However, the prohibition of polygamy does not apply to Muslims who are subject, with regard to this issue, to the *sharīʿa*, which recognizes polygamy.

There are cases in which *sharʿī* norms are reinstated in the Islamist legislation, but are softened and mitigated with respect to women. For example, according to the *sharīʿa*, blood money for causing homicide or injury to a woman amounts to one-half of the blood money demanded for a man in similar circumstances.[227] The law distinguishes between full *diya*—one hundred camels of unspecified variety and quality, unlike the traditional *sharʿī* norm {Section 64(2)}—and reduced *diya*, apparently camels of lesser quality, or fewer than one hundred camels.[228] Regular *diya*, the nature of which is not defined

[226] For further details see, II.2.1.4 and 2.2.1.

[227] Schacht, *Introduction*, 185; Anderson, *Homicide*, 815; *idem*, *Africa*, 360; Peters, *Criminal Law*, § 0.1.3.3.3. For further details, see above, II.2.2.1.1.

[228] Schacht, *Introduction*, 185; Tyan, *Diya*, 341 II; Peters, *Criminal Law*, § 0.1.3.3.2; Köndgen, *Das islamisierte Strafrecht*, 92.

in the law, applies in the event of deliberate homicide, quasi-deliberate homicide, or accidental homicide (Sections 251, 253, and 256, respectively). Full *diya* applies in the case of amputation of a non-paired limb, while reduced *diya* applies in the event of amputation of one limb of a pair {Section 278(2)}. In no case, however, is a distinction made, on the legislative level, between the sexes in the amount of the *diya*, which indicates that in the act, as opposed to the uncodified *sharīʿa*, this distinction is irrelevant.[229]

There is ample evidence in court decisions that pregnancy is taken into consideration with a view to mitigating the severity of a sentence. Thus in one case, a woman was sentenced to twenty-five lashes, nine months' imprisonment and a fine of £S 200 or an additional six months' imprisonment. Having regard to the woman's pregnancy the CrimCAp replaced the punishment of imprisonment by a fine of £S 300 or, in the event she could not pay the fine, an additional four months' imprisonment. She was to be released immediately upon paying the fine.[230]

There is good reason to believe that women's status in the Islamist legislation was inspired by Ḥasan al-Turābī's approach which is both liberal and progressive from the women's point of view. Al-Turābī recommends granting women full equality with men in every respect, including the right to choose their husbands, to own and dispose of property, to be admitted to any public position (including the judiciary), to be entitled to full political rights to the point of being elected to parliament. Moreover, women should be admitted to the army to fulfill administrative and even combat functions. Their rights should be anchored in law. Al-Turābī admits that his views on the status of women are not in conformity with orthodox *sharīʿa* (though he claims that women played a considerable role in public life at the time of the Prophet) to the point that some people would accuse him of apostasy.[231] Al-Ṣādiq al-Mahdī too suggests radical reforms in the status of women to the point of full equality with men with respect to evidence; they should be qualified to testify in cases entail-

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[229] See above, IV.1.3. We have no information as to distinction between the sexes in the matter of *diya* in judicial practice.

[230] *Al-Ṣaḥāfa*, November 4, 1984, p. 2.

[231] Al-Turābī, *al-Ḥaraka*, 137–41, 213; *idem*, *Ḥiwārāt fī 'l-islām*, 50. For further details, see al-Turābī, *al-Mar'a*, especially, 11–37. Cf. Abdelmoula, *Fundamentalism*, 20, 26; Lowrie, *Turabi*, 43, 48; El-Affendi, *Turabi's Revolution*, 173–75; al-Turābī, *Islamic State*, 244; Weissbrod, *Turabi*, 64, 67ff.; Viorst, *Sudan's Islamic Experiment*, 53.

ing Qur'ānic punishments and retaliation, to participate in the procedure of the *qasāma*, the accusatory oath,[232] and to serve as judges.[233]

Women have been integrated in the judiciary after training in special courses for judges to deal with all domains of law including penal law entailing *ḥadd* punishments. There is evidence of women being nominated to the civil chamber within the court of the Mudiriyya in Khartoum and to a CAp.[234] In November 1984 Numayrī decided to form an International Judicial Council (*majlis al-qaḍā' al-ʿālamī*) and committed himself to appoint a woman to its SupC.[235]

3.2. *Non-Muslims*[236]

The Explanatory Note to the PC, 1983 declares that all human beings regardless of religion and social status are equal before the law. Thus there is no difference with respect to blood price between a Muslim and a non-Muslim; the Qur'ānic punishment on wine drinking is applicable only to Muslims, although wine drinking coupled with offending the sensibilities of another person—and this seems to refer to Muslims—or disturbance of the public order is applicable to members of all religions and the same applies to trade in wine, since these offenses harm society regardless of religious affiliation. As to illicit intercourse, non-Muslims are subject to the punishments anchored in the law of their respective religions. With regard to false accusation of illicit intercourse (*qadhf*) the punishment can be effected only if the injured party by defamation is a Muslim.[237] Chief Justice Daf'allāh al-Ḥājj Yūsuf shares the views expressed in the Note. He claims that there was no need to consult Christians with respect to reinstatement of the Qur'ānic punishments since they do not interfere with their tenets.[238] Chief Justice Fū'ād al-Amīn ʿAbd al-Raḥmān declares that the rights of the non-Muslim minorities are secured since they are anchored in constitutional provisions, and in civil,

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[232] Cf. Anderson, *Africa*, Glossary, *qasāma*. For details, see above, III.2.2.2.2.

[233] Al-Mahdī, *ʿUqūbāt*, 137–38, 140–42; *idem, al-Ṣaḥwa*, 20. Cf. Flueher-Lobban, *Islamic Law and Society*, Index.

[234] *Al-Ṣaḥāfa*, October 24, 1983, p. 1 (Farīda Ibrāhīm); December 13, 1983, p. 2 (Iḥsān Muḥammad Fakhrī, President of a CAp); December 27, 1983, p. 3, col. 5; February 10, 1985, p. 1 (Iḥsān Fakhrī, judge of the CAp of Khartoum).

[235] *Al-Ṣaḥāfa*, November 24, 1984, p. 2, col. 3.

[236] For historical, political and social background, see above, I.4.5.

[237] *Al-Ṣaḥāfa*, October 18, 1983, p. 5, cols. 1, 6.

[238] *Al-Ṣaḥāfa*, October 29, 1983, p. 4, col. 4.

penal, and personal status laws. Moreover, he claims that there is no legal system in the world that defends the minorities' rights the way Islam does in the Qur'ān and the *sunna*.[239] At the first Islamic conference dedicated to the application of the *sharī'a* in the Sudan, Dr. Yūsuf al-Khalīfa and Aḥmad 'Abd al-Ḥalīm presented a paper entitled "The Guarantee of the Rights of Non-Muslims belonging to the Revealed Religions in Islam." In the paper they argue that these rights have been preserved intact even after the promulgation of the "September laws." Again, it is claimed that all human beings in the Sudan are equal before the law, and that the Islamist laws do not discriminate between Muslims and non-Muslims, and that non-Muslims are subject to the laws of their respective religions. They are not bound by Islamic prohibitions such as wine drinking and consumption of pork, etc.[240]

These views are shared by Ḥasan al-Turābī and by al-Ṣādiq al-Mahdī who credit Islam with peaceful intentions vis-à-vis the non-Muslim South.[241] Al-Turābī's approach to non-Muslims seems to have inspired their status in the Islamist legislation. He assures non-Muslims in the South that Islam is tolerant toward other religions and that, consequently, there is no reason to oppose the application of the *sharī'a*. Non-Muslims are allowed to profess and adhere to their own religion and regulate their family and communal life in accordance with their religious law and norms. Moreover, al-Turābī claims that the testimony of non-Muslims against Muslims should be admitted although it is in glaring contradiction to the *sharī'a*. On various occasions he expressed the opinion that the *ḥudūd* penalties should not be applied to non-Muslims in the South. Al-Turābī also has innovative ideas regarding apostasy. However, he makes a very clear distinction between *dhimmī*s (protected non-Muslims subjects living in a Muslim territory) and adherents of animistic tribes, who are not entitled to be tolerated and are expected to convert into Islam.[242]

In reality, the Islamist legislation's treatment of non-Muslims ranges from tolerance to discrimination:

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[239] *Al-Ṣaḥāfa*, November 6, 1984, p. 3, col. 8.

[240] *Al-Ṣaḥāfa*, September 26, 1984, p. 6.

[241] The NIF elaborated its views on this issue in *INF: The Southern Sudan Question*, 1–34 (see Bibliography, Constitutions and Charters); see also al-Mahdī, *al-islām wa-mas'alat janūb al-sūdān*, especially 12–13.

[242] Al-Turābī, *Ḥiwārāt fī 'l-islām*, 51; *idem*, *al-Ḥaraka*, 213; *idem*, *Naẓarāt*, 165; *idem*, *Islamic State*, 250; Lowrie, *Turabi*, 43; El-Affendi, *Turabi's Revolution*, 176–77; Weissbrod, *Turabi*, 102, 104, 117; Viorst, *Sudan's Islamic Experiment*, 53.

(1) Although the *sharīʿa* was granted superior status, the religious law of non-Muslims was recognized, but for reasons of public policy, it was subjected to normative control. Thus, for example, Section 5 of the CivPA, 1983, which regulates the question of which law to apply in national courts after all religious courts (including *sharīʿa* courts) have been abolished,[243] states the following: on matters of personal status, succession and testamentary disposition, *waqf*, and gifts, when the parties are non-Muslims, the court will judge

> [A]ccording to the custom (*ʿurf*) common among the parties, provided that it does not contravene justice (*ʿadāla*), equity (*inṣāf*), and good conscience (*wijdān salīm*), and was neither amended nor abrogated by virtue of this law or any other law, or abrogated by virtue of a ruling by an authorized court.

It appears that the word "custom" should be interpreted here in a wide sense, that is, the law applying in Christian and tribal courts. "Justice, equity, and good conscience" reflect the mark left by English law as a source of normative control over indigenous laws.[244] Precedential jurisprudence as a source of law is also in the best tradition of English law.[245] The *sharīʿa*'s status as a general law is expressed in the fact that it is to be applied in the matters mentioned above not only when the parties to a lawsuit are Muslims, but also in cases when a marriage was performed according to the *sharīʿa*, which apparently means when the male partner is a Muslim. Similarly, Section 16(2) of the CivTA, 1983 provides that a foreign law should not be applied to Sudanese residents if that law is repugnant to the *sharīʿa*, public policy, or morality in the Sudan.

(2) Non-application to non-Muslims of offenses exclusive to Muslims. Wine drinking is an offense only for Muslims, and entails Qur'ānic punishment whereas for non-Muslims, wine drinking is permitted and in some cases—for instance, that of Christians—it is also used for ritual purposes. The punishment set down in the law for wine drinking is forty lashes, based on the Shāfiʿī doctrine.[246] Nevertheless, if the wine drinking offends the sensibilities of another person (viz. Muslims), a non-Muslim, too, will be subject to the discretionary

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[243] See above, III.1.
[244] See above, II.3.1.
[245] See above, II.3.2.
[246] See above, II.2.2.1.1.

punishment of lashes, a fine, or incarceration (Sections 443–44). A non-Muslim is also subject to a similar punishment for production of and trade in wine (Section 449).[247]

As already observed, the ZakTA, 1984, was intended to institutionalize the alms tax and to turn it into a statutory tax in both method of collection and method of distribution to the needy.[248] This act applies only to Muslims. Non-Muslims are instead required to pay a "social solidarity" (*takāful ijtimāʿī*) tax, which is paid only on the basis of wealth, while the alms tax is paid on the basis of wealth, cattle, movable commodities, and the like. Critics of the law claim that the social solidarity tax is in fact a *zakāt* tax with a different name imposed on non-Muslims.[249] Al-Ṣādiq al-Mahdī shares the criticism and suggests to adjust the law of *zakāt* to modern requirements, especially with respect to non-Muslims, by means of *ijtihād* in a way unlikely to cause any resentment. Moreover, in his view, the Islamist legislation contradicts the 1973 Constitution with respect to non-Muslims. Thus Article 16 supports religious pluralism: Islam is defined as the religion of the majority, while Christianity is professed by a large number of citizens, and the rest are tribal animistic religions. Article 9 states that the *sharīʿa* and custom are the principle sources of law on an equal basis, and Article 38 forbids discrimination on grounds of origin, race, locality, sex, language or religion. The Islamist legislation, on the other hand, derives its inspiration from the *sharīʿa*.[250]

(3) There is no distinction between Muslims and non-Muslims regarding the substance of the offense, but the sanctions entailed are derived from the religious law of the offenders. This is particularly evident in the area of vice crimes, that is, offenses connected to matrimony and illicit intercourse. Only in the event of a lacuna in this law are they subject to statutory punishment, which in any event is less severe than the *sharʿī* punishment for the same offense imposed on Muslims. Thus, for example, Section 318(2) of the PC, 1983 provides, in conformity with the Mālikī doctrine, that the punishment for illicit intercourse applicable to members of "revealed religions" (that is, Jews

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[247] Cf. Nataloni, *Codice Penale*, 348.

[248] See above, II.1.2 and IV.2.2.2.1.

[249] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 29, 154; Sālim, Ḥawbāt & al-Nūr, 52–53; Esposito, *Islamic Experiment*, 194.

[250] Al-Mahdī, *al-Nïẓām*, 28–29, 41.

and Christians) is the punishment provided in the laws of their religion, and that only in the event that no punishment is provided in their religion are they subject to a maximum of eighty lashes, a fine, or incarceration for up to one year. The punishment for illicit intercourse for a Muslim is execution if the offender is *muḥṣan*, and one hundred lashes if he is a virgin. If he is male, he will be imprisoned and banished for a year as well {Section 318(1)}.[251]

Similarly, if a non-Muslim man has sexual relations with a woman under the false claim that she is married to him; or after forging marriage documents; or with a woman married to another man; or with a relative within the forbidden degrees for marriage—in all these cases the offenders will be subject to the punishment for such offenses set down in the laws of their religion. (The same applies to a married non-Muslim woman who has sexual relations with another man.) If there is none, they will be subject to the discretionary punishment of lashes, a fine, or imprisonment {Sections 425(2), 428(1), 430(1), 432}. A Muslim who commits such offenses, however, will be subject to the *sharʿī* punishment for illicit intercourse.

(4) Imposition of the *sharʿī* norm concerning the offense, but a distinction between Muslims and non-Muslims as to punishment. Thus, for example, on the issue of *qadhf*, false accusation of *zinā*, illicit intercourse, against another person, the law imposes on non-Muslims the *sharʿī* norm concerning the substance of the offense, but makes a distinction between Muslims and non-Muslims concerning punishment. While Muslims are subject to the Qurʾānic sanction of eighty lashes, non-Muslims are subject to the discretionary punishment of lashes, a fine, or incarceration (Section 434). There are cases in which the legislator imposes the *sharʿī* norm on non-Muslims on a certain offense, but adopts the most lenient position in the *sharīʿa* on that offense. Thus, for example, in the case of homicide or assault, the PC does not address the issue of the victim's religion in relation to the amount of blood money to be paid. This reflects the Ḥanafī doctrine, which holds that the blood money paid for a *dhimmī* or a *mustaʾmin* (a non-Muslim admitted temporarily to Muslim territory) is equal to that paid for a Muslim. According to the doctrine of most of the schools, the blood money paid for a *dhimmī* or a *mustaʾmin*

[251] For further details, see above, II.2.2.1.1.

amounts to half of that paid for a Muslim, and according to the Shāfiʿīs, one-third.[252]

(5) Offenses and punishments exclusive to non-Muslims. Thus, for example, the prohibition on multiple marriages applies to non-Muslims only, and the offender is subject to the discretionary sanction of lashes, a fine, or imprisonment. Muslims qua Muslims have a "good defense" against the charge of polygamy, since the *sharīʿa* applies on this issue (Section 426).[253]

(6) One law for Muslims and non-Muslims concerning both the offense and the punishment. Thus, for example, the PC does not address the issue of the victim's gender, religion, or citizenship for offenses involving homicide, bodily harm, and damage to property and honor (for example, Section 246ff.), although in the *sharīʿa* such a distinction is relevant to the severity of the results. Thus a Muslim who kills a *dhimmī* is subject to execution, and a Muslim who steals a *dhimmī*'s money is subject to amputation of a hand.[254] Similarly, Qur'ānic punishments on some of the offenses are imposed on non-Muslims as well. For example, the PC distinguishes between theft entailing discretionary punishments of lashes, a fine, or incarceration, and theft entailing Qur'ānic punishment of amputation (Sections 320–21).[255] No distinction is made here between thieves of different religions, from which al-Kabbāshī concludes that the punishment of amputation applies to non-Muslims as well.[256] The imposition of the *sharīʿa*, and especially the Qur'ānic punishments and the rules of evidence which discriminate on grounds of religion and gender, on non-Muslims is a cause for concern and tension in southern Sudan.[257]

(7) Discrimination between *dhimmī*s and members of tribal animistic religions. Although the PC provides punishments for offensive remarks about other religions, it clearly discriminates between revealed reli-

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[252] Sālim, Ḥawbāt & al-Nūr, 24; Tyan, *Diya*, 341ii; Anderson, *Homicide*, 815; *idem*, *Africa*, 360–61; Peters, *Criminal Law*, § 0.1.3.3.2.

[253] Cf. Layish, *Women*, 72–73.

[254] Al-Kabbāshī, *Taṭbīq al-sharīʿ*, 122; Köndgen, *Das islamisierte Strafrecht*, 44.

[255] Köndgen, *Das islamisierte Strafrecht*, 113. For further details, see above, II.2.2.1.1 and IV.2.2.1.3.

[256] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 122; An-Naʿim, *Reformation*, 129.

[257] An-Naʿim, *Reformation*, 130–33; Abdelmoula, *Ethnicity*, 50.

gions and other religions. Thus, for example, Section 242 provides that a person who publicly scorns any of the revealed religions or one of its prophets, emissaries, or angels, or in any way offends the sensibilities of believers of this religion, is subject to the discretionary punishment of lashes, a fine, or imprisonment. What is not forbidden may be inferred from what is forbidden: This punishment does not apply to a person who insults tribal animistic religions. Likewise, as mentioned above, for offenses involving illicit intercourse, offenders who are members of revealed religions are subject to the punishments set down in their religion, if there are any, while this does not apply to members of tribal animistic religions.

In sum, the Islamist legislation makes a clear distinction between Muslims and non-Muslims, and among non-Muslims, between *dhimmī*s and believers in tribal animist religions. The legislation does not refer to *musta'minūn*, residents of *dār al-ḥarb* (abode of war, i.e., non-Muslim territory) who are temporarily admitted to Muslim territory and enjoy protection, and *ḥarbiyyūn*, who do not enjoy protection under the *sharī'a*.[258] It is interesting to note in this connection that al-Ṣādiq al-Mahdī suggests radical reforms in the status of non-Muslims to the point of equalizing their status with that of Muslims, especially with respect to homicide, retaliation, and blood money.[259]

Some idea concerning the status of non-Muslims in the Sudan can be obtained from court decisions. There is ample evidence of Christians being charged and punished under Sections 444 (wine drinking coupled with disturbance) and 449 (trade in wine) of the PC, 1983. Among the convicted were the Italian Representative of the Catholic Churches, a Portuguese subject on a flight from London, a foreign development engineer, and non-Muslim subjects from various African countries.[260] The Italian Representative of the Catholic Churches in the Sudan was sentenced to twenty-five lashes and a fine of £S 500 on grounds of possession of alcoholic beverages. Al-Ṣādiq al-Mahdī denounces this decision as a deviation from both the *sharī'a* and the PC. The accused claimed that the wine belonged to a certain *muṭrān* (archbishop) though he could not prove it. Al-Ṣādiq

[258] Schacht, *Introduction*, 131, 206; Köndgen, *Das islamisierte Strafrecht*, 44.

[259] Al-Mahdī, *al-'Uqūbāt*, 137–38, 140–42; al-Mahdī, *al-Ṣaḥwa*, 20.

[260] *Al-Ṣaḥāfa*, May 31, 1984, p. 2; August 17, 1984, p. 2; October 14, 1984, p. 2, col. 6 (the perpetrator carried with him six bottles of whisky); October 19, 1984, p. 2, cols. 2–3 (the perpetrator was drunk and caused disturbance in front of his house); October 26, 1984, p. 2, col. 2; October 29, 1984, p. 2, cols. 5–6.

al-Mahdī argues that the accused did not have to prove his innocence; rather, it was incumbent on the prosecution to prove the charge of trade in wine against him. Moreover, the wine could have been for personal consumption or for religious ritual purposes. Fūda, too, reports on this case and comments that the *sharīʿa* and the general law do not prohibit non-Muslims from consuming alcoholic beverages, especially as these may be required to perform Christian religious rituals.[261]

In one case, a Christian man and woman were charged with illicit intercourse. In court they proved by witnesses that they were married to each other and hence acquitted from this charge. However, they were found in what the court defined as a very dishonorable situation. The husband was wandering naked and drunk in the streets while the wife was naked in the house. Though the latter was not a crime, the court nevertheless regarded it as a sin in the eyes of Allāh; a human being must be fully dressed even in his own home since, according to a *ḥadīth*, some of the angels share his home permanently with him. The husband was sentenced to forty lashes under Section 443 (wine drinking) and to discretionary punishment of twenty-five lashes under Section 234 (detestable conduct). In another case, the two partners to illicit intercourse were charged under Section 318. The man confessed the crime, having regard to the fact that he was a Christian, the court sentenced him under Subsection (2) to discretionary punishment of a year's imprisonment and eighty lashes. Since the woman retracted her admission, the *ḥadd* punishment was averted but she too was nevertheless sentenced to discretionary punishment of eighty lashes.[262] In one case, three men, at least one of them a foreigner, were charged with playing a game of hazard in a public place and were sentenced to fifty lashes each.[263] In another case, the court admitted, on the basis of Criminal Circular No. 97 pertaining to the integrity (*ʿadāla*) of witnesses, the testimony of a Christian in matter pertaining to an offense entailing Qurʾānic punishments. The decision was substantiated by the CrimCAp in Khartoum.[264]

In several cases, the CrimCAp mitigated the sentences imposed by lower courts on the perpetrators probably on account of the

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[261] Al-Mahdī, *al-Nizām*, 45–46 cites *al-Ayyām*, May 21, 1984; Fūda, *Qabla al-suqūṭ*, 128–29.

[262] *Al-Ṣaḥāfa*, May 30, 1984, p. 2; and August 2, 1984, p. 2, respectively.

[263] *Al-Ṣaḥāfa*, August 29, 1984, p. 2.

[264] *Al-Ṣaḥāfa*, February 10, 1985, p. 1.

different religion or nationality. Thus in one case, the CrimCAp cancelled the punishments of flogging and imprisonment, though not the fine, and added a warning against repetition of the crime. In another case, the CrimCAp cancelled altogether the charge because the accused were celebrating Christmas though he added a warning, probably against offending the sensibilities of Muslims. In yet another case, a Christian woman, probably from the South, was charged under Section 449 with producing wine after the termination of the period of mourning for her late husband. The CrimCAp condemned this custom as unaccceptable under the *sharīʿa*, but nevertheless cancelled the charge having regard to the woman's poor social condition.[265]

4. The Judge as an Instrument for Implementing Islamist Laws

4.1. *The Judges'* Sharʿī *Education*

The integration of the *sharīʿa* courts into the national judiciary exposed the *sharīʿa*, in matters traditionally under the jurisdiction of the *sharīʿa* courts, to the legal thinking and social philosophy of the civil judges, who were not necessarily well versed in the *sharīʿa*. Moreover, civil judges were expected to apply the Islamist legislation in domains of civil and criminal law that since the end of the nineteenth century have been outside the control of the *sharīʿa* and the jurisdiction of the *sharīʿa* courts.

The judges of the SupC at the time of Numayrī had a different legal background. Only one-quarter (four out of seventeen) of the judges of the SupC had received formal *sharʿī* education. These were Shaykh Muḥammad al-Walī, Sayyid Aḥmad al-ʿAwaḍ (also at one time a Grand Qāḍī), Ḥanafī Ibrāhīm, and al-Mukāshifī Ṭāhā al-Kabbāshī. The rest of the judges had received formal or informal education or training in common law or civil law.[266] In these circumstances it is safe to conclude that most of the judges in the SupC were not

[265] *Al-Ṣaḥāfa*, July 16, 1984, p. 2 (Lucia John Dinq?); July 25, 1984, p. 2 (some of the accused, probably not Christians, were sentenced to lashes and fines); October 22, 1984, p. 2, col. 1.

[266] Unless otherwise indicated, the information on the judges' education and training was provided by former Judge of CAp Hunud Abia Kadouf (see Interviews).

equipped with solid *sharʿī* education or training; they had no adequate orientation in the intricacies of the religious legal literature, and thus were not qualified to exercise *ijtihād*. As noted above, in connection with the application of the JudA, 1983, Ḥasan al-Turābī, al-Ṣādiq al-Mahdī and other observers too shared the opinion that the national judges' education did not qualify them for *ijtihād* and that the decisions handed down by them were a real cause for concern.[267]

Support for this opinion can be obtained from the detailed decisions of the SupC published in the *Sudan Law Journal and Reports* (*SLJR*). Quite often the SupC presents in the process of handing down its decisions legal norms and doctrines based on the *ḥadīth* or attributed to the founders of various schools of law and jurists. Occasionally, it gives references to specific classical treatises. The commonest treatises are:[268] *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid fī ʾl-fiqh* by Abū ʾl-Walīd Ibn Rushd (al-Ḥafīd; d. 595/1198), *Mawāhib al-Jalīl sharḥ Mukhtaṣar Khalīl* by al-Ḥaṭṭāb,[269] *al-Mughnī* by Ibn Qudāma (d. 1223),[270] *al-Sharḥ al-kabīr* by al-Dardīr, *al-Mabsūṭ* by al-Sarakhsī; *al-Muhadhdhab* by al-Shīrāzī.[271] However, on many other occasions when important rules and doctrines are mentioned, the SupC does not find it necessary to supply references to legal treatises from which these rules or doctrines have been derived but the possibility that the judges of the SupC have free access to classical treatises cannot be ruled out.[272]

At the same time there is ample evidence to the effect that the SupC acquaints itself with the doctrines of various schools and jurists through consultation of modern compilations, private codifications, and journals. The manual most frequently resorted to is ʿAbd al-Qādir ʿAwda, *al-Tashrīʿ al-jināʾī al-islāmī muqāranan biʾl-qānūn al-waḍʿī*. 2 vols. Dār al-Turāth, 1951. From this source the SupC derives information on issues such as definition and components of *ḥirāba*, highway robbery; the number of witnesses required to prove the

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[267] See above, II.2.2.3.

[268] For bibliographical references according to school of law affiliation, see Linant de Bellefonds, *Traité*, vol. 2, 9–10.

[269] *SLJR*, 1983, 107.

[270] *SLJR*, 1986, 97.

[271] *SLJR*, 1986, 97–98.

[272] E.g., *SLJR*, 1984, 108, 110 (evidence on offenses entailing *ḥudūd*); 112, 116 (enhanced blood price in quasi-deliberate homicide); *SLJR*, 1986, 95 (confession of illicit intercourse).

crime of *ḥirāba* and the punishment entailed (*ḥadd* and *taʿzīr*); doubts averting Qur'ānic punishments and discretionary punishment; circumstantial evidence in the *sharīʿa*; crimes calling for retribution and blood price and the witnesses required to prove them.[273] Another popular manual is Muḥammad Abū Zahra, *al-Ǧarīma wa'l-ʿuqūba fī 'l-fiqh al-islāmī*. 2 vols. Cairo: Dār al-Fikr al-ʿArabī, n.d. From this source the SupC derives information on issues such as the divorced wife and the *iḥṣān*, liability to *ḥadd* punishment imposed on *zinā*; multiplicity of crimes and the sanctions, either *ḥudūd* or *qiṣāṣ*, involved.[274] Ibn ʿĀbidīn, *Radd al-muḥtār ʿalā al-durr al-mukhtār* provides information on the Ḥanafī doctrine pertaining to definition and components of *iḥṣān* in crime of *zinā* entailing lapidation, consummation of marriage and *iḥṣān*; difference of opinions between the Ḥanafī and the Shāfiʿī schools with respect to admission of *zinā* by one of the partners while the other refutes it.[275] Rashīd Riḍā's *al-Manār* is enlisted to support the SupC's view that the *muḥṣana* must be a married woman, not divorced, at the time the *zinā* took place.[276]

Those who joined the judiciary at the different levels were expected to have a basic law degree, whether common law, civil law or *sharīʿa*. Before their appointment they had to pass a legal profession examination by the Bar Council. Prior to the unification of the two judicial systems, the civil and *sharʿī*, only those who wanted to join civil courts were required to sit for Bar examination. Those who wanted to join the *sharīʿa* courts were exempted from this requirement. Since the unification of the judiciary by Numayrī, all the judges had to sit for the Bar exams and receive the same legal training to try both civil and *sharʿī* cases. Traditionally they had to undergo a training in the courts between six and twelve months before they were entitled to resume their judicial activities as judges of whatever level. As noted earlier, a number of police and army officers with almost no legal education and experience were appointed to the judiciary to deal with criminal cases.[277]

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[273] *SLǦR*, 1984, 67; *SLǦR*, 1986, 133–34, 138–39, 147–48.
[274] *SLǦR*, 1986, 130, 145.
[275] *SLǦR*, 1986, 94, 96, 130.
[276] *SLǦR*, 1986, 130.
[277] See above, III.1.1.

4.2. *Expansion of the Judge's Discretion*

We saw previously[278] that the policy of Islamizing the law in the Sudan was an attempt to increase state supervision over public morals by reviving the institution of the *ḥisba* and anchoring vice crimes, along with deterrent sanctions, in the statutory legislation. The judge became an essential tool for implementing this policy; this was manifested in the widespread discretion given him by the legislation to impose punishments for various offenses, and in particular, vice crimes. The Explanatory Note to PC, 1983 provides explicitly that the purpose of the PC is to leave the judge a wide option with respect to punishment, and Ḥāfiẓ al-Shaykh al-Zākī includes in the judge's discretion the right to impose *sharʿī* punishments on statutory offenses.[279]

Section 76 of the PC, 1983 provides that the court is entitled to impose the punishment of flogging with a whip in the following circumstances: (1) when it is the appropriate "*sharʿī* punishment," that is, the punishment that suits the severity of the offense according to the *sharīʿa*, or the punishment set down in the law for the specific offense; and (2) when the offender demonstrates contempt for human life or property or for moral values. In these circumstances, the judge is even entitled to impose additional punishment. Section 444 of the PC provides that anyone who drinks intoxicating beverages (for a definition of *khamr*, see Section 445) while offending other people's sensibilities is subject to forty lashes or imprisonment, in the case of a Muslim, and to flogging, a fine or imprisonment, in the case of a non-Muslim. In other words, drinking wine in such circumstances—even with regard to a Muslim—entails a discretionary penalty in addition to Qurʾānic punishment.[280]

As noted above, Section 3(a) of the JudA, 1983 provides that in the event of a lacuna in any given statute, a judge may apply the uncodified *sharīʿa* as established in the Qurʾān and the *sunna*. This implies that he may apply at his discretion "*sharʿī* punishment," either Qurʾānic or discretionary.[281] Moral values is an abstract concept, and therefore it hardly lends itself to an objective definition. However, in the Islamist legislation under review, its translation into concrete

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[278] III.1.3, IV.2.

[279] *Al-Ṣaḥāfa*, October 16, 1983, p. 5, cols. 1–2; and October 29, 1983, p. 11, col. 2, respectively.

[280] Cf. Khālid, *al-Fajr al-kādhib*, 55, 75; Anderson, *Africa*, 375.

[281] Cf. Khālid, *al-Fajr al-kādhib*, 51; see above, II.2.2.2.

terms, in assigning punishments, was left exclusively to the discretion of the judge, who was actually guided by his own religious and social world view. As already observed, the court, by virtue of Section 3(a), did not hesitate to impose at its discretion *shar'ī* punishments even for uncodified offenses.[282]

We noted above that the PC, 1983 provides two separate mechanisms for theft: one as defined in the Penal Code, 1974, which entails the discretionary punishments of flogging, a fine, or imprisonment, and the other as defined—albeit with certain deviations—in the *sharī'a* which entails a Qur'ānic punishment (Sections 320–21).[283] Section 2(a) of the JudA instructs the judge to assume that the legislator did not intend to contravene the *sharī'a*;[284] it appears that the legislator expected the judge to exhaust the *shar'ī* mechanism before turning to the other mechanism. The *shar'ī* sanction is of course more severe (e.g., amputation of limbs), but on the other hand, the definition of theft in the statute is more limited, partly because of the precondition of the *niṣāb*, minimal value of the object stolen. In any event, the judge has the discretion to decide which of the two systems to apply, and we have already noted that he tends to exhaust the *sariqa ḥaddiyya* before resorting to the statutory theft.[285]

Sections 251 and 253 impose execution or, alternatively, payment of blood money for deliberate and quasi-deliberate homicide respectively.[286] However, while in the case of deliberate homicide the option of blood money is conditional on the consent of the *walī al-dam*, the victim's next of kin, no such stipulation exists in quasi-deliberate homicide (the *walī al-dam* is not mentioned in Section 253). Hence, al-Kabbāshī maintains that the option to choose between execution and settlement of the conflict through blood money should be left to the court. Section 253 is a compromise between the Mālikī doctrine which subsumes this intermediate category in deliberate homicide and implies that the option of retribution is still available, and the Ḥanafī doctrine which does not admit retribution in categories other than deliberate homicide. The combination of the two doctrines extends the judge's discretion: it is up to him to decide the case either by retribution or blood price, regardless of the wish of

[282] See above, III.2.2.2.
[283] For further details, see above, II.2.1.4.
[284] See above, II.2.1.3.
[285] See above, IV.2.2.1.3.
[286] See above, II.2.1.4.

the victim's avengers.[287] There is some evidence that the court makes use of this discretion given it under Section 253 and usually opts (*ikhtārat al-maḥkama*) for blood price.[288]

In one case, the former husband of a woman—her paternal cousin and the father of her three minor sons—killed her husband. The court repeatedly gave the widow the option to choose between retribution and blood price, as required by Section 251, before handing down its decision. The widow, however, declined to choose: she wanted neither reconciliation nor retribution. She felt threatened by both the perpetrator's and the victim's relatives. Had she taken sides she might have created a great danger for herself and her sons. She was well acquainted with the customs of her relatives and her late husband's relatives—all of them Bedouin (*ʿarab*)—and therefore had good reason to believe that neither party would tolerate rapprochement. She declined to accept the state's defense, and suggested that the court handle the matter at its discretion as if she did not exist. The court's attempts to persuade other heirs to opt for blood price were in vain and hence a death sentence was handed down.[289]

There is also a trend toward expanding the judge's discretion with respect to doubts or mistakes (*shubuhāt*) that avert Qur'ānic punishments, that is, when the alleged offense resembles a legal act, and a presumption of *bona fides* on the part of the accused is therefore possible.[290] There are several references to this issue in the PC, 1983. Thus, for example, Section 323 states, *inter alia*, that the punishment of amputation will not be applied for theft entailing Qur'ānic punishment if the accused can claim in his defense *shubha bi'l-milk*, that is, if he succeeds in proving that the object stolen was of the kind for which private ownership does not exist; or that acquisition of private ownership was impossible or prohibited; or that he was part-owner of the object.[291] A defense based on *shubha* applies also in the case of an irregular (*fāsid*) marriage that the husband believed to be valid (*ṣaḥīḥ*), or when the marriage contract was concluded during the waiting period (*ʿidda*) following an irrevocable divorce, while the husband believed it to be revocable.[292]

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[287] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 16; Anderson, *Homicide*, 819; Schacht, *Introduction*, 181; Köndgen, *Das islamisierte Strafrecht*, 96. See above, II.2.2.1.1.

[288] *Al-Ṣaḥāfa*, September 17, 1984, p. 2, cols. 3–4; September 18, 1984, p. 2, col. 4.

[289] *Al-Ṣaḥāfa*, August 14, 1984, p. 3.

[290] Schacht, *Introduction*, 176; Peters, *Criminal Law*, § 0.1.1.1 (*shubha*).

[291] Schacht, *Introduction*, 179–80.

[292] *Ibid.*, 163, 168.

Section 458 of the PC expands the court's discretion with respect to *shubha* beyond that provided by the *sharīʿa*. Subsection (1) (c) provides that *shubha* is "any reasonable doubt" (*kull shakk maʿqūl*), that is, doubt according to the court's understanding and judgment; it is apparently not restricted to the specific doubts set down in the uncodified *sharīʿa*. The mechanism of *shubha* was intended to curb the hasty application of Qurʾānic punishments. The court's discretion with respect to non-Qurʾānic punishments is not restricted by such a mechanism which may facilitate arbitrary use of this discretion. In fact, some maintain that the regime turned the PC into a means of suppressing political opposition.[293] Khālid argues that the judge's discretion has been expanded beyond reasonable scope and that in actual fact his discretion is almost tantamount to legislative authority. Moreover, he claims that the judge's wide discretionary punishment has actually emptied the [codified] *sharīʿa* of its content.[294]

4.3. *Different Approaches to Islamist Laws within the Judiciary*

The application of the Islamist legislation and legal circulars reveals differences of views and approaches among the judges of various instances. This is manifested in the fact that decisions handed down by lower courts are quite often overruled by CAps, and decisions handed down by the latter are overruled by the SupC. Decisions of the SupC are given by one judge. No mention is made in *SLJR* of whether the other members of the court agree with or dissent from the decision; there are no majority and minority views. Still, occasionally it is possible to compare decisions of judges of the SupC on similar issues given in different cases.

The variety of views and approaches among the judges may be attributed to differences in legal education and training, social background and political-ideological affiliations. We have already noted that the judges of the different instances had common law training and that only a minority of the judges of the SupC had *sharʿī* education. This implies that only few judges had free access to the classical religious legal literature. We also noted that judges of the lower courts were mobilized from the ranks of the Muslim Brothers as well

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[293] See above, II.2.1.4. Cf. Köndgen, *Das islamisierte Strafrecht*, 43; Amin, *ME Legal Systems*, 342.

[294] Khālid, *al-Fajr al-kādhib*, 51. On judicial legislation within the scope of legislative interpretation in Egypt, see Naveh, *Tort Injury*, 18–19, 24.

as police and army officers. Judges of the SupC were more professional and seem to have been nominated on the basis of their qualifications rather than political affiliation and loyalty to the regime.

On the face of it, judges from all instances were attentive, though with various degrees of commitment and enthusiasm, to the Islamist legislation. They resorted to the Qur'ān and the *sunna* not only in the event of a lacuna, as prescribed by Section 3(a) of the JudA, 1983, but also in cases of explicit statutory provisions designed to deal with the matter under review. They seem to have been fully aware of Section 2 of JudA, 1983 which guides the judge to interpret statutory provisions, both substantive and procedural, in conformity with the principles and norms of the uncodified *sharīʿa*. However, their adherence to *sharʿī* sources did not reach the level of judicial *ijtihād*. As already noted, to the extent that Section 3(b) of the JudA, was resorted to, *ijtihād* did not exceed the mere exercise of judicial discretion.[295]

However, the differences in legal, ideological, and socio-political backgrounds seem to have left their imprints on judicial practice. Generally speaking, one may distinguish two basic approaches within the judiciary toward the application of the Islamist legislation: a conservative approach which seems to be dominant in the lower courts and a liberal approach which seems to be dominant in the CAps and more so in SupC. This is, of course, a schematic division; exceptions may be found in either directions, that is, a liberal approach among judges of lower instances and a conservative one among judges of the upper courts.

Judges of the lower courts seem to be politically and ideologically committed to strict application of the Islamist statutes. Some of them went out of their way to expedite the process of Islamization of the legal system, and even to push it beyond the goals set in the Islamist legislation. The conservative approach is manifested in various ways: Judges were eager to implement harsh Qur'ānic punishments and retribution. To this end, they took account of circumstantial evidence which in principle is not recognized under the *sharīʿa*. They applied uncodified *sharʿī* punishments in the absence of respective offenses in statutory provisions. This is the case, for instance, with respect to the *taʿlīq*, the tying of the amputated limb to the thief's neck which

[295] See above, III.2.2.3.

was abolished in an Islamist circular,[296] and apostasy (*ridda*) which was applied in the case of Maḥmūd Ṭāhā. In cases where two punishments are reserved for the same offense, as with regard to theft, a harsh one based on the *sharīʿa* (amputation) and the other discretionary based on pre-1983 statute, the judges as a rule were anxious to exhaust the *sharʿī* punishment before resorting to the statutory alternative.

We have already noted that the judges, and this applies first and foremost to those of lower courts, regarded themselves, in the best tradition of the *muḥtasib*, as the guardians of the public morals at large by virtue of their commission to apply the Islamist legislation and the uncodified *sharīʿa*. Evidence to this effect may be found in cases of illicit intercourse and false accusation of illicit intercourse, wine drinking, theft and highway robbery. In most cases the judges treated pick pocketing (*nashl*) as *sariqa ḥaddiyya* and sentenced the perpetrators to amputation of the hand under Section 321(2) of PC, 1983. They maintained that amputation on grounds of theft could not be subject to pardon since the offense is one of the *ḥudūd allāh* prescribed in the Qur'ān.

Judges of the CAps and more so judges of the SupC seem to have been more restrained and liberal with respect to the application of the Islamist laws. They explored every avenue in order to mitigate or avert harsh Qur'ānic punishments. Thus they canceled sentences of tying up (*taʿlīq*) the amputated limb to the thief's neck handed down by lower courts. They went out of their way to settle cases of homicide and bodily assault by pardon and blood price rather than by retribution. To this end they did not hesitate to take into consideration Western-inspired principles of law, such as natural justice, case law and retroactive application of statutory provisions, even though they may not be in conformity with the *sharīʿa*.[297]

The judges' liberal approach toward the eclectic device (*takhayyur, talfīq*) to the extent that they did not deem themselves bound to any particular school of law (though there was of course a natural inclination toward the Mālikī school), seems to have been determined by purely pragmatic (rather than legal or ideological) considerations, namely the desire to provide juristic justification for the mitigation

[296] See above, III.2.2.1.
[297] See above, III.1.2.

of the harsh Islamist legislation and especially to avert Qur'ānic punishments as in the case of the immunity (*iḥṣān*) of adulterous divorced women (the juristic basis was provided by the Shī'ī Imām al-Ṣādiq and contemporary Sunnī jurists).[298] The same pragmatic approach may have led the SupC to oppose the eclectic device as in the case of the amputation of the hand of the bookkeeper from Wād Sidna.

The application of the doctrine of public interest (*maṣlaḥa*) is another manifestation of the judges' liberal approach. We noted previously that in the case of obligatory insurance the SupC deviated from the *shar'ī* concept which confines the contractual relations solely to the two parties concerned, and extended its application to the "third party," the injured. The SupC's endeavor to avoid application of retribution in cases of homicide and grievous assault and to settle the dispute by means of blood price was similarly guided by the doctrine of public interest. This trend was also shared by lower courts.[299]

The adaptation of traditional legal institutions such as *'āqila*, mutual responsibility based on kinship, and *diya*, blood price, to modern requirements may be regarded as another manifestation of the judges' liberal approach.[300] Closely connected to it was the tendency, in the judicial practice of the SupC, to convert institutions such as homicide and grievous bodily harm from private to public law.[301]

4.4. *Resort to Judicial Practice and Legislation in Arab and Western Countries*

On several occasions the SupC resorted to judicial practice and legislation in various Arab countries in order to derive support for its decisions. Thus, in one case discussed above, a CrimC charged the accused with theft entailing Qur'ānic punishment under Section 322(2) of the PC, 1983 and sentenced him to amputation of his right hand and tying (*ta'līq*) of the amputated limb to his neck for a certain duration. The CrimCAp upheld the amputation (though it canceled the tying of the limb). The convicted appealed to the SupC asking to cancel the sentence of amputation. The SupC ruled that the accused had no right to appeal to it since Section 235(2) of the CrimPA, 1983 provides that decisions handed down by a CrimCAp

[298] See above, III.2.1 and 2.2.4.
[299] See above, III.2.2.4.
[300] See above, IV.1.1.
[301] See above, IV.1.2.

cannot be appealed and are final. However, the SupC may, by virtue of Section 239, examine the protocol of any judicial procedure if it deems it contradictory to the *sharʿī* procedure and hence revise the decision. This ruling is based, *inter alia*, on the judicial practice of countries such as Saudi Arabia. Sentences on crimes entailing Qur'ānic punishments such as amputation of limbs and lapidation handed down by the Saudi courts of first instance, require substantiation by the Court of Revision (*maḥkamat al-tamyīz*), the Supreme Council of the Qāḍīs and the King before being carried out. The SupC sought to derive support for its decision also from Egyptian bills pertaining to execution of Qur'ānic punishments of 1976. These bills provide that under any circumstances, sentences pertaining to Qur'ānic punishments must be brought before the Court of Cassation (*maḥkamat al-naqḍ*) which reviews disputable principles of law, rather than the Court of Appeal that seeks to correct an error or injustice committed by a lower tribunal.[302]

In another case, a CrimC ruled that the crime of *ḥirāba*, highway robbery, had been established by means of *sharʿī* evidence and the accused were sentenced to alternate amputation. The conviction and the sentence were upheld by the CrimCAp. The SupC concentrated, *inter alia*, on the question of the validity of evidence. Section 78 of the EvA, 1983 provides that crimes entailing Qur'ānic punishments, with the exception of illicit intercourse, must be proved by two male witnesses; their testimony must be clear and unequivocal, and each of the witnesses must testify on all the components pertaining to the crime. However, if there are more than two witnesses it is sufficient for the fulfillment of the requirements of the evidence (*niṣāb al-shahāda*) that any two witnesses testify on one or more components of the crime. The SupC sought to derive support for this decision from an Egyptian bill pertaining to theft.[303]

It is interesting to note in this connection that the Sudanese SupC does not hesitate to refer to judgments given by the American Supreme Court. Thus in one case, the Sudanese SupC discussed the issue of judicial immunity stemming from a decision handed down by a CrimCAp presided over by al-Kabbāshī in the famous case of

[302] *SLJR*, 1983, 90–91. Cf. Black, *Law Dictionary*, 217, 353. For further details on *taʿlīq*, see above, III.2.2.1.

[303] *SLJR*, 1984, 88–91. Cf. Peters, *Criminal Law*, § 0.1.2.2; Anderson, *Africa*, Glossary, *ḥirāba*.

embezzlement by the bookkeeper from the high school in Wād Sidna. Al-Kabbāshī regarded the embezzlement as a theft entailing a Qur'ānic punishment within the meaning of Section 320(2) of the PC. The convicted's right hand was amputated. Later, the bookkeeper alleged in the SupC that the amputation on grounds of embezzlement was compatible neither with the *sharīʿa* nor with the PC. Though the SupC accepted the bookkeeper's allegations, it nevertheless granted al-Kabbāshī (who in the meantime had retired) judicial immunity and released him from personal liability. To support its decision the SupC quoted from decisions by the American Supreme Justice M.N. Cardozo and Chief Justice Warren and the Indian jurist Rātinlāl in cases pertaining to personal immunity of judges.[304]

In one case the CrimCAp overruled a sentence of a CrimC regarding an offense that had taken place prior to 1983 on the grounds that it was not permissible to apply the Islamist legislation retroactively. It further ruled that the doctrine of legality provides that everyone is entitled to know the statutory sanctions entailed in any specified offense. The CrimCAp derived support for this doctrine from ancient Roman jurists, the International Charter of Human Rights, modern statutes issued since the French revolution, and the American constitution.[305]

To sum up, the Sudanese SupC seems to be attentive to judicial practice and legislation in both Arab and Western countries.

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[304] *SLJR*, 1986, 174–80. For further details on al-Kabbāshī's decision, see above, III.2.1, 2.2.3, 2.2.5.2.

[305] *Al-Saḥāfa*, October 24, 1983, pp. 1–2. The reference is to the rule of *nulla poena, nullum crimen sine praevia lege* which means that there is no punishment nor a crime without a previous legal provision. In other words, an act is punishable only if the law has defined it as a punishable crime. Such legal provisions are of strict law and may not be extended by analogical interpretation. We owe this remark to Ruud Peters.

CHAPTER FIVE

CONCLUSIONS AND EPILOGUE

1. Salient Features of the Sudanese Experiment in Reinstating Islamic Law

Reviewing the policy of Islamizing the law in the Sudan earlier in this study, we noted that Numayrī seemed to have no intention of replacing the existing legal system exclusively by the orthodox *sharīʿa*. Rather, his policy of Islamization was meant to achieve, by means of statutory legislation and judicial practice, the following objectives:

(1) revision of the existing legal system with a view to making it compatible with basic *sharʿī* norms;

(2) freeing the Sudanese legal system from the impact of English law;

(3) mitigation of various domains of the *sharīʿa* and its adaptation to modern requirements.[1]

To what extent did Numayrī succeed in implementing his Islamization policy? As to the first objective, critics believe that Numayrī in no way intended to change the existing legal system, except to the extent that it openly contradicted the *sharīʿa*.[2] In the course of reinstating various domains of the *sharīʿa* through codification, entire statutes or parts thereof contravening the uncodified *sharīʿa* were abolished. Thus Section 2 of the CivTA, 1984 provides a list of more than ten statutes that were replaced by the CivTA, 1984. The ZakTA, 1984 eliminated income tax and other taxes prohibited by the uncodified *sharīʿa* (except for two for which support was ostensibly found in religious legal sources) to be replaced with the alms tax for Muslims.[3]

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[1] For full details, see above, II.1.1.2.

[2] Zein, *Religion, Legality, and the State*, 202 and the source mentioned there; Safwat, *Islamic Laws*, 243.

[3] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 19, 29–30.

However, reinstatement of the *sharīʿa* in the Sudan does not mean restoration of the orthodox *sharīʿa*, the creation of independent, uninstitutionalized jurists. Numayrī's version of the *sharīʿa* derives its standing first and foremost from being underpinned by statutory legislation backed by state sanction, and not from the learned authority of the *fuqahāʾ*, as in the traditional conception. It is perhaps possible to legitimize in *sharʿī* terms the issuing of the Islamist legal and criminal circulars by anchoring them in the doctrine of *siyāsa sharʿiyya*, that is, the ruler's authority to supplement the *sharīʿa* by administrative regulations provided they do not exceed the limits of the *sharīʿa*,[4] though one should, of course, bear in mind that Sudan is not a theocracy. The resort to *sharʿī* mechanisms was intended to create the impression of a genuine internal refurbishment of the *sharīʿa*.[5] On the other hand, the attempt to reinstate Islamic law through Western style statutory legislation and codification by definition contradicts the nature of the *sharīʿa* as jurists' law. Statutory legislation has two dimensions: incorporation of *sharʿī* norms into Islamist statutes and contingency of the validity of legislative provisions on their conformity with the *sharīʿa*.[6] From Numayrī's point of view, this style had the advantage of enabling his regime to fully control the process of reinstatement, at least on the level of legislation (and to a lesser degree on the level of judicial practice). As already observed, codification is not merely a formal technical issue; it has far-reaching substantive consequences. Even when the state law is based exclusively on the *sharīʿa*—and this is not exactly the case in Sudan—the very fact of codification implies transformation of the *sharīʿa* from jurists' law to statutory law. This entails also a departure from the wide-ranging Islamic religious-legal literature, and a disruption of the *sharʿī* legal methodology (*uṣūl al-fiqh*) and body of rules (*furūʿ*), as well as demotion of the status of the *ʿulamāʾ* and *muftī*s as the sole exponents of the *sharīʿa*.[7] Al-Kārūrī totally rejects statutory legislation on the grounds that a positive law (*qānūn waḍʿī*) can by no means replace the *sharīʿa* as a basis for ruling a state and controling public morality. The process of codification has been mitigated to some extent by the fact that in the event of a lacuna in any given statute, the

[4] Schacht, *Introduction*, 54; Coulson, *History*, 129ff.; Vogel, *Siyāsa sharʿīyya*.
[5] For further details, see above, Preface.
[6] Cf. Mayer, *Law and Religion*, 163–66.
[7] For further details, see above, II.2.1.1. Cf. Peters, *Islamization of Criminal Law*, 254; An-Naʿim, *Sharīʿa and Positive Legislation*; Mayer, *Law and Religion*, 152ff.

Sudanese legislator allowed the application of the uncodified *sharīʿa*, that is, the classical jurists' law. In this respect, it may be argued that the orthodox *sharīʿa* enjoys the status of a source of law in the Sudanese legal corpus that approaches the conception of natural law in the sense that it has binding validity even if it is not anchored in statutory provisions; to use al-Karūrī's wording: "The *sharīʿa* is wider than law (*qānūn*); moreover, it is the law of humanity, equivalent to the law of nature (*qānūn al-ṭabīʿa*)."[8]

The eclectic expedient (*takhayyur, talfīq*) is the main method of reinstating the *sharīʿa* in the statutory legislation, and it is also evident in the Islamist legal circulars. This expedient is in the best tradition of the legal circulars issued by the Grand Qāḍī since the period of the Anglo-Egyptian Condominium. The Chief Justice proceeded with this tradition since the abolition of the institution of the Grand Qāḍī in 1979. The Sudanese legislator made extensive use of the eclectic expedient expanding the realm of choice to include the Mālikī and other Sunnī schools, and did not hesitate to adopt doctrines that had been current at any time in the past. This expedient has also been extensively used in reformist legislation in matters of personal status, succession, and *waqf* in the Middle East and North Africa. Direct resort to the Qurʾān and the *ḥadīth* as a means of reinstating Islamic law also has a precedent in reformist legislation in the Muslim world, where it is formulated in terms of neo-*ijtihād*.[9]

The selective incorporation of *sharʿī* norms into the statutory legislation in many cases led to deviations from the *sharīʿa*, to the point of distorting it.[10] Al-Kabbāshī is adamantly unwilling to admit the mixture of *sharʿī* and non-*sharʿī* statutory elements in the process of reinstating the *sharīʿa*. Thus, for example, he holds that statutory punishments such as flogging, imprisonment, fines, and confiscation of property are, in actual fact, *sharʿī* discretionary punishments (*taʿzīr*) that have support from the *ḥadīth* and from the *fuqahāʾ*. In the same way he argues that support can be found in the Qurʾān for the death penalty for economic crimes.[11] However, al-Kabbāshī's claims

[8] Al-Kārūrī, *al-Sharīʿa khiyār al-umma*, 2. Cf. the status of the *sharīʿa* as *ordre public* in Tunisia and Morocco. Mayer, *Law and Religion*, 144–45. For definition of natural law see Black, *Law Dictionary*.

[9] Mayer, *Law and Religion*, 154; Anderson, *Legal Reform*, 47–65; Coulson, *History*, 185–217.

[10] See above, IV.1.3. Cf. Mayer, *Law and Religion*, 151 n. 57; Khālid, *al-Fajr al-kādhib*, 71.

[11] Al-Kabbāshī, *Taṭbīq al-sharīʿa*, 63–64, 101.

should be seen as the apologetics of an enthusiastic supporter of Numayrī's policy of Islamization. One of the distortions created as a result of the *sharʿī* norms' incorporation into statutory legislation was occasioned by the superimposition of *sharʿī* terms on statutory definitions that consequently lost their original meaning. Thus, for example, in the PC, 1983 this caused a lack of conformity between the offense and the punishment for the offense. Another was the distortion, in the PC, of the traditional *sharʿī* balance between the severity of the punishments and the mechanisms to avert them. As we saw previously, the legislator imposed strict Qurʾānic punishments (execution and amputation) on the one hand, and on the other, deprived the offender of the "good defenses" on the grounds of doubt or mistake (*shubha*) that averts corporal punishments. This situation derives from the court's subordination to civil rules of evidence and procedure that do not recognize such defenses.[12]

The Islamization of the Sudanese legal system has been carried out not only on the level of statutory legislation and legal circulars, but also on the level of judicial practice. To what extent have the judges met the legislator's expectations? The eclectic device is applied extensively by the judges. Although traditionally the Sudanese *qāḍī*s are bound by the Ḥanafī school, the judges are naturally inclined toward the Mālikī school; moreover, in practice they do not deem themselves bound by any particular school. In fact, we have noted that judges attempted to derive support for their decisions from jurists of all schools, including the Ẓāhirī school, and from ancient jurists dating as far back as the Prophet's Companions (*ṣaḥāba*) and their Followers (*tābiʿūn*).

Generally speaking, most of the judges interpret Islamist provisions in a manner compatible with the *sharīʿa*. The Qurʾān and the *ḥadīth* are resorted to quite often with a view to enlisting their religious-legal sanction in support of the judges' decisions. Moreover, the judges consult the textual sources not only in the event of a lacuna, but also in the presence of explicit statutory provisions designed to deal with a specific case. Occasionally judges apply *sharʿī* rules that have not undergone codification; there is also some evidence of the application of the uncodified *sharīʿa* even prior to the Islamist legislation. As noted earlier, the resort, by means of judicial discretion,

[12] Cf. Köndgen, *Das islamisierte Strafrecht*, 43–44.

to the uncodified *sharīʿa* actually grants the latter a status as a source of law in the Sudanese legal corpus. Thus it imposes Qurʾānic punishments for offenses that have not undergone a process of codification (as in the cases of apostasy and usury). The judge exercises his discretion while relying on the Qurʾān and the *ḥadīth*, the mechanism of analogical reasoning, and the extensive religious legal literature.

Granting the right of *ijtihād* (in the original sense of the term) to a civil court judge, is not compatible with Islamic judicial tradition. This right was reserved for qualified *fuqahāʾ* and *ʿulamāʾ*, whose authority was based exclusively on their learning. The Sudanese version of judicial *ijtihād* is an unusual mixture of Islamic and Western legal sources and principles. The court amalgamates principles from the classic (*uṣūl al-fiqh*) and modernist (*maṣlaḥa*) *ijtihād* with principles of English law (such as justice, equity, good conscience, and legal precedent). We have some evidence to the effect that Western-inspired principles of law, such as "more favorable for the accused" and obligatory insurance are being translated into *sharʿī* norms in judicial practice. The doctrine of *maṣlaḥa* (public interest) seems to be instrumental in the assimilation of these principles in *sharʿī* context.[13] Moreover, the Sudanese SupC is also attentive to judicial practice of Western countries. Such a mixture is inconceivable from the point of view of the orthodox *sharīʿa*. In al-Ṣādiq al-Mahdī's view, the resort to the schools of law (probably by means of the eclectic expedient), and to the Qurʾān and the *sunna* by way of neo-*ijtihād* alongside with statutory legislation, has not resulted in the creation of a modern Islamic legal amalgamation or synthesis; rather, it is a mixture of various legal elements each of which maintains its own autonomy.[14]

Judicial *ijtihād* in the classical sense of deriving new rules from the Qurʾān and the *ḥadīth* by means of analogical reasoning (*qiyās*)—though without resorting to the consensus (*ijmāʿ*) of the contemporary *fuqahāʾ*—seems to be very rare in daily practice. Rather, *ijtihād* has been reduced to the judicial discretion of a judge with respect to adopting legal doctrines from the uncodified *sharīʿa* and modern legal literature. Again, it was exercised—contrary to the legislator's expectations—also in the presence of an explicit provision regulating the case under review.

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[13] For further details, see above, III.2.2.4.

[14] Al-Mahdī, *al-Ṣaḥwa*, 29–32.

The Sudanese SupC's judicial discretion has resulted in "judicial legislation" and "legislative interpretation." The former signifies the law established by judicial precedent and decisions.[15] The latter implies that the judge uses his discretion to choose, from among several possible legal solutions, the most appropriate alternative to the case in question. To this end he examines the objectives of the Islamist legislation in the light of its sources of inspiration and judicial precedents.[16]

Maṣlaḥa, public interest, a subsidiary source of law in the JudA, 1983, proved to be a guiding principle in Sudanese judicial practice though it has not been raised to the status of an independent source of law totally detached from the textual sources as in the legal methodology of the Modernists;[17] there is no evidence that it served for judicial *ijtihād*.

As a rule, Islamist laws are not applied retroactively though occasionally there are exceptions having regard to the Western principle of the new law (i.e., Islamist law) being "more favorable" (*aṣlaḥ*) for the perpetrator (than the pre-1983 law). Although circumstantial evidence is, generally speaking, not recognized by the orthodox *sharīʿa*, there is ample evidence to the effect that Sudanese judges take account of circumstantial evidence even with respect to crimes entailing Qurʾānic punishments and retribution. The medical report based on modern medicine has also become essential auxiliary evidence almost tantamount to circumstantial evidence.

On the other hand, it appears that Numayrī's regime lost control over the process of Islamization at the level of application. We noted that judges, especially (but not only) in lower courts, associated with the Muslim Brothers went out of their way to expedite the process of Islamization, and to push it beyond the goals set in the Islamist legislation. The most noteworthy example of this was the application of uncodified *sharʿī* rules, such as the death penalty for apostasy (*ridda*). The judicial treatment of usury (*ribā*), in itself a purely civil matter, as a crime entailng penal sanction is another case in point.[18] In this sense it may be claimed that the creature turned on its creator. The Sudanese legislator expanded the national court judge's

[15] Cf. Black, *Law Dictionary*, s.v. judge-made law.
[16] Cf. Naveh, *Tort Injury*, 18–19, 24.
[17] Layish, *Modernists*, 266–67.
[18] Cf. Köndgen, *Das islamisierte Strafrecht*, 43, 59, 82. See above, III.2.2.2.1, IV.4.3.

discretion far beyond that given to the *qāḍī* by the *sharīʿa*, thus making him to a large extent the guardian of public morals.[19]

As to the declared objective pertaining to freeing the Sudanese legal system from the impact of English law, it seems that Numayrī's success was only partial. Dafaʿallāh al-Ḥājj Yūsuf, Chief Justice at the time of the promulgation of the Islamist statutes, maintains that with the codification of the criminal and some parts of the civil law, the *sharīʿa* has been completely restored in the Sudan such that it "will replace common law as the [main] source of legislation."[20] Although complete statutes or parts thereof not compatible with the uncodified *sharīʿa* were abolished in the course of Islamist legislation, the Chief Justice's assessment does not seem to stand the test of reality. The *sharīʿa* is a principal source for legislation, but not the only one. Other pre-1983 sources of law alien to the traditional doctrine are also explicitly recognized. English principles of law such as justice, equity and good conscience and the judicial precedent of the superior judicial court, similarly anchored in the tradition of English rule, still play a central role in Sudanese law, both as a source for deriving positive law and as a means of normative control. English principles of law are occasionally applied in Sudanese judicial practice. English-inspired case law, totally alien to Islamic law, seems to have firmly consolidated itself in the Sudan. There are those, in fact, who hold that English law was never replaced by the *sharīʿa* and that, in any case, it survived as an important source of law within the Islamist legislation. It is further claimed that changes carried out in the name of Islamization have been only cosmetic or superficial.[21] Thus Khālid maintains that Sudanese legislators adopted, by way of codification, English-inspired statutes after having enhanced them with fictitious embellishments—the reference being to *sharʿī* norms incorporated in the September statutes—without effecting any concrete change in the substance of these statutes. Thus, for instance, it is claimed that the PC, 1983 was copied in an unreliable manner from the Penal Code, 1974 and then falsely attributed to the *sharīʿa*.[22]

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[19] Cf. Coulson, *Conflicts*, 95.

[20] Yūsuf, *Interview*, 12.

[21] Esposito, *Islamic Experiment*, 193; Mayer, *An-Naʿim*, 39–40; *idem, Law and Religion*, 150–53, 184. For more details, see above, II.3.1.

[22] Al-Kārūrī, *al-Sharīʿa khiyār al-umma*, 7; Khālid, *al-Fajr al-kādhib*, 50, 104–5.

To what extent did the Islamist experiment succeed in mitigating the severity of the *sharīʿa* and adapting it to modern requirements? The transformation of the *sharīʿa* from jurists' law to statutory law, following its codification, caused the traditional *sharʿī* classification of domains of law to lose some of its significance. We have noted instances of how subject matters defined in the uncodified *sharīʿa* as private law were placed in the realm of public law in the Islamist statutory legislation. This is the case (albeit with some reservation), for example, with payment of blood money by the state rather than by the *ʿāqila*,[23] and with the transferal of discretion in exercising the option of retaliation—from the blood avenger to the judge. These examples symbolize the adaptation of the codified *sharīʿa* to the conditions of modern times. Another manifestation of this trend at the level of legislation can be seen in the Islamist legislation's treatment of women and non-Muslims, which generally reflects a more tolerant approach than that of traditional law. The Islamist legal circulars, designed to guide the courts with respect to the application of the Islamist statutes, mitigated to some extent the harsh consequences of the *sharʿī* punishments and retribution based on the Qurʾān and the *ḥadīth*.

At the level of judicial practice, the judges' resort to doctrines from all schools of law by means of the eclectic expedient, and to the Qurʾān and the *ḥadīth* by way of neo-*ijtihād* alongside with statutory legislation, was inspired by pragmatic considerations as well as by the desire to adjust the legal norm to modern requirements. The status of the doctrine of public interest (*maṣlaḥa*) as a subsidiary source of law in the statutory *ijtihād* and especially its extensive application in judicial practice, signal the judges' liberal approach in implementing the Islamist legislation. A case in point is the judges' endeavor to avoid application of retribution in cases of homicide and grievous assault and to settle the dispute by means of blood price. Custom—which has never been recognized as a source of law in Islamic legal theory, even though it enjoys a special status in the Mālikī doctrine—received a recognized status in Sudanese Islamist statutes and was taken into account in judicial practice not only in consideration of the large communities of non-Muslims in the Sudan (members of tribal animist religions and Christians) but also because it served as a mechanism for accomodating the *sharīʿa* to the changing conditions of the time.

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[23] See above, IV.1.2.

In the Preface we mentioned Bälz's three complimentary models to define the paradox of legal pluralism in Egypt as manifested in the "constitutional provision" (Article 2). We further mentioned that these models may be useful in defining the relations between the uncodified *sharīʿa* and Islamist legislation in the Sudan. These models are briefly as follows:

(1) Normative control of the *sharīʿa* over statutory provisions ("supra-legislative norms");
(2) Incorporation of the *sharīʿa* in statutory legislation;
(3) Coexistence of the *sharīʿa* and statute as two radically autonomous legal orders each of which constructs a social reality of its own.[24]

By way of elimination one may conclude that the third model does not tally with the Sudanese case. The *sharīʿa* and statute do not represent here two radically autonomous legal systems; on the contrary, we have to do here with interpenetration of two legal systems as visualized in the second model though with some variations. As already observed, the statutory legislation by which the *sharīʿa* has been reinstated, has two dimensions: incorporation of *sharʿī* norms or rules into Islamist statutes thus obtaining their validity through the process of codification, on the one hand, and the subjection of the validity of legislative provisions to their conformity with the *sharīʿa*, on the other. However, there is some deviation from the second model: in the event of a lacuna in a statute it is permissible to apply the *sharʿī* rules that have not undergone codification. From the first model Sudan has adopted the ingredient of normative control of the *sharīʿa* over statutory provisions, the best manifestation of which is Section 2 of JudA, 1983. Thus Subsection (b) provides that a judge shall interpret general concepts and discretionary expressions in accordance with the rules, principles and the general spirit of the *sharīʿa*, and Subsection (c) provides that a judge shall interpret technical legal terms and religious legal expressions in the light of basic legal principles or norms and the linguistic rules of the Islamic science of the *sharīʿa* (*fiqh*).[25]

[24] See Preface and the reference to Bälz, *The Secular Reconstruction of Islamic Law*, 231–33.
[25] For full details, see above, II.2.1.3.

What are the sources of inspiration of the Sudanese experiment in the reinstatement of the *sharīʿa*? This experiment is in striking conformity with al-Turābī's legal methodology. The similarity between them obtains in two respects: the synthesis of the Islamic classical legal methodology with Western legal principles, and the attempt to shape a new version of Islamic law by means of statutory codification and legislation based on the eclectic expedient. Al-Turābī's legal methodology finds detailed expression in the JudA, 1983. Thus according to Section 3 of this act, which was drafted by al-Turābī himself, in the event of a lacuna in a statute and absence of a *sharʿī* rule in the Qurʾān and the *ḥadīth*, the judge may exercise *ijtihād* on the basis of the classical sources of law, such as consensus (*ijmāʿ*) and analogy (*qiyās*), as well as English principles of law, such as judicial precedents, natural justice, equity and good conscience.[26] Earlier, the 1968 Bill of Islamic Constitution, also drafted by al-Turābī, provided that the *sharīʿa* is the basic source of inspiration for legislation, that any law not consonant with the Qurʾān and the *sunna* is rendered null and void, and that a judge may, in the absence of a statutory provision, exercise *ijtihād*.[27] Although the bill did not mention Western principles of law, it may give some idea of al-Turābī's views regarding judicial *ijtihād*.

Al-Turābī's imprint can also be found in various statutory provisions. As is known, embezzlement of public money is not included under the *sharʿī* definition of theft entailing *ḥadd* punishment due to *shubhat milk* (doubt as to ownership); everyone is assumed to have a share in the public money. Al-Turābī, however, claims that this is inconceivable since embezzlement is tantamount to infringement of social justice.[28] Sections 320(1) and 321(1) of the PC, 1983 provide a statutory definition and a sanction for theft which also cover embezzlement. Similarly, wine drinking is punishable by both *sharʿī* and discretionary sanctions (Section 443ff.), as recommended by the 1977 committee.[29] As already noted, al-Turābī regards the *sharʿī* alms tax (*zakāt*) as an instrument for promoting social justice (*ʿadāla*), though he does not rule out statutory taxes aimed at promoting the welfare of the community. Similarly, the prohibiton of usury in the CivTA,

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[26] For further details, see above, II.2.2.3.
[27] Abdelmoula, *Ethnicity*, 45–46.
[28] Al-Turābī, *Naẓarāt*, 158.
[29] *Ibid.*, 153.

1984 is meant to pave the way for the establishment of the Islamist economic model with respect to banks and insurance.[30] Al-Turābī argues that a satisfactory level of public morality should be based on criminal legislation and on the Qur'ānic duty enjoining the "Propagation of Virtue and the Prevention of Vice." Both recommendations have been implemented in Islamist statutes.[31]

As noted earlier, al-Turābī's approach toward women is both liberal and progressive. His views on women are reflected to some degree in the Islamist legislation. Discrimination against women still exists with respect to the rules of evidence anchored in orthodox *sharīʿa*. However, with respect to the substance of offenses women have been equalized to men.[32] Similarly, al-Turābī's liberal approach to non-Muslims may find some support in the Islamist legislation. Although the *sharīʿa* has a superior status, the religious law of non-Muslims has been recognized in Islamist legislation, albeit subject to some normative control.[33]

The style of the Sudan with respect to the reinstatement of the *sharīʿa* in its codified version is in striking conformity with al-Turābī's education and training. Al-Turābī is well versed in both Islamic and Western culture. He displays a good knowledge of the *sharīʿa* (though he does not take the trouble to provide the reader with references to legal treatises). At the same time he is well entrenched in Western law.[34] Al-Turābī reflects on Islam as an outside observer (rather than as an observant believer) with a view to adjusting Islam to modern times on the basis of Western sciences and values. In this respect there is some similarity between al-Turābī and Zia Gökalp.[35]

As observed previously, there are some manifestations of neo-Mahdism in contemporary Sudan.[36] It seems that the Mahdī's legal methodology left its impact on the Anṣār. Thus in a conference of the Anṣār held in Abā Island on March 1963, it was decided to adhere to the Qur'ān and the *sunna* and to exercise *ijtihād* totally independently from the schools of law so as to meet the requirements

[30] Al-Turābī, *Nazarāt*, 160; *idem*, *al-Ḥaraka*, 163, 174; *idem*, *Islamic State*, 246. Cf. Abdelmoula, *Fundamentalism*, 30–31; Schacht, *Introduction*, 105.

[31] Al-Turābī, *Tajdīd al-fikr*, 100; *idem*, *Qadāyā al-tajdīd*, 225; *idem*, *Ḥiwārāt fī 'l-islām*, 44. Cf. Abdelmoula, *Fundamentalism*, 29–30. See above, III.1.3 and IV.2.1.

[32] For further details, see above, IV.3.1.

[33] For further details, see above, IV.3.2.

[34] See above, I.2.2.1.

[35] Cf. Heyd, *Ziya Gökalp*.

[36] See above, I.2.1.

of modern times.[37] This decision resembles in various respects the legal methodology of the Mahdī. In an interview, Numayrī claimed that the application of the *sharīʿa* in the Sudan was nothing new. He was referring to the Mahdī and the Khalīfa who replaced him.[38] However, as already noted, the Mahdī's methodology seems to have had a very modest impact, if any at all, on the legal methodology of al-Turābī who played a decisive role in Numayrī's experiment of the reinstatement of the *sharīʿa*. In any case, it seems that the most important contribution of the Mahdiyya to modern Sudan lies in the fact that it laid the foundation for a national territorial state strongly tied to Islam.[39]

The policy of Islamizing the law in the Sudan is very similar—as far as style, technique, and results are concerned—to the process of reinstating Islamic law in Libya by Qadhdhāfī about ten years earlier. In Libya, too, the declared policy was to revise the statutory legislation with a view to reinstating the *sharīʿa* and eliminating statutory provisions not compatible with the *sharīʿa*. The technique of the legislation was also based mainly on the eclectic expedient (*takhayyur*). The *sharīʿa* was perceived by the legislator in terms of vague and flexible fundamentalist principles that could be easily adapted to the changing conditions of time and place. The Libyan legislation does not make use of the legal methodology of the Sanūsī, who reserved for himself the right to exercise *ijtihād*;[40] it nevertheless contains some reinterpretations of Qur'ānic verses that are technically similar to *ijtihād*. The narrow definition of the *sharīʿa* as an ethical, not legal, program in Qadhdhāfī's teachings, is intended to solve Libya's social, economic, and political problems (*sharīʿat al-mujtamaʿ*). In Libya, too, the selective incorporation of *sharʿī* norms into statutory legislation caused a deviation from and distortion of the orthodox *sharīʿa*. In Libya, as in the Sudan, the Islamist legislation was intended to insure state control over public morals through criminal sanctions. Observers hold that in Libya, too, there was a relatively modest restoration of *sharʿī* principles that undermined Western-inspired statutory legislation, and it appears that the Libyan legislator was also guided, in

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[37] Al-Mahdī, *Mustaqbal al-islām*, 382.

[38] *Al-Ṣaḥāfa*, July 5, 1984, p. 3.

[39] Al-Ḥājj, *al-Mahdiyya*, 48; Jacobs, *Islamization*, 206. For further details, see above, I.1.

[40] See Vikør, *Ijtihād*.

the policy of Islamizing the legal system, by pragmatic and economic considerations. The Libyan regime needed a fundamentalist image in order to legitimize its rule in the eyes of the masses, and as a tool for eliminating opposition. Nevertheless, in spite of this fundamentalist image, observers believe that the Libyan legal system is no more Islamic today than it was in the past. Moreover, in Libya, Islamic criminal law was never applied in practice. Finally, in Libya, too, the process of Islamization of the law eventually ceased, as occurred in the Sudan under al-Ṣādiq al-Mahdī's government in 1986–89. Moreover, steps were taken in Libya to reverse the course, such as abolishing *sharīʿa* courts and transferring their jurisdiction to national courts (which also occurred in Sudan later), and abolishing the family *waqf* and confiscating *waqf* property belonging to the Sanūsī order.[41] However, despite the great similarity between the reinstatement of the *sharīʿa* in the Sudan and in Libya, well-informed sources hold that Libya was not a source of inspiration for the Islamist legislation in the Sudan.[42]

As one might have expected, the Islamization of the legal system was supported, with various degrees of enthusiasm, by inhabitants of northern Sudan, especially in rural areas, the Muslim Brothers and some Ṣūfī groups, as well as by several *'ulamā'* from countries such as Egypt who justified the policy of Islamization as an indispensable measure for the purification and "decolonialization" of the *sharīʿa* from Western legal impact, while totally ignoring any contradiction between the *sharīʿa* and statutory legislation.[43] Apart from these, the reaction to Numayrī's policy of Islamization was not favorable. Not only liberal and leftist sections of the intelligentsia (such as judges, lawyers and other professionals), as well as the Christian and the non-Muslim southerners opposed the Islamist laws in the Sudan, but also wide Muslim circles that ostensibly should have welcomed this initiative. Among the opponents were the leader of the Anṣār,

[41] Layish, *Divorce*, 10–13 and the references to Mayer's publications mentioned in n. 32; Peters, *Islamizatioon of Criminal Law*, 255–56.

[42] Interviews with Muhamed Ibrahim Khalil and Isḥāq Idrīs Saqūṭa. Weissbrod, on the other hand, maintains that al-Turābī's model of regime intended for the Sudan was inspired by Qadhdhāfī's model of "popular democracy" introduced in Libya. He does not refer to the issue as to whether this inspiration has had any impact on the legal methodology of al-Turābī. See Weissbrod, *Turabi*, 129.

[43] El-Affendi, *Turabi's Revolution*, 123–24; Sidahmed, *Politics and Islam*, 138; Sālim, Ḥawbāt & al-Nūr, 24–25 (Ibrāhīm Ḥasan Idrīs), 34; Khālid, *al-Fajr al-kādhib*, 87; Fūda, *Qabla al-suqūṭ*, 145ff.; Amin, *ME Legal Systems*, 336.

al-Ṣādiq al-Mahdī, who was imprisoned by Numayrī, and the leader of the "Republican Brothers," Maḥmūd Muḥammad Ṭāhā, who was executed. Al-Ṣādiq al-Mahdī criticized the PC, 1983 on grounds that it violated basic freedoms and human rights and that Qur'ānic punishments should in any case be applied only "within an Islamic order which strives against crime by spiritual, moral and economic means." Ṭāhā opposed the September laws as anti-Islamic according to his modernist conception of Islam. Shaykh al-Ṭayyib, a proponent of reviving the *sharīʿa*, was executed by Numayrī because he espoused a different view regarding the manner in which the *sharīʿa* should be applied. Moreover, even *ʿulamāʾ* from Egypt, Pakistan and Jordan criticized the Sudanese style of the Islamization of the legal system though in principle they were in favor of the application of the *sharīʿa*.[44]

It is interesting to note that after the fall of Numayrī in 1985, al-Turābī criticized the policy of the Islamist legislation and its application. His criticism is both substantive and tactical. On various occasions he argued that the *sharīʿa* should have been reinstated and implemented gradually in order to facilitate its absorption, that there were so many loopholes and other defects in the Islamist statutes and their application that he considered the possibility of restoring the English legal system with a view to starting a new initiative to reinstate the *sharīʿa*. He also observed that the codes pertaining to procedure and evidence should have been based on Islamic basic principles (*uṣūl*) rather than on positive (*waḍʿiyya*) legislation. He strongly citicized the judge's right to exercise *ijtihād* in the event of a lacuna in matters relating to Qur'ānic punishments by resorting directly to the uncodified *sharīʿa*, the more so since most of the judges did not qualify for *ijtihād*. Al-Turābī claims that the draft of a penal code prepared by himself contained clear and detailed provisions of the *ḥudūd*, based exclusively on the *sharīʿa*, that were meant to guide the judges in this complicated domain, but the draft was turned down by Numayrī. Al-Turābī also criticized the execution of Maḥmūd Ṭāhā on charge of apostasy, while concealing the political background of the affair.[45]

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[44] Al-Mahdī, *al-Dīmuqrāṭiyya*, 100–01; *idem*, *al-ʿUqūbāt*, 16; Fūda, *Qabla al-suqūṭ*, 145–50; Taha, *The Second Message*, 11; An-Naʿim, *Reformation*, 32; El-Affendi, *Turabi's Revolution*, 123–24; Sidahmed, *Politics and Islam*, 138; Abdelmoula, *Ethnicity*, 51–52; Gordon, *Legal Revolution*, 803; Mayer, *Law and Religion*, 152, 178ff.; Amin, *ME Legal Systems*, 336.

[45] Al-Sharīf, *Ḥasan al-Turābī*, 71; al-Turābī, *Udīn al-ʿunf*, 24–25. See above, I.3.2, 4.2 and 4.4 and III.2.2.2.1.

2. The Impact of the Islamist Legislation on Sudan's Society and Economy

The process by which, according to Numayrī, the foundations of the Islamist state were laid, was described by the President of the Republic in his opening speech to the International Islamic Conference, held in Khartoum on September 22, 1984 to celebrate the achievements of the first year of the application of the Islamist laws.[46] Numayrī started by alluding to positive, practical reasons, which in his view justified the new laws. The rate of criminality in Sudan, prior to the establishment of the new Islamic order had risen to such an extent that all previous measures had proven ineffective. In the year 1982–83, nearly 12,500 murders or attempted murders had been recorded, while the number of thefts had risen to nearly 130,000. According to Numayrī, this record number of crimes had dropped in consequence of the implementation of PC, 1983 by over 40% in one year. He therefore concluded that the deterrent effect of the Qur'ānic punishaments and retribution had been proven beyond reasonable doubt and it was more than likely that Sudan would soon be free of crime.

But even more far-reaching was his conclusion that the essence of the application of the Islamist laws namely the creation of a righteous individual leading ultimately to a just society, as prescribed by Islam was being rapidly achieved. This notion was, as noted above, disputed by al-Ṣādiq al-Mahdī and others who opposed the application of the *ḥudūd* in an unjust society, while al-Turābī and his supporters gave it their blessing as part of an on-going educational process. Furthermore, Numayrī proudly ascribed the success of establishing an Islamic economy to the reinstatement of the *zakāt* (*sharʿī* alms tax) and to the new taxation act {"social solidarity" (*takāful ijtimāʿī*) tax}.[47] Thereafter the *zakāt* had become the "heart of the Sudan's economy" since it was one of the pillars of Islam, enabling the poor to receive their rightful share of the national income.[48] Non-Muslims were not hurt by this measure and instead of *zakāt* a similar tax was levied on them. Numayrī promised that taxes on individual income would, in future, not exceed 2.5 percent, whereas taxes on capital gains would not exceed 10 percent. As a result of these just

[46] Numayrī, *ʿĀm ʿalā taṭbīq*, 17–32; also *idem, al-Nahj al-islāmī kayfa*?; the following, unless otherwise stated, is based on the above sources.

[47] See above, IV.3.2.

[48] See above, IV.2.2.2.1.

taxes the Sudan's economy had, according to Numayrī, been able to attract massive investments both from foreign markets as well as from local private entrepreneurs.

It is difficult to verify Numayrī's claim about the decline in criminality in the Sudan in 1985. Moreover, the statistics presented by him seem irrelevant since an argument based on the crimes committed during one year can hardly be regarded as conclusive evidence one way or another. In addition, there seems to be no independent statistical evidence to corroborate this claim. If we add to this the conditions prevailing in Sudan and the ways in which the *ḥudūd* (Qur'ānic punishments) were implemented,[49] namely a state of emergency which did away with all civil rights and which granted the President of the Republic and his entourage unchallengeable powers, the alleged decline in crime seems hardly surprising. We should also bear in mind that the September laws were executed arbitrarily by specially constituted prompt justice courts [ProJCs], which, according to some experts, were neither legally constituted, nor had the necessary Islamic legal training.[50] The total number of amputations carried out from September 1983 to April 1985 ranges, according to various estimates, between 96 and 120. Fūda estimates that the number of hands cut off in the Sudan in half a year "has exceeded the number of hands that were cut off during the twenty-five years of King ʿAbd al-ʿAziz Āl Saʿūd's reign."[51]

Both the laws and their execution were, as mentioned above, regarded illegal and un-Islamic by many Muslim leaders and scholars, though most of them were reluctant to declare their views openly. Numayrī, however, had the active support of most of the Muslim Brothers' leadership, who supported him both for ideological reasons and in order to serve their own political and financial interests. He also enjoyed the support of his Ṣūfī mentors and other Ṣūfī *shaykh*s incorporated in the Islamic Revival Committee. But according to Sudanese sources, whereas Islamist laws certainly brought about a change in social habits such as drinking, they did not bring

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[49] Cf. Fūda, *Qabla al-suqūṭ*, 126ff.; above, IV.2.2.

[50] See above, III.1.1 and IV.4.1.

[51] Fūda, *Qabla al-suqūṭ*, 137. In April 1985, the new government which replaced Numayrī's regime, suspended the execution of sentences of amputations but the courts nevertheless continued to pronounce such sentences. For further details, see Peters, *Islamization of Criminal Law*, 265–68. Cf. al-Mahdī, *al-Dīmuqrāṭiyya*, 101; Zein, *Religion, Legality, and State*, 184; Mayer, *An-Naʿim*, 53; Khālid, *al-Fajr al-kādhib*, 65–66.

about "a significant decrease in crime, nor improved ethical standards. On the contrary, due to the rampant economic and social hardships and the release of seasoned criminals [. . .] armed robbery became more widespread than ever before."[52] The director of the Supreme Council for Religious Affairs and head of the Judicial Personnel attested in December 1983 that although hundreds of offenses pertaining to theft were dealt with in court, only in two cases were the sentences of amputation carried out. In the other cases the punishment was averted on grounds of doubt (*shubha*). Consequently it was asserted that the Islamist laws had failed to function as a deterrent against crime.[53]

In the economic field Numayrī's claim to success is easier to refute since the attempt to enforce an Islamic economy was a total failure with disastrous repercussions.[54] In 1983 the Sudan was just beginning to recover economically as a result of massive foreign aid and careful economic planning. The newly applied "Islamic economy" interrupted this process and brought it to a halt. The CivTA, 1984 abolished limited liability and interest charges on all transactions not involving foreign interests. Confidence in the already shaky economy was thus undermined even further. Even more disastrous was the ZakTA, 1984. As already mentioned, this statute was enacted with a view to Islamizing the taxation system by institutionalizing the charity tax and turning it into a statutory tax in both method of collection and method of distribution to the needy.[55] Consequently, revenue from previous taxation was virtually stopped while the new act was so obscure that it could not be fully implemented. The only revenue collected was the flat rate of 2.5 percent on personal incomes exceeding £S 200 (at that time US$ 154.00). *Zakāt* on agricultural production and livestock was not even implemented because of the

[52] Sidahmed, *Politics and Islam*, 139.

[53] *Al-Ṣaḥāfa*, December 11, 1983, p. 2 cols. 2–3. During the first month (May 8–25, 1984) after nine EmCCs were established, the courts issued 492 convictions on various offenses. 434 (88 percent) pertain to trade in alcoholic beverages (341 cases), drunkenness (74) and drunkenness with disturbance (19). The rest of the convictions were sexual offenses (19 cases), detestable acts (12), running of brothels (19), theft and attempted theft (6) and armed robbery (2). *al-Ṣaḥāfa*, June 9, 1984, p. 7. See also *al-Saḥāfa*, June 24, 1984, p. 1.

[54] *African Economic Development*, December 21, 1984, estimated the loss in revenue resulting from the new Islamist laws as disastrous for the ailing economy of Sudan.

[55] Cf. Mayer, *Law and Religion*, 168 and the references to the literature mentioned in fn. 87. For further details, see above, IV.2.2.2.1.

act's obscurity as mentioned above.[56] A further considerable loss in government revenue was caused by the ban on the sale of all alcoholic beverages which had been highly taxed, prior to the September laws, and had now come to a complete standstill. The final blow to the ailing economy was dealt by the Islamization of the banking system, in December 1984, which was undertaken despite repeated warnings from some of Numayrī's closest advisors. The severe economic crisis which followed the implementation of the Islamist economy was the final blow to Numayrī's regime and was, at least partly, brought about by these new economic measures. The social-economic revolution, which al-Turābī viewed as an essential element of the new Islamic order, thus failed to emerge. In his words these new Islamist laws and institutions were "to serve as examples and models of an Islamic-oriented social change."[57] In reality certain social habits, such as consumpion of alcohol, or the relations between the sexes, were certainly effected.[58] On the other hand, the Islamization of the banking system was primarily justified in the context of prohibition of *ribā* (usury). As mentioned earlier, this prohibition is anchored explicitly in the Qur'ān though it is a matter of civil, rather then penal, law. Usury is explicitly prohibited in the CivTA, 1984 but is not considered a crime under the PC, 1983. The Governor of the Bank of Sudan was ordered to eliminate usury in local and foreign banks, and to institute instead the *muḍāraba*, the *murābaḥa* and the *mushāraka*.[59] The Islamic banks were run primarily by members of the Muslim Brothers and were of great financial benefit to the future NIF[60] but not to the population which needed help. The constant rise in the cost of living, a devalued currency accompanied by rapid inflation and related hardships, prove beyond doubt that Numayrī's claims regarding success were a far cry from reality. This disastrous economic policy, combined with other unrelated factors, led to a sharp drop in Sudan's GNP which in 1984 was at its lowest level since independence. If we add to this the rocketing rate of inflation, it is self-evident that the lower classes were hardest hit. Thus on the eve of Numayrī's departure for Washington D.C., Sudan

[56] Cf. Mayer, *Law and Religion*, 166–68.
[57] Sidahmed, *Politics and Islam*, 129.
[58] See above, IV.2.2.1.1–2.
[59] For further details, see above IV.2.2.2.1 and the references to literature in the footnotes. For definitions of *muḍāraba*, *murābaḥa* and *mushāraka*, see Glossary.
[60] Cf. Ḥamdī, *al-Bunūk al-islāmiyya*, 116, 124.

was on the brink of economic collapse. By April 1985 its accumulated arrears to the International Monetary Fund alone, amounted to about US$ 130–150 billion, while its national debt stood at about US$ 13 billion.[61]

3. Epilogue

We are writing this epilogue in September 2001, more than sixteen years since President Numayrī's removal from office, and yet the Islamist laws remain on Sudan's statute books. Moreover, many of Sudan's religious and political leaders who had committed themselves to amend or abolish these laws defined by them as un-Islamic, were unwilling to do so following Numayrī's downfall, although they had the power to do so. We shall here run briefly through the relevant events and attempt to suggest some reasons which may have led to this impasse.

In the wake of Numayrī's downfall, on April 6, 1985, the Sudanese were evidently exhilarated by their newly acquired freedom. Within a few weeks after the uprising more than forty political parties were founded and announced their intention to play an active part on the political scene. Among them were the one-time leaders of the National Front who had fought against Numayrī until 1977 and had hoped to become his partners following national reconciliation. These were the Muslim Brothers, now renamed the NIF, led by Ḥasan al-Turābī, the Anṣār and the Umma party led by al-Ṣādiq al-Mahdī, and the Khatmiyya order led by Muḥammad ʿUthmān al-Mīrghanī and closely aligned with the DUP. In the general elections which took place in April 1986, the Umma party won ninety-nine seats in the newly elected parliament; they were followed by the DUP with sixty-four seats and the NIF with fifty-one seats. The remaining seats went mainly to the regional parties from the South, the Nuba Mountains and the Red Sea Hills. The Communists and the left, in general, did rather poorly.[62] They had all played a political role in the period between 1964 and 1969 and were in no small measure responsible for the failure of previous attempts to introduce democracy

[61] Sidahmed, *Politics and Islam*, 238, Ch. 6, fn. 1.

[62] Salih, *Fading Democracy*, 201–19; see also Jādīn, *Taqyīm al-tajriba al-dīmuqrāṭiyya*, 103–12.

into Sudan. It may therefore be useful to examine more closely some of their political aspirations and assess their political performance, especially with regard to the fate of the Islamist laws, in the years that followed Numayrī's departure.

Neither the transitional military government, which ruled Sudan from April 1985 for exactly one year, nor the civilian government which followed it after the April 1986 elections, came out with any clear pronouncement regarding the implementation of the Islamist laws. General ʿAbd al-Raḥmān Suwār al-Dhahab and his colleagues, who had led the Sudan during the transitional year following Numayrī's deposition, promised to deal with the ailing economy, to end civil war in the South, to reintroduce civil rights and democracy in Sudan, and to reestablish cordial relations with Libya and Ethiopia. But when asked whether the new regime would reexamine the controversial reinstatement of the *sharīʿa*, the response was either negative or evasive. According to Suwār al-Dhahab and Prime Minister al-Jizūlī Dafaʿallāh, the Islamist laws enjoyed the support of the vast majority of Sudanese and required only minor revisions. But even in this respect they shied away from intervening. They claimed that as a non-elected transitional government, they did not want to become involved in what was bound to evolve into a major political controversy. To this consideration one may add that the NIF, which was well organized and financed, had considerable influence within the Military Council and that both Suwār al-Dhahab and al-Jizūlī Dadaʿallāh were devout Muslims. The latter had even declared his support for the September 1983 laws when they were first promulgated.[63]

The democratically elected civilian government which assumed power after the April 1986 election also failed to make any far-reaching amendments to these laws. Al-Ṣādiq al-Mahdī, Sudan's newly elected Prime Minister had openly denounced the Islamist laws, yet when elected to power in 1986 he was either unwilling or unable to revise them, as he had previously promised to do. Instead their application was temporarily suspended while a revised version was being hammered out by the various contenders for power. In these circumstances the abolition of the Islamist laws, demanded by the South and by many northern Sudanese Muslims, stood little chance of being implemented.

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[63] According to one source, Suwār al-Dhahab, Bashīr Muḥammad ʿAlī, ʿAbdallāh al-Ṭāhir, and ʿAbd al-Raḥmān Faraḥ were members of a secret Muslim Brothers cell within the SDF in the late 1950s; see ʿAlī, *Azmat al-islām al-siyāsī*, 60–63.

Ḥasan al-Turābī was released from prison on April 6, 1985 and was the first political leader to meet General Suwār al-Dhahab, Sudan's temporary head of state. He was also the first to call upon his supporters to attend a mass rally in Khartoum University stadium, at which some 25,000 people showed up. Whether these were indeed Muslim Brothers, as claimed by al-Turābī, or just ordinary people lured by their suddenly regained political freedom is irrelevant. What is more important is that the Muslim Brothers' leaders, having spent only one month behind bars, were much better funded, organized and equipped, than their major contenders for power, the Umma and the DUP. Furthermore, as close collaborators with Numayrī, the Brothers had gained senior posts both in the armed forces and in various administrative and financial institutions. Unlike al-Ṣādiq al-Mahdī and Muḥammad ʿUthmān al-Mīrghanī, al-Turābī had supported Numayrī's pursuit of the Islamic path even before reconciliation had started. He had promoted the reinstatement of the *sharīʿa* in the past and continued to advocate it for the future.[64] Following his release from prison, al-Turābī was interviewed by numerous journals and newspapers and stated his views on the Islamist laws. He fully justified both the punishments and the executions carried out under the Islamist laws stating that such executions were prescribed by the Qur'ān and were consequently justified. Similarly, he approved the amputation of the hands of thieves which he viewed as an educational process. Al-Turābī also viewed the economic measures favorably since such laws as the ZakTA, 1984 had helped Sudan to advance toward a just society. His only criticism regarding the reinstatement of the *sharīʿa* was that it had not been all-embracing, since it did not include important issues such as constitutional law, especially regarding the *shūrā*. With regard to the future, al-Turābī was convinced that the power of the NIF would enable it to form a coalition with the traditional groups, namely the Khatmiyya and the Anṣār, which together constituted an absolute majority of those seeking to establish an Islamic state. Al-Turābī praised the Islamic state in Iran stating that Khumaynī led a popular Muslim revolution against imperialism and oppression and this had a great appeal for African Muslims who were equally oppressed. He dismissed the schism between the Sunna and the Shīʿa as irrelevant insofar as African Muslims or the future Islamic state were concerned. Al-Turābī insisted

[64] For details, see Sidahmed, *Politics and Islam*, 127–32; also *ibid.*, 22–29, 41–49.

that the Islamic state in Sudan would pursue its own course based on the unique conditions prevailing there. Hence, he expressed a hope that the new Islamic order which had been started under Numayrī would be pursued peacefully until the ideal Islamic state would be established. However, he was quite adamant about the NIF's insistence to resort to arms against outside interference liable to threaten the peaceful pursuit of the Islamic path. In al-Turābī's view, the Islamic state in Sudan was a reality based on popular support and hence those opposing it could only be alien forces against whom the banner of *jihād* should and would be raised.[65]

During the ensuing three years of democratic government which followed military rule, the Islamist laws though suspended remained on the statute books and provided the Sudan with a major bone of contention. Repeated attempts at mediation between al-Ṣādiq al-Mahdī and the SPLM failed as a result of the government's unwillingness to compromise on the Islamist laws, especially as long as it sought the support of the NIF. However, the SPLM's leader, Dr. John Garang, also bears part of the responsibility for this failure since he believed that he was now in a position to dictate his terms to a weakened North. Compromise became even more unlikely once the Sudan's coalition government of "National Agreement" was established in May 1988, including for the first time members of the NIF in leading government positions. Al-Turābī, was appointed both as Attorney-General and as Minister of Justice and was thus responsible for introducing a new penal code. The new code was alleged to be suitable for an ethnically heterogeneous nation and hence represented a radical departure from the September 1983 laws. Nonetheless, it satisfied the NIF's Islamist agenda in that it promised to "impose Islamic law on all the Sudan's Muslims."[66]

Sayyid Muḥammad ʿUthmān al-Mīrghanī was at this time the only leader of a major political party, who attempted to overcome the crisis between the North and the South by offering a compromise with regard to the Islamist laws. He became leader of the Khatmiyya in 1968, following the death of his father Sayyid ʿAlī al-Mīrghanī. The Khatmiyya had traditionally avoided active involvement in pol-

[65] *Al-Majalla*, April 20, 1985; *al-Waṭan al-ʿArabī*, April 26, 1985.

[66] Salih, *Fading Democracy*, 206; quoted from *al-Siyāsa*, April 8, 1988; *al-Sūdānī*, April 13 and 27, May 1 and 15, 1988; *al-Waṭan*, May 4 and 11, 1988; *al-Ayyām* and *al-Ǯarīda* May 15, 1988.

itics and had persisted in this line until the May 1969 revolution. However, under Numayrī, the late al-Sharīf Ḥusayn Yūsuf al-Hindī, a member of another leading Ṣūfī family and the leader of the DUP, founded and led the anti-Numayrī National Front while in exile. He never accepted the implementation of the Islamist laws and refused to join Numayrī even after the 1977 National Reconciliation. However, unlike the leaders of the Anṣār or the Muslim Brothers, the religious leadership of the Khatmiyya, led by al-Mīrghanī, was not involved in active opposition to Numayrī; it had remained in the Sudan, while al-Hindī and other DUP leaders had gone into exile. Furthermore, as head of the Ṣūfī "Islamic Revival Committee" founded in 1978 under Numayrī's patronage, Muḥammad ʿUthmān al-Mīrghanī lent his support to Numayrī's Islamic policy.[67] The DUP therefore suffered from a leadership crisis from which it did not recover until the 1986 elections. The Khatmiyya-DUP partnership had also been undermined during these long years of separation, with the bulk of its political leadership in exile. During these years Sayyid Muḥammad ʿUthmān al-Mīrghanī was playing an ever-increasing role in the internal politics of his country, thereby reversing previous Khatmiyya practices and moving closer to the *modus operandi* of his Anṣār rivals. He regarded the Khatmiyya and the Anṣār as the two most popular forces in the Sudan and dismissed the many smaller parties which had mushroomed after the April 1985 revolution as irrelevant. He was convinced that even the young generation would lend massive support to the Khatmiyya-oriented DUP rather than to the Muslim Brothers or the Communists. After Numayrī's downfall, al-Mīrghanī denounced Numayrī's Islamist laws as false, misleading, and unjust, and defined the latter's regime as one based on the law of the jungle. However, he expressed his conviction that under the proper religious and spiritual guidance of trained *ʿulamāʾ* and *fuqahāʾ*, this could soon be remedied. The Islamic republic he visualized in the Sudan would be based on the *shūrā* and on the true Islamic spirit of forgiveness, human kindness, and mercy. The main concern of Islam was human dignity wherein the individual's fate, his honor, and his property would be fully safeguarded.[68]

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[67] See Woodward, S*udan, 1898–1989*, 182–85.

[68] *Al-Waṭan al-ʿArabī*, April 26, 1985; *al-Muṣawwar*, April 26, 1985; among traditional Khatmiyya supporters there were many who viewed al-Mīrghanī's involvement in active politics with grave misgivings.

Of the three Muslim leaders, al-Mīrghanī took the most pragmatic and conciliatory position with regard to the conflict with the SPLA. Following the continuous failures of al-Ṣādiq al-Mahdī and his emissaries, Sayyid ʿUthmān al-Mīrghanī surprised his colleagues when he took the initiative, in November 1988, and signed a draft agreement in Addis Ababa with the SPLA leadership that called for a cease-fire, suspension of the Islamist laws, lifting of the state of emergency, and abolition of all political and military pacts with other countries. The two sides proposed that a constitutional conference should be convened in order to discuss the relationship between religion and politics, to decide how to divide the "political cake," and to work out a formula by which the national resources of the Sudan would be equitably distributed between the different regions. Al-Mīrghanī's major concession, one which al-Ṣādiq al-Mahdī had previously refused to offer, was the proposition that the Islamist laws of September 1983 would not be included in the government's platform.[69]

The NIF was quick to condemn this agreement and reiterated its former position that it would oppose any move to suspend or abolish the Islamist laws. It organized a massive rally, attended by more than 100,000 people, in order to exert pressure on the government. Al-Turābī stated that although the NIF was ready to negotiate a peaceful settlement it was against any preconditions dictated by the SPLA, such as its demand that the Islamist laws be abolished prior to the convening of a constitutional conference. When al-Ṣādiq al-Mahdī's government refused to back the agreement, the DUP retaliated by withdrawing its ministers and its support, thereby contributing, two months later, to the downfall of the third coalition since the 1986 elections. It was replaced by an all-party government in which al-Mīrghanī's proposed agreement won a majority. Hence, its endorsement by the newly formed cabinet and its ratification later by the Constituent Assembly came as no surprise.[70] It was this concession which, as expected, led to yet another government crisis since the NIF refused to accept what it viewed as an un-Islamic compromise. Moreover, the NIF conducted a personal smear campaign against Muḥammad ʿUthmān al-Mīrghanī who had been hailed, by public acclaim as the champion of peace and as the Sudan's most popular leader. It

[69] Sidahmed, *Politics and Islam*, 168–69; see also Alier, *Southern Sudan*, 283.

[70] Salih, *Fading Democracy*, 218–19, quoting from *al-Siyāsa*, July 15, 1988; March 29, 1989; *al-Waṭan al-ʿArabī*, December 2, 1988.

was probably this popularity, combined with al-Ṣādiq al-Mahdī's declining fortunes, which led to the latter's refusal to ratify the proposed peace agreement despite its approval by his new government. Thus in the months that followed, the Sudan lapsed into near anarchy with the slogan: "Peace in the South" as the common rallying cry of all those opposing al-Ṣādiq's apparent submissiveness to al-Turābī and his unwillingness to accept his government's decision.[71]

Al-Ṣādiq al-Mahdī's political performance as the Sudan's Prime Minister in the years 1986–89, cannot be reconciled with the views he had expressed previously. Even some of his close associates from within the Anṣār and the Umma were critical of his policies and accused him of having become a spokesman of the Muslim Brothers. This was especially true with regard to his adamant refusal to revoke the Islamist laws which he had previously condemned as un-Islamic. In fact, "the question of the *sharī'a*, like that of peace, had become a pawn in the struggle for power."[72] However, the lack of better-formulated alternative laws was not the real cause of failure. There were two sets of draft laws presented to the Attorney General, one by the NIF and the second by an *ad hoc* Concord Committee. The latter was composed of members of all political and religious groups and was initiated by Khālid Faraḥ, the Editor of the daily *al-Siyāsa*. It reached a consensus, after prolonged discussions, and decided to refer the controversial Qur'ānic punishments (*ḥudūd*) to the Constitutional Conference. But instead of accepting this draft as a basis for discussion, al-Ṣādiq al-Mahdī accepted the alternative draft prepared by the NIF, which had joined his Government in May 1988 on condition that its draft laws would be promulgated within two months with al-Turābī acting as both Attorney General and Minister of Justice. The NIF draft thus became the Government's Criminal Bill, 1988. It included application of all the *ḥudūd*, retaliation (*qiṣāṣ*)

[71] Al-*Muṣawwar*, December 15, 1988; March 10 and 17, 1989; *October*, March 12, 1989, April 23, 1989; it was estimated that over one million people welcomed al-Mīrghanī on his return from Adis Ababa in November 1988, in a demonstration of popular support for his peace agreement with John Garang. According to 'Alī 'Uthmān Ṭāhā, the parliamentary spokesman of the NIF, the reason for his party's opposition to the initialed agreement was its unwillingness to sign an agreement with the SPLA prior to a cease-fire.

[72] Sidahmed, *Politics and Islam*, 177–78; we would like to thank Professor Mohamed Ibrahim Khalil, a leading member of the Umma party, a former Speaker of the Sudan's Parliament and a visiting fellow at the Woodrow Wilson Center in 1989/90, for allowing us to make use of his very informative talk on this topic.

and blood money (*diya*), but "it purported to exempt the Southern regions from the application of *ḥudūd* penalties, unless the accused specifically requests their application to him."[73] The new version of the Islamist laws, presented by the NIF and supported by al-Ṣādiq al-Mahdī, was not different in essence from the previous ones but according to the NIF, non-Muslims were exempted from the application of the *ḥudūd.* Al-Ṣādiq al-Mahdī's support for this version was aimed at placating the NIF and he expressed his hope that southerners would accept a law that was not applicable to them. "Ideologically, al-Sadiq al-Mahdi found himself more at home with the NIF project than with that of the Concord Committee," which he himself had encouraged. This was also in line with al-Ṣādiq's claim that "Islam protects the rights of non-Muslims because of its inherent values of justice and respect of human dignity."[74]

When in March 1989 al-Ṣādiq al-Mahdī was finally forced to compromise with the SPLM, the initiative had already passed into the hands of the Khatmiyya leadership. An alliance of trade unions, professional associations, and sections within the army led by the Khatmiyya, presented on February 22, 1989, by way of ultimatum, a memorandum to the Council of State, clearly indicating that both the army and the civilians were losing patience with al-Ṣādiq al-Mahdī's leadership. The last attempt to save democracy, under the leadership of the "National Salvation Government," brought about the only serious attempt to deal with Sudan's real problems. On June 30, 1989, a committee of senior lawyers, including former chief justices, an ex minister of justice, and several senior advocates, presented to the Government a draft-repealing law which, if accepted, would have brought about the final abrogation of the September 1983 laws, and thus might have paved the way for peace talks with the SPLM. But it was already too late since those in the army who, not unlike the NIF, opposed this conciliatory trend and demanded the uninterrupted implementation of the Islamist laws, acted before the new policy could be implemented.[75]

The Islamist laws promulgated by Numayrī and advocated by the Muslim Brothers have thus outlived Sudan's third democratic inter-

[73] Malwal, *First Victim*, 3; see also Sidahmed, *Politics and Islam*, 180; Alier, *Southern Sudan*, 281–82.

[74] Sidahmed, *Politics and Islam*, 180–81; details of the new "Criminal Bill," are quoted by Sidahmed on p. 180.

[75] *October*, March 12, April 9 and 16, 1989; interview with Muhamed Ibrahim Khalil.

lude. With a military dictatorship guided by radical Islamic principles, the prospects for change were rather remote. The problems alluded to by al-Ṣādiq al-Mahdī as having led to Numayrī's downfall have not only remained unsolved under his own leadership, but have been exacerbated. The Sudan, on the eve of al-Bashīr's coup, on June 30, 1989, was financially, politically and morally bankrupt largely as a result of incompetent leadership, leading to political indecisiveness and duplicity. This had contributed to its inability to overcome recurrent sectarian and regional struggles for power. The Muslim Brothers, the only viable non-sectarian force, have played a divisive role in the realities of the Sudan and have been the main force barring the end of civil war. Their insistence on the creation of an Islamic state in Sudan and their adamant refusal to compromise with regard to the Islamist laws have probably been the main cause leading to al-Ṣādiq al-Mahdī's downfall and to the end of Sudan's third democratic government. Furthermore, the military regime that has ruled Sudan since 1989, seems to have been towing the Muslim Brothers' line in its Islamic policy and in its refusal to compromise with the SPLA. It is therefore hardly surprising that the coup of June 30, 1989 was carried out with the tacit agreement of the NIF, which feared that the agreement reached by al-Mīrghanī with the SPLM would undermine Sudan's Islamic character. The Umma's secretary general, 'Umar Nūr al-Dā'im, stated that if the NIF had really believed in democracy it could have forced the military after the June 1989 coup to hold new elections. But al-Turābī and his colleagues had opted for the shortcut proposed by their military allies. When asked by the interviewer whether the NIF's assumption of power was part of the resurgence of political Islam, 'Umar Nūr al-Dā'im responded that the NIF never really believed in democracy and had considered the option of armed intervention preferable.[76] In fact, al-Turābī had admitted much earlier that the exploitation of "ballot-box democracy," with its limited opportunities for the Islamist movement, was no more than an important stage toward the final goal. Whether in opposition or in government the NIF exploited

[76] Interview with Dr. 'Umar Nūr al-Dā'im, General Secretary of the Umma party, *al-Ahālī*, December 7, 1994; Nūr al-Dā'im received his doctorate in agricultural engineering in the DDR (Germany) in 1963; he served twice as Minister of Agriculture, in 1967 and 1986, and was elected to the post of General Secretary of the Umma in 1986; in 1986 he was appointed Minister of Finance. See Shāmūq, *Mu'jam al-shakhṣiyyāt*, 318.

democracy only in order to further its own goals, namely the seizure of power by whatever means available so as to establish the Islamic state.[77] The validity of the accusation against the NIF was clearly demonstrated in the "Charter of the National Democratic Rally in the Sudan" which was adopted in Khartoum by eleven political parties and by fifty-one trade unions and professional associations on October 21, 1989. By being the only party that refused to sign the Charter, the NIF clearly indicated where it stood. The first and principal concern of this document's signatories was a return to real democracy, with the active participation of all modern forces, including professional associations, in the political process. Secondly, it demanded the preservation of human rights and the "restoration of fundamental freedoms including the freedom of association, thought, creed, expression, printing, [and] movement." Thirdly, it advocated the peaceful solution of all conflicts dividing Sudanese society, thereby strengthening

> [. . .] the basis of national unity [. . .] by solving the issues of identity, development and sharing of power and wealth; and by identifying the relations between religion and state, and formulating a permanent constitution [. . . This would of course lead to the] abolition of all laws restricting freedom, and specifically the September laws of 1983.[78]

It is impossible at this stage to forecast whether or not the Muslim political forces of northern Sudan will be as willing to compromise should they ever regain power, as they were while in opposition to Bashīr's Islamist dictatorship. Their past record seems to shed some doubts on their ability or willingness to forsake their Islamic missionary goals for the sake of achieving peace and unity. Furthermore, internal divisions within the opposition tend to weaken its claim of presenting an alternative to the present regime.

The Islamist regime which has ruled Sudan since 1989 has not only refused to budge vis-à-vis the Islamist laws but has promulgated a new Islamist penal code in March 1991.[79] Executions and other punishments, prescribed by the *sharīʿa*, were reported from Khartoum and its environs as well as from Darfur, the Nuba Mountains, and

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[77] Ḥaydar, *al-Ikhwān wa'l-ʿaskar*, 192–94, 214.

[78] *Mīthāq al-Tajammuʿ al-Waṭanī*. We are grateful to Professor Khalil for giving us a copy of this document with an English translation (see Constitutions and Charters).

[79] The new penal law is closer to the uncodified *sharīʿa* than the PC, 1983; see above, II.1.2 and the sources indicated in fn. 155.

other regions of the Sudan.[80] The National Congress, the new name assumed by the NIF (Muslim Brothers), following Bashīr's coup has managed to play a dominant role in the new regime due to its political and economic superiority, on the one hand, and its ability to enlist massive support both within the SDF and the newly established Popular Defense Force, on the other. It is, however, rather doubtful whether its claim to have established a more representative and more democratic government than that of the Anṣār-Khatmiyya coalitions can be verified. This claim rests on its so-called "grassroots democracy,"[81] on its victory in the 1996 elections, on the Islamic Constitution promulgated in June 1998, following a referendum, and on its willingness, since January 1999, to allow the establishment of a multi-party system in Sudan.[82] All these statements reflect the regime's own claims and are generally rejected by the opposition.

The 1983 Islamist laws have thus survived with certain amendments the end of the millenium and are unlikely to be abolished in the near future. To abolish these laws in a country like Sudan, which is ruled by a Muslim majority and where the Mahdist heritage plays an important role, would require a different agenda. Their replacement by secular laws is likely to be condemned as anti-Islamic. Muslims constitute a majority in Sudan and the "language of Islam" is a dominant feature in their daily lives. Hence, even the vast majority of Muslims who are not radicals and many of whom were opposed to the Islamist laws when they were first implemented, are unlikely to support their suspension and replacement by secular laws, as demanded by the SPLA. Moreover, Muslims in Sudan are historically divided into political parties and religious movements or sects. An attempted compromise regarding the Islamist laws, proposed by one party, is likely to be denounced as un-Islamic by its political rivals, should elections take place. Paradoxically it would seem that only an anti-Islamist military coup could dare to undertake such a step and arrive at a settlement with the non-Muslim minority. This

[80] See, for instance, *Sudan Democratic Gazette*, No. 19 (December 1991), 6, and No. 20 (January 1992), 6, quoting from *Amnesty International Report* of December 6, 1991.

[81] For further details, see Sidahmed, *Politics & Islam*, 188–90; Esposito & Voll, *Islam and Democracy*, 98–99.

[82] "For all the pain: the election farce wins no points for the regime," *Sudan Democratic Gazette* (April 1996), 12; see also *al-Muṣawwar*, November 26, 1999, in which Ḥamdī Rizq reported on an ongoing conflict beteen al-Turābī and President Bashīr.

was indeed Numayrī's greatest achievement in 1972 when he arrived at a settlement with the South and put an end to civil war which seemed at long last to lead to peace and to a united Sudan. However, he reversed this policy within less than ten years and it is highly unlikely that Sudan's present leadership will be willing or able to undertake similar compromising policies. It is equally unlikely that an ethnically and religiously diverse state such as Sudan can survive within its present boundaries under Islamist rule.

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PC, 1983 — the Penal Code (*qānūn al-ʿuqūbāt*), 1983.
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[1] For more details on the Islamist acts, see Gordon, *Legal Revolution*, 795.

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GLOSSARY OF ARABIC LEGAL AND TECHNICAL TERMS

Note: Plural forms of nouns as keywords are given only when they appear in the study; the singular form is given in parentheses. Different meanings for one entry are separated by a semi-colon. Page numbers in bold letters indicate principal reference.

abkār al-mahdiyya the Mahdī's first adherents 1
ʿāda (pl. *ʿādāt*) custom 124, 139–41; also *ʿurf*
ādāb morals 84
ʿadāla justice 90, 103, 128, 146, 156, 197ff., 251, 257, 284; integrity, good character (required of a witness) 182, 198, 202, 219, 262; also *ʿadl*
ʿadāla fiṭriyya natural justice 92, 128, 136, 197ff.
adhan harm 111
ʿadl justice; a person of good character qualifying to serve as a witness 99, 154; also *ʿadāla*
ʿafw settlement of dispute by pardon and blood price 189
al-aḥkām al-khamsa the "scale of the five religious-legal qualifications" for conducting human acts 76, 102, 128
ahl al-dīwān soldiers belonging to the same unit 208; also *ʿāqila*
ahl al-ḥadīth lit. the "party of Tradition," the Traditionists who adhere to formal traditions of the Prophet 163
ahl al-ḥall wa'l-ʿaqd jurists authorized to issue religious-legal permissions and prohibitions 86
ahl al-raʾy lit. the "party of reasoning," jurists who adhere to legal reasoning 163
ahl al-shūrā the representatives of the *umma* 86
ahl al-ẓāhir the Ẓāhirī school, headed by Dāwūd ibn Khalaf, holds that the Qur'ān and the *ḥadīth* should be interpreted according to the literal, evident meaning of the text 163; also *ẓāhir*
ajāwīd (sg. *jawād*) lit. "generous people" who act as mediators 141
ʿalmāniyya secularism 184
ʿamal practice (of the Prophet); judicial practice (in the Mālikī school) 140, 177
ʿamd deliberate (homicide, assault) 108, 110, 122; also *qatl*
amīn trustee 187
anṣār the Mahdī's supporters, a term that originally designated those of the Prophet Muḥammad 2, 7
ʿaqārāt (sg. *ʿaqār*) immovables 101
ʿaqd (pl. *ʿuqūd*) contract 218
ʿaqīda (pl. *ʿaqāʾid*) article of faith, tenet; doctrine, dogma 185
ʿāqila the offender's or the victim's collectively responsible group based, in Mālikī law, on the respective male agnates **110**, 200 n. 172, 204, 207–8, 212, 216, 272, 282
ʿaql legal reasoning 87; also *raʾy*
ʿarab Bedouin 268
aʿrāf—see *ʿurf*
ʿaṣaba male agnates 208
aṣḥāb (sg. *ṣāḥib*) the Companions of the Prophet 95; also *ṣaḥāba*
aṣl—see *uṣūl*

aṣlaḥ li'l-muttaham lit. "more favorable for the accused," retroactive application of Islamist laws having regard to the best interest of the accused 159, 190–91, 229, 279
awlawiyya priority 127
awliyā' al-dam—see *walī al-dam*
awrāq ʿurfiyya non-official written documents 147

barā'a, barā'at al-dhimma presumption of innocence 92, 128, 156, 198
baraka divine grace; holiness, virtue as inherent spiritual power 5, 11 n. 17
bāṭil invalid; null and void (contract) 218, 245
bāṭin the inner meaning of the Qur'ān and the *ḥadīth* 82
bayʿ sale 246
al-bayʿ bi'l-taʿāṭī sale based on exchanging commodity and price 194
bayʿ bi'l-wafā' sale with the right of redemption 244
bayʿa oath of allegiance 1, 8, 40, 86
bayʿatān fī bayʿa double sale 244
bayt al-māl the Public Treasury 164
bayt al-ṭāʿa forced obedience of wife to her husband 135
bayyina proof by testimony of witnesses 113, 147, 152
bayyina munfaṣila "independent evidence" (i.e., circumstantial evidence) 157
bayyināt ẓarfiyya circumstantial evidence 153–54
bidʿa negative innovation 99
bikr virgin 112, 119, 225, 228–29, 253
birr charity 210

dā'ira Mahdist domain 10
ḍamān financial liability; guaranty; insurance applicable in private claims and road accidents 101, 206, 207
dār al-ḥarb lit. "Abode of War," a territory not ruled by Muslims or Islamic law 152 n. 33, 261
dār al-islām lit. "Abode of Islam," the territory of the Islamic state ruled by Islamic law 152 n. 33
ḍarar damage, damages 124, 212
ḍarūra (pl. *ḍarūrāt*) necessity 27, 76, 84, 88, 124, 206
daʿwa Mahdist or Islamist mission 4–5, 11, 45–46
dhikr rhythmical repetitive invocation of God's names among Ṣūfīs 5 n. 5
dhimmī protected non-Muslim subject living in a Muslim territory 256, 259–60
al-dīn al-ḥanīf the True [Islamic] Religion
diya blood money 104–7, 146, 208–10, 216, 253–54, 300
diya mughallaẓa enhanced blood money 122, 168, 207

fā'ida (pl. *fawā'id*) unlawful gain, profit; usury 202, 244–46
fakī (pl. *fuqara'*) a dialect-form of *faqīh*, religious teacher propagating Islam 9
faqīh—see *fuqahā'*
farā'iḍ (sg. *farīḍa*) the heirs' prescribed *sharʿī* shares in estate 19
farḍ ʿayn individual duty 150, 223
farḍ kifāya collective duty, the fulfilment of which excuses the other individuals from fulfilling it 150, 223
fasād corruption 188
fāsid irregular, defective (marriage, sale) 268
al-fātiḥa the title of the first chapter (*sūra*) of the Qur'ān
fatwā (pl. *fatāwā*) nonbinding legal opinion of a *muftī* 87, 96, 145, 148, 206, 237, 246, 250; also *muftī*
fiqh the science of Islamic law 80, 125
fiqh ijtihādī reopening the door of *ijtihād* (in al-Turābī's methodology) 86

al-fiqh al-uṣūlī the classical science of legal methodology 80; also *uṣūl al-fiqh*
fuqahāʾ (sg. *faqīh*) jurists, authorized exponents of the *sharīʿa* xiii, 9, 58–59, 83, 86, 97, 129, 277, 297
fuqarāʾ (sg. *faqīr*, anglicized as *fakir*) the equivalent of *darāwīsh*; the Mahdī's followers 4, 7
furūʿ (sg. *farʿ*) lit. "branches," legal rulings, *sharʿī* provisions, substantive law 80, 81, 169, 276

gharāma fine 106
gharar risk; uncertainty, speculation 209, 247, 249
ghaṣb unlawful appropriation of another person's property 114, 162, 175, 245
ghāṣib a person who commits *ghaṣb* 216
ghawth call for help (in highway robbery) 239; also *ḥirāba*
ghazw thaqāfī "cultural assault," e.g., legal colonialism 38

ḥabs imprisonment 105
ḥaḍāna custody of minor children 232
ḥadd—see *ḥudūd allāh*
ḥadīth (pl. *aḥādīth*) narrative report; a formal tradition deriving from the Prophet; a textual source of law 5–6, 19, **82**, 84, 125–26, 149–50, 161, 164, 174ff. 181–83, 186, 277, 279
ḥaḍra (pl. *ḥaḍrāt*) *nabawiyya* Prophetic colloquy, gathering; vision 3, 7–8, 71 n. 2
ḥajj the official Muslim pilgrimage to Mecca 30, 35, 235
ḥākimiyyat allāh sovereignty of God 25, 185
ḥalāl permissible act (under *sharīʿa*) 247
ḥaqq claim, right 124, 212
ḥaqq ādamī private claim (in the realm of private law) 104, 210
ḥaqq allāh (or *lillāhi*) right or claim of Allāh; crimes against religion (in the realm of public law) 104, 150, 167, 188, 210, 231
al-ḥaqq al-ʿāmm the public claim 167, 212; also *ḥaqq allāh*
ḥarām prohibited act (under *sharīʿa*) 102, 247; also *al-aḥkām al-khamsa*
ḥarbiyyūn residents of *dār al-ḥarb* 261; also *dār al-ḥarb*
hayʾa tashrīʿiyya legislature 88
hiba (pl. *hibāt*) donation, gift 145, 219
hijra the Mahdī's immigration to Jabal Qadīr in the Western Sudan; in the context of Numayrī's "return to Islam" 2, 35
ḥīla (pl. *ḥiyal*) legal device 139, 244
ḥilf oath 183; also *qasāma*
ḥirāba highway robbery 100, 105, 107, 119, 120–21, 154–55, 170–71, 176, 226, 239ff., 273; also *qaṭʿ al-ṭarīq*
ḥirz the object's being in custody, in a safe place, or under guard 119, 163, 215, 235, 236
ḥisba the institution of the inspector of the market 150–52, 266; also *muḥtasib*
ḥiyāza private possession 105, 215
ḥudūd (sg. *ḥadd*) *allāh* Qurʾānic punishments prescribed for theft, illicit intercourse, etc. 1, 19, 26, 32, 45, 53–58, 70, 76, 77, 100, 105, 113, 127, 129, 145, 153–55, 161, 164, 172–73, 181, 186, 209–10, 216, 224, 228, 237, 271, 289–93, 299–300
ḥukm (pl. *aḥkām*) rule of the Mahdī 71 n. 2; *sharʿī* rule; statutory provision; judicial rule 81, 85
al-ḥukm al-sharʿī al-maskūt (or *al-matrūk*) *ʿanhu* lit. "the *sharʿī* rule that has been disregarded," i.e., has not been codified in Islamist laws 127, 176
ḥulum puberty 173

ibāḥa a permissive approach toward human acts 92, 128, 184
ibāḥat al-ḥarām making prohibitions permissible 76

ibtizāz fleecing 114
iʿdām execution 106
ʿidda waiting period of a woman after divorce or husband's death 268
iftā' issuing of *fatwā* 87
ighātha help 240; also *ghawth; ḥirāba*
ightiṣāb rape 111, 225
iḥsān immunity (against temptations through consummation of valid marriage) 166, 171, 194, 217–18, 272; also *muḥṣan*
iḥtiyāl taking an object through fraud 114, 121
iḥyā' revival movement in Islam 2; also *tajdīd*
ijāra hiring; leasing 219
ijmāʿ consensus of the *fuqahā'* within each of the schools of law 19, 25, 55 n. 118, 71, **82–84**, 93, 127, 131, 139–42, 162, 184, 279
ijmāʿ tashrīʿī lit. "statutory consensus," consensus obtained through the process of legislation 86
ijtihād legal reasoning; independent judgment of a *qāḍī* or judge; deriving rules from the Qur'ān and the *ḥadīth* by *fuqahā'* xiii n. 5, 19, 25, 55, 78, 80 n. 36, 86, 92–94, 203
ijtihād fiqhī (pl. *ijtihādāt fiqhiyya*) legal reasoning; legal interpretation; jurisprudence by means of *ijtihād* 115, 199, 215
ikhtilāf al-fuqahā' differences of opinions between the jurists 115
ikhtilās snatching an object while its owner's attention is diverted 119, 160 n. 57, 161–65, 186–87, 236; embezzlement (in statutory provisions) 114, 160, 201
ilhām Prophetic inspiration as a source of law in the Mahdī's legal methodology 71–72, 90
ʿilla (pl. *ʿilal*) effective, efficient cause, *ratio legis*, as a basis for analogical reasoning 84, 128
ʿilm al-uṣūl science of legal methodology 80; also *uṣūl al-fiqh*
imām (pl. *a'imma*) a founder of one of the Sunnī schools of law; Shīʿī concept of the "Hidden Imām;" a prayer leader; title of Sudanese Mahdī and Numayrī 11, 31, 221–22
imāma the institution of divinely inspired descendants of the Prophet adopted by the Mahdī and his descendants, and claimed by Numayrī 11 n. 16, 12
indhārāt (sg. *indhār*) warnings issued by the Mahdī 71 n. 2
inṣāf justice, equity 136, 146, 156, 257
intifāḍa uprising 45
iqrār confession, admission, acknowledgment 147, 149, 152, 171, 233
irshād religious guidance 221
ishhād summoning witnesses to testify; attestation 148
iṣlāḥ reformist movements in Islam 79; also *tajdīd*
ʿiṣma matrimonial authority; protection of an apostate in a Muslim domain 166, 179
istibdāl al-maʿāsh commutation of pension 246–47
istiftā' request for a formal legal opinion 237; also *fatwā*
istiḥsān "approval," a discretionary opinion in breach of strict analogy for reason of public interest or convenience 19, 84, 140
istikhlāf God's appointment of a deputy on earth 25
istiʿmār qānūnī lit. "legal colonialism," the imposition of Western law and legal systems on Muslim countries 36, 40
istinbāṭ al-aḥkām deriving rules for novel legal cases 99
istiṣḥāb, a method of legal reasoning (particular to the Shāfiʿī school) 84, 88
istiṣlāḥ taking the public interest into account; utilitarian interpretation 55 n. 118, 88, 140; also *maṣlaḥa*
iʿtirāf confession 153, 233; also *iqrār*
itlāf damage resulting from road accidents 212

jāhilī a pagan of the pre-Islamic period 49
jā'iz legally permitted under the *sharī'a* 196
jald flogging 106, 138, 159
jarḥ bodily harm, injury 111, 199; also *jurḥ*
jarīma crime 107
jihād holy war 2, 6, 7, 20, 29, 58, 90, 178, 296
al-jihāz al-qaḍā'ī the Judiciary Personnel 100
jināyāt offenses creating liability for torts (a private claim for injury or damage) 104
jizya poll tax levied on non-Muslims 64
jumūd stagnation (of Islamic law) 80, 83
jurḥ (pl. *jirāḥ*) wound, injury 110, 213; also *jarḥ*

kafāla bail (for release from custody) 207
kaffāra religious expiation for a wrong action, sin or crime 109, 167, 212, 217, 229
kāfir—see *kuffār*
khafā', *khafiyyatan*, *khufyatan* secrecy; taking of property secretly (a precondition for theft entailing *ḥadd*) 119, 170, 214, 215, 235–36
khalīfat rasūl allāh successor of the Prophet Muḥammad; a title claimed by the Mahdī 2
khalsa taking an object while its owner is distracted; also *ikhtilās*, *mukhtalis*
khalwa privacy (between husband and wife, or a man and a woman) 233
khasāra losses (in joint ventures such as partnerships) 246
khaṭa' accidental (homicide, assault) 108, 109, 122
khaṭf forcible seizure 162
khayr charity 210
khibra expert's evidence 147, 218
khiyāna embezzlement of public property 119
khiyānat al-amāna breach of faith by the depository 187
khulafā' (sg. *khalīfa*) founders of branches of Ṣūfī orders 189–90; the Sudanese Mahdī's successors 2, 5, 7, 8, 11
al-khulafā' al-rāshidūn the four orthodox caliphs 2, 153
khuṭba public address given in a mosque on Fridays and festivals 54
kuffār (sg. *kāfir*) heretics, infidels, unbelievers; those who did not adhere to the Mahdiyya 3, 185
kufr unbelief, heresy 179, 185; also *kuffār*

lawth strong suspicion connecting the suspect to the homicide suffices, in the absence of eyewitnesses, to initiate the *qasāma* procedure **152**, 156, 183, 224; also *qasāma*
lāzim irrevocable 83
li'ān dissolution of the marriage through a procedure of mutual imprecation (in case the husband denies paternity but cannot prove *zinā*) **153**, 225, 231–32
liwāṭ sodomy 225

mabādi' (sg. *mabda'*) principles of law 102, 125,
al-mabādi' al-kulliyya general principles of Islamic law which may not be interpreted or altered (in Egyptian constitutional law) 102, 129
mādda fiqhiyya shar'ī material 81; also *mawādd qānūniyya*
madhāhib (sg. *madhhab*) schools of law 71, 80
madhhabiyya school affiliation 89
maḥārim (sg. *maḥram*) relatives within the forbidden degrees for marriage 106, 111, 225, 233
mahdī lit. "the rightly guided one," the name of the restorer of religion and justice expected to rule before the end of the world 2

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