# DEVELOPMENT AND FUTURE OF ENGLISH LAW AND ISLAMIC LAW IN THE SUDAN

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# DEDICATION

Dedicated in gratitude and affection to my mother, the late Amnah, and my father, the late Ibrahim Elkhalifa, and to my wife Sumaia Abu Kashawa, my son Ibrahim, and my daughter Atika.

## ABSTRACT

This thesis addresses The Development and The Future of English and Islamic Law within the given historical, political, social and legal context of the Sudan. In so doing it uses a comparative methodology.

Part I highlights the genesis and the development of Islamic Law in the Sudan over three centuries. Emphasis is on the legal aspect of this long history, though other relevant factors are highlighted as well. The characteristics of this era are significant in understanding later developments of both English and Islamic Law as well as their future in the Sudan.

Part II focuses on the factors that were conductive to the development of English Law from 1899 to 1956. It examines how the British investment in English legal education, legal training, dissemination of English language and different aspects of the Sudanese public life created a factor of unexpressed consciousness of legal training and affinity which led to the ultimate adoption of English Law and the assimilation of the Sudan into the English legal heritage.

Part III presents how the generation of the Sudanese lawyers who were reared in the colonial era enhanced the development of English Law after the independence. Their methodology of adopting and not adapting English Law is thoroughly examined.

Part IV analytically follows the judicial and legislative evolution of law in the Sudan which posed serious challenges to the development and future of English Law in the Sudan. Instances of radical departure from the course of English Law are outlined in details. The reception and the rejection of the 1971 Civil Code are fully discussed. The forces behind the Islamization of laws in 1983 and the impact of such laws on the legal development in the Sudan, besides the drafting problems and other flaws respecting these laws are well examined in this part.

Part V addresses the various historical, legal, political and cultural factors that influence the future of both English and Islamic Law in the Sudan, along with the thesis author's conclusion as to where the law in the Sudan shall embark and why the future in the Sudan is for Islamic Law and not English Law.

# RESUME

Cette thèse traite du développement et de l'avenir de la loi anglaise et islamique dans le contexte historique, politique, social et légal du Soudan. Pour se faire, elle utilise une méthodologie comparative.

La partie I souligne l'origine et le développement de la loi islamique au Soudan sur une période de trois siècles. L'emphase porte sur l'aspect légal de cette longue histoire, bien que d'autres facteurs significatifs soient également mentionnés. Les caractéristiques de cette période sont nécessaires afin de comprendre le développement ultérieur de la loi anglaise et islamique ainsi que leur avenir au Soudan.

La partie II traite des facteurs qui ont mené au développement de la loi anglaise de 1899 à 1956. Elle analyse la façon dont l'investissement britanique dans l'éducation et la formation juridiques anglaises, et dans la dissémination de la langue anglaise, ainsi que les différent aspects de la vie publique soudanaise ont créé une certaine affinité dans les milieux juridiques soudanais avec la loi anglaise; ce qui a abouti à son adoption ultime et à l'assimilation du Soudan dans l'héritage juridique anglais.

La partie III présente la façon dont les générations d'avocats soudanais, formés au cours de la période de colonisation, ont participé au développement de la loi anglaise après l'indépendance. Leur méthodologie dans l'adoption et l'adaptation de la loi anglaise est analysée entièrement.

La partie IV examine de façon analytique l'évolution juridique et législative de la loi au Soudan qui a posé de sérieux problèmes au développement et au futur de la loi anglaise dans ce pays. Des exemples de retrait radical du cours de la loi anglaise sont étudiés à fond. L'acceptation et le rejet du Code Civil de 1971 font l'objet d'une analyse. Cette partie renferme une étude des forces derrière l'islamisation des lois en 1983 et de l'impact de telles lois sur le développement juridique au Soudan, en outre du problème de rédaction ainsi que des autres imperfections concernant ces lois.

La partie V touche aux différent facteurs historiques, juridiques, politiques et culturels qui influencent l'avenir de la loi anglaise et islamique au Soudan; en plus de la conclusion de l'auteur sur la thèse en ce qui a trait à la direction que prendra la loi au Soudan et à la raison pour laquelle l'avenir du Soudan est favorable à la loi islamique et non pas à la loi anglaise.

# PREFACE

I had the theme of this thesis in mind since I was a law student at the University of Khartoum in 1970's. Fortunately it is a lifelong dream that has come true. It feels good that I have been able to accomplish with the help of God what I have always hoped to do. This thesis critically examines the development and future of English Law and Islamic Law in the Sudan. Little research has been done to cover this area, and as such, it offered formidable challenges. This work is intended to stimulate lawyers, even if they do not accept the thesis' premises and conclusion. There has always been lack of scholarship and basic misconceptions on the part of western scholars as far as Islamic Law is concerned. It is sad that the law of one billion people around the world is plagued by distortion and apathy on the part of western lawyers, who, nevertheless, have shown interesting and fascinating abilities in scholarly studies in other similar areas. It is their lack of knowledge of the development and future of English Law and Islamic Law in the Sudan that warrants the choice of this thesis. In addition, it provides a particular challenge to scholars and students of comparative law. Islamic Law did not secure sufficient attention from western comparative lawyers, scholars and students, despite the fact that it is a living law and is a major world legal system. Of all the disciplines that can be used in the West to study Islam and the Sudan, law seems the most difficult to use meaningfully simply because it is so much engraved in western values. However, only the diligent study of Islamic Law can forward a better understanding of the development and future of English Law in the Sudan. The constant exchange of ideas and experiences will gradually broaden everyone's vision. This thesis is also a serious attempt to understand the forces which have motivated the reception, and development of English Law and Islamic Law in the Sudan. Law in the Sudan is a product of many influences, it is very much relevant to the historical, political and social development of the country itself. Any attempt to understand the topic of this thesis outside this context is futile. If one is to comprehend the prospects of the future of English Law and Islamic Law in the Sudan, one must understand how these legal systems came to be, and how they developed within the given historical, political, social and legal context of the Sudan. A poor knowledge of this background would make it very difficult to appreciate the purpose and content of

this thesis.

This thesis is not meant to be an extravagant and exotic academic pursuit. It is intended to address a current and timely issue in the Sudan which shall remain the focal point for the rulers and the ruled until it is finally settled.

To the best of my knowledge, the topic of this thesis has never been addressed in this elaborate manner. This I humbly claim as my contribution to original knowledge. Instances are numerous when the development of English Law in the Sudan was discussed. On rare occasions the development of Islamic Law has been discussed. Again, my contribution to original knowledge is manifest in the critical analysis of some judicial decisions based on English Law and the highlight of the probable Islamic Law solutions to such decisions. Part V on the prospects of the future of English Law and Islamic Law in the Sudan is substantially the author's contribution to original knowledge. Suffice it to state, at least, that it is a contribution to original knowledge simply to present this comparative study, to the Sudanese legal profession and the western comparative law scholars and students, in the hope of bringing the two worlds together.

Lack of significant material written in English regarding the development of Islamic Law in the Sudan, and the translation from Arabic to English rendered this research effort exceedingly difficult.

Lastly, this thesis is intended to provoke its audience to reconsider stereotypes and rethink whatever literature is available on the topic or at least put the subject in a more objective perspective. It may as well dispel some of the obsessions with English Law.

Whatever errors contained in this thesis are mine. All the merit it may have is due to Allah, the Bestower.

# ACKNOWLEDGEMENT

It is a pleasure to acknowledge those who have helped me to bring this thesis to its present form.

I am particularly indebted to my wife Sumaia Abu Kashawa whose patience, concern and full support made it easy for me to complete this thesis through. She stood beside me through thick and thin. At times, when I desperately needed the moral support, she was right there to give it in a self denying way that is so rare these days. I am also indebted to my son Ibrahim and my daughter Atika. With them it was a major operation to write this thesis; without them it could have been an impossible task. Their purity and sweetness were abundantly inspiring.

I hasten to acknowledge with gratitude the moral support, encouragement and the invaluable supervision by Professor M.A. Bradley. He corrected the draft of this thesis in an untiring manner and with enthusiasm. His academic remarks, liberal approach and rich experience were a great help to me. With his friendly attitude and sense of humour, I developed a greater liking for the laborious research work that was required for this thesis. His concern has gone well beyond the dictates of academic obligations.

Thanks are due to Mrs. Bradley for helping read her husband's handwriting for me when he was away.

I am also indebted to Professor Brierley, the previous Dean of the Law Faculty, McGill University. His book 'Major Legal Systems' triggered a dormant idea of writing this thesis. I commented on certain parts of his text book, I sat with him on occasions and found him an open minded professional. His remarks were positive and encouraging.

Thanks are due to the staff of the Law Library at McGill University and the Institute of Islamic Studies, for their help and co-operation.

I am deeply indebted to Mohamed Masaud who sacrificed valuable time to help put this thesis in order. His invaluable help is very much appreciated.

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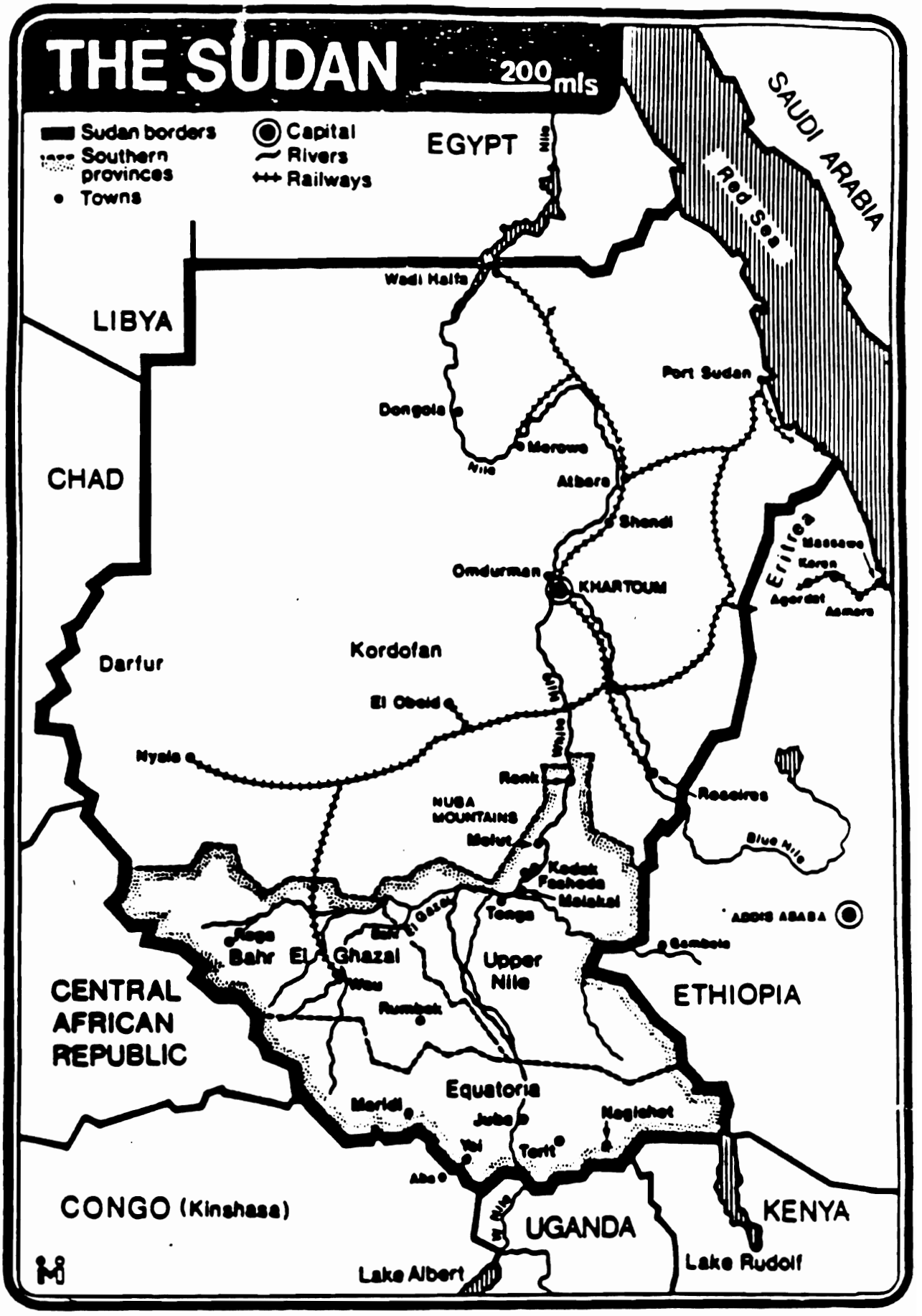
I reserve a word of appreciation to McGill, this Great University that can pride itself, among other things, on its freedom of academic research, for making it possible to carry on my research and complete this thesis, by the Grace of Allah.


THE SUDAN
200 mls
Sudan borders
Southern provinces
Towns
Capital
Rivers
Railways
EGYPT
SAUDI ARABIA
Red Sea
Nile
Wadi Halfa
LIBYA
Port Sudan
Dongola
Merowe
CHAD
Atbara
Shendi
Eritrea
Massawa
Keren
Agordat
Asmara
Omdurman
KHARTOUM
Kordofan
Darfur
El Obeid
White Nile
Nyala
Renk
NUBA MOUNTAINS
Malut
Roseires
Blue Nile
Kadok
Feshoda
Malakal
Tonga
ADDIS ABABA
Sobat
Bahr El Ghazal
Upper Nile
CENTRAL AFRICAN REPUBLIC
ETHIOPIA
Rumbek
Equatoria
Meridi
Juba
Nagichot
Yei
Torit
Aba
CONGO (Kinshasa)
UGANDA
KENYA
Lake Albert
Lake Rudolf

# PART I

# THE GENESIS AND DEVELOPMENT OF ISLAMIC LAW IN THE SUDAN

# Chapter 1

## HISTORICAL BACKGROUND

It is not overstating the case to say that a proper understanding of the development and future of English Law and Islamic Law in the Sudan is assisted by a general knowledge of the basic features of the country itself. The subject can only be intelligible within its historical context.

**Section A:-**

**Sudan: The Land and the People:-**

The Sudan is a recent creation of the 19th. Century; before that the Arabic word 'Sudan' was used to denote black or dark-skinned peoples in general. Geographically, the Arabic name "Bilad as-Sudan", the land of the Blacks, was used to signify all sub-saharan Africa extending from the Red Sea to the Atlantic Ocean, an area inhabited by the dark-skinned peoples.[1]

Contemporary Sudan occupies the middle reaches of the River Nile and borders Egypt on the North; Libya, Chad and Central Africa on the West; Zaire, Uganda and Kenya on the South; Ethiopia and the Red Sea on the East. The Sudan is the largest African country, it covers nearly one million square miles, an area as vast as that of Britain, France, Sweden, Norway, Denmark, Belgium, Spain and Portugal.[2]

Obviously, a country as vast as this is a mosaic of different races. Its composition is multi-pigmentational.

**Section B:-**

**Culture, Language and Religion:-**

The spread and development of Islam, which is a culturally uniting factor, made the Sudan a culturally homogeneous unit.[3] The sense of belonging to one entity called the Sudan has grown increasingly over the last two centuries.

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[1] Yusuf Fadl Hasan, "Sudan in Africa". Kh. U. Press, The Democ. Repub. of the Sud., Oct., 1971, p.1.

[2] Ash - Shatir Busaily Abdul Jalil, "Sudanese Historical Studies; Milestones in the History of the Nile Valley Sudan from the 10th. Century to the 19th. Century." 1st.ed., Arabic Text, Abu Fadil Press, Cairo, 1955, p.3

[3] Mudathir Abdal-Rahim, "Imperialism and Nationalism in the Sudan, A Study in the Constitutional and Political Development 1899-1956". Oxf. at Clarendon Press, 1969, p.3.

The total population of the Sudan is nearly twenty million, with over half of this population speaking Arabic as their mother tongue while the majority of the rest use Arabic or its pidgin form as a "lingua franca".[4] The English language maintains an important place among the Sudanese intelligentsia.

The Sudanese people are mostly Muslims, but there is a small minority of Christians in the South and some originally of foreign origin in the major towns.[5] The last two are estimated to be four percent.[6]

The North differs from the South in that it is predominantly Muslim and Arab, while the South is mainly "pagan" and only to a much lesser degree either Muslim or Christian. Trends to Islamize the pagans of the Southern Region were restrained during the Anglo-Egyptian Condominium when American and European missionaries effected a limited Christianization of the Southern Region of the Sudan.[7] This policy assumed monopolistic dimensions. Islam was deliberately kept out, even to the extent of prohibiting Muslim names or Muslim dress among the Southern population. The British Administrators and Christian missionaries were the instruments of this cultural disintegration campaign. However, the feud between educated Southerners and the central government has always been political and not religious.

The Muslim penetration of the Sudan started in the 7th. Century at a time when Christianity had taken root in the upper part of the Sudan known as Upper Nubia and in the middle part known as Lower Nubia. Christianity was a state religion embraced by the Monarchs and Nobles of the Upper and Lower Nubia; this fact restrained the popularity of Sudanese Christianity, which failed to respond to the challenge of the penetrating Muslim people and the vigorous Islamic state on the northern borders (Egypt).[8] The Church remained exotic and was never indigenous in the way Islam is today. The liturgy was in Greek, a language never spoken by the people; that foreign language

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[4] Loc. cit.

[5] Dr. C. d'oliver Farran, "Marriage and Divorce in the Law of the Sudan." S.L.J.R., (The Sudan Law Journal and Reports), The Judic., Kh. 1957, p.147.

[6] Harold D. Nelson, et.al, "Area Handbook for the Democratic Republic of the Sudan." 1973, ch.6, p.109.

[7] P.M. Holt and M.W. Daly, "The History of the Sudan from the Coming of Islam to the Present Day." Wiedenfield and Nicolson, Lond., 3rd.ed., 1979, p. 3.

[8] J. Spencer Trimingham, "Islam in the Sudan". Geoffrey Cumbr. Oxf. Univ. Press, Lond. N.Y. Toro., 1949, p.78.

and the foreign Church hierarchy failed completely to exert any effective influence on the common people. This pushed spiritual life to a very low ebb,[9] and the Christian Nubia ultimately succumbed to gradual erosion and infiltration, rather than to organized military invasion.[10]

On the other hand, through intermarriage and interaction between the Arabs and indigenous inhabitants, Hamites and Negroids, Islam emerged as the popular religion in the Sudan.[11] This process of Islamization developed gradually and peacefully, without any official missionary support. It spread through the zeal, efforts and example of some pious Muslim individuals who settled in different centres of the Sudan. They established Islamic educational institutes to teach, inter alia, Islamic Law, which was a basic and major constituent of their curriculum. The Maliki school of fiqh[12] reigned supreme during this era.

**Section C:-**

**Legal History**

The 15th. Century witnessed the establishment of a variety of Shaykhdoms and Imarates and an increase in the influence of the Islamic Law teachers and sufis.

The first Islamic state to be established was Sinnar, which attracted Muslim Scholars from different parts of the Islamic world to enrich the then cultural and social life of the Sudanese people. Islam was applied in all walks of life. The Sudanese jurists of that era graduated from Al-Azhar of Cairo, and were experts in extracting rules from the glosses, compendiums and commentaries of the Maliki school of fiqh.

The decay and fall of the Sinnar Sultanate in the 18th. Century opened the way for rule by the Turks, who brought scholars representing the four schools of Islamic fiqh with them. The Law teachers oligarchized Islamic Law and identified themselves with the ruling authority. This left the people under the exclusive influence of the sufis. Towards the end of Turkish rule, Islamic Law was

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[9] Ibid at 76, 77.

[10] P.M. Holt and M.W. Daly, op. cit. , p.15

[11] Yusuf Fadl Hasan, op. cit. , p.75

[12] Professor Osman Sayed Ahmed, et.al, "Islam in the Sudan, A Study in the Make-up of the Sudanese Identity." 1st. Int. Conf. on the Implem of Shariah in the Sud., Supr. Coun. for Relig. Aff. & Islamic Trust, Waqf, The Democ. Repub. of the Sud. 1984, p.4.

not applied in its entirety; this fact caused discontent and paved the way for the rise of a people's revolution under the banner of the Mahdi. His raison d'ètre was to establish an Islamic state following the example of the first state of Medina, in a conscious tendency to re-enact the prophet Mohamed's model. Islamic Law was applied in toto, and the Sudan experienced being a political entity under the rule of indigenous leadership for thirteen years.

By the year 1899, Sudan was again subject to alien rule (Anglo-Egyptian) known as the Condominium, and remained under that rule until January 1956, the year of independence. Islamic Law during this colonial era was confined to personal matters. That was a colonial policy. English Law was adopted as being synonymous to justice, equity and good conscience. English Statutes were closely followed in most of the cases and enactments were passed modelled on their English counterparts.

After independence, the laws and the judicial structure remained the same except for some minor modifications. However, there has always been concern about the cultural integrity of the Sudan and opposition to alien English Law.

The first radical departure from English Law was the 1971 adoption of a code based upon the Egyptian Civil Code. This was a hasty action prompted by political motives that polarized the legal profession in the Sudan. Adopted in haste, this was summarily dispensed with in 1973 and a return to a modified form of English Law took place in that year. This in turn was replaced by Islamic Law as a territorial law in 1983. This was a total departure from English Law.

The striking feature of the legal structure throughout the Anglo-Egyptian rule, Condominium, and the post independence era was legal pluralism. The primary sources of law were Islamic Law, Customary Law and English Law as a general territorial law. Islamic Law was confined to personal matters. English Law was received through legislation and judge made law.

This is a brief review of the land and the people of the Sudan and a background to its legal history. Relevant parts of this legal history will be dealt with in the various chapters of this thesis.

## Chapter 2

# THE GENESIS OF ISLAMIC LAW IN THE SINNAR SULTANATE

## 1504 - 1821

Before the 16th. Century the concept of a national state was non-existent. A few Shaykhdoms developed in the Sudan and applied Customary Law and a very rudimentary form of Islamic Law. There were no judges or a judicial machinery. The Shaykh was the arbitrator. Arbitration was an uncontested procedure to settle disputes. The Shaykh combined judicial and executive powers and had to be to some extent versed in Islamic Law and learned in Customary Law.

During the 16th. Century, an alliance between the Funj chief and the Shaykhdom of Abdallab (attributed to its founder, a certain Abdallah Jama) contributed to the establishment of the Sinnar Sultanate. Because of the ignorance of the people and lack of learned men, Islamic Law was not strictly observed at the beginning of Sinnar Sultanate. It was said that a man would divorce his wife and she would remary the same day, without going through a three month probation period, Idda,[13] as prescribed by the Qur'an[14] and as an established fiqh rule. Some learned scholars, primarily Islamic Law teachers from Baghdad, Egypt and Morocco enlightened the people of Sinnar Sultanate, taught them rules of Islamic Law[15] and endeavoured to bring their tribal usages and customs into conformity with the Shariah. Such scholars were referred to as 'Fakis', a colloquial term derived from the classical Arabic "Fuqaha", meaning jurists, a term which was attached indiscriminately to those men who played leading roles in moulding Sudanese life and who had a distinctive legal, social and political influence over the society.[16] They used to teach people, supervise marriage ceremonies and funerals and assume the role of judges to settle disputes.

By and large, at this time, intellectual activity throughout most of the Islamic world was at a low ebb and Islamic Law revolved around the different schools of fiqh each of which carried the

[13] Mohamed Dayf Allah, "Kitab at-Tabaqat." with a commentry by Ibrahim Ahmed Siddiq, Arabic Text, 1929; reprinted. Al-Maktabatul-Thaqafiah, Beirut, Lebanon, undated, p.5.

[14] This probation period is to check whether a marriage conditionally dissolved is likely to result in issue or not; it also checks hasty decisions by the divorced woman and keeps the door open for reconciliation; see A. Yusuf Ali, "The Holy Qur'an; Text, Translation and Commentary". Amana Corp. 1983, p.90.

[15] Yusuf Fadl Hasan, op. cit. , p.76.

[16] P.M. Holt, M.W. Daly, op. cit. , pp.33, 34.

name of its founder jurist. Given such a fact, it is hardly surprising that these scholars brought with them and introduced the part of Islamic Law that they knew and the school of fiqh with which they identified themselves, viz, the Maliki school of fiqh.[17] There was a sharp drop in critical intellectual activity and these jurists confined themselves to the glosses, compendiums and commentaries of the Maliki school of fiqh.[18] Two standard text books, 'ar-Risalah' of Abi' Zayd al-Qayrawani, a Muslim faqih who died in 996 (Hijra) and 'al-Mukhtasar' of Khalil Ibn Ishag who died in 1365 (Hijra), a compendia of Islamic Law according to the Maliki school of fiqh became the staple of legal education in the Sudan.[19]

The second half of the 16th. Century was marked by the beginning of a formal reception of Islamic Law in Sinnar Sultanate, when four judges were officially appointed, each with a territorial jurisdiction.[20] The most outstanding of these four judges followed the Shafii school of fiqh; despite his different approach he was very popular and best known as 'Qadil ad-dalah', the judge of justice. Upon their appointment, these judges were instructed to adhere to the Qur'an and Sunnah (precept of prophet Mohamed) when they dispensed justice.

This official establishment co-existed side by side with the simple judicial mechanism in the Sinnar Sultanate. It consisted of the fuqaha, scholars who were well versed in Islamic Law. They were a very significant factor in settling disputes in remote areas outside the jurisdiction of the officially appointed judges. Usually their decisions would bind the parties who consented to consult them, but if for any reason either party to the dispute was dissatisfied with the decision of the fuqaha, he could ignore such a decision and take his case to an officially appointed judge. The opinions of the fuqaha were respected, and observed more often than not. Some people would seek such an opinion on a purely hypothetical issue.[21]

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[17] The founder of this school was Malik Ibn Anas the faqih of Medinah (93-179 Hijra) approximately (712-798 A.C.) who adamantly refused to impose his contribution collected in a text book best known as "Al-Muwatta" on the Muslims of his time.

[18] Professor Yusuf Fadl Hasan, et.al, "Some Milestones of the History of Islam in the Sudan." The Islamic conf. in the Sud., Islamic Thought and Culture Assoc., Arabic Text; Al-Fikr Printing, Publication and Distribution Service, Kh., 1982, p.48.

[19] P.M. Holt, "A Modern History of the Sudan from the Funj Sultanate to the Present Day". Weidenfeld and Nicolson Asia-Africa Series, 1961, p.29.

[20] Mohamed Dayf Allah op. cit. , p.90.

[21] Mohamed Ibrahim Khalil, "The Legal System of the Sudan". the Int. & Comp. and L.Q. Vol.20, the Brit. Inst. of Int. and Comp. L., 1971, p.626.

Some of the fuqaha would go beyond declaring their opinions, and would pass a sentence and execute the judgement. The best example was the case of one lady who came to a certain Shaykh Hamad Al-Mashiakhi and complained that another woman defamed and accused her of being morally loose. The Shaykh found the accused lady guilty of unsupported slanderous accusation of unchastity, qadhf, and sentenced her to eighty lashes. The judgement was executed by some of his followers.[22]

Indigenous customs were already giving way to Islamic Law. The officially appointed judges and the fuqaha took positive regulatory actions against those customs and never hesitated to reject any custom which they deemed repugnant to and inconsistent with established rules of Islamic Law. A very controversial issue that sparked a heated debate among both the fuqaha and the officially appointed judges was the question of whether it was Islamically lawful to smoke; the issue was referred to Al-Azhar in Cairo for a conclusive opinion.

**Section A:-**

**Judicial Organization in Sinnar Sultanate**

The judicial organization in Sinnar Sultanate developed to a sophisticated form when a Supreme Court was established under the supervision of the all-Sinnar Judge, appointed by the Sultan. Under this Supreme Court there were many minor courts, each one administered by one judge and sometimes more.

A more simple form of settling disputes was known as the ''Bright Shariah Judiciary''. It was an informal establishment. Usually the parties to a dispute would agree to resort to any learned man to settle their dispute. The whole procedure would be verbal, and if either party was unhappy with the decree, the learned man would enter his finding and pass a sentence in a written form to be submitted by the contesting party to the officially appointed judge under whose jurisdiction the case might fall. The judge would uphold the ruling whenever it conformed with Islamic Law and when upheld, the ruling would become enforceable. This can be assimilated to appeal and cassation.[23]

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[22] Mohamed Dayf Allah, op. cit. , p.68.

[23] H.S.A. Al-Mufti, ''Development of the Judicial System in the Sudan,'' Pt. 1, 1st. ed. Tamadun Press, Kh., Arabic Text, 1959, p.18.

Usually this informal method of settling disputes was used in remote areas where officially appointed judges were not available.

A third procedure to settle disputes was mediation. The mediators were often a group of elderly people known as the "a jaweed", who had a wide jurisdiction from rather petty disputes to murder cases, provided that the parties would consent to their decrees. Especially in serious offences such as murder, if the mediators failed to acquit the accused, or convicted him and passed a 'dyiah'[24] sentence, then the case should be submitted to the all-Sinnar Supreme Court that had original jurisdiction to look into such cases according to the rules and procedure of Islamic Law.

A judicial system based on Islamic Law started to evolve in the Sinnar Sultanate. A judge of the Supreme Court had deputies who formed part of the court. This Supreme Court judge would examine the plaintiff, his witnesses and the defendant and his witnesses or the complainant, accused and witnesses as the case might be; examination by any of the deputies would be through the presiding judge. Written records were maintained by a court clerk. Any judgement had to be supported by reference to and citations from Islamic Law. The winning party to the suit or case would keep the only available copy of the judgement for the purpose of executing the decree. Usually there was no filing system in the court.[25] A judgement would be executed immediately after passing the sentence, but capital punishment could only be inflicted by the ruler.

There was a simple system of advocacy in the court of the 'Manjil', the ruler of the Abdallab. The complainant and accused would each choose his own advocate from amongst the people present, the advocates would submit their verbal pleadings each on behalf of the party they represented, the ruler and supreme judicial authority would listen attentively and then pass his unappealable judgement.[26] If someone other than the Sultan was sitting in such a court, then his

[24] 'Dyiah' is a fusion of punishment and compensation. It is blood money to be paid by accused to the family of deceased in unintentional and mistaken killing, (culpable homicide not amounting to murder), and all injuries. In pre-meditated and intentional murder it is subject to the forgiveness of the deceased's family and their consent to release accused upon payment of 'Dyiah'. It is a Qur'anic rule that helps settle blood feuds; confines ill feelings and bitterness; encourages and fosters tolerance and forgiveness; saves the accused from the death sentence in murder cases; and serves a host of other social and personal purposes which go beyond the topic of this thesis.

[25] H.S.A. Al-Mufti, op. cit. , p.28.

[26] Mekki Shibaykah, "History of the Nations of the Nile Valley, Egypt and the Sudan in the 19th. Century", 'Arabic Text', Thaqafa Press Services, Beirut, 1965, p.322; R.S.O'Fahey and J.L. Spaulding, "Kingdoms of the Sudan". Methuen and Co. Ltd. Lond., 1974, pp. 51, 52.

decision would be appealable to the court of justice presided over by the Sultan.

The pleadings were in public and jurists and learned men were entitled to attend the court and object to any irregularity or a point of law.[27] If the judge was not convinced, he would refer the controversial issue to a jurist in Egypt for a conclusive opinion. Imam Ajhouri of Al-Azhar was frequently referred to for a conclusive opinion.[28] He was the law teacher for most of the jurists of Sinnar Sultanate.

The Sultan was in charge of the administration of justice and would sometimes personally sit in a court of justice in cases of gross injustice and sometimes delegate his power to one of the judges to consider such a case.[29]

The minor courts would try petty cases; agricultural disputes and civil suits and questions of marriage, divorce, succession, gifts, custody and trust, 'Waqf'. Their procedure was similar to that of the major courts in that they were verbal and only the judgements were reduced to a written form[30] and were subject to appeal. Contempt of court was punished at all judicial levels.

The fiscal regulations were drawn according to the rules of Islamic Law. Zakat was collected and distributed in accordance with Islamic Law. Liquor was prohibited throughout the Sinnar Sultanate.

**Section B:-**

**Characteristics Of The Sinnar Era**

By and large the Sinnar era was characterized by the following:-

a) The polarization of the schools of Islamic Law, as each jurist would echo Islamic Law according to the school he followed, but in most areas the Maliki school as embodied in the 'Mukhtasar', compendium, of Khalil and the 'Risalah' of Abi Zayed reigned supreme. Qur'an

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[27] Notice the striking similarity between such a proceeding and Rule 13.2 of the Ontario Rules of Civil Procedure 1984, which provides that, "any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument."

[28] H.S.A. Al-Mufti, op. cit. , p.31.

[29] Dr. Mekki Shibaykah, "The Sudan Through the Centuries." Arabic Text, The Culture Printing Service, Beirut, 1965, p. 68.

[30] H.S.A. Al-Mufti, op. cit. , pp. 35-37.

and Sunnah were neglected by most of the jurists of Sinnar Sultanate.

b) A profound knowledge of Islamic Law and general enlightment were lacking because of the general backwardness and impact of non-Islamic social usages and superstitions.

c) There was a very close link between the Sudanese fuqaha, jurists, and those of the Cairo Azhar, whose opinions were taken for granted and would settle all legal disputes.[31] The number of Sudanese Islamic Law students at Al-Azhar was so large that they had what was known as the Sinnar cloister.

d) Despite the influential role of the fuqaha, some customs and social usages, especially in remote areas, survived all efforts to dispense with them.

e) The establishment of an Islamic state in the heart of Africa attracted some sufis who dominated Sudanese life.[32] Some sufis at times ignored Islamic Law, and that earned them the wrath of the legal establishment whose objective was to maintain uniformity in public morality. The best example was the case of a certain sufi, Shaykh Al-Hamim, who married more than four wives, two of whom were sisters. Dushayn, known as the judge of justice strongly objected to this gross violation of Islamic Law and rendered such marriages void.

f) The Sinnar era, albeit naive, was a significant milestone in the process of the reception of Islamic Law in the Sudan at the beginning of the 16th. Century, and can be described as a formative era.

g) The fuqaha were very influential and were allowed access to the Sultan's court. They could always intercede with the Sultan. Some of them were Sudanese men who received their training within the Sinnar Sultanate. These fuqaha endeavoured to bring social usages and customs into conformity with Islamic Law.

h) Education was geared towards the study of Islamic Law, which, it was firmly believed, was the only subject of true learning.

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[31] Zaki Mustafa Abdel Majid, "The Sudanese Civil Law, its History and Characteristics". Arabic Text, Inst. of Research and Arabic stud., Cairo, 1968, p.5.

[32] Dr. Mekki Shibaykah, "ACompendium of the Recent History of the Sudan". Arabic Text, The Inst. of Advanced Arabic Stud., Cairo, 1963, p. 6.

## Chapter 3

# THE RECEPTION OF ISLAMIC LAW IN DAR FUR SULTANATE

## 1596 - 1916

The Sultanate of Dar Fur as well as the Sinnar Sultanate did not have rigidly defined boundaries, but each was centred in a heartland.[33]

Dar Fur Sultanate gained momentum and was at the height of its powers when the Sinnar Sultanate was declining.

Although Islam entered Dar Fur in the Western part of the Sudan, as early as the 13th. Century, it was only in the reign of Sulaiman Solong (1596-1637) that Islamic Law was received and that Islam became officially the religion of the Sultanate. Before that the Law of the Daali reigned supreme.

All the Sultans of Dar Fur from 1596 to 1916 had deep respect for the teachings of Islam and Islamic Law; they applied the latter in their courts and encouraged its study.[34]

The Sultan in Dar Fur was responsible for the administration of justice, and would sometimes personally consider serious offences and important litigation. There was no official post for a Mufti, juris consult, and it was left to every individual citizen to refer to any faqih or learned man whom he trusted.

The judges did not confine their roles to the settlement of disputes and dispensing justice, they assumed the role of teaching and guiding people as well. They did not receive fixed salaries, but were granted all that could satisfy their needs and were tax exempted. They had to pay Zakat.[35] This secured the honesty and purity of the judges.

The Dar Fur Sultans were particulary dedicated to the cause of Islam. They encouraged strongly the teaching of Islamic faith and Islamic Law in schools and mosques that spread throughout Dar Fur Sultanate. Some students were sent to Al-Azhar to study Islamic Law. They

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[33] R.S. O'Fahey and J.L. Spaulding, op. cit. , p. 49.

[34] Musa Al-Mubarak Al-Hasan, "The Political History of Dar Fur". Arabic Text, Kh. U. Press Undated, p. 28.

[35] H.S.A. Al-Mufti, op. cit., p.51. Zakat is one of the pillars of Islam which demands that a yearly 2.5% of a Muslim's savings should be paid to the poor. Zakat is payable from cash property, trade merchandise and herds of cattles.

were allotted a cloister of their own known as the Dar Fur cloister.[36] One of the Dar Fur Sultans was a faki before he became a Sultan; this is indicative of the far reaching influence of the fakis.[37] When it came to decision making, it seems that the role of these fakis was advisory. The actual administration of justice was firmly under the control of the Sultan.

The Shaykh father was the Prime Minister in Dar Fur Sultanate and came next to the Sultan, according to the protocol. He was the final authority as regards the Customary Law and would personally consider serious cases which would be settled according to such Customary Law.[38]

**Section A:-**

**The Law and Courts in Dar Fur**

**1. The Territorial Law**

By and large the territorial law was Islamic Law and the Daali Customary Law.

The reign of Sultan Omar the 2nd. in the 18th. Century and Sultan AbdelRahman witnessed strict observance of Islamic Law. The latter nullified social usages and customs that ran counter to Islamic Law. He declared drinking intoxicants as unlawful and punished those who violated the rules of Islamic Law. He also strictly punished adultery and took harsh measures against thieves and vagabonds in order to maintain security. He was the first Sultan to appoint a 'Grand Qadi', Chief Justice, for Dar Fur.[39]

**2. Constitution of the Courts**

The court in Dar Fur was comprised of a council of six or seven judges, except in the villages and remote areas where it was sufficient for a single judge to sit in a court.

**3. Procedure of the Courts in Dar Fur**

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[36] Mandour El Mahdi, "A Short History of the Sudan". Lond. Oxf. U. Press, 1956, p. 60.

[37] P.M. Holt, M.W. Daly, op. cit., p. 41.

[38] Mohamed Ibn Umar at-Tunisi, "Tashhidh Al-Adhhan bi-Sirat Bilad Al-'arab Wa' Sudan". Editors Khalil Mahmud 'A Sakir, et.al, The Egyptian Pub. Corp. for Publication, News and Printing, Cairo, 1965, p. 62.

[39] Ibid., p.115.

Usually a panel of six or seven judges would meet in one court room with the Sultan. The more learned and better versed in Islamic Law of those judges would preside over the court. If both or either the plaintiff or defendant were absent, the court would adjourn the hearing, to summon the parties to the suit. If present, both parties would sit before the judges and abide by the discipline of the court, or be lashed for contempt of court.

The president of the court would conduct the proceedings of the court with permission of the Sultan and he would consult with the members of the court. There were no court records and the whole hearing was verbal. Before the announcement of the judgement, the president of the court would take the whole case to the Sultan and request his approval. If such approval was obtained, then the court would resume and announce the judgement; if not then the case would go for retrial and a fresh hearing.[40] In petty cases the court was under no obligation to seek approval of the Sultan.

The judgement of the court would be executed without any delay and was not subject to objection or appeal.

The parties to a dispute were at liberty to resort to the courts described above which applied Shariah Law or to a court that would apply Customary Law. Thus to a certain degree there was a dual legal system, but Islamic Law reigned supreme.[41]

The Sultan would sometimes personally sit in the "court of justice" to settle a case of gross injustice done to anyone of his subjects.

**4. Jurisdiction of the Courts**

The council of judges had a sweeping jurisdiction and would look into any dispute, but the single judge courts were confined to minor cases of custody, petty debts and some agricultural disputes.

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[40] Ibid. , pp. 56, 57, 58.

[41] Mahjoub Ziyadah, "Islam in the Sudan", Arabic Text, Education Service, Egypt, undated, p.85.

**5. Legal Education**

Most of the judges were graduates of Al-Azhar of Cairo. They all studied Islamic Law according to the Maliki school of fiqh, and the legal text book of Mukhtasar Khalil was used as an authentic Law text book. Very much like the Sinnar Sultanate judges and Fakis, those of Dar Fur exerted no opinion of their own. They were echoing opinions and statements expressed in the compendiums, commentaries and glosses of the Maliki school of fiqh.

**6. Customary Law**

There had grown in Dar Fur a body of Customary Law that was applied by courts of elders, acting as 'ajaweed', or mediators. Daali[42] was credited with the codification of Customary Law in the so called book of Daali. These Customary Laws were designed by the chief Shaykh father, known as Daali, to secure power and income for the Sultan; punishment was solely by fine. In some parts of it this 'Daali Book' was an attempt to reconcile Islamic Law according to the Maliki school of fiqh with Customary Law.[43] In some respects, this Customary Law ran contrary to Islamic Law; females, for instance, were not allowed to inherit. Such an instance of deviation from Islamic Law could never happen in the Sinnar Sultanate, where the judges would nullify such a ruling and strike down such a custom as repugnant to and inconsistent with Islamic Law.[44] Generally the Dar Fur Sultans ruled through the Shariah and legitimized their position in the face of threat from the outside world, by reference to prinicples of Islamic Law.[45]

The 'Daali Book' was a penal code, so to speak, but contained a few provisions relating to personal Law and regulated some constitutional aspects; for instance, the elder son of the Sultan would succeed to the throne unless he was unfit. Under that Customary Law, theft, adultery, murder and injuries were punished with fines. Life imprisonment was the punishment for treason.[46]

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[42] Daali means tongue in the dialect of Fur and Daali Customary Law used to refer to instructions of the Sultan and the expression of his will. See H.S.A. Al-Mufti, op. cit. , p. 61.

[43] R.S. O'Fahey and J.L. Spaulding, op. cit. , p. 119.

[44] M.I. Khalil, op. cit. , p.627.

[45] R.S. O'Fahey and J.L. Spaulding, op. cit. , p. 125.

[46] Mohamed Ibn' Umar at-Tunisi, op. cit. , p. 121.

The 'ajaweed' who applied Daali Law did not follow a strict procedure. They would sit anywhere, in a house, a mosque or under a tree to settle a dispute and could do that at any time, day or night. It was not unusual for two persons to speak at a time in that informal procedure. No records were kept. If the parties to a dispute chose to resort to such 'ajaweed', then there would be no limit to their jurisdiction.

There was always a conflict between Islamic Law and Customary Law in Dar Fur. Some Sultans nullified many customs and social usages.

There were some legal counsellors best known as 'Kamkolak' who would hear some cases referred to them by the Sultan.

A certain Dar Fur Sultan, Abu Midian, was an ardent admirer of Mohamed Ali the Khedive of Egypt. He became interested in the European system of government, the French tax system, industry, education and commerce. He expressed a lifelong dream of being sent by Mohamed Ali to Paris for a year or two so that he could get in touch with the civilization he heard about while in Egypt. He was the only Sultan of Dar Fur who started to learn the French language.[47]

The financial system of the Dar Fur Sultanate was a blend of Islamic Law and the local feudal system. Zakat was collected, but not distributed according to Islamic Law, except during the reign of Sultan Abdel Rahman, who nullified all the usages that ran counter to Islamic Law.

**Section B:-**

**Characteristics of the Dar Fur Era**

a) The legal system was a blend of Islamic Law and Customary Law known as Daali Law.

b) In case of any conflict between Islamic Law and Customary Law, Islamic Law would prevail whenever the decision of the 'ajaweed' was appealed to a Shariah judge.

c) Islamic Law was received and reigned supreme in Dar Fur Sultanate until its downfall in 1916.

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[47] Ibid. , p. 359.

d) Learned men, Fakis, judges and the counsellors were very influential as regards Sultanate policy.

e) Some Dar Fur Sultans were dedicated Muslims who devoted their time and efforts to learning Islamic Law and acting according to its tenets.

f) Repugnant customs and social usages faded away, gradually giving way to Islamic Law.

g) Islamic Law was the cornerstone of the system of education and was encouraged by the Sultans. There were enough Dar Fur students of Al-Azhar to have a cloister of their own.[48]

h) Islamic Law received at Dar Fur was according to the Maliki school of fiqh.

i) The ultimate judicial authority was the Sultan, and the role of the appointed qadis, judges, seems to have been limited to an advisory one.[49]

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[48] Professor 'Aun ash-Sharif Gasim, et.al, op. cit. , p. 24.

[49] R.S. O'Fahey and J.L. Spaulding, op. cit. , p. 171.

# Chapter 4

# ISLAMIC LAW IN TAQALI, KORDOFAN AND Ad-DAMAR

**Section A:-**

**Islamic Law in Taqali**

Taqali was a small Muslim state in the pagan Nuba mountains.[50] It was founded about 1530; it was a product of Islamic cultural influence. This tiny Muslim Kingdom received Islamic Law as a territorial system, to the exclusion of any Customary Law that was inconsistent with and repugnant to Islamic Law.

The qadi, judge, in Taqali would settle all disputes according to Islamic Law in the light of the Maliki school of fiqh. He was the legal counsellor of the King, who would not hesitate to consult the qadi in serious matters. The King of Taqali refused to join the Mahdist movement simply because his qadi denounced the Mahdi on certain Islamic principles.

The Kingdom of Taqali had striking similarities with the Dar Fur Sultanate and Sinnar Sultanate, and it maintained its Islamic characteristics until the beginning of the 20th. Century.[51]

The Muslim jurists played an undeniable role in establishing the Taqali Kingdom and bringing it under the rule of Islamic Law.

**Section B:-**

**Islamic Law in Kordofan**

The judicial system in Kordofan was slightly at variance with its counterpart in Dar Fur Sultanate, in that the Judiciary in Kordofan enjoyed total independence.

The learned men of Kordofan used to settle the disputes applying Islamic Law according to the Maliki school of fiqh, and were usually known as the judges of the 'Bright Shariah'. They sat anywhere and heard the case without keeping any records, and would promptly do justice to the satisfaction of both parties to a dispute.

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[50] P.M. Holt, op. cit. , p.8; P.M. Holt, M.W. Daly, op. cit., p. 5.

[51] Professor 'Aun ash-Sharif Gasim, et.al, op. cit., pp. 24, 25.

The Sultan in Kordofan would never interfere in the domain of those learned men. He would confine himself to the administration of the Sultanate militarily and politically.[52]

When Kordofan was annexed to Dar Fur Sultanate., the Dar Fur Sultanate appointed a 'Grand Qadi' for all Kordofan to be centered in El-Obeid. On the other hand, the 'judges of the bright Shariah' still carried on their functions. It was optional for the litigants to accept their judgements. When they did not, such judgements would be appealable to the all-Kordofan judge, who would retry the case.

The All-Kordofan judge had absolute jurisdiction to try all cases according to the Maliki school of Islamic Law. His main court room was the mosque of El-Obeid. He had deputies who would sit at his right and left. A group of Fakis and 'ajaweed' would join the constitution of the court.[53] The judge would preside over the court and conduct all the proceedings. He would refer to the fakis and his deputies whenever he was faced with a legal problem.

There were no court records, but the court clerk would write down the judgement and hand it to the winning party after putting the judge's seal at the bottom; such judgements were not appealable.

Major sentences, like exile, stoning of a married person who had committed adultery, and amputation of the hand of a thief were executed by the Governor known as 'Maqdoom', whereas the judge would personally order the execution of district petty sentences, such as flogging and custody.

When the whole Dar Fur Sultanate fell in the hands of the Turks in 1875, they confirmed the post of the All-Kordofan judge, and when Sultan Ali Dinar recaptured Dar Fur Sultanate in 1898, the Judiciary resumed the same functions it used to have. This continued until Dar Fur Sultanate ultimately succumbed to the Anglo-Egyptian rule in 1916.[54]

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[52] H.S.A. Al-Mufti, op. cit. , p.66.

[53] Ibid. , pp. 66-67

[54] Ibid., p. 70

**Section C:-**

**Islamic Law in ad-Damar**

The significance of ad-Damar lies mainly in its Islamic educational role. The Majadhib had, during the 18th. Century, established what might almost be called an Islamic University. It was a thriving academic institution with an extensive curriculum having Islamic Law according to the Maliki school of fiqh as its core.[55] It drew a nation-wide student body. The students were in contact with the greater and more famous schools of Cairo and Hijaz.[56] The teachers were graduates of Al-Azhar. The great teacher Mohamed Al- Majdhoub was highly influential and remained so even when the Sinnar Sultanate started to disintegrate. He had laboured to kindle the fire of learning.

Ad-Damar was the most notable centre for teaching Islamic Law and a spiritual centre and as such, acquired a far reaching socio-political status.[57] It was an alternative to the political vacuum generated by the disintegration of the Sinnar Sultanate. The power and stability of ad-Damar as an educational institute kept Islamic Law developing irrespective of political instability.

When the Sudanese people were invited to support the Mahdi in establishing an Islamic state, the graduates of ad-Damar were quick to give their full support to that cause.

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[55] 54. P.M. Holt and M.W. Daly, op. cit. , p. 35.

[56] P.M. Holt op. cit. , p. 192.

[57] Gabriel Warburg, "Islam, Nationalism and Communism in a Traditional Society, the Case of Sudan." Frank Cass, 1978, p. 4.

# Chapter 5

## DEVELOPMENT OF ISLAMIC LAW DURING THE TURKISH RULE IN 1821 - 1855

When the forces of Mohamed Ali the Khedive of Egypt stormed the Sudan, Islam had already sunk deep roots. The invading army was accompanied by three Egyptian 'ulama', learned men, to convince the Sudanese Muslim people that it was a duty incumbent on them to submit without resistance to the Khedive. The Sudanese people realized that such invasion was meant to serve some mundane purposes of the Khedive, and was not genuinely meant to further Islam. It was a private venture by Mohamed Ali. It was also meant to provide the viceroy with the means to assure his position in Egypt and his independence of the Sultan. Although the Sudan after the invasion was ruled by the same Turkish elite that ruled Egypt, the Sultan had no power over the Sudan.[58]

At the beginning of the Turkish era, Islamic Law continued to reign supreme. Shariah Courts had a sweeping jurisdiction to try all civil, criminal and personal matters. The new administration had to apply Shariah Law because the Sudanese people were not prepared to respect and submit to any other law. They had no respect for the secular laws applied by the Egyptians and considered them an innovation that did not conform with Islamic Law.[59]

Islamic Law was applied according to the Hanafi school of fiqh[60] which was followed by the Egyptian Courts. Judges were paid fixed salaries for the first time and had a uniform which they wore when appearing in public.[61] Judicial circulars and regulations were introduced for the first time and a systematic judicial organization was introduced.

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[58] P.M. Holt and M.W. Daly, op. cit., pp. 48, 49.

[59] Zaki Mustafa, op. cit., p.14.

[60] The Hanafi school of fiqh is attributed to its founder Abu Hanifa (80-150 Hijra) approximately (700-770 A.C.). He was an uncontested pioneer of the exerting of opinion and analogy fiqh trend at his time. His fiqh was a collective contribution and a product of consultation with his outstanding students. His sources were the Qur'an, the Sunnah and the tradition of the prophet's desciples. His fiqh was very much related to practical events. Other schools of fiqh are the Maliki, Shafii and Hanbali, Zaidi and Ga'fari. Imam Abu Abdallah Mohamed Ibn Idris ash-Shafii (150-240 Hijra) is the founder of the school of fiqh called after his name. He had access to the different schools of fiqh. He was the first author of the principles of fiqh. The Hanbali school of fiqh is attributed to Ahmed Ibn Hanbal (164-241 Hijra) who started as a student of Shafi'i and later established his own school of fiqh. He used to dislike indulging in hypothetical cases. Zaidi school of fiqh is attributed to Zaid Ibn Ali El Hussain (80-122 Hijra). His fiqh has striking similarities with the four Sunni schools of fiqh: "Maliki, Hanafi, Shafi'i and Hanbali." Ga'fari school of fiqh is attributed to Imam Ga'far As-Sadiq (80-148). The last two schools represent the Shi'a; Ijtihad, exerting one's opinion, has never ceased to exist in both schools. Details of the various schools of fiqh are beyond the topic of this thesis.

[61] D.F. Hawley, "Judge's Robes in the Sudan". S.L.J.R., 1959, p.213.

In remote areas there was a system similar to the 'Justices of the Peace' composed of unpaid members. They were presided over by a paid official in big cities.[62] The courts were divided into a High Court centered at Khartoum and known as the Sudan Appeal Council, Provincial Courts, District Courts and Divisional Courts.

**Section A:-**

**Constitution and Jurisdiction of Courts**

Initially the Turks established Provincial Courts, District Courts and Divisional Courts. There was no final Court of Appeal for the Sudan. At a later stage a High Court for all the Sudan was established as a general Court of Appeal. Prior to the establishment of the High Court various systems for review of judgement were established and these are described below:-

**1. Jurisdiction of the Provincial Courts**

The Provincial Courts had both original and appellate jurisdiction over cases and suits originally tried by Divisional Courts within the jurisdiction of the province.

The Provincial Court was comprised of a judge and his deputy. There was always a court clerk to make and keep records. The court proceedings were public; any jurist or learned man attending a trial could object on a point of law or an interpretation of a Shariah provision,[63] and the judge would respond and accept the objection if it was valid. Judgements of the Provincial Court passed by way of original jurisdiction were appealable to the Provincial Commissioner, who would consult with the Provincial Judge. If the latter admitted that the decision he made was wrong, then he had to revise it; if not, then the whole case would go to the faqih of the Maliki school in Egypt. The faqih would uphold the decision or send the case back for revision.[64] Needless to say, this was a very slow and unnecessary procedure. It centralized the administration of justice in Cairo.

The judge was under the scrutiny of more than one authority. This had the advantage of better handling of each case, but on the other hand, the appeal procedure could be confusing and slow. At

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[62] Professor Mekki Shibaykah, "British Policy in the Sudan, 1882-1902." Oxf. U.,Press, 1952, p.9

[63] See footnote 27, supra.

[64] Ibid., p.86

a later stage a faqih was appointed for each province and an Appeal Council was established superseding appeal to the Maliki faqih in Egypt which saved time. This in turn was replaced by the High Court.

By 1848, the court had introduced a record and a registration system for the first time in the development of Islamic Law in the Sudan.

**2. Jurisdiction of the District Courts**

Within a certain district there was no limit to the jurisdiction of the District Court. It had jurisdiction over criminal cases, civil suits and personal matters, all according to Islamic Law as detailed by the Hanafi school of fiqh.

**3. Jurisdiction of Divisional Courts**

Divisional Courts were also described as Regional Courts. A Divisional Court was comprised of a single judge. Its jurisdiction was limited and it had to refer major cases to the relevant Provincial Court according to a judicial circular to the following effect:-

> "Major cases that stand for trial in villages and the countryside shall be referred to the Provincial Judges to consider and settle according to Shariah Law."[65]

**4. Jurisdiction of the All-Sudan Qadi**

The Turks realized that they had to have an All-Sudan Judge. He would nominate the judges, supervise them after their appointment and see to it that their decisions were consistent with Islamic Law.

**5. Jurisdiction of the Provincial faqih**

The Province Commissioner would not take any step concerning Islam or the Muslims without having the mandate of the faqih. It was within the jurisdiction of the faqih to revise decisions of the judges within his province by way of appeal. He assumed the role of the Maliki faqih in Egypt.

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[65] Ibid., p.97

With the creation of a High Court this position was abolished. The establishment of the local councils marked the start of the dichotomy in the one Judiciary, and the establishment of a dual legal system and a dual judicial system. The law applied in these local councils was partly Islamic Law and partly Humayunic, Imperial Rescript of Ottoman Empire, and French Mercantile Law.[66] As there was no legislation then, ad hoc by laws, regulations and circulars were issued whenever the need was felt. At one point, cases were sent to the council of judgements in Egypt, but ultimately it was decided to copy the experience and have a parallel organization in the Sudan.[67]

The local councils were established in the Sudan in 1850 and were entrusted to the notables, mayors and merchants who were granted judicial powers to try cases according to customs and social usages in all cases, criminal, civil or even personal matters. They also established the appellate local council. There was an appointed faqih to advise the appellate local council, but his opinion was very rarely sought. Reference to Islamic Law diminished. Custom and social usages reigned supreme.

The whole judicial system plunged into chaos, ignorance and apathy. The separation of powers was blurred and the Administrators would settle disputes and decide cases without consulting any judge, learned man or faqih. These administrators were often corrupt and were sometimes non-Muslims. They were impatient with the rules and procedure of Islamic Law, and were the first to deviate from Islamic Law. The whole Sudan, during the last years of the Turkish rule, was in a state of misery through injustice, heavy taxation, misgovernment[68] and rupture to the course of development of Islamic Law.

The Sudanese people knew of no legal system other than Islamic Law. The Turkish Administration became insensitive to this. In the last years of the Turkish rule, Islamic Law was almost cast aside and people were totally alienated. Knowledge of Islamic Law was no longer a requirement for admission to the Judiciary. An illiterate soldier was appointed as a judge in

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[66] Mekki shibaykah, op. cit. , p.288.

[67] Abd Allah Husayn, "The Sudan since Ancient History to the Egyptian Mission Trip." vol. 1, Arabic Text, Rahmannia Press, Egypt, 1st. ed., 1953 p.143.

[68] J. Spencer Trimingham, op. cit. , p.93.

Kordofan province.[69] For the first time in the Sudanese history, people had to pay court fees and were exposed to complicated procedural formalities.

**6. Jurisdiction of the High Court**

The High Court consisted of a number of judges under the presidency of the All-Sudan Qadi. It was advised by a faqih known as the All-Sudan Appeal Council faqih. This court had an appellate authority to review any judgement of a Provincial Court, a District Court or a Divisional one.[70]

If the judgement was consistent with Islamic Law, then the High Court would uphold it, if not it would be quashed and the same High Court would assume original jurisdiction to retry the case. Whatever decision the High Court would take was final. Many people did not have access to the High Court for practical reasons such as difficulties of transportation and remoteness of their districts from the court.

**Section B:-**

**Development in Law applied and its Administration-Drift from Islamic Law**

In the later part of their rule, the Turkish rulers started to drift away from Islam and Islamic Law. The Governors and Administrators were Europeans and some were fanatical Christians. They ruled through disciplinary institutions which ran contrary to Islam.[71] The Shariah Courts were stripped of their jurisdiction except for personal matters. Criminal cases were shifted to the Province Commissioners and the Mamour of the police station. Shariah Courts were confined to personal law; the latter had to follow the Hanafi school of fiqh.

**Section C:-**

**Characteristics of the Turkish Era**

a) The fact that there was a strong central government in the first half of the Turkish rule

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[69] Zaki Mustafa Abdel Majid, op. cit. , p.9

[70] S.A.H. Al-Mufti, op. cit. , p.83

[71] Dr. Hasan Abdallah at-Turabi, "The Basis of Government in Islam." The Int. Conf. on the Implementation of Shariah in the Sud. The supr. Counc. for Relig. Aff. & Islamic. Trust, The Democ. Repub. of the Sud., 1984, pp.15, 16.

brought uniformity to the judicial system. The conflict between Islamic Law and local customs was reduced to a diminished level. Islamic Law reigned supreme.

b) Despite the adherence of the Sudanese people to the Maliki school of fiqh, the introduction of the Hanafi school by the Turkish rulers enriched the development of Islamic Law in the Sudan.

c) At the beginning, Shariah Courts were organized in a relatively sophisticated regular way, that was a landmark in the development of Islamic Law. Procedures were established and proper channels of appeal were brought into existence. Circulars directing the administration of justice found their way into the judicial system for the first time, a development which trimmed the judicial functions of the fakis, sufis and fuqaha.[72]

d) The establishment of a local stratum of official 'Ulama' and denying the fakis the privileges they used to enjoy in Sinnar Sultanate, brought about a rift between the rulers and the popular establishment of fakis.[73]

e) The integration of the Azhar Islamic Law graduates into Shariah Courts enhanced the performance and the development of Islamic Law, and brought the Sudanese people closer to the original sources of Islam and its institutions.[74]

f) The administration of the Judiciary was first under the control of its counterpart in Cairo. That slowed down the procedure to dispense justice.[75]

g) Adherence to Islamic Law during the first half of the Turkish Administration was partly due to the resistance of the Sudanese people to other legal systems. However, Islamic Law was generally applicable to the Sudanese people, martial law was applicable to all the Turkish soldiers whereas foreign subjects were not subjected to either of these laws. Their disputes were referred to the diplomatic representatives of their own countries.[76]

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[72] Gabriel Warburg, op. cit. , p.9

[73] Loc. cit.,

[74] P.M. Holt, op. cit. , p. 21.

[75] Republic of Egypt, Council of Ministers Headquarters, "The Sudan from February 13, 1841 to February 12 1953", Govt. Press, Cairo, 1953, p. 194.

[76] Zaki Mustafa Abdel Majid, op. cit. , p.14.

h) At the beginning of the Turkish rule, the jurisdiction of Shariah Courts covered all cases, civil, criminal and personal matters. As time passed, the Administrators became impatient with the measures of Islamic Law. They disposed of it and preferred their own arbitrariness.[77] Ultimately, the qadis were deprived of a substantial portion of their jurisdiction and were confined to personal matters.

i) The last years of the Turkish Administration were characterized by corruption, misgovernment, injustice, heavy taxation and excessive punishments.

j) Some administrators were sent to the Sudan as a punishment for offences they committed in Egypt. Some were incompetent[78] and corrupt, while others were fanatical Christians[79] of the Victorian period with all the prejudices of this group. This accelerated the movement from Islamic Law and further alienated the Sudanese people.[80]

k) The established local councils were run by illiterate and corrupt merchants, which was detrimental to the development of Islamic Law.

l) During the second half of the Turkish era a secular system was introduced to the Sudan, after centuries of the reign of Islamic Law.

m) Although the Turkish rule allowed for deeper penetration of Islam in remote areas that were brought under the control of the central government, the interest of Christian missionaries and their desire to spread Christianity not only in the Sudan, but also through it to the rest of Africa, arose during the last years of the Turkish rule.[81] They penetrated far ahead of the Turkish Administration and returned after the re-occupation of the Sudan in 1899 to renew their efforts.[82] Their work impeded the flow of Islam southwards.

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[77] M.I. Khalil, op. cit. , p. 627.

[78] Mekki Abbas, "The Sudan Question, the Dispute over the Anglo-Egyptian Condominium 1884-1951". Faber and Faber Ltd. Lond., undated, p. 30.

[79] P.M. Holt and M.W. Daly, op. cit. , p. 79.

[80] Ash-Shatir Busaily Abdel jalil, op. cit. , p. 191.

[81] Mohamed Omer Beshir,"The Southern Sudan, Background to Conflict." Frederick A. Praeger, Publishers N.Y. Wash. 1968, p.13.

[82] K.D.D. Henderson, C.M.G., "The Making of the Modern Sudan." Faber and Faber Ltd. Lond., 1952, p.106.

n) The Khedive of Egypt and his secular tendencies and the corrupt Turkish Administrators and their obvious violations and undermining of Islamic Law brought the whole Administration into disrepute and distorted the image of the already symbolic Muslim leadership of the Ottoman Empire.

# Chapter 6

# DEVELOPMENT OF ISLAMIC LAW DURING THE MAHDIST RULE 1881-1898

**Section A:-**

**Islamic Law During the Rule of the Mahdi, 1881-1885**

Before his revolution, the Mahdi used to propagate Islam as a total way of life. He used to address the Turkish rulers, reminding them of their departure from the course of Shariah.[83] These efforts were in vain. The broad base of the Mahdi's appeal to the Sudanese people was the injustice of Turkish rule and the western pressure on the Islamic world, the alien rule with all the practices that departed from the Shariah,[84] the suspension of Islamic Law and the blind application of custom and social usages and the replacement of Islamic Law by secular laws.

By 1881 the ground was very well prepared for a change and, Mohamed Ahmed of the Sudan proclaimed himself to be the long awaited Mahdi. He started a revolution that ultimately unified the various tribes of the Sudan by an Islamic ideology, and succeeded in establishing the first Sudanese state in modern history a state where Islamic Law reigned supreme.

Whereas it was thought in the 19th. Century that things were heading towards the establishment of a secular, western style system, the Mahdist Revolution interrupted that process. It established instead an Islamic state[85] after the model of prophet Mohamed's Islamic state in Medina. Mahdism primarily aimed at a return to the original Islamic Constitution in government, culture and religion. The ideology of Mahdism was comprised of two principles, a return to Islam as a total way of life, and submission to the rules of the Qur'an and precept, Sunnah, of prophet Mohamed as the guiding law.[86]

The revenues of the Mahdist State were collected from the sources described in the Qur'an

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[83] Dr. Mohamed Ibrahim Abu Saleem, "The Intellectual Movement in the Mahdiyah". U. of Kh. Press, 1970, p. 10.

[84] Loc. cit.

[85] John O. Voll, "Islam and Stateness in the Modern Sudan". Discussion paper series No. 4, Centre for Developing Area Studs. McG. U. Mont., 1983, p. 20.

[86] Mandour El Mahdi, op. cit., , p. 96.

and distributed accordingly. The Judiciary was wholly based on Islamic Law.

The Mahdi was a renewer of the Muslim faith and is comparable to the Muslim reformers of the eighteenth and nineteenth Centuries, such as Mohamed Ibn 'Abd Al-Wahhab in Arabia[87] , and Al-Afghani and Mohamed 'Abdu in Egypt.

All these reformers, including the Mahdi aimed at reviving Islam and Islamic Law by a return to the early days of Islam and by taking direct inspiration from the Qur'an and from the authentic sunnah, precept, of prophet Mohamed.[88] Going back to the original sources of Islamic Law and giving them a new application is an inherent right of any adequately qualified jurist, Faqih. It was only when the different schools of fiqh, jurisprudence, crystallized that these original sources became historical ones for the followers of such schools. The Mahdi was impatient with the polarization amongst Sudanese Muslims and Islamic community universally speaking. He rejected identifying one's self with any of the four schools of fiqh and brought Islamic Law to the original sources, viz, Qur'an and Sunnah of prophet Mohamed. He was equally impatient with the commentaries, compendiums and glosses which he considered complicated more than they facilitated. He was convinced beyond any doubt that the role of the four schools was finished and that to follow such schools and the different sufi sects would further polarize the Muslims.[89] The Mahdi, in his rejection to the strict adherence to any of the fiqh schools and his call for a return to the Qur'an and Sunnah as the sources of law, enhanced the development of Islamic Law. He also paved the way for "Ijtihad", exertion of the jurist's opinion according to the Qur'an and Sunnah to cope with emerging needs. This was a very bold action far ahead of the times.

The Mahdi considered himself a 'mujtahid', one who exerts his own opinion as explained above, and set aside imitation and undue following of any school of fiqh. He was aware of the vacuum he created and started to issue circulars to fill the gap and guide the courts and community. He found time to begin, but never finish a fiqh text book of his own. However, his circulars fell into

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[87] Ibid , p. 97.

[88] 87. Mekki Shibaykah, op. cit., , p.19

[89] Dr. Abd Al Qadir Mahmoud, "The Sufi Thought in the Sudan, its Sources, Trends and Variations." Arabic Text, Arab Thought Press, 1968-1969, pp. 99-100.

the same trap the Mahdi intended to avoid. His followers invited close and strict observance of such circulars and dealt with such circulars as if they were sacred sources. This ran inconsistent with the instructions of the Mahdi, who wanted his circulars to be judged against the yardstick of the Qur'an and Sunnah and to be rejected whenever there were inconsistencies.[90]

A distinctive feature of the Mahdi's circulars was the simple language used and the plain message given so that they could be understood by laymen. The Mahdi dismissed a host of fiqh and sufi books and spared only a few of them that were plain and simple. The Mahdi was himself a student of fiqh and a sufi, and he made it obligatory to teach the Qur'an throughout the state.[91]

**1. The Judiciary During the Mahdi Era 1881-1885:-**

The judicial organization in the Mahdist State preceded the establishment of the state. In 1881, while the Mahdi was in Gadir mountain at the head of a large army, he took the first step towards the formation of a judicial structure. He did this by appointing an ad hoc judge for the various units of his army to settle field disputes and supervise division of the looted property, all according to the rules of Islamic Law.[92] He also established an Islamic Treasury and appointed Ahmed Jubarah a Judge of Islam, 'qadil-Islam', which is equivalent to the Chief Justice. Shrewdness and loyalty to the Mahdi were the requirements for the judicial posts and hierarchy, rather than a thorough knowledge of Islamic Law.

After the Mahdi took over the first town (El-Obeid) in 1882, he appointed a deputy for the administration of justice. When the volume of work increased, the Mahdi appointed assistant deputies whose jurisdictions were confined to civil and criminal disputes. He also appointed some 'Umana', Trustworthy people, to settle political disputes; all were to apply Islamic Law and the instructions of the Mahdi.[93]

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[90] Dr. Khalifa Babiker Al-Hasan, "Islamic Shariah and the Judicial System in the Sudan". in 'Islam in the Sudan', Arabic Text, The Minis. of Relig. Aff. and Islamic Trust, The Democ. Repub. of the Sud. Islamic Culture Library 1976, p. 33.

[91] Abdel Majid 'Abdin, "History of Arabic Culture in the Sudan since the Beginning to Date, Religion, Sociology and Arts." Arabic Text, Thaqafa Press Service, Beirut, 1967, p. 131.

[92] Mohamed Ibrahim Abu Saleem, op. cit., , p. 23; El Fahal at-Tahir Omer, "The Administration of Justice During the Mahdiyah." S.L.J.R., 1964, p. 167.

[93] H.S.A. Al-Mufti, op. cit., , p. 130.

The supreme judicial authority rested with the head of state, the Mahdi, who was the final and conclusive reference in judicial matters, but his power to hear and determine cases at law was widely delegated. The Grand Qadi was in charge of the administration of justice and would approve the judgements, especially instances of 'qisas', capital punishment for murder. He would also nominate the learned men for the judicial posts, and would sometimes interpret the judicial circulars of the Mahdi and publish such interpretation and distribute it to the judges. He would also preside over the High Court.

The Mahdist armies were always accompanied by judges to settle field disputes and when such armies would take over a town, the army judge would be appointed a judge for that town.[94] After the conquest of Khartoum, the Mahdi separated the Judiciary from the executive, entrusted the Judiciary to the 'Ulama', learned men, and the executive power to the rulers,'Umara'. He declared that the judges should pronounce their decrees according to the Qur'an and Sunnah, the rulers were to execute such decrees.[95]

The Mahdi's decrees and orders appointing judges would usually emphasize the following principles:-

a) Avoiding injustice.

b) Equality before the law.

c) Sources of law should be the Qur'an and Sunnah and the circulars of the Mahdi.

d) No judge should decide any case if he could not find the law; difficult cases should be referred to the Grand Qadi.

e) Separation of the judicial and executive powers.

f) A judge would automatically be dismissed if he violated Islamic Law or behaved in a way inconsistent with it.[96]

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[94] Dr. Khalifa Babiker Al-Hasan, op. cit., , p. 32.

[95] El Fahal at-Tahir Omer, op. cit., , p. 168.

[96] Zaki Mustafa Abdel Majid, op. cit., , p. 24.

Some of the judges were well known for their knowledge of Islamic Law and their honesty. The best example was the Grand Qadi Al Husayn Az-Zahra, who was a graduate of Al-Azhar of Cairo, a very knowledgeable and shrewd person. He paid with his life during the Khalifa era as he was not ready to betray the principles and rules of Islamic Law. A system of summons was introduced during the Mahdi era but later it was abolished because of the delays which it caused.

The Mahdi was very keen to serve the ends of justice. For that purpose, he established a 'grievances court' and appealed to all those who felt themselves wronged and aggrieved to apply to him for redress:-

> ''My beloved, I appeal to everyone of you in the name of God and in the name of His prophet, that if I oppressed anyone of you and have forgotten that I have done so, you should at once ask for redress. Do not wait till the last day, the day of resurrection. I wish to bear all such faults, and I do not wish the blame to fall on others. Therefore bring forward your accusations now and do not wait until it is too late''.[97]

**2. Legislation during the Mahdi era 1881-1885:-**

The Mahdi was also the supreme legislative authority. He would often issue circulars, establishing rules of morality, obedience and moderation, all expressing a puritan attitude to life. One of his circulars drawn up in the form of an enactment, ran as follows:-

a) ''Abstain from intoxicants, neither sell them nor drink and let them not be seen in your dwellings.

b) Order all the members of your family to establish the five daily prayers.

c) Abstain from theft and adultery and punish all those who commit such acts.

d) Be honest and never misappropriate or conceal the booty taken in war.

e) Oblige the female members of your family to cover their heads and bodies and punish any woman who does not do so.

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[97] The Mahdi's circular to all the beloved followers; see F.R. Wingate, ''Mahdism and the Egyptian Sudan''. 2nd. ed., Frank Cass and Co. Ltd. 1968 p. 12.

f) Do not allow women to mourn the dead.

g) Do not exaggerate the dowry of a groom, ten 'Riyals', Mahdist coin, are sufficient in case of a virgin and five in case of a previously married woman.

h) Prevent all immodesty amongst the women.

i) Bring back anything lost and found to the Treasury.''

This circular dealt with miscellaneous issues; ranging from prohibition of intoxicants, to family organization, protection of public and private property, protection of public morality, disposing of customs and social usages that are inconsistent with Islamic Law, lost and found property and some social matters. Most of the circulars were only reiterating the already established rules of Islamic Law, but a few of them established new rules for events unprecedented and unknown at the time when Islamic fiqh reached its pinnacle. Smoking was an instance of such an emerging event. The Mahdi took a very hard line and regarded smoking more strictly than the drinking of intoxicants and would sentence a smoker to a hundred lashes. Obviously that was excessive punishment, but the Mahdi wanted to suppress the newly emerging habit. He would also sentence to twenty seven lashes and a seven day imprisonment anyone who would insult another by calling him names such as pig, dog or pimp.

Through these circulars, a body of legislation came into being by which the legal transition of the Sudan from an Egyptian dependency to a Mahdist State was accomplished.[98] The Mahdi asserted a unique authority in matters of law. He suspended all judicial litigations before 1882 except for waqf, debt and the property of orphans. That was the inauguration of the new legal regime. Those arising after that date would have their pleas heard. That limitation was extended to all the places seized by the Mahdi.

The rulings given by the Mahdi formed established precedents, especially in cases that dealt with the status of women and ownership of land. The establishment of the Mahdist State gave rise to many incidents of broken marriages and irregular unions and numerous pleas by landowners who

[98] P.M. Holt, op. cit., , p. 112.

were wrongly deprived of their land by the Turks. Land Law claims were restricted to a seven years period of limitation.[99] That was meant to remedy obvious hardship on the one hand, and preserve the stability of land ownership on the other hand.

The bulk of the Mahdi's legislation was aimed at modifying or abolishing Sudanese customs and social usages that were repugnant to Islamic Law.

The Mahdi was the first Sudanese ruler to exercise one of the traditional prerogatives of a Muslim ruler: that of striking money.[100] The central treasury and court of justice had some branches in the other provinces. The Treasury was modelled after the early Islamic Treasury established by prophet Mohamed. The sources of the two treasuries were identical. The Mahdi also established a public supervisor's, Ombudsman, system, 'Muhtasib', to publicly supervise the law in the market area, and inspect all the commodities presented for sale. He would also supervise public morality and enjoin what was right and prohibit what was wrong. Prompt trial of Criminal Law cases was among the assignments of the 'Muhtasib'. A 'Muhtasib' performs functions similar to those of a judge. It was a system to insure adherence to Islamic Law in public life. The 'Muhtasib' would settle petty disputes in the market area, such as counterfeiting of coin, labour disputes and the demolition of old and hazardous premises.

By and large, the administration of the Mahdist State was meant to look very much like the first Islamic state; the Mahdi and his followers genuinely believed that they were re-enacting the same role played by the prophet and his disciples.

**Section B:-**

**Development of Islamic Law During the Khalifa Abd Allah Era 1885-1898**

The judicial system during the Khalifa era was reorganized and more powers were assigned to 'qadil-Islam'. The Khalifa used to transfer the disputes to the court to settle them according to Islamic Law. Direct supervision of the Judiciary intensified during the Khalifa era. This slowed down the procedure and made it more complicated. The fact that the judges had to consult the

[99] Ibid., p. 113.

[100] P.M. Holt, op. cit., , p. 89; P.M. Holt and M.W. Daly, op. cit., , p. 97.

Khalifa before passing a sentence made their job more difficult.[101]

Reference to the astute Khalifa for final decisions threatened the independence of the Judiciary, destroyed the courage of the judges to take initiatives and made the majority of them ready tools in his hands. The independence of the Judiciary in the reign of the Khalifa, particularly his last days, almost withered away. To be fair to the judges of that era, it has to be mentioned that Al-Husayn Az-Zahra, the then 'qadil-Islam', in several instances gave judgements contrary to the wishes of the ruler and adhered to the rules of Islamic Law. He firmly objected when the Khalifa wanted to impose taxes to meet the expenses of his bodyguard 'Mulazmin'.[102] Al-Husayn was a shrewd and knowledgeable judge who adhered to Islamic Law and did not hesitate to dismiss the Mahdi's circulars and proclamations whenever he considered that they were inconsistent with Islamic Law. The most circumstantial account of Al-Husayn Az-Zahra's adherence to the rules of Islamic Law was an instance when the second most powerful man Yaqub, the Khalifa's brother, instructed the judge to stay execution upon some of his supporters and Al-Husayn refused and stated:-

"I am a man proceeding according to the Book, Qur'an, and the Sunnah, not turning aside from the truth nor fearing the blame of the blamer in regard to the Holy Law, Islamic Law, but I judge by the acceptable truth".[103]

It is obvious that the Khalifa lacked the Mahdi's charisma and knowledge of Islamic Law. Yet he still kept the supreme judicial authority, but assumed a far less extensive legislative function. He instructed the courts that the evidence of witnesses was inviolable and it was the discretion of the courts only, to accept or reject witnesses.

By the time the Khalifa assumed power after the Mahdi's death, Islamic Law had already taken firm root and had developed into a system governing all walks of life in the Mahdist State. It further developed during the first half of the Khalifa era. The Judiciary was well organized and was

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[101] P.M. Holt, "The Mahdist State in the Sudan, the Khalifa Abd Allah Era 1885 - 1898". Arabic Text, translated from English to Arabic by Henry Riyad, et.al,. The Generation Press Service, Beirut, 1982, p.285.

[102] Na'um Shouqayr, "The Ancient History of the Sudan." Vol. III, Arabic Text, Cairo, 1903, p. 563.

[103] P.M. Holt, "The Mahdist State in the Sudan, 1881-1898, A Study of its Origin, Development and Overthrow." Oxf. At the Clarendon Press, 1958, pp. 191-192.

divided according to jurisdiction. It acquired an increasingly complex organization, although with no greater independence of the Khalifa in carrying out its functions.[104] The Khalifa sought to establish his authority by developing an extensively elaborate and centralized administration including that of the Judiciary.[105]

Justice under the Khalifa was dispensed according to Islamic Law. He took some steps to alter the simple judicial structure of the Mahdi's era. He sent an inspection committee to inspect all courts and report on whatever modifications or reforms were desirable.

**1. Constitution of the Courts:-**

The courts were constituted as follows during the reign of the Khalifa:-

a) The High Court in the Capital.

b) The District Courts.

c) The 'Karah', black soldiers of the Turkish rule who joined the Mahdi, Court.

d) The Battlion Court.

e) The Grievance, Madhalim, Court.

f) Public Supervisor, Muhtasib, Court.

g) The Treasury, Bait Al Mal, Court.

h) The Mulazmin, Body Guard, Court.

i) The Council of Commerce Court.

**2. Jurisdiction of the Courts:-**

**a) The High Court:-**

The High Court had an original jurisdiction and an appellate one and was comprised of twenty members, all sitting in the mosque to dispense justice, and was presided over by 'Qadil-Islam'. Each judge would deal with his own cases according to the Qur'an, sunnah and the circulars and

[104] P.M. Holt and M.W. Daly, op. cit., , p.113.

[105] Loc. cit.,

proclamations of the Mahdi. In cases not covered by the these sources, they would apply Islamic Law according to the Maliki school of fiqh. Major offences like murder were adjourned after the hearing so that the judge conducting the trial could consult the council of the high court sitting once a week on a day known as 'the day of consultation'. Such cases had to be confirmed by 'Qadil-Islam' and the Khalifa, as the supreme judicial authority.[106]

The High Court would keep a full record of all cases, especially the major ones.

**b) The District, Amalat, Courts:-**

The number of judges assigned for each 'Amalah', district, varied according to the significance and size of each district. The court was usually comprised of more than one judge. Any one of them could deal with petty cases, but major cases had to be dealt with collectively and jointly. Again each judge had to consult with the president of such court and the other members before passing his sentence. There were no court records except in very rare cases, and only the judgement was reduced to a written form.

**c) The 'Karah' Court:-**

The 'Karah' Court was unique. It met in the capital. It was established to look after the needs of the large number of black soldiers who fought for the Turks and later surrendered to the Mahdi. Its jurisdiction extended to personal matters, debt suits, commercial transactions and criminal cases involving these soldiers.

**d) The Battlions Courts:-**

Whenever a unit of the army was on a military mission, it was accompanied by a judge; this court had the same jurisdiction as that of the district courts.

**e) The Grievance Court:-**

This was a fusion of a court jurisdiction and the strong hand of the ruling authority, it was a

[106] H.S.A. Al-Mufti, op. cit., pp. 149, 150; A.B. Theobald, op. cit., p. 180.

check to any excessive assumption of power. The rules of procedure were more relaxed.[107] The Khalifa, and before him the Mahdi,would personally hear the case and settle it or refer it to 'Qadil-Islam'. It is a typical Islamic system whose foundation was laid by prophet Mohamed. It took shape during the Umayad's Dynasty.[108] The Grievance Court was designed to help the oppressed and the weak. This body had all the characteristics of a court of justice. It was assigned an armed force to be at its disposal. It was surrounded by fuqaha and judges and when it moved to any region, the judge of that region would join it. There were clerks to take records. The grievance court had a sweeping jurisdiction.

**f) The Public Supervisor, Muhtasib Court:-**

This was a court to publicly supervise adherence to Islamic Law by individuals and groups; again, this was an Islamic establishment founded by the 2nd. Khalifa of the Muslims, Omer. The function of this court was to enjoin what was right and prohibit what was wrong. It supervised the market area against cheating, violation of covenants, breach of trust and any act or word violating the established rules of Islamic Law. The 'Muhtasib' has a broad jurisdiction to rule according to Islamic Law and the Mahdi's circulars and proclamations. He was chosen and appointed in the same manner that judges were appointed.

**g) The Treasury, Bait Al-Mal, Court:-**

The Treasurer could sue and be sued in this special court. The public could also sue and be sued in this court, provided that all such suits were relevant to the Treasury and the Islamic revenue.[109]

**h) The Mulazmin, Bodyguard, Court:-**

The jurisdiction of that court did not go beyond settlement of petty disputes amongst the Khalifa's bodyguard.

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[107] El Mawirdi, "El Ahkam as-Sultaniyah Wa'l-Wilayat ad- Diniyah", Arabic Text, reprint, 1st. ed. El-Fikr Service, Egypt, 1983, pp. 69, 75.

[108] Loc. cit.,

[109] H.S.A. Al-Mufti, op. cit., , pp. 181-183.

**i) The Council of Commerce Court:-**

It had jurisdiction over commercial disputes, was comprised of ten merchants, and resembled a chamber of commerce. It was bound to settle disputes according to Islamic Law. This example of judicial specialization and division of jurisdiction was created during the Khalifa's era.

**3. Judicial Reforms:-**

The Khalifa's judicial reforms differed radically from the simple organization of the Judiciary during the Mahdi's era. In some aspects, these reforms bore striking resemblance to the early Islamic forms of Judiciary. These reforms handsomely contributed to the development of Islamic Law in the Sudan.

The Khalifa consulted the judges to settle legal questions facing the state, and his agents in the different regions followed his practice in that respect. Punishment in all the courts was usually in accordance with Islamic Law. Decisions of other courts were appealable to the High Court, but decisions of the High Court were unappealable.

**4. The Financial System in the Mahdist State:-**

As with the justice, so the revenue, collection of u'shur, zakat on money, camels, cattle and property, finances and trade of the Mahdist State were strictly according to Islamic Law. The revenue system was simple and not oppressive, unlike its Turkish counterpart. The centre of the Mahdist State financial system was the general 'Bait Al-Mal', Treasury, there were other subsidiary treasuries in the different regions of the Sudan.[110] There was a special court as already noted to settle disputes involving the Treasury and to secure that all transactions concerning the Treasury were carried out according to Islamic Law.

**Section C:-**

**Characteristics of Islamic Law During the Mahdist Era**

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[110] A.B. Theobald, "The Mahdiya, A History of the Anglo- Egyptian Sudan, 1881-1899". Longmans, Green and Co. Lond. N.Y. Toronto, 1951, p. 182.

a) The raison d'être of Mahdism was the adoption of Islam as a total way of life and the application of Islamic Law in toto. A significant reason for the rise of Mahdism was the deviation of the Turkish rule from Islamic Law and the introduction of secular laws and western modes of life.

b) The fanatical adherence to any of the four schools of Islamic jurisprudence, fiqh, was condemned, and the Islamic fiqh according to such schools was suspended. The compendiums, glosses and commentaries of such schools were seen as dividing Muslims.

c) The fuqaha were invited to have access to the original sources of Islamic Law, the Qur'an and the sunnah of the prophet.

d) The circulars and proclamations of the Mahdi became a third source of Islamic Law for the Mahdist State. It was meant to detach people from the fanatical adherence to the different schools and to fill the intellectual vacuum left. However, ultimately the Mahdi's followers fanatically adhered to his circulars and proclamations rather than promoting and generating a wide intellectual movement of 'Ijtihad', 'exertion of one's opinion in the light of the Qur'an and Sunnah'.

e) Islamic Law was the territorial system and was the yardstick by which custom and social usages were measured and accordingly incorporated into the legal system, or rejected if repugnant to or inconsistent with Islamic Law.

f) Some aspects of the application of Islamic Law in the Mahdist State bore close resemblance to the early application of such law. However, Mahdism was a revolution and as such it applied Islamic Law rather harshly in certain instances.

g) A large number of former judges had taken similar positions in the Mahdist State, this enhanced the judicial performance and built on a previous experience, giving the judicial system a continuity and a stability.

h) Application of Islamic Law was the central fact in life during the Mahdist State. It appealed to the people.

i) The administration of the Judiciary was centralized and that was detrimental to the smooth and easy flow of justice. Such centralization threatened the independence of the Judiciary.

j) The application of Islamic Law was coloured with a Sudanese brush, and intimate relations with Al-Azhar ceased, indeed were deliberately severed.

k) A rift developed between the Mahdi and the jurists and the same was the case with the Khalifa after the Mahdi.

l) There was no line of demarcation between state and religion in the Mahdist State, the Mahdi rejected the idea of a state or a body politic separate from religion. The dichotomy between state and religion was absolutely unknown in the Mahdist era.

m) The Judiciary acquired an increasingly complex organization during the reign of the Khalifa. It was well organized and established a basis for specialization.

n) Generally the proceedings were of a summary nature, except for major offences.

o) There was no line of demarcation between criminal cases and civil suits in the circulars of the Mahdi.

p) Some of the Mahdi's circulars bore close resemblance to contemporary legislation.

q) Application of Islamic Law and the Mahdist movement were responses to a worldwide Islamic outcry for an Islamic resurgence and Islamic integrity. The Sudanese society, with all its complex ethnic composition, readily responded to establishing an Islamic state and applying Islamic Law.

# PART II

# THE GENESIS OF ENGLISH LAW IN THE SUDAN

# Chapter 1

## THE FALL OF THE MAHDIST STATE AND THE RISE OF THE CONDOMINIUM

The decision taken by the British government in 1896 to invade the Sudan was an episode in the colonial scramble for Africa. The French were already pushing their way from central Africa towards the Nile and at the same time the British were seeking to establish their own authority throughout the Nile Valley. The Italians were defeated in Ethiopia. There was a high probability of an Ethiopian and Mahdist agreement to launch an attack on the Italians who were occupying Kasala, an important city in Eastern Sudan. The decision to invade the Sudan was prompted by a desire to rescue the Italians at Kasala and to prevent the Mahdist State from winning a conspicuous victory which was considered a serious set-back to "the cause of civilization in Africa". The ulterior object for such an invasion was to restore the Sudan to Egypt under the British Control.[1] However, the failure of the Mahdist State to meet with the very serious challenge of a social and economic crisis paved the way for the invasion of the Sudan. Egypt was used as a pretext to reduce the possibility of war with France, and to disarm the French diplomatically in the event of war.[2]

Since the beginning, the vacuum created by the overthrow of the Mahdist rule, sharply posed the question as to who would administer the Sudan. A hybrid form of administration was devised to honour Egyptian claims over the Sudan and to maintain the British interests.[3]

It is a fallacy to think of the Sudan as a country, "never brought under British sovereignty."[4] The fact was that Britain dominated the Sudanese administration, formulated policies, and supplied the administrative personnel, although the appearance of a Condominium was maintained.[5] According to article 3 of the Condominium, the supreme military and civil command in the Sudan was vested in the Governor-General, who had always been a British subject from the beginning of

[1] Ronald Robinson and John Fallagher with Alice Denny, "Africa and the Victorians, the Climax of Imperialism." Anchor Books Doubleday and Inc. Garden City, N.Y., 1968, pp. 346-352.

[2] Mudathir Abd Al-Rahim, op. cit., p. 25.

[3] P.M. Holt and M.W. Daly op. cit. , p. 118.

[4] Rene David and John E.C. Brierley, "Major Legal Systems in the World Today". 2nd. ed., Stevens, Lond., 1978, p. 444.

[5] The U.S. Department of State's Report on Status of the World's Nations. "Countries of the World and Their Leaders", 2nd. ed., Sudan, Revised Apr. 1973, Gales Res. Company, Book Tower Mich., 1975, p. 910.

the Condominium to its end. Thus the Condominium was never practically an exercise in joint rule. The British were the sole masters of the Sudan, which came to be governed by the British government through the Governor-General. The British rightly claimed that the invasion of the Sudan had been effected by English funds, English troops and Egyptian troops officered and trained by Englishmen. This fact, according to Lord Cromer's statement, conferred on the British government a predominant right in the determination of the future of the Sudan.[6]

The creation of that "hybrid" form of government, 'the Condominium', has scarcely few counterparts in International Law.[7] It was designed to bring about a situation whereby the Sudan should be at one and the same time, Egyptian to a degree that would satisfy political exigencies; and yet sufficiently British to allow full control.[8] Later events proved beyond the least doubt that Britain was, for all practical purposes, the de facto governor of the Sudan.

Obviously, the establishment of the Condominium raised the issue of the law to be applied in the Sudan. The British Administrators dealt with the situation as if there was a legal vacuum in the Sudan before 1899. Lord Cromer expressed very clearly that all that would be needed to satisfy the natives of the Sudan would be, "a light system of taxation, some very simple forms of the administration of civil and criminal justice, and the appointment of a few carefully selected officials with a somewhat wide discretionary power to deal with local details".[9]

The fact was that Islamic Law was very much alive, although it had naturally suffered in the general chaos[10] during the last days of the Mahdist State . It was the law binding the courts and the people of the Sudan and was the territorial law for at least four centuries during Sinnar Sultanate, Dar Fur Sultanate, most of the Turkish rule and the Mahdist State . That fact embarrassed Lord Kitchener. He could not decide as to what law to administer in the Sudan. One of the objectives of

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[6] Mekki Abbas, op. cit. , Appendix B, p. 164.

[7] The Condominium Agreement was signed by Lord Cromer (the architect of the device) and Boutros Basha Ghali, the Egyptian Minister of Foreign Affairs, on January 19, 1899 and formed the constitutional framework within which all legal actions took place. A similar situation was that of the Congress of Vienna putting the district of Moresnet under the joint control of Prussia and the Netherland in 1819 and that, of the province of Schleswig-Holstein being subjected to a joint control of Prussia and Austria in 1869; see Mudathir Abd Al-Rahim op. cit. , pp. 37,38

[8] Beshir Mohammed Said, "The Sudan Crossroads of Africa" The Bodley Head, Lond., 1965, p. 17.

[9] Lord Cromer's memorandum to the Secretary of State for Foreign Affairs supporting his draft of the Anglo-Egyptian Agreement on the Sudan; see Mekki Abbas, op. cit. , Appendix B, p. 161.

[10] A.W.M. Disney, "English Law in the Sudan, 189-1958". S.N.R. (Sudan Notes and Records), vl., XL, Kh. 1959, p. 121.

the reconquest was to combat the influence of Islam; considering this fact, among other things, it is not surprising that the British Administration was very keen not to maintain the application of Islamic Law, which was the territorial law of the Sudan until the reconquest.

Islamic Law was at once confined to personal matters, and it was declared that the necessary laws and regulations would be carefully considered and issued as required. The British Administration was very careful not to induldge in any un-Islamic activities or to impose secular laws at the start. They were cautious because of the resentment of foreign non-Islamic rule which prevailed throughout the Sudan. The new Administration wanted to avoid unrest and confrontation. There was careful concern for Muslim opinion in the government's judicial policies.[11] One of the directives issued by the Governor-General was to the effect that his governors and their assistants should be careful to see that religious feelings were not in any way interfered with and that the Islamic religion was respected.[12] Kitchener declared that he came to the Sudan to reduce the sufferings of the Muslims, to establish an Islamic state based on justice and to construct mosques and help spread correct Islam.[13]

In 1899 Lord Cromer promised a gathering of Shaykhs and notables to respect the Islamic religion. One Shaykh asked whether that could mean application of Islamic Law and Lord Cromer assured the Shaykh that it did.[14] Lord Cromer was obviously playing politics. He wanted to calm the fear of the Sudanese people, but he never meant the true meaning of his statement.

The British Administration found an ally in some Muslim jurists who were alienated by the Mahdists; it established the board of the 'Ulama', jurists, in 1902 to advise the government in Islamic affairs.[15] The posts of Mufti and Grand Qadi were restored. The board of 'Ulama', the Mufti and the Grand Qadi were considered by the people as a British made establishment. It was

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[11] P.M. Holt and M.W. Daly op. cit. , p. 124.

[12] Natale O. Akolawin, "Islam and Customary Law in the Sudan: Problems of Today and Tomorrow," in 'Sudan in Africa.' Studs. presented to the 1st Int. Conf. sponsored by the Sud. Research Unit, 7-12 Feb., 1968, edited by Yusuf Fadl Hassan, Kh. U. Press, 1971, p. 280.

[13] Na'um shuqayr, op. cit. , pp. 581-582.

[14] Mekki shibaykah, op. cit. , p. 420; Egon Guttmann, "The Reception of Common Law in the Sudan". The Int. and Comp. L. Q. Vol. 6, Lond. The Soc. of Comp. Legis., 1957, p. 404.

[15] Ja'far Mohamed Ali Bakhit, "The British Administration and the National Movement in the Sudan 1919-1939". 'Arabic translation by Henry Riyad', Al Thaqafa Press Service, Beirut, 1972, p. 33.

lacking in popular support. The whole Administration was poorly received in the Sudan.

It was a firm conviction of the British Administration in the Sudan that no radical and abrupt change of system was advisable. The taxation system was based on the same Islamic principles of the Mahdist State , as it was decided that in the assessment of the taxes, no innovation, based on western concepts, should be introduced. Lord Cromer was impressed by the Mahdist taxation, although he thought that the way it was levied during the last days was cruel. He thought that in principle, it was simple, would not overburden the taxpayers, and could be collected in kind if the farmers were unable to market their produce.[16] Unlike the way it was conceived this system turned out to be burdensome. The Sudanese people, or strictly speaking, the taxpayers were bound by Qur'anic rules to give their dues to certain categories of people, or to hand them over to the Muslim government for distribution according to the rules of Islamic Law. Obviously the British Administration did not represent those categories, so the people were actually paying and distributing their Zakat, and then paying the same amount to a non-Islamic government; they ended up paying double taxation.[17]

The Condominium Agreement, though not a constitution, gave legal recognition to the prevailing situation following the reconquest.[18] Its preamble emphasized the necessity of providing a legal system and set of laws for the Sudan. Article IV of the Condominium Agreement vested supreme judicial and legislative authority in the Governor-General of the Sudan, who was authorized to make, alter or abrogate by proclamation all the laws, orders and regulations. Egyptian Law would come under such laws that could be altered or abrogated by a proclamation of the Governor-General. Being the ultimate legal authority, he was only required to notify the British Agent Consular-General in Cairo and the Egyptian Prime Minister of the laws made.

Article V of the Agreement dealt with laws applicable in the Sudan by negation. It excluded

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[16] Mekki shibaykah, "The Sudan in a Century." 3rd. ed., Arabic Text, Authorship translation and public. Comm., Cairo, 1961, p. 323. Along the same line the British Administration enacted the taxation of Rainland 'Ushur' Act, 1924, The Taxation of Animals Act, 1925 and the Taxation of Land and Date Trees Act, 1925.

[17] Loc. cit. Although Zakat is regulated by the Islamic Government, it cannot be defined as a tax; it is legally controversial whether taxes can be levied over and above Zakat.

[18] Gabriel Warburg, op. cit. , p. 124.

the enforcement of any Egyptian Law in the Sudan, unless it was declared valid by a proclamation of the Governor-General. It was later stated that only the Egyptian Laws that were in force before the collapse of the Turkish rule were enforceable in the Sudan. That was intended to limit the application of future Egyptian Laws to those specifically approved by a proclamation of the Governor- General.[19]

Article IX barred the jurisdiction of the Egyptian Mixed Courts Tribunals from the Sudan. Sawakin[20] was an exception to such a bar as the jurisdiction of the Mixed Tribunals had extended to cover Sawakin since the Turkish rule of the Sudan.[21] To strengthen the position against admitting the jurisdiction of the Mixed Tribunal to the rest of the Sudan, Martial Law was imposed according to Article IX to all the Sudan except for Sawakin. Ordinary civil jurisdiction of the courts was in abeyance, and the imposition of Martial Law was designed, inter alia, to further the powers of the British Governor-General of the Sudan.[22]

Article XIII dealt with sale and importation of arms and alcoholic drinks. The latter item was never officially imported or officially sold in the long history of the Sudan before the Condominium; very soon this was followed by regulations relating to the import and sale of alcoholic liquor, all of which were consolidated in and amended by the Liquor Licence Act, 1923.[23]

The Condominium Agreement has conceded to the Sudan a legal system independent of that of Egypt.[24] Lord Cromer, on a visit to the Sudan, stated that no attempt would be made to govern the country from Cairo, still less from London, and pointed out that the Sudanese people must look to the Governor-General for justice.[25]

As the Mahdist Revolution and the war had shattered the old structure of land tenure, the need was strongly felt to enact a Land Ownership Ordinance as early as 1899, the same year that a

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[19] Mekki shibaykah, "British Policy in the Sudan 1882-1902". op. cit. , p. 415.

[20] The then only port of the Sudan on the Red Sea.

[21] Gabriel Warburg, Ibid.

[22] In a later amendment of the Condominium Agreement the exemption of Sawakin was repealed.

[23] The Liquor Licence Act, 1923, L.S. (Laws of the Sudan), vol. 1, 1901-1925 5th ed. Kh. U. Press, The Democ. Repub. of the Sud. 1976, pp. 202-209.

[24] P.M. Holt, op. cit. , p. 118.

[25] Egon Guttmann, op. cit. , p. 404.

Taxation Ordinance was enacted, following the precedent of the Mahdist State .[26]

The most important laws to be enacted in the first two years of the Condominium were the Sudan Penal Code and the Code of Criminal Procedure and the 1900 Civil Justice Ordinance. These will be dealt with in the next chapter.

[26] P.M. Holt, Ibid.

# Chapter 2

## RECEPTION OF ENGLISH CRIMINAL LAW

Both the Sudan Penal Code and the Code of Criminal Procedure were drafted by Sir William Edward Brunyate,[27] a British lawyer in the Egyptian Ministry of Justice and Mr. E. Bonham Carter, the Legal Secretary under the Condominium until 1917 and who later served as acting Judicial Commissioner of the Sudan.

**Section A:-**

**The Code of Criminal Procedure**

The Code of Criminal Procedure, introduced in 1899, was based on its Indian counterpart, with engrafted upon it some elements of the Egyptian Martial Law with which the Egyptian officers, who were entrusted with its application in the Sudan, were familiar.[28] The Egyptian rules of Criminal Procedure in relation to hearing of cases were closely followed in drafting the Sudanese counterpart. Thus Egyptian elements were themselves an adaptation of English Law . Thus, Lord Cromer stated that:[29]

> "The Code of Criminal Procedure is partially based on the Indian Code, but having regard to the fact that the magistrates are all military officers, the forms and methods of Egyptian Military Law with which they are familiar, and which is itself an adaptation of English Military Law, have been so far as possible retained."

The Code of the Criminal Procedure was not to apply to the whole of the Sudan at once, but was to be gradually extended to the different parts of the Sudan. The Administrators had the discretion to introduce the Code of Criminal Procedure with adaptations suitable to the needs of their provinces.[30] It was a flexible Code, simple and easy to apply.

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[27] Sir William Edward Brunyate also drafted the 1899 Land Ordinance.

[28] Mekki Shibaykah, "The Sudan Through the Centuries." op. cit., p. 447.

[29] Zaki Mustafa, "The Common Law in the Sudan, An account of the Justice, Equity and Good Conscience Provision". Clarendon Press Oxf., 1971, p. 44.

[30] Egon Guttmann, op. cit., p. 405.

The Code of Criminal Procedure was a product of the Condominium era where judicial and administrative functions rested in the same hands of the British Administrators and later the magistrates. It allowed the magistrates an extremely wide discretion in pre-trial procedure, a thing that is inconsistent with the always pressing need to maintain judicial impartiality.[31]

**Section B:-**

**The Penal Code of the Sudan[32]**

The Penal Code of the Sudan adopted with insignificant variations the Code drafted by Lord Macaulay for India.[33] The Indian version of the Code was almost entirely the draft of a single man, who had in mind the Penal Code that was smoothly applied in Zanzibar[34] as early as 1867 and later in both Uganda and Tanganyika. In his letter to the British Governor-General in India accompanying the draft of the Penal Code, Macaulay claimed originality, and boldly stated that his draft was not a digest of any existing system,[35] although he admitted to having received assistance from Code Napoleon and the Louisiana Code. The plain truth is that the Macaulay draft drew heavily from the law of England, stripped of technicality and English peculiarities, shortened, simplified, amended and made intelligible and precise. He started from basic principles of English Law, but was conscious of the social circumstances differing from those in England.[36] Instances of inspiration from the the Code Napoleon were most insignificant.

The Sudan version of that Code was simple enough to allow persons with rudimentary or no special legal training to administer. It was thought, inter alia, that if crude English Law was to be applied, it would incur greatly increased expenses to appoint legally trained magistrates.[37] The simplification, partial adaptation and precision failed to cloak the English nature of the Sudan

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[31] Abdullahi Ahmed an-Naiem, "The Many Hats on the Sudanese Magistrates; Role Conflict in Sudanese Criminal Procedure", J.A.L., vol. 22, School of Oriental and Afri. Stud., U. of Lond., 1978, p. 61.

[32] The 1899 Penal and Criminal Procedure Codes were revised and re-enacted in 1925, revised in 1941 and 1954; re-enacted again in 1974 and underwent a major revision and re-enactment in 1983.

[33] Egon Guttmann Ibid.

[34] Mekki Shibaykah, Ibid. ; H.F. Morris,"History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935." J.A.L. vol. 18, School of Oriental and Afr. Studs. U. Of Lond., 1974., p. 13.

[35] Alan Gledhill, "The Penal Codes of Northern Nigeria and the Sudan." Lond.: Sweet & Maxwell, 1963, p. 17.

[36] Loc. cit.

[37] H.F. Morris, Ibid.

version of the Macaulay Penal Code. It remained exotic and some of its parts were completely in disharmony with the morals and Islamic convictions of the Sudanese people. In certain areas it departed from the provisions of English Criminal Law, but in many respects offences which were substantially the same as their English counterparts, were given different names or were visited with different penalties.[38]

It is a simple fact that pressure groups influence the policy of the state, particularly when it comes to the Penal Code. The Muslim jurists of Northern Nigeria best reflected this fact. When a panel of jurists presided over by the then Chief Justice of the Sudan recommended the introduction of a Penal Code based on the Sudan version of the Macaulay draft, the draft bill accepted by the Northern Region Government of Nigeria and approved by the legislature, was scrutinized and censored. The censorship was carried out by a committee of Northern Nigeria Ulama, jurists, who struck out all provisions repugnant to Islamic Law, and gave the bill an Islamic colour by introducing 'hudud'.[39] The offences visited with 'hadd' punishment according to the Northern Nigerian Code are: adultery by a man, adultery by a woman, defamation or strictly speaking, slanderous accusation of unchastity, injurious falsehood, drunkenness in private, drinking of alcohol by a Muslim and committing any of such offences within a period of six months after a previous conviction.[40] These 'hudud' were imposed in addition to the other offences prescribed by the Code; obviously this was a compromise yielding to the pressure exerted by the Muslim Ulama. Facts of such 'hadd' offences must come within the scope of offences defined by Islamic Law according to the Maliki jurisprudence as 'hadd' offences, and must equally satisfy the ingredients of such offences in the Code.[41]

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[38] Ibid. p. 9.

[39] Hudud singular 'hadd':- Unlike the discretionary punishment known as ta'zir', 'hadd' is the punishment determined in fixed terms in the 'Qur'an' or the 'Sunnah'. The application of hadd is the right of 'Allah' and cannot be reduced or enhanced; after the judge takes cognizance of a 'hadd' offence it can never be pardoned by the court, the political authority or by the victim of the 'hadd' offence, it is an absolutely unpardonable offence. 'hadd' offences include the drinking of intoxicants, theft, armed robbery, illicit sexual relations, slanderous accusation of unchastity and apostacy; some authorities hold varying views as to whether the first and last of these offences qualify for a 'hadd' or a 'ta'zir'; see Mohamed S. El-Awa, 'Punishment in Islamic Law'. Am. Trust Pub., Ind. 1982, pp. 1,2.

[40] Alan Gledhill, op. cit. , p. 768.

[41] Loc. cit.

The case with the Sudan was different, as pressure groups were absent for these obvious reasons:-

a) The Penal Code and other laws were all drafted in English with no Arabic translation. That alienated the people.

b) The board of Sudanese jurists was government oriented, and it was highly improbable that it could exert sufficient pressure, if any at all.

c) Neither those administering justice, nor the bulk of the parties to the cases were Sudanese. Those parties who were Sudanese were mostly simple illiterate people.

d) These Codes were introduced two years after the defeat of the Mahdist Islamic State. It is a rule that the conqueror imposes his law upon the conquered, and that was exactly what took place.

e) Opposition was directed against the whole colonizing Administration rather than against the details of that system.

**Section C:-**

**Some Features of the Penal Code**

The Sudanese version of the Macaulay Penal Code draft contained some elements abhorrent to the moral standards of the Sudanese people, much more so to the generations that outlived the Islamically based Mahdist state. An average Sudanese person had been brought up to consider such elements repulsive and reprehensible. Instances of such serious elements are the following;

a) Dropping the 'hudud' and rejecting Islamic Law, a system that formed a significant part of the religious belief of the people.

b) Unlike the Northern Nigerian Penal Code, the Sudanese Penal Code did not provide for the offence of keeping or managing a brothel.

c) Drinking alcoholic beverages was not considered an offence by the Sudanese Penal Code.

d) Illicit sexual relations with a consenting woman of age was not an offense.

e) Sexual intercourse with one's own wife could be rape if she were under age.

f) Consent was a defence to carnal intercourse. That was not the case even in England then. Homosexuality was not yet legalized in England, only to be legalized fifty years later.[42]

g) A sexual act done to an animal or a consenting person was not an offence. Interestingly, the Northern Nigerian Penal Code conformed with a considerable portion of the principles of Islamic Penal Law; consent is irrelevant in sexual offences according to the Northern Nigerian Penal Code as scrutinized by the Northern Muslim, Ulama, scholars.

h) Sexual intercourse with a married woman, if her husband consented or connived at it was not an offence punishable under the Sudan Penal Code. The Macaulay Penal Code considers polygamy an offence. This runs contrary to the rules of Shariah.

i) The offence of theft in the Penal Code was different from theft as defined by Islamic 'fuqaha', scholars; the value of stolen property, "nisab as-sariqa", is such a significant ingredient in Islamic Criminal Law definition of theft that any stolen property below that value does not qualify for inflicting the hadd punishment of amputation of the right hand. Theft in Islamic Criminial Law is a wider area than the limited one in the Sudan Penal Code. Theft as a 'hadd' offence was totally dropped by the Sudan Penal Code.

j) Killing with consent of the person deceased did not constitute culpable homicide punishable with death. This exception could embrace the case of euthanasia, which is still legally and ethically debatable in all civilized nations.

k) Some sections of the Sudan Penal Code, such as arranging, promoting or organizing fights between cocks, rams, or other domestic animals, were a free adaptation from English legislation for the protection of animals, before their consolidation in the Protection of Animals Act, 1911.[43] Such a section was irrelevant to the Sudan as there had never been such

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[42] In August of 1954, in England, a committee under the chairmanship of John Wolfenden was established to consider the then existing English Penal Laws concerning homosexuality and prostitution. In 1957, the Wolfenden Report was issued. It recommended that homosexual behaviour occurring in private between consenting adults no longer be punishable under the law. At roughly the same time a committee in the United States of America began to draft a model Penal Code. The final recommendations of the Model Penal Code in respect to homosexuality and prostitution were almost identical to those contained in the Wolfenden Report. For more details see: Richard A. Wasserstrom, "Morality and the Law." Wadsworth Publishing Co., Inc., Belmont Cal. 1971, pp. 3, 4, 29, 30.

[43] Ibid. p. 625.

practices in the Sudan. It was a slavish copying of rules that would not necessarily fit any other alien setting.

Public interest in morality was generally overlooked. It is shocking that such acts were legalized in a Muslim country at a time when at least a great part of them were still condemned as illegal in England.

Although there are differences in approaches and results between the Islamic Penal Law and the Sudan Penal Code, such differences are less than one is often tempted to believe.

Although the simplified elements of English Criminal Law were numerous, instances of departure from principles of English Criminal Law, albeit few, had always been there as a result of adaptation. Section 281 of the Sudan Penal Code imposed a duty to help injured persons, in a way that took the section far beyond the Common Law concept of a person's duty of care for his neighbour.[44] It is neither in the Indian Penal Code nor in the Northern Nigerian one. It has the ingredients, approach, but not the result of the same offence in Islamic Penal Law.[45]

In later years, a judicial circular warned the Sudan Criminal Courts not to refer to the McNaughten rule in order to elaborate the plain meaning of the words "the nature of his acts" in section 50 of the Penal Code, regarding insanity as a defence.[46]

Section 319 of the Sudan Penal Code provides for the act of gross indecency. This section is not found in the Indian Penal Code. It was imported from the Egyptian Law to provide for the punishment of abortive acts short of penetration, but exceeding mere preparation. This section was introduced to fill the gap in the Sudan Penal Law.

The Sudan Penal Code contained elements of English Criminal Law amended and simplified to suit administration by lay magistrates, who were Administrators and retired high rank police

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[44] Ibid. p. 357.

[45] Omission to assist persons injured, unconscious or facing death is considered to be murder if death ensued, that was a view in the Maliki school of fiqh. A view in the Hanbali school considers such an omission culpable homicide not amounting to murder. A view in the Hanbali school of Islamic juridprudence holds a person who is in a position to rescue someone surrounded by fire or who is drowning or attacked by a fierce animal, but omits to do so, responsible for the death of that one; see Abdel Qadir' Uda, "The Islamic Criminal Law compared with Positive Law", vol. 2, 'Arabic Text', 5th. ed., Beirut, 1968, pp. 57, 58.

[46] Alan Gledhill, op. cit. , p. 99.

officers.

There was a great leniency in the penalties throughout the Sudan Penal Code, compared to Islamic Criminal Law and even to the Indian and Northern Nigerian Penal Code. This resulted in a decline in the deterrent element of the punishment.[47]

The Sudan Penal Code was introduced in 1899, but was not to apply to the whole of the Sudan at once. It was to be extended gradually to the rest of the provinces. In areas that were not subjected to the jurisdiction of the Sudan Penal Code, justice was administered according to local customs and tribal usages. It took six years to extend the application of the Sudan Penal Code to all of Northern Sudan. It took a number of years to apply the Sudan Penal Code to the rest of the Sudan. The official justification for that gradual and slow process could be found in the words of Mr. Bonham Carter, the then Legal Secretary of the Sudan:-

> "Not infrequently the Administrator finds that the people with whom he is dealing are in such a backward condition that the principles underlying European systems of criminal jurisprudence lose their significance when applied to them."[48]

The resentment and bitter feeling of the Sudanese people towards the British Administration that crushed their own state that was applying Islamic Law; and the Administration's awareness of the danger of inflaming the resentment and angry feeling of the Sudanese people were crucial factors, inter alia, to enforce the policy of gradual imposition of an alien set of laws throughout the Condominium era. It was a policy carefully adopted to absorb opposition, bearing in mind that time could always be the best healer.

The whole idea of re-enacting the Indian Penal Code, and its gradual extension was to obviate opposition and criticism arising from imposing colonial codes.[49] A very serious implication of the inception was the clash it brought between law and morality. The enacted set of laws and in

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[47] Egon Guttmann, op. cit., p. 406 where Report, 1904was quoted.

[48] Zaki Mustafa, op. cit., p. 45 where the author quoted Lord Cromer's Report on the Finance, Administration and Condition of the Sudan 1902, pp. 12-15.

[49] The first two decades of the Condominium witnessed a host of armed opposition against the British Administration. The most significant uprising was that of a certain Abdel Gadir Wad Habouba, a Mahdist supporter who led an armed rebellion against the government which had crushed the Islamic Mahdist state and rejected the rule of Islamic Law as he so stated.

particular, the Sudan Penal Code was far from being compatible with the morals of the Sudanese people. It introduced a dichotomy between law and morality in a sharp, unprecedented manner. No serious thought was ever given to the application of Islamic Law, or even to its adaptation. It was often repeated that the British Administration had the intention of introducing to the Sudan a simple Penal Code that could best suit the circumstances and needs of the Sudanese people. Lord Cromer reflected such intention in his following statement:-[50]

> "The Penal Code has provided the country with a system of Criminal Law at once simple, just and well suited to the habits of the people. It is an adaptation in a simplified form of the Indian Penal Code, which had already been employed with success in Zanzibar and East African Protectorates."

The irony in Lord Cromer's statement is that at least a portion of the Sudan Penal Code was tailored to suit British policy in the Sudan, rather than the Sudanese people. A whole chapter entitled, "Of Offences Relating to Religion" was embodied in the Sudan Penal Code to help the Administration keep the peace in a conquered country where people were motivated by religion to oppose the alien rule.[51] Apart from the vague offence of abusing religions or noble spiritual beliefs for political exploitation, the rest of the provisions of this chapter could be traced to their origin in the Indian Penal Code upon which the Sudan Penal Code drew heavily.

Given the fact that the Mahdist state was based totally on religion and the opposition to the British Administration was based absolutely on religion, it would not be surprising that the sections of that chapter were therefore intended rather for the keeping of the peace than for the protection of religion as such.[52]

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[50] Zaki Mustafa, op. cit., p. 44 where the author quoted the Report of H.M.'s Agent and Consul General on Egypt and the Sudan, 1899, p. 52.

[51] Interestingly this chapter has always remained in force, despite the different amendments of the Sudan Penal Code and it had always served to protect the different political systems of the Sudan, since the Condominium. It is even reflected in the different Constitutions of the Sudan.

[52] Akolda M. Tier, "Freedom of Religion Under the Sudan Constitution and Laws". J.A.L., vol. 26, No. 2, 1982, pp. 138-139.

# Chapter 3

# THE RECEPTION OF ENGLISH COMMON LAW IN THE SUDAN

**Section A:-**

**Introduction and Custom as a means of Introducing English Law:-**

Lord Cromer went back on his own promise to respect Islam in the sense of applying Islamic Law and abiding by its rules. He later remarked that such a promise would in no way tie the hands of the British Administration in dealing with that matter.[53]

Lord Kitchener did, in his annual report for 1899, say that, "The necessary laws and regulations will be carefully considered and issued as required."[54]

The British Administration was caught on the horns of a dilemma vis-á-vis the laws to apply in the Sudan. On the one hand, the British Administration wanted to make the Sudanese people feel that it respected their religious convictions, and that it was keen to avoid confrontation at any level; on the other hand, the official stance of the British Administration was not in favour of adopting any of the laws applied during the Turkish rule, much less Islamic Law applied during the Mahdist era. Although the British Administration was at great pains not to offend or provoke the sensitive religious feelings of the Sudanese people, it was at equal pains to avoid adoption of, or even less, adaptation to, a body of substantive civil law founded on Islamic Law. It is obviously very naive to conceive of a British Administration that spared no effort to crush the Mahdist state and its Islamic legal system, as one that could in any way apply Islamic Law.

Lord Cromer stated very bluntly that:-

"The cannon which swept away the Dervish hordes at Omdurman proclaimed to the world that on England or, to be more strictly correct, on Egypt under British guidance had devolved the solemn and responsible duty of introducing the light of western civilization amongst the

[53] G.A. Lutfi, "The Future of the English Law in the Sudan". The S.L.J.R., 1967, p. 225 where the author quoted Lord Cromer Report for 1899.

[54] A.W.M. Disney, Ibid.

sorely tried people of the Sudan.''[55]

English Law could have been promptly applied, but it was considered that such a prompt application of English Law with all its sophistication and technicality might not suit a primitive society like the Sudan. It was further thought that such prompt application of English Law was apt to provoke and antagonize Egypt, the de jure partner in the Condominium. It might equally disturb the peace and cause complete unrest among the conquered nation, which was assured right after the reconquest that Islamic Law would be applied.[56] A regular Judiciary was not yet established to administer the application of English Law, which was, by far, more difficult to apply than other codified laws.

Egyptian Laws were dismissed as a choice by the very words of article IV of the Condominium:-

> ''No Egyptian Law Decree Ministerial Arrête, or other enactment hereafter to be made or promulgated shall apply to the Sudan or any part thereof, save in so far as the same shall be applied by Proclamation of the Governor-General in manner hereinafter provided.''

The sudden application of foreign law was in the highest degree improbable, and Egyptian Law qualified for a foreign law as well as English Law did. Again, it was perceived as dangerous to follow Egyptian Codes, derived from the Code Napoleon, using the same logic for refusing the imposition of a sophisticated technical legal system on a primitive society like the Sudan.

A host of political considerations tilted the balance against the adoption of the Egyptian Code. One such consideration was the phobia that Egypt, being the rival partner to the Condominium, could possibly influence the Sudanese legal system, and ultimately the Sudanese political life. However, the British Administration was prepared to accept partial application of Egyptian Law in restricted form where no other law would lend itself as an immediate alternative.[57]

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[55] P.M. Holt and M.W. Dally, op. cit. , p. 116 quoting Lord Cromer, Modern Egypt, 1908.

[56] Mekki Shilbaykah, "British Policy in the Sudan 1882-1902." Ibid. ; Egon Guttmann, Ibid. where the author quoted address delivered by Lord Cromer in Odmurman in 1899; Zaki Mustafa, op. cit.p.53.

[57] Zaki Mustafa, Ibid.

The need for a gradual change was strongly felt for the foregoing reasons. Again, the British experience in India was seen as the best way out of this legal dilemma. The British Administration was conscious of the futility of imposing a foreign law upon the unreceptive Sudanese people. All the policy justification underlying the introduction of the Sudan Penal Code was taken into consideration in the case of civil justice. The British Administration hardly knew anything about the customs and the Sudanese way of life. That being the case, it was thought advisable not to establish a body of substantive civil law.

**Section B:-**

**The Reception of English Law Through the Personal Law for Non- Muslims**

**The Civil Justice Ordinance 1900:-**

The Civil Justice Ordinance was an 'amalgam of Indian Civil Procedure rules and English principles of pleading.'[58] It has since then been revised and re-enacted a number of times, but has only been altered very slightly.

The Civil Justice Ordinance is a Code of Civil Procedure. It was prepared by Mr. Bonham Carter, who portrayed its basic features as follows:-[59]

> "The rules contained in the Civil Justice Ordinance lay down that questions regarding succession, gifts, marriage, family relations and the constitution of charitable endowments, are to be decided in accordance with Islamic Law, where the parties are Muslims, and in accordance with law or custom applying to them if they are not Muslism, and that in other cases, if not bound by the positive law, the court shall act according to justice, equity and good conscience. In my opinion, general legislation upon the principles of civil law is not advisable until a regular Judiciary is established."

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[58] Mohamed Ibrahim Khalil, op. cit. , p. 637; The issues under the Civil Justice Ordinance are settled by the judge after hearing the parties, or pursuing their pleadings, or both, whereas in the English Procedure the issues are settled by the pleadings of the parties. This is a point of departure.

[59] Zaki Mustafa op. cit. pp. 54, 55, where the author quoted Report of H.M.'s Agent and Consul General on Egypt and the Sudan, 1901, p. 1113.

Again the Civil Justice Ordinance was interwoven with ideas and phraseology derived from the Indian Civil Procedure that was applied in British Bechuanaland and Burma. This was to enable its administration to be entrusted to untrained judges with rudimentary legal qualifications, postponing legislation upon the principles of civil justice. The Civil Justice Ordinance is primarily procedural, with only two sections dealing with substantive law.[60] However, the ordinance was only gradually extended to all the provinces of the Sudan. It was within the jurisdiction of the administrators to apply the Civil Justice Ordinance where the situation warranted such an application. Ironically codification, uncharacteristic of English Law, was used to incorporate principles of English Law at the beginning of the Condominium in the Sudan, as well as fending off the infiltration of legal influences other than English Law.

It is note-worthy that Islamic Law was given such a minor role that it was inferior to custom, which is generally a very secondary source of Islamic Law. It was confined to the area of personal law, following the footsteps of the British administration of justice in India and all the Muslim colonies.

Chapter II of the 1900 Civil Justice Ordinance provided for the law to be applied. Section 3 provided that personal matters include questions pertaining to succession, inheritance, wills, legacies, gifts, marriage, divorce, family relations or waqf and that should be decided in accordance with the following rule:-

a) Any custom applicable to the parties concerned which was not contrary to justice, equity or good conscience, and which had not been abolished by law or invalidated by a competent authority.

b) Shariah Law, where the parties were Muslims, unless it had been modified by custom. Section 3 of the Civil Justice Ordinance stipulated that in personal matters involving non- Muslim litigants the court should decide according to the custom applicable to such parties.

The word 'custom' as used in section 3 invited too much controversy. It was interpreted to

[60] This is understandable when we know that English Law was constructed along procedural lines.

accommodate "the personal law of the parties or ecclesiastical rules common to the parties". It was argued in Heirs of Mariam Bint Boulos Saleeb V. Heirs of Boulos Saleeb ,[61] that the word "custom as used in section 5 of the Civil Justice Ordinance includes personal law" or Coptic Law, so to speak, since both parties to the dispute were Coptics.

A leading case in point is Abdulla Charchaflia V. Marie Bekyarellis ,[62] which was a case of separation, alimony and custody of children. It was established per Gorman J. that:-

> "The court is directed by section 5 of the Civil Justice Ordinance 1929,[63] in a suit involving personal status or family relationship to apply any custom relating to such matters applicable to the parties concerned. Such custom or body of customs is usually referred to as the personal law of the parties. It has been decided by this court that where the parties are in a country other than the Sudan, which possesses a national law of personal status, such law is to be regarded as a body of customs applicable to the parties within the meaning of section 5."
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> Gorman J. proceeded to say:-
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> "But where the parties are domiciled in the Sudan, or in a country with no national law of personal status, then it has been held, it is the customs of the religious community to which they belong which are to be looked to, and which comprise their personal law."

The Appellate Court in the foregoing case as stated per Gorman J. reiterated an earlier precedent established by the Court of Appeal. It gave the word custom such a wide interpretation as including, "personal law of the parties", "law of personal status" and "the customs of the religious community to which the parties belong and which comprise their personal law."

It is interesting that in this case, the judge obtained a certificate of church custom both from the Vicar Apostolic and the Greek Catholic Archimandrite. The Archimandrite certified that Greek Catholics were governed by Islamic Law according to the Hanafi school of fiqh, while the Vicar

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[61] (Ac-Rev-17-1932); II S.L.R.C. Sudan Law Report), Civil Cases, (1932-1940), the Faculty of L., U.of Kh., Oceana Publics. Inc. Dobbs Ferry, N.Y. 1969, pp. 4-7.

[62] (Ac - App -12 -1934); II S.R.R. op. cit. pp. 129-133.

[63] The Civil Justice Ordinance was repealed in 1929 and re- enacted after its fusion with the Courts Ordinance 1915; section 3 of the 1900 Ordinance became sec. 5 in the re-enacted 1929 Civil Justice Ordinance and sec. 4 became sec. 9.

Apostolic, set out the canon law on the subject.[64] Faced with these conflicting certificates of church custom, the court opted for the customs as set out by the Vicar Apostolic and refused to follow the certificate of the Greek Archimandrite, on the assumption that "the Greek Catholics during the centuries when they were under the Turks were forced to adopt the prevalent Muslim Law". But this assumption "did not make such law a body of customs applicable under section 5 of the Justice Ordinance."

The learned Appeal Judge set the following principle:-

> "Where, in accordance with the interpretation which has been put on this section, the courts of this country have to consult church customs, it is the essential, universal and characteristic custom of that church to which regard is to be paid, not that which it may have been forced to adopt in a particular locality at particular times. Therefore, had these parties been Greek Catholics, I should not have consulted the Hanafite code, but in default of any Greek Catholic Custom in the above sense being proved, I should, they being Catholics, have looked to the Canon Law as the highest expression of the Catholic Christian Law."

It is surprising that Gorman J. very bluntly rejected the certificate of the Greek Catholic Archimandrite, who was the highest ecclesiastical authority as far as the Greek Catholics resident in the Sudan were concerned. He rejected such a certificate on a mere assumption, and did not take the least trouble to support his assumption with proven historical facts. The learned judge felt free to assume a set of facts and believed in all seriousness the truthfulness of his own assumption.

Section 5,a, of the Civil Justice Ordinance of 1929 set three qualifications on any custom in order to be applicable to the parties. These were:-

a) It should not be contrary to justice, equity and good conscience.

b) It should not have been by the Civil Justice Ordinance or any other enactments altered or abolished.

c) It should not have been declared void by decision of a competent court.

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[64] Ibid. p. 132.

The assumption of the learned judge does not qualify as one of these qualifications. He was simply adding one of his own. He was not interpreting any of these qualifications to include his own assumption, but rather usurping the function of a legislator and creating one.

It is interesting that Gorman J. conceived of reception as one way traffic. He represents a trend within the English judges then in the Sudan, who would grasp every single opportunity to disregard the local custom in favour of their own laws, and vehemently resist to recognize and receive other legal systems, much less Islamic Law. However, the final order of the appellate authority regarding the custody of the children was strikingly similar to that which would have been rendered if the relevant rules of Islamic Law had been applied.

George Helal V. Gamila Helal ,[65] lends itself as an example of a case where the court took it for granted that custom as provided for in section 3 and later section 5,a, of the Civil Justice Ordinance was wide enough to include the personal law of the parties. The parties to this case, who were members of the Syrian Branch of the Greek Orthodox Church, agreed that their personal law as to alimony was identical to Islamic Shariah Law. The court did not contest that agreement and did not challenge the authentic authority of the Archimandrite. The court had the advantage of an expression of opinion both from the Mufti, juris-consult, of the Sudan and the Archimandrite in Khartoum of the Greek Orthodox Church, whose views were identical. The court arrived at its decision in light of the two views. This case, in contrast with Abdulla Charchflia V. Maria Bekyarellis, represents a liberal trend within the English judges during the Condominium. It is a Court of Appeal decision that paid no heed to the qualification introduced by Gorman J. and rendered it worthless.

At one point in time, it seemed to be settled that 'custom' as in section 3 and later 5,a, of the Civil Justice Ordinance could be widely interpreted to include personal law. But Bennet C.J. seemed to reject such a wide interpretation when he stated in obiter dicta in Constantine Cambouris V. Constantine Procos ,[66] that he had:-

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[65] (AC-REV-88-1936); II S.L.R. 214-215.

[66] A.C. APP-5-1944.

"Some doubt whether the expression 'custom applicable to the parties concerned', in section 5,a, includes the personal law of the parties."

Cumings, C.J., in later Court of Appeal decision,[67] pointed out with emphasis that 'custom' in section 5,a, of the Civil Justice Ordinance 1929 includes the law of the religious community to which the parties belong and was even prepared to extend the meaning of custom to include the law of the country of nationality. However, such law was identical to the religious law of the parties who were Greek Catholic, and both laws derived from Islamic Law. The learned C.J. related this to the fact that Syria and Lebanon, the countries of nationality of the parties, were for so long within the Ottoman Empire. The learned C.J. accepted the fact that the statute personal of the Greek Catholic community was Islamic Law according to the Hanafi school and gave his judgement accordingly.

In the notorious case of Basil E. Bamboulis V. Katina Bamboulis ,[68] the Court of Appeal interpreted 'custom' as it appears in section 5,a, of the Civil Justice Ordinance 1929 to include the personal law of the religious community to which the parties belonged. But he brushed aside the dictum of Cumings, C.J. in Constantine Cambouris V. Constantine Procos where he was ready to accept the municipal law of the country of nationality as one of the wide interpretations of the word 'custom' as it appears in section 5,a,. Bodily J., followed this ruling view and adopted it in toto in Gerassimos Xidakis V. Maria G. Xidakis. [69] He said:-

"The meaning and intention of section 5,a, of the Civil Justice Ordinance provides a law which the courts of the Sudan can administer, but that law is not the municipal law of the country of which the parties may be nationals, but their social or ecclesiastical custom."

The almost consistent interpretation of 'custom' as provided by section 5,a, of the Civil Justice Ordinance blocked the way to introducing principles of English Law to personal status cases. A bold attempt to breakthrough was made by Lindsay, C.J., who suggested the application of English Law on the basis of convenience in Bamboulis. He stated:-

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[67] Moneib Constantine V. Zakia Tifaya , A.C.-APP-13-1946.

[68] (Ac-Rev-58-1953); VII S.L.R. Civil Cases, (1952-1953), edited by the Faculty of L. U. of Kh., 1977, pp. 367-378.

[69] H.C. - C.S. - 1060 - 1950. p. 7.

"I am in no doubt that the most equitable and sensible approach would lie in the application of the principles of English Law. The English Law is accessible to our judges and our advocates, all of them trained in, or with a sound working knowledge of this system of jurisprudence, and it is of great importance that our courts shall administer a law which is understood, which is accessible to both parties and to the courts."

The learned C.J. ignored a significant factor that English Law, albeit understood and accessible to the court and advocates, was neither understood nor accessible to the litigants. Rather it was the personal law of the religious community to which they belong that was understood and accessible to them. The learned C.J. thought that section 5 of the Civil Justice Ordinance "at first sight appears to stand in the way of applying the principles of English Law to all foreigners in divorce".[70]

With all due respect to the honourable Chief Justice, I found his argument short of convincing when he said:-

"Custom is an established usage which, by recognition in a Sudan Court of Law, acquires the force of Law. The section envisages that such custom can be altered or even abolished or declared void. The ecclesiastical rules of a church and civil law of foreign countries are in my view incapable of being altered, abolished or declared void and clearly not contemplated by the wording of the section to be within the meaning of the word 'custom'."

It is not true that section 5,a, envisages that, on principle such custom can be altered or even abolished or declared void. This interpretation runs opposite to the simple obvious meaning of the section which states that:-

"Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience and had not been by this or any other enactment altered or abolished and had not been declared void by decision of a competent court."

It is true that custom, by and large, can run contrary to justice, equity and good conscience,

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[70] Ibid. p. 375.

and can even be altered or abolished or declared void by decision of competent court. But that is not the kind of 'custom' envisaged by the section. On the contrary, it has to be a custom incapable of such description, and if it falls within any of these qualifications then it is not custom applicable to the parties concerned. Since the ecclesiastical rules of a church are, in the view of the learned C.J. and consistent with the judicial precedents, incapable of being altered, abolished or declared void by decision of a Sudanese competent Court, then it makes no sense to say it is not the 'custom' envisaged by section 5,a, of the Civil Justice Ordinance. To refute the agrument of the learned C.J. when he said:-[71]

> "The section envisages that such custom can be altered or even abolished or declared void", I would rather say:-
>
> "The section envisages that such custom should not have been altered or even abolished or declared void."

The Court of Appeal in the present case gave a narrow interpretation to the word custom, and restricted it to "local custom originating by usage in the Sudan" only to justify its final judgement that:-

> "Accordingly it accords with equity, justice and good conscience to decide such matters according to English Law."

The course taken by the learned C.J. did not gain momentum. Watson J. in subsequent case, Charalambous Cocolas V. Anthepes Cocolas,[72] stated that:-

> "It is well established that in matrimonial disputes the law applied is the custom applicable to the parties, vide Civil Justice Ordinance, section 5,a, and that custom is normally the canon law of the community to which they belong, or possibly the civil law of the state of which they are nationals."

Watson J. offered that statement in a manner that suggests that he was either unaware of or disregarded the judgement of Lindsay C.J. in the Bamboulis case. For reasons pertaining to the

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[71] loc. cit.

[72] (HC-CS-259-1952); VII The S.L.R. Civil Cases, 197. pp. 100-105.

merits of Charalambous Cocolas ,the learned judge was forced to a highly unsatisfactory conclusion that the case must be decided simply according to justice, equity and good conscience vide Civil Justice Ordinance, section 9 rather than the canon law of the community to which the parties belong. Watson J. admitted that:-

> "In so doing I am well aware that I am going directly against the precedent of this court where it has been established that disputes in matrimonial affairs must be decided according to the personal law of the parties, and not left to the very wide discretion that section 9 confers, and which is hardly appropriate in matrimonial affairs. Nevertheless in this case I see no alternative."

Charalambous Cocolas judgement stood alone, since the case was decided per incuriam. But a number of subsequent cases followed faithfully the reasoning of Chief Justice Lindsay in the Bamboulis case.

One can say with full confidence that Bamboulis opened the door wide enough for English Law to be received in the area of personal law for non-Muslims and the word 'custom' miraculously turned out to mean English Law. In Costis Zis V. Alice Zis ,[73] the appellate authority asserted that since Bamboulis , it has been settled law in the Sudan that the Sudan Civil Courts, in deciding cases in accordance with section 5,a, of the Civil Justice Ordinance, are bound by the principles of English Law, and not by the personal law or customary law of the parties.

This part of the Court of Appeal decision in the Costis Zis case made a clear distinction between 'personal law' of non-Muslims, and their 'custom'. This was to put an end to the almost constant decisions of this series of precedents before the Bamboulis case that interpreted 'custom' to include the personal law of the parties.

It was decided in C. Carvanopoulos V. Carvanopoulos ,[74] that the principles of English Law as regards judicial separation of spouses were to be applied following the ruling in the Bamboulis case. Two years later, the Court of Appeal stated in the clearest terms that in matrimonial causes for

[73] H.C.-C.S.-75-1954, Khartoum; A.C.-APP-4-1955.
[74] H.C.-C.S.-25-1952.

non-Muslims domiciled in the Sudan 'it is only right and proper that there should be a resumption of the trial to determine the case according to the principles of English Law'.

Since the Bamboulis case, the drive to apply the principles of English Law instead of the personal law of the parties, gained momentum,and the binding authority of Abdulla Cherchflia case faded away until 1957, a year after the independence of the Sudan. Then it was decided in Hanna Kattan V. John Y. Kattan ,[75] that Bamboulis V. Bamboulis should be cited with great reserve and that Abdulla Chercheflia V. Maria Bekryarellis "is authoritative".

Both cases were discussed at length per B. Awadala J, 'a Sudanese judge who later became Chief Justice of the Sudan'. The learned judge quoted Gorman J. as saying in Abdulla Chercheflia :-

> "It has been decided in this court that where the parties are domiciled in a country other than the Sudan which possesses a national law of personal status that such law is to be regarded as a body of customs applicable to the parties within the meaning of section 5: the law of the domicile is in these matters adopted by the law of the Sudan as their personal law. But where the parties are domiciled in the Sudan or in a country with no national law of personal status then, it has been held, it is the customs of the religious community to which they belong which are to be looked to and comprise their personal law."

The learned J.B. Awadalla then commented:-[76]

> "The learned judge's statement as regards persons domiciled in a country other than the Sudan was of course obiter. But such a statement - though not authoritative - will be accorded the greatest respect by this court and will not be disregarded unless it runs counter to previous and binding decisions governing the point in controversy."

Although the court in the Hanna Kattan case was not considering in detail the conflict between the ratio decidendi in Abdula Chercheflia and Bamboulis , it felt the occasion justified the statement that:-

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[75] (Ac/Rev/47/1957); S.L.J.R., 1957, p. 35

[76] Ibid. p. 51.

"The restrictive interpretation of section 5 adopted in Bamboulis is no doubt a novel one and is certainly not the view which has always been taken by the Sudan Courts with regard to this section... Bamboulis thought to lay a principle of its own, the efficacy of which it is not for us to consider in this case, and it is our respectful opinion that until an opportunity for an exhaustive analysis of the principles underlying it arises, this case should be cited with great reserve."

That was a Court of Appeal decision to which the Chief Justice concurred. In view of the foregoing remarks it was decided in Maurice Goldenburg V. Rachel Goldenburg, George Rizkalla Sayis and Edward Michel ,[77] "that Lindsay C.J.'s decision in Bamboulis V. Bamboulis has become of very doubtful authority."

Michel Cotran J., having carefully considered all the relevant authorities with special regard to the wording of section 5 of the Civil Justice Ordinance, was of the opinion, as was held by Gorman J. in Abdulla Charcheflia V. Maria Bakryarellis , that "the word 'custom' in section 5 includes the personal law and customs of the religious community concerned where parties are domiciled in the Sudan."

The shift from the rule in Bamboulis to the rule in Abdalla Cherchflia stopped the reception of English Common Law in the area of personal law for non-Muslims.

It was decided in the case of Amal Fakhri Saad V. Fayez Shukri Bishara ,[78] that:-

"It is evidently clear from Kattan's case and the decisions which followed that the word 'custom' in the Civil Justice Ordinance, S.5, includes the personal law of the parties provided they are domiciled in the Sudan and therefore the applicable law is their personal law and not the English Law."

The law in this formative era was uncertain and the pace of reception of English Law was slow. The existence of Islamic Law deterred the English judges from applying excessively English Law during the first two or three decades of the Condominium. It was perceived to be futile to

[77] (HC-CS-441-1958); S.L.J.R., 1960, p. 36.

[78] (AC-Rev-26-1968); S.L.J.R., 1968, p. 99.

introduce principles of English Law to an unreceptive environment.

# Chapter 4

## RECEPTION OF ENGLISH LAW THROUGH THE JUSTICE, EQUITY AND GOOD CONSCIENCE PROVISION OF THE CIVIL JUSTICE ORDINANCE

Section 4 of the 1900 Civil Justice Ordinance and later, section 9 of the 1925 Civil Justice Ordinance provided:-

> "In cases not provided for by section 3, 'later section 5', or by any other law for the time being in force the court shall act according to justice, equity and good conscience."

The strikingly permissive nature of section 9 resulted in a wide range of jurisprudential uncertainties[79] that characterized a whole era in the legal development of the Sudan. Section 9 is the most significant section of the Civil Justice Ordinance. It is through this section that principles of English Common Law diffused through the Sudanese legal system and reigned supreme for decades.

Section 9, which remained the key to the creation of the Sudanese general territorial law, originated in India, where it was introduced on the recommendation of Sir Elijah Empey, and was used there by the English judges as a cloak for the introduction of English Law into India.[80] The British Administration in the Sudan was captured by the Indian experience and the whole Civil Justice Ordinance was tailored to follow the adaptations of the Indian Civil Procedure Act, which was successfully applied in British Bechuanaland and in Burmah.[81]

To act according to "justice, equity and good conscience" is simply to employ subjective criteria. The phrase is so flexible that it allows a temperamental set of rules. This flexibility yielded "a unique competition between English Common Law and the French styled Civil Codes of Egypt, particularly during the early years of the Condominium. However, after some time the Common Law became established as the primary foreign source of the Sudanese law".[82] Such competition

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[79] C.F. Thompson, "Research into the Law of the Sudan". Research in the Sudan, Parts 1 and 2, Philosophicial Society of the Sudan, edited by Prof. Mustafa Hassan Ishaq Dean Faculty of Science, U. of Kh. Proceedings of the 12th. Annual Conference Jan. 3-5, 1969, p. 162.

[80] Egon Guttmann, op. cit., p. 406 where the author quoted Prof. A. Gledhill's Inaugural Lecture, " Whither Indian Law". in Dec. 7, 1955; Natal OL wak AKolawin op. cit., p. 231.

[81] Zaki Mustafa, Ibid.

[82] Samuel J. Trueblood, in the introduction to I S.L.R., op. cit. , p. vii.

was confined to the laws of England and Egypt being the parties to the Condominium; Islamic Law was kept in limbo for obvious reasons. The most significant of all such reasons was that the judicial staff in the Sudan were all British and they were ignorant of Islamic Law. David Kohen V. Suliman Helali,[83] was the first reported case to be decided according to section 4 of the Civil Justice Ordinance 1900. Bonham Carter, Acting J.C., decided the following:-

> "Under the Sudan Civil Justice Ordinance the court is directed to determine cases of this sort in accordance with justice, equity and good conscience. I have no hesitation in deciding in this country that to enforce an agreement to pay interest at the rate of 15% per month between an alien and a sudanese would not be in accordance with good conscience."

It cannot be argued that the learned acting Judicial Commissioner was unaware of the simple fact that in the Sudan the whole idea of interest is not in accordance with good conscience and not only excessive interest. A year or two before this judgement such a claim as this present would not be entertained in the Mahdist Courts that used to apply Islamic Law. Usury was positively prohibited under the Mahdist rule in accordance with Islamic Law.

In the early years of application of Section 4, the French styled Egyptian Law was referred to more often than not. In the case of Fabris V. Stoppani and Colombaroli ,[84] , Wasey Sterry, C.J., applied Egyptian Law as being in accordance with justice, equity and good conscience. He said:-

> "I may add that under the Egyptian and the Code Napoleon it is expressly provided that an agent acts gratuitously apart from special agreement or an implication resulting from his position."

However, the case stands for a universal application of section 4 (later section 9 of the Civil Justice Ordinance).

Reference had been made to both Egyptian Law and English Common Law vis-á-vis carrier's liability in the case of Singer Line Co. V. Salama Abdel Shahid ,[85] but both were held to be

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[83] (JC-APP-2-1900); I S.L.R., op. cit. , pp. 1-2.
[84] (HC-CS-79-1906); I S.R.L., op. cit. , p. 4.
[85] (JC-APP-40-1907); I S.L.R., op. cit. , p. 11.

contrary to the practice followed by the native boat carriers in the Sudan. The learned E. Bonham Carter, Acting Judicial Commissioner stated:-

> "According to the Egyptian Law (native Code of Commerce section 97) and also according to English Common Law, a carrier is liable for all losses or accidents to the goods, unless the loss or damage arises from vis major, from defects in the goods or from negligence of the consignor. This strict rule is not, however, in accordance with the practice which has hitherto been followed in the Sudan, and to adopt it would be to place a burden on the native boat owners which they are unable to support. I find therefore that in this country a common carrier on land or water is not liable for loss or damage unless it is occasioned by some negligence on the part of himself or his agent or servant."

Singer Line Co. V. Salama Abdel Shahid symbolizes a flexible approach and a genuine desire to do justice even if it ran contrary to established principles of English Common Law. It is significant that such a trend was pioneered by E. Bonham Carter, the architect of the Civil Justice Ordinance as well as other Ordinances. Local facts of life were accommodated in his judgement. Other than the decisions in the area of Land Law, this case counts among the rare instances where Sudanese custom and local practices were the bases for a court decision in the Condominium. Together with Dawood Cohein V. Suliman Hillali, this case stands for a flexible approach to decide cases according to justice, equity and good conscience. Local custom was considered to be more in accordance with justice, equity and good conscience than both English and Egyptian Laws. This was, I borrow the words of Zaki Mustafa:-

> "A healthy tendency and it could have very easily ended in giving us a set of Common Law rules, with deep roots in the Sudanese society."[86]

During the first years of Condominium the English judges were under the impression that they were to follow Egyptian Law. In Hassan Abu Hegazi and another V. Abdel Halim Mohi El Din and others ,[87] Wasey Sterry, Acting Judicial Commissioner, said:-

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[86] Zaki Mustafa op. cit. , p. 70.

[87] (JC-APP-132-1907); I S.L.R., op. cit. , p. 21.

"Now according to the Egyptian Law which we follow, the respondent, if he wishes to invoke five years prescription, must have a peaceable, public and continuous possession by an unambiguous title of ownership for five years provided that the possessor has a just title."

The trend to follow Egyptian Law was short lived, and very soon there was a strong conviction among English judges and later Sudanese judges to equate justice, equity and good conscience with the application of English Law. Egyptian Law could not take the challenge and stand competition from English Law that had the full support of the English judges who, for obvious reasons, tilted the balance in favour of the law with which they were familiar.

The English judges were employing an eclectic approach at the beginning, but they later abandoned such an approach when the competition between English Law and Egyptian Law became very sharp.[88]

Nicola Episcopoulo V. The Superior of the African Catholic Mission ,[89] is a good example of a fair eclectic approach to apply a law that would be in accordance with justice, equity and good conscience. This was a Land Law case where plaintiff and defendants were registered owners of adjoining plots of land. In constructing certain buildings on their own land, the defendants mistakenly allowed their buildings to encroach on plaintiff's land, to the extent of about 90 square feet. Plaintiff, who was away when the construction took place, brought an action in the High Court against defendant for trespass to his land, claiming either that the defendant be ordered to remove the buildings on plaintiff's land, or, in the alternative, that defendants be ordered to pay plaintiff compensation assessed at L S. 106 for the loss of enjoyment of the land. Defendants admitted the fact, but contested the reliefs claimed.

There was no provision in the Civil Justice Ordinance or any other law in the Sudan dealing with such a situation. The High Court had to apply the justice, equity and good conscience provision. N.G. Davidson, J., held that,[90] "It would be oppressive to vacate this strip of land now." Davidson, J., held that such an order would be a hardship on the defendant, and of no use to the

[88] Natale Olwak Akolawin, op. cit. , p. 235.

[89] JC-APP-42-1908; I S.L.R., p.23.

[90] Ibid. , p. 25.

plaintiff except as a means of extorting from the defendant much more than the land itself is worth.

On appeal to Judicial Commissioner against the judgement of the High Court, the Judicial Commissioner reversed the decision of the High Court and defendants were ordered to pull down their building to restore the land to plaintiff, but no compensation was ordered. Wasey Sterry, Acting J.C., arrived at that decision after interpreting and examining the relevant provisions in English Law, Egyptian Law and Ottoman Civil Code which was a codification of Islamic Law according to the Hanafi school of figh. The learned Acting Judicial Commissioner said:-[91]

> "Under English Law, which has gone too far in my opinion in considering that every piece of land is of so unique a character that a remedy in damages cannot be given in a case of this kind, the real owner is entitled to turn off the trespasser, keep the buildings erected on the land, and recover damages from the trespasser if the land has been damaged by them."

The learned Wasey Sterry, Acting Judicial Commissioner, critically examined English Law and was of the opinion that it has gone too far that a remedy, the damages in this case, cannot be given. It is interesting that English Law was not applied, implicitly as being contrary to justice, equity and good conscience in this case, whereas Egyptian Law and Ottoman Law were partially applied though he did not explicitly say that.

The learned Acting J.C., said:-

> "Under Egyptian Law as administered by both the Native and Mixed Tribunals the matter depends very much on whether or not the trespasser built in good faith. In either case he must give up possession, but his rights to receive compensation from the real owner for the value of the buildings taken over by him depend on the good faith of the builder."

He held that however free from moral blame, the defendants could not legally say they acted in good faith and could not bring themselves under the protection of Egyptian Law in order to receive compensation for the value of their buildings. He held that under article 909 of the Ottoman Civil Code:-

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[91] Ibid., p. 26.

"If a person who possesses without right the land of another, makes in it constructions or plantations, he will be obliged to restore the land after having removed them. If their removal is prejudicial to the land the proprietor may keep them by paying the value to the person who has built them after deduction of the expenses of demolition or uprooting. But in the case where the constructions and plantations would have a value greater than that of the land if the possessor was of good faith when he made them he can keep the land by paying the value of them to the proprietor."

Wasey Sterry, Acting J.C., stated that this provision supported as a general principle the decision of the court of first instance, which said that it would be inequitable and oppressive to order the restoration of the land by reason of the excessive damage done to the trespasser and the small amount of good done to the real owner by the restoration. Given the fact that Wasey Sterry, Acting Judicial Commissioner, decided that the defendants, however free from moral blame, could never say that they acted in good faith and that defendants could not prove that the value of their buildings exceeded the value of the land, I can hardly see how article 909 of the Ottoman Civil Code would support the decision of N.G. Davidson. As judge of the court of first instance, he had deemed it oppressive to vacate that strip of land; it was an unqualified statement, and good faith was not a requisite. Article 909 has two requisites, one is the case where the value of the construction is greater than that of the land; the other is good faith. Both requisites were lacking in the judgement of the court of first instance; fortunately the learned Acting Judicial Commissioner was aware of the first requisite and reversed the decision of the civil judge accordingly. However, this case provides a classical and proper application of "justice, equity and good conscience". The examination of the different legal systems thought to be in point was balanced and without prejudice.[92] Interestingly, the Judicial Commissioner did not state from what source he drew his judgement. However, his judgement was not in accordance with English Law, since he ordered restoration of the land and the removal of the buildings. English Law entitles the real owner to have the land and keep the buildings and recover damages from the trespasser if the land has been damaged by such buildings.

[92] Natale Olwak Akolawin, Ibid.

It is a very rigid rule allowing no room for good faith or any other defence.

Egyptian Law, as examined by the Judicial Commissioner, was not clear as to whether the building should be removed or kept by the real owner if the good faith requisite is lacking. But since the real owner in such a case would not compensate the trespasser for the value of his buildings then he could keep such buildings. That makes Egyptian Law similar to English Law.

It is, therefore, not true, with all due respect, that the decision of the Judicial Commissioner rested this case on applying either English or Egyptian Ottoman Law.[93] It is a result achieved only by applying the first part of article 909 of the Ottoman Civil Code which reads:-

> "If the person who possesses without right the land of another, makes in it constructions or plantation, he will be obliged to restore the land after having removed them."

The decision of the Acting Judicial Commissioner falls within the four corners with the wording of the foregoing article, although this was said nowhere in the decision of the Acting Judicial Commissioner.

Two years after the decision in Nicola Episcopopoulo V. The Superior of the African Catholic Mission , the same court of Judicial Commissioner abandoned its eclectic approach and took a different stance in deciding on appeal the case of Grivas Brothers V. Nicola Pothitos. [94] The issues for decision were:-

a) Whether an acceptance of a promissory note was a full discharge of the debt.

b) The question of reasonable time within which an action on a promissory note must be instituted. The Civil Judge held, applying English Law, that the appellants had accepted the bill in full settlement for the price of goods supplied and money paid, and that the appellants should have sued within a reasonable time. Mr. Drower for the appellant on appeal argued that:-

> "Civil Judge by insisting that appellants should have sued the respondent within a reasonable

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[93] I S.L.R., op. cit. , p. 24.

[94] JC-APP-54 & 55-1910; I S.L.R., p. 37.

time had imposed upon them an additional burden which exists neither by Common Law nor by the Ordinances of the Sudan. The duty of an endorser at Common Law is the same as that of a guarantor. There is no statutory limitation under English Law and therefore the only limitation would be that which exists in the case of simple contracts, i.e. six years. A rule of German, French or Egyptian Law which says that delay would defeat the endorser, cannot be imported into this country without legislation. But even if it was possible to import such a rule the court should not apply it because it does not accord with justice, equity and good conscience."[95]

Wasey Sterry, Acting Judicial Commissioner, reversed the decision of the Civil Judge below; he held, applying English Law that the ordinary presumption of law is that payment by cheque or bill or promissory note is conditional only and that if the negotiable instrument is dishonoured, the debt revives and that in the case before him he saw nothing in the conduct of the parties or otherwise there to rebut that presumption.

The learned Acting Judicial Commissioner said in tackling the second issue of reasonable time within which an action on a promissory note must be instituted:-[96]

"I am not prepared to admit, in the absence of statutory provision to the contrary, that the guarantor of a note is in a different position to that of any other guarantor. It seems to me that this would not only be to legislate by judge's decision, but to introduce a rule which has up till now never been acted upon by the courts of the Sudan. I assume that it is not unreasonable for the guarantors of negoitable instruments to be put in a favourable position in as much as French, Egyptian and German Law givers have put them there; but when I do not find that English Law, and after all that nation may be supposed to know something on commerce, limits the liability of guarantors in this matter except by the ordinary statutes of limitation I cannot, I think, say that justice, equity and good conscience demand that I should lay down the limit of a reasonable time or say that even so the reasonable time would not be the time

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[95] I S.L.R., p. 37.

[96] Ibid. , p. 40.

prescribed by the general rules of limitation.''

It appears that the Judicial Commissioner considered that the courts should apply English Law except where there is a Sudan Statute or Ordinance to the contrary. Not to abide by that,

''would not only be to legislate by judges decision, but to introduce a rule which has up till now never been acted upon by the Courts of the Sudan.''

The learned Acting Judicial Commissioner went to the extent of considering English Law as synonymous with justice, equity and good conscience. The Acting Judicial Commissioner unnecessarily exhibited a great degree of nationalism.[97] The decision of Wasey Sterry, Acting Judicial Commissioner, is a landmark in the process of reception of English Law. It marks the tendency to use justice, equity and good conscience as an instrument of receiving English Law.[98] It is interesting that Wasey Sterry, who stated in Hassan Abu Hegazi V. Abdel Halim Mohi El Din that the Sudanese Courts follow Egyptian Law, would have such a change of heart! Wasey Sterry, Acting Judicial Commissioner, was careful to consider local customs and practices more often than not. Ali El Karar Hassan V. Abdel Rahim Mohamed El Fekih ,[99] was an instance where he arrived at a decision with full consideration to local circumstances and customs. He said:-

''What are reasonable means and what is negligence must depend in part on the circumstances of time and place and habits and customs of the poeple and their domestic animals.

If a man found a horse in his close on an English farm it might not be reasonable that if it refused to be led by the forelock that he should get on its back without saddle or bridle to take it to a pound two or three miles away, but then saddles, bridles and halters are easily procurable on any English farm, and some stable or building that may be used as a pound. None of these conveniences are easily obtainable on a piece of rain in a valley in the Sudan, nor are the habits and customs of men and their animals the same as in England. I therefore hold that it was not unreasonable or negligent for the respondent in the circumstances of the case to attempt to exercise his right of pounding this mare by riding her without saddle, bridle

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[97] Natale Olwak Akolawin op. cit. , p. 237.

[98] Loc. cit.

[99] JC-APP-6-1914; I S.L.R., op. cit. , p. 58.

or halter to the pound.''

This was again a tendency to realize the difference between the Sudanese habits, customs and local circumstances, and their English or other foreign countries' countparts. If such a tendency was to develop, a Sudanese Common Law could have developed and could have been much more in accordance with justice, equity and good conscience.[100] One can say there is a Sudanese Land Law that developed because the courts almost fully recognized local customs and usages in land disputes. Heirs of Abdalla Freigoun V. Mohammed Ali Hamdun ,[101] stands for that trend. In this case it was said per Wasey Sterry, Acting Judicial Commissioner:-

> ''In course of time local customs usually grow up for dealing with the problems that arise, and as they will naturally represent the general agreement of the persons interested as what is fair in the circumstances, with which they are all familiar, a court of law should, it seems to me, give effect to those customs whenever possible.''

In Michael E. Saba V. Philip Philippedes ,[102] Peacock, J., in deciding whether money lent for the purpose of gambling is recoverable or not said:-

> ''I know of no Ordinance in the Sudan making the playing of Baccarat illegal or declaring that money lent for the purpose of gambling is irrecoverable in the Sudan Courts; but having regard to the English Law it seems to the court contrary to public policy and good conscience to hold that money lent for the purpose of gaming is recoverable in an action in the Sudan.''

It is interesting that the learned J. ignored the fact that in a country that was ruled by Islamic Law a few years before his judgement, gambling, in whatever name, could have never been legal! It seems that he never conceived of Islamic Shariah Law as a solution to the issue before him. He paid lip service to Egyptian Law and referred to it in an empty gesture and a meaningless courtesy.[103] He said:-

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[100] Zaki Mustafa op. cit. , p. 71.

[101] (JC-APP-25-1914); I S.L.R., op. cit. , p. 62.

[102] (HC-CS-228-1917); I S.L.R., p. 73.

[103] Zaki Mustafa, op. cit. , p. 75.

"I call attention to the Egyptian Law No.1, (Jan.9, 1904)"

What that law is about and what its relevance was, the learned judge did not take the least trouble to clarify. Instead he jumped to a more or less predetermined decision to apply English Law. The judge referred to Gaming Act, 1710 and Gaming Act, 1738 and Gaming Act, 1744 and Gaming Houses Act, 1854 as effectively barring recovering money lent for the purposes of gambling. That was the first time an English Statute was applied by a supposedly Sudanese Court. This decision was a further bold step to imposing English Law on the Sudanese legal system. The eclectic approach was rejected by this decision and English Law was unhesitantly equated with justice, equity and good conscience. According to this case, public policy consideration and good conscience are decided after having regard to English Law. Peacock, J., said:-[104]

> "In determining whether actions are maintainable in the Sudan Courts in absence of special legislation the courts follow English Law so far as having regard to different conditions, such law can reasonably be applied. I follow the English Law further and hold that money lent for the purpose of playing a game illegal under English Law is not recoverable in the Sudan Courts."

[104] I S.L.R., op. cit. , p. 75.

## Chapter 5

# A FAR REACHING RECEPTION OF ENGLISH LAW

Emmanuel Saad V. Elias Debbas and Gabra Hanna ,[105] is a case that dealt a fatal blow to the application of Egyptian Law in the Sudan. It was a case where a claim against two partners was first filed in 1914, but the dissolution of the partnership had taken place in 1906. It was held that the action was time barred. The court referred to, but did not consider itself bound by the five years limitation for actions between partners after the dissolution of the partnership, which is provided for by section 65 of the Egyptian Native Commercial Code 1883. Instead, the court applied English Law.

Dun, C.J., labeled Egyptian Law as a foreign law and he said:-[106]

"I do not feel justified in saying that the Sudan Courts can apply section 65 of the Egyptian Native Commercial Code except in very special circumstances, and even then not as a hard and fast rule, but only as the enunciation of a principle of foreign law by means of which the court can arrive at a decision consonant with justice, equity and good conscience."

Ironically English Law has never been described as a foreign law.[107] Fleming J. quoted statement of Davidson J.:-

"Egyptian Law is not the law of the Sudan."

This trend stands in sharp contrast with the tendency of the English judges during the first decade of the Condominium, when Wasey Sterry, Acting Judicial Commissioner, said, in Hassan Abu Hegazi and another V. Abdel Halim Mohi El Din and another :-[108]

"Now according to the Egyptian Law which we follow..."

The law which the courts in the Sudan follow, suddenly turned out to be not the law of the Sudan, but a foreign law, used only as an important aid 'though nothing more' towards arriving at a correct conclusion. It helps to fill a blank which exists in the Administrative Regulations regarding

[105] (AC-APP-37-1917); I S.L.R., p. 76.
[106] Ibid. , p. 80.
[107] Zaki Mustafa op. cit. , p. 75.
[108] Loc. cit.

prescription by which the Sudan Courts have for many years been guided.[109] That was the beginning of the domination of English Law that has reigned supreme since then until 1983.

Fleming J. concluded that:-[110]

"It also adds greatly to the confidence with which I agree to the dismissal of this appeal that in the Courts of England and Scotland no such claim as the present would be entertained."

Dun, C.J., in this case cited a previous case, Bank of Egypt Ltd. V. Surial Saad and Elias Debbas ,[111] that gave his decision the colour and flavour of English Law. It laid the basis for the doctrine of stare decisis to develop. In a later case Dun, C.J., said:-[112]

"I know of no other previous decisions in the courts of this country to guide me."

In Yani Krithary V. Mariam Bint Dasta,[113] a Greek national cohabited with an Abyssinian woman for several years and three children resulted therefrom. On his desertion, the respondent instituted action for the maintenance of the children, and the district judge decreed in her favour. Appellant appealed on the ground that a Sudan Court has no jurisdiction on matters affecting his personal status and assuming it has, Greek Law prohibits an action to prove the paternity of an illegitimate child, Dun, C.J., referred very vaguely to a legal textbook.[114] This was the first time that such a reference was made. It was also the first time that such a wide eclectic approach was taken. The case was decided according to the principles of justice, equity and good conscience, since there was no Ordinance or Proclamation dealing with the case. Roman Civil Law was examined in this case, French Law, Dutch Law, English and Scotish Law, the law of most of the states of U.S.A., Islamic Law, Swiss and Hindu Law. The learned Chief Justice arrived at his decision on the following ground:-

"I feel impelled by two considerations to decide in favour of the decree: one is that it seems to me to be contrary to justice that a man may take a woman as his mistress and when he gets

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[109] I S.L.R., op. cit. , pp. 82, 83.

[110] Ibid. , p. 84.

[111] AC-APP-38-1916.

[112] Yanni Krithary V. Mariam Bint Dasta , HC-APP-9-1918; I S.L.R., p. 91.

[113] Loc. cit.

[114] Phillmore's International Law Vol. IV, section DXXXIII.

tired of her, cast her and the children she has born him adrift. The other is that a principle which is accepted over the greater part of the British Empire with its very varying conditions of life seems to me to be a suitable one to follow in the Sudan."

After the learned Chief Justice decided to follow English Law he commented on Islamic Law and said:-

"The facilities which Muslims enjoy as regards marriage and divorce makes cases such as these so rare as to be negligible; the free concubine or mistress or the professional prostitute may almost be said to be non existent among Muslims."

Of all the legal systems discussed in this case, Islamic Law was the only legal system discussed after the court had already arrived at a decision and applied English Law. Nontheless the case stands as a rare instance where principles of Islamic Law were discussed or referred to.

The Chief Justice in this case examined a host of legal systems before arriving at a decision. It represents a liberal application of the principles of justice, equity and good conscience along with the African Mission case.[115] Yanni Krithary V. Mariam Bint Dasta is a demonstration of how the Sudan Courts employed the legislative power given them by the justice, equity and good conscience provision of the Civil Justice Ordinance, to fill the vacuum created after rejecting the Mahdist legal system.[116]

It became public policy to apply English Law according to the decision in Antonious Saad V. Aziz Kafouri, [117] in which R.H. Dun, C.J., said:-

"English Law does not appear to me to produce in this case a result contrary to justice, equity and good conscience and on that ground alone I would be satisfied in dismissing this appeal."[118]

The liberal and flexible approach maintained in Yanni Krithary V. Mariam Bint Dasta,[119] was

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[115] See p. 82 where this case is discussed

[116] Natale Olwak Akolawin, op. cit. , p. 239.

[117] AC-APP-50-1919; I S.L.R., p. 114.

[118] Ibid. , p. 116.

[119] Loc. cit.

very much restrained in Antonious Saad V. Aziz Kafouri when Wasey Sterry, Legal Secretary and President of the Court of Appeal decided that:-[120]

> "It appears to me that if there is a question whether the courts should adopt English Law or Egyptian Law, the courts should as a general rule adopt the English Law rather than the Egyptian, not so much because I consider it necessarily better, but because it is the law to which English judges are accustomed and that if once they begin administering a law to which they are not accustomed and as to the interpretation of which they have not much opportunity of informing themselves they are very likely to make mistakes and end up administering a law which is neither English nor Egyptian."

This statement can be understood in the light of the fact that ever since 1900 judges of the Civil High Court have been recruited from English lawyers, or from lawyers whose educational and training orientation was English.[121] It is an obvious and simple fact that since it was a British Administration, with English judges and a more or less English type of judicial set up, English Law should necessarily be applied. Given the fact that the above statement was per Wasey Sterry who was the Legal Secretary and President of the Court of Appeal, his words:-

"The courts should as a general rule adopt English Law rather than the Egyptian" have a directive tone to all the judges. It sounds very much like a judicial circular, except for the fact that such directive had a binding authority rather than a persuasive one.

It was a "general rule" or in other words, a public policy that the courts should adopt English Law. The learned judge chose his words very carefully and consciously used the word 'adopt' and not 'adapt'. The justification for that policy, was convenience and practicability,[122] rather than considerations of justice, equity and good conscience.

It became a practice for the courts to adopt English Law. As Peacock J. put it in Negib Haddad V. Cotonificio Veneto and Yusif Hakim :-[123]

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[120] I S.L.R., p. 118.

[121] Egon Guttmann, op. cit. , p. 409.

[122] Zaki Mustafa, op. cit. , p. 95.

[123] (HC-CS-38-1920); I S.L.R., p. 120.

"It has not been suggested that the court should depart from its practice of applying generally the principles of English Law in questions of contracts, and I, therefore, think we must go to English Law in order to find out the measure of damages."

The issue in this case was whether a clause in a contract written in English would bind a person who signed it when such a person did not know any English. Peacock, J., in deciding to embark on the principles of English Law stated that:-[124]

"It appears to me to be not only bad policy, but bad law, to encourage the plea that a document duly signed is to lose its force because it is written in a language that is foreign to the signatory."

Such a statement is an utter failure to realize the difference in circumstances and the variation in conditions between his homeland and the Sudan. He failed to realize the simple fact that what was good policy and good law for England was not necessarily the same for the Sudan. This decision was made at a time when literacy in Arabic in the Sudan was no more than 0.5%.[125] Other than his strong sentiment as an English judge Peacock could not present any reasonable explanation for the application of the principles of English Law to such a situation.

Mansour El Shouehi and others V. Abu Fatima Sharif[126] was a sale of goods case, where appellants bought a certain number of bulls from the Kababish Arabs tribe. On the same afternoon the respondent bought for export 20 of those bulls from the appellants and took them on the next day to the quarantine station where it was discovered that most of the bulls were infected with cattle plague. The respondent brought an action for rescission of the contract and recovery of the purchase money. The trial judge found that respondent was entitled to a rescission of the contract and an appeal followed. Dun, C.J., on appeal, stated that the application of any other legal system would be repugnant to justice, equity and good conscience and only English Law would not. The learned C.J. said[127] :-

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[124] Ibid. , p. 181.

[125] Zaki Mustafa, "The Treatment of Exemption Clauses by the Sudan Courts # 1". II The J.A.L. Lond. Butterworth, 1967, pp. 122, 123.

[126] (AC-APP-3-1920); I S.L.R., p. 147.

[127] Ibid. , p. 150.

> "I have considerable hesitation in applying the principles of French or Egyptian Law partly because it is much more difficult for an English lawyer to discover how to apply the French Law to any particular set of facts than it is to discover how to apply the English Law and, therefore, I should not as a rule apply the principles of French, Egyptian or any other law except English Law in cases in which I am directed by section 4 of the Civil Justice Ordinance to act according to justice, equity and good conscience unless the result of applying English Law was repugnant to my ideas of justice, equity and good conscience. It is necessary therefore to consider how this case would be decided by English Law".

The learned Chief Justice resorted to the rule of convenience and practicability and made it a must to reject all other legal systems except English Law. Being at top of the judicial hierarchy, he gave the rest of the judges the example to follow and established a precedent and a rule to adopt English Law. He would refrain from so doing only when the result of applying English Law was repugnant to 'his ideas' of justice, equity and good conscience. The criteria employed by the learned Chief Justice was subjective. It will be remarkable to find an English lawyer who conceives of English Law as repugnant to his ideas of justice, equity and good conscience.

The result of this case was that Egyptian Law covering the question was not in accordance with justice, equity and good conscience, and English judges should in any case generally follow English Law. Williamson, J., said, in the same case:-[128]

> "On the question of the legal principles to be applied to cases such as these in the Sudan, I should think that as a general rule it is more in accordance with justice, equity and good conscience that the English Law should be applied in preference to the Egyptian Law or any other law."

Any other law obviously includes Islamic Law. The learned J. took pains to justify and rationalize his statement. He said:-[129]

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[128] Ibid. , p. 151.
[129] Loc. cit.

> ''The law as administered by British judges is more likely to be a just law if it is administered in accordance with a system with which they are familiar rather than in accordance with a system such as Egyptian Law. The latter with its technicalities and terminology does not commend itself to me as a legal system applicable to a country in a backward state of civilization where the people are in no sense familiar with the law itself and the judges have had no particular experience of the system.''

The learned judge wanted to look objective by unnecessarily inserting that ''the people are in no sense familiar with Egyptian Law''. If that was a genuine criterion, then the same people were much less familiar with English Law, and if that was again a genuine criterion, and if the learned judge meant what he said, then the only law with which the people were familiar was Islamic Law.

It is interesting that the learned judge was seemingly convinced or wanted us to be convinced that English Law is less technical and less sophisticated and civilized than its Egyptian counterpart and would therefore suit the primitive Sudan.[130] The learned judge in an attempt to tone it down went on saying:-[131]

> ''I do not say that there may not be cases in which it may be equitable to apply the principles of Egyptian or even any other law if the principles of English Law are not in accordance with the principles of justice, equity and good conscience when applied to a particular case in this country, but as a general rule I am of the opinion that the application of English Law is more likely to confer justice than the application of any other law.''

It seems that the learned judge was making concession, but a thorough reading of his reasons shows that he was playing with words; the proviso to his rigid rule was only hypothetical, since as a general rule, he had a firm conviction like the rest of his peers that English Law was synonymous with justice, equity and good conscience.

The arguments favouring the application of English Law reflect expediency and convenience and are in no way related to the substance.[132] Familiarity with a certain system of law has nothing

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[130] Zaki Mustafa op. cit. , p. 84.

[131] I S.L.R., p. 152.

[132] Natale Olwak Akolawin, op. cit. , p. 242.

to do with the notion of justice, equity and good conscience, but is so closely linked with knowledge of that law.

It is interesting that the British Administration avoided, for political reasons, imposing through legislation English Law, but it conferred such a legislative function on the courts under the justice, equity and good conscience section of the Civil Justice Ordinance, 1920 and 1925. This could lead to no conclusion other than the application of English Law, since the judges, the judicial system and personnel were British or British oriented. The decisions of the courts to opt for English Law were irrational and reflect more politics and ethnocentric convictions than law. The English judges in the Sudan were moved by a nationalistic drive when they were faced with the question of the law applicable. In this case " Mansour Elshouehi,"[133] they adamantly insisted on the application of English Law whereas an application of the principles of Islamic Law would have produced a result much more in consonance with justice, equity and good conscience.[134]

The case of Ali Sabri V. The Sudan Government ,[135] lends itself as a good example of the adoption of English Law even when it was contrary to justice, equity and good conscience in the particular case. In that case a fire broke out near appellant's shop. The Mamur ordered the shop to be broken into for the purpose of rescuing goods inside and as a precaution against the spread of fire. Appellant alleged that as a result certain of his property was lost. He sued respondent in negligence as vicariously liable for the tortious acts of the Mamur. Osborne, J., held that [136] the English rules:-

(a) that the Crown is not answerable at law for the tortious acts of its servants done in their official capacity, and;

(b) that a servant of the Crown is responsible at law for his own tortious acts, even though they were done by the authority of the crown.

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[133] Loc. cit.

[134] Zaki Mustafa, op. cit. , p. 91.

[135] (HC-APP-63-1922); I S.L.R., p. 214.

[136] Ibid. , p. 215.

Are to be applied in the Sudan, with such qualifications as the differences in place, conditions and social development between Britain and the Sudan.

The learned J. admitted that these were differences of place, conditions and social development, but that these differences were not strong enough to pursuade him to take a different stance, He said:-[137]

> "I am of the opinion that these differences are not such as to lead me to reject the principle underlying the English Law."

Fortunately even in England the law was changed as early as 1947 and it was provided that the Crown may be liable for the tortuous acts of its servants or agents.[138] If the differences of place, conditions and social development between England and the Sudan are not such as to lead the learned judge to reject the English Law, what differences would lead him to do so.

One would say it was the principles of English Law that concerned the English judges rather than the principles of justice, equity and good conscience. In the Egyptian and Sudan Cotton Trading Co. V. Receiver in Bankruptcy of S. S. Hakim and Co. [139] R.H. Dun, C.J., bluntly stated that:-

> "In the Sudan the courts look to the principles of English Law: The principles of the law of England have been built up by generations of judges: and are founded on a broad basis and are far reaching."

It is not my intention to comment on the C.J.'s breathless sentiment. Rather, I would like to add emphasis to his statement that in the Sudan the courts look to the principles of English Law. It is again an arbitrary, emotional decision that reflects politics and no law.

In Awwad El Kadi V. Mohammed Hussein Badran, [140] Davidson, J., based his decision on the judicial notion that:-[141]

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[137] Ibid. , p. 218.
[138] The Crown Proceeding Act, 1947.
[139] (AC-APP-7-1925); I S.L.R., p. 251.
[140] (AC-APP-27-1925); I S.L.R., p. 274.
[141] Ibid. , p. 277.

"No English Court would award damages under such circumstances."

That was sufficient reason for the learned judge to found his decision on. It is a blind application that shows no legal talents and is as such far from being in accordance with the principles of justice, equity and good conscience.

The High Court in Hassan Hussein V. Sudan Government Railways ,[142] took a different course when it decided that the English Workmen's Compensation Legislation, which allows for such claims for compensation, ought not to be recieved as law in the Sudan, since it did not arise out of English Common Law, but introduces novel principles, and is based on English social and economic conditions which do not exist in the Sudan. Owen, J., said:-[143]

> "It would be unsafe, if not impossible, to apply the provisions of those Statutes of English Law which provide for such compensation in that country for those Statutes are the outcome of several years of special legislation adapted to the needs of a highly organized industrial system. The principles underlying them are of recent growth; they formed no part of the Common Law and the conditions which gave rise in their adoption as part of the law of England have no parallel in this country."

The judgement of Owen, J., compared with that of Osborne, J., in Ali Sabri V. The Sudan Government ,[144] is indicative of the inconsistency, subjectiveness and arbitrary approach of the then High Court in the Sudan. The latter judge was of the opinion that the differences between England and the Sudan were not such as to lead him to reject the principle underlying English Law. The first judge was of the opinion that the differences were such as to lead him to reject the principle underlying English Law! Sadly, the result of both cases, apart from their reasoning, was not in accordance with the principles of justice, equity and good conscience. Reasons for such injustice were obvious. In both cases, plaintiffs were Sudanese individuals suing the government for compensation. The Judiciary was an inseparable part of the executive power at that time, and both decisions were tailored to protect the government and deny such individuals their due compensation.

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[142] (HC-CS-55-1926); I S.L.R., p. 281.

[143] Ibid. , p. 282.

[144] (HC-APP-63-1922); I S.L.R., 1969, Ibid.

The two judges used contradictory approaches to come to one and the same result.

Though Owen, J., used valid reasoning, he arrived at an invalid result. His judgement bears significance in that he made a distinction between the application of English Common Law and English Statute Law in the Sudan, saying that the conditions that gave rise to the latter have no parallel in the Sudan. One would wonder if the conditions that gave rise to a rule of English Common Law have a parallel in the Sudan! The qualifications and fetters set by Owen, J., were not extended by him to cover English Common Law.

To add to the confusion and arbitrariness, I quote Halford, J., who said in Nima Bint Saleh V. Mohammed Bey Labib El Shahid :-[145]

> "It is common ground that the rules of English Law in the matter of an assignment of a chose in action as laid down by the Judicature Act, 1873, section 25 (6) are applicable to such assignments in the Sudan."

This is a case of an English Statute that was the outcome of several years of special legislation adapted to the very needs of England. Yet the learned judge did not think it was unsafe or impossible to apply. Instead he thought "it is common ground that such law is applicable to the Sudan."

Um-Setrein Bint Hamad El-Tom V. El Hassan Hamad El Shafie ,[146] was a ray of hope in the middle of that confusion. In this case, plaintiff, a girl of 17 years and defendant, who was her uncle and guardian, held undivided shares in different plots of land. They agreed that the plaintiff should acquire the defendant's interests for the sum of LE12.300 m/ms and the defendant should acquire the plaintiff's interests for a sum of LE17. The defendant paid the difference to the plaintiff. Unknown to the plaintiff, the land she received was almost valueless because it was subject to a perpetual tenancy. She sued for cancellation of that part of the agreement under which she had received the encumbered land. It was held that the transaction was harsh and unconscionable on the part of the defendant, who obtained valuable land and gave almost valueless reversionary rights.

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[145] (HC-CS-114-1926); I S.L.R., p. 284.

[146] (HC-CS-178-1926); Ibid.

Registration was restored to what it was before the transaction and the defendant must pay the plaintiff LE12.300 m/ms.

The defendant was not entitled to the cancellation of the other part of the agreement in which he received valuable land. There was no exchange of land, but two divisible sales. They held that even if the transaction were an exchange, the court, acting according to justice, equity and good conscience would refuse to apply any English rules entitling the defendant to mutual cancellation. Hamilton-Grierson, J., said:-[147]

> "I should not be prepared to hold myself bound to apply those strict rules of English Law, in the circumstances of the present case, and would apply what I consider to be in accordance with justice, equity and good conscience."

The learned judge's decision reflects a sense of justice and reminds one of the decision of Wasey Sterry in Ali El Karar Hassan V. Abdel Rahim Mohammed El Fakih ,[148] when the learned J. refused to apply English Law as it could run opposite to the principles of justice, equity and good conscience in that particular case.

In Receiver in Bankruptcy of S. S. Hakim & Co. V. Anglo- Egyptian Bank, Ltd. ,[149] the court decided that there is an irrebuttable presumption that words in a Sudanese Ordinance bear the same meaning which the English Courts have given the corresponding words in the English Acts. Dun, C.J., said:-[150]

> "It seems to me that when the legislature of the Sudan uses in an Ordinance words indistinguishable in sense from those used in English legislation, the legislature of the Sudan must have intended to use them in the sense in which the English Courts have interpreted the corresponding words in the English Acts, and this court, though not legally bound, is morally bound to consider and apply the decisions of the English Courts."

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[147] Ibid. , p. 289.
[148] (JC-APP-6-1914); I S.L.R. Ibid.
[149] (AC-APP-15-1926); I S.L.R., op. cit. , p. 290.
[150] Ibid. , p. 291

The learned Chief Justice made a point that the Court of Appeal is not legally bound to apply the decisions of the English Courts, but is morally bound to do so. The Appeal Court in Ahmed Hasan Abdel Moneium & Brothers, V. Heirs of Ibrahim Khalil ,[151] held that it was guided and not bound by English Common and Statute Law. The Court of Appeal tried very seriously to rationalize the issue of adoption or rejection of English Law; Bell, C.J., said:-[152]

> "I am unable to assent to the proposition that 'although English Common Law is applicable in the Sudan, English Statute is not, unless it has specifically been made applicable by Ordinance'. English Common Law has been modified by Statute from time to time, because it has been found to be unsuited to changed conditions. The law to be administered in the Sudan is laid in Chapter II of the Civil Justice Ordinance 1900, and, in my opinion, the Sudan Courts are fully entitled to consider English Statute Law and to adopt or reject it, according to whether or not it is in consonance with the provisions of Chapter II having due regard to conditions in the Sudan."

The learned C.J. did not show reasons why the Sudanese Courts are entitled to consider English Law and why not other legal systems. The only reason shown by the C.J. was the reference to the principles of justice, equity and good conscience which were conceived by the learned C.J. to be another name of English Law. However, he gave the courts the discretion to adopt or reject English Statute Law. This discretion could only be exercised in accordance with each judge's subjective concept of justice, equity and good conscience.[153] The learned C.J. did not extend his discretion to cover English Common Law which was believed by the English judges to be capable of being carried about, as it were, in a portmanteau and easily and safely applied wherever the British flag flies.[154]

It was decided per Owen, J., in this case that the courts in the Sudan were guided, but not governed by English Common and Statute Law. He said:-[155]

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[151] (AC-APP-42-1926); I S.L.R., p. 302.

[152] Ibid. , p. 305.

[153] Egon Guttmann, op. cit. , p. 410.

[154] Ibid. where the author quoted Peacock J., HC/CS/225/1925 (AC/APP/48/1926).

[155] I S.L.R., p. 308.

"I agree with the principle indicated in the judgement of the Chief Justice, that the Courts of the Sudan are entitled to adopt or reject the English Common Law as modified by Statute or not, according to whether it is in consonance with the principles of justice, equity and good conscience, having regard to this country. We are guided but not governed by English Common and Statute Law."

According to Owen, J., English Common Law was subject to qualifications such as those encumbering the free application of English Statute Law. Thus, the learned judge put English Common Law and English Statute Law on equal footing. Accordingly, both should be subject to consonance with the principles of justice, equity and good conscience, having regard to the Sudan. The fair statement of Owen, J., simply meant that should another legal system do more justice and equity, it should be applied instead of English Law which may not always lead to a just solution.[156] It also meant that English Common and Statute Law could not be received in the Sudan without examining them against the yardstick of the local social and economical conditions of the Sudan.

Occasionally the English judges saw themselves as being guided by English Law. In Abu El Gasim Ibrahim V. Mina Khalil and another ,[157] it was decided that when a person is injured through the negligence of another, he is entitled to full, fair, and reasonable compensation for the pain and suffering as well as loss of future income. However, he is not entitled to perfect compensation, the amount of compensation to be determined by using the rules of English jurisprudence as guides, and not the Workmen's Compensation Ordinance 1908. Francoudi, J., said:-

"I am obliged therefore to decide this issue, being guided as far as is possible by the rules of English jurisprudence."

The learned judge was closely following the decision in Ahmed Hassan Abdel Moneim and brothers V. Heirs of Ibrahim Khalil. [158]

The English judges in the Sudan sometimes capitalized on the fact that words are

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[156] Egon Guttmann; Ibid.

[157] (HC-CS-121-1929); I S.L.R., p. 400.

[158] (AC-APP-42-1926); I S.L.R., 1969, Ibid.

temperamental creatures; in the case of Mohammed El sayed El Barbari V. Heirs of Yassin Ali Gabtan, [159] Gorman, J., was of the opinion that the courts would be guided by no legal system other than English Law. The word 'guide' was given the meaning of 'bound' in this case; the learned J. said:-[160]

> "Section 9 of the Civil Justice Ordinance is what binds us. We have to decide a case like this in accordance with the principles of justice, equity and good conscience, and in this regard it was laid down by the Court of Appeal in 1920 in Mansour Eshouhi and others V. Abu Fatma Sharif ,[161] and doubtless was acted upon long before that, that in the absence of Sudan legislation or a previous decision of this court, we should especially in purely commercial matters be guided mainly by the legal principles with which we are familiar...not as a rule applying the principles of any other law except English Law, unless the result of applying English Law would be repugnant to justice, equity and good conscience."

The learned judge was faced with the fact that English Law made use of a registration system which was not available to the Sudan, and further faced with the difficult question of whether he should apply English Law in such circumstances to the Sudan. The question also arose whether to apply English Law as it existed before the machinery of registration was created by the Bills of Sale Acts, or to apply it as it stood then.

The learned judge came to a very interesting conclusion. He said:-[162]

> "Therefore, in my view, the fact that the permissive machinery set up by the Statute has not been erected in the Sudan is no reason why the primary remedy of the Acts should not be applied."

He added that until a registration system is created in the Sudan such document 'unregistered' cannot give priority as against a creditor not having notice of it. The learned judge in an obiter dictum said that he would retain an open mind which could accept the adoption of English Law to

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[159] (AC-APP-7-1930); I S.L.R., p. 473.

[160] Ibid. , p. 477.

[161] I S.L.R., p.147 Ibid.

[162] I The S.L.R., p. 479.

the full extent of holding an unregistered document, in the absence of a system of registration in the Sudan, as wholly void even against creditors having notice of it![163]

The dogmatic adoption of English Law was sometimes relaxed. It was decided per Cutter, J., in the case of Heirs of Mariam Bint Boulos Saleeb V. Heirs of Boulos Saleeb ,[164] that:-

> "The exclusion of the heirs of a daughter who predeceased her father, is not pecular to Coptic Law. It is a rule in many other countries and is also the rule in Islamic Law. It would, I think, be very dangerous to hold that merely because the rule does not apply in English Law that we therfore ought to exclude it."

This is one of the instances where a distinction was made between English Law and the principles of justice, equity and good conscience; it was considered as dangerous to exclude a rule merely because it did not apply in English Law. The learned judge stated a simple fact that a rule could run contrary to English Law and still remain in consonance with the principles of justice, equity and good conscience.

It was decided per Owen, C.J., in a mortgage foreclosure action[165] that the English rule that the claim for interest is limited to the shorter period provided for simple contract debts or actions on account is not the law in the Sudan. The honourable C.J. said:-[166]

> "I can see nothing offensive in this - whatever may be the case in England. What may be advisable and desireable in one country may not be either advisable or desirable in another. The limitation in the case of the recovery of interest in England is purely statutory. I feel that if the fact of this statutory limitation had not been in the back of the mind of the court, it would not have been suggested that the Sudan legislature was intending to create a limitation similar to that in force in England."

The statement of Owen, C.J., is a flat rejection of the blind unqualified adoption of English Law. It recognizes the differences from one country to another and invites an application of law that

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[163] Ibid. , p. 479.
[164] (AC-REV.-17-1932); II S.L.R. 1969, Ibid.
[165] Paylak Murad Derounian V. Omar Mohammed Abbasis and another. (AC-APP-20-1932); I S.L.R., op. cit. , p. 26.
[166] Ibid. , p. 32.

takes such differences into consideration. The present case, together with Ali El Karar Hassan V. Abdel Rahim Mohamed El Fekih [167] and Um-Setrein Bint Hamad El- Tom V. El Hassan Hamad El Shafie ,[168] represent a trend among some English judges not to equate principles of justice, equity and good conscience with English Law.

A trend is also seen to realize all the differences between England and the Sudan and to apply a law that would appeal to local circumstances of the Sudan. If such a trend would have dominated, it could have yielded to a system of law most relevant to the Sudan.

Saleh Sobhi V. Saleh Sasoun ,[169] is another case that represents such a trend. The question in this case was whether the provisions of the English Statutes should be enforceable in the Sudan. Gorman, C.J., said:-[170]

> "I think the test should be whether the Statute affords equity, justice and good conscience. Some Statutes affect rights, legal rights, and these are usually based on the demands of justice. But other Statutes merely announce a rule of convenience, e.g., the Road Traffic Act, and no one would say it ought to be applied to the Sudan, if we have no similar rule ourselves, as a matter of equity, justice and good conscience. It cannot be said that section 4 of the Statute of Frauds is a mere rule of convenience, but it is closer to such than to the other type of Statute. If there were evidence of a custom in the Sudan to put guarantees into writing, the existence of the Statute of Frauds would reinforce us in applying such a custom, but there is no such evidence."

According to the learned C.J., he would reject the application of a certain rule only when it is a rule of convenience, but Bennet Attorney General took a more positive stance in the same case, saying:-[171]

"I found my judgement refusing the application of section 4 of the English Statute of Frauds,

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[167] (JC-APP-6-1914); I S.L.R. Ibid.
[168] (HC-CS-178-1926). Ibid.
[169] (AC-REV-36-1936); II S.L.R., p. 198.
[170] Ibid. , p. 199.
[171] Loc. cit.

in virtue of section 9 of the Sudanese Civil Justice Ordinance, on the particular circumstances of this case, there being in my opinion no sufficient justification for such application in this case, even if it is open to the court to import into the law of the Sudan the positive provisions of an English Statute, either generally or for the particular purposes of an individual case."

The learned A.G. confined his refusal to apply English Statute Law to the particular circumstances of this case and abstained from assenting to or dissenting from the application of English Statutes either generally or for the particular purposes of an individual case. In another case,[172] Bennett, A.G., was sharply against the application of English Statutes, and said:-[173]

"Whatever may be the scope and meaning of section 9 of the Civil Justice Ordinance, it does not enable this court to set itself up as a legislative body, free to adapt or adopt and so in effect to enact any foreign Statute or any statutory enactment of its own imagination that may recommend itself. It is confined so far as any body of foreign law is concerned to the application of the general principles underlying that law. The court may determine and apply the principles, but it cannot borrow any artificial qualifications which may have been grafted on the principle by foreign Statute."

He went as far as saying that application of English Sale of Goods Act, 1893, to this particular case, would run contrary to the principles of justice, equity and good conscience. He said:-[174]

"The only question for the court, therefore, is whether in accordance with justice, equity and good conscience it shall hold that subject to such exceptions as arise upon a similar test, a contract for the sale of goods shall not be enforceable by action unless it is in writing. The answer is obviously 'NO'. Little or no publicity is given to the judgements of this court, the population of the country is largely illiterate, and only the greatest confusion and injustice could follow an attempt by the civil courts to require that all contracts for the sale of goods should be in writing in order to be enforceable by action."

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[172] Henein manios V. Boxall & Co. (AC-APP-14-1936); II S.L.R., p. 227.

[173] Ibid. , p. 238

[174] Ibid. , p. 239

Bennett, A.G., considered English Law as a 'foreign law' to the Sudan. It is perhaps the first time that English Law came under such a label, which until then was reserved exclusively for Egyptian Law. He highlighted the question of applying English Law by the Sudan Courts subject to the conditions of the Sudan, and described acting otherwise as the "greatest confusion and injustice." However, not all the English judges were prepared to take such a liberal approach. Four years after this decision, it was decided per Halford, J., in the Sudan Government V. Ahmed Omer ,[175] that the law in Great Britain is the source of the Sudanese jurisprudence. The learned judge said:-[176]

> "I am convinced that it is a clear law in Great Britain - and therefore in the Sudan, as this is the source of our jurisprudence - that however unambiguous the literal text of a Statute may be, if such literal meaning conflicts at all with the intention of the Statute as a whole, it will not be adopted by a court called upon to interpret it."

I have no quarrel with the conclusion of the learned judge, but I have some reservations as to his statement that since it is a clear law in Great Britain, therefore, it is a clear law in the Sudan. It is a puzzling inference and a hard argument to accept.

I have an equal reservation as to his statement that the law in Great Britain is "the source of our jurisprudence." It could have been acceptable if it were "a source" of the Sudanese jurisprudence, but to be "the source" means it is the one and only source of the Sudanese Law. One is entitled to know why such a monopoly exists, and question whether this attitude is consistent with justice, equity and good conscience.

By and large, the formative era of English Law in the Sudan, and its reception took place over a number of years and was attended by uncertainty. It was not certain whether the courts would adopt, adapt or reject English Law.[177] A decision to embark on any of these alternatives was subjective and depended on the conservative or liberal attitude of the judges. The decisions were sometimes arbitrary or motivated by political drive or nationalistic considerations. This created

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[175] (AC-APP-12-1940); II S.L.R., p. 432.

[176] Ibid. , p. 439.

[177] Cliff F. Thompson, op. cit. , p. 1165

uncertainty and inconsistency. The doctrine of binding precedent was not yet established and that added more uncertainty and inconsistency.

English Law was received through the personal law of non-Muslims and through the justice, equity and good conscience provision as well as through legislation. The early stages of this formative era witnessed a liberal approach and English Law was applied only when it was consonant with justice, equity and good conscience. Egyptian Law was applied more often than not, as Egypt was conceived of as a partner in the Administration of the Sudan. However, in the second decade it became clear that Britain was, for all practical purposes, the de facto sole master, and it became almost a public policy to adopt English Law.

There emerged an undeniable trend to subject reception of English Law to relevant social economical differences between the Sudan and England. Of all the vehicles of reception of English Law ''justice, equity and good conscience'' was primarily used as a standard measure of reception of English Law.[178] Ultimately, it was more or less a judicial stance that the courts in the Sudan were ''guided, but not bound by'' English Common and Statute Law. This dictum of Mr. Justice Owen was repeated so often enough that it became law.

[178] Natale Olwak Akolawin, op. cit. , p. 249.

# PART III

# FURTHER DEVELOPMENT OF ENGLISH LAW IN THE SUDAN

# Chapter 1

## DEVELOPMENT OF ENGLISH LAW A DECADE PRIOR TO THE INDEPENDENCE OF THE SUDAN

A decade before the independence of the Sudan in 1956, the Judiciary adopted a policy of applying English Common and even Statute Law. In 1952 Watson, J., delivering a judgement in the case of Henri Servais V. Frans Verbiest ,[1] said boldly:-

> "I further hold that it is the duty of this court to administer the principles as laid down in section 168 of the U.K. Merchant Shipping Act 1894, which section I conceive is designed to meet just such a situation as has now arisen."

The learned judge expressed his strong committment to English Law, but did not advance any reason as to why it was the duty on the court to apply the principles of section 168 of the U.K Merchant Shipping Act 1894.

The case of Habib Ghofrill V. Gerald Andrew and Sudan Government ,[2] presents an interesting argument as to the application of English Statute Law. The Advocate General contended that the basic principle applicable is section 9 of the Civil Justice Ordinance - (justice, equity and good conscience) with the consequence that the Sudan Courts follow English Law. He argued that, where in the interests of justice and equity it has been found necessary to amend the Common Law by Statute, then it is for the courts in the Sudan to follow that amendment.

The advocate for first defendant submitted that the courts in the Sudan follow English Statute Law only when it codifies the Common Law and conforms to justice, equity and good conscience.[3] The difference between the two advocates is one of degree and not of kind. In principle, none of them challenged the application of English Statute Law; they differed as to when the Statute Law should be applied. That takes us to the stance of the court presided over by Watson, J., who reiterated the statement of Owen, Chief Justice:- "We are guided, not bound, by the English Law"[4]

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[1] (HC-CS-5-52); VII S.L.R., Civil Cases - 1952-1953, 1977, p. 25.

[2] (HC/KIM/CS/62/52); VII S.L.R., op. cit. , p. 58.

[3] Loc. cit.

[4] Heirs of Ibrahim Khalil V. Hassan Abdel Moneim (AC/6/1926).

and considered it a maxim which is axiomatic for the Sudanese Courts. The learned judge also quoted Bennett, J., as saying:-[5]

> "Whatever may be the scope and meaning of section 9 of The Civil Justice Ordinance it does not enable this court to set itself up as a legislative body free to adapt or adopt and so in effect to enact any foreign Statute or any statutory enactment of its own imagination that may recommend itself. It is confined so far as any body of foreign law is concerned to the application of the general principles, but it cannot borrow any artificial qualifications which may have been grafted on the principle by foreign Statute."

The learned judge paid lip service to the dicta of Owen, C.J., and Bennett, J., and brushed them aside when he said:-[6]

> "I have indeed no hesitation in following those dicta of Owen, C.J., and Bennett, J., but in my view neither preclude the courts of the Sudan from applying the principles of the 1953 Act in this country, for surely these amendments to the Common Law are essentially principles and not artificial qualifications."

Watson, J., always adamantly adhered to the application of English Law, whether Common Law or Statute Law. The learned judge in support of his argument, said:-[7]

> "We follow English Common Law, but when in altered circumstances of modern life it has been found necessary to amend the Common Law surely we cannot reject such amendments as contrary to justice, equity and good conscience."

It is interesting that the learned judge stated his support for the dicta of Owen, C.J., and Bennett, J., who stated that "the courts of the Sudan are guided, not bound by the English Law" and yet he stated that "we follow English Law." Obviously the word 'follow' is closer to 'bound' than it is to the word 'guided'. This happened at a time when the same judge referred to such dicta of both judges as "a maxim which is axiomatic in the Sudanese Courts"!

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[5] Manios V. Boxall. Ibid.

[6] Habib Chofril V. Gerald Andrew and Sudan Government, op. cit. , p. 61.

[7] Loc. cit.

Stanley - Baker, J., in Amin Abdel Messih V. Victoria George Kadaa and another ,[8] ran against the precedent of the High Court and against the maxim which was said to be "axiomatic in the courts of the Sudan", when he said:-

> "It is obviously unsafe for this court to depart from the long established rules of English Law, unless it is perfectly clear, that their, strict application in a particular case in the Sudan would cause an injustice."

There is no obvious unsafety in departing from English Law. It is political consideration and convenience rather than legal ones, that dictated this approach. It reflects a nationalistic committment.

The first Sudanese judge to deal with the application of English Statute was Ahmed Mutwali El-Atabani. The case before him was Grand Gadi V. Great Britain Restaurant And Bar. [9] The facts of this case were as follows:- The G.B., comprised of a bar, a restaurant and a cabaret, occupied premises in Wingate Avenue, Khartoum, under successive tenancy agreements with the owner, The Grand Qadi. The Grand Qadi served the G.B. with a notice to determine the tenancy and to vacate the premises in May 1953. The user of the premises as a bar and cabaret was in breach of the covenants as to the user in the tenancy agreement, and because the Grand Qadi did not intend to use the premises as a bar or a cabaret. Therefore, the Grand Qadi sued for possession, and the G.B. counterclaimed for a new lease of one year's duration as compensation for the loss of goodwill. The G.B. based its counterclaim on the English Landlord and Tenant Act 1927, Section 5, that conferred such a right.

A.M. El Atabani, J., in considering whether or not the English Landlord and Tenant Act should be applied to this case under section 9 Civil Justice Ordinance, stated the following:-[10]

> "In order to answer that question, therefore, the practice has grown in the Sudan Courts, and has become so established as to be regarded now as the main source of legal evolution in the

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[8] (AC-APP-19-562, KSA-HC-CS-260-51); VII S.L.R., 197, p. 177f.

[9] (AC-APP-39-1953; HC-CS-121-1953); VII S.L.R., 1977, p. 310.

[10] Ibid. , p. 315.

country, to refer to the English Law for guidance - be it the English Common Law or the English Statutory Law but, and for very good reasons, with a greater degree of persuasive force for the former source."

The learned J. dismissed the counter claim, inter alia, on the following grounds:-

a) To recognize the rights conferred by the Act would not, in this case, accord with justice, equity and good conscience.

b) Historically, the Act is without any background either in law or in equity; it was a mere logical extension of the rights created by the Agricultural Holdings Act 1923.

c) The Act invests the courts with the peculiar and extraordinary power of creating a tenancy against the will of the parties. It makes a serious inroad into one of the fundamental conceptions of justice, i.e. the freedom of contract.

d) The court does not create a right which the parties themselves did not provide for by their agreements, either expressly or by necessary implication.

In support of his rejection of English Statute Law, El Atabani, J., referred to English Common Law, and in particular, the judgement of Scott, L.J., in Clift V. Taylor ,[11] where he criticized the Act as interfering with the freedom of contract and thus modifying an important right of the individual. El-Atabani firmly decided that the Sudan Courts should not recognize the right to a new lease given to a tenant by the English Landlord and Tenant Act 1927, under section 9 of the Civil Justice Ordinance.

Lindsay, C.J., agreed in the main with the conclusion of the learned Trial Judge, but was unhappy with the statement made by the latter to the effect that recognition of the rights conferred by the Act would not accord with justice, equity and good conscience. The C.J. stated in dicta that:-

"In certain circumstances it would be just and equitable for a Sudan Court to compensate an out-going tenant for loss of goodwill, and in so deciding the court might properly seek guidance from the provisions of the Landlord and Tenant Act 1927 as to the principles to be

[11] 2 K.B. 1948, pp. 394-400.

applied."

The Learned C.J. minimized the effect of his dicta when he said that the circumstances of the case would not justify the granting of such a remedy. The C.J. accepted to be guided and not bound by English Law, but he still could not conceal his worries about the liberal and critical approach of the Sudanese judge. In a later decision, only a month and a half after his dicta ,in the Grand Qadi V. Great Britain Restaurant and Bar ,[12] the learned C.J. seized the opportunity to state that:-[13]

"I am in no doubt that the most equitable and sensible approach would lie in the application of the principles of English Law."

He stated that:-

"The English Law is accessible to our judges, and our advocates all of them trained in or with a sound working knowledge of this system of jurisprudence, and it is of great importance that our courts shall administer a law which is understood, which is accessible to both parties and to the court."

The foregoing statement alludes that the Sudan Courts are bound by English Law. That runs against the precedents of the same court which frequently stated that it is 'guided' and not 'bound' by English Law. The statement of the Chief Justice lacks credibility when he says that English Law is accessible to the parties to a dispute. They are usually laymen who have hardly ever heard of English Law, let alone have access to it. The learned C.J. exceeded all limits when he stated that:-[14]

"The only law which is readily accessible to all parties and the courts is English Law."

This is definitely an uncalled for restriction on how the Sudan Courts have to act according to justice, equity and good conscience.[15] The Legislature did not intend English Law to be applied as a general rule in cases not provided for by the Civil Justice Ordinance or any other enactment in force in the Courts of the Sudan, it deliberately left this question undecided.[16] It merely enacted that:-

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[12] (AC-APP-39-1953; HC-CS-121-1953); VII S.L.R., 1977, Ibid.

[13] Katina Bamboulis V. Basil Bamboulis, Ibid.

[14] Ibid. , p. 377.

[15] Natale Olwak Akolawin, "The Reception of English Law in the Sudan" op. cit., p. 242.

[16] Egon Guttmann, op. cit., p. 407.

"In cases not provided for by Civil Justice Ordinance or any other enactment for the time being in force, the courts shall act according to justice, equity and good conscience."

On the one hand the English judges who administered the courts in the Sudan betrayed the intention of the legislature by narrowing the wide concept of justice, equity and good conscience. They took it as another name for principles of English Law.[17] They abused the carte blanche under section 9 of the Civil Justice Ordinance 1929. On the other hand, given the fact that since 1900, judges of the Civil High Court had been recruited from English lawyers or from lawyers trained in the English Common Law, those English judges could hardly be unfaithful to their own legacy. It is not surprising that their practice has predominantly reflected English Law according to their legal education and training.

Considering the foregoing facts one can logically infer that section 9 was carefully drafted to avoid shocking the feelings and convictions of the Sudanese people by avoiding the imposition of English Law on them. At the same time, it rejected the application of Islamic Law, which was predominent until the establishment of the Condominium. Obviously, a completely English oriented Judiciary would not opt for the application of Islamic Law. The justice, equity and good conscience standard which was the most important provision in the whole Sudanese Civil Law, allowed English Law to creep into the vacuum created by the suspension of the Islamic Law then in force. This Islamic Law would include the fiqh of the scholars, the custom of the people, the practice of the courts and qadis during the Sinnar, Darfur and Mahdist Islamic rules and the regulations of such Sultanates and State.

The English judges chose to apply English Law with a preconceived notion about the superiority of English Law. They rarely made an objective analysis of a given concept under English Law or any other legal system. The wording of section 9 of the Civil Justice Ordinance 1929 allowed almost unlimited materials to be admitted as persuasive authority, but in practice virtually the only sources referred to in the Courts of the Sudan were English cases, Statutes and text books.[18]

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[17] Natale Olwak Akolawin, Ibid.

[18] W.L. Twining, "Some Aspects of Reception." S.L.J.R., 1957, p. 230.

It is technically easy to adopt or receive the codified law of another country, but it is quite difficult to adopt its case law in a limited period of time.[19] The justice, equity and good conscience provision was employed by the British Administration to facilitate the gradual reception of English Common Law over a considerable period of time.

[19] Enid Hill, "Comparative and Historical Study of Modern Middle Eastern Law." The Am. J. of Comp. L. Q. vol. 26, Am. Assoc. for the Comp. L. Inc., 1978, p. 290.

## Chapter 2

# WESTERNIZATION AND SECULARIZATION EFFORTS DURING THE CONDOMINIUM, 1899-1956

The fall of the Mahdist State marked an era of exposure to the western world and western culture. Law had attracted the attention of the British Administration of the Sudan as a vehicle to bring about the required change. It used the English judges, who almost consistently applied the principles of English Law or the enactment of substantive laws based on, or borrowed from, English Law,[20] to westernize the legal aspect of the Sudanese life.

The faithful adherence to English Law could not be separated from a policy of secularization of a legal system which had been dominated by Islam. It was part of a policy of speedy westernization of the Sudan.[21] This policy was partly deliberate, articulate and conscious and partly unplanned, unconscious and inarticulate. Both policies were fused together to count on the eventual success of a 'secularization' or 'westernization' policy.[22]

The 'secularization' policy was geared towards the parts of law that would excite very little or no interest outside the legal profession. Family Law was left intact as it was considered a part of law that was of vital importance to the Sudanese subjects. It was classified as a dangerous area which if tampered with, could inflame public opinion. Apart from the Shariah Law restricted to personal affairs, and the elementary institutions of religious education, all the administrative, cultural, educational and legal institutions followed the non-Islamic European pattern.[23]

The reaction to that imperialistic domination varied from jihad, war for the cause of God, which was reflected in many instances of armed resistance, to cultural isolation, withdrawal and non-cooperation with the non-Muslim western imperialists. The elites, with their long immersion in western ways, were partly secularized and westernized, but the people have never been as secularized as the elite. Their Islamic convictions have never been shaken. They never broke with

[20] ie. The Bill of Exchange Ordinance and Companies Ordinance. See M.I.an-Nur, "The Role of the Native Courts in the Administration of Justice in the Sudan." XLI S.N.R., 1960, p. 80.

[21] Loc. cit.

[22] Ibid., p. 237.

[23] Dr. Hasan Abdalla at-Turabi, op. cit., p. 17.

their Islamic upbringing.

The English judges acted as agents for the reception of English Law and contributed considerably towards the process of 'secularization' and 'westernization' of the Sudan. That process involved a break in the historical continuity of Islamic legal development in the Sudan. The English judges during the Condominium brought cultural prejudice with them. Case Law was their prime vehicle for the introduction of new thoughts into the body of the Sudanese legal system. However, statutory regulation played a less effective role to bring about such a result.

The judges were recruited from lawyers trained in English Common Law. They followed the legal legacy with which they were familiar. Those judges drew heavily on English authorities and frequently applied Common Law principles. Secular legislation, along with the courts' decisions based on Common Law, gradually replaced Shariah Law. Secular courts expanded their functions at the expense of Shariah Courts whose jurisdiction was confined to Personal Status Law. Shariah Courts had fallen into a secondary status behind the secular judicial system.[24]

Two different judicial systems having very little in common co-existed alongside one another, resulting in a dual judicial system. The Condominium was organized around secular institutions on the basis of western thought.[25] The ruling British subjects brought with them their own ideas of justice, equity and good conscience. Islamic Law was never considered to be in accordance with justice, equity and good conscience. The English judges perceived Islamic Law through the coloured glasses of the western concept of justice, equity and good conscience. They were also handicapped by their ignorance of the Arabic language and were unable for this reason to have access to the sources and literature of Islamic Law. Their limited notion of Islamic Law drew heavily from the Orientalists who were hostile to Islam more often than not.[26] However, the English judges' ignorance of the Arabic language is not a convincing justification for them to refrain from applying Islamic Law. They could have imported the Indian translations of Islamic Law, all available in

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[24] Daniel Crecelius, "The Course of Secularization in Modern Egypt" in "Islam and Development, Religion and Sociopolitical Change". John L. Esposito, Editor, Syracuse U. Press, 1980, p. 59.

[25] Ibid., p. 63.

[26] Aziz Ahmed, "Islamic Law in Theory and Practice". The All-Pak. Legal Decisions L. Publishers, Lahore, 1956, p. 7.

English, in the same manner by which they imported the justice, equity and good conscience provision from India and in the same manner by which they imported the Indian Penal Law and the Indian Code of Criminal Procedure. If this had taken place, it would have been sensible since the court would apply a law well known to the Sudanese people and accessible to them. This could have put an end to the anomalous situation where the courts employed the law and the language of the masters and imposed them on people.[27] It could not be said that the English judges rejected the application of Islamic Law for any inherent defect. The Indian Courts, at the early stage of applying the justice, equity and good conscience provision used to draw heavily from Islamic Law, the custom and local usages. Cultural snobbery was an undeniable force behind the uncompromising adherence to English Law and the flat rejection of Islamic Law.[28]

The whole educational policy and in particular the legal one was geared to secularize and westernize the Sudanese society. The Faculty of Law rigidly followed the curriculum of the English Law schools. The language of instruction was English and even the staff was English. The law library was predominantly occupied by English case books and English textbooks. Yet, secularization and westernization could not penetrate society's belief and structure and could not break through the barriers thrown up against it by the Sudanese people. It remained confined to a small, but influential, elite.[29]

For all practical purposes the fiqh, which is a practical science, was divorced from practical life except for personal law matters. The traditional educational system gave way to a secular and a western counterpart. The courts which applied Islamic Law in toto were confined to personal law disputes. Of all the institutions that maintained Islam, only the mosques were left intact.

Education in the Sudan started at the higher end of the scale and its aim was purely imperialistic.[30] One of the first defined purposes of education was to diffuse the educated Sudanese among the Sudanese people, to enable the latter to understand the machinery of Government,

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[27] Zaki Mustafa Abdel Majid, "The Sudanese Civil Law, its History and Characteristics". op. cit., p. 108.

[28] Ibid. , p. 109.

[29] Daniel Crecelius op. cit., p. 57.

[30] J. Spencer Trimingham op. cit. , p. 254.

particularly with reference to the administration of justice.[31] The Educational Department was in fact part of the political service and its officers trained in it. A former warden of Gordon College at Khartoum expressed the concern of the educational policy to secularize the elite by classifying the graduates of the Gordon College, according to a careful study that ran as follows:-

1) Those who rejected westernization and become fanatical Muslims.

2) Those few who became secret unbelievers, who adhered to the social system, but over whose lives religion has no influence.

3) The majority who kept westernization and religion in separate water-tight compartments.[32]

Interestingly, the last two categories were the graduates who influenced the political lifelong after independence, and were the elite who ruled the Sudan for decades. By and large, those graduates of Gordon College were not Islamically conscious and they had no vision of an Islamic future for the Sudan.

During the Condominium the whole establishment was secular and western, i.e. the Judiciary, the laws, the economy, the civil service, educational and cultural policies. It seems that there was an irrebuttable presumption that whatever was suitable for England was necessarily suitable for the Sudan. For over fifty years, the judges indulged in a process of religious adoption of English Law. It took English Law centuries to develop the way it has come to be now. This development cannot be divorced from English soil with all the relevant social, economical, educational and cultural and religious factors peculiar to that English environment. Yet the English Administrators wanted to forget such a crucial factor, and to engraft the product of certain factors through centuries in the Sudanese life without paying heed to the sharp differences between the two. Not only that, they denied Islamic Law normal development in its own land by rejecting it and introducing their own legal system.

Davis, an English Administrator, proposed to establish courts that would be administered by

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[31] Ibid. Where the author quoted Sir James Currie, "The Educational Experiment in the Anglo-Egyptian Sudan, 1900-33". J. Afr. Soc., 1934, p. 364.

[32] Ibid. , p. 258.

the graduates of Shariah, and replace the local courts applying custom by Shariah Courts administered by fakis and the local pious people. These proposals were met with uncompromising opposition. It was decided instead, to develop and extend the jurisdiction of the secular judges. In 1934 a plan was set to develop the judicial structure to be modelled on "The principles of British justice" which were considered the principles of justice par excellence.[33]

The British Administration was against co-operating with the faqis and U'lama and did not want to support them.[34] The British Administration was tolerant of some religious and sufi organizations which stood aloof from the struggle in public life and were occasionally exploited to give the government political support.[35]

Islamic culture was denied any role in the South. Measures were taken to prohibit the spread of Islam in the Southern Region. It was contained by closing the Southern Region and giving the Christian missionaries a free hand and allowing them to monopolize the Southern part of the Sudan.[36]

Islamic culture was seen as a stumbling block to secularization and westernization. Christianity was seen as the best means to secure secularization and westernization. That was done cautiously and gradually, to avoid unneeded provocation of the Muslims' strong feelings and to avoid antagonizing them. Arabic language was replaced by English language at all official levels to help accelerate the pace of westernization. The British policy in the Sudan was designed to foster secularization and westernization. The law has been used as a significant element in the westernization and secularization process. It was used as a conscious instrument to promote cultural change in the Sudan.[37]

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[33] Dr. Ja'far Mohamed Ali Bakheit, op. cit. , p. 252.

[34] Ibid. , p. 138.

[35] Dr. Hasan Abdallah at-Turabi, Ibid.

[36] Loc. cit.

[37] Herbert J. Liebesny, "Stability and Change in Islamic Law." In the Midd. E.J., The Midd. E. Inst., Wash. D.C., Winter 1967, p. 26.

# Chapter 3

## DEVELOPMENT OF ENGLISH LAW DURING THE POST-INDEPENDENCE ERA UNTIL 1970

By the time the Sudan became independent in 1956, almost all institutions and laws were secular:- the Judiciary, the economy, the laws, the educational and cultural policies.[38]

The attitude of the Sudanese judges towards receiving English Law was more or less similar to that of the English judges. Sometimes they were more vocal in their support for English Law than some English judges. Their voice was sometimes louder than that of the former master! One can easily understand why the English judges religiously adhered to the application of English Law, but one has difficulty trying to understand the slavish adherence of the Sudanese judges to English Law.

In a Court of Appeal Revision, R.C. Soni, J., drew the attention of the trial court to the recent development of English Law as regards hire - purchase agreements involving penalties. He said:-[39]

> "Recently the courts in England have held a number of hire- purchase agreements unenforceable as involving penalties. This matter should receive the attention of the trial court when the case is heard afresh. A case which the court might study is London Trust V. Hurrell (1955) 1All E.R. 839, (1955) 1W.L.R. ,[40] wherein is mentioned a judgement of the English Court of Appeal (Gooden Engineering Ltd. V. Stamford (1953) I.Q.B. 86 Ed.) , which Denning, L.J., followed."

One cannot miss the emphasis which the J. has put by saying:-

> "This matter should receive the attention of the trial court when the case is heard afresh."

It is an unqualified imposition of a judicial stance. No effort was made to give reasons why this matter should receive the attention of the trial court. The words of the Sudanese judge show that English Law principles were eventually taken for granted and it was imperative to apply them. It amounts to saying that the courts of the Sudan are 'bound' and not only 'guided' by the rules of

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[38] Dr. Hasan at-Turabi, op. cit. , p. 18.

[39] Rouchdi Boutros V. Christos Simos, (AC/REV/234/1957); S.L.J.R., 1957, p. 8.

[40] 1All E.R. 839, (1959) 1W.L.R., p. 9.

English Law. However, we should not overlook the systematic reference and citation and the up-todate knowledge of development in English Law that the court has shown.

English Law became the principle and authority for the Sudanese Courts. There was occasionally an exception to the rule that Sudanese judges slavishly adhered to the application of the rules of English Law. Sometimes they remembered they were 'guided' and not 'bound' by English Law. Bakheita Ibrahim V. Hamad Mahayoub ,[41] stands as a landmark in reminding the courts of the Sudan of the maxim which was axiomatic in the Sudanese Courts. M.A. Abu Rannat, C.J., rejected the adoption of the English Land Law rule that would prevent a purchaser from recovering damages beyond the expenses he had incurred by an action for a breach of contract if such contract was for sale of real estate and if it was entered by a person who has no title to it, nor any means of acquiring it. He stated firmly that it would be contrary to justice, equity and good conscience to follow such a rule. The learned C.J. said:-[42]

> "This rule has been much criticized and is based on the peculiarities of English Land Law. It is 'founded entirely on the difficulty that a vendor often finds in making a title to real estate, not from any default on his part, but from ignorance of the strict legal state of his title'. In my view this rule should not be adopted in the Sudan, where the question of title is much more easily ascertainable in view of Land Registration and the provisions of the Land Settlement and Registration Ordinance."

The learned C.J. continued to say:-[43]

> "Thus this is an instance in which the courts of the Sudan should remember that they are 'guided' by, but not 'bound' by, the Common Law. It would be contrary to justice, equity and good conscience to follow such a rule."

The technical rules of English Land Law were rejected in this case and the court availed itself of this opportunity to remind the courts of the axiomatic maxim that they are 'guided', but not

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[41] (AC/REV/8/1957); S.L.J.R., op. cit. , p. 25.

[42] Ibid. , pp. 32, 33.

[43] Loc. cit.

'bound' by English Law. It is one of the rare instances where the court deemed it contrary to justice, equity and good conscience to follow a rule of English Law.

In Hanna Kattan V. John Y. Kattan ,[44] Babikir Awadalla, J., in an exhaustive judgement said:-

"We see no reason to depart from the rule of the conflict of laws recognized by English Law."

It is not clear whether the learned J. was 'guided' or 'bound' by the English Common Law in his too faithful replica of English Conflicts rules. The court was not alert to the caution necessary in the field of marriage law, as English Law is deeply prejudiced against polygamy. Such prejudices have coloured not only the internal law of England, but also its conflict of law rules.[45]

In Hasan Abdel Rahman V. Satti Mohamed Satti ,[46] Babikir Awadalla, J., took a liberal approach in dealing with the application of English Law, he said:-

"I think the matter is not governed by the rules of English Law invoked under section 9 Civil Justice Ordinance, but by Sudan enactments."

Although the Lost and Stolen Property Recovery Ordinance 1924 speaks of 'property' which is defined in section 2 of the same Ordinance to mean movable property only and does not specifically include the 'value' of the property in case it is consumed, the learned judge preferred to draw an analogy from the Sudanese Ordinance for the application of English Law. He stated:-[47]

"I would rather have the analogy made to our Ordinance than the rules of English Law."

There is a strong commitment and sense of belonging to a legal system other than English Law in using the words 'our Ordinance', even though the Lost and Stolen Property Recovery Ordinance 1924 was British made. It indicates a trend to develop the law ready at hand. The same judge as above followed the same line in Alam Maximos V. Khadiga Hamad El Brigdar and Fahmi Girgis V. Khadiga Hamad El Brigdar ,[48] when he decided that the rule of English Law whereby a

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[44] (AC/REV./47/1957); S.L.J.R. 1969, p.35.

[45] C. d'Olivier Farran,"Marriage and Divorce in the Law of the Sudan." op. cit. , p. 148.

[46] (AC-Revision-135-58); S.L.J.R., 1958, p. 66.

[47] Ibid. , p. 67.

[48] (AC-Revision-73-58), (AC-Revision-74-58); S.L.J.R., op. cit. , p. 80.

tenant remains liable to pay rent even though he is deprived of the use of the premises by fire, rain, etc., is against justice, equity and good conscience and will not be followed in the Sudan. The learned J. said:-[49]

> "I do not think that it would be in accordance with equity, justice and good conscience in this country if we hold that a tenant who is deprived of the use of the house by fire, rains, etc., should continue to pay the rent for the duration of the term."

The justice, equity and good conscience provision became a two-edged sword. It was introduced to allow the easy flow of English Law into the legal vacuum created by the destruction of the Mahdist State and establishment of the Condominium. The role of the same principle is now reversed to reject the adoption of English Law. In Mukhtar Ahmed Abdel Rahim and others V. Fatma Hussein Ali ,[50] Babikir Awadalla, J., stated that both Islamic Law and Customary Law in the Sudan already conferred upon the wife a degree of independence which English Law had attained only after a series of reforms. Accordingly, he decided that the relationship of a husband to his wife is not of itself a fiduciary one, so that where a husband receives money from his wife by the way of loan he does not hold the same in a fiduciary capacity on her behalf and she has the right to retain her money as against the husband.

In Khartoum Municipal Council V. Michel Cotran ,[51] M.Y. Mudawi, J., referred to English Law as a foreign law and refused even to be guided by it in assessing the quantum of damages. He said firmly:-[52]

> "Counsel for Plaintiff brought to our notice a host of English cases with a view to guide us in assessing the quantum of damages. Let us make it clear from the outset that we refuse to be guided (or do we say misguided?) by English or any foreign cases in this respect i.e. the actual amount of money to be awarded."

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[49] Ibid. , p. 81.
[50] (AC-Revision-189-58); S.L.J.R., op. cit. , p. 82.
[51] (Ac-Appeal-31-1958); S.L.J.R., op. cit. , p. 85.
[52] Ibid. , p. 113

The learned J. made a clear distinction between the economic realities and social philosophy of England and the Sudan. He saw no room for comparison. He said:-[53]

> "The question of quantum of damages is a particularly local concern touching closely on the local conditions and circumstances of each individual country - depending on the standard of living, the wealth of the nation, the economic realities of the country, and its social philosophy. We will be living in a world of dreams, in a fool's paradise, if we attempt to ignore the existing differences in conditions of life between our country and the United Kingdom. There is no room for comparison."

In his refreshing analysis of the standard of care, Mudawi, J., in the same case as above, positively asserted:-[54]

> "We believe that any standard of care taken blindly from English cases will be most unfair and unrealistic, and if we fail to appreciate this fact we will be in the position of a man putting himself behind an iron curtain. We use the phrase in no political sense - closing his eyes, and putting his hands on his ears, neither hearing of nor seeing the civic, economic or social realities of Sudanese life. We do not want for one moment to be in that position."

Khartoum Municipal Council V. Cotran ,[55] stands as one of the rare instances where English authorities have been rejected on the grounds that English and Sudanese conditions are different.[56] The exhaustive judgement in this case is based on a thorough study of the relevant English authorities. But it shows a shrewd awareness of the problems of adopting a foreign law. It also shows a vigorous attempt to tackle such problems.[57] Unfortunately this trend does not represent a whole stance of the Judiciary in the Sudan. If it were so, it could have brought the Sudanese judicial system back to the track of Islamic Law. M.A. Abu Rannat, C.J., in Alla Maana Bint Mohamed V. Elrawda Bint Mohamed ,[58] took the same old stance when he said:-[59]

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[53] Loc. cit.
[54] Ibid. , p. 107.
[55] (Ac-Appeal-31-1958); S.L.J.R. 1958, Ibid.
[56] W.L. Twining," Khartoum Municipal Council V. Cotran: A Study in Judicial Techniques," S.L.J.R., 1959, p. 136.
[57] Ibid. , p. 139.
[58] (AC-Revision-17-59); S.L.J.R., op. cit. , p. 29.
[59] Ibid. , p. 30.

"In Benham V. Gambling (1941) A.C. 157, the House of Lords insisted upon the general need for moderation in assessing damages in such cases, and we see no reason to depart from such general rule."

One need not go into the merits of such a case as above to realize the slavish adherence to principles of English Law. A clear distinction between principles of English Law and the justice, equity provision has been made in Maurice Goldenburg V. Rachel Goldenburg, George Rizkalla Sayis and Edward Michel Sikias Michel [60] Cotran, J., stated:-[61]

"In the result, I hold that whether judged by principles of English Law, or by the personal law of the parties, or by justice, equity and good conscience, the decision in the present suit is the same."

By and large, cases of the courts of England were always taken as authoritative in the Sudan Courts. The ruling in Khartoum Municipal Council V. Cotran ,[62] was confined to assessment of quantum of damage. Tewfik Cotran, Acting J., in Administratix of Costas Zis V. German and Swiss Engineering and Contracting Company and Pheonix Assurance Company ,[63] stated the following:-

"One thing is certain, viz., that whilst cases of the courts of England are always taken into account as authoritative in the Sudan Courts, the assessment of the damages must necessarily be assessed under purely local conditions and values."

The English precedents, even after the independence of the Sudan, represent about 90% of all cases cited as authorities in the courts of the Sudan.[64] This happened, though there is theoretically nothing to prevent reception of law from different sources. An obvious reason is that cases, Statutes and textbooks that form the core of the legal education and training were primarily English. There has always been certain variations from English authorities mainly in technical matters and questions of measure of quantum of damage.[65] The English judges in the pre-independence era

[60] (HC-CS-441-1958); S.L.J.R., p. 36.
[61] Ibid. , p. 42.
[62] (Ac-Appeal-31-1958); S.L.J.R., 1958 Ibid.
[63] (HC-CS-695-1956); S.L.J.R., 1960, p. 142.
[64] S.L.J.R., 1959, p. 98.
[65] S.L.J.R., 1960, p. 164.

religiously adhered to principles of English Law. The Sudanese judges followed suit. They were only an improved copy of the English judges. M.I. an-Nur, J., who was among the first generation to assume judicial functions after the Sudanization of the Judiciary, expressed the commitment of that generation of judges to English Law by saying:-[66]

> "The early judges of the Sudan, who were mostly British, looked into the system which they knew best. This was the general principles of English Law, and they based their decisions on it without ignoring any custom covering the case in the Sudan. To this may be added that most, if not all, of the enacted substantive law issued by the Government was based on, if not completely borrowed from, English Law. Thus the Sudan judges in resorting to the English Law system as a strong influence, have since formulated a Common Law of their own."

One would take with a grain of salt the statement that the English judges adhered to English Law without ignoring any custom covering the case in the Sudan. Such judges were not even aware of these customs. They knew very little or none of the details of the Sudanese life. Later, English judges were better informed of the customs of the Sudan than those who administered the Judiciary for decades during the Condominium. It is equally not fully true that the Sudan judges formulated a Common Law of their own. They were slightly more aware of the customs of the people than their English counterparts during the Condominium. They felt more free to depart from English Law when adherence to that law would run contrary to justice, equity and good conscience.

By and large, the Sudan judges frequently resorted to English Law as a strong influence and as authoritative. The post independence era, especially for the first two decades, was largely a replica of the pre-independence era. There was no radical change concerning the philosophy or the methodology adopted. The extent of adherence to English Law increased in proportion to the increase in litigation, the improvement of legal training and the availability of English legal literature.[67] English Law, pure and simple, was adhered to more often than not. In rare circumstances the universal application of English Law was critically questioned. Along the line of

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[66] M.I.an-Nur, op. cit. , p. 78.

[67] Zaki Mustafa, op. cit. , pp. 183, 184.

continuing religious adherence to English law one can examine the following statement per Tewfik Cottran, J., in Kuwa Kuku V. African Oil Industries [68]

> "The doctrine of common employment has been abolished by the Law Reform (Personal Injuries) Act, 1948. Since this Act was designed to change the basic rule of the Common Law and is not really a procedural or technical Statute it is immediately adopted by the Sudan Courts under section 9 of the Civil Ordinance."

Such a statement leaves very little or no room for doubt that the judge conceived of section 9 of the Civil Justice Ordinance, or the justice, equity and good conscience as a device for the automatic adoptions of English Law.

In Awad Mustafa V. El Hag Salih Suleiman and another ,[69] M.A. Hassib, J., decided that English decisions should be sought in interpreting the Sudanese Rent Restriction Ordinance. He said:-[70]

> "The law in the Rent Restriction Ordinance is similar to the English Law and in interpreting Sudan Law the English decision 'should' be sought."

The word 'should' as used by the judge made it incumbent upon the court to seek English decisions to interpret Sudan Law. The judge did not only oblige his court by his sharp statement, but wanted his rule to be a maxim when he so generalized such a rule. The court in Rouchdi Boutros V. Christos Simas ,[71] decided that the decisions of English Law pertaining to the merits of this case 'should' receive the attention of the trial court when the case is heard afresh. The stance of both judges and their usage of the word 'should' reflects a deep conviction with the universal application of English Law. Both judges did not address the relevance or applicability of the rules of English Law.

It was a usual judicial practice to interpret Sudan Statute Law with reference to English Common Law. This was generally done with a more flexible approach than that of the foregoing

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[68] (KHC-CS-676-1958); S.L.J.R., 1960, p. 201.
[69] (AC-Rev-177-1960); S.L.J.R., op. cit. , p. 197.
[70] Ibid. , p. 198.
[71] (AC-REV./234/1957); S.L.J.R., 1957, Ibid.

two cases. A case in point is Fatma Habib and others V. as-Sarra Bint Fideil. [72] The court in this case decided that:-[73]

"Looking therefore to English reported cases for guidance upon interpreting Sudan Statute Law does not tally with the recognized rules of interpretation of Statutes."

This case takes the courts back to the axiomatic maxim that the Sudan Courts are guided by and not bound by the principles of English Law. There is no obligation whatsoever to bind the court by principles of English Law. The court in Sudan Government V. Mohamed El Hasan Hashim and others ,[74] reasserted that:-[75]

"According to our practice we usually refer to the Indian and English authorities for guidance."

The uncertainty that characterized the judicial decisions during the Condominium continued to exist after independence for a decade or more. Mohamed Yousif Mudawi, Province Judge in the case of Omair and Achille Avareeno V. Sarkis Izmirlian ,[76] in trying to find out whether the Sudan rules of limitation come under the category of substantive or procedural law, stated the following:-[77]

"The test accepted by English Law - from which I have no reason to depart, is that if the period of limitation extinguishes the cause of action itself, i.e., the right itself (as opposed to the right of action) then it is characterized as a matter of substantive law, but if it affects only the right of action, that is the right to have a remedy then it is put on the category of procedure."

The learned J. adhered to such a test only because it is accepted by English Law and that is the sole reason why he had no reason to depart from it. This was again the kind of attitude within the Sudan Judiciary that would take English Law at its face value and never question the relevance of such law.

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[72] (AC-REV-137-1959); S.L.J.R., 1962, p. 64.
[73] Ibid. , p. 67.
[74] (AC-CR-REV-170-1962); S.L.J.R., op. cit. , p. 176.
[75] Ibid. , p. 178.
[76] (AC-REV-94-1962); S.L.J.R., op. cit. , p. 185.
[77] Ibid. , p. 189.

The post independence era witnessed an increased reliance on English precedents. The different Sudan Statutes modelled on their English counterparts contributed considerably to such an increase in reliance on English precedents.[78]

Heirs of Imam Ibrahim V. El Amin Abdel Rahman ,[79] is a leading case and a landmark in the Sudan judicial precedents. It poses a contrast of a liberal trend and a conservative one within one and the same Judiciary. In this case, the plaintiff landlord brought an eviction action against his tenant's widow who had been living with the tenant in the premises in question at the time of the tenant's death. The widow argued that at her husband's death she succeeded to his tenancy of the Rent Restriction Ordinance 1953. The Rent Restriction Ordinance 1953 was silent in this respect. Dafalla El Radi Siddiq, District Judge, in an able manner arrived at a decision in which he was inclined to the view of the English Law for the following reason:-

> "In my view the attitude taken by the English Law in this respect is equitable and so I uphold it as being a reflection of common sense."

The learned District Judge cited an English precedent[80] in which a widow was held to have become a statutory tenant after the death of her husband. The judge supported his argument by citing Blundel and Wellings, Complete Guide to the Rent Act 184 (1958). This text book defined the expression tenant to include the widow of a tenant who was residing with him at the time of his death.

On revision, Abdel Majeed Imam, J., reversed the forementioned decree of the District Judge on the following ground:-[81]

> "There is nothing in the Rent Restriction Ordinance giving such protection. It seems that the protection given by English Law is based not on Common Law, but arises under Statute Law, and in particular, Increase of Rent and Mortgage Interest (Restriction) Act, 1920, S.12 (1) (g). This being the case, I think there would be no point in adopting piecemeal English Statute

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[78] Zaki Mustafa, op. cit. , p. 188.
[79] (AC-REV-53-1963); S.L.J.R., 1962, P. 228.
[80] Moodie V. Hosegood [1952] A.C.61.
[81] Ibid. , p. 231.

Law."

The learned judge in his rejection to adoption of piecemeal English Statute Law was aware of the fact that it might be hard to leave a widow and dependants of a deceased tenant unprotected, but he thought this should be a matter for legislation. Babiker Awadalla, J., was of the opinion that to afford protection to the family of a deceased statutory tenant in the Sudan would not rightly be equated with blindly following the provisions of an English Statute. He said that what the Sudan Courts apply is not the English Statutory provision itself but the general principles of justice which prompted the legislature in England to cater for the situation.

Babiker Awadalla, J., unlike Abdel Majeed Imam, took a more liberal view on less legal but more equitable ground. The real question for him was whether there was an obvious hardship in which case it would be contrary to justice, equity and good conscience to leave unremedied. He stated that:-[82]

> "Once the court is satisfied that there is such hardship, then it should not in my view be dissuaded from its duty in applying the principles of the Civil Justice Ordinance, S.9, by the simple fact that a similar situation was in England remedied by a statutory provision."

The learned judge continued his clarification by saying:-

> "What the Sudan Courts are prevented from doing is the borrowing of artificial qualifications granted on a general principle by a foreign Statute."

Babiker Awadalla in so deciding, was reiterating the words of Bennett, J., in the case of Manios V. Boxall ,[83] who said that section 9 of the Civil Justice Ordinance is confined as far as any body of foreign law is concerned to the application of the general principles underlying that law. Bennett, J., stated also that the court may determine and apply the general principle, but it can not borrow any artificial qualifications which may have been grafted on the principle by foreign Statute. However, what was relevant and applicable according to Babiker Awadalla, J., was the intention of the legislature in England to alleviate the hardship which would otherwise have befallen the family

[82] Ibid. , p. 234.

[83] (AC-APP-14-1936); II S.L.R., Ibid.

of a statutory tenant deceased. The learned judge made it clear that it was not unusual for the Sudan Courts to adopt English Statutes and he could see no reason why a different view should be taken in this case. Mohamed Ahmed Abu Rannat, C.J., fully agreed with Babiker Awadalla, J., He said:-[84]

> "The Sudan Courts have been applying the principles contained in section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, and when the judges of this court give a decision on the application of a Statute, such a decision is binding on them and their successors. In the case of Hunein Manios V. Boxall Co. , AC-APP-14-1936, we applied the provisions of the Sale of Goods Act, 1893, and in the case of Heirs of Ibrahim Khalil V. Ahmed Hasan Abdel Moneim and Bros. AC-APP-42- 1927, we considered and applied the principles of the law of tort, both as to rights of workmen injured in an employment and dependants of deceased persons. We applied these principles under the general provisions of the Civil Justice Ordinance, S.9."

It is interesting that the learned C.J. used the phrases 'we applied', 'we' considered in reference to decisions of English judges during the Condominium. Some of these decisions were made even long before he became a judge. It is obvious that he considered himself a link in the long chain of English judges who administered justice in the Sudan. He identified himself with the English judicial legacy.

The application of English Law has been extended to the application of English Statute Law as being in accord with justice, equity and good conscience. This is obviously because the judges were trained in English Law and they followed the legal tradition with which they were oriented. It has been a deep-seated principle with the Sudanese judges to equate justice, equity and good conscience with English Law. Heirs of Imam Ibrahim V. El Amin Abdel Rahman ,[85] lends itself as the best example for such a serious commitment to English Law. If the judges, at the different judicial levels, in dealing with this case were conscious of their Islamic legal legacy, they could have saved themselves the pain of that long argument. It is one of many incidents in which English

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[84] Ibid. , p. 236.

[85] (AC-REV-53-1953); S.L.J.R., 1962, Ibid.

Law was applied where Islamic Law was ready at hand to provide a just and equitable solution. However, English Law settled the issue of a widow or deceased's family to continue as a statutory tenant after the death of her husband, only in the year 1920 under the Increase of Rent and Mortgage Interest (Restrictions) Act. The same issue had been settled by the different schools of fiqh twelve centuries before English Law. This takes us to the views of these different schools of fiqh vis-á-vis this issue. The Maliki school of fiqh which is widely known to the people of the Sudan, is of the opinion that a lease contract is terminated only if the subject of such contract perishes, i.e., if the leased means of transport perished or is totally lost, or if the leased premise collapsed. But the lease contract cannot be terminated by the death of the object of the contract, i.e., it does not terminate by the death of the lessee or tenant, rather his heirs will step into his shoes if they so wish to do, provided that they undertake to be bound by the terms of the existing contract.[86]

The Shafii and Hanbali schools of fiqh have a firm stance on this issue. They are of the opinion that the contract of lease cannot be terminated by the death of the lessee who so possessed such a usufruct that it can be passed to his heirs when he dies. His heirs will step into his shoes after his death. The Zaidi school of fiqh has the most coherent view of all the fiqh schools. For this school of fiqh, neither the death of the lessor nor that of the lessee can terminate a lease contract. Not even the death of both the lessor and lessee at a time would terminate such a contract. The heirs of both deceaseds can step into their shoes. The Abaddi school of fiqh, which is popular in Oman Sultanate, Zanzibar and some of the Berbers of North Africa, meets on four corners with the stance of the Zaidi school of fiqh.[87] It is only the Hanafi and Dhahiri school of fiqh that think the lease contract is terminated by the death of either the lessor or the lessee. The heirs of both the deceased lessor or lessee are not privy to the contract, they were not part of it and are under no obligation to abide by the terms of such contract. Unlike the Dhahiri (who adhere to the letter rather than the spirit of the law), the Hanafi softened their hard stance by having a proviso to the effect that if there is an excuse i.e. if leased agricultural land has a product yet to be cultivated, then the

[86] The author of this thesis is indebted to Ali Osman Mohamed Taha, advocate, for his valuable remarks on this point in a personal conversation in Khartoum, 1978.

[87] Jamal Abdel Nasir Encyclopaedia of Islamic fiqh, Vol. 2, "Termination of Lease Contract". The Sup. Council for the Islamic Affairs, The United Arab Repub., Cairo, 1966, pp. 326-329.

lease contract cannot be terminated.[88]

Within the Imami Shiat school of fiqh there are three views, the first favours the termination of the lease contract by the death of any of the contracting parties; a second view is that the lease contract is terminated by the death of the lessee and not the lessor; a third view that represents the mainstream within this school of fiqh states that the lease contract can not be terminated by the death of any of the contracting parties. The heirs of any of the deceased or both can step into the shoes of the deceased.[89] The overwhelming majority of the Islamic schools of fiqh consider a lease contract a usufruct or interest, and as such it is capable of passing from the lessee to his heirs after his death. This could have solved the problem in Heirs of Imam Ibrahim V. El Amin Abdel Rahman ,[90] if the justice, equity and good conscience provision was liberally used and if the learned judges were aware of this rich area of Islamic fiqh. Their ignorance cannot be an excuse.

The judges in the Sudan were accustomed to referring Shariah issues to the Shariah Courts or the Mufti for opinion. It just did not occur to them to do otherwise. They were absolutely oriented to English Law. The mind of Dafalla El Radi Siddig, D.J., was only directed to English Law. He upheld its view as being equitable and a reflection of common sense. Abdel Majeed Imam, J., was very strict in his rejection of the application of English Statutory Law, but he did not give an alternative. His argument would have been valid if he accepted Islamic Law as consonant with justice, equity and good conscience. He seemed to be satisfied with his rejectionist role. Babiker Awadalla, J., wanted to reconcile the two views of the previous judges and approve both of them. He convinced himself that what they applied in the Sudan was not English Statutory provision itself but the general principles of justice which prompted the legislature in England to cater for a situation. Mohamed Ahmed Abu Rannat, C.J., candidly stated that the Sudan Courts have always been applying English Statutory Law pure and simple. This case clearly shows that the English Law orientation of all the four judges and their commitment to such law had assumed far reaching dimensions, whereas their Islamic Law orientation and their commitment to such law was exiguous,

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[88] Loc. cit.

[89] Loc. cit.

[90] (AC-REV-53-1963); S.L.J.R., 1962, Ibid.

if they had any. This was not unusual for this generation of Sudanese judges. Knowledge of English Law was their ambition. They would confine themselves to the first English Law reference their hand could reach and were not educationally or culturally prepared to look elsewhere for a solution.[91]

For the sake of comparison, it is worth mentioning that if the tenancy is a contractual one, then, in English Law, the heir or devisee of the tenant is entitled to enter into possession on the strength of the deceased's title.[92] It is only when the tenancy is properly a statutory one that the interests of deceased tenant do not pass to his heirs or devisees. In Islamic Law, whenever the term of contract comes to an end then the lease contract expires. There is no room for statutory tenancy.

The decision of the Court of Appeal in the case of Heirs of Imam Ibrahim V. El Amin Abdel Rahman ,[93] raises some interesting questions vis-a-vis the development of English Law in the Sudan. A crucial question is whether the legislative power assumed by the courts of the Sudan under the justice, equity and good conscience provision can be extended to supplement a Sudan Statute. According to one commentator,[94] since there is a Sudan Law covering the issue and since such law does not grant a certain right existing under English Statute Law, then the courts cannot grant such a substantive right under the justice, equity and good conscience provision. The legislative power of the Sudan Courts under the justice, equity and good conscience does not go as far as supplementing Sudan Statute Law, it can only apply in the absence of a Sudan Ordinance or enactment to cover a case before the court. Acting otherwise is at the least controversial and can be said to exceed the limits of justice, equity and good conscience.[95] The other question is whether the post-independence Sudan Courts should continue through the legislative power granted them by the justice, equity and good conscience, to be agents of reception of English Law.[96] The legislative power under the justice, equity and good conscience provision (section 9 of the Civil Justice

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[91] Henri Riyad, High Court Judge of the Sudan in a personal interview with the author of this thesis at the office of the first, Khartoum, December 31, 1984.

[92] S.L.J.R., 1962, p. 233, where Babiker Awadalla, J., quoted 23 Halsbury laws of England, 3rd ed. 1958, p. 661.

[93] S.L.J.R., 1962, Ibid

[94] Loc. cit.

[95] Natale Olwak Akolawin, op. cit. , p. 254.

[96] Ibid. , p. 257.

Gregory ,[99] El Fatih Awouda, Acting P.J., stated that he felt impelled by considerations to decide in favour of the decree of the court below. One of these two considerations was that:-[100]

> "A principle which is accepted over the greater part of the British Empire with its very varying conditions of life seems to be a suitable one to follow in the Sudan."

It is interesting logic to say that a certain rule is a suitable one to follow in the Sudan because it is accepted over the greater part of the British Empire with its varying conditions of life. The Sudan was no longer part of that British Empire anyway and the litigants were not British subjects either. In the case of Nicolas Stephanon Stergiou V. Aristea Nicolas Stergiou ,[101] M.Y. Mudawi, P.J., admitted that English Law has for long been established as the yard stick for resolving disputes in almost all areas of the Sudan Law. However, the learned judge decided that English Law could not and should not be applied in this particular case.[102] In the case of Dirar Soheil V. El Sheikh Mustafa Ahmed ,[103] the court did not hesitate to admit that wholesale English legislation was imported into Sudanese Law. T.S. Cotran, D.J., said:-[104]

> "The plaintiff has asked for compensation for his little daughter's death. But if he means by compensation that he should be given damages as a sort of solatium for his anguish and mental suffering for the loss of his daughter, then I am afraid that neither the Common Law of the Sudan nor the British Acts which we have imported into the Sudan will help him in this respect."

What the judge called Common Law of the Sudan was originally English Common Law imported into the Sudan as well as the English Acts or Statutory Law. However, the Sudan Courts were used to applying English Statutes as if they were enacted in the Sudan. In doing so the courts sometimes were slow to indicate that they were applying such Statutes. In the case of Apostolon Enterprises Co. Ltd. V. Mohamed Salah Direis ,[105] the Court of Appeal applied the English Sale of

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[99] (PC-REV-3-1961-Juba); S.L.J.R., 1963, p. 118.
[100] Ibid. ,p. 121.
[101] (HC-CS-240-1961); S.L.J.R., 1963, p. 182.
[102] Ibid. , p. 185
[103] (HC-CS-261-1959); S.L.J.R., 1964, p. 85.
[104] Ibid. , p. 87.
[105] (AC-REV-172-1958); S.L.J.R., 1958, p. 69.

Goods Act, 1893 without indicating it was an English Statute being applied.[106]

Sometimes the Sudan Courts would cite an English authority in support of their decision without the least discussion about such authority. They would sometimes rely on a dictum in an English case rather than indulging in creative legal thinking.[107] English cases cited in judgements of the Sudan Courts were usually taken from footnotes in English text books without the source being acknowledged.[108]

The post-independence Judiciary in the Sudan inherited substance and form from the pre-independence Judiciary. The judges' robes in the Sudan derive their inspiration from the robes worn by the judges of the Queen's Bench in England. Members of the Bar wore black robes that are identical with the gown of an English barrister. All the robes worn by the judges and advocates in the Sudan betray the ecclesiastical origin of such robes.[109] It can be understood that the English judges of the pre-independence Judiciary were so nostalgic that they brought this tradition along with them. But one's mind boggles when a judge of Sudanese origin who comes from a Muslim family follows suit and wears ecclesiastical robes and wigs.

Most Sudanese judges continued to use the English language years after the independence. In the case of El Rashid Hamza Koko V. Kamal Khalafalla ,[110] Mubarak Imam El Hag, District Judge, could not express himself in Arabic. He chose to do so in English. The District Judge said:-[111]

> "May I be excused for writing the judgement in this case in English, because the question in issue is wholly a legal question involving so many technicalities difficult to express in Arabic?"

One wonders how the District judge could inform the litigants of his ruling and the reasons thereof. The law report shows they were not represented by advocates! The foregoing statement of the District Judge illustrates the alienation of the judge and most of his generation from the community.

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[106] Cliff F. Thompson, "The Formative Era of the Law of the Sudan." The S.L.J.R., 1965, p. 492.

[107] Loc. cit.

[108] Ibid. , p. 494.

[109] D.F. Hawley, "Judges Robes in the Sudan". S.L.J.R., 1959, p. 211.

[110] (DC-CS-1245-1962 'Kosti'); S.L.J.R., 1965, p. 58..

[111] Ibid. , p. 463.

They detached themselves from their people's language, culture and legal heritage. The District J. in this case decided that English Law was the persuasive authority for his court. He followed the development of English cases in Chesire and Fifoot, Contract (5th. ed. 1960). Soon after his statement that English Law was the persuasive authority, the District Judge forgot his words and arrived at his decision religiously following the decisions of the English Courts. It is obvious that the education, recruitment and training and the subject matter taught to the Sudanese judges, set up what one would call "the factor of the unexpressed consciousness of legal training and affinity which led to the ultimate adoption and consolidation of a Common Law legal system in the Sudan".[112] The early Sudanese judges, most of whom pursued their postgraduate education in England, were faithful in fostering what they were taught and what they were trained and recruited for. Babiker Awadalla, A/C.J., had a hostile attitude towards a certain aspect of Islamic Criminal Law and Sudanese Customary law, viz, 'Diyah', blood money, paid by accused to the heirs of deceased by way of compensation. He stated in the case of Sudan Government V. El Degeil Saeed Hasan ,[113] that:-

> "'Diyah' is an archaic form of expiation of crime which in my view is highly inconsistent with modern conceptions of criminal punishment and its indiscriminate recognition should be curtailed."

This statement reflects a concept of a function of law in a society other than the Sudan. The judge has been very conscious of what has been inculcated into him through his legal education and training. The judge's remarks about 'Diyah' accords with Criminal Court Circular No. 18, 2(a), going back to the year 1952 which states that:-

> "'Diyah' is essentially a tribal custom. It should not therefore be considered in detribalized communities or towns."

Though 'Diyah' is a tribal custom of some animist tribes in the South, it is not in anyway essentially a tribal custom. It derives its origin from the Qur'an and Sunnah. It is a basic punishment

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[112] Egon Guttmann, op. cit. , p.409.

[113] S.L.J.R., 1966, pp. 39, 40.

in Islamic Law.[114] The statement of the acting Chief Justice is shocking to any Muslim. It touches the convictions and faith of the people. I know of no justification or legal ground why a judge should impose his personal disbelief on a legal system that affects the whole nation. The English judges avoided any confrontation that would trigger Islamic discontent. Tactful as they always were, they went around the issue, convinced themselves that 'Diyah' is essentially a tribal custom and wanted to confine such a custom to tribal communities. But the Sudanese judge who was the second man in the judicial hierarchy went beyond the limit of his judicial function in declining to follow a Qur'anic rule and condemning it. The Arabic word for expiation is 'kaffara' and is part of the Islamic knowledge of Muslims whether they live in towns, detribalized communities or tribal ones. However, Islamic Law confines such a fusion of punishment and compensation to accidental homicide. That being the case I cannot see why and how it is inconsistent with modern conceptions of criminal punishment. It could have been more judicious for the acting Chief Justice to criticize the abuse of such a Qur'anic rule,[115] if there were one, rather than his categorical condemnation and rejection.

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[114] See Pt. 1. Ch. 2, p.10, footnote 24, of this thesis.

[115] The Quar'anic rule is as follows:- "Never should a believer kill a believer; but if he so does by mistake, it is ordained that he should free a believing slave, and pay 'Diyah' to the Deceased's family." verse 92, section 13, sura IV, Nisa, the Women. Translation by Yousif Ali, op. cit. , p. 179.

# Chapter 4

## THE INFLUENCE OF ENGLISH LAW OVER THE SUDANESE JUDGES

It is true that after the independence the judges were Sudanese, but this had no effect in reducing the influence of English Law on the Sudan. At least in the High Court and Court of Appeal the Sudanese judges were used to giving their judgement in English and heavily draw from English Law. Sometimes the Sudanese Courts rigidly adhered to the technical rules of English Law. Kattan V. Kattan ,[116] is a good example. The court in this conflicts case, followed a number of English decisions which were unanimously condemned by textbook authors in the conflicts of laws field. The reform of such decisions had been officially recommended by the Lord Chancellor's Private International Law Committee.[117] The fact that such English decisions were reformed or so recommended suggests that they were not in accordance with justice, equity and good conscience.[118] If a just and equitable decision can, at one point of time, be inequitable and unjust, then the same decision can be inequitable and unjust in a different place. The Sudanese judges sometimes seemed not to be aware of this obvious fact. There was always a need for a reminder. M.A. Abu Rannat, C.J., reiterated the words of Owen, J., in the case of Heirs of Ibrahim Khalil V. Ahmed Hasan Abdel Moneim and Brothers. [119] He said in the case of Bakheita Ibrahim V. Hamad Mahayoub that:-[120]

> "The Courts of the Sudan should remember that they are 'guided', but not 'bound' by Common Law."

Although the foregoing statement had become an axiom for the Sudan Courts long since the pre-independence era, yet the courts below were in a constant need to be alerted to it by the High Court and the Court of Appeal. Sudanese judges engaged in a process of adopting rather than adapting the rules of English Law.[121] In their adoption of principles of English Law, the Sudanese

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[116] S.L.J.R., 1966.

[117] C. D'Olivier Farran, "The Sudan", the Solicitors J. " 'Suppl. to the Solicitor's J.' Jan. 19, Lond. 1962, p. 903.

[118] Loc. cit.

[119] (AC-6/1926); (AC-APP-42-1927); Ibid.

[120] (AC/REV./8/1957); S.L.J.R. 1957, Ibid.

[121] Zaki Mustafa, "The Treatment of Exemption Clauses by the Sudan Courts,1" op. cit. , p. 120.

judges were sometimes departing from the principles of justice, equity and good conscience. The principles of English Law in such cases were adopted merely by reason of their English origin and not because they were compatible with justice, equity and good conscience. Cases covering exemption clauses in contracts offer a good example of this attitude. In the case of Electrical and Mechanical Engineering Co. Ltd. V. Ahmed Fadl El Mula and Mohmed El Amin Mohamed Ali ,[122] plaintiff and defendants entered into a hire purchase contract for a diesel engine. The defendants who knew no English at all signed the contract which was drafted in English. The first installment was not paid by the respondent on the grounds that;

a) The engine was not fit for the purpose required.

b) On delivery some of the parts were missing.

c) No opportunity had been provided for inspection prior to delivery.

The contract contained an exemption clause to the following effect:-

> "The hirer has examined the said diesel engine and accessories previous to this agreement and satisfied himself as to the state and condition thereof and no warranty on the part of the owners as to the state or quality thereof is implied other than the standard form warranty issued by the makers of the diesel engine."

The District Judge in dealing with issue of the defendant's signature decided that the signature of a contract written in English by persons who do not know English is not binding at all on them. This decision took into account the illiteracy of the defendants which was a central factor. It took into consideration the local circumstances and the differences between an industrial developed country like England and the Sudan. Moreover, the District Judge's decision was identical to the rule of Islamic Law, although he did not state that in his judgement. In Islamic Law an offer or acceptance made in a language unknown to the other party has no legal effect and the language in which the contract is written must be understood by both parties or else the contract is not binding on any of them. Obviously a signatory party to such a contract will not be bound by its terms.[123]

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[122] (AC-Revision-42-58); S.L.J.R., 1958, p. 45.

[123] Zaki Mustafa, op. cit. , p. 135.

However, this realistic approach was short lived when the Court of Appeal in revising the decision of the District Judge, decided that it is not true in all cases that ignorance of the language of a written contract excuses the party signing it from liability thereunder. The Court of Appeal chose to adhere to the principles of English Law and thus ignore the local circumstances and conditions of the Sudan. In so doing the Court of Appeal was at odds with the concept of justice, equity and good conscience which was supposed to be the raison d'être of its own decision.

In an unreported case,[124] of a hire-purchase agreement, the defendants claimed that they were ignorant of English which was the language in which the contract they signed was written. The District Court and the High Court approved such a claim and the exemption clause in that case was considered as not binding on the defendants. The Court of Appeal reversed the decision of the High Court and opted to take the stance of English Law. Babiker Awadalla, C.J., firmly stated that:-[125]

> "It is high time that people who voluntarily enter into and execute written contracts in the normal course of business should realize that they do so at their own risk and peril. If it ultimately turns out that the contract - which is apparently in solemn form and is obviously meant to include conditions touching the subject matter of the contract - does in fact contain conditions restricting the rights of the parties in any way, then that party would be held bound by his own signature."

In the two foregoing cases the court acted on the justice, equity and good conscience to adhere to English Law, yet ironically enough in both cases the final decision unfortunately ignored the differences between England and the Sudan, and as such was repugnant to the justice, equity and good conscience concept as well. The Sudanese Appeal Court especially in exemption clause cases was generally dealing with English Law as if it was the sole source of equity. This trend has influenced the court's decisions since the inception of English Law in the Sudan. In the case of Mustafa Mohamed Gasmalla V. Alfred Tawfiq Ibrahim ,[126] the court decided that it is unsafe to

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[124] Sudan Mercantile Co. (Motors) Ltd. V. Abdel Karim Beshir Mustafa, and others , (AC-REV-416-1964); Zaki Mustafa op. cit. , p. 129.

[125] Ibid. , p. 3.

[126] (KHT-HC-CS-68-1954), (unreported); Cliff F. Thompson, "The Sources of Law in the New Nations of Africa: A Case of Study from the Republic of the Sudan". Wis. L. Rev., Vol. 1966, U. of Wis. L. Schools, 1966, p. 1163.

depart from established English Law applied under the standard unless its application is unjust in the Sudan. The Sudanese Courts were faithful to the first part of this Commandment but, usually they would tend to forget the latter part. They would have been more in consonance with justice, equity and good conscience if they were less committed to the rigid adherence to English Law. It is surprising that, during the Condominium, a more serious attempt to discover whether legal systems other than English Law would give a more just and equitable solution were made by the English judges than by the Sudanese judges during the post-independence era. The latter were more Monarchistic than the Monarch himself! However, there were instances albeit, not very frequent, where the Courts of the Sudan were fully aware of the differences in circumstances and variations in conditions between England and the Sudan.[127] In the case of Cairo Insurance C. V. Bakheita Widatalla and others ,[128] El Fatih Awouda, J., in assessing damages in a death action stated an instance of difference in circumstances of England from those of the Sudan as follows:-[129]

> "Unlike in England, a daughter in this country does not cease to be a dependent by reason of her coming of age. She remains a dependant until she is emancipated by marriage."

In the case of Ahmed Ramadan V. Dina Kosta ,[130] Osman El Tayeb, J., rejected the principle of reasonableness of the order of possession in connection with the ground of failure to pay rent. The learned judge asserted that:-[131]

> "This is the English Law, which provides by Statute that the court shall not make an order of possession unless it is satisfied that it is reasonable in the circumstances to do so. In the Sudan, we have no such provision in our Statute Law, namely, the Rent Restriction Ordinance. How can we receive the foreign Statute to substitute or amend our own? I think this we are not authorized to do under Civil Justice Ordinance, S.9."

This is more or less the same judicial stance of Abdel Majeed Imam, J., when he rejected the adoption of piecemeal English Statute Law in the notorious case of Heirs of Imam Ibrahim V. El

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[127] See Pt. III, Ch. 3, pp. 127,128 for more details.

[128] (AC-APP-29-1965); S.L.J.R., 1967, p. 18.

[129] Ibid. , p. 24.

[130] (AC-REV-300-1966); S.L.J.R., op. cit. , p. 123.

[131] Ibid. , p. 125.

Amin Abdel Rahman. [132]

In the case of Ali Salih El Barbari V. Attia Mahmoud F. Attia ,[133] Osman El Tayeb, J., stated that:-[134]

"It has been noted that the definition of landlord in the English Acts is different from ours".

Details of instances of departure from English Law shall be dealt with in a separate chapter of this thesis. However, such instances of departure were the exception whereas adherence to the application of English Law has been the rule. There were instances where the Sudanese judges could derive their rules from the Islamic fiqh, but most probably they would choose to derive them from English Law. Obviously because they were more oriented and educated in English Law than Islamic Law. The case of Sudan Government V. Ibrahim Mohamed Fadol ,[135] is such an instance where the judge for reasons of his educational background chose to support his rule by reference to Indian and English Law rather than Islamic Law. Accused in this case was convicted of murder and sentenced to death. He died while awaiting the result of an appeal against his conviction. His death raised the point whether the confirmation proceedings abate because of the death of the convicted prisoner or not.

Abdel Majid Imam, J., was aware of the express provision in the Indian Criminal Procedure Code that provides that any such appeal shall finally abate on the death of the appellant; the only exception made is where the sentence contains an order to pay fine. Hasan Abdel Rahim, J., referred to Salmond, Jurisprudence where, he said:-[136]

> "The received maxim was (Actio personalis moritur cum persona). A man cannot be punished in his grave, therefore it was held that all actions for penal redress, being in their time mature instruments of punishment, must be brought against the living offender and must die with him."

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[132] See Pt. III, Ch. 3, p. 132 of this thesis.

[133] (AC-REV-64-1966); S.L.J.R., 1967, p. 130.

[134] Ibid. , p. 133.

[135] (AC-CP-209-1966); S.L.J.R., op. cit. , p. 215.

[136] It is not unusual for the Sudanese judges to refer to the author, title of the book and the number of the page only, when they cite a reference.

Neither of the two judges attempted to find out how Islamic Law deals with such an instance. Given the educational background and legal training of that generation of Sudanese judges, it was unlikely that they would have recourse to Islamic Law. However, if they did so, they would have arrived at the same conclusion. It is an established Shariah rule that a person's entity ceases to exist with his death and hence all his money and property and his rights pass to his debtors and his heirs.[137]

In the case of Sudan Government V. Mohamed Abdel Majid ,[138] Galal Ali Lutfi, J., stated in an obiter dictum that when a Sudanese Law is similar to English Law, he could see no objection why the Sudanese Courts should not apply the interpretations of the English Court to cases of the same nature arising in the Sudan.[139] According to the same judge when the Sudanese precedents offer no great help, the Sudanese Courts have to consult the English Law.[140] The judge made it imperative on the Sudanese Courts to consult English Law in the circumstances he stated. It is not unusual for Galal Ali Lutfi, J., to express his unbridled support for the adoption of English Law in such sharp terms.

In the case of Amal Fakhri Saad V. Fayez Shukri Bishara ,[141] the High Court applied English Law to dismiss an applicant's claim for divorce on the ground that her husband is incurably insane. Applicant's claim was dismissed on the ground that the husband's insanity was not shown to be definitely incurable and that the husband was not under continuous care and treatment for at least five years preceding the presentation of the petition. Fortunately the Court of Appeal, reversed the decision of the High Court and held that the Personal Law applicable to Coptic Christians who were domiciled in the Sudan is their Personal Law and not the English Law. The Coptic Orthodox Personal Law does not require such formalities as certification or continuous care and treatment for five years as in English Law.

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[137] Abdel Gadir 'Awda, Vol. 1, op. cit. , p. 399, where the author quoted 'Al-Mugni', Ibn Gudamah, 1st.ed., Manar printing press, vol. 9, pp. 535-542.

[138] (AC-CR-REV-232-1967); S.L.J.R., 1968, p. 90.

[139] Ibid. , p. 93.

[140] Ibid. , p. 92.

[141] (AC-REV.-26-1968); S.L.J.R., 1968, Ibid.

Once again Galal Ali Lutfi, J., was prepared to go all the way in full support of the adoption of English Law. In the case of Sudan Government V. Abdel Rahim Sharaf Eddin Abdalla & another ,[142] issue was the admissibility of the evidence obtained with the help of the police dog. There was no law covering this question in the Sudan. It was the first time such a case was brought before the Sudanese Courts. The judge examined different legal systems, all of them are offshoots of Common Law. In his eclectical approach this judge started by examining the Scotish Law which accepted evidence of a tracker dog as admissible. He then examined the Canadian Law and in particular the case of R. V. Haas,[143] where the objection rested against the weight, but not the admissibility, of such an evidence. New Zealand and the Northern Ireland Law were examined as well. American Law and English Law were also examined with special emphasis on the latter. Although the evidence of a tracker dog was admissible in Scotland, Canada, New Zealand, Northern Ireland and the United States, the judge chose to accept the stance of English Law and follow it. He firmly asserted in obiter dictum that the tracker dog's evidence is unreliable, uncertain and inadmissible. Of all the options before him the judge showed no hesitation in opting for the English Law view.

It became usual for the Sudanese judges and advocates to draw heavily from English Law. In the case of George D. Kiriazis V. Heirs of John Yousif Kattan ,[144] the submissions of the advocates for both applicant and respondent contained various quotations from English textbooks. That was one way to impress the court. It was also the impact of the English oriented legal education and training on the bulk of the Sudanese lawyers. Excessive reliance on English Law characterized the Sudanese Judiciary. Almost all citations were taken at face value, few of them were disputed or challenged as an authoritative source of law.[145] One of the Sudanese judges quoted at length one of the legal commentators addressing a public lecture, the judge stated the following:-

"J.A. Jollowicz, a lawyer of international repute, said in a lecture delivered in New Zealand

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[142] (AC-CP-621-1967); S.L.J.R., 1968, p. 119.
[143] (1962) 35 D.L.R. (2d.) 1972.
[144] (AC-REV-134-1966); S.L.J.R., 1969, p. 4.
[145] Zaki Mustafa, op. cit. , p. 226.

in 1965 as follows:-'',[146]

It seems the judges were relying upon the legal literature available and that was predominantly English.[147]

The case of Mohamed Nasr Abdalla V. Ibrahim Abdalla El Garai ,[148] stands as a good example of how some Sudanese judges were not prepared to accept the least departure from English Law. In this case the Provincial Judge based his decision on a rule of Shariah Law which makes the validity of the dispositions of persons designated as idiots dependent upon the ratification of a duly appointed guardian. The Provincial Judge refused to apply the rules of the English Common Law on the ground that such rules do not satisfy the requirements of justice, equity and good conscience. On appeal Mahdi Mohamed Ahmed, J., was quick to assert the following:-[149]

> ''Generally speaking it is the practice of the courts of the Sudan to identify the principles of English Law with justice, equity and good conscience. In this way the reception of English Law has been accomplished. Even English Statutes were sometimes received on the pre-text that it is not the Statute but the principle underlying it that is being applied. Cases of departure were few and far between.''

This Sudanese judge chose to take an antagonistic stance against any departure from English Law even if Islamic Law would provide the same solution. He adamantly opposed any departure from what he considered a sacred legal heritage. It was totally unacceptable for him to upset the rules of an already established English type legal system. This judge with Galal Ali Lutfi then a judge, and a group of other Sudanese judges were representatives of a group who dogmatically and unquestionably adhered to English Law and were religious supporters of its dominance in the Sudan. They were a faithful echo of their English predecessors.

It is obviously not an overstatement to say that it has been an ongoing practice of the Courts of the Sudan to identify the principles of English Law with justice, equity and good conscience.

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[146] See the judgement of Salah Eddin Hassan, J., in the decision of the Appeal Court in Renolds Aluminium Co. V. Abbas El Naiem , (AC-REV-168); S.L.J.R., op. cit. , p. 62.

[147] Zaki Mustafa, Ibid.

[148] (AC-REV-307-1968); S.L.J.R., op. cit., p.116.

[149] Ibid. ,p. 117.

# Chapter 5

## DEVELOPMENT OF ENGLISH LAW AFTER THE YEAR 1970

It is significant that for the first time in the legal history of the Sudan, The Sudan Law Journal and Reports was published partly in Arabic and partly in English in 1970. Two years later it was published mostly in Arabic, a few pages being spared for English. After a long reign of supremacy English as a legal language was yielding and giving way to Arabic language. As late as 1972 decisions of the Shariah Court of Appeal on Muslim Personal Law cases found their way to the Sudan Law Journal and Reports. The courts were also displaying a more liberal attitude towards consulting legal systems other than the English one. The judges who had their post-graduate legal education in the United States of America were showing considerable interest in American Law. Reference to English Law, albeit reduced, was still maintained.

In Sabir Syedhum V. Heirs of El Amin Abdel Rahman ,[150] English Law was used once to expand the protection under the Rent Restriction Ordinance to devolve on the heirs of the deceased, and another time to restrict such a protection to residential premises. In both instances English Law was the criteria, whereas the court took a different approach in the case of The Hydro Central Corporation V. Mohamed Hamid Ahmed. [151] It decided per incuriam that English cases are not binding on the Sudanese Courts. A number of English cases were reviewed and were found to be of no guidance. The statement of the Appeal Court in this case is a reiteration of the axiomatic maxim that has almost been a motto for the Sudanese Courts, that they are 'guided, but not bound, by English Law.' This maxim has been repeatedly asserted, but has equally been brushed aside when the Sudanese Courts adhered to the application of English Law. The Sudanese Courts for years did not try seriously to find law other than in English sources. In the case of AGIP Sudan Ltd. V. Khalid Ahmed Omer and another ,[152] the Supreme Court decided on the strength of English Common Law, that the lease transfer all the landlord's liabilities for damages to the tenant upon the latter's entry to the leased premise. The Supreme Court was fully aware that this general Common

[150] (AC-REV-314-1969); S.L.J.R., 1970, p.8.
[151] (AC-REV-3-71); S.L.J.R., 1972 p.85.
[152] (SC-C-REV.-310-73); S.L.J.R., 1973, p.85

Law rule was amended by section four of the English Tenants Act, 1957, but refused to adopt the amendment on the ground that it is not bound by foreign legislation. The Supreme Court did not rule out the possibility of being guided by such a foreign legislation if that can do justice to both parties.[153] The Supreme Court in this case did not recognize the reasons that urged the English legislator to amend the Common Law rule adumbrated above. Although ultimately the court opted for English Common Law, it exercised a discretion to act according to justice, equity and good conscience.

In 1971 a major departure from English Law and a shift to the Continental System took place. However, this radical change was shortlived. In 1974 Arabicization of a substantial part of the law took place with the paradoxical result that there was a rennaisance in English Law, but in an Arabic form. Both changes in the reception of English Law shall be dealt with in a seperate part of this thesis.

It was decided per Abdullah El Amin judge of the Court of Appeal in Heirs of Hussain Bakheit V. Heirs of Hussain Ali El Amin ,[154] that the circle of exceptions from the general rule of hearsay evidence has been enlarged through legislation. The learned judge went on to say:-[155]

> "If the masters of Common Law opted for the relaxation of its harshness in civil suits, then I can see no reason why we should stick to the harshness of the hearsay evidence rule. In the absence of a Sudanese legislation I believe we should follow the English legislation on the basis of justice, equity and good conscience."

Abdalla El Amin, J., supported his arguement with the following:-[156]

> "If we have chosen to adopt the principles of Common Law, we should also apply the English legislation remedying the rigour of Common Law."

The Appeal Courts in both cases used the sentence, "adopt the principles of Common Law" which runs in opposition to the maxim which is axiomatic in the Sudan Courts that they are

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[153] Ibid. ,p.90

[154] (AC-REV-62/1975); S.L.J.R., 1975, p.330.

[155] Ibid. , p.335

[156] May Corporation for workers V. Babiker Fadl El Ati , S.L.J.R., 1971, op. cit. ,p. 198.

'guided', not 'bound', by the English Law.

In the case of El Tayeb El Sawi V. Hamouda El Tahir ,[157] the court drew heavily from English Law. Abdel Wahab El Mubarak, J., of the Court of Appeal quoted Lord Denning in D and C Builders Ltd. V. Rees (1966) 2Q.B.617.[158] as saying that when there is a real accord whereby the creditor willingly accepts an amount of money less than the debt as a final settlement, and the debtor fulfils his part by paying off that portion of the debt as an acceptance to the offer of the creditor, then it is unfair for the creditor to demand the forgiven balance of the debt. The Sudanese judge went on to assert that the English Judiciary has decided that if someone other than the debtor paid part of the debt in full satisfaction of the debt, then the creditor has no right to claim the unpaid part of the debt. The Sudanese judge stated that if this is what English Law has established, then we need to adopt such a rule in the Sudan in order to foster "the reconciliation spirit." It seems that it never occurred to the Sudanese judge that both rules, viz, "The satisfaction and accord, and the partial payment of the debt by a third party to the full satisfaction of the whole debt", are well established in Islamic Law long before they were incorporated in English Law. Accord and satisfaction which is an equitable estoppel was known since the early days of the prophet in Medina.[159] Partial or full payment of the debt by a third person is an established rule of Islamic Law known as 'Hawala' or 'Novation' which discharges the original debtor from liability to his creditor by the substitution of a third person who undertakes to pay off such a debt.[160] The Sudanese judge was not aware that these principles constitute part of the Islamic Law but he was fully aware that they constitute part of English Law. This is one of several examples showing how the legal education and legal training of those generations of Sudanese judges alienated them from Customary and Islamic Law.

In the case of Salah Min Allah El Tayeb V. Abdel Moneim El Tayeb Widat Allah ,[161] the Supreme Court asserted that the Sudanese Courts have accepted and applied the resulting trust rule

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[157] (AC-REV-C-428/1975); S.L.J.R., 1975, p.355.

[158] 2Q-B.617, 196 op. cit. , p. 362.

[159] Sayed Sabiq, "Fiqh as-Sunnah." Vol. III, 'Arabic Text', 'Reprint', The Arts Library, Cairo, 1980, p.221.

[160] Ibid., pp. 258-260.

[161] (S.C.C.C. ass. 340-1976); S.L.J.R., 1976, p. 346

which originated in English Law, and it has been a settled law that the resulting trust rule is one of the reasons to rectify the register as provided for in section 85 of The Land Settlement and Registration Ordinance. The Supreme Court proceeded to assert that English Law is the source of the resulting trust rule which is binding on the Sudanese Courts, it is so binding and acceptable to the court because it accords with the principles of justice, equity and good conscience.[162]

The Supreme Court in the case of A. Mohamed Sulaiman V. Hashim El Khalifa ,[163] based its decision on the fact that English Law has since 1900 consistently asserted that the special agreements to operate cafeterias, theatres and the like do not establish a right or a vested interest in the property, they merely confer a privilege and a licence to use such places. It is only a licencor and a licencee relationship that is established and as such the licencee does not enjoy the protection guaranteed to the lesees by the law. The Sudanese Supreme Court was satisfied with tracing the historical development of this rule in English Law and was not prepared to state why such a rule should be binding on it. In a dissenting judgement, Zakaria Ahmed El Hashim, an Appeal Court Judge, in the case of Siddiq Mohamed Ahmed and Mohamed Ahmed Jamil V. Adam Bashir Fadl El Mahi ,[164] reiterated the same stereotype that what is settled law in England is necessarily settled law in the Sudan. He stated that particularly in the area of the law of Contract, what is settled law in the Sudan are the principles of Common Law and equity that have been applied on the strength of the justice, equity and good conscience provision. The Appeal Court Judge erroneously stated that principles of Common Law and equity in the United Kingdom have been applied by the Sudanese Courts as restricting sources provided by the justice, equity and good conscience.[165] It is worth mentioning that section '9' of The Civil Justice Ordinance 1929, only provides for the application of any law that can accord with justice equity and good conscience. It never mentioned principles of Common Law or equity as being a source of law in the Sudan, no other law was mentioned as a source and there was no question of restricting sources. It was so elastic that it could embrace any legal system. To give the Appeal Court Judge some credit we can say his words were not accurately

[162] (S.C.C. Cass.-383-1967); S.L.J.R., 1976, pp. 347, 350.
[163] (S.C.C.C. ass.-383-1976); S.L.J.R., op. cit. ,p. 364.
[164] (AC-CP-710); S.L.J.R., op. cit., p. 389.
[165] Ibid. ,p.394.

phrased. In many instances the Sudanese judges were satisfied with asserting that the law of England has consistently established a certain rule, soon after such an assertion the same judges reached the conclusion that, ergo, it is the law of the Sudan. Sudan Government V. Sulaiman Hasan Dawood ,[166] is another example of how the Sudanese Courts were sometimes satisfied with referring to the relevant English Law and applying without rationalizing such an application. This resulted in an intellectual stagnation in the Judiciary. The Supreme Court had to restate some obvious facts to curb the inclination of some judges to automatically apply English Law. The Supreme Court in the case of Neilain Bank V. Mohamed Musa Zein El Abedin ,[167] asserted that Sudanese Legislation has priority over its English counterpart. It is extraordinary that such an obvious statement should have to be made. However, the Court of Appeal in the case of The Plastic Sacs Co. Ltd. V. Mahjoub Mohamed Ahmed ,[168] declared that it is lawful to draw analogies from English Law in Company Law cases as the English Company Act is the background of the Sudanese Company Act. The Court of Appeal also stated that it has always been the custom of the Sudanese Courts to draw such analogies whenever there is a need to interpret The Sudanese Company Act.

By and large the reliance, on English Law diminished, more and more reference to Sudanese precedents was taking place. But such precedents were originally a replica of their English counterparts. Some of the characteristics peculiar to English Law already coloured the Sudan legal system. The next chapter of this part of this thesis is dedicated to the technical influence of English Law over the Sudan legal system.

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[166] (AC-CP-834-76); S.L.J.R., op. cit., p. 472.

[167] (S.C.C. Cass. 234-1979); Monthly L. Bull., The Tech. Bur. for the Sup. Crt., The Jud. Headq. Apr. May and June 1980, p.21.

[168] (S.C.C. Cass.-223-79); Monthly L. Bull., Oct., Nov. and Dec. op. cit., pp. 75-95.

# Chapter 6

# TECHNICAL INFLUENCE OF ENGLISH LAW OVER THE SUDAN LEGAL SYSTEM

Since the introduction of English Law in the Sudan, English has been the language of litigation at different levels of the Judiciary. Arabic was occasionally used, but the records of the Sudanese Courts were always kept in English.[169] Until the late 60's the Court of Appeal continued to use English throughout.[170] Now Arabic has completely taken over and is used at all the judicial levels. But as late as 1970 only a few cases were reported in Arabic in the Sudan Law Journal and Reports. It was only by 1980 that the Monthly Law Bulletin appeared almost wholly in Arabic. Latin maxims and phrases were widely used.[171] The majority of the Sudanese judges had their legal education and training in English, and they found it easier to express themselves in the language of their legal education and legal training. English had also been, for a long time, the language of the legal sources from which the Sudanese judges drew.[172] The methods and techniques of English Law have influenced the Sudanese legal system and permeated its fabric. The Sudanese judges were so familiar with the methods, techniques and terminology of English Law that it is often reflected on their judgements. The Latin maxims and phrases were used to excess by the Sudanese judges and had become part of the judicial exegesis.

## Section A:-

## The Rule of Precedent

The importation of English Common Law brought with it the adjectival and substantive aspects of Common Law.[173] The absence of proper law reports until 1956 did not allow for a strict Sudanese system of precendent.[174] Interestingly, the English judges in the Sudan and the first

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[169] Abd Allah Hussayn, op. cit., p. 138.

[170] Zaki Mustafa, op. cit., p.222.

[171] Zaki Mustafa, Ibid.

[172] Zaki Mustafa, "Opting out of the Common Law:- Recent Developments in the legal System of the Sudan.", J.A.L., Vol. 17, Butterworths London, 1973, p. 141.

[173] Antony Allot, "New Essays in African Law". Lond. Butterworths, 1970.

[174] S.L.R., p.v.

generation of Sudanese judges had reasonable access to English precedents, but very little or no access to local precedents.[175] The early English judges could never have imported English Law without respecting judicial precedents. They are very essential to the certainty of Common Law and without which its very existence will be challenged.[176] Theoretically speaking the Sudanese Courts are guided, not bound by the English Law; but de facto the courts have regarded themselves as bound by the English Law more often than not. It was enough for a judge to find a relevant English precendent to confine himself with full satisfaction to such a precedent. However, the rule of precedent has never consistently taken the rigid form it has originally in England. It was not unusual for the High Court to disregard its own precedents.[177] In a number of cases, the English judges intentionally relaxed the rigour of the rule of precedent. In the case of Receiver in Bankruptcy of S. S. Hakim and Co. V. Anglo Egyptian Bank Ltd. ,[178] Dun, C.J., stated that though not legally bound, he was morally bound to consider and apply the decisions of the English Courts. In Yanni Krithary V. Mariam Bint Dasta ,[179] Dun, C.J., asserted that he knew of no other previous decisions in the Courts of the Sudan to guide him. It is bizarre that the learned C.J. was morally bound to consider and apply the decisions of the English Courts and was only guided by the decisions of the Sudan Courts. However, Dun, C.J., was the father of the rule of precedent in the Sudan. His decisions laid down the foundation for the rule of precedent to evolve in the Sudanese legal system.[180]

Generally the rule of precedent has always been inconsistent and uncertain. Bennett, A.G., in a Court of Appeal revision in the case of George Helal V. Gamila Helal ,[181] disregarded a previous decision of the Court of Appeal in the case of Abdulla Charchaflia V. Marie Bekyarellis. [182] He decided that the personal law of alimony applicable to the parties who were Syrians of the Greek Orthodox Church, was identical with the Shariah Law. In the latter case Gorman, J., had already arrived at a decision to dismiss the relevance of Shariah Law in a case involving Syrians of the

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[175] Loc. cit.

[176] Rene David, John E.C. Brierley, op. cit., p.349.

[177] See the rule per Watson, J., in Charalambous Cocolas V. Anthepes Coculas, Ibid.

[178] (AC-APP-15-1926), I S.L.R. 1969, Ibid.

[179] (HC-APP-9-1918), I S.L.R. 1969, Ibid.

[180] See Part II ch.5, p.88 of this thesis.

[181] (AC-REV.-88-1936); II S.L.R., 1969, Ibid.

[182] (AC-App-12-1934); II S.L.R., 1969, Ibid.

Greek Orthodox Church. These are two of a number of conflicting rules of the Court of Appeal during the Condominium. To add to the confusion, the overruled decision in Abdalla Charchaflia V. Bekyarellis, [183] was considered authoritative by a later Court of Appeal decision in the case Hana Kattan V. John Kattan. [184]

Two years after the independence, M.Y. Mudawi, a Court of Appeal Judge, challenged the very existence of the rule of precedent. He said:-[185]

> "Precedents, valuable though they are for purposes of comparison and as examples of how other minds work in similar circumstances, are not conclusive and do not fetter the discretion of this Court in choosing the figure it thinks reasonable. Each case has its own merits, its own circumstances and its own conditions and no two cases are exactly alike for the simple reason that you can hardly find two injuries identical in everything including the victim."[186]

In his bold statement, M.Y. Mudawi, J., is relaxing the rigidity of the doctrine of precedent and is refusing to be bound by it. He is rendering precedents persuasive and not binding. This raises the question of whether the Sudan Court of Appeal is bound by its own decisions. Until then there was no judicial decision or legislative Act to answer the question. Mudawi's statement could give a negative answer to such a question, but the paradox, according to his own words, is that his precedent is not conclusive. The inconsistency and uncertainity of the decisions of the Court of Appeal make it difficult to answer this question, but by and large it is open for the Court of Appeal to overrule a single decision of its own. The situation need not necessarily be the same where there is a series of its own decisions all supporting a particular conclusion.[187] It was decided by M.A. Abu Rannat, C.J., in Heirs of Imam Ibrahim V. El Amin Abdel Rahman ,[188] that when the judges of the Court of Appeal give a decision on the application of a Statute, such a decision is binding on them and their successors. This statement, when compared with statement of Mudawi, J., reflects the

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[183] Loc. cit.
[184] Loc. cit.
[185] Khartoum Municipal Council V. Michel Cotran, Ibid.
[186] Ibid., p. 113.
[187] W.. Twining, op. cit. ,p.133.
[188] (AC-REV-53-1963); S.L.J.R., 1962, Ibid.

contradiction and inconsistency in the decisions of the Court of Appeal. The conflict becomes acute when we view the statement of M.A. Hassib, J., in Fatma Habib and others V. El Sarra Bint Fideil ,[189] where he declared that he would never yield to the authority of precedent if justice is not done. When Hassib, J., made his statement, he was faced with more than a single precedent of the Court of Appeal, yet he chose this liberal attitude towards the doctrine of precedent. The Sudanese Courts have, on occasion, been unaware of their conflicting decisions and have, on other occasions, been slow to provide justification for their final decisions.[190] In a number of cases the Sudanese Courts chose to follow English precedents without making a serious attempt to find out whether a Sudanese precedent covered the point in issue.[191] However, Dafalla El Radi Siddig, J., in Renolds Aluminium Co. V. Abbas El Naiem ,[192] declared that both the Provincial Court and the District Court are bound by the doctrine of stare decisis. In the case of Mohamed Nasr Abdalla V. Ibrahim Abdalla El Garai ,[193] the Provincial Judge based his decision on a rule of Shariah and refused to be bound by English Law. On appeal, Mahdi Mohamed Ahmed stated that it is the essence of justice to fulfil the expectations of the parties. Such fulfillment, he said, can only be achieved by applying the system of stare decisis which is deeply rooted in the Sudan legal system. To refuse to follow precedents will not only disappoint the parties, but will introduce an element of uncertainity into the body of the Sudanese Law. Mahdi Mohamed Ahmed is a very strong advocate of the rule of precedent; for him, the Province Judge was bound to apply the precedent in point in the case before him, even if he does not approve of it.[194] Ramadan Ali Mohamed, J., concurred with Mahdi Mohamed Ahmed, J., He further added that the Civil Justice Ordinance, .9 empowers a court to act according to justice, equity and good conscience "in cases not provided for by the Civil Justice Ordinance or any other enactment for the time being in force." This section, he said, must be read subject to the general rule of stare decisis. He went on to say that the expression "or any other

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189 (AC-REV-137-1959); S.L.J.R., 1962, Ibid.

190 Cliff F. Thompson, "The Sudan Law of Landlord and Tenant and the Judicial Interpretation of the Rent Restriction Ordinance 1953.", S.L.J.R., 1962, p.445.

191 Zaki Mustafa, "The Treatment of Exemption Clauses by the Sudan Courts:11." J.A.L. Vol. 12, op. cit., p.164.

192 S.L.J.R. 1969, Ibid.

193 S.L.J.R. 1969, p.116.

194 Ibid., p.117.

enactment for the time being in force'' appearing in section 9 of the Civil Justice Ordinance must be taken to include any existing law to be applied by the court. Any binding precedent is such a law for the time being in force!

The authority of the pre-independence precedents is unsettled, but at a minimum they were deemed persuasive.[195] Again Mahdi Mohamed Ahmed and Ramadan Ali Mohamed then judges of the Supreme Court, declared in the case of M. El Hissayn El Hasan V. Heirs of El Mahi El Saflawi ,[196] that the lower courts are bound by the latest appeal decision. When the decisions of the Court of Appeal contradict, the lower courts are bound to follow the latest of such decisions.

It is interesting that Mahdi Mohamed Ahmed, who was fanatically vocal in his support for the rule of precedent, refused to follow an Appeal Court precedent though he did so with regret. There has never been any dispute regarding the binding force of the decisions and precedents of the Supreme Court over all the lower courts.[197] But it was controversial whether the decisions of the previous Appeal Court were binding on the later Appeal Court.[198] It was decided, in the case of Heirs of Medani Abashar V. Ahmed Zein El Abedein ,[199] that decisions of the previous Appeal Court which was the final judicial authority before it was repealed, were not binding on the present Appeal Court. But is has a high appellate value that should not be evaded except for specific valid reasons. In contrast to this view it was decided later in The Public Insurance Co. V. Heirs of El Sheikh Mohamed El Hasan ,[200] that the decisions of the then Appeal Court fetter and bind the present Appeal Court (which comes after the present Supreme Court in the judicial hierarchy), and such precedents can never be evaded under any circumstances. However, it was decided that the Appeal Court could overrule its own previous decisions if there was a mistake of law or if the law was wrongly applied. This decision was based, according to the words of El Tijani El Zubair, J., in S. G. V. Abdel Rahim El Mardi Braima ,[201] on the English Common Law from which the Sudan

[195] S.L.J.R., 1970, p.110.

[196] S.L.J.R., 1972, p.50.

[197] This judicial stance was firmly expressed in Ahmed Idris Ahmed V. Ahmed Ali El Tawil ; (AC-REV-172-1973); S.L.J.R., 1973, p. 190.

[198] At one point in the legal development of the Sudan, The Appeal Court was the final judicial authority, but later it was the Supreme Court that was the final judicial authority.

[199] (AC-C.REV-304-1974); S.L.J.R., 1974, p.207.

[200] (AC-REV-583-76), S.L.J.R., 1976, 514.

[201] (AC-Major Crt-71-74), S.L.J.R., 1974, p.450.

Courts have derived the rule of precedent. In the case of Awad Abdel Rahman V. Mohamed Hasan El Gool ,[202] the precedent rule was given a sweeping interpretation and was said to require the lower courts to follow the higher courts. Strictly speaking the higher courts can include different levels and is not necessarily confined to the Supreme and Appeal Courts.

The fact that a portion of the Sudanese precedents was based on the justice, equity and good conscience provision is apt to lead to confusion and uncertainty. The justice, equity and good conscience provision is a subjective one. What is according to justice, equity and good conscience for one court may not necessarily be the same for another. In Amnah A'tiah V. Abdel Rahman Ballah Awad ,[203] the Appeal Court stated that it did not agree with the Court of Appeal when in a previous decision the latter declared such a decision to be in accordance with justice, equity and good conscience. The Appeal Court decided that, on the contrary, such a decision does not accord with the principles of justice, equity and good conscience.

The rule of precedent in the Sudan has been applied so inconsistently that an Appeal Court judge would approve a certain decision in one case and reject the same in another case. In The Sudanese Auto Insurance Co. Ltd. V. Heirs of Said Tawfiq ,[204] As- Sadiq Abdalla, president of a circuit in the Appeal Court, fully concurred with the decision that the case diary is not a public document and as such is not admissible as evidence in a civil proceeding. The same judge, sitting as a president of another circuit in the same Court of Appeal, concurred with another decision to the effect that the case diary is admissible as evidence in a civil proceeding.[205] Interestingly the lapse of time between the two cases was only three months and the appellant in both cases was one and the same legal entity. Thus, we can imagine the confusion and uncertainity created by such instances. However, the Court of Appeal in El Tayeb El Sawi V. Hamoudah El Tahir ,[206] stated that application of the rule of precedent is not automatic. It involves an analysis of each case in order to

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[202] (S.C.C.C. ass./136/1975); S.L.J.R., 1975, p.202.

[203] (S.C.C.C. ass./342/1975); S.L.J.R., op. cit., p.226.

[204] (AC-C.REV.-352-1975) S.L.J.R., op. cit., p.298.

[205] The Sudanese Auto Insurance Co. Ltd. V. Heirs of Hamid Mohamed Hamid ; (AC-C.REV-219-1975); S.L.J.R., 1975, p.330.

[206] Ibid.

decide whether it is in line with a certain precedent or distinguished from it.

This takes us to the fact that at least part of the techniques of the precedent rule was frequently used by the Sudan Courts i.e. the technique of distinguishing cases.

In Kafina George and others V. Abdel Rasul El Nur Ahmed ,[207] it was decided that it is established law to be guided by the precedents in the eviction suits for essential need, without being rigidly and strictly bound by such precedents. Obviously, this is a compromise that stands halfway between strict application of the rule of precedent and the total rejection of such a rule. Both stances found expression in the almost chaotic decisions of the Sudan Courts. In The Public Insurance Co. V. Heirs of El Sheikh Mohamed El Hasan ,[208] As-Sadiq Salman, J., asserted that the Appeal Court is bound by the judicial precedents and, in particular, those of the Supreme Court and the Appeal Court when it was the final authority. He went on to assert that any attempt to deviate from the consensus of the precedents is doomed to failure. This judge, despite his strong support for the precedent rule, did not bind himself by a precedent to whose establishment he contributed. He went that far in the case at hand as an overreaction to total adoption of an Islamic fiqh rule by his colleague Bakri Sir El Khatim, who presided over that particular circle of the Court of Appeal. However, the Supreme Court, in Heirs of Mohamed Ahmed Yaquob V. The Sudanese Auto Insurance Co. Ltd. ,[209] declared that it is not bound to observe any precedent, including its own.

The Supreme Court in The Railway Corporation V. Mahdi Abdel Hamid El Mahdi Mustafa ,[210] added to the confusion by saying that the rule that the recent decision will overrule the previous one is inapplicable as regards decisions of the Supreme Court. The Supreme Court went on to say that when there are two conflicting decisions of the Supreme Court then there is nothing to prevent the lower courts from following whichever decision they choose to observe. The overriding consideration is to maintain justice between the parties regardless of any conflict between the precedents, and when such a conflict exists then these precedents are no more than a guide for the

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[207] (S.C.C.C. ass-392-76); S.L.J.R., 1976, p.237.

[208] (AC-REV-583-76), op. cit. p. 514.

[209] (S.C.C.C. ass.-15-1980); Q.L. Bull. (The Quarterly Law Bulletin) Apr., May, June 1982, p.84.

[210] (S.C-C.REV-56-1978); Q.L. Bull. Jan., Feb., Mar., 1984, p.50.

courts of first instance. These courts have the discretion to apply the precedent that is apt to maintain justice in the case before them.[211]

**Section B:-**

**The Rule of Precedent and Statute Law**

The rule of precedent has long been applied in interpreting the Sudanese Statutes and, in particular, the Rent Restriction Ordinance. This Ordinance has already been overburdened by a number of precedents which, through time, almost replaced the text of the Ordinance itself. Such precedents were sometimes so conflicting that the spirit of the Ordinance was blurred.

The Organization of the Laws Act 1973, gave the rule of prescedent priority over the rules of Shariah and the principles of justice, equity and good conscience. Section 7 of the same Act provides for the following:-

"In matters not provided for by any law, the courts shall apply the principles approved in Sudanese judicial precedents and the principles of Shariah and the custom and the principles of justice, equity and good conscience."

All the Acts enforced from 1974 until 1983, except for The Sales Act, 1974, provided for the interpretation of such Acts by the rule of precedent. Section 3 of the Contract Act, 1974 and section 2 of the Agency Act, 1974 read as follows:-

"In interpreting the provisions of this Act, the courts shall be guided by the principles approved in Sudanese judicial precedents provided that such principles are not inconsistent with the provisions of this Act."

Both Section '3' of the Contract Act, 1974 and Section '2' of the Agency Act, 1974 relaxed the strictness of the rule of precedent when they provided that such precedents were only persuasive. They further diluted the binding force of the Sudanese judicial precedents by the qualification that these precedents should not be inconsistent with the provisions of The Contract Act. In case of any inconsistency the provisions of the Act were to prevail.

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[211] Ibid., p.52.

A different emphasis is given to precedent in the preface to the Contract Act 1974. It clearly states that the Act itself was primarily a codification of the judicial precedents and it was a deep conviction of the legislator that such precedents are to be followed, and in no way departed from, without a specific necessity. I find it hard to understand why the judicial precedents should not be binding when the substantive law was basically drawn from such precedents. The same legislator drafted and passed the Civil Procedure Act, 1974, section 6.2, which reads as follows:-

> ''In cases not provided for by any law, the court shall act according to Sudanese judicial precedents, principles of Shariah Law, custom, justice and good conscience.''

This section clearly confers a binding force on the Sudanese judicial precedents and with that the Sudanese Courts ended up with a system which is bound by the rule of precedent in one branch of law and compromises the same rule in another branch of law!

# PART IV

# CHALLENGES TO THE FUTURE OF ENGLISH LAW IN THE SUDAN

## Chapter 1

# THE JUDICIAL CHALLENGES TO THE FUTURE OF ENGLISH LAW IN THE SUDAN

There had always been instances of departure from English Law; such instances were a challenge to the absolute authority of English Law. As early as the year 1908 (the first years of the inception of English Law) Wasey Sterry, Acting J.C., criticized English Law as going too far in its protection of landowners against trespassers. He refused to apply it since it might produce great injustice in certain cases.[1] In the case of Hassan Hussein V. Sudan Government Railways [2] Owen, J., refused to receive the English Compensation Legislation as law in the Sudan since it was based on English social and economic conditions which did not exist in the Sudan.

English Law rules were sometimes rejected on the grounds of justice, equity and good conscience.[3] It was decided in Saleh Sobhi V. Saleh Sasoun [4] that the English Statute of Frauds did not afford justice, equity and good conscience and as such was inapplicable in the Sudan.

In the case of Associated British Manufacturers (Egypt) Ltd. V. Aziz Kafouri ,[5] it was emphasized that the Civil Justice Ordinance, 1929 differs from the English Procedure, in that the issues are not settled by the pleadings of the parties (as in England), but by the judge himself, after hearing the parties, or pursuing their pleadings, or both.[6] The court in Heirs of Mariam Bint Boulos Saleeb V. Heirs of Boulos Saleeb ,[7] emphatically asserted that it would be very dangerous to exclude a certain rule merely because it is not English Law. This simply meant that English Law was not yet completely accepted as part of the Law of the Sudan. At best it was regarded as persuasive.[8]

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[1] Nicola Episcopoulo V. The Superior of The African Catholic Mission. Ibid.

[2] (HC-CS-55-1929); I S.L.R., 1969, Ibid.

[3] See the judgement of the High Court in Um-Setrein Bint Hamad El Tom V. El Hasan Hamad El Shafie. Ibid. ; See also Pt. II, Ch.5, p.87 of this thesis.

[4] (AC-REV-36-1936); II S.L.R., 1969, Ibid.

[5] (AC-APP-30-1929); I S.L.R., 1969, p.430.

[6] See Pt. II Ch. 2, p.63, footnote 58, of this thesis.

[7] (AC-REV-17-1932); II S.L.R., 1969, Ibid.

[8] Grand Qadi V. G. B. , Ibid.

**Section A:-**

**Instances of Departure from English Law in the Post Independence Era**

As early as the second year of independence, Mohamed Ahmed Abu Ranat, C.J., boldly rejected the adoption of the English Land Law rule relevant to the case of a vendor who can not make a title to real estate because of his ignorance of the strict legal state of his title.[9] The learned C.J. departed from that English Law rule since it was much criticized and was based on the peculiarities of English Land Law.

Alam Maximos V. Khadiga Hamad El Brigdar and Fahmi Girgis V. Khadiga Hamad El Brigdar ,[10] was another instance where the Court of Appeal departed from English Law and refused to follow it in the Sudan since it was against equity, justice and good conscience. The relevant English rule was that a tenant should remain liable to pay rent even though he was deprived of the use of the premises by fire, rains, etc.

Mudawi, J., was vocal in his departure from English Law. In his notorious judgement in Khartoum Municipal Council V. Michel Cotran ,[11] he said:-

> "Counsel for Plaintiff brought to our notice a host of English cases with a view to guide us in assessing the quantum of damages. Let us make clear from the outset that we refuse to be guided (or do we say misguided?) by English or any foreign cases in this respect."
>
> He went on to say that:-
>
> "We will be living in a world of dreams, in a fool's paradise, if we attempt to ignore the existing differences in conditions of life between our country and the United Kingdom. There is no room for comparison."
>
> Mudawi, J., went further in departing from English Law when he asserted that:-[12]
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> "We believe that any standard of care taken blindly from English cases will be most unfair

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[9] See the C.J.'s rule in Bakheita Ibrahim V. Hamad Mahayoub , Ibid. Also see Pt. III, Ch. 1, p.98 of this thesis.

[10] (AC-Revision-73-58); S.L.J.R., 1958. Ibid.

[11] (AC-APP-31-1958); S.L.J.R., 1958 Ibid.

[12] Ibid., p.107.

and unrealistic, and if we fail to appreciate this fact we will be in the position of a man putting himself behind an iron curtain - we use the phrase in no political sense - closing his eyes, and putting his hands on his ears, neither hearing of nor seeing the civic, economic or social realities of Sudanese life. We do not want for one moment to be in that position."

Mudawi, J., based his astute rejection of English cases as being of no authority whatsoever in the Sudan, on the grounds that English and Sudanese conditions differ, other judges would reject an English case only when it is criticized and brushed aside as undesirable in England.[13] The learned J. was fully aware of the problems of adopting English Law; with clear thinking and unshaken conviction he vigorously addressed the problem and took an uncompromising stance.

Babiker Awadalla, J., in the case of Heirs of El Niema Ahmed Wagealla V. El Haj Ahmed Mohamed ,[14] used some strong words to justify his departure from English Law. He stated that:-[15]

"I cannot see why Muslim heirs should suffer for no reason other than lack of foresight on the part of the legislature in incorporating into the Wills and Administration Ordinance an archaic principle of English Common Law which is void of all reason."

The Court of Appeal in Khalifat Kholafa El Tareiga El Ismailia V. Mohamed Ahmed Osman ,[16] decided that as far as the Prescription and Limitation Ordinance 1928 is concerned, by giving the word 'person' a wider definition than is recognized for the purpose of England, the presumption is that we meant to deviate from the principles of English Common Law. Occasionally there was an intentional departure from English Law in some Sudanese legislation. The Lost and Unclaimed Property Ordinance 1905 is one example.[17] This institution of a reward for finders consisting of one-tenth of the value of the property found, under section 4 of this Ordinance is plainly a departure from the Common Law.

Again, M.Y. Mudawi, in the case of Nicolas Stephanon Stergion V. Avistea Nicolas

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[13] W.L. Twining, op. cit., p.136.

[14] S.L.J.R., 1961, Ibid.

[15] Ibid., p.223.

[16] (AC-REV-259-1963); S.L.J.R., 1962, p.258.

[17] Land Law is a distinct area of Sudanese Law that has drawn the least from English Law.

Stergion ,[18] was uncompromising in his departure from English Law. He clearly stated that:-[19]

> "Apart from the contemplation of the parties I am of opinion that English Law in this particular case is alien and will not lead to a fair and just solution of the problem... In the East domestic relations are closely interconnected with religion, while in the West they are, at least today, secularized. In view of this I conclude that English Law could not and should not be applied in this particular case."

Dafalla El Radi Siddiq, J., was pragmatic in the case of Renolds Aluminum Co. V. Abbas El Naiem. [20] He stated that:-

> "The state of the Law in England should in no way hamper our faculties for innovation where there is a hiatus in our law allowing us room to invoke our concepts of justice."

The statement of Dafalla El Radi Siddiq, J., was a clear expression of discontent with slavish adherence to English Law.

In Mohamed Nasr Abdalla V. Ibrahim Abdalla El Garai ,[21] the Provincial J. based his decision on a rule of Shariah Law and refused to apply the rules of the English Common Law on the ground that such rules do not satisfy the requirements of justice, equity and good conscience. Although this judgement was overruled on appeal, it added to the slowly growing trend to depart from English Law and to explicitly condemn the adherence to it.

At-Tijani Az-Zubair, J., in Shawqi El Jundi V. Mohamed El Amin El Faki ,[22] expressed a liberal approach in his departure from English Law, saying:-[23]

> "I believe that our courts can apply the general principle that allows them to interfere in the order and decisions of the lower courts if such an interference can afford justice even when there is a provision to bar the appeal. Because their interference in this capacity does not establish a right to appeal or review. It is rather a revision. It is our right not to bind ourselves

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[18] S.L.J.R. 1963, p. 182.
[19] Ibid., p. 185.
[20] S.L.J.R. 1969, Ibid.
[21] S.L.J.R. 1969, p. 116.
[22] (AC-REV.167-73); S.L.J.R., 1973, p.161.
[23] Ibid., p. 164.

with the formalities of the judicial revision orders as applied in English Law, because these formalities are not binding on us and because such formalities do not achieve justice even for the English people themselves."

The case of The Public Insurance Co. V. Heirs of El Sheikh Mohamed El Hasan, [24] poses a very interesting diversity of opinions within the Sudanese Judiciary. It is a unique case where the trend towards Islamic Law and the departure from English Law crystalized and was structured by the Judiciary itself. The resistance to this trend was equally strongly stressed by other number of cases.

Bakri Sir El Khatim, a Court of Appeal J., showed a great inclination towards Islamic Law. He stated:-[25]

"There is no doubt that this discussion is one of the results of the influence of English Law and English jurisprudence over the Sudan. It is deplorable that this issue has not been discussed in the light of Islamic Law at any point in our legal development, although 'Diyah' for culpable homicide is an established rule in Islamic Law that has been well researched and well discussed."

He continued to state:-

"Since 'Diyah' is an established rule of Shariah Law and since Article 9 of the Constitution provides that Shariah is a principal source of legislation, and since we have no written law to cover cases of damages, I think we should abide by the rules of 'Diyah' as established in Shariah Law as far as that does not contradict Sudanese written Law."

This statement provoked feverish debate and brought the whole issue of the future of both English Law and Islamic Law into the judicial arena. Mahmoud Mohamed Said, J., in the same case, came out in full support of adhering to English Law. He made certain allusions that to depart from English Law and follow Islamic Law is fanatical. His own words were as follows:-[26]

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[24] (AC-REV-583-76). Ibid.

[25] Ibid., p.516.

[26] Ibid., p.520.

> "I am not of the supporters of the blind fanaticism to the teachings of Islamic Shariah particularly that we are in a time where the Muslim scholars admit that the religious teachings have given the legislature the option to regulate the complicated aspects of life and have accepted with full satisfaction to be a source of legislation and not a legislation by itself."

This is a highly secular approach to Islamic Law. It betrays the judge's strong commitment to English Law and a distorted knowledge of Islamic Law. However, what the judge stated is the thesis of the supporters of adherence to English Law against Islamic Law.[27] According to this judge, English Law has established the relevant factors in assessing damages and the Sudanese Judiciary has accepted such factors since they do not contradict with justice, equity and good conscience. Such factors, the judge stated, were adjusted to the values and local circumstances of the Sudan in the case of Cotran. [28]

The third judge in this appeal was of the opinion that the statement respecting Shariah Law was irrelevant since the applicants did not ask the court to depart from English Law and apply Islamic Law to their case. He said, in other words, that the issue of the application of Shariah Law and departure from English Law is dormant and should remain so. However, when he was faced with the issue, he took sides and stated:-[29]

> "I do not know for how long shall we suffer from the complex that the Statutes and precedents originating from English Law are destructive to our values and ideals. This ignores the fact that our Judiciary could adjust such Statutes and precedents and could give them a local colour. The Sudanese Courts often rejected the English precedents when it was inappropriate to follow such precedents."

Using the judge's logic one can legitimately say:- for how long shall these judges suffer from the complex that the Sudan should remain a hostage to a colonial legacy and uproot itself from its own one! Surprisingly enough, this judge differed completely with the first judge who argued in favour of Islamic Law in this case, and fully agreed with the second judge who adamantly resisted

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[27] See Article by G.A. Lutfi, op. cit. , pp. 227-235.
[28] (AC-APP-31-1958); S.L.J.R., 1958, Ibid.
[29] Ibid., p. 522.

such an argument and wanted to adhere to English Law. However, he agreed with the conclusion of the first judge as regards the damages!. This renders his argument against Islamic Law as hollow and emotional.

In the case of The Neilain Bank V. Edward Sadiq Sulaiman ,[30] Henry Riyad, a Supreme Court J., in a dissenting decree, stated that:-[31]

> "There is no need to be guided by the English precedents or the English jurisprudence in this aspect."

The issue in this case was the award of damage to a customer against his bank when the latter wrongfully refused to honour his cheque.

The instances of departure from English Law, albeit few, reflected the awareness of some Sudanese judges of the sharp social, cultural and economic variations between England and the Sudan. However, such instances of departure posed a challenge to the future of English Law in the Sudan. They stand for a pragmatic judicial approach rather than the unquestioning and uncritical adoption of English Law.

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[30] (S.C.C.C. ass. 115/1980); Q.L. Bull., Jan., Feb., Mar., 1981, p. 49.

[31] Ibid., p. 55.

## Chapter 2

# THE 1971 CIVIL CODE CHALLENGE TO THE DEVELOPMENT AND FUTURE OF ENGLISH LAW IN THE SUDAN

The adoption of the Civil Code in 1971 represented an instance of symbolic politics. It dealt a blow to the dominance of English Law over the Sudan legal system. This adoption was meant, inter alia, to legitimize the then new military regime through an appeal to a blend of socialism and Arab nationalism. Ironically enough, the Civil Code 1971 was still mainly western, although it was meant to render the Sudanese legal system consonant with the values of the Sudanese people. It was meant to give the Sudan, "a good set of laws emanating from the conscience of the people, fulfilling their needs, expressing their objectives and accommodating and embodying their history, traditions and customs." [32] This noble objective was the assignment of the 1970 Law Commission that consisted of sixteen lawyers, only four of whom were Sudanese; twelve of them were Egyptians who knew very little if any of the history, traditions and customs of the Sudan. It was apparent from the formation of the drafting committee that there was nothing to insure a reflection of the needs of the Sudanese people. [33] Babiker Awadalla, the then Minister of Justice, was the architect of introducing the Civil Code. He is thoroughly knowledgeable in Common Law and he had remarkably and with distinction contributed towards the development of English Law in the Sudan. During his career as a High Court Judge and then as a Chief Justice and all the time before that, he used to draw heavily from English Law throughout his judgements, which were always written in English. Given such a background it was bizarre that he introduced the Explanatory Memorandum to the Civil Code 1971 as follows:- [34]

> "It is a sign of good law that such a law emanates from the conscience of the people that it addresses, fulfills their needs, expresses their objective and is faithful to their heritage, tradition and customs. It is deplorable that the laws that dominated the Sudan for the long

[32] Introduction to the Explanatory Memorandum to the Civil Code 1971, Vol. 1, p.3; The Civil Code 1971, p.1.

[33] A few lawyers were hopeful that this committee would reflect the history, traditions, and customs of the Sudan. A then Appeal Court Judge expressed his hope by saying:-"The process of codification which is going on at present in the Sudan purports to take into account the indigenous customs of the people, their religious and cultural background." Obeid Haj Ali in his article, "The Conversion of Customary Law to Written Law." S.L.J.R., 1979, p. 147.

[34] Ibid.

bitter past and are still enforceable are void of such characteristics of good law and as such relate in no way to the Sudanese society; neither through thought, nor culture or tradition. They are laws that were imposed by the English colonization in order to link the Sudan tightly to the Anglo-Saxon institutions."

Babiker Awadalla was quoted as saying that:- [35]

"The history of the Sudan since the invasion of the colonizers in 1898 kept reflecting the painful fact that the law which dominated the nation and governed its relations until after the independence was English Law which was copied verbatim from the legislations passed through centuries by the English parliament. It emanates from the history of the English people, responds to their realities and their capitalistic environment based on fuedalism."

Such sharp remarks and critique had never shown in any judgement passed by Babiker Awadalla as a judge. He was critical of 'Diyah', a Shariah concept which he once denounced as "an archaic system." He was known to have enhanced the reception of English Law. He could have seriously challenged the dominance of English Law over the legal system of the Sudan. He could employ the justice, equity and good conscience provision to apply the law that responds to the realities of the Sudanese people and emanates from their history. For no good reason he chose to enhance the development of the very English Law which he later criticized!

Babiker Awadalla went on to state in the Explanatory Memorandum to the Civil Law 1971, that:-[36]

"Since the main source of English Law is Common Law and not legislation which covers a minor part of relations and transactions between the people, it was a must that the English colonization had to go around the method of introducing its own laws in order to dominate the Sudan. Needless to say that the justice, equity and good conscience provision in the Civil Procedure Ordinance, 1910 and the Procedure Ordinance, 1928 always meant the application of English Law. It is through this provision that English Common Law could sneak and settle

[35] Loc. cit.
[36] Loc. cit.

in an environment that is not its own and in a society that has no link of culture, thought, tradition or heritage to it. The Sudanese people who were helpless throughout that decade were looking forward to the hour of salvation and escape from this octopus in order to have a Sudanese Law flesh and blood.''

I have quoted Babiker Awadalla at length to emphasize how a once distinguished High Court Judge and a Chief Justice for about three years criticized English Law and spared no time to reject it in toto. His rejection was based on the following factors:-

1. English Law as applied in the Sudan was utterly void of the characteristics of a good Law that emanates from the conscience of the Sudanese people, fulfills their needs, expresses their objectives and accommodates their history, traditions and customs.
2. English Law was imposed by the English colonization to bring the Sudan close to the Anglo-Saxon institutions.
3. English Law as applied in the Sudan was copied verbatim from the legislation passed by the English parliament through centuries and as such emanates from the history of the English people and responds to their own realities that have very little if anything to do with the Sudanese life.
4. English Law 'sneaked' into the Sudan legal system through the justice, equity and good conscience provision.
5. The Sudanese people were helpless throughout that decade and were always looking forward to the hour of salvation and escape from English Law.
6. It was the life long dream of the Sudanese people to have a Sudanese Law flesh and blood; a law that carries their name, coexists with their environment and helps the people come to the Judiciary open-eyed rather than being lost and knowing nothing about their own affairs.
7. It was a duty incumbent on the national governments after the independence of the Sudan to achieve this noble goal of having a Sudanese Law, but they miserably failed to do that. They could not realize the essentials of independence. Such essentials would make it imperative on

any national government in the Sudan to depart from the slavish adherence to English Law.

8. Rejection of English Law should be the starting point of a legislative revolution.

**Section A:-**

**Salient Features of the 1971 Civil Code**

1. The 1971 Civil Code marked the downfall of English Law as well as of the English language in the legal arena. It was the first time since the fall of the Mahdist State that the legal system was Arabicized.

2. The 1971 Civil Code was claimed to be socialist in nature. It was posed as a system abhorring exploitation as such and dismissing the abuse of rights. It restricted the use of property rights and viewed ownership as a social function. Moreover, it bound the judge to interpret the rules in consonance with the socialist philosophy of the state.

3. The 1971 Civil Code tried to strike a balance between the rigid application of the letter of the law and the unlimited authority of the judge to exert his own opinion. The latter amounts to assuming a legislative function. This was sought to be handled through what the Introduction to the Explanatory Memorandum of the 1971 Civil Code described as the positive role of the judge.[37] It provided the judge with some flexible criteria to allow him to develop the legal rules according to the changing conditions and circumstances.

4. It made the Shariah the first official source to resort to in the absence of a relative legislation.

5. It switched the Sudanese legal system to codification after a long history of Common Law.

6. While the 1971 Civil Code was meant to deal English Law a fatal blow, it was nevertheless still substantially western. It was more or less a Continental System.

7. The 1971 Civil Code was a blend of various Arab Civil Codes such as Egypt, Libya, Iraq, Syria and Kuwait.

8. It emphasized the significance of preserving the legal heritage of the Sudan in relation to pre-

[37] Ibid., p.9.

emption, which derived originally from Islamic Law.

**Section B:-**

**The Sources of the 1971 Civil Code**

The provisions of the 1971 Civil Code were copied with slight variations from the Egyptian Civil Code, the Libyan Civil Code, the Iraqi Civil Code, the Kuwaiti Law of Commerce, the Syrian Civil Code and the Consolidated Civil Code Bill for the United Arab Republic.[38] The drafting committee of the 1971 Civil Code included all the sources, viz, Arab Civil Codes which were considered in creating each article. The 1971 Civil Code can hardly be Sudanese flesh and blood. The drafters were aware of this fact. They stated that the 1971 Civil Code was not necessarily related to these sources as far as its interpretations, application or development are concerned. They argued that a provision may be identical in text to its source, but as it adapts to the new environment and strengthens its ties and bonds with the relevant circumstances of this environment, its links with its historical sources gradually fade away. It will ultimately break away from these historical sources and will become an independent entity.[39] Ironically enough, this was the same logic used by the advocates of the adoption of English Law, who claimed that what was applied in the Sudan was not English Law, but Sudanese Law based on English principles.[40] They also claimed that ultimately a body of Sudanese Law would evolve.[41] However, it remains a fact that both the Common Law and the Civil Law received in the Sudan were those of England and France and so remained, except that they had also become the Common Law and the Civil Law of the Sudan.

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[38] The Explanatory Memorandum for the 1971 Civil Code Bill, Vol.1, 1971, Part 1, Ch.1, p.22. The Majalla is a source from which these Codes drew. The Iraqi Code in particular drew heavily from the Majalla, and in most cases, the language is almost identical. The Majalla was a product of the reform movement in the Ottoman Empire which started in 1839. the Majalla was created to preserve Islamic Law. It was derived from the writings of the eminent jurists of the Hanafi school of fiqh. Prior to the enactment of the Majalla in 1877, there was no single Muslim Code. The Majalla was designed to make the rules of Shariah accessible to judges not trained in Shariah Law. See P. Nicholas Kourides, "The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems:- The Formation and Binding Force of Contracts." The Colum. J. of Transna. L. Vol.9, No., 1., Spring 1979, pp. 399, 413.

[39] Ibid., p.9.

[40] Jalal Ali Lutfi, op. cit., p. 241.

[41] Zaki Mustafa, "The Common Law in the Sudan." op. cit., p. 237.

The various Civil Codes from which the 1971 Civil Code derived do not express the objectives of their own people, nor do they accomodate their history, tradition or customs. While those Codes were drafted in Arabic, they were nevertheless closely tied to their western origin. This is true in spite of the indirect adoption of a few rules of Islamic Law.[42] These Codes went out of their secular way to pay Islamic Law an allegiance that goes no further than the expression in words. The Code being a replica of these Codes, followed suit. Section 4 of the 1971 Civil Code provided that:-

> "In the absence of any provision the court shall rule according to the principles of Islamic Law..."

With a Code comprising of 917 sections, section 4 was only a 'joke'. The circumstances in which a judge may not be able to find a relevant provision were very few in number, so the court would in very few cases rule according to the principles of Islamic Law. Ironically even the few sections that had their origin in Islamic Law were subject to interpretation in consonance with the rules of the socialist system of the state, rather than the basic sources of fiqh. These few sections were isolated and divorced from their sources and origin and were engrafted into a secular system. The Explanatory Memorandum of the 1971 Civil Code,[43] stated that the most significant legal theories derived from Islamic Law were the following:-

1) Restriction upon the absolute and abusive use of property right.

2) Liability of interdicted persons.

3) The Hawala, Novation,[44] transfer of debt.

4) The doctrine of unforseeable circumstances.

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[42] The Arab Civil Codes demonstrate an adoption of some Islamic legal principles. The Egyptian Civil Code Article 1 placed more significance on custom than on Islamic Law as a source of rules, whereas Article 1 of the Libyan and Syrian Civil Codes reversed the order of custom and Islamic Law and placed Islamic Law as the first available source of law in the absence of an applicable provision of the Code. The 1971 Civil Code followed the example of the Libyan and Syrian Codes. See Nochlos Kourides, op. cit., p.415.

[43] Ibid., p. 10.

[44] The aval of medieval French Law is said to be derived from the 'hawala' of Islamic Law. For a detailed account of this issue see Gamal Moursi Badr, "Islamic Law:- Its Relation to Other Legal Systems." The Am. J. of Comp. L. vol.26, 1978, p.196.

5) The legal capacity.

6) Gifts

7) Pre-Emption

8) The rules relevant to Majlis al-aqd, 'The contract unity in place and time'.

9) The transactions of a mortally sick person.

10) The termination of contract for the death of a tenant.[45]

11) The option to inspect, in contracts of sale.

12) Planting trees on rented land.

13) The rules relevant to the joint wall.

The 1971 Civil Code was divided into four parts that ran as follows:-

Part I:- Consisted of four chapters that covered the application of laws, the conflict of laws, rules, legal entity and restriction upon the abusive use of property rights. Part II:- Consisted of five chapters and covered the sources of obligations,the consequences of obligations, the circumstances that affect the consequences of these obligations, the transfer of obligations and the lapse of obligations. Part III:- Consisted of five chapters covering nominate contracts. Part IV:- Consisted of five chapters that covered all kinds of property rights and other rights relevant to them.

The reception of the 1971 Civil Code created some confusion as far as the legal education at the University of Khartoum was concerned. However, despite the short notice, the Law Faculty incorporated the Civil Code or parts of it into its curriculum,[46] and sent two of its teaching staff to France to pursue their D.C.L. in Civil Law. Other than these limited measures, the Law Faculty still taught English Law, and was thus teaching an irrelevant legal system.[47] In a similar situation, Oxford University taught Roman Law until well after the 19th. Century, although it was for all

[45] See the detailed discussion of this issue in Pt. III, Ch. 1, pp. 131-138 of this thesis.

[46] The author of this thesis was then a semi-final law student who was exposed to the 1971 Civil Code tortious liability chapter, Pt. II, (1) Ch. III, in the torts course.

[47] Zaki Mustafa, op. cit., p.143.

practical purposes irrelevant to the English Courts.

By and large, there was a strong feeling that the 1971 Civil Code was imposed on the Sudanese people even more bluntly than English Law was. The Civil Code threw away a set of alien legal rules, viz, English and Indian, only to replace them with another set of still alien rules.[48] The law that was meant to be Sudanese flesh and blood was far from being this. However, it is an undeniable fact that there was little more indirect borrowing from Islamic Law in the 1971 Civil Code than in the era of English Law dominance. However, although Islamic Law had retained some influence, it still had not been as influential as French Civil Law.

The 1971 Civil Code was very short-lived and very few cases were decided under it in its one year duration. El Khidir Mohamed Abdalla V. Banaqa Hasan Jubara ,[49] was one of the few reported cases decided under the 1971 Civil Code, it was decided, on the strength of section 137 (2) of the 1971 Civil Code, that the unforseeable circumstances which made it onerous on the creditor to fulfill his obligation, had subjected such a creditor to a great loss and as such justifies the interference of the court to strike off the burdensome obligation.[50] It was decided in The Sudanese Auto Ins. Co. Ltd. V. Azhari Ahmed El Mustafa and another ,[51] that although the principle of estoppel is a Common Law principle, it could still be relevant to act upon. The Supreme Court supported this ruling by reference to section 4 and 5 of the 1971 Civil Code. Both sections, the court asserted, would allow for the application of the principles of justice emanating from the Common Law. With respect, I believe that the Supreme Court erred twice in reference to these two sections. When it referred to section 5 of the 1971 Civil Code which was not relevant to the case. It was confined to the application of the 1971 Civil Code in matters of personal law for non-Muslims. The Supreme Court failed to interpret correctly the relevant part of section 4 of the 1971 Civil Code that reads as follows:-

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[48] Ibid., p. 146.

[49] (SC-C.Cass. -20-73); S.L.J.R., 1973, p.64.

[50] This legal principle is unknown to English Common Law which recognizes the circumstances that render the contract null and void. It is also considered an interference with the freedom of the contracting parties which is observed more often than not in English Common Law. It is not an unusual situation in the civil Code to recognize the theory of abuse of the use of right. See N.B. of the Editor, Ibid., p. 65.

[51] (SC-C.Cass. 482-73); S.L.J.R., op. cit., p.141.

"In the absence of any provision the court shall rule according to the principles of Islamic Shariah, if there is no relevant Shariah rule the court shall rule according to custom provided that it does not contradict with the public order or, if there is no relevant custom then according to justice, equity and good conscience."

The Supreme Court neither looked into the Shariah Law nor custom to rule accordingly. It skipped both of them to jump to the bottom line of the order of its sources of rules. This took place when it was imperative for the court to observe the sequence of sources as provided by the provision. Obviously, the Supreme Court was still anchored to the 'justice, equity and good conscience' maxim. However, this case is one of various cases where the court brushed aside the 1971 Civil Code and drew from the Common Law legacy.

The case of the Dept. of Land Survey V. Heirs of Juma Ibrahim ,[52] lends itself as another example of how the Sudanese Courts were so attached to English Law. The Supreme Court in this case applied the English Common Law principle of "Res Ispsa locquitur". Using Shariah Law to support this principle, the Supreme Court said:-[53]

"The Sudanese Courts are guided by the foreign rules which are considered to be 'principles of justice' and this Court is of opinion that placing the burden of proof on the side of the plaintiff is consonant with the principles of Shariah."

The case of Ali Dungula V. Sudan Government ,[54] is a leading case on how the Sudanese Courts tactfully circumvented the Civil Code, 1971 and fell back on the Common Law legacy. The Appeal Court in this case decided that:-[55]

"Although it is imperative to apply the Civil Code, there is no reason not to be guided by the English judicial precedents."

The Appeal Court deliberately ignored the provisions of the Civil Code and the sequence of the laws to be applied in the absence of any provision as laid down in section 4 of the Civil Code.

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[52] (S.C.C. Cass. 491-73); S.L.J.R., op. cit., p. 150.

[53] Ibid., p. 152.

[54] (A.C.-CA-94-73); S.L.J.R., op. cit., p.197.

[55] Ibid., p.200.

However, this does not diminish the fact that in some cases the courts confined themselves very strictly to the provisions of the Civil Code.[56] Generally, the adoption of the Civil Code, 1971 marked a total departure from the route of English Law. It repealed English Law altogether and brought to an end its long dominance over the Sudan legal system.

[56] Awad El Karim Mohamed Abu Ajour V. Sudan Railways Dept. , (S.C.-C.Cass.-361-74), S.L.J.R., 1974, p. 137.

## Chapter 3

# ENGLISH LAW AS RESTORED BY THE 1974 ACTS

The Regularization of Laws Act, No.l4 of 1973 repealed the 1971 Civil Code Act, the Civil Pleadings Act, 1972 and the Civil Evidence Act, 1972. It revived the laws that were repealed by the foregoing Acts, viz, the Civil Justice Ordinance 1929 except for the justice, equity and good conscience provision (section 9) and a few other provisions and chapters.[57] Section 9 of the 1929 Civil Justice Ordinance was replaced by section 7 of the Regularization of Laws Act, No.14 of 1973. It reads as follows:-

> "In cases not provided for by any provision the court shall apply the principles that have been judicially settled in the Sudan and the principles of Islamic Shariah and the justice, equity and good conscience."

The order of the sources of rule as laid down by the Regularization of the Laws Act, No.14 of 1973 emphasized the role of English Law as applied by the Sudan Courts. It placed Shariah as a secondary source of rules. The justice, equity and good conscience provision which was already fully utilized to allow English Law "principles that have been judicially settled in the Sudan" to creep into the Sudan legal system was reserved as the last source of rules this time.

It was clear that this retreat to the legal system prior to the introduction of the Civil Code 1971 was transitional. The urge to do 'something' about the Sudan legal system was strongly felt. The Sudanese lawyers were not in agreement as to what 'thing' to do.[58] Zaki Mustafa, who was once the Dean of the Law Faculty, was entrusted with the Attorney General's Chambers portfolio. He seized the opportunity to implement his concept of what to do about the Sudanese legal sytem. He had already expressed his concern and had alluded to the degree of change he thought to be fit for the purpose. In a 1973 article in the J.A.L. he stated that:-[59]

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[57] Chs. 3, 4 and 23 were excepted from the re-enforcement and so were sections 168 and 173 of the Civil Justice Ordinance 1929.

[58] Zaki Mustafa, "Opting out of the Common Law:- Recent Developments in the Legal System of the Sudan." op. cit., p. 134.

[59] Loc. cit.

"Some Sudanese lawyers thought that all that was needed to be done about the Sudanese legal system was a purely formalistic step such as stating and Arabicizing the law which already existed."

Others, he stated:-[60]

"argued that both the substance and form of law needed a thorough examination."

This latter group he classified as follows:-

1) Those who advocate the rejection of English Law and its replacement by Arab Codes.

2) Those who advocate the rejection of all secular laws regardless of their origin, and their replacement by Islamic Laws.

3) Those reformists who advocate reforming the existing legal system (English Law as applied in the Sudan) through codification and the elimination of those rules which were unsuitable to the Sudanese life or obsolete.

Zaki Mustafa conceived of the reform as a blend of Arabicization, codification and elimination of the unsuitable rules of the already existing law. This concept was already included in Zaki Mustafa's book "The Common Law in the Sudan, an Account of the Justice, Equity and Good Conscience Provision"[61] in which he stated:-[62]

"Sudanese lawyers appear to be generally agreed that codification is about the only practical solution they can think of."

It is not unusual for commentators in the Sudan to use sweeping statements like the foregoing quotation by Zaki Mustafa to impress and persuade their readers and impose their own views. Zaki Mustafa is no exception to that. It is puzzling as to how he had arrived at his conclusion. There has never been any poll to draw on the opinions of the Sudanese lawyers, nor has there been a forum where they were brought together to express their concerns. However, this line of argument was developed through the articles written by Zaki Mustafa. He further stated that:-[63]

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[60] Loc. cit.
[61] Loc. cit.
[62] Ibid., p. 245.
[63] Loc. cit.

"One can hardly see any benefit or sense in completely ignoring the rules of law which were received and applied by the courts for over seventy years."

Those rules of law referred to above were rules of English Law, pure and simple. It can be summarized that Zaki Mustafa was an advocate of:-

1. Arabicization.
2. Limited eclecticism.
3. Codification of Common Law as applied in the Sudan and the elimination of those rules unsuitable to the Sudanese life.

The heralded goal of Arabicization accurately caused the decline in the use of English language that led to the decline in drawing from English Law sources.

When Zaki Mustafa was appointed an Attorney General for the Sudan, he spared no effort to implement the kind of change which he projected in his writings. He did not form a committee for the purpose of drafting laws, but sought the assistance of one member of the teaching staff of the Faculty of Law at University of Khartoum.[64] He took it upon himself to prepare all the drafts. Most of the prefaces to the 1974 Acts concluded with one and the same cliché:-

"And I was joined by Dr. Mohamed El Fatih Hamid...in preparing the Bill."

It was more or less a one man job or at its best was a two men job. Some legal counsellors in the Attorney General's Chambers assisted in the preparations, but the main job was Zaki's.

**Section A:-**

**English Law as drafted in 1974**

A number of Acts were drafted, there were:-

1. The Civil Procedure Act, 1974.
2. The Contract Act, 1974.

[64] Dr. Mohamed El Fatih Hamid, The then Head Department of Commercial Law considerably contributed in drafting the 1974 Acts.

3. The Sales Act, 1974.

4. The Agency Act, 1974.

5. The Penal Code Act, 1974 and the Penal Procedure Act, 1974.

**1. The Civil Procedure Act, 1974**

There was no originality in drafting all these Acts. They were more or less a re-enactment of the similar laws that were existing before the introduction of the Civil Code 1971, or a codification of English Law as applied in the Sudan. However, there were always a few modifications wherever the need was felt by the drafter.

Section 6 of the Civil Procedure Act, 1974 replaced Sectin 9 of the Civil Justice Ordinance, 1929. It dealt with the law to be applied in the absence of express provisions and reads as follows:-

> Section 6.1 "In matters not provided for by this Act, the court shall apply such rules as are likely to serve the ends of justice."
>
> Section 6.2 "In cases not provided for by any law, the court shall act according to Sudanese judicial precedents, principles of Sharia'h Law, custom, justice and good conscience."

The Civil Procedure Act, 1974 was vague as to what law to apply in the absence of express provisions. The court should apply any rule to serve the ends of justice. It all depends on the orientation of the judge. That rule could be Islamic, English, Egyptian, French or whatever. It was not very different from the 'justice, equity and good conscience' maxim that was introduced by the British Administration to the Sudan. The wording was slightly different, but the essence was the same. It is surprising that Zaki was so critical of the vagueness of the 'justice, equity and good conscience' provision in the Civil Justice Ordinance, 1929, to the extent of being sarcastic.[65] When he had his opportunity to change, he repeated the same uncalled for vagueness that he had denounced before. To be fair to him, there were a number of substantive law Acts this time, and section 6 (1), (2) was by no means the only substantive law among a number of procedural

[65] For a detailed account of this aspect see Zaki Mustafa, "The Common Law in the Sudan, an Account of Justice, Equity and Good Conscience Provision" Ibid.

provisions,[66] as was the case with the repealed Civil Justice Ordinance, 1929.

As far as laws other than the Civil Procedure Act, 1974 were concerned, the courts were supposed to apply the Sudanese judicial precedents (English Law as applied in the Sudan) as a first source of rules and then principles of Shariah as a secondary source. English Law was given preference over Islamic Law, but that was done in an indirect and subtle way.

The Civil Justice Procedure Act, 1974 repealed the Civil Justice Ordinance, 1929 and the Regularization of Laws Act, 1973. It rephrased section 7 of The Regularization of Laws Act, 1974 and re-enacted it in section 6.2. which has been referred to above. Ordinances such as the Prescripion and Limitation Ordinance, 1928 and the Pre-emption Ordinance, 1928,[67] continued in force.

Section 5 of the Civil Procedure Act, 1974 was a re-enactment of Section 3 of the Civil Justice Ordinance, 1900, and section 5 (a) of the Civil Justice Ordinance, 1929,[68] with minor verbal changes. These latter sections had already given rise to excessive controversy[69] and had proven to be problematic. Despite the seemingly strong commitment by Zaki Mustafa to eliminate these unsuitable rules, these sections found their way into the Civil Procedure Act, 1974.Section 5 of the Civil Procedure Act, 1974 reads as follows:-

> "Where in any suit or other procedure in a civil court, any question arises regarding succession, inheritance, wills, legacy, gifts, marriage, divorce, family relations or the constitution of waqf, the rule for decision of such question shall be:-

a) Any custom applicable to the parties concerned, which is not contrary to 'justice, equity or good conscience' and has not been by this or any other enactment altered or abolished or has not been declared void by the decision of a competent court.

b) The Shariah Law in cases where the parties are Muslims except so far as the law has been

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[66] See Pt. II, Ch. 3, p. 64 of this thesis.

[67] The Pre-emption Ordinance, 1928 was introduced by the British Administration. It was imported from India, but had its roots in Islamic Law. This Ordinance survived all the major and minor legal changes that took place in the Sudan.

[68] See Pt. II, Ch. 3, pp. 64-67 of this thesis.

[69] Ibid., p. 143.

modified by such custom as referred to above.''

It is not clear as to whether the word 'custom' could mean the personal law of the parties or the law of the religious community to which the parties belong or the law of nationality of non-Muslim parties. If it could include the personal law of the parties, then who has the right to deny such parties the application of their own personal law on the ground that it is contrary to 'justice, equity and good conscience' which has already been shown to be vague. Who has the jurisdiction to alter or abolish the personal law of the parties by enactments? And which court is competent to declare such a personal law inapplicable?[70] Could the word custom be confined to ''local custom originating by usage in the Sudan?''[71] Or could it be miraculously stretched again to include the principles of English Law? It had been judicially settled in the Sudan that the word 'custom' as used above would include the personal law and custom of the religious community concerned. Such a decision was arrived at after a very rough ride through a road of inconsistent and contradictory court decisions. Section 5(a) of the Civil Procedure Act, 1974 was a re-enactment of its counterpart in the repealed Procedure Ordinance, 1929. It ignored the judicial decisions that defined the word 'custom'. When we read section 5(a) with sub-section 'b' of the same section it is crystal clear that the word 'custom' was confined to ''local custom originating by usage in the Sudan'' in which case it would be bizarre for such a custom to modify Shariah Law. To cut this long story short, I am inclined to believe that section 5(a), (b) of the Civil Procedure Act, 1974 was a result of mindless copying from both section 3 of the Civil Justice Ordinance, 1900 and section 5 of the Civil Justice Ordinance, 1929. At any rate Zaki's claim that he had eliminated all the unsuitable previous rules cannot always be sustained.

By and large, the contents of the Civil Procedure Act were still that blend of ideas and phraseology deriving from the Indian Civil Procedure as applied in the then British Colonies of British Bechuanaland and Burma and the English rules of pleadings.[72] A few sections of the Civil Procedure Act, 1974 were directly derived from both the Egyptian Civil Pleadings and the Sudan

[70] For a detailed account of these issues see Pt. II, Ch. 3 of this thesis.

[71] Ibid., p. 160.

[72] Ibid., p. 141.

Civil Code, 1971, i.e., section 188 "The Court's own motion to reject fresh claims on the objection". Section 25 '3' drew from section 48 'a' of the repealed Civil Code, 1971 "The Place where the cause of action arises." Both sections 175 and 176 drew from the new Egyptian Pleadings Act.

Section 5 of the Civil Procedure Act, 1974 restored the jurisdiction of the Shariah Courts over gifts.[73] They were originally a Shariah jurisdiction but, in 1967 the Shariah Courts were denied such jurisdiction over gifts' cases, but gifts remained governed by Islamic Law.

**2. The Contract Act, 1974:-**

The Contract Act, 1974 was primarily based on the following pillars:-[74]

1. The basic reliance on the outcome of the Sudanese experience relating to the legal principles which regulate the contractual transactions 'Sudanese judicial precedent.'
2. The commitment to enhancing the contents of these basic rules through updating and vetting them to make them better able to satisfy the present and future needs of society.
3. The commitment to draft a Bill which is flexible, and simple in content and form.

The reliance on the Sudanese experience was said to be based on a conviction that it was a necessity to observe what was familiar and known.[75] The drafter undertook not to depart from the Sudanese experience except for a specific need necessitated by specific circumstances and reasons.

The Sudanese experience, often repeated in the Introduction to the Contract Act, 1974, is no more than English Law as received in the Sudan. Principles of English Law of Contract as applied by the Sudanese Courts since the Condominium were substantially embodied in the Contract Act, 1974. There was an attempt to benefit from the legal experiences in the Arab East, the Far East, Africa, Europe and North America. Limited borrowing from such legal experiences was confined to instances of enhancing or updating English Law as received in the Sudan.[76] The starting point for

[73] For the full text of this section see pp. 191-193 of this thesis.

[74] Introduction to the Contract Act, 1974, Special legis. Supl. to the Democ. Repub. of the Sud. Gazette No., 1162, 25th. June, 1974, Suppl. No., I:- General Legislation, Arabic Text, p.360.

[75] Loc. cit.

[76] Ibid., p.361

drafting the Contract Act, 1974 was the presumption that the principles of the Sudanese Law were being developed and shaped and that any attempt to enact a law that impeded such development is uncalled for.[77] This is a commitment to English Law, a condemnation to the Civil Code, 1971 and an act of blocking all legal avenues other than that of English Law.

It was claimed that the Contract Act, 1974 differed from all attempts to codify the Anglo-Saxon jurisprudence in India, United States of America, Tanzania and even the attempts which had been taking place in United Kingdom since 1965. It followed the route of the European and American modern legal trends that abhor indulging in minute details in the process of codification. To act otherwise would render the code rigid and would fetter the hands of the courts at a time when they needed more freedom to achieve justice and respond to the ever changing needs.[78] Again the argument used by Babiker Awadalla in the Introduction to the Civil Code, 1971,[79] was used by Zaki Mustafa, viz, the Act was meant to be simple and easy to be understood by any layman with a reasonable intellect. This is a frank admission that English Law was beyond the comprehension of the Sudanese laymen who were endowed with reasonable intellect, and that such laymen were in most cases ignorant of the legal consequences of their own transactions. In interpreting the Contract Act, 1974 the courts were directed to be guided by the principles that were judicially settled in the Sudan and which would not contradict the provisions of the Contract Act, 1974.[80] Such principles of English Law were already codified in the Contract Act, 1974.

Section 3 of the Contract Act, 1974 can only make sense in cases where the codified principles would contradict the principles that were judicially settled; in which case one can see no good reason to uproot such principles and detach them from their own sources. However, the principles of English Law that were approved in Sudanese judicial precedents were to 'guide' and not 'bind' the Sudanese Courts.[81]

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[77] Loc. cit.

[78] Ibid., p.362

[79] Loc. cit. See Pt. IV, Ch.2, p. , of this thesis.

[80] S. 3 of the Contract Act, 1974.

[81] This is in itself a codification of the long standing maxim that the Sudanese Courts are 'guided, not bound by English Law'. For a detailed account of this maxim see Pt. II, Ch.5, pp.88-107 of this thesis.

Section 37 of the Contract Act, 1974 with the title "Non Est Factum" was a codification of the principles in the case of Ali Saeed Baashar V. Ahmed Ali Saleh ,[82] which stated the following:-

> "In an action upon an account stated, mistake in the account, or incompleteness of the account, is no defence. The only available defences are 'non est factum' i.e. that if the defendant signed the account, he signed thinking it to be a totally different kind of document, or where the defendant admits being aware of the nature of the document when he signed, that his signature was procured by some fraud or misrepresentation."

Section 52 '2' of the Contract Act, 1974 was a total departure from English Law principles as approved by Sudanese precedents. Zaki Mustafa codified his own valid criticism of what was obviously unfair and exemption clauses, i.e., and exemption clause would be inoperative if the party who signed was illiterate unless the terms were read and explained to him, and where the term was written in a language which could not be read by the party who signed, unless the contents were sufficiently explained to such a signatory.[83]

Section 53 of the Contract Act, 1974 "effect of void contracts" repealed the long approved principles in the case of Rab Joud Mohamed V. Hawa Bint Mohamed. [84] It established the bizarre rule that because of the void contract the landlord could never in this particular case recover possession of his premises by right of ownership. Section 53 restored the parties to the position in which they were before the contract was made.

Section 73 of the Contract Act, 1974, "Effect of the Unforseeable Circumstances" was again a departure from the principles of English Law and the legal principles approved by the Sudanese precedents. It was a re-enactment of section 137 '2' of the repealed Civil Code, 1971 which was in turn derived from Islamic Shariah. It stated that as a result of unforseeable circumstances and after taking the interests of both parties, the court could reduce to reasonable limits an obligation that has

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[82] (AC-REV-143-1959); S.L.J.R., 1964, p.72.

[83] For a detailed account of such departure from English Law see Part IV, Ch.1 , p.170 , of this thesis and also see Zaki Mustafa, "Exemption Clauses in Sudan Courts". op. cit., pp. 122-123.

[84] (AC-REV-225-1959); S.L.J.R., 1961 op. cit., p.166.

become excessive.

Sections 79 and 80 of the Contract Act, 1974 were a codification of what was judicially settled in the Sudan, which in turn derived from the rule in the English case of Hadley V. Baxendale ,[85] i.e., "rules of compensation".

The penalty clause, section 82 of the Contract Act, 1974 was also a codification of the principle stated in the case of Ahmed El Bakheit V. Sarkis Izmirian ,[86] i.e., "A contract clause giving the seller the right to sue for the unpaid balance after repossession is a penalty clause and is unenforceable."

Section 85 restored the parties to their positions before the contract was concluded. If that is not possible then a fair compensation should be ordered. This section relieved the Sudanese Courts from the ongoing dispute about such an issue in the English sources. It specified the rights of the contracting parties if the injured party rescinded the contract.[87]

**3) The Sales Act, 1974:-**

This was the first Act to regulate sale of goods contracts. The Sudanese Courts were completely dependent on English Law and the English Sale of Goods Act, 1893. This complete dependence ultimately resulted in an almost literal aplication of the Act with all its defects and discrepancies.[88]

The backbone of the Sales Act, 1974 was the Sales of Goods Bill drafted by Professor Patrick Saleem Atiyah.[89] That draft was published in the Sudan Law Journal and Reports.[90] Atiyah's Bill was according to his own words based on the English Act, with considerable alterations and emendations.[91] However, the Sales Act, 1974 was intended to be simple and flexible despite the

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[85] (188) 9EXCH. 341 at 354); The M.L. Bull., Apr., May, June, 1980. p. 62.

[86] (HC-CS-538-1957); S.L.J.R., op. cit., p. 14.

[87] M.L. Bull op. cit., p. 64.

[88] Introduction to The Sales Act, 1974, Special Legislative Supplement to The Democratic Republic of The Sudan Gazette No., 1162, op. cit., p. 397.

[89] Atiyah was then a Senior Lecturer and Head Department of Commerical Law, University of Khartoum. His book on Sale of Goods was and still is a text book on the subject at the Law Faculty, Univ. of KH.

[90] S.L.J.R., 1957, pp. 107-141.

[91] Ibid., p. 107.

detailed nature of the Act. The final draft was worked out by Dr. Zaki Mustafa and Dr. Mohamed El Fatih Hamid and was approved by Professor Atiyah. The original draft was prepared in English and then translated into the Arabic language.[92] It was said that the Sudanese precedents were the source of inspiration as far as the contents of the Sales Act, 1974 were concerned.[93] These were the same judicial precedents that were criticized in the introduction to the same act as being a very literal reception of English Sale of Goods Law and as being obsolete! This was meant to give the Sales Act, 1974 a local flavour, but it was exclusively English Sale of Goods Act and English jurisdiction that dominated the Sales Act, 1974.

**4) The Agency Act, 1974:-**

The Introduction to the Agency Act, 1974 stated the fact that the Sudanese Courts were always guided within the domain of agency by English Common Law. The Agency Act, 1974 was the first of its kind in the legal history of the Sudan.[94]

The main source for the Agency Act, 1974 was judicial decisions of the Sudan Courts, which were substantially based on English Common Law rules of agency. A second source was the commercial usage that was dominant in the Sudan as far as the rules of agency were concerned. The Agency Act, 1974 was codification of what was familiar and known to the Sudanese Courts[95] and was intended to be conducive to the continuation of English Law as applied in the Sudan. Other subsidiary sources that helped to add to the body of principles of agency and fill in the gaps which were visible upon application, were Islamic Shariah and other Laws, i.e., the Egyptian Civil Code, Abu Dhabi Code, the Indian Law, Tanzanian Law and the principles of English Common Law.[96] It is noteworthy that principles of English Common Law were both a primary source and a subsidiary one. The drafter convinced himself that there was a Sudanese experience apart from English Law which was far from being true as the drafter's own words show.[97] The drafter gave top priority to

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[92] Introduction to the Sales Act, 1974, op. cit., p. 398.

[93] Loc. cit.

[94] Introduction to the Agency Act, 1974, special legis. suppl. op. cit., , p. 430.

[95] Loc. cit.

[96] Loc. cit.

[97] Loc. cit.

such experience and then considered English Common Law principles of agency as a subsidiary source.

**5) The Penal Code Act, 1974:-**

The Criminal Law Ordinance, 1925 and the Criminal Procedure Ordinance, 1925 were both repealed and replaced by the Penal Code Act, 1974 and the Code of Criminal Procedure, 1974. Both Acts remained substantially the same, retaining their blend of English and Indian Law.[98] However, there were a few alterations and emendations here and there. For the first time in the legal development of the Sudan, the Arabic language was the language of the original text of both Acts. Likewise, it was the first time an official Arabic text was drafted for both texts.

There was no offence known as infanticide in the Criminal Law Ordinance, 1925, but the Sudan Courts used to follow English Criminal Law in this respect - in assessing the appropriate sentence.[99] Such an infanticide offence was embodied in the Penal Code Act, 1974,section 253A. This move was a codification of long accepted practice of the Sudanese Courts.

As far as sexual offences were concerned, sexual intercourse with an unmarried girl over 19 years was not an offence if the consent of such a girl was secured. This was still unresponsive to the realities of the Sudanese life. Adultery was considered an offence, but it was drafted in a way that deemed sexual intercourse by a married woman adultery, but not sexual intercourse by a married man with a consenting unmarried girl over 19 years of age.[100] Unnatural offences were punishable regardless of consent.[101] The Penal Code Act, 1974 retained the section which had been used by the British Administration in the Sudan as a pre-text to foil any political resistance. This section punished for what it called abuse of religious and noble spiritual beliefs for political exploitation.[102]

English Law had made a comeback through the 1974 Acts. This was done at the hands of Dr.

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[98] For a detailed account of this aspect see Pt. II, Ch. 3, p. 64 of this thesis.

[99] See decision of Supreme Court in S. G. V. Fatma Mohamed Arman , (AC-CP-607-1967), unreported. This case was cited by Amin M. Medani, "Some Aspects of the Sudan Law of Homicide." J.A.L, vol. 18, 1974, op. cit., p.97.

[100] Sections 429, 430, The Penal Code Act, 1974.

[101] Section 318, Ibid. For a comparison with unnatural offences under the Penal Code, 1925, see Pt. II, Ch. 2, p. 56, of this thesis.

[102] For a detailed account of this section see Pt. II, Ch. 2, p.60, of this thesis.

Zaki Mustafa who once stated that:-[103]

> "We can never be convinced that English Law is void of defects and shortcomings and that it can provide all the fair solutions that are consonant with good conscience, for our problems and cases."

He even went further to say:-[104]

> "If we are convinced that there were political or any other considerations to prevent the application of the Egyptian Law, is it still possible for us to accept these considerations and objections as a justification for excluding Islamic Shariah, custom and local usages? A quick answer to this question could probably be that Islamic Shariah sources were written in Arabic, a language neither read nor understood by the English judges. This objection is easy to refute. The British Administration could have imported the Indian English translations of Shariah, just the way it did with the 'justice, equity and good conscience' provision. If that was done there could have been much less objections and it could have been much more acceptable, since the litigants would be familiar with or had the means to be familiar with the courts procedure and substantive law. That could also put to an end the strange and abnormal legal status from which we kept suffering for years,viz, the existence of the law in the language of the masters who used to apply in a language other than that of the Sudanese people."

One would expect a lawyer with such a candid and firm stance to see to it that Islamic Shariah was applied once it was within his authority to do so. Ironically this same lawyer brought back to life the whole body of English Law that was once applied in the Sudan. Zaki Mustafa did no more than set out in codified and Arabic form the principles of English Common Law, with only

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[103] Zaki Mustafa, "The Civil Law in the Sudan, Its History and Characteristics." op. cit., p. 108.

[104] Loc. cit.

minor modifications. He never considered applying Shariah which he once described as familiar for the Sudanese people. He was mindless of some sections retained from the 1925 Penal Code. These sections are totally incompatible with certain Shariah rules i.e. the punishment for polygamy. It is basically a Canon Law and a Christian concept imposed on Muslims.

The 1974 Acts, being a form of Code, were apt to limit the scope and application of English Common Law to some degree. However, since it was a big fallacy that the Sudanese Courts had settled a jurisprudence of their own, they could still turn for guidance to English Common Law which provided the major part of the flesh, as well as the skeleton of the 1974 Acts. The 1974 Acts witnessed the emergence of a species of English Common Law defined and elaborated through codification. Codification of Common Law subjects like contracts was meant to end a major cause of uncertainty in the sources of lawyers' law while also allowing Sudanese adaptation.[105]

**Section B:-**

**Characteristics of the 1974 Acts are as follows:-**

1. They were all claimed to be drawn from the Sudanese judicial experience.
2. They were a codification of the principles of English Law.
3. They were meant to be flexible and simple enough to allow reasonably educated laymen to understand their contents.
4. They were mostly prepared by one man.
5. Arabic was considered to be the language of the original texts for the purpose of interpretation.
6. They were Arabicization and codification of English Law and an elimination of unsuitable rules of English Law.

[105] Cliff Thompson, "The Formative Era of The Law of The Sudan". S.L.J.R., 1965, p.504.

7. Some sections of these Acts bore little resemblance to English Law. They were strongly flavoured with Islamic Law.

## Chapter 4

# DEVELOPMENT OF ISLAMIC LAW MENACES THE DEVELOPMENT AND FUTURE OF ENGLISH LAW IN THE SUDAN

**Section A:-**

**The Judicial Evolution of the Concept of Shariah as a Source of Law**

The introduction of English Law into the Sudan during the Condominium was calculated, inter alia, to preserve the influence which conquerors must maintain to retain power. Lest the religious susceptibilities of the people be offended, the process of introducing English Law was a long and gradual one.[106]

Islamic Law was forced to relinquish its territorial character and was reduced to a personal status law. However, as far as personal matters were concerned, Islamic Law was left intact. This was systematic British colonial policy throughout the then colonized Eastern Islamic countries.[107]

Section 3 of the Civil Justice Ordinance, 1900 provided that personal matters include questions pertaining to succession, inheritence, wills, legacies, gifts, marriage, divorce, family relations and waqf (Islamic Trust). The section also provided that the rule of decision in such instances should be Shariah Law where the parties were Muslims, except so far as it had been modified by custom. Thus Islamic Law was not only confined to personal matters, but was further rated as subordinate to custom. It could, according to section 3 of the Civil Justice Ordinance, be modified by custom, in such a case custom would prevail over the Shariah.[108] Apart from being an anathema to Muslims such legislation was a deliberate limitation of Islamic Law. The Mohamedan Law Courts Ordinance, 1902 organized the Shariah Division of the Judiciary, thus splitting a single and unified Judiciary into two watertight compartments with the administrative dominance vested in the secular divison of the Judiciary.[109] This introduced a clear-cut dichotomy in the system of courts

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[106] See Pt. II, Ch.2, pp. 48, 49 and Ch. 3, p. 59 of this thesis.

[107] J.J. Gow, "Law and the Sudan". S.N.R. vol.XXXIII Pt. 1, June 1952, p. 304 where the author quoted Alexander Dow, a Lieutenant Colonel in the Service of the East India Company in 1772 as making the above mentioned statement.

[108] Section 5 of the Civil Justice Ordinance, 1929 replaced section 3 of the repealed Civil Justice Ordinance, 1900 to the same effect. The enactment that Customary Law would prevail over Islamic Law was an anathema to Muslims.

[109] Bonham Carter the then Legal Secretary of the Sudan was of the opinion that the 'qadis', 'Shariah judges' were of low standard. He said, "the salaries paid to them are wretched and would be disgraceful if regarded as a normal salary for a legal

and an almost equally palpable dichotomy in the law which they applied.[110] However, Shariah Courts were theoretically competent to decide upon any question other than personal law, provided that all parties, whether Muslims or not, made a formal demand to be bound by a ruling in accordance with Islamic Law.[111] Conflicts of jurisdiction between the Civil and Shariah Courts were to be decided by a council consisting of the Legal Secretary, the Grand Qadi and the Judicial Commissioner.[112] The qadis followed the Hanafi school of fiqh in their decisions. Efforts to extend the jurisdiction of the Shariah Courts beyond personal status of Muslims to cover land matters, were adamantly resisted by the British Administration. Due to the shortage in the number of qadis, many cases which were supposed to be settled by Shariah Courts, were settled by the British inspectors![113] The dichotomy in the Sudanese Judiciary also created a bifurcated legal profession, one part western trained and the other, Shariah trained. For a considerable time they were worlds apart in outlook and life style.[114] Each part within its own sphere acted without much concern for the other.

The Transitional Constitution of the Sudan, 1956 embodied the already existing duality of the Judiciary Article 93 of the Transitional Constitution, 1956 provided for the divisions of the Judiciary, viz, the Civil Division and the Shariah one. Article 94 of the Transitional Constitution, 1956 provided for the jurisdiction of the Civil Division, whereas Article 95 provided for the jurisdiction of the Shariah Division as laid down in the Mohamedan Law Courts Ordinance, 1902. Article 96 of the same Constitution provided for an establishment of a jurisdiction court to settle conflict of jurisdiction between the two divisions of the Judiciary.

The Judiciary Act, 1958 maintained the dichotomy within the Sudanese Judiciary. The Transitional Constitution of the Sudan, as amended in 1964, also maintained the duality of the

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official..." He added, however, that, "their decisions...though probably wrong in form and possibly in law are based on a knowledge of the people and are usually regarded by them as just." Ironically the English judges were very amateurish and were not legally educated. See Gabreil Warburg op. cit., pp. 125, 131.

[110] J.N.D. Anderson, "Modern Trends in Islam:- Legal Reform and Modernization." Int. & Comp. L.Q. Vol.20, Lond, The Brit. Inst. of Int. & Comp. L. 1971, p. 16.

[111] Section 6(C) of the Sudan Mohammedan Law Courts Ordinance, 1902.

[112] Both the Legal Secretary and the Judicial Commissioner were British subjects. The latter was appointed by the Governor-General and was invariably one of the senior British officials of the Legal Department. See Gabriel Warburg op. cit., p.129.

[113] Ibid., pp. 132-133.

[114] Stephen C. Hicks, "The Fuqaha and Islamic Law." The Am. J. of Comp. L. Vol. 30, The Am. Assoc. for the Comp. tud. of L, Inc., 1982, p. 11.

Judiciary. Even the proposed Constitution of the Republic of the Sudan, 1968 which was generally Islamic, provided for two separate divisions of the Judiciary. This was totally irreconcilable with the distinct Islamic features of that Constitution and was contrary to the recommendation of the Technical Committee for the Constitution, 1968.[115] The duality of the Judiciary was established under the authorization of a long line of enactments. This duality is explained by the colonial historical background in the Sudan. The judges were British who neither knew Shariah Law nor Arabic, the language of Shariah and of the people to whom Shariah was to apply.[116] However, it is puzzling why such a dichotomy should survive so long after the independence of the Sudan. It was only as late as 1972 that the Judiciary Authority Act, 1972 provided for the amalgamation of the separate divisions of the Judiciary in a one- judicial body.[117]

The Constitution of the then Democratic Republic of the Sudan, 1973 provided that the administration of the Judiciary is exclusively the function of an independent body which shall be called 'The Judicial Body'.[118] The same principle was echoed in the Judiciary Act, 1982 when section 4 of the same act provided that the judicial authority in the Sudan shall be entrusted to a one-judicial body called the 'Judicial Body'. This 'Body' shall be directly accountable to the President of the Republic for the conduct of its affairs.[119] The same section was re-enacted in section 4 of the Judiciary Authority Act, 1983. However, it remains a fact that the amalgamation of the two distinct divisions of the Judiciary is a landmark in the legal history of the Sudan and was long awaited. It brought to an end a British colonial legacy that lingered long after the British departed from the Sudan in 1956. It was Wingate who fathered the duality of the Judiciary in the Sudan, thinking that by so doing, the British Administration had established something that was acceptable to the Sudanese people.[120]

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[115] The Technical Committee for the Constitution, 1968 strongly recommended the unification of the Judiciary if Islamic Law was to be the source of legislation. See the Memorandum of The Technical Committee for The Constitutional Studies about the proposed Constitution of the Sudan, 1968. Kh. Univ. Press, The Repub. of the Sud., 1968, p.46.

[116] Natale O. Akolawin, "Islamic and Customary Law in the Sudan, Problems of Today and Tomorrow." 'Sudan in Africa'. Studies Presented to the First International Conference Sponsored by the Sud. Research Unit, 7-12 Feb.1968, edited by Yusuf Fadl Hasan, Kh. Univ. Press, 1971, p.286. However, it still remains true that ignorance of the Arabic language should be no excuse for the British judges not to apply Islamic Law. They could use the Indian translations used by their counterparts in India, but somehow they chose not to. For a detailed account of this issue see part IV, ch. 3, p.200 of this thesis.

[117] Pt. II, section 3.1 of the Judiciary Authority Act, 1972.

[118] Pt. VIII, Ch. 1, Art. 185 of the repealed Const. of the Democ. Repub. of the Sud., 1973.

[119] The Judiciary Act, 1982 repealed the Judiciary Act, 1976 and was in turn repealed by the Judiciary Act, 1983.

The Judiciary Authority Act, 1972 consolidated the Sudan Judiciary and it so remained after a long history, 72 years, of a clear-cut dichotomy. This consolidation dealt a hard blow to the long dominance of the Civil Division of the Judiciary over the Shariah one. Instead of the uneasy co-existence of two jurisdictions, the secular division of the Judiciary administering Civil and Criminal Law had, for the first time in the legal history of the Sudan since the Condominium, 1899, been put on an equal footing with the Shariah Division.[121] The consolidation of the Judiciary is also significant in that it prepared the ground for a later unification of law.[122] It also compelled a change in the educational programme that had provided separate lines of studies for prospective Shariah and civil lawyers.[123]

**Section B:-**

**Shariah as a Source of Law**

From the fall of the Mahdist state and the beginning of the Condominium rule, Shariah ceased to be the source of law. However, since then occasional reference to Shariah as a source of law have been made by the different courts in the Sudan.

The case of Yanni Krithary V. Mariam Bint Dasta ,[124] was one of the early instances where a rule of Shariah was discussed, albeit, very briefly. This was a suit for the maintenance of illegitimate children who were the result of cohabitation. Dun, C.J., after examining the relevant laws of England, Holland, Scotland, U.S.A., France, Switzerland, Greece and of Roman Law, arrived at the conclusion that "the Roman Civil Law and particularly the whole of modern European Law and Islamic Law were against awarding the mother any sum for the maintainance of

[120] Gabriel Warburg, op. cit. , p.125.

[121] The duality of the court systems did not exist in British India, probably because of the existence of laws of various communities. Such laws were applied by British judges aided by the so called 'law officers' who, in case of Muslims were a kin to the 'Muftis', juris-consults. Although the British grafted the legal experience they gained in India on the Sudan, they did not show the least interest in having a one-judicial body in the Sudan.

[122] When Islamic Law was restored in 1983, the Judiciary was already a one consolidated body.

[123] The merging of the Shariah and Civil Division Courts into one system was invited particularly by the acadamic community. The late Mohamed Salih Omer of the University of Khartoum, Faculty of Law (Shariah Department) made a study of the consolidated Egyptian system. Natale O. Akolawin of the same Faculty of Law (Civil), ironically for a different motive, was also an advocate of a unitary system of courts. It is worth mentioning that at the African Conference on Local Courts and Customary Law (Dar es-Salaam, Sep. 9 19, 1963), The Sudan took the lead in urging the elimination of this dichotomy. See Natale. O. Akolawin, Loc. cit. and Cliff F. Thompson, "The Sources of Law in the New Nations of Africa:- A Case Study from the Republic of the Sudan." op. cit., p.1171.

[124] Ibid.

her illigitimate children''. Dun, C.J., decided against Islamic Law and European laws other than English Law. He decided according to English Law. However, as far as Islamic Law was concerned Dun, C.J., made a courtesy remark. He stated that:-[125]

> ''The facilities which Muslims enjoy as regards marriage and divorce..., makes cases such as these so rare as to be negligible; the free concubine or mistress as distinguished from...the professional prostitute may almost be said to be non-existent among Muslims.''

Dun, C.J., examined Shariah as a source of law, but did not follow it.

In the case of Mariam Abdulla Yusif Abagi V. Administrator of the estates of Abdulla Yusif Abagi , [126] it was decided that the Civil Courts have jurisdiction to decide, with the assistance of the Shariah Courts, on the question whether a valid Islamic marriage was formed, and whether this would give a daughter to such a marriage, rights of inheritance.

Shariah was considered as a source of law in the case of Fatima Bint Mohamed and Salih Abbakar Mohamed El Hakim V. Newidas Abdulla. [127] Bell, C.J., stated that:-

> ''The parties are both Muslims, and for this reason, and as the parties were husband and wife, we have thought it desirable to ascertain what view the Islamic Law would take of such a case.''

The Court of Appeal in this case looked to Shariah on the question and applied an Islamic Law rule that if the wife showed reasonable cause for having spent such sums as were reasonable in the circumstances and, took an oath that she had actually spent such sums, then the husband would accordingly be estopped from claiming anything from her. Shariah substantive and procedural rules were observed in this case.

Reference to Islamic Law was made to support the rule in Heirs of Mariam Bint Boulos Saleeb V. Heirs of Boulos Saleeb [128] Cutter, J., stated that:-

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[125] Loc. cit.
[126] (AC-APP-26-1926); I S.L.R., Ibid.
[127] (AC-APP-27-1927); I S.L.R., Loc. cit.
[128] (AC-REV-17-1932); II S.L.R. 1969, Ibid.

"The exclusion of the heirs of a deceased daughter is not peculiar to Coptic Law. It is a rule in many other countries and is also the rule in Mohammedan Law. It would, I think, be dangerous to hold that merely because the rule does not apply in English Law that we therefore ought to exclude it."[129]

In the case of Heirs of Ibrahim Ahmed Alim V. Heirs of Fatima Bint A. Magboul ,[130] Flaxman, P.J., referred to Shariah as a source of law in the following context:-

"Judgement is accordingly entered in favour of Estate of Ibrahim Ahmed Alim for a total sum of Pounds LE.85.077 m/ms against the defendant heirs, each of them to have several liabiity to repay the proportion of this sum which represents their share under the Shariah Law of inheritance."

Khadija Bint Ali Hamed Beshir V. Beshir Mohamed Hamed ,[131] was another instance when Creed, C.J., decided that land owned by a Muslim infant may not be sold by the guardian without first obtaining the approval of the qadi of the Shariah Court. This was a rule of Shariah observed by Creed, C.J.,

In Nur El Huda Abdel Ghani V. Omer Hasan ,[132] the Civil High Court held that there was no cause of action in Islamic Law for the breach of a promise to marry. This case was stated by the Shariah High Court, i.e., referred to it for a decision. The ruling of the Shariah Court so obtained is binding on the Civil Court.

Generally the Sudanese Courts took judicial notice of the rules of Shariah in criminal cases. In Sudan Govt. V. Babikir Mohamed Mabloul ,[133] the court took judicial notice of the evidence necessary in Shariah to prove a divorce.

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[129] It is valid that according to the majority of the Fuqaha, the heirs of a deceased son or daughter are excluded from the inheritance of their grandfather or grandmother, but on the other hand some other fuqaha, albeit, a minority, among whom the famous Ibn Hazm is one, were of the opinion that such heirs are not excluded. They are entitled to the share that could have been due to their father or mother if he or she were to outlive the testator. If the testator were to outlive his/her son or daughter and the son or daughter had direct decendants, viz, sons or daughters, then it would be deemed that the testator had made a bequest for such direct decendants of his deceased son or daughter. Such a presumed bequest is best known as 'The Obligatory Bequest'. It was introduced into the Egyptian legal system through the Bequest Act, No., 71, 1946.

[130] (HC-CS-69-1933); II S.L.R., op. cit., pp. 43-47.

[131] (AC-REV-30-1937); II S.L.R., op. cit., p. 265.

[132] (1953) Digest No. 24; S.L.J.R., 1957, p. 154.

[133] S.L.J.R., 1956, p. 36.

In civil suits the practice was to state such suits to Shariah Courts when a Shariah rule was involved. A fatwa, Islamic legal opinion, could possibly be obtained from the Grand Qadi or a competent Shariah judge.

In Heirs of Ahmed Khidir Nuqud V. Heirs of Neima Khidir ,[134] the Civil Court took judicial notice of the Shariah inheritance rules and gave effect to them, holding that as the two sisters were the true Shariah heirs, their possession was 'adverse' to the registered owner, and not one ''in a fiduciary capacity''. Thus the Civil Court took judicial notice of the Shariah rules of succession and also the legal nature of the heirs rights' in Shariah as not being merely 'usufructuary' or 'fiduciary' rights, but those of vested ownership from the moment of the testator's death.[135]

The previous suit was one of a number of suits where the Civil Court honoured and observed a Shariah rule and implicitly refused to accept any modification of such Shariah rules by custom.[136] Ali Saeed Deif V. Abdel Rahim Saeed Deif ,[137] was another such instance where the Civil Court decided according to Islamic Law that a Muslim co-heir who occupied a house forming part of the inheritance by agreement with the other heirs, was under no implied obligation to pay rent, and he could not have acquired the house by prescription.[138]

In Hasan and Gaafar Abdel Rahman V. Sanousi Mohamed Sir El Khatim ,[139] the Civil Court decided according to Shariah that a Muslim wife is entitled to be provided with a separate house from that in which her husband's other wife or wives reside. As well, the fact that she accepted before to share a house with the other wives of respondent does not absolve her husband from his legal obligation to provide her with a separate house if and when she wants it.

With the increase of Sudanese judges there was a steady increase in observing Shariah as a source of law. In the case of S. G. V. El Amin Adama Mohamed ,[140] M.I. an- Nur, J., mentioned a

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[134] (AC-Revision-117-59); S.L.J.R., 1959, p.53.

[135] Ibid., p.110.

[136] According to section 5, of the Civil Justice Ordinance, 1929 Shariah Law was to be applied in matters of personal law for Muslims in as far as it was not modified by custom.

[137] (AC-Revision-144-59); S.L.J.R., 1959, p.55.

[138] Ibid., p.110.

[139] (AC-Revision-122-1959); S.L.J.R., 1969, p. 33.

[140] (AC-CP-244-1957); S.L.J.R., 1960, pp.83. 139.

rule of Shariah Criminal Law as a persuasive authority. He said:-[141]

> "Last but not least, because the rule in Shariah Law is that a father who kills son or daughter in whatever circumstances should in no way be hanged for it. I mention this rule of Shariah Law as persuasive, since we have no fixed rule of law indicating exactly whether the sentence of death should necessarily be executed."

In Ali El Hiwaires V. Mohamed Ramadan ,[142] it was held per M.I. an-Nur, J., that a Shariah Court decision on the question of the validity of a gift between Muslims was final and binding on the Civil Court and was not advisory.

Heirs of El Niema Ahmed Wagealla V. El Haj Ahmed Mohamed ,[143] was a landmark in observing Shariah as a source of law. The importance of this case lies in the strong statement by Babiker Awadalla, J., He said:-[144]

> "In the case under consideration the same injury which resulted in death was the cause of the pain to which the deceased was subjected before her death and therefore, in accordance with the Shariah ruling given above the Grand Qadi, the right of the deceased to receive compensation in respect of it is inheritable by her heirs. It may be said that it would be highly anomalous to allow Muslim estates to be inflated through the operation of a rule of law the recognition of which, in case of non-Muslims, was denied by the Wills and Administration Ordinance. This may be true, but the question is wholly governed by the personal law of the deceased and if Islamic Law recognizes such a progressive principle (which in England was only adopted in 1934), I cannot see why Muslim heirs should suffer for no reason other than lack of foresight on the part of the legislature in incorporating into the Wills and Administration Ordinance an archaic principle of English Common Law which is void of all reason."

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[141] Ibid., p. 85.
[142] (AC-REV-240-1958); S.L.J.R., 1960, p. 136.
[143] S.L.J.R., 1961, Ibid.
[144] Ibid., p. 223.

Shariah was not only referred to as a source of law; it was also described as progressive pro hac vice. On the other hand English Law, which was at its pinnacle then in the Sudan was boldly described as 'archaic' and "void of any reason" as far as this case was concerned. The legal principle that tortious actions survive if a claimant dies, to be brought by his estate, was known to Islamic Law 1200 years before it was known by English Law, only to be adopted by the latter in 1936. Before that date the rule of English Common Law was "Actio personalis moritur cum persona".

The Wills and Administration Ordinance 1928, S.40, prohibited survival of tortious actions. This Ordinance, like the rest of the legislation passed during the British rule in the Sudan, adopted the law then existing in England, without the least consideration of whether such legislation was suitable to the Sudan with all its Shariah heritage. They were deemed just and sensible merely because they were the Law of England.[145]

The Court of Appeal in this case evaded the Wills and Administration Ordinance 1928 and applied Shariah Law. The rule which formed ratio of the decision on the question of survival of tort actions was a rule of Shariah Law. However, if any argument were needed to abolish the Wills and Administration Ordinance 1928, it was Babiker Awadalla, J.'s, words that S.40 of the same Ordinance, is "an archaic principle of English Common Law which is void of all reason."[146]

The failure to provide a sensible rule in England found its way to an Ordinance in the Sudan, whereas a progressive and sensible rule of Shariah could not.

The Pre-emption Ordinance, 1928 was one of the exceptions to the general rule that the Sudanese legislation copied English counterparts. The Pre-emption Ordinance, 1928 was imported from India, but originally it was a Shariah concept. In Tammam Huds V. Ahmed Mohamed Abdalla and another ,[147] A.A. Bitar, J., resorted to the source from which the Pre-emption Ordinance, 1928 was enacted. He said:-[148]

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[145] David L. Perrott, "A Note on the Case of Heirs of El Neima Ahmed Wagealla V. El Haj Ahmed Mohamed ,S.L.J.R., 1961, p. 280.

[146] Ibid., p. 285.

[147] (HC-CS-63-1959 'Medani'); S.L.J.R., 1962, p. 61.

[148] Ibid., p. 62.

"Furthermore the Pre-emption Ordinance provided for the sale of property. Property is defined therein to mean immovable property. The general and natural meaning of immovable property can never include the leasehold interest in the immovable property. In giving this interpretation to the Pre-emption Ordinance I had to resort to the source in the light of which the Ordinance was enacted, which is the Muslim Law, which provides that there must be full ownership in the land pre-empted. I refer to Fyeez, Outlines of Mohamedan Law, S.58 (A) (1) at 289 (1949):- 'There must be full ownership in the land pre-empted, and therefore the right to pre-empt does not arise on the sale of leasehold interest in the land."

The decision of the Civil Court in the above case rested squarely on Islamic Law.

In Heirs of El Tayeb El Melik V. Ahmadiya Zawya ,[149] the Court of Appeal held that the Answer of the Grand Qadi to the question posed by the Court of Appeal that the relief sought by plaintiff was for the constitution of a 'waqf' within the meaning of Civil Justice Ordinance, 1929, S.38, is binding on the Court of Appeal.

The Appeal Court went on to state that:-[150]

"Awaqf, which is a peculiar institution of Islamic Law, is entirely different from the English Law conception of a Trust. In their creation, operation and extinction, the two institutions are entirely different."

The Appeal Court decided that the court below had no power to grant the relief it did by constructive trust since the parties to the suit were both Muslims.

Nicolas Stephanon Stergion V. Aristea Nicolas Stergion ,[151] is a notorious case in which the plaintiff and defendant were married in the rites of the Greek Orthodox Church. The plaintiff converted to Islam and lived separately from his wife. He brought the suit for custody of the children. M.Y. Mudawi, P.J., decided the case according to "justice, equity and good conscience". In order to arrive at such a decision he had to draw from three sources, mainly English Law, Greek

[149] (AC-REV-262-1961); S.L.J.R., 1962, p. 135.
[150] Ibid., p. 138.
[151] (HC-CS-240-1961); S.L.J.R., 1963, Ibid.

Orthodox Canon Law and Shariah. Mudawi, P.J., awarded custody of the children to the father. He stated:-

> "At the inception of the marriage I can say that both parties had the rules of Greek Orthodox Religion in mind, but today at least the father holds different views. The father is a Muslim and he prefers to be judged according to the rules of Shariah. In a country like ours where the family connections are close and the father occupies a position only excelled by the position of the Roman 'Pater Familias', it is only logical that any faith professed by the father is bound to mould and control the way of life of the children and go a long way in shaping their future concepts and beliefs. Besides Shariah is accepted law of the domestic relations of the community in which the children of this marriage are going to be brought up. This being the case, I must say, confronted with the choice between Greek Canon Law and the Shariah, I have to choose the latter."

Mudawi, P.J., decided in this case that English Law was alien and would not lead to a fair and just solution to the problem. He decided on the basis of Shariah, and in so doing he took judicial notice of the relevant rules of Shariah. He stated:-[152]

> "As Shariah is part of our law, its rules can be judicially noticed and no expert evidence is required. According to Shariah the mother has the right of custody up to the age of seven in the case of male children and up to the age of eleven in the case of females."

This was a rare instance where a Civil Court equated Shariah with the principles of "justice, equity and good conscience". The court felt so familiar with Shariah that it decided to do without expert evidence on Shariah.

In Ahmed Abdalla Hasan V. Haj Abdalla Mohamed Haj Ahmed and another ,[153] the court received Islamic Law in aid of interpretation of the Pre-emption Ordinance, 1928 such aid was considered advisable by the court because the main principles and concepts of the Pre-emption Ordinance were derived from Islamic Law.

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[152] Ibid., p. 185.

[153] (AC-REV-53b-1966); S.L.J.R., 1969, p.7.

In Mohamed Ahmed Khalifa V. Mohamed Hamad Ahmed ,[154] the court drew from Islamic Law to decide on a pre-emption suit. Mahdi Mohamed Ahmed, J., said:-

"The Hanafite doctrine applied by the Shariah Courts of this country denies the existence of such a right on the sale of buildings except in the case of two-storey buildings by way of 'Istihsan', preference".

In S. G. V. Abdalla Mari Mohamed ,[155] the Major Court passed a life imprisonment sentence on accused instead of the death penalty. The court relied on the tradition of prophet Mohamed to the effect that a father can never be executed for killing his own child. The court went on to support its rule by saying that prophet Mohamed is the créme de la créme of the Islamic Ummah, nation, and he would not utter anything absurd. The principles set by the prophet were revelation. The court stated that ignoring this tradition of the prophet would hurt the whole Ummah. The Appeal Court confirmed the above statement but questioned the jurisdiction of the Major Court to alter the sentence from a death penalty to life imprisonment. It was imperative on the court to pass a death sentence once a verdict of guilty was entered in a murder case.

The Islamic rule that was considered in the case of Heirs of El Niema Ahmed Wagealla V. El Haj Ahmed Mohamed ,[156] became a legal precedent and was binding on the Appeal Court in the case of El Sir Osman and others V. Heirs of Salih Abdel Rasoul. [157] In this case the court decided that damages for pains survive the deceased if it was part of a judgement before the deceased's death; it does not survive if the court has not settled until the death of deceased except when it is specified and considered when the judgement is rendered.

The Supreme Court, in the case of S. G. V. Abdel Muntalib Yasin Salih ,[158] confirmed the decision of the Appeal Court and stated that:-

"I agree with the opinion of the Court of Appeal rejecting the opinion of the Indian jurists

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[154] (AC-REV-548-1967). S.L.J.R., op. cit., p.46.
[155] (AC-MC-817-1969); S.L.J.R., 1970, p.12.
[156] S.L.J.R., 1961, Ibid.
[157] (AC-REV-431-71); S.L.J.R., 1972 op. cit., p. 146.
[158] (SC/Cr. Cass/76/74); S.L.J.R., 1974, p.40.

that the husband (and not the father) is the person injured by the defamation of the wife. That was just a view taken by an Indian jurist, which cannot be accepted in the light of Sudanese convictions and traditions which allow no margin for such a theory to precipitate in our judicial heritage.''

This was an instance whereby Shariah was observed and Indian Law was rejected as being repugnant to Shariah. The principle was emphasized in the case of S. G. V. Mohamed Badawi El Sheikh ,[159] when the Supreme Court decided that:-

> ''...The accused was a lover to that woman. If that was so, then Indian authorities say that such a person may be provoked by the conduct of his mistress because Indian commentators regard the question of provocation as a psychological matter where there is no distinction between a husband and a lover. See Gour, Penal Code, 8th. Ed., (1968) at page 1975. We refer to this matter out of academic interest, because we reject this position taken by the Indian commentators because it is inconsistent with the values, morals and religion of our society.''

The Sudanese Courts became more critical of English Law and Indian Law, and more aware of the legal principles of Islamic Law and more faithful to the convictions and traditions of the Sudanese people.

In the case of Mohamed El Hasan Mohamed Fadl V. Mohamed Amir Bashir and others ,[160] the Supreme Court arrived at a conclusion that what English Common Law has established as a principle of estoppel was already an established rule in Shariah; it stated the famous fiqh maxim:-

> ''He who seeks to rescind what he did with his own hands 'free will' shall be denied such recission.''

The Court of Appeal in the case of Amna El Khalil Sulaiman V. Haseib Babiker and another ,[161] supported its argument with the Hanafi school of fiqh definition of mortal sickness, ''Marrad El Moat'', which runs as follows:-

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[159] (SC-Maj. ct. 82/1975); S.L.J.R., 1975, p.44.
[160] (SC-CP/161/1975); S.L.J.R., op. cit., p.174.
[161] (AC-CA-855-1975); S.L.J.R., 1975, p.288.

"Mortal sickness is one where the fear of death will be most probable and the sick person will be incapable of looking after his own affairs outside his home in case of a male or inside her home in case of a female, and he or she dies before the lapse of a one complete year from the beginning of such a sickness."

The case of Taj El Sir Abdallah V. Mirgani Abdalla and others ,[162] reflects the response of some Supreme Court judges to the issue of observing Shariah rule. Two judges out of three in this case fully accepted a Shariah rule of evidence. They stated that:-

"The criteria in admitting evidence according to the rules of Islamic Shariah Law is the lack of self interest in what the witness testifies. Once there is a personal interest then his testimony is inadmissible. A witness should not be a decendent or an acendent of the person in whose favour he testifies, neither should there be a marriage bond between the two."

Whereas the president and one member of the Supreme Court circuit that dealt with the case at hand, approved of the foregoing Islamic evidence rule, the third member dissented and stated that the Civil Courts should not abide by the Shariah rules of evidence, but rather the evidence rules that were observed by the Civil Courts, viz, Indian and English evidence rules. However, the other two members went a little bit further and stated that the court of first instance and the court above it were supposed to know the rules of fiqh especially the Hanafi one as far as the issue at hand (Gifts) was concerned, whether such rules are substantive or procedural.

In the case of Abdel Hamid Mahmoud El Gousi V. Ahmed El Hadi Mohamed Ibrahim ,[163] the Court of Appeal stated that the origin of the pre-emption is found in Islamic Shariah. The Appeal Court examined the Hanafi school of jurisprudence which states that pre-emption establishes a cause of action, though Imam Abu Hanifa himself was not of such an opinion. The two Imams, Malik and Ahmed Ibn Hanbal, were not of the opinion that pre-emption establishes a right to litigate.

Once again the feud between the pro-Shariah judges and the English Law oriented judges was illustrated in the case of The Public Insurance co. V. Heirs of El Sheikh Mohamed El Hasan. [164]

[162] (SC-C-Cass-117/1976); S.L.J.R., 1976, p.172.
[163] (AC-CA-943-1976); S.L.J.R., op. cit., p. 507.
[164] (AC-REV-583-76). Ibid.

Bakri Sir El Khatim, Appeal J., who presided the Appeal circuit dealing with the case at hand, stated that:-

> "Since 'Dyiah' is established in Islamic Shariah and since Article 9 of the Constitution states that Islamic Shariah is a main source of legislation, and since we have no written law to settle the question of damages, I am of the opinion that we should abide by the rules of 'Dyiah' to the extent that does not contradict with any Sudanese written law..."

The same judge regretted the fact that the question of damages had never been discussed in the light of Shariah.

Mahmoud Mohamed Saeed Abkam, J., who was a member of the same Appeal circuit was quick to state that:-

> "I am not a supporter of the fanatic following of the teachings of Islamic Shariah particularly at a time when the Muslim scholars have admitted that the religious teachings gave way to the legislation to organize the different developed and complicated aspects of life and the teachings of Shariah have willingly accepted to be a source of legislation and not the legislation per se."

This judge did not take the trouble of mentioning the name of a single Muslim scholar who has admitted that Shariah is incapable of organizing the different developed and complex aspects of life. He also took the liberty to incorrectly state that:-

> "Shariah has accepted with satisification to be a source of legislation and not the source of legislation."

He took the stance of echoing the stereoptypical bias against Islamic Law and chose to be a fanatic and slavish follower of English Law.

The third member of the Appeal Court took his stance right in favour of English Law, but he was less blunt than the second member. He stated that:-

> "I do not know for how long shall we suffer from the complex that English Law disintegrates our convictions and values and ignore the fact that our Judiciary had through years of long

practice, been able to mould English Law into a Sudanese shape to the extent of being real Sudanese. Too often the Sudanese Courts rejected English Law when there was no justification to follow it."

The case of S. G. V. Daw El Beit Ahmed El Nadif ,[165] is significant as it was handled by a circuit presided by the Chief Justice. The court in this case resorted to the Shariah rules of evidence relating to the testimony of minors who have not attained the age of puberty. The Supreme Court arrived at a conclusion that it is just right to follow the guidance of Islamic Shariah. Unfortunately the ruling of the Supreme Court is inconsistent with the materials on which it relied for such a rule. The court examined the Hanafi viewpoint which excludes the testimony of a minor under the age of puberty or under 15 years of age. It also examined the Maliki viewpoint which does not exclude such a testimony. The Maliki fiqh is of the opinion that exclusion of such a testimony is a great loss and a loss of cases that could have been proven by such a testimony. However, Malik has certain conditions to accept such a testimony, among them the need for corroboration for the testimony of the minor under the age of puberty. Malik's view point was later supported by Ibn El qaim, a Muslim jurist.

The Supreme Court arrived at a conclusion that Shariah rejects the testimony of the minors who have not attained the age of puberty. Such a conclusion ignores the Maliki viewpoint which makes more sense than that of the Hanafi. The Supreme Court was caught on the horns of a dilemma. On the one hand they opted for the inadmission of the testimony of a minor not attaining the age of puberty, and on the other hand the Supreme Court was bound by section 214 of the Criminal Procedure Act, 1974 which admits the testimony of the minors not attaining the age of puberty. The Supreme Court thought to reconcile the two by requiring a corroboration for such a testimony. With such a compromise, they betrayed the Hanafi viewpoint that rejects the testimony of minors not attaining puberty or the age of 15 altogether. The Supreme Court could have opted for the Maliki fiqh viewpoint that accepts such a testimony, but stipulates corroboration among other stipulations. If it did, then the Supreme Court would have been consistent and faithful to both

[165] (SC-Maj.C./142/1976); S.L.J.R., op. cit., p.564.

Shariah Law and section 214 of the Criminal Procedure Act, 1974.

In the case of S. G. V. Beleila Khalifa Nimir ,[166] the Supreme Court, in its note to the president of the Sudan, on the prerogative of mercy, stated the following:-

> "Islamic Shariah permits pardon in murder cases with or without compensation, i.e., 'Dyiah'. The Permanent Constitution of the Sudan makes Shariah a main source of law in the Republic of the Sudan. We submit that it is appropriate under the circumstances for the President of the Republic to be guided by the rules of Shariah in cases not provided for by the law."

The Court of Appeal in the case of Nabawyia Ibrahim V. Sir El Khatim Osman ,[167] decided that since The Contract Act, 1974 did not provide for Bailment Contracts, it would resort to the other legal sources, i.e., Islamic 'fiqh' in accordance with S.6 of the Civil Procedure Act, 1974. The Appeal Court arrived at a conclusion that according to Islamic 'fiqh' the Bailee is under obligation to hold the bailed property and protect it against any damage. Subsequently, he is entitled to ask the owner to pay him all the expenses he incurred to keep the bailed property safe and sound.

The Supreme Court, in S. G. V. Awad Mekki Mohamed Khalil ,[168] decided according to Shariah that if the witnesses are known for their corruption then they have to be numerous in order to corroborate each other. If the testimony of such witnesses is contradictory, then it is inadmissible. Omer Bakheit El Awad, J., stated in this case that in the absence of any Sudanese precedent dealing with the veracity of witnesses and when the rules of evidence do not provide for such a condition, it becomes imperative to draw from the legislative source that is specified by the legislation, viz, Islamic Shariah.

The trend to draw from Islamic Law steadily increased in the late 70s and early 80s, particularly at the level of the Supreme Court and Appeal Court. There were frequent legislative measures and authoritative judicial decisions in reference to Shariah as a basic source of law.

In the case of Mahjoub as-Sayed Ali Jad V. El Lagiyah at-Tahir ,[169] it was decided per

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[166] (SC-Ct./Maj.-35-1976); S.L.J.R., op. cit., p. 31.

[167] (AC-C.Cass.-337-76); M.L. Bull., Jan., and Feb., 1977, p. 87.

[168] (SC-Ct.Maj.-114-1979); M.L. Bull., July-Aug. Sep. 1980, p. 30.

[169] (SC-C.Cass-134-1980); Q.L. Bull., Oct., Nov., Dec., 1980, p.54.

Farouq Ahmed Ibrahim, J., that:-

> "The court cannot close its eyes to the realities of the Sudanese family life and its distinctive features such as the love and care we owe to our parents especially when they are senior citizens. This is because the court does not work in a vacuum. It derives its justice from the heart of the traditions of our society. A court is instrumental in reflecting these traditions and making people adhere to such traditions."

The Supreme Court in the case of Osman Haj ad-Daw and another V. Abdel Rahim Haj ad-Daw ,[170] decided that the origin of pre-emption, 'Shufah', is an Islamic Law and it is proper to resort to it in pre-emption suits, since it is an estabished practice to fall back on the law from which Sudanese legislation draws. The Supreme Court decided according to the Hanafi school of fiqh that the neighbourhood which establishes the right to pre-empt is the annexed or next neighbour.

The Court of Appeal, in the case of F. B. S. V. N. G. F. ,[171] strongly favoured Shariah as a basic source of legislation. Dr. Bushara Ibrahim, J., said:-

> "...Why should we go far when we have in Islamic Shariah such noble principles that have enriched the tortious liability and invasion of privacy affecting persons and property. It is not unusual to employ such Shariah principles in the case at hand since we are within the domain of public and not personal law. However, if the personal law for non-Muslims contravenes the principles of justice, equity and good conscience or if it fails to cover the case ready at hand then the court can cast it aside and apply the principles of Shariah without feeling at fault."

The Appeal Court in this case stated that Shariah protected the 'privacy' much earlier than any other legal system.

In the case of Mohamed Osman El Zubair et. al. V. Osman Mahmoud Hamid ,[172] the Court of Appeal decided that according to Shariah the age of discretion is seven years. As the deceased was a young girl only 6 1/2 years old, she could not be guilty of contributory negligence. She did not

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[170] (SC-C-Cass-119-1981); Q.L. Bull., July, Aug. Sep., 1981, p.88.
[171] (SC-C-Cass-235-1976); Q.L. Bull., Oct., Nov., Dec., 1981, p.94.
[172] (SC.C. Cass.-112-1982); Q.L. Bull., Oct., Nov., Dec., 1982, p.63.

possess sufficient reason to guard after her own safety.

**Section C:-**

**Legislative Evolution of the Concept of Shariah as a Source of Legislation**

The 1956 Constitution of the Sudan did not provide for the sources of legislation. However, a year after the independence of the Sudan the Deputy Attorney - General addressed the Permanant Under - Secretary of the Ministry of Foreign Affairs who sought a legal opinion from the first on "Marriage of Belgian Nationals and persons of Sudanese status." He stated emphatically that:-[173]

> "Because the Sudan is an Islamic country, the Islamic Law governs such marriages between Sudanese and others."

The 1958 Draft Constitution of the Sudan, which was not endorsed because of the 1958 coup d'etat, declared Islam the official religion of the state, but again it did not provide for the law to be applied.[174]

The National Charter, 1964 provided for an establishment of a committee to draft new laws conforming with Sudanese traditions. There was then a consensus among the effective political parties to subject the legal legacy of British colonialism in the Sudan to severe critical scrutiny and make new laws reflecting the values, tradtions, Islamic culture and the socio-economic conditions of the Sudan.[175] As a result of that pressure a national committee for the Constitution was set up. The Committee to draft the Constitution was reconstituted in 1968. It could produce the Draft Constitution of the Republic of the Sudan. By and large, the profile of that Draft was Islamic. Apart from the Islamic concepts that were reflected through that Draft Constitution, it was for the first time since the Comdominium that Islamic Shariah was considered 'The main source of the state laws'. [176] The same Draft provided that any provision in any law passed after that Draft was ratified which contravened any rule of the Qur'an or Sunnah should be declared void, except when such a

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[173] Natale Olwak Akolawin, "Personal Law in the Sudan - Trends and Developments." J.A.L. 1973, op. cit., p. 174 where the author quoted:- M.J./Legis/28-1 dated April 17, 1957.

[174] Loc. cit.

[175] Ibid., p. 175.

[176] Art. 113 of the Draft Const. of the Repub. of the Sud. 1968.

contravention basically existed before that Draft Constitution was ratified.[177]

Article 115 of the Draft Constitution of The Republic of the Sudan, 1968 provided the following:-

> "The State shall enact legislation that shall amend all the laws which contravene any rule from the Qur'an and Sunnah. Such legislation shall also give the force of law to the once suspended rules of Shariah; provided that such legislation shall come into force as gradually as necessary and according to the Legislature discretion."

The Draft Constitution of the Republic of the Sudan, 1968 Bill was not ratified because the political regime was toppled and an authoritarian regime was imposed on the Sudan in May, 1969. The May coup d'etat was a calculated political move by the Communists, the Arab Nationalists and a handful of secular military Officers, to combat any attempt to ratify a Constitution with basic Islamic features. Ironically the leader of the May coup who declared that it was his top priority to scrap that Constitution and in fact did so[178] was the very person who later restored Islamic Law in 1983.

When the 1971 Civil Code was introduced, there was an explicit recognition of Islamic Law as a source of legislation. Section 4 of the Civil Code, 1971 provided that:-

> "In the absense of any provision the court shall rule according to the principles of Islamic Law..."

The Civil Code, 1971 derived a number of significant legal principles from Islamic Law.[179] The introduction to the Explanatory Memorandum of the Civil Code, 1971 stated that:-

> "In recognition of the greatness of Shariah as a legal system, the legislature drew heavily from it, and considered Shariah as the first official source for a judge to refer to in cases not provided for by the Civil Code, 1971."

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[177] Art. 114, Ibid.

[178] Dr. Ahmed El Amin El Bashir, "The Relation between Politics and Religion in the Sudan." Al Mustaqbal Al Arabi, The Arab Future, Centre for Arab Unity Studs. Beirut, Lebanon, 77, July 1985, p.114.

[179] See Pt. IV ch. 2, pp. 184, 185 of this thesis.

When the Civil Code, 1971 was abrogated, Shariah was still considered as a source of law, but it ranked after the established Sudanese judicial precedents. Section 7 of The Organisation of the Laws Act, 1973 provided that:-

> "In cases not provided for by any enactment, the courts shall apply the principles that have been judicially established in the Sudan and the principles of Shariah Law and customs and justice, equity and good conscience."

Article 9 of the Constitution of the Democratic Republic of the Sudan, 1973 stipulated that:-

> "Islamic Shariah and custom are two basic sources of legislation and the personal status of non-Muslims shall be governed by their own law."

There has been inconsistency in the legislative provisions relating to Shariah as a source of law. At one time it was the primary source and at another time it was a secondary source.

In the aftermath of the abrogation of the Civil Code, 1971 a number of Acts were drafted, two of these Acts[180] derived some legal principles from Islamic Shariah. The Civil Procedure Act, 1974 followed the track of the Civil Justice Ordinance, 1929 in allowing custom to modify Shariah in cases of personal law for Muslims.[181] The legislator copied this section from the repealed Civil Justice Ordinance, 1929. Ironically S.6 '2' of the Civil Procedure Act, 1974 considered Shariah as a territorial source of law in absence of express provision, and not only was custom in this case not allowed to modify Shariah, but it also ranked after Shariah as a source of law. It took only two sub sections of the Civil Procedure Act, 1974 to accomodate this contradiction and inconsistency. The Civil Procedure Act, was amended in 1982 to repeal section 5 'b' which allowed Shariah to be modified by custom. The content of this section was first repealed in 1971 with the introduction of the Civil Code, 1971. The second and final repeal was in 1982. It was replaced by a sub-section which reads as follows:-

> "Islamic Shariah where the parties are Muslims or where the marriage was conducted according to Islamic Shariah".

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[180] The Sales Act, 1974 and the Agency Act, 1974.

[181] Section 5 'b' of The Civil Procedure Act, 1974.

The foregoing sub-section was confined to questions regarding succession, inheritance, wills, legacy, gifts, marriage, divorce,family relations or the constitution of Waqf, 'Trust'.

S.6 '2' of the Civil Procedure Act, 1974 was repealed and replaced by the following in the 1982 amendment:-

> "In matters not provided for by any legislation the Courts shall apply Islamic Shariah and the principles that have been judicially established in the Sudan and custom and justice, equity and good conscience."

Before this amendment, Islamic Shariah ranked after the Sudanese judicial precedents, which derived substantially from English Law, but after the amendment this order was tilted. Shariah became the first source of law, then came the Sudanese judicial precedents and then custom and last the justice, equity and good conscience provision which had been the sole source for decades.

By 1983 Islamic Shariah was accepted as the primary source of law and any law which contravened the principles of Shariah would be rendered void by the courts.[182]

The Sudan Transitional Constitution, 1985 restored Article 9 of the Democratic Republic of the Sudan Constitution, 1973. Article 4 of The Sudan Transitional Constitution, 1985 provided that:-

> "Islamic Shariah and custom are primary sources of legislation and the personal status for non-Muslims is governed by their own personal law".

In most cases it was a symbolic phrase to stipulate that "Shariah is a source of laws" and no serious step was taken to recommence the suspended rules of Shariah. This symbolic phrase was often an offshoot of 'law reform' activities, not the result of organized academic endeavors. The official recognition of Islamic Shariah as a fundamental source of laws was a means of legitimizing the political regime, through an appeal to Islamic values and a popular conviction.

Until 1983 much has been adopted from Shariah, without seriously considering a complete return to it. Such adoption has been piecemeal and fragmentary.

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[182] S. 2 'A' of The Judgements (Basic Rules) Act, 1983.

## Chapter 5

# THE TOTAL DEPARTURE FROM ENGLISH LAW AND THE REPATRIATION OF ISLAMIC LAW

The repatriation of Islamic Law in 1983 was preceded by certain steps that were pertinent to it. The Prostitution Combatting Act, 1976 was one such step to eradicate corruption and bring the Criminal Law of the Sudan closer to Islamic Law.

For the purpose of the Prostitution Combatting Act, 1976 homosexuality was considered prostitution.[183] Running a house for prostitution was equally punishable; it was further provided that a house or place used for prostitution would in certain circumstances be confiscated.[184]

The establishment of the first Islamic Bank in the Sudan in 1977 represented a giant step toward bringing the Banking system in line with Islamic Law.[185] It brought a new horizon of hope in that it sought to establish an overall Islamic economic order the aims of which are:-[186]

a) Prohibition of monopoly, whether by individuals or groups.

b) Prohibition of accumulation of wealth; money has to circulate.

c) Restricting oneself to lawful transactions.

d) Prohibition of Riba, 'usury' or the interest system.

e) Prohibition of gambling.

It did not take long for the Islamic, interest - free Banking system, to prove successful and spread throughout the Sudan. The pragmatic attempts to Islamize the un-Islamic transactions of the western conventional banks were no longer acceptable. In 1980 all the specialized banks such as the Real Estate Bank, the Industrial Bank and the Agricultural Bank were directed to liberate their transactions from 'Riba'.[187] They were directed to adopt the Islamic principles of 'mudarabah' joint

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[183] Section 3 of the Prostitution Combatting Act, 1976.

[184] Section 5 '2' '3', Ibid.

[185] The Faisal Sudanese Islamic Bank, 1977.

[186] Hamdi, Abd-Al-Rahim, "Hints of the Experience of the Faisal Islamic Bank (Sudan)." The National Printing and Public. House, KH. Sud. 1982, p. 4.

[187] Riba, usury, Islamically means any payment imposed in excess of the principal of the loan. It also includes, as a corrollary, the excess in quantity in the barter exchange of the same commodity e.g. 14 to 12 pounds of wheat, without any consideration of whether excess can be justified by quality, differential or not. See Dr. Munzer Kahf, op. cit., p. 68.
Riba is unequivocally prohibited in the Qur'an and Sunnah.

enterprise,[188] 'Musharakah', partnership[189] and 'Murabaha', markup.[190] Zakat[191] was fully recognized as a basic tool in the economy of the Sudan. These partial implementations of Islamic Law brought the Sudanese legal system closer to a more encompassing application of Islamic Law.

The prohibition of alcohol gained momentum through local and regional intiatives. Islamic policies were emphasized, particularly in the field of education.[192]

In 1977 a committee was set up to revise the Sudanese Laws in order to comply with the rules of Shariah Law. The members of this committee were mainly Sudanese scholars. The few non-Sudanese members were irregular members and their contribution was negligible. From 1977 until 1980, the committee was able to present a number of laws i.e.:-

1) The Judgements (Basic Rules) Bill 1978.

2) The Consumer and Co-operative Loans Bill, 1978.

3) The Unlawful Enrichment (Prohibition) Bill, 1978.

4) The Miscellaneous Amendments (Prohibition of Gambling) Bill, 1978.

5) The Zakat Fund Bill, 1978.

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Interestingly, up to the 13th. Century when the church rule was supreme, the charging of interest was strictly forbidden. But with the gradual decline in the power of the church and the rise of secular power, the lending out on interest began to be tolerated. Criticism was then directed against the charging of a high rate of interest rather than against the payment of interest itself. See Anwar Iqbal Qureshi, "Islam and the Theory of Interest, with A Chapter on Interest Free Banking." Ashraf Publ., Lahore, reprinted 1974, pp. 8-9.

The prohibition of 'usury' was reflected in the European ecclesiastical doctrines and secular legislations to the middle of the 16th. Century. At Florence, the financial capital of medieval Europe, the secular authorities fined bankers frequently for usury in the middle of the 14th. Century; fifty years later, credit transactions were prohibited altogether. Then Jews were brought to conduct a business forbidden to Christians. See R.H. Tawney, op. cit., p. 49.

[188] 'Al-Mudarabah' is also known as 'Al-Qirad' which is a sort of partnership between the owners of monetary assets and businessmen. It is an Islamic mechanism for introducing monetary assets into production activity by transforming them into real factors of production as a result of a joint action between the owner of the assets and the entrepreneur. The reward of the owner of the assets is a pre-agreed ratio of the total profit of the project; the remainder of the profit is the reward of the entrepreneur. Losses, however have to be borne solely by the owner of the capital. Islam considers the mere act of saving and depositing in a bank as an economically negative action and is thus without a reward, 'interestless'; this is in addition to the fact that Riba or interest is strictly prohibited in a number of Qur'anic verses. See Munzer Kahf, op. cit., pp.70-70; See also Volker Niehaus, "Islamic Banks - Ashort Survey." Islam and The Modern Age, Q.J., Zakir Husain Inst. of Islamic studs., New Delhi, Feb., 1983 pp.8-9.

[189] 'Musharakah' is a contract or company where both parties bring in capital and jointly manage the project. Profits will be shared according to a pre-agreed ratio:- losses have to be borne in relation to the shares in the brought in capital. See Volker Niehaus, Loc. cit.

[190] 'Murabaha' is a contract where the bank purchases for its customers exactly specified goods which he has promised to re-purchase from the bank at a price which covers all costs of the bank and in addition includes a pre-agreed mark-up or profit margin for the bank. Ibid.

[191] For the definition of Zakat see Pt. I, Ch. 3, p. 14 of this thesis.

[192] Dr. Hasan Abdel Allah at-Turabi, "The Basis of Gov. in Islam." op. cit., p.26.

6) The Public Morals Bill, 1980.

7) The Usurious Transactions (between individuals) Prohibition Bill, 1979.

8) The Liquor Prohibition Bill, 1980.

It took three to six years since 1977 to endorse the application of Shariah. In 1983 the then President of the Sudan, took a historic decision to repatriate Shariah as the territorial law of the Sudan, to the exclusion of English Law. This move improved the popularity of that ailing political regime. It equally mobilized the Sudanese people and consolidated them much more than any other event after the independence of the Sudan. It was estimated that over a million of the Sudanese people paraded to show their full support for the application of Shariah.[193]

It was crystal clear long before the application of Islamic Law that the slow workings of justice both in criminal cases and civil suits was a serious problem. Dr.Saeed El Mahdi[194] in his "General Survey of the Sudan Civil Justice Ordinance, 1900" stated that:-[195]

> "Delay in justice is publicly attributed to the provisions of the Civil Justice Ordinance. It is high time to reform the-72 year-old rules".

Sobatt Commercial Corporation V. Mohamed Ahmed at- Toam ,[196] was a civil suit that had been dragging on since 1961, only to be settled in 1974, thirteen years after the initiation of its proceedings, Hasan Mahmoud Babiker, J., in his dissenting decree stated the following:-[197]

> "The way this civil suit has been handled is a tragic problem and the different courts at different levels should be accountable for that."

In the case of S. G. V. Mohamed Ahmed Fadl & others [198] the Supreme Court stated that "this criminal case was unduly delayed for a long time and the reasons why it was last time adjourned were not convincing."

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[193] The Ottawa Citizen, Canada, Wed. Sept. 26, 1984, p.A16.
[194] A previous Dean, Faculty of Law, University of Khartoum, Sudan.
[195] S.L.J.R., 1969, p. 244.
[196] S.L.J.R., 1974, p.128
[197] Ibid., p.131.
[198] S.L.J.R., 1976, p.689.

The delaying tactics and technical complexities that became integral with the legal system substantially contributed to the sluggishness of and delays in justice in the Sudan. It goes without saying that a delay in justice is a denial of justice. The semi paralysis of the judicial system prompted the need to bring about a drastic change.

Both the repealed Attorney General's Act, 1981 and the existing Attorney General's Act, 1983 emphasized the need to make available prompt justice and to revise the laws of the Sudan in order to reflect the values of justice in the Sudanese society and to cope with the development in its life.[199]

The final breakaway from English Law occurred and the application of Islamic Law was completed in 1983. When most of the Bills recommended by the 1977 committee were adopted, the Civil Law was reformed; the Military Law was amended; the Road Traffic Control was passed and the Organization of Public Participation in Establishing Moral Guidance of Public Life was created.

**Section A:-**

**The Judgements (Basic Rules) Act, 1983**

Of all the Acts that were endorsed to implement Shariah, the Judgements (Basic Rules) Act, 1983 was the most important one. It has an overwhelming impact on the development of Islamic Law in the Sudan. It is the first of its kind to extend the application of Islamic Law in the Sudan to all walks of life.

The Judgements (Basic Rules) Act, 1983 provides for two situations, one of interpreting legislative provisions and the other of the applicable law in the absence of legislative provisions. As far as the second situation is concerned, the Judgements (Basic Rules) Act, 1983 brought to an end the various provisions that allow for the law to be applied in the absence of express provisions.[200] The laws embodying such provisions were repealed altogether. However, the legislator realized that in order to apply Shariah rules, it is not enough to enact substantive rules complying with Shariah, it

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[199] Section 5 'a', 'C' of both Acts.

[200] Section 6 of the Civil Procedure Act, 1974. Section 3 of the Contracts Act, 1974 and Section 2 of the Agency Act, 1974.

is equally necessary to provide certain rules and principles to interpret legislative provisions.[201] The Judgements (Basic Rules) Act, 1983 stipulates in section 2 'A' that:-

> "A judge shall presume that the legislator does not intend to contradict Shariah for the purpose of holding a definite duty in abeyance or allowing that which is clearly prohibited and shall pay due regard to Shariah directives of approbation and disapprobation."

This section guards against incompatibility with Islamic Law. It is designed to ensure that the Judiciary does not apply the law by reference to secular laws and standards. It is so clear and unequivocal as to leave no doubt of an intention to depart from a Shariah rule. It presumes irrebuttably that the legislator never intends to contradict the rules of Shariah and never intends to make lawful what is unlawful in Shariah or make unlawful what is lawful in Shariah.

Shariah consists of obligations, 'faraid', and strict prohibitions, 'haram', enjoined by the Qur'an and Sunnah. Between these two ends there are things that are abominable, 'makruh' and others that are commendable, 'mandub'. Section 2 'A' of the Judgements (Basic Rules) Bill, 1980, presumes irrebuttably that the legislator never intends to contradict or suspend such obligatories, 'faraid', of the Shariah or violate any strict prohibitions, 'haram', of the Shariah. The section also presumes that the directives of Shariah as far as 'mandub' and 'makruh' are concerned be well observed.[202]

The Act goes further to establish rules of interpretation that bring generalities and discretionary provisions into concordance with the rules, principles and general spirit of Shariah.[203]

The rules of Shariah are the detailed rules embodied in the two basic sources of legislation in Shariah, viz, Qur'an and Sunnah. The principles of Shariah are the general principles established by the **'fuqaha'**, Muslim jurists, throughout time and space by a thorough examination and interpretation of the 'nussus', authoritative texts or lex scripta. The general spirit of the Shariah is resorted to in absence of a detailed 'nass', lex scripta, or a principle of Shariah that can help in

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[201] The Explanatory Memorandum for the Judgements (Basic Rules) Bill, 1977.

[202] Loc. cit.

[203] The Judgement (Basic Rules) Act, 1983 section 2 'b'.

interpreting the 'nussus'.[204]

Section 2 'C' provides a third principle of interpretation to bind the judge as he interprets a 'nass'. It stipulates the following:-

> "A judge shall interpret jurisprudential terms and expressions in the light of the basic linguistic rules of Islamic jurisprudence."

The basic linguistic rules of Islamic jurisprudence have long been set by Muslim scholars on fiqh. Such linguistic rules deal with 'nass' as Arabic words that have definite meaning in the Arabic language or fiqh terms that have definite meaning as settled by the basic rules established by fiqh scholars.[205] 'Nass' may not be confined to its literal meaning. It may have various meanings that can be understood from the indication of such a 'nass' and the intent or purpose underlying it.[206] Words are the most temperamental creatures; alone they do not furnish the sole basis for determining the contents of the 'nass'. The spirit of the 'nass' should be regarded and pursued to help elucidate the meaning of the words of the 'nass'. Obviously some of these meanings are more cogent than others and they should prevail over the less cogent ones in case of contradiction.[207]

The rules of interpretation of legislative provisions as set out in section 2 of the Judgements (Basic Rules) Act, 1983 are indispensable since Shariah has been restored in a form of legislative provisions. This was done to ease the task of the judges who are not Shariah oriented. Such guides give normative direction to the findings of courts, and they are so exhaustive that nothing remains outside their realm.[208] The rules of interpretation should always be read by reference to the intent of

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[204] The Explanatory Memorandum on the Judgements (Basic Rules) Bill, 1977.

[205] Ibid., p.2.

[206] Abdul Wahab Khallaf, "The Basic Rules of Fiqh Science." Arabic Text, 14th. edition. Darul-qalam for Printing, Publishing and Distribution, Kuwait, 1981 p.143.

[207] The 'nass' can have various meanings, one is the apparent plain meaning or the literal meaning. Another is the meaning that cannot be directly derived from the words of the 'nass', viz, 'Isharatu nass' indication of the 'nass' and this needs a deep and thorough ponderance on the 'nass'. A third meaning is called 'Dalalatu nass' which is the meaning of the 'nass' that can be derived from the content and spirit of the 'nass' together. Let us take the following translation of the Qur'anic verse as an example:-

"Thy Lord hath decreed that ye worship none but Him, and that ye be kind to parents. Whether one or both of them attain age in thy life, say not to them a word of contempt 'not even oof', nor repel them, but address them in terms of honour..." Sura XVII, verse 23, The Holy Qur'an, Translation and Commentary, A. Yusuf Ali, op. cit., p.700.

This verse is a 'nass' the content of which means that a son or a daughter is strictly prohibited to utter a single word that shows disrespect or contempt to parents, such word is apt to hurt and intimidate the parents. The spirit of this same 'nass' tells us of an apriori injunction, viz, assaulting or battering parents is more strictly prohibited since it is obvious that such acts hurt lot more than the utterance of words. The third meaning of the 'nass' is the intent or purpose 'muqtadda' of such a 'nass' , it is the meaning without which the 'nass' shall be meaningless. Ibid., pp. 144-150.

[208] It is interesting to compare these guides to the notion of no guides whatsoever as expressed in Kelsen's 'Pure Theory

the legislator to re-enact and declare Shariah rules. This intention should be strictly enforced by the courts in their work of interpreting any legislative provision.

Section 3 of the Judgements (Basic Rules) Act, 1983 provides for the law applicable in the absence of legislative provisions. It has replaced Section 6 of the repealed Civil Procedure Act, 1974[209] Section 3 of the repealed Contracts Act, 1974 and Section 2 of the repealed Agency Act, 1974.

The basic sources of law as laid down by section 3 of the Judgements (Basic Rules) Act, 1983 are imperative even in instances where a provision in an Act provides for the rules to be applied in the absence of express provisions. This is so since the legislator does not intend to contradict Shariah. It is conceivable that in the transitional period some Shariah rules may remain uncodified and this may lead to an illusion that the legislator intended to defer the aplication of Shariah. To refute such an illusion, the Judgements (Basic Rules) Act, 1983 section 3 'a' stipulates that the existing Shariah rule as established by Qur'an and Sunnah has to be applied on every case even if there is no relevant provision.[210] This conforms to the general trend to apply Shariah in its totality. It equally conforms to the general rule that the Shairah rules as established by the Qur'an and Sunnah are an integral part of the public order in an Islamic state and as such, the courts shall apply them even if the litigants do not request such an application.[211] Section 3 'a' is signficant in that it takes the judge directly to the original sources of Islamic Law.

Section 3 'b' of the Judgements (Basic Rule) Act, 1983 brings the issue of 'ijtihad'[212] to

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of Law' where he stated that:-

"From a positive law stand point, there is no criterion on the basis of which one out of several possibilities can be selected. There is no method which could be characterized as positively legal, by which out of several meanings of a norm only one can be shown to be correct."

Kelsen's 'Pure Theory of Law' allows any construction of the norm to be legally proper even if it leads to unreasonable, unjust or absurd results. See Edgar Bodenheim, "Jurisprudence, the Philosophy and Method of the Law." 'revised ed.' Harv. U. Press, 1974, p.348.

[209] Section 6 of the repealed Civil Procedure Act, 1974 was itself a link in the evolution of the justice, equity and good conscience provision which started with Section '4' of the Civil Justice Ordinance, 1900. For a full account of the latter see Pt. II, Ch.4, pp.75-86 of this thesis.

[210] The Explanatory Memorandum for the Judgements (Basic Rules) Act, 1983, p.3.

[211] Loc. cit.

[212] 'Ijtihad' literally means an effort or an exercise to arrive at one's own judgement. In its widest sense, it means the use of human reason in the elaboration and explanation of Shariah Law. It covers a variety of mental processes, ranging from the interpretation of texts of the Qur'an and the authenticity of Hadith. 'Qiyas' 'analogical' reasoning is a particular form of 'ijtihad', the method by which the principles established by the Qur'an, Sunnah or 'Ijma' 'consensus' are to be extended and applied to the solution of new problems not expressly regulated before. 'Ijtihad', therefore, is an exercise of one's reasoning to arrive at a logical conclusion to deduce a conclusion as to the effectiveness of a legal precept in Islam. See Abdar Rahman I.

focus as it stipulates the following:-

> "In the absence of any such provision, the judge shall exert his thought and be guided in so doing by the principles hereinafter mentioned taking them with due regard to their complementarity and observing their chronology with respect to the priority of their consideration and preponderance."

'Ijtihad', exerting one's own rational faculties within the relevant guides of Shariah was regarded as an inherent right of any adequately qualified faqih. However, when the doctrines of the different schools of fiqh[213] had crystallized, this faculty started to diminish and progressively fall into abeyance.[214] With the political weakness and the crippling divisions of the Islamic World, 'bab-al-ijtihad', the door of ijtihad, was closed to any serious attempt to make ijtihad.[215] Erroneously people convinced themselves that fiqh is immutable; this led to the slavish adherence to 'taqlid', the recognition of the authority of the scholars of past generations, to the 'exclusion of ijtihad'. The plague of 'taqlid' has crippled the progress and evolution of fiqh and has caused it to stagnate and lose touch with some contemporary issues.[216] Later the imperial powers forced Islamic Law out of the legal life of Muslims except for the statut personnal, and imposed their own European Law on the various Muslim countries.[217]

The Judgements (Basic Rules) Act, 1983 is an instance of a breakthrough from the long maintained forceful rejection of Islamic Law. It is the first attempt of its kind throughout the

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Doi, "Shariah the Islamic Law," Ta Ha Publ. Lond., 1984, p.78.

[213] For a brief account of these schools of fiqh, see Part I, Ch.2, p. 8 and Ch.5, p.23 of this thesis. See also, J.N.D. Anderson, "The Significance of Islamic Law in the World Today." The Am. J. of Comp. L. Q., Vol.9, Am.Assoc. for the Comp. stud. of L., Inc., 1960, p. 193.

[214] Rene David, John E.C. Brierley, op. cit., p.426.

[215] In the 19th. Century two Muslim scholars, namely Jamul Din Al-Afghani and his disciple Mohamed Abduh took it upon themselves to re-open 'bab al-ijtihad'. They argued that the re-opening of 'bab al-ijtihad' was an Islamic response to imperialism which dominated the Muslim World then. Both scholars gave fresh interpretation to the 'nussus' of the Qur'an and the Sunnah. They validly claimed that 'bab al-ijtihad' was only closed in the period of intellectual stagnation and under fear as well as during a foreign domination i.e. 'the Mongols in Baghdad around 1258 A.D.' and as such it is not binding on anyone and should be repealed. The two scholars launched fresh 'ijtihad' in the public interest. However, some contemporary Muslim scholars claimed that 'bab al-ijtihad' was never closed, but 'ijtihad' did not take momentum as the intellectual life of the Muslims was declining. See Abdur Rahman I. Doi, op. cit., pp. 80, 81. See also Dr. Abd-Al Munim an-Namir, 'Al-ijtihad', 1st. ed. Arabic Text, Shoruq Int. Lond. Eng. 1986, pp.196-197.

[216] The Explanatory Memorandum on the Judgements (Basic Rules) Act, 1983, op. cit., pp.3, 4.

[217] This happened when the writings of the founders of the four schools of fiqh and commentarity, glosses and compendiums of their disciples became the standard text books for all students of law; any effort to depart from them was denounced as 'bida', innovation.

contemporary Islamic world that aims at taking the Muslims to their original, authentic and primary sources of law, viz, the Qur'an and the Sunnah. Nothing should hamper the judge's faculty for exerting his thought where there is a hiatus in the fiqh, allowing such a judge room to invoke Islamic concepts of justice. There is a pressing need for the fiqh to come to grips with new challenges and opportunities.[218] The Qur'an and the Sunnah are flexible enough, they generally draw broad lines and leave a lot of details to adapt to time and space. The revival of 'ijtihad' is the most far reaching and effective element in bringing fiqh to grips with the realities of modern life.

The Judgements (Basic Rules) Act, 1983 did not overlook the fact that 'ijtihad' has certain rules and there has to be an objective mental process that takes full account of time, space and the objectives of Shariah. It is not for the judge to decide according to his temperament or whim. For this reason section 3 'b' of the Judgements (Basic Rules) Act, 1983 sets certain principles to guide the judge as he frames his judgement. Such principles have to be used taking into account that they are complementary and that the order in which they are expressed defines the priority of consideration and the weight to be given to each. However, the most careful precautions cannot rule out the possibility of arriving at a wrong decision.[219] This shall always remain the exception rather than the rule and the fact shall always remain that 'ijtihad' is far better than 'taqlid'. Almost none of the well versed Muslim scholars would approve of 'taqlid'. Ibn Hazm, the notable scholar of 'Dhahiriyya', the ostensible meaning, school of fiqh, condemned 'taqlid' as unlawful and he stated that it is equally unlawful for anyone to follow what another scholar has said without asking for proof.[220]

Imam Mohamed Abdu, the Muslim reformer in the late 1900's strongly criticized 'taqlid' and is reported to have said:-[221]

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[218] Fathi Osman, "On Reflection, Shurah and Democracy." Arabia, The Islamic World Rev., No, 33, The Islamic Press Agency Ltd., East Brunham, England, 1984, p.76 where the editor of this article quoted Al-Shihristani who said in his well known book 'Al-Milal wa - Nihal' that:-

"We know definitely that events cannot be counted or limited, also we know definitely that the revealed texts did not cover in detail with a direct relevance all events from the time of revelation onwards in every place and such comprehensiveness cannot be imagined. Since the revealed cannot be controlled by what is limited, the practice of 'ijtihad' should be definitely considerable to face the continuously emerging events."

[219] Ibid., p.4.

[220] Mohamed Abu Zahrah, "Ibn Hazm, His life, His time and Fiqh Views." Arabic Text, Dar Al-Fikr Al-Arabi, Cairo, Egypt, 1978, p.302.

[221] John L. Esposito, "Women in Muslim Family Law". Syracuse U. Press, 1982, pp. 104, 105.

'''Taqlid' is a deceptive thing, and though it may be pardoned in an animal is scarcely seemly in human beings.''

Mohamed Iqbal, the reformer of Pakistan (1875-1938) is quoted to have said:-[222]

''The closing of the door of 'ijtihad' is pure fiction suggested partly by the crystallization of legal thought in Islam, and partly by that intellectual laziness which, especially in the period of spiritual decay turns great thinkers into idols.''

The closing of the gate of 'ijtihad' and the submission to 'taqlid' was more an accident of history than a requirement of theory in Islam.[223]

A scholar like Ibn Taymiyya who was a 'mujaddid', renewer, rejected the highly technical and scholastic form which Islamic Law had acquired in all its schools, including his own Hanbali school, and advocated a fresh return to its two principal sources, the Qur'an and the Sunnah.[224]

Imam Shawcani opted out of 'taqlid' and dismissed it as a prohibited 'bida', innovation, and rendered 'taqlid' valueless, futile and unlawful to carry on.[225]

Abul A'la Maududi, a 20th. Century Muslim thinker related 'taqlid' to the miserable and stagnant intellectual life of Muslims. He stated that:-[226]

''It is only the Qur'an and Sunnah that can be the source from which people can derive different branches of knowledge, ideas and laws through time and space, having due regard to their ever changing needs and necessities. Islamic Law remained timely and relevant as long as Muslim scholars kept deriving their knowledge from the Qur'an and Sunnah and kept applying 'ijtihad'. But the moment the Muslim scholars abandoned pondering on these prime sources and satisfied themselves with the slavish immitation, 'taqlid', of the forebears and considered the views of such forebears as sacred and immutable, Islamic Law started to freeze

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[222] Loc. cit.

[223] Bernard Weiss, ''Interpretation in Islamic Law:- The Theory of Ijtihad.'' The Am. J. of Comp. L., Q., Vol.26, Am. Assoc. for the Comp. Stud. of L., Inc., 1978, p. 208.

[224] Joseph Schacht, ''Islamic Law in Contemporary States.'' The Am. J. of Comp. L. Q., Am. Assoc. for the Comp. stud. of L., Inc., 1959, p.146.

[225] Imam Mohamed Ibn Ali Ash-Shawcani, 'Al-qawl Al-Mufid fi adilat Al-ijtihad Wa-taqlid.' Arabic Text, verified by Abdul Rahman Abdul Khaliq, Darul-qalam, 3rd. ed. Kuwait, 1983, p.46.

[226] Abul-A'la Mandudi, ''Islam and the Western Civilization.'' Arabic Text, Risalah Inc., undated, pp. 200,201.

and go downhill. The intellectual life of the Muslims plunged into stagnation. It is true those forebears were pious, but the fact remains that they were human and fallible. Their means of acquring knowledge are available to all Muslims through time and space. They were not inspired by a revelation from God.''

The First of the guides as set by section 3 'b' of the Judgements (Basic Rules) Act, 1983 which have to be observed by the judge on the process of exerting his own thought runs as follows:-

''To pay due regard to the unanimity of Muslim jurists, the exigencies of the totality of Shariah rules, its general principles and Shariah directives respecting questions of detail in the matter.''

Unanimity, consensus or the concurrent decision of Muslim scholars is best known as 'Al-ijma'.[227] It is a secondary source of the basic rules of Islamic Law. The judge has to pay due regard to 'Al-ijma', which expresses the force of public opinion.

Imam ash-Shafii, the first Muslim systematic legal theorist, widened the concept of 'ijma'. He advocated in the final revision of his doctrine the 'ijma', consensus, of the community at large, yet he did not repudiate the doctrine of the 'ijma' of the shcolars altogether. However, he saw in the doctrine of 'ijma' the safest and highest legislative authority.[228]

The judge shall equally pay due regard to the universal rules of Shariah and its general principles. Such universal rules are best known as 'al qaw-aid al-kulliyah al-fiqhiyah'. Particular legal provisions may be deduced from these universal rules or general principles of Shariah,

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[227] Al-ijma:- The consensus of opinions is defined as 'The general agreement of all scholars of the Islamic community living in a certain period after the death of prophet Mohamed 'P.B.U.H.'. The doctrine of Al-ijma is based on some famous traditions of the prophet that say:- ''My community will never agree on whatever leads them astray'', 'What the Muslims view as good is good with Allah', ''Allah would have never brought my community together on what is wrong.'' Al-ijma is a conclusive argument in proving the existence of a law, or interpreting or abrogating it. It has to comply with the following conditions:- (i) It shall be ijma of scholars, an essential requirement for whom is moral purity; (ii) The majority of such scholars shall agree to the legal opinion allowing for a dissenting minority; (iii) The object of such scholars' agreement shall be a legal matter liable for reasoned opinion, relating to permissibility, prohibition, validity or nullity, it cannot relate to a matter settled by revelation; (iv) Al-ijma shall occur after the death of the prophet, since, had he agreed on the opinion in question, it would have become a tacit agreement 'Sunnah taqririya', or had he disagreed it would have invalidated the ijma.

Al-ijma may be verbal or practical. It is said that when Al-ijma has to do with some marginal issue on 'Ibadat', worship, it must be ratified by every member of the community concerned. But if it has to do with anything that needs thorough reasoning, then the layman's view is irrelevant. See Jamal J. Nasir, ''The Islamic Law of Personal Status.'' Graham & Trotman Inc. Lond. 1986, pp. 20, 21; see also Abd. Al-Wahab Khallaf, op. cit., pp.45-52; see also Abdur Rahman I. Doi op. cit., pp.64-70.

[228] Mejelletul Ahkam Al-Adliyah 'The Compendium of Legal Provisions Codified in 1876 AD' as the Ottoman Civil Code' compiled 99 of such maxims. The Sudanese Evidence Act, 1983 compiles seven of such maxims.

maxims.[229] These universal rules can be grouped under five headings:-

1. Intention, i.e., 'A matter is determined according to intention'. This is derived from an authentic tradition of prophet Mohamed that ''deeds are judged by intentions and each shall get what he intends''.

2. Proof:- 'Certainity is not dispelled by doubt' or 'Freedom of obligation shall be deemed the original state of things' 'He who alleges should prove and he who denies the allegation should take the oath' 'No weight is given to mere supposition, 'tawahhum' '.

3. Flexibility:- 'Difficulty begets facility' and 'Necessity renders prohibited things permissible', 'Necessity is estimated by the extent thereof' and 'Necessity does not invalidate the right of another'.

4. Injury:- 'Injury is removed', ''An injury cannot be removed by the commission of a similar injury.''

5. Custom:- 'A matter established by custom is like a matter established by law', ''Public usage is conclusive evidence which must be observed in action''. Obviously it shall not be binding if it contravenes Shariah.[230]

'Al qaw-aid al Fariyah', the derivative rules of figh, are the second type of Shariah rules. They are very specific and relate to particular incidents and can never be extended to any other incident. Such rules are guides to be observed by the judge in making 'ijtihad'.[231]

General principles as well as Shariah directives respecting questions of detail in the matter together with 'ijma' provide the judge with the first guide in order to make 'ijtihad'.

'Qiyas', analogical deduction, is the second guide in the Judgements (Basic Rules) Act, 1983 section 3 'b' which stipulates the following:-

''To render justice by ways of analogy with the provisions of Shariah for the purpose of

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[229] Majid Khadduri, ''Nature and Sources of Islamic Law''. The Geo. Wash. L. Rev., Vol.22, No., 1, Oct., 1953, pp. 14, 15.

[230] Jamal J. Nasir, op. cit., pp.22-26.

[231] The Explanatory Memorandum on the Judgements (Basic Rules) Act, 1983, op. cit., p.5.

realising its objectives or following its example or comparing with its methods in rendering justice'', Qiyas is defined as ''the deduction of a ruling on a case for which no provision is found in the Qur'an or the Sunnah from a similar case for which there is such a provision on the strength of a common factor.''[232]

Section 3 'b''1' of the Judgements (Basic Rules) Act, 1983 is ahead of its time in that it is not confined to the conventional methods of 'qiyas'; it added new dimensions to the principle of 'qiyas' by providing general and flexible factors of 'qiyas' namely, following example of Shariah and comparing with its method in rendering justice and realizing the objects of Shariah. Such factors allow the judge enough room to indulge in a broad 'qiyas' that responds to the public interest and goes beyond dealing with detailed incidents.[233] It should allow greater pragmaticism.

The third guide is provided by section 3 'b' '3' which stipulates the following:-

''To pay due regard to what achieves goodness, justice and reform, and parries corruption and deterioration, evaluating the same in a manner destined to realize the ends of Shariah and the objectives of life under complete Shariah rule in the context of the present circumstances and that which is not repealed by subsidiary Shariah rules.''

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[232] It was Imam Abu Hanifa, the founder of the Hanafi school of fiqh, in Iraq who introduced 'qiyas' as another secondary source of the basic rules of fiqh. This took place at a time when Muslims during the period of the 'Abbasids', engaged themselves in reading and translating various text books on logic and philosophy. Some of the Hellenistic logic features were utilized so successfully in developing 'qiyas' as a secondary source of legislation in fiqh, to the extent that they seem home grown features of this science.

Qiyas has the following ingredients:-

(i) Asl, original subject. (ii) Far', an object of analogy, being a new subject, (iii) Illah, effective cause common to both subjects, (iv) Hukm, a rule arrived at by qiyas. In the case of the prohibition of an intoxicant like gin, the following four cardinal points must exist:-

(i) Wine being the Asl, (ii) Gin being a Far', (iii) intoxication being the Illah (iv) prohibition being the Hukm.

The original subject in this case is wine which is prohibited by a Qur'anic verse; the cause of such prohibition is intoxication and since such cause is inherent in gin which is the object of analogy here, therefore the rule arrived at is the prohibition of gin. This analogical deduction runs as follows:-

Major premise:- Wine is intoxicant and is prohibited.

Minor premise:- Gin is intoxicant and is wine.

Conclusion:- Therefore, gin is prohibited.

The origin of 'qiyas' can be found in some Qur'anic verses and in the tradition of prophet Mohamed. This was long before the Muslims were exposed to the Hellenistic philosophy. However, the latter was utilized to develop an already existing principle. For a detailed account of 'qiyas' see, Abdur Rahman I. Doi, op. cit., pp. 70-80; Jamal J. Nasir op. cit., pp. 21,22.

[233] Dr. Hasan at-Turabi who is the author of the Judgements (Basic Rules) Act, 1983 has some bold ideas on the science of the basic rules of fiqh. He is of the opinion that Muslims need to make a breakthrough by engaging in Qiyas Wasi, broad and general 'qiyas'. He thinks that response to public interest, following example of Shariah and comparing with its methods in rendering justice and the realization of the objects of Shariah are apt to establish a fiqh that can come to grips with new challenges and opportunities such as the increasingly sophisticated and comprehensive socio-economic order among Muslims. See Dr. Hasan at-Turabi, ''Renewal of the Basic Rules of Fiqh.'' Arabic Text, Darul-Jil, Beirut, 1st.ed. 1980, pp. 22-25.

Most of the causes ,'illal', of the Shariah rules are related to public benefit or public welfare, 'Maslaha', and as such, it is one of the secondary sources of the basic rules of fiqh to pay due regard to the 'Maslaha' which achieves goodness, justice and reforms and parries corruption and deterioration. Section 3 'b' '3' gives priority to achieving public benefit over parrying corruption.[234] But this order cannot hold since section 2 'c' of the Judgements (Basic Rules) Act, 1983 binds the judge to interpret jurisprudential terms and expressions in the light of the basic linguistic rules of Islamic jurisprudence. One of such binding rules is this basic rule of Islamic jurisprudence which stipulates that:-

''Parrying corruption and deterioration shall have priority over achieving public benefit.''

This basic rule is very cautious. It puts more emphases on parrying corruption and deterioration than achieving goodness, whereas section 3 'b' '3' is more positive and more aggressive as it shifts the emphasis and tilts the balance in favour of achieving public benefit welfare if that has to be balanced with parrying corruption. However, section 2 'c' of the same act has made it impossible to go this progressive way and reverse the traditional sequence.

This section has made it clear that in addressing the public benefit and welfare, the judge should not lose sight of the ends of Shariah and the objectives of life under complete Shariah rule in the context of the present circumstances and that which is not repealed by subsidiary Shariah rules.

This section is significant in that it exposes the fiqh to all the development in life and begs an answer for every new aspect of life. Had it not been that the rules of fiqh should be judged in the light of the ever changing public benefit and welfare, the fiqh could become stagnant and rigid and this would not comply with the ends and objectives of Shariah which are meant to achieve the public benefit and welfare. However, the 'Maslaha' has three cardinal conditions:-

a) It has to be real and not a presumed 'Maslaha';

b) It has to be a public interest and not a personal one;

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[234] The different texts of the basic rules of fiqh always place it the other way round. Such texts stipulate that:- ''parrying corruption should have priority over achieving public benefit''. See Mohamed El Khudari, 'Usul al-fiqh', Arabic Text, undated, p. 307.

c) It should not contravene a rule established by a 'nass' from the Qur'an or the Sunnah and 'ijma'.[235]

The fourth guide provided by section 3 'b' of the Judgements (Basic Rules) Act, 1983 is "the presumption of innocence, non prohibition of acts and indulgence in imposition of duties." This subsidiary source of the basic rules of fiqh is best known as 'Istisshab'. It is the presumption in the laws of evidence that a state of affairs known to exist in the past continues to exist until the contrary is proved, i.e., there is a presumption of innocence until the guilt is proved; ownership is presumed from valid title deeds until the contrary is proved; if a person is missing, 'Mafqud', his wife remains his legal wife until the court, after due inquiries arrives at a decision presuming the contrary, namely death of the husband.[236] There is a similar presumption that by and large things are 'halal', lawful, unless they are specifically prohibited. This relates more to Criminal Law than to any other branch of Shariah. It is a principle of legality well established in Shariah that there is no crime or punishment without a 'nass'. Shariah emphasizes that "there is no imposition of duties except after a 'nass' is established" and that "there is no punishment except after due warning" and that, "Originally, things and actions are lawful". With the existence of all these maxims there is strictly no room for the judge to depart from the law he is supposed to apply and establish crimes and punishments not provided for.[237]

Indulgence in imposition of duties[238] is another basic legal notion which is provided by this sub-section of the Act. However, 'istisshab' is accepted by all the schools of fiqh as a subsidiary source of the basic rules of fiqh.

Section 3 'b' '5' directs the judge to be 'guided' and not 'bound' by established judicial precedents in the Sudan in so far as they are not inconsistent with Shariah. This is the first time

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[235] Abd Al-Wahab Khallaf, op. cit., pp. 84-87. Dr. Abd Al-Munim an-Namir in his book 'Al-ijtihad' op. cit., p. 61 challenges the last part of condition C. He states that he takes with a grain of salt the claim that 'ijma' on a rule based on 'ijtihad' prevents 'ijtihad'. To equate 'ijma' with a 'nass' from the Qur'an or the Sunnah is much too extravagant and goes beyond reasonableness. He goes to the extent of saying that even 'ijma' based on a 'nass' should not prevent 'ijtihad'.

[236] Abdur Rahman I. Doi, op. cit., pp. 83,84.

[237] The Memorandum of Explanation on the Judgements (Basic Rules) Act, 1983, op. cit., p.7.

[238] This legal notion can be traced to its origin in some Qur'anic verses, i.e.:- "God intends every facility for you; He does not want to put you to difficulties." Surah II, verse 185; "We have not sent down the Qur'an to thee to be (an occasion) for thy distress." Surah XX, verse 2; "He, 'God', has imposed no difficulty on you in religion." Surah XXII, verse 79, The Holy Qur'an, Translation and Commentary, A. Yusuf Ali, op. cit., pp. 78,790, 872.

where it is stipulated that it is not enough for a judicial precedent to be established, it has to meet with the condition of being consistent with Shariah as well, so that it can guide the judge, but not hamper him.

Given the fact that the Judgements (Basic Rule) Act, 1983 makes it imperative for the judge to apply the existing Shariah rule as established by the Qur'an and the Sunnah and in the absence of any such provision make 'ijtihad' with the aid of the guides embodied in the same act, and given the fact that this act stipulates that the judge shall presume that the legislator does not intend to contradict Shariah, then the established legal precedents with the qualification in section 3 'b' '5' have a minimal chance, if any at all, to influence the judicial decisions of the Sudanese judges. Great as has been the role of legal precedents in shaping Sudanese Law, they can no longer carry the load.

Another interesting aspect is the other half of section 3 'b' '5' which provides that the judge shall be guided by subsidiary legal opinions and confirmed jurisprudential rules set forth by Muslim jurists.

The section has given priority to established judicial precedents in the Sudan in so far as they are not inconsistent with Shariah, over subsidiary legal opinions of Muslim jurists, or has at least put the two on equal footing. This is not surprising since the Act is designed to enhance the fiqh and update it through the revival of 'ijtihad'. It makes sense not to overrate the influence of the traditional fiqh if one's intention is to provoke an overwhelming 'ijtihad' movement.

The sixth guide is ''to have due regard to usage in dealings in matters not inconsistent with the rules of Shariah Law or the principles of natural justice''. Usage is best known in fiqh as 'Urf' or 'adat' and it is recognized as a subsidiary source of the basic rules of fiqh by all schools of fiqh. But the 'Maliki' school of fiqh put more emphasis on 'urf' than the rest of the schools of fiqh.[239] Again the section stipulates that 'urf' has to be consistent with Shariah, otherwise it is not a valid

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[239] 'Urf', custom, is considered by the Muslim scholars as an established basic rule. One of the notorious maxims relating to the law of contract runs as follows:-
''A matter established by custom is like a matter established by law, and what is established by custom is like what is established by a 'nass'.'' Abd Al-wahab Khallaf, op. cit., p.90.

one, 'fasid', and it has to be consistent with the principles of natural justice. This is a safeguard against the recognition of a custom that might have developed during the period of departing from the rule of Shariah, contrary to its rules, ends and objectives.

The last guide is provided by section 3 'b' '7' which reads as follows:-

"To strive to find the significations of justice prescribed by noble human laws and the rules of justice and equity enshrined in good conscience."

This guide adds more flexibility to the Judgements (Basic Rules) Act, 1983. The act invites originality, yet it is flexible enough to allow the Sudanese judge the opportunity to become exposed to the laws of other nations and attempt to identify the precepts of justice prescribed by such laws. This is not meant to be a back door through which English Law can make a comeback. It is rather an encouragement to a critical analysis of other laws and a thorough comparative approach to such laws. In consulting the holdings in other laws, the judge should not be overwhelmed by these laws, which was the case with English Law. The judge is supposed to keep in touch with laws other than Shariah; this does not imply dependence on such laws, copying or slavish adherence to them.[240]

The Judgements (Basic Rules) Act, 1983 rekindles the hopes in the revival of 'ijtihad', and it broadly guides the judge to prevent him from going astray. It breaks the psychological barriers which have blocked the way of a strong 'ijtihad' movement.[241] It is emphasized once again that the judge is destined to play a far reaching role in the revival of 'ijtihad'. The judge is supposed to give to the law precision, fill the gaps and adapt the texts of the different laws to modern needs. He is well equipped with objective tools to carry out these functions. The bulk of the fiqh cannot seriously develop anywhere outside the court, because fiqh is a practical science and not a hypothetical one.

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[240] The Explanatory Memorandum on the Judgements (Basic Rules) Act, 1983, op. cit., p.7.

[241] Dr. Abd Al-Munim an-Namir in his scholary approach to ijtihad stated that:-
"Those who still conceive of ijtihad as an impossible task and think of it as a wild monster which no one can get close to, are captured by some illusions that have accumulated and precipitated in their own minds. These illusions became true for such people who live under the pressure and the nightmare of such illusions. They are satisfied with these illusions and think they are part of the perfection of religion. Such people did not take the trouble of reading any literature about 'ijtihad', how was it and how was it practiced by the ancestors, they are incapble of crossing the barrier of the intellectual slavery of immitation 'taqlid'". See Dr. Abd-Al-Munim an-Namir, op. cit., p.207. Dr. Hasan at-Turabi stated that the Muslims are so overwhelmed by the caution from the implications of the freedom of 'ijtihad' that even the advocates of opening the gate of 'ijtihad' can be so scared to encounter a new point of view that has not been stated by any of the ancestors. He is of the opinion that the restrictions imposed on the process of 'ijtihad' have to be relaxed if we want the dormant Muslim Ummah, nation, to move forward. Dr Hasan at-Turabi, op. cit., pp.37,39.

This is obvious because the courts carry with them the secret of the laws eternal youth. Likewise the public and private life of the Muslims have to be consistent with Shariah in order to enable the fiqh to seriously develop through 'ijtihad'. This is natural in a religion that recognizes no dichotomy between religious and mundane matters. It is an overall system of life. But without 'ijtihad' this dichotomy is apt to exist. 'Ijtihad' is conducive to the conceptual understanding of Islam and is essential to the practical development of fiqh and as such, 'ijtihad' is a fundamental Shariah need. Again without 'ijtihad' it becomes a hollow and unrealistic claim to say that Islam is a total way of life and that Shariah is an overall legal system which is valid through time and space.[242] It is noteworthy that Abu Hanifa's usage of 'qiyas' reflected the need of a new social environment for the development of fiqh which originated in Arabia.[243] Now it is not only the change of space, but it is also the change of time that prompts the need for the development of fiqh. Islamic Law has its inherent potentials for change and survival. The legal devices provided by the basic rules of fiqh 'Usul Al Fiqh' account for such change and survival.

To conclude one can state with confidence the Judgements (Basic Rules) Act, 1983 is a piece of legislation the Sudanese legal profession can justly be proud of. It is well drafted, highly professional, succinct and original.

Section B:-

Islamization of the Other Laws

The different Acts that were endorsed after the declaration of restoring Shariah provided a convenient starting point and reduced the necessity of consulting an immense mass of collections, commentaries and digests of antecedent fiqh rules spreading over centuries. However, provisions of such Acts cannot be interpreted apart from reference to the relevent section of the Judgements (Basic Rules) Act, 1983. In interpreting provisions of these Acts the judge has to bear in mind that in the Judgements (Basic Rules) Act, 1983 language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the fiqh basic rules concerning the subject

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[242] Dr. Abd Al-Munim an-Namir, op. cit., p.66.

[243] Majid Khadduri, op. cit., p.13.

matter. The judge should avowedly adopt the judgement's basic rules and follow the principles of interpreting all definitions, doctrines and rules contained in any Act in complete conformity with Shariah rules. A general intent of the legislator to re-enact and declare Shariah principles and rules, with all their consequences, should be irrebuttably presumed and strictly enforced by the courts in interpreting the provisions of all Acts.

The judges educated and trained in western oriented law schools are inadequately prepared to consult the ancient texts and arrive at the right opinion, but they are perfectly capable of interpreting and applying these Acts with the help of the guides contained in the Judgements (Basic Rules) Act, 1983.

**1) The Civil Procedure Act, 1983:-**

The Civil Procedure Act, 1983 was one of the Acts endorsed under the Islamization of the Sudanese Laws. It repealed the Civil Justice Ordinance, 1974.

Section 5 of the Civil Procedure Act, 1983 reversed the sequence contained in section 5 of the Civil Procedure Act, 1974. Both sections provide for the law to be applied in matters of personal law. Section 5 of the Civil Procedure Act, 1983 stipulates that:-

''Where in any suit or other proceedings in a Civil Court any question arises regarding succession, inheritance, wills, legacy, gifts, marriage, divorce, family relations or the constitution of waqf, the rule for decision of such question shall be:-

a) The Shariah Law where the parties are Muslims or the marriage contract was conducted according to Shariah Law.

b) Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience and has not been altered or abolished by this or any other enactment or has not been declared void by a decision of a competent court''.

Shariah Law as applicable in this section is not qualified as it was in section 5'b' of the Civil Procedure Act, 1974. The latter section stipulated that Shariah Law shall apply ''in cases where the parties are Muslims except so far as the law has been modified by such custom as is above referred

to''. This opened the way to diminishing Shariah to vanishing point. It would stand to be modified by custom under the 1974 Act. However, this unfortunate part was deleted in the 1983 Act for the obvious reason that the legislator does not intend to contradict Shariah Law. It is not necessary that the parties should be Muslims to bring their case under Shariah personal law. It is sufficient ground to do so if the marriage contract was made according to Islamic Shariah.

Custom in the 1983 Act stands as it were in the 1974 Civil Procedure Act. It is applied in matters of personal law to non-Muslims.

Section 6 of the Civil Procedure Act, 1983 provides the law to be applied in absence of any express provision. It copied the counterpart 6 in the Civil Procedure Act, 1974 with a reversal in sequence. It stipulates that:-

> ''In cases not provided for by any law, the court shall act according to Islamic Shariah and the established Sudanese judicial precedents, custom, justice and good conscience.''

Again Shariah in the 1983 Act takes priority over the established Sudanese precedents which was not the case with the 1974 Act, for an obvious reason that the legislator intends this time to fully apply Islamic Shariah. However, with the presence of the Judgements (Basic Rules) Act, 1983 which deals with the topic of section 6, the Civil Procedure Act, 1983 in detail, Section 6 becomes redundant, furthermore it does not follow the sequence in section 3 'b' of the Judgements (Basic Rules) Act, 1983.

Section 90 of the Civil Procedure Act, 1983 provides for the obligation to testify on oath and provides for the contents of the oath which are different from the contents of oath as provided for by section 62 '1' of the Evidence Act, 1983. This is another instance of inconsistency.

Section 110 of the Civil Procedure Act, 1983 stipulates that the court shall, under no circumstances, order the payment of interest. This is the first time in the legal history of the Sudan since the inception of the Civil Justice Ordinance, 1900 that the courts are forbidden to sanction the payment of interest. This section complies with the principles of Shariah that prohibit 'riba', usury, or interest.[244] In the Civil Procedure Act, 1974 and all the previous Civil Justice Ordinances it was

[244] For a full account of this issue see Pt. IV, Ch. 5, p. 227, of this thesis.

within the power of the courts to order the payment of interest. Such order was issued upon the plaintiff's claim in his plaint, this is as far as interest after the institution of suit was concerned, but it was also discretionally for the courts to order payment of money with or without interest.[245]

Other than the aforementioned instances, the Civil Procedure Act, 1983 remained substantially the same as the Civil Justice Ordinance, 1900. Such instances are a face lift of an old Ordinance impregnated with problems and un-Islamic features. Under the Civil Procedure Act, 1983 justice is still a comodity affordable only to the haves, whereas the paupers have to go through a procedure to request suing in forma pauperis. A pauper has to provide the court with a list of any movable or immovable property belonging to him with its estimated value, a certificate signed by two persons and authenticated in such manner as the court may verify that the petitioner is a pauper. In addition to that the court may require the petitioner to make a declaration on oath or an affirmation as to the property which he possesses or as to his inability to pay the prescribed fees. Furthermore, the defendant has the right to appeal and show cause why the plaintiff should not be allowed to sue as a pauper! One wonders what the defendant has to do with the plaintiff suing in forma pauperis. To make the situation of the pauper worse, the court shall reject his application to sue in forma pauperis for, inter alia, very interesting reasons, i.e., "where his allegations do not show that he has a reasonable prospect of success in the suit." Even after allowing the plaintiff's application to sue in forma pauperis, the court can still witch-hunt the plaintiff and order him/her to be dispaupered for some reasons that are most irrelevant to plaintiff's financial misery or, to be more accurate, for reasons that are reflections of such financial misery, i.e., 'if plaintiff is guilty of vexatious or improper conduct in the course of the suit!'

The fees system as it stands in the Civil Procedure Act, is anything but Islamic. It can be traced back to the western capitalist system and to an historical development which is peculiar to the western legal system and alien to Shariah.

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[245] Section 109 '1' of the Civil Procedure Act, 1974 stipulates that, "where and in so far as the decree is for the payment of money, the court may, for any sufficient reasons, fix the date of payment, or order that payment of the sum decreed shall be made by installments with or without interest."

Section 215 of the Civil Procedure Act, 1983 stipulates that a decree passed by the Supreme Court is not subject to review; however, it is possible that the Supreme Court may unanimously and upon its own initiative, review any decree that it has passed if it contravenes the rules of Islamic Shariah. The Supreme Court shall pass a decree by the majority of opinions. This section is newly introduced, and it has no counterpart in the 1974 Act. Section 215 allows the Supreme Court a margin of flexibility to review its own decision if it does not comply with the rules of Islamic Shariah. But the way it is drafted is problematic. It makes it a discretion, which simply means that if the Supreme Court does not move to act according to this descretion, its decision which does not comply with the rules of Shariah shall remain binding. If the majority of the Supreme Court does not approve of the result of the review, again the same decision that does not comply with the rules of Shariah remains unchanged. Obviously both possibilities violate section 2'A' of the Judgements (Basic Rules) Act, 1983. This section provides that "a judge shall presume that the legislator does not intend to contradict Shariah...". It equally flies in the face of the public order in a state that has officially restored the rule of Shariah. It should have been imperative on the Supreme Court to review its own decision when it does not comply with the rules of Shariah, and it should have been imperative that the result of such review should comply with the rules of Shariah.

The second schedule of the Civil Procedure Act, 1983 applies to the personal law suits. It provides for the procedure to dispense with personal law suits. Nothing has been done in the area of personal law. This schedule has always been there with some cosmetic touches from time to time. Although the two divisions of the Judiciary, Shariah and Civil, have officially been consolidated, each section still retains its inherent characteristics. Interestingly the rules relating to personal law section have not been adapted to the new situation where Shariah has become the Territorial Law of the Sudan. It is still stipulated that district Shariah judges shall also be competent to decide any suit not falling within their jurisdiction, as specified by law, if the parties have requested the application of Shariah rules.[246] This section has been there since the Condominium to allow Muslims to resort to Shariah rule at will. Now that Shariah Law is not confined to personal law for Muslims, this

[246] Section 12 'b', chapter 3, the Second Schedule of the Civil Procedure Act, 1983.

section becomes absolutely meaningless and miserably out of date.

Again, section 16 of the second schedule of the Civil Procedure Act, 1983 states that:-

"Decisions of the Shariah Law Courts or personal matters requiring the application of Shariah rules shall be in accordance with the authoritative doctrines of the Hanafi jurists except in matters in which the Supreme Court (Personal Law Circuit) otherwise directs in a judicial circular,in which case the decisions shall be in accordance with such other doctrines of the Hanafi or other Muslim jurists as are set forth in such circular."

This is exactly how this section has been since the Condominium. When compared now with the sections of the Judgements (Basic Rules) Act, 1983 the section seems obsolete because it slavishly adheres to the legal views of the Hanafi school which were introduced to the different parts of the Muslim countries through the influence of the Ottoman Empire.

By and large, whole chunks of the Civil Procedure Act, 1983 are copied verbatim from the previous Act of 1974 which was in turn an Arabic version of the Civil Justice Ordinance, 1929 which in turn can be traced to the Civil Justice Ordinance, 1900. These Ordinances have remained substantially intact except for the change of the name and title. This obviously challenges the Islamic originality of the Civil Procedure Act, 1983 except for some sections. It has been drafted in haste by incompetent draftsmen. Unlike the Judgements (Basic Rules) Act, 1983 the Civil Procedure Act, 1983 is not the work of a technical committee or the 'Committee for the Revision of Laws to Comply with Shariah', which was established back in 1977. Only a few sections were engrafted on the Civil Procedure Act to make it look like Islamic Law, but it was still that 81 year old Civil Justice Ordinance, first introduced by the British Administration in the year 1900.

**2. The Evidence Act, 1983:-**

The Evidence Act, 1983 is applicable to both criminal cases and civil suits. It is the second time that a law of evidence has been enacted. The first experience was shortlived and it vanished with the repeal of the Civil Code, 1971. This time the Evidence Act, 1983 has adopted a considerable number of Shariah rules of evidence. However, some rules were copied without a

serious thought being given to them. Section 4 '3' of the Evidence Act states a general rule that stipulates the following:-

"Originally a pubescent is safe and sound from any legal incapacity and is free, 'Hur'...."

It is out of date to speak of freedom, 'Hurriya', the opposite of which is slavery at a time when slavery has long been a historical fact. It has nothing to do with the world of today. But the legislator mindlessly copied from the fiqh book he had at hand.

Section 8 of the Evidence Act, 1983 accommodates the rule of the court in the case of Ali Basaeed V. El Surra Basaeed.[247] Babiker Awadalla was reported to have stated in this case that:-[248]

"On grounds of public policy and fairness, the law has always abstained from allowing the character of a party to be raked up by his adversary in court when such character is not in issue, and a fortiori it cannot allow the court itself to take the initiative and assail the character of a party appearing before it and on grounds entirely alien to the matter in controversy".

Section 8 stipulates that the entities of people, their physical conditions, their behaviour and their relations are only relevant in as far as the matter in dispute is concerned.

Section 11 of the Evidence Act, 1983 provides that relevant evidence cannot be inadmissible simply because it has been illegally obtained as long as the court is confident that such evidence is substantively valid and correct. This is objectionable from a Shariah point of view. Fortunately section 12 of the same Act, qualifies and restricts the seemingly sweeping character of section 11. Section 12 states that:-

"The court may reject relevant evidence whenever it is convinced that the admission of such evidence violates the principles of Islamic Shariah, justice and the public order."

I have a reservation as to the wording of the previously mentioned section. It gives the court the discretion to reject evidence that violates Shariah principles, justice and the public order. If the

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[247] S.L.J.R., 1964, p.12.

[248] Ibid., p.13.

court opted not to use the discretion, then such evidence with all its implications is admissible. It should have been imperative on the court not to admit evidence that violates Shariah principles, justice and the public order.

Section 25 makes a distinction as to the admission of evidence in both civil suits and criminal cases. It is conclusive evidence against the party who makes the admission in both civil suits and criminal cases. However, in the case of criminal cases the admission cannot be conclusive if it is not judicially obtained, judicial confession, or if it is made with the intention of protecting the original offender. However, retraction of an admission is not allowed in civil suits except for a mistake of fact, in which case the burden of proof lies with the party who makes the admission. On the other hand retraction of a confession in criminal cases render the confession inconclusive.[249]

The lawful means of obtaining evidence run thus:-[250] a) Confession 'Iqrar' b) Testimony of the witnesses. 'Shahada' c) Documents. 'Mustanadat' d) Circumstantial evidence. 'Qara'in' e) The binding force or effect of judgements. f) Testimony on oath 'Yameen' g) Examination of the subject of dispute h) Expertise.

Section 31 of the Evidence Act has enacted the rule in S. G. V. Mohamed El Hasan Hashim and others [251] in which the court held that:-

> "Communications between a client and his lawyer in the course of that relationship and in professional confidence are privileged unless the legal service was sought in order to enable or aid the client to commit a crime or fraud."

Section 31 added one more reason as a proviso to the privilege on communication in professional confidence, viz, if the client gives permission to disclose such a communication.

Section 32 '2' provides for a rule established by Qur'an[252] , viz, inadmissibility of the

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[249] Section 26 of the Evidence Act, 1983.

[250] Section 18, Ibid.

[251] (AC-CR-REV-170-1962); S.L.J.R., 1962, p.176.

[252] The translation of the relevent Qur'anic verses reads as follows:-

"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after:- for such men are wicked transgressors.

Unless they repent thereafter and mend (their conduct); For God is oft-Forgiving, Most Merciful."

Verses 4,5 consecutively of Sura XXIV, The Holy Qur'an, Translation and Commentary, A.Yusuf Ali, op. cit., p.897.

These Qur'anic verses contain some rules for the protection of the honour of womanhood. Unsupported slander against a woman's chastity is punished by flogging. The slanderer is also deprived of his civic right of giving evidence. He or she can

testimony of a witness who has previously been flogged in a case of slander against a woman's chastity unless it is established that he has repented thereafter.

According to section 36 '1' of the Evidence Act, 1983 hearsay evidence is not admissible. The exceptions to the hearsay evidence rule are claims of lineage, marriage and death. These exceptions are only admissible when no better evidence is obtainable, in which case the court shall consider, upon the weight of this evidence, the circumstances leading to such evidence. It also considers the need to corroborate such evidence.

Section 48 of the Evidence Act, 1983 presumes that ancient documents 'ten years old or more' are written and signed by the person so claimed to have written and signed them. The signature of witnesses thereto are presumed to be authentic. This section has adopted the established judicial decision in the case of Heirs of El Amin Abdel Karim V. Heirs of Abdel Aziz Haj Mohamed. [253]

Section 57 repeals the long standing decision of the Sudanese Courts that held the evidence of a criminal conviction is inadmissible in a civil suit to prove facts alleged to be the basis of the conviction. The section provides that the judge in a civil suit shall be bound by the decision in a criminal case as far as the facts alleged as the basis of that decision are concerned and if it is essential for the judge in a civil suit to decide on such facts.

Chapter 12 of the Evidence Act, 1983 deals exclusively with the establishment of evidence relating to 'hudud'.[254]

Section 77 of the Evidence Act, 1983 establishes the means to prove the offence of 'zina', adultery. These means are:-

1. The frank confession in a court of justice, unless it is retracted before the execution of the judgement;

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only be readmitted to be a competent witness if he/she repents thereafter.

[253] (AC-REV-67-1958); S.L.J.R., 1964, op. cit., p.37.

[254] Awad Mohamed Nur V. El Fadil Idris , (HC/REV/4/1957); S.L.J.R., 1957, p.23. 214/ For the meaning of 'Hudud' see footnote No. 39 in Pt. II, Ch.2, p. 54 of this thesis.

2. The testimony of four fair adult witnesses. The testimony of less than four fair adults will only be admissible as an exception to the 'four fair adults' rule.

3. Pregnancy in case of a woman with no husband, 'feme sole';

4. 'Mulaana', imprecation:- It is the solemn invoking of the wrath of God on the party who is telling a lie in case of adultery and absence of any witness.

The confession of an adulterer in a court of justice is conclusive evidence to prove the offence of 'zina'. However, such a person has every opportunity to withdraw from his confession. This right to withdraw a confesson is unrestricted. The person does not have to give reasons why he is withdrawing it, and such a person can retract from confession at any time before the execution of the judgement. The reason for this flexibility is the intention to help extenuate the harsh rule if possible. The punishment for a proved offence of 'zina' is 'rajm' stoning to death in case of married people and one hundred lashes in case of unmarried ones.

The second means to prove 'zina' is through the testimony of four witnesses. They must be eye witnesses and they must see the actual act of penetration. But to say that they should be only males needs revision. However, there is a provision to the sub- section which allows the court in cases of necessity to admit the testimony of fair female witnesses. Ibn Hazm, the learned faqih was of the opinion that the sex of witnesses in such cases is irrelevant and so were 'Atta and Hammad', the two distinguished Muslim Scholars.[255]

The pregnancy of a 'feme sole' is circumstantial evidence and not conclusive evidence; and as such it can be rebutted. It is possible to prove that the pregnant woman did not commit the offence of 'zina', but was forced to submit to sexual intercourse. Abu Hanifa, ash-Shafii and Ahmed Ibn Hanbal, the founders of three schools of fiqh were of the opinion that an allegation that a pregnant woman was forced to intercourse is sufficient to rebut the circumstantial evidence of 'zina'. She does not have to prove that claim. There can be instances when the woman can become pregnant by injecting the semen of a man who is not her husband 'insemination'. There is no penetration in this

[255] Abdul Gadir 'Awda, "Islamic Penal Legislation, Compared to Secular Laws." op. cit., p.411.

case and there is no coercion. None of the ingredients emphasized by the 'fuqaha' exists in such a case. It becomes a complex case to handle. However, there is a tendency among some scholars not to apply the 'hadd' in such a case.[256] They claim there is doubt in this case which rules out the 'hadd'. It is to the benefit of the accused. I believe this is an area which needs 'ijtihad'.

Imam Malik, the founder of the Maliki school of fiqh was of the opinion that the pregnancy of a 'feme sole' is sufficient evidence to invoke 'hadd' without the need for an admission on her part. He further stated that it is not enough for such a woman to allege that she was forced to intercourse. She has to establish cogent evidence or circumstantial evidence to stand such a defence.

'Mulaana' is confined to the case of married persons. If one of them accuses the other of unchastity and it is not possible to prove such accusation with the testimony of four eye witnesses, then the complainant can solemnly swear four times to that fact and in addition invoke a curse on himself if he lies. That is prima facie evidence of the other spouse's guilt. If the accused spouse similarly swears four times and similarly invokes a curse on herself, then the accused is acquitted of the guilt. If the latter steps are not taken the charge is held proved and the punishment follows. In either case the marriage is dissolved, as it is against human nature that such spouses can continue to live together happily after such an incident.[257]

'Mulaana', imprecation, is a Qur'anic rule[258] which has been observed by section 77 '4' of the Evidence Act, 1983.

Section 78 provides that, having due regard to the means to prove the offence of 'zina' as laid down in section 77, the rest of 'hudud' offences, i.e., murder, theft, etc..., are established by the following evidence:-

1. Admission in a court of justice.

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[256] Ibid., p.441.

[257] The Holy Qur'an, Translation and Commentary, Yusuf Ali, op. cit., foot note No. 2960, p. 897.

[258] Verses 6,7,8,9 consecutively of Sura XXIV of Qur'an establish 'Mulaana' procedure as follows:-
"And for those who launch a charge against their spouses, and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by God that they are solemnly telling the truth; and the fifth (oath) (should be that they solemnly invoke the curse of God on themselves if they tell a lie. But it would avert the punishment from the wife, if she bears witness four times (with an oath) By God that (her husband) is telling a lie; and the fifth (oath) should be that she solemnly invokes the wrath of God on herself (if her husband is telling the truth)."

2. The testimony of two witnesses.

Section 79 of the Evidence Act, 1983 states that to smell alcohol is sufficient evidence to establish the offence of drinking liquor. The smell has to be proved by the testimony of two fair witnesses or a report of an expert thereto. This section is a codification of the Maliki fiqh view on this issue. Abu Hanifa and Shafii did not accept that statement and were of the opinion that the smell alone is not sufficient evidence of the offence of drinking liquor.[259]

The crimes visited by harsh punishment in Islamic Penal Law have strict and onerous rules of evidence. Section 80 of the Evidence Act, 1983 provides for the instances in which a 'hadd' shall be set a side.

Section 81 of the Evidence Act, 1983 provides that the interpretation of the provisions of the Evidence Act shall not contradict the rules of Islamic Shariah. This is redundant since it has already been settled in section 2'a' of the Judgements (Basic Rules) Act, 1983 that ''a judge shall presume that the legislator does not intend to contradict Shariah...''

**3. The Penal Code Act, 1983 :-**

The Penal Code Act, 1983 repealed the Penal Code Act, 1974.[260] It also repealed the Prostitution Combatting Act, 1976.

By and large, the Penal Code Act, 1983 embodies all the 'huddud' in Islamic Criminal Law. The remaining parts of the Code are copied verbatim from the Penal Code, 1925 and its replica, the Penal Code Act, 1974. However, this can be acceptable since the 'tazir', punishment[261] in Shariah is flexible enough to accomodate offences established by these two repealed codes.

The 'huddud' embodied in the Penal Code Act, 1983 include the punishment of 'rajm', stoning to death for married adulterers, and flogging for unmarried adulterers, death sentence for murder, 'diyah' as a principal and original punishment for some offences and as a substitute punishment for other offences. In the latter case 'diyah' has to be accepted by the victim or the

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[259] Ibid., p.511.

[260] The Penal Code Act, 1974 repealed the Penal Code, 1925.

[261] For the definition of 'tazir' see Pt. II, Ch. 2, p.54 of this thesis.

guardian of the deceased. Included also are 'qisas', equitable retaliation, in offences affecting life and human body, and amputation of hand for theft.

'Diyah' has become a punishment common for offences affecting life and offences affecting the human body. It has replaced the punishment with imprisonment and fine which was characteristic of the Penal Code, 1925 and the Penal Code Act, 1974. The fine imposed on the accused under these Codes used to go to the public treasury whereas the 'diyah' is due to the heirs of the deceased. 'Diyah' serves the needs of public peace and security in Sudan. It recognizes that the victim has a place in dealing with the offender. It accomodates the progressive notion that an offence creates a relationship not only between the criminal and the society but equally a relationship between the criminal and his victim.[262]

The Penal Code Act, 1983 introduced another type of murder, viz, 'qatl Al-gila'[263] which is visited with death sentence. It is not a substitutable sentence. 'Diyah' shall not replace the imperative death sentence. This is the fiqh view of Imam Malik. The rest of the Muslim scholars did not recognize the distinction between 'qatl Al-gila' and murder as such. For these scholars both crimes are visited with death as an original punishment or pardon upon the payment of 'diyah' as a substitute, provided that the latter is accepted by the guardian of the deceased.[264]

The Penal Code Act, 1983 provides for some instances where the accused shall not be punished with death in murder cases. Such instances are:-[265]

1. When a woman causes death of her child immediately after birth or within eight days therefrom due to a mental or pyschological state caused by delivery (infanticide).
2. When a parent kills his/her own child.
3. For the purpose of applying the second of these instances, ancestors of father and mother shall be deemed as parents. 'Diyah' shall be the punishment in such a situation.

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[262] Natale Olwak Akolawin, "Compensation in Criminal Proceedings in the Sudan." S.L.J.R., 1969, p.219.

[263] Such as the case of a criminal who persuades a person, through deceitful means, to follow him to an isolated or hiding place in order to kill such a person.

[264] Sayyed Sabiq, 'Fiqh as-Sunnah', Vol. II op. cit., pp.530,531.

[265] Section 254 of the Penal Code Act, 1983.

When 'diyah' is substituted for the death sentence in murder cases it is best known as 'complete diyah' and when it is a punishment for physical injury it is known as 'incomplete diyah'. Complete 'diyah' is imposed on the accused when such accused intentionally mutilates an organ of the body which is singular, i.e., 'mouth or sexual organ'. When the organ mutilated is more than one in the human body, i.e., 'eyes, ears, hands, fingers ets...' incomplete 'diyah' shall be imposed, provided that it is only one eye or ear (for example) which is damaged. However, when a dangerous means, i.e., 'arms, fire, electricity etc...' is used to damage even one of a pair or one of a number of organs then complete 'diyah' is imposed on accused.

The definition of the term 'zina', is confusing. It reads thus:-[266]

> ''Whoever penetrates with his penis or the circumcized part of it the vagina or the anus of an adult person not joined in lawful wedlock, or allow another to penetrate her vagina or anus with his penis or its circumcized part without being joined in lawful wedlock is deemed to have committed the offence of 'zina.''

The problems and confusion posed by this definition stem from the following:-

1. It suggests that to penetrate a woman's anus if the couple are joined in lawful wedlock is acceptable in Shariah which is not true.
2. It excludes homosexuality from the definition of 'zina' and does not provide in any other section of the code for the punishment of homosexuality which may suggest that it is lawful. Again that is far from being true in Shariah.
3. If the word anus is there to include homosexuality then what does the phrase 'joined in lawful wedlock' mean? If not then point '1' remains valid.
4. Lesbianism is excluded as well in this definition and there is no other provision in the Code to punish such an offence. The section defining the offence of 'zina' is poorly drafted and lacks precision.[267] It provides that death sentence is the punishment for 'zina' by a 'muhssan', married person. This creates a problem since it is not the 'Shariah' rule for the offence of

[266] Section 316 'A', Ibid.
[267] S.318 '1', Ibid.

'zina'. 'Rajm' is the punishment for such an offence. Section 64 'B' of the Penal Code Act, 1983 provides for the punishment of 'rajm' as one of the punishments stipulated by the different sections of the Penal Code, 1983. But it appears nowhere in the code, especially where it ought to, viz, 'zina' offence.

There is a proviso to the punishment of 'zina'. It exempts non-Muslims from such a punishment. They shall instead be punished with the punishment, if any, provided by their own religion; otherwise the punishment with flogging not exceeding eighty lashes or fine or imprisonment for a term not exceeding one year.

The Penal Code Act, 1983 visits running a place for the purpose of 'zina' or any unlawful sexual act with flogging and fine and imprisonment. In case of a second conviction for running a house for the purpose of 'zina' or any unlawful sexual act, accused shall be punished with death or crucifixion or amputation of opposite hand and foot. The unlawful sexual acts mentioned in this section[268] are not referred to in the Code. They are not defined, yet they are visited with a punishment!

The Penal Code Act, 1983 distinguishes between 'hadd' theft and 'non-hadd' theft. The first is punished with amputation of hand whereas the latter is punished with flogging or a fine or imprisonment, that is, 'tazir'. The definitions of the two kinds of theft are quite different. Theft as such is defined as follows:-[269]

'Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to carry out such taking, and whoever dishonestly abstracts, diverts, consumes or uses any electricity or electric current is said to commit theft.'

The 'hadd' theft is thus defined:-[270]

''Whoever dishonestly takes any movable and lawful, 'mutaqawam', property which is below

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[268] S. 318 (A), Ibid.

[269] S. 320 '1' of the Penal Code Act, 1983.

[270] S. 32 '2' '3', Ibid.

the 'nisab', minimum value, out of the possession of any person without that person's consent, is said to commit theft''.

For the purpose of the foregoing definition the 'nisab' is a quarter of a dinar of gold or three dirham of silver or their equivalent in Sudanese currency.[271]

The first of these two instances of theft is punished with 'tazir' whereas the other is punished with 'hadd'. The latter has more ingredients than the first. The movable property which is the subject of theft has to be 'mal mutaqawam', i.e., liquor and pork are unlawful in Islam and as such they are both non-'mutaqawam' property. The punishment for the theft of these two items shall be 'tazir' and not 'hadd' since the latter is the punishment only for the theft of 'mal', property, 'mataqawam'.[272] Furthermore, there has to be a 'nisab', 'value of stolen property', below which the theft does not qualify as a 'hadd' offence and becomes a 'tazir' offence. The stolen property has to be owned by somebody, but not necessarily in that person's possession.[273]

Theft between parents or grand-parents and children or grand-children is not a 'hadd' theft and is not punished with amputation of hand and so is theft between the prohibited degrees of marriage[274] as well as theft between a married couple and anybody in whose case there can be an assumption that he owns the stolen property. These are all instances of 'tazir' theft.

The offence of robbery and brigandage is met with death and crucifixion or amputation of the opposite hand and foot or life imprisonment with exile. The same punishment is prescribed by the Penal Code Act, 1983 for the following offences - voluntarily causing injury in committing robbery, brigandage, brigandage with murder, robbery or brigandage with attempt to cause death or grievous hurt and habitually stealing or robbing or cheating, house-breaking after preparation to commit an

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[271] There is a need to review the 'nisab', 'minimum value'. It was sufficient at the time of prophet Mohamed and for a while after that to maintain an average person. It was based on social circumstances which were certainly variable and did not serve a particular purpose after it was shaped by the prophet. Now it has to be reviewed in light of contemporary social circumstances, taking into account the fluctuation in the value of money and the amount considered negligible under given circumstances, i.e., time and space. See Mohamed S. El-Awa, op. cit., pp. 4,5.

[272] Liquor and pork have no value for Muslims, but they have a value for non-Muslims. Such value is relative and that renders the theft in such a case a 'tazir' offence. See Abdul-Gdir 'Awda, op. cit., p.544.

[273] The four Sunni and 'Zaydi' schools of fiqh unanimously agree that to establish the offence of theft, it must be proved that the stolen property was in custody, 'Hirz'. The 'Dhahiri' school of fiqh disagrees with this view and renders the question of 'hirz' irrelevant. See Mohamed S. El-Awa, op. cit., p.6.

[274] These are father's wife, one's own mother, daughter, sister, father's sister, mother's sister, brother's daughter, sister's daughter, foster mother, foster sister, mother in law, step-daughter who is under one's protection and a wife of one's own son.

offence against life and property, lurking, house-trespass or house-breaking after preparation to inflict physical injury, assault or wrongful restraint, lurking house-trespass or house-breaking by night in order to commit a 'hadd' offence, grievous hurt caused whilst committing lurking house-trespass or house-breaking, and persons jointly concerned in committing such lurking house-trespass or house-breaking by night where death or grievous hurt is caused by one of them and also running organized crime nets or gangs.[275]

The Penal Code Act, 1983 provides cohabitation brought about by a man deceitfully inducing a belief of lawful marriage, to be a 'zina' offence and so is the offence of incest.[276]

Polygamy is considered as an offence except in the case of a Muslim husband who complies with the rules of Islamic Shariah relating to marrying up to a maximum of four wives.[277] Originally this section was introduced by the British Administration with all its Christian connotations, although it was designed to apply to a Muslim population. Surprisingly the 1974 Penal Code Act endorsed the section as it was, in a mindless literal translation of the Penal Code Act, 1925. The Penal Code Act, 1983 exempts Muslims from such a rule, but again it is a rather unfortunate adoption of an English legacy. The Penal Code Act, 1983 was claimed to be an Islamization of the Sudanese Criminal Law and as such it is supposed to consistently codify the rules of Shariah and provide for a proviso for non-Muslims and not vice versa.

The sections stipulating punishment for 'zina' with a married woman, 'Muhsana', 'feme covert', and by such a woman[278] are both redundant since they were already incorporated in sections 316 and 318 of the same Penal Code. They are there merely because of mindless copying by the legislator from the repealed 1974 Penal Code Act.

The offence of 'qadhf', 'false accusation of unchastity', is a 'hadd' offence and is punished with eighty lashes.

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[275] Ss. 334, 336,337,338,339, 326'e', 393,394,395,396,398,399 and S. 457 of the Penal Code Act, 1983.

[276] Ss. 425,432, Ibid.

[277] S. 426, Ibid.

[278] Ss. 429,430, Ibid.

The Penal Code Act, 1983 confirms the public and official policy of combatting drunkenness. The Code punishes drinking and considers it a 'hadd' offence. It provides penalties for drinking, whether in public or in private and for trafficking in liquor or producing it. The Code defines liquor as 'a drink much of which shall intoxicate'.[279] Any intoxicating material not in the form of liquid is not considered as 'Khamr', liquor, i.e., liquor candy. Such an intoxicating material other than 'Khamr' as defined by the code is a 'tazir' offence. For a Muslim scholar like Ibn Taimiyah, liquor can be drunk and can be eaten and there is no need to confine 'Khamr' to intoxcating liquids only.[280]

According to the Penal Code Act, 1983 taking drugs is a 'tazir' offence. But I am inclined to view it as 'Khamr' and probably worse, if not just as bad. Ibn Taimiyah, a Muslim scholar best known as Shaykh Al-Islam was of the opinion that:-[281]

> ''Hashish 'and so all kinds of drug' are 'haram', unlawful, and the one who is using it shall be flogged like the drunken person. It is more tainted than liquor in that it corrupts and confuses the mind and mood...''

Ibn Al-Qayyim, another Muslim scholar who was a student of Ibn Taimiyah, agreed with Ibn Taimiyah's fiqh view on this issue.[282]

Section 77 A'1' of the Penal Code Act, 1983 provides that:-

> ''A court which convicts any accused person whether or not it passes any sentence of punishment may order the offender to make compensation of any person injured by his own offence if such compensation is in the opinion of the court recoverable by Civil suit.''

This section has been there since the introduction of the Penal Code, 1925 but it has undergone a progressive development since then. In the 1925 Sudan Penal Code, an order to compensate may be sent to a civil court for execution under section 206 of the Civil Justice

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[279] Section 445, Ibid.

[280] Shaykh Al-Islam Ibn Taimiyah, ''as-Siyasah ash-Shariyah''. Arabic Text, reprint, Dar Al Katib Al-'Arabi, undated, pp.118,119.

[281] Ibid., p.116.

[282] Sayyed Sabiq, op. cit., p.388.

Ordinance.[283] the Penal Code Act, 1983 has been faithful to the wording of the Sudan Penal Code, 1925. It kept the section intact. The courts were always reluctant to award compensation in criminal proceedings. They were unconscious victims of the artificial seperation of civil and criminal procedure found in Common Law and other so called developed legal systems.[284]

The Penal Code Act, 1983 allows the court to summon any third party who has an interest in the criminal proceedings and to proceed with the case as its nature requires. The court may also order that the civil fees to be deducted from any compensation paid or be paid to the person who suffers injury. For the purpose of compensation as provided for by section 77A and for the purpose of any rights due to anybody who suffers injury or loss incurred as a result of a criminal act, the criminal court is deemed to be a civil court.[285]

By allowing one court to deal with the criminal and civil liability of an injury incurred as a result of the offence, unnecessary litigation is avoided, fair treatment is secured for both the accused and the victim of the offence, and the party who suffers injury as a result of the offence is made a party to criminal proceedings.[286]

The Penal Code Act, 1983 has fully observed the recommendations by Natale Olwak which were embodied in his article, 'Compensation in Criminal Proceedings in the Sudan'.[287]

Section 77A of the Penal Code Act, 1983 along with section 57 of the Evidence Act, 1983 'which stipulates that the judge in a Civil suit shall be bound by the decision in a criminal case as far as the facts alleged to the basis of that decision are concerned', have minimized the gray area between criminal and civil procedure in Sudanese Courts.

The absence of a legislative provision in the Penal Code Act, 1983 should not restrict the court in applying Shariah rules. No provision in this Code shall be interpreted in a way that contradicts a basic rule of Shariah.[288]

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[283] Section 77B of the Sudan Penal Code, 1925.

[284] Natale Olwak Akolawin, op. cit., p.197.

[285] Section 77A '4' of the Penal Code Act, 1983.

[286] Natle Olwak Akolawin, op. cit., p.199.

[287] Loc. cit.,

[288] S. 458 '3', '5' of the Penal Code Act, 1983.

By and large, the Penal Code Act, 1983 has enacted almost all 'hadd' offences and thus, it resembles closely Islamic Criminal Law. This does not rule out infiltration of a number of un-Islamic notions into the Code, i.e., offences against the state, sedition, abuse of religious and noble beliefs[289] and offences against the public tranquility. All of these offences are designed to protect whoever is in power in the Sudan. In doing so they generally undermine public liberties and the freedom of expression. The regime was not prepared in the least to tolerate political opposition. This part of the Penal Code Act, 1983 is politicized not legal or Islamic.

A number of criminal court circulars were issued to elaborate on issues like complete 'diyah', reasons to drop drinking 'hadd' punishment, reasons to drop robbery 'hadd' punishment, reasons to drop 'zina''hadd' punishment, reasons to drop theft 'hadd' punishment and reasons to drop 'qadhf', false accusation of unchastity, 'hadd' punishment and a few other circulars. There was an urgent need for these circulars to support the newly introduced offences and punishments and to assist the courts to better understand such offences and punishments. These circulars were to caution the courts to be sure beyond doubt before passing a 'hadd' sentence. Almost all of these circulars were reminding the criminal courts of the traditions of prophet Mohamed that go thus:-

''Repulse the 'hudud' with 'Shubuhat', doubts.''

''It is better for a ruler to err in pardon rather than erring in punishment.''

''Repulse the application of 'hadd' punishment as much as you can whenever any doubt persists.''

Obviously the Chief Justice then was concerned that some judges might over enforce 'hudud' and render the new punishments repulsive by their excessiveness.

**4. The Criminal Procedure Act, 1983:-**

The Criminal Procedure Act, 1983 stipulates a set of basic rules. Such rules are:-

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[289] Abuse of religious and noble beliefs is a section that found its way to all the Penal Codes since the Macaulay Penal Code, 1899 and throughout the legal history of the Sudan. It reflects the fear of the political force of Islam that has been behind every historic event in the Sudan. For a detailed account of this section see Pt.II, Ch.2, p.53-60, of this thesis.

A. Every accused has the right of a prompt fair trial. Every accused is innocent until his guilt is proved beyond reasonable doubt. No one shall receive a punishment which is harder than the punishment provided by the law which was in force at the time the offence was committed. It is also prohibited to subject anybody to inhumane treatment or punishment.

B. The court shall award a just and fair compensation to anybody who suffers injury or loss incurred as a result of a criminal act.

C. He who alleges should prove 'semper necessitas probandi incumbit ei qui agit' and he who denies the allegation should take the oath.

Release of accused on probation is not allowed in cases of violation of a rule of Shariah and so is the case with 'qisas', retaliation, offences.

A salient feature of the Criminal Procedure Act, 1983 is the jurisdiction accorded to the Prosecutor. This jurisdiction include:- taking an arrested person to the judge or Prosecutor to take cognizance of all cases of arrest; search or warrant the search of an arrested person; issuing a warrant of arrest; taking affidavit of the summons clerk to the effect that a due summons has been processed; releasing accused on bail; receiving complaints; ordering accused to appear before the Prosecutor and present an undertaking to keep the peace or refrain from acts that break the law; such undertaking may be supported by bail. The Prosecutor has the power to order the accused to present an undertaking supported with bail to observe a bond of good conduct, provided that such accused is a habitual offender; taking cognizance of complaints; as well as ordering an unlawful assembly to disperse; dispersing of unlawful assembly by force; investigating and conducting the case diary; sending the accused for a medical examination; keeping accused in confinement or renewing such detention for a period that does not exceed fifteen days; bringing accused before the judge for trial; withholding the stolen property or a property suspected to be stolen and having the same authority entertained by a police officer within the limits of station.

Some of the powers and jurisdiction accorded to the Prosecutor were powers and jurisdiction of the magistrates and some were police powers before the 1983 Code of Criminal Procedure was enacted. This brings part of the Sudanese Criminal Procedure close to the system of Prosecutor in

Egypt which has its origin in French Law. It relieves the judges of an extra-judicial burden and diminishes the quasi-judicial powers accorded to police officers.

The powers given to the president of the State Security Department and the Police Inspector General or their delegates to arrest anybody for political reasons, under the pre-text of posing a threat to the national security, has nothing to do with Islamization of the Criminal Procedure.[290] It is more political than legal or Islamic.

The power of the Attorney General to discontinue the prosecution, 'Nolle Prosequi', can never be entertained if such entertainment contradicts the rules of Islamic Shariah.[291] Again the tender of pardon to an accused in order to provide the court with the relevant evidence can only be entertained if it does not contradict the rules of Islamic Shariah.[292]

The Supreme Court has the discretion to review the record of any proceedings conducted by any other court if it is of the opinion that a procedure has been followed which contravenes the rules of Islamic Shariah. The Court of Appeal has the same discretion.[293]

The authority of the President of the Republic to stay execution of a sentence; award a pardon; drop a punishment or substitute such a punishment should not contradict a rule in Islamic Shariah Law.[294]

Settlement, 'Sulh', in offences other than offences against the state or public order is permissible, provided that it does not contravene a rule of Islamic Shariah.[295]

An accused cannot be released on bail unless the guardian of the deceased or the injured party consents to such a release.[296]

The Criminal Procedure Act, 1983 stipulates that the Chief Justice shall, from time to time, issue criminal court circulars indicating what school or schools of thought to follow in applying

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[290] S. 97 of the Criminal Procedure Act, 1983.
[291] S. 215 '2', Ibid.
[292] Section 216 '6', Ibid.
[293] Section 239, Ibid.
[294] Section 257, Ibid.
[295] S. 270, Ibid.
[296] S. 272, Ibid.

Shariah principles. This runs contrary to the letter and spirit of the Judgements (Basic Rules) Act, 1983 which evinces the intention not to follow any school of Islamic fiqh and rejects promotion of 'taqlid', imitation. The legislator was mindless of the Judgements (Basic Rules) Act, 1983 when he incorporated this section.

**5. The Civil Transactions 'Mu'amalat' Act, 1984:-**

The Civil Transactions Act, 1984 is the second attempt of its kind. The first was the Civil Law Act, 1971. There is a resemblance between the two. A significant difference is that the Civil Law Act, 1971 drew some of its rules and theories from Islamic fiqh, but the bulk of its rules and theories remained western and could be traced to their French origin; whereas the Civil Transactions Act, 1984 is predominantly Islamic in origin.

The Civil Transactions Act, 1984 repealed a number of Ordinances and Acts, including, inter alia, The Pre-emption Ordinance, 1928 the Rent Restriction Act, 1982 the Sales Act, 1974 the Agency Act, 1974 the Contracts Act, 1974 and the Recovery of Lost and Stolen Property Ordinance, 1924.

In interpreting the provisions of the Civil Transactions Act, 1984 and in the absence of a provision, the courts shall be guided by Shariah principles and shall follow the rules provided for in the Judgements (Basic Rules) Act, 1983.

The Civil Transactions Act, 1984 incorporated a number of basic principles for the application of the Act. These basic principles include, among other things, the following:- a predominant or consistent custom should be considered; the change of rules due to change in time cannot be denied; what is specified by custom is just like what is specified by stipulation; the delay of the rich in paying his debt is injustice and is punishable; the contract is the law of the contracting parties; there can be no 'ijtihad' in the presence of the 'nass'.[297]

The Act provides that the rules of International Law relating to conflict of laws shall be followed in as far as they do not contradict the rules of Islamic Shariah, and rules of a foreign law

[297] Section 5 of the Civil Transactions Act, 1984.

shall not be applied in the Sudan if such rules contravene Islamic Shariah, the public order or the morals in the Sudan.[298]

A considerable part of the Civil Transactions Act, 1984 is copied verbatim from the Jordanian Civil Law e.g. the abuse of right which in turn can be traced to section 9 of the 'Majalla', 'the Ottoman Code of Civil Law'. However, the abuse of right as stated in the Civil Transactions Act, 1984 is a blend of the established rules of Shariah and the contemporary fiqh relating to the theory of abuse of right. It takes into consideration the western legal theory of abuse of right.[299]

Part II of the Civil Transactions Act, 1984 deals with the law of contract. This includes the Sales, Agency, Partnership and Hire Contracts. The rules and principles relating to contracts as such generally apply to these types of contracts, although some of the rules and principles relating to these contracts may be an exception to the general rules and principles of Contracts. The Civil Law Act, 1971 took this approach of consolidating the various contracts under the title, the sources of obligation, but the 1974 codification took a different approach and three separate Acts covered contracts, sales and agency.[300] However, Part II of the Civil Transactions Act, 1984 follows very closely its counterparts in the Civil Law Act, 1971 except for some arbitrary omissions, minor rewording, and a change in the order of the sections. This is by and large valid for some parts of the Civil Transactions Act, 1984. The parts of the Civil Transactions Act, 1984 that are derived from Islamic Law are, in most cases the legal opinion of the Hanafi school of fiqh.

Part III of the Civil Transactions Act, 1984 relates to tortious liability. It takes into consideration the Islamic fiqh rule which stipulates that any person who causes damage to another person or to that other person's property by an act or an omission shall be liable to pay for such a damage by way of compensation. It is not relevent whether the person who causes the damage has attained sufficient maturity of understanding or not.[301]

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[298] S. 16 '2', Ibid.

[299] S. 29, Ibid. which is equivalent to S.5 of the Egyptian Civil Code, S.5 of the Libyan Civil Code, S.8 of the Iraqi Civil Code and S.6 of the Syrian Civil Code. See the Explanatory Memorandum on the Jordanian Civil Law, Vol. 1, Arabic Text, the Bar Assoc. Amman, undated, p. 83. See also the Explanatory Memo on the Sudanese Civil Code, 1971 op. cit., ,p. 84; The doctrine of abuse of right is continental. To a common lawyer there is always the temptation not to recognize the doctrine of abuse of right. It is condemned as being, "too vague to serve as a useful legal principle in the Common Law." See Salmond on Torts, 17th. ed., 1977, 20.

[300] See Pt. IV, Ch. 3, pp. 228-230 of this thesis.

[301] S. 138 of the Civil Transactions Act, 1984.

'Diyah' is dealt with as a form of compensation and a punishment.[302] An injured party is entitled to sue for damages in addition to the 'diyah'.

Part V deals exclusively with the Sales. It derives the Sales rules from The Jordanian Civil Law which, in turn, derives its rules substantially from 'El-Majalla'. Such rules can ultimately be traced to the Hanafi school of fiqh.[303] Some of these rules are derived from the Maliki fiqh, i.e., sale with the stipulation of trying or testing the item which is the subject of sale.[304] Some other rules derive from the Hanbali fiqh, i.e., the loss of the right to sue for breach of warranty.[305]

Chapter V of Part V of the Civil Transactions Act, 1984 specifies some types of Sales which are peculiar to Islamic fiqh, viz, 'as-Salam', 'Al-Mukharajah' and the 'Sale in the condition of mortal sickness'.[306]

The Sales provisions in the Civil Transactions Act, 1984 are almost entirely Islamic. The repealed Sales Act, 1974 was almost entirely English. It was based squarely on the English Sale of Goods Act, 1893.

The Civil Transactions Act, 1984 Part VI, Chapter I deals with another type of contract, viz, the gift contract. The 'Hiba', gift, contract is formed by offer and acceptance. There need not be any consideration. This type of contract is governed entirely by the rules of Islamic fiqh.

Partnership is another type of contract described in Part VII, Chapter I of the Civil Transactions Act, 1984. It derives entirely from the rules of Islamic fiqh.

The loan contract is another type of contract deriving from the rules of Islamic fiqh. 'Sulh', 'settlement', is also a type of contract having its roots in Islamic fiqh.

The rent contract is one of a series of types of contract emanating from the rules of Islamic

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[302] S. 156 Ibid.

[303] See Pt.1, Ch.5, p.23 of this thesis.

[304] S. 181 of the Civil Transactions Act, 1984; See the Explanatory Memorandum on the Jordanian Civil Law, op. cit., V. II, p. 497.

[305] S. 207 of the Civil Transactions Act, 1984.

[306] 'As-Salam' is the sale of a property which is not ready at hand for a prompt price with the understanding that the buyer shall promptly pay the price of an item which he shall receive at a later date. 'Mukharajah' allows an heir to sell his share in the estate to another heir or heirs for a specific consideration even if the assets of the estate are not specified. See Ss. 217, 22 and 224 of the Civil Transactions Act, 1984.

fiqh. It repealed the Rent Restriction Act, 1982 which was ultimately English Law except for some adaptations here and there.

The 'Muzaraa', rent of the agricultural land, and 'Musaqah' are a set of other types of contract that have their roots in Islamic fiqh and the customs of the Sudan.[307] By so doing the Civil Transactions Act, 1984 recognizes and incorporates the customs that are compatible with Shariah.

Part XI of the Civil Transactions Act, 1984 relates to 'I'arah', lending, which is a contract usage for no consideration. It is typical of Islamic Shariah which fosters co-operation and assistance to others. Again this Part of the Act follows very closely Part II of the Jordanian Civil Law which in turn follows very closely 'I'arah' as stipulated in the 'Majalla' and the Hanafi school of fiqh.[308]

The Civil Transactions Act, 1984 deals with a variety of contracts and sources of obligations such as the contractor contract, the labour contract, the agency contract, the 'wadia', bailment, contract.

The 'gharar' contracts[309] are declared as void for uncertainty. This rule falls in the four corners of the rules of Shariah.

'Hawalah', assignment of debts, is another form of contract stipulted by the Civil Transactions Act, 1984. It is a contract which allows a lendor of money to a second party to assign or transfer the claim to a third party upon the latter's request. It is a contract which is approved by Imam Malik, opposed by other jurists of the Shafii and Hanbali schools of fiqh, and allowed only in exceptional cases by the Hanafi school of fiqh.[310] Civil Transactions Act, 1984 followed the Civil Law Act, 1971. Both fully adopted the Maliki jurisprudence relating to 'hawalah'.

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[307] Muzara'a is a contract to invest in agricultural land. The parties to this contract are the landlord and the person who invests and utilizes the land. The produce of the land shall be divided among them in a pre-agreed ratio. Section 329 Ibid. See also sayed Sabiq, "Fiqh as-Sunnah," op. cit., p. 227.

Muzara'a is a popular custom in the Sudan, especially in 'Marawi' of Northern Sudan where it is best known as 'Haq Al-Ard', the right of land.

Musuqah' is a parternship contract to utilize the trees. The owner of the trees and the one utilizing these trees are the parties to this contract. Each party to such a contract shall have a pre-agreed ratio of the produce of the trees. For the purpose of the Musaqah contract a tree is every plant the roots of which have remained on earth over a year. S.237, Ibid.

[308] The Explanatory Memorandum on the Jordanian Civil Law, op. cit., p. 557.

[309] These are contracts in which uncertainity is involved, such as the contract to sell the fish or birds before they are caught or produced by the vendor. See Abdur Rahman I. Doi, op. cit. , p. 359.

[310] Loc. cit.,

Part XIX of the Civil Transactions Act relates to ownership, constraints on such ownership and the means to acquire ownership. The different types of ownership include:- ownership in common or undivided ownership, family ownership, ownership of floors and apartments, ownership of treasure and metals, ownership of antiques, ownership of lost and found goods, ownership of the usufruct of lands, ownership of lands and real estates.[311]

Chapter 8 of this part relates to rights of servitude, how to acquire these rights and the termination of such rights. Some of the rights of servitude, 'Irtifaq', are:- the common or shared wall; the right of way; the right of passage; the right of drinking and irrigation; and the right of drainage.

Chapter 10 of this part describes the means of acquiring ownership of the land. It commences with the acquisition of land which is formed as a result of the precipitation of silt along a river. It also stipulates the means of acquiring land that moves from its original place due to natural causes, the islands and the land from which the sea or lakes recede. Sea-bed land or 'terra lucrabilis'. It codifies some recognized customary means to acquire ownership of land, i.e., 'Haq Al-Qusad'.[312] Pre-emption is recognized as a means of acquiring ownership, possession is another mode of acquiring ownership, and legal transactions are obviously another mode of acquiring ownership. Prescription is also among the means of acquiring ownership. Succession and inheritance is yet another mode of acquiring ownership. Testament is also a Shariah rule, in addition to inheritance, to acquire ownership.

Part XX of the Civil Transactions Act, 1984 deals with the rights that branch from the right of ownership. These rights are, the right to deal with property, the right of usufruct, the right to use and the right to dwell and 'Waqf', 'Islamic Trust'.

Mortgage is dealt with in Part XXI of the Act.

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[311] S. 559(1) of the Civil Transactions Act, 1984 states that:-
"The land belongs to Allah, and the state is entrusted with it, responsible for it and is the owner of such land."

[312] It is a customary right whereby owners of the land adjacent to the river are presumed to own all lands appearing in the river between their bank and the middle of the river bed. See Heirs of Ahmed El Hussein and others V. Heirs of Omer El Bihari and others , (AC-REV-189-1957); S.L.J.R., 1961, P.149.

The legal principles laid down in the Civil Transactions Act, 1984 are strongly related to their sources and origin, viz, Islamic Law. The Judgement (Basic Rules) Act, 1983 serves to keep all laws within the folds of the rules of Shariah. In the case of the Civil Law Act, 1971 the sections that had their origin in Islamic Law were cut off and divorced from their sources and origin and were engrafted on a different system. These acquired an independent existence.[313]

**6. The Zakat and Taxes Act, 1984:-**

It was the first time ever since the fall of the Mahdist state and the establishment of the Condominium rule in 1899 that the state in the Sudan would directly supervise on the collection and expenditure of Zakat.

The Zakat and Taxes Act, 1984 repealed twenty Acts, ranging from the House Tax Act, 1918 up to the Production and Consumption Tax, 1983.

A Zakat and Taxes chambers was established under the Zakat and Taxes Act, 1984 Section 4. Section 7 of the same Act provides for the functions and powers of this chamber. The functions include the following:-

a) Receipt of the declarations from those liable to pay the Zakat or Tax.

b) Inspection of these declarations.

c) The collection, management and the distribution of the Zakat according to the 'masarif', ways of expenditure, prescribed in the Qur'an.

Zakat is viewed as more of a social welfare tax than merely an ordinary one. It serves to redistribute income among the needy and the affluent or an intra-generation distribution of income.[314]

The Zakat and Taxes Act, 1984 authorizes the constitution of complaint committees to deal with and decide upon any complaint concerning the levy or estimation of the Zakat or tax.[315] A

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[313] For a detailed account of this issue see Pt. IV, Ch. 2, p. 177 of this thesis.

[314] Dr. Monzer Kahf, op. cit., p. 102.

[315] S. 9 of the Zakat and Taxes Act, 1984.

high national committee which would be an appellate body against the decision of these complaint committees would be established.[316] The members of the high national committee would be a representative of the Judiciary, a representative of the Shariah 'Efta', 'legal opinion', counsel, a representative of the High Council of the Religious Affairs and 'Waqf', Islamic Trust, and a representative of the Zakat and Taxes Chambers.

The responsibility to provide the legal opinion, 'fatwa', in all matters concerning the application of this Act, is vested on the Shariah 'Efta' council according to section 11 of the same Act.

Chapter III of the Act provides for the types and funds of the Zakat to be levied thereon and the general conditions for such a levy. It also provides, inter alia, for the calculation of the Zakat on the income of officials and businessmen which is one quarter of one tenth provided that the income reaches a 'nisab', Zakat value. It is unequivocally stated in the same chapter (Section 48) that the Zakat and tax shall only lapse by payment thereof.

Section 55 of the Act provides for the ways in which the Zakat and tax fund shall be expended.

Section 64 of the Act states that:-

'Whoever intentionally and by implication, refuses, evades or uses trickery not to pay the Zakat shall be punished with a fine not less than double the amount of the prescribed Zakat'.

This is an arbitrary punishment and does not derive from Shariah rule. It would have been more equitable and closer to Shariah rule to force such a person to pay the due Zakat not less not more unless this person freely chooses to pay more.

Section 70 of the Act states that the obligation to pay Zakat shall have priority over other claims against funds of the indebted person.

The principle of repatriating Islamic Law has a more far reaching impact on the development and future of both English Law and Islamic Law in the Sudan than the laws as such. It broke the

[316] S. 10 Ibid.

long monopoly and domination of English Law in the Sudan. It also dealt a blow to the secularization and westernization that played havoc with the Sudanese legal life. However, the drafting and application of the laws are not altogether perfect. I hasten to say this was also the case when English Law was introduced in the Sudan. It would be too idealistic to imagine a perfect application of a system that was kept in limbo for over two thirds of a century. Unfortunately all the Acts other than the Judgements (Basic Rules) Act, 1983 were drafted by two or three lawyers, not very experienced it must be admitted, despite the existence of professionally drafted Bills touching the same topics. This bizarre situation yielded some rules that are anything but Islamic. The Criminal and Civil Procedure Acts remain substantially as they were first introduced by the British Administration. The same is true for a substantial part of the Criminal Law Act, 1983. These acts with the provisions relating to state security are alien to the rules of Shariah and were imposed on the process of the Islamization of laws. One can say with confidence that the Zakat, prohibition of 'riba', the application of 'hudud' and the contracts and a substantial part of the Civil Transactions Act, 1984 are Islamic Laws pure and simple.

The repatriation of Islamic Law despite its shortcomings, took the Sudan out of the syndrome of slavish imitation of other foreign systems. It responded positively to the ever growing resentment against foreign un-Islamic laws. It was received peacefully and spontaneously and that was of a far greater impact than the forcable imposition of English Law. One of the motives of the then existing body politic behind the repatriation of Islamic Law was to enhance its own image and attract support and popularity. However, the Islamization of Laws as such has brought to an end a turbulent and explosive period of the legal history of the Sudan.

# PART V

# PROSPECTS OF THE FUTURE OF ENGLISH LAW AND ISLAMIC LAW IN THE SUDAN

# Chapter 1

## WHITHER ENGLISH LAW?

The subtle and well-planned British colonial policies in the Sudan have succeeded in creating some chronic problems. The ongoing feud between the Southern part of the Sudan and the consecutive central governments in Khartoum is the chronic problem par excellence. However, the problem as to what legal system to administer in the Sudan, albeit, far less chronic than the Southern problem, has always proved to be a burning issue.

By and large, the reception and teaching of English Law were adoptive and not adaptive, thus transferring the body of English Law with all its ills of history.[1] Cultural snobbery was an undeniable force behind the uncompromising adherence to English Law and the flat rejection of Islamic Law.[2]

The legal education of the Sudanese lawyers was designed to foster purposeful legal thought. Thus, the British judges in the Sudan, together with the training of Sudanese lawyers who succeeded them, created what may be called, "The factor of unexpressed consciousness of legal training and affinity," which led to the ultimate adoption of English Law in the Sudan.[3] The British investments in the Sudan were a British style of education 'the law taught in the Faculty of Law, University of Khartoum, is predominantly the English Law', a British style civil service, a British style army, a British style elite, and a British style Judiciary and legal system. The British colonialism was both military and cultural. It was designed so that in the social and political vacuum created by the British colonialism, the western-trained elite in all the foregoing fields were the only politically and ideologically trained elite group on whom the power in the Sudan would devolve.[4]

Lord Cromer, in his notorious statement, declared that:-[5]

"The cannon, which swept away the Mahdist Islamic State, proclaimed to the World that on

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[1] J.J. Gow, "Law and the Sudan." op. cit., p. 305.

[2] See Pt. III, Ch. 7, pp. 116-121 of this thesis.

[3] Guttman, "The Reception of the Common Law in the Sudan." op. cit., p. 409.

[4] Harry J. Benda, "Non-Western Intelligentsias as Political Elites." Political Change in Underdeveloped Countries; edited by John H. Kautsky, Wash. U. St. Louis. John Wiley and Sons, Inc. N.Y., 1967, p. 246.

[5] See Pt. II, Ch. 3, p. 61 of this thesis.

England had devolved the solemn and responsible duty of introducing the light of western civilization amongst the sorely tried Sudanese people.''

In imposing English Law on the Sudanese people the British Administration was obsessed with the dangers and threats posed to British control by Islam, and with the urge to combat Islam. English Law was introduced in the Sudan with the intention of obliterating Islamic Law. However, the ideals of English Law were those of an alien colonial power and so were quite out of line with the needs, ideals and aspirations of the Sudanese people. Considerable portions of English Law were incompatible with the morals and values of the Sudanese people; thus introducing a sharp dichotomy between law and morality.[6] S. G. V. Magzoub Bashir Abu Hisses ,[7] lends itself as a classic example of such a dichotomy. In this case Osman El Tayeb, C.J., stated the following:-[8]

''The act or conduct that is the subject of consideration in this case, as stated above, is that the deceased and the maternal uncle of accused, the two of them being of age, consented to, and joined in a carnal intercourse, in private. This is not an offence, but it is certainly an immoral act that is generally not accepted by the society of accused. As such it is capable of provocation to any person in the position of accused.''

The words of the C.J. in this case speak for themselves. How can a person in the position of accused in this case respect such a law or abide by it when it is so inconsistent with his values?

By and large, the Sudanese people were of the opinion that English Law was imported and imposed on them from above, despite their different Islamic values and morals.

English Law was often published or reported where no one other than lawyers would read it. It was drafted in English, a language which was comprehensible only to an extremely small minority, mainly the elites. People did not respond positively to the parts of English Law to which they were exposed. Moreover, political conditions have always spun the dormant public distrust of English Law. Naturally during the colonization of the Sudan, public opinion was hostile to England

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[6] Ibid., p. 130.

[7] (AC-CP-564-1964); S.L.J.R., 1969, op. cit. , p. 111.

[8] Ibid., p. 115.

and English Law. It is impossible for English Law to escape the odium of its origin.[9] The whole British Administration was poorly received in the Sudan, none less than English Law. The impact of imposing English Law was only skin deep and has not penetrated the hearts of the Sudanese people. Only a small minority would frankly opt for secular laws in the Sudan. These are the lawyers who are obsessed with a narrow loyalty to English Law with which they are conversant. They feel a vested interest in their knowledge of English Law and their skill which they have laboriously acquired. They cling consciously to the usage to which they are accustomed. They are insensitive to the values of their own people. This group of lawyers were the agents through which English Law was transplanted into the body of the Sudanese legal system.

In his commentary on the future of law in the Sudan, Mohamed Ahmed Abu Rannat, the first Sudanese Chief Justice, stated the following:-[10]

> "For the future, I believe that a Sudan Common Law will have to develop as an integral part of the society now emerging in the Sudan, and it will not be based on religious adherence, but upon the social customs and ethics of the Sudan as a whole".[11]

The late Abu Rannat is one of a generation that was overwhelmed by western culture and particularly by English Law.

Mansur Khalid, who belongs to another generation but represents the spear head of secularization and westernization in the Sudan, stated the following on the future of law in the Sudan:-[12]

> "That this Common Law and the system giving rise to it are there to stay is an uncontested fact amongst lawyers in the Sudan today."

The foregoing statement by Mansur Khalid is far from being true. It is a statement whose sweeping character is only matched by its inaccuracy. The truth is that if there is only one contested

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[9] Roscoe Pound,"Development of American Law and its Deviation from English Law." L. Quart. Rev., Vol. 67, Lond., Stevens and Sons Ltd., Jan. 1951, p. 56; Cliff F. Thompson, "The Formative Era of the Law in the Sudan." op. cit., p. 474.

[10] Mohamed Ahmed Abu Rannat, "The Relationship between Islamic and Customary Law in the Sudan." J.A.L. Vol. 1960, Lond. Butterworth, 1960, pp. 15, 16.

[11] This statement has been often reiterated by advocates of English Law. See Akolda M. Tier, op. cit., p. 151.

[12] Mansur Khalid, "The Laws Administered by the Civil Courts in the Sudan." The Am. J. of Comp. L. Vol. 10, Am. Assoc. for the Comp. stud. of L. Inc., 1961, pp. 163, 164.

fact amongst the lawyers in the Sudan, then it is the fact that the Common Law and the system giving rise to it are there to stay!

Of all the adherents to English Law in the Sudan, Galal Ali Lutfi,[13] is the most slavish and blunt one. Pondering on the future of English Law in the Sudan he stated the following:-[14]

> "...English Law will no doubt continue as the main guidance for our future legal development.... If this unnecessary change has taken place - and I hope not - the result will definitely be a disastrous one."

The troika of Abu Rannat, Mansur Khalid and Galal is an extreme case of western oriented fanatics. They do not represent the main stream of lawyers. They are rather an alienated elite or intelligentsia which is not a product of organic social growth, but rather one of an alien education grafted on the Sudanese society.

Babiker Awadalla, the second Sudanese Chief Justice, who was far more conversant with English Law than at least the last two of this troika, severly criticized English Law as applied in the Sudan and spared no time when he was in power to reject it altogether.[15] He criticized English Law. He said:-[16]

> "The history of the Sudan since the invasion of the colonizers in 1898 kept reflecting the painful fact that the law which dominated the nation and governed its relations until after the independence was English Law... The Sudanese people who were helpless throughout that decade were looking forward to the hour of salvation and escape from this octopus in order to have a Sudanese Law flesh and blood."

Mudawi, J., was no less critical of English Law. He stated in the famous case of Khartoum Municipal Council V. Michel Cotran, that:-[17]

> "...we refuse to be guided (or do we say misguided?) by English or any foreign cases in this

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[13] A previous Attorney-General of the Sudan (1965-1967), a previous Member of the Supreme Court, now an advocate.

[14] G.A. Lutfi, "The Future of the English Law in the Sudan." S.L.J.R., 1967, op. cit., pp. 248, 249.

[15] See Pt. IV, Ch. 2, p. 178 of this thesis.

[16] Introduction to the Explanatory Memorandum to the Civil Code, 1971, op. cit. , p. 3.

[17] Loc. cit. For a full account of this case see Pt. IV, Ch. 1, pp. 170,171 of this thesis.

respect... We will be living in a world of dreams, a fool's paradise, if we attempt to ignore the existing differences in conditions of life between our country and the United Kingdom. There is no room for comparison."

Dr. Hasan at-Turabi,[18] who was the first Sudanese to be Dean of the Faculty of Law at University of Khartoum and who is an outstanding lawyer, has always been committed to the total departure from English Law and to the full application of Islamic Law. He is now the leader of an Islamic National Front whose raison d'être is the application of Islamic Law.

Fuad El Amin who is a previous Chief Justice, was of the opinion that "English Law was alien and was a foreign body implanted in the Sudanese soil. It was for a developed industrial society."[19]

J.J. Gow, an English professor of law who was a lecturer in the Faculty of Law at University of Khartoum, could sense the blurred future of English Law long ago. He gave an early warning when he said:-[20]

"...What I am concerned with is simply this - that so long as and so far as the Common Law continues to be the backbone of the civil law in the Sudan and the staple diet of the education of its civil lawyers; then, I urge vehemently that both the application and the teaching, particularly the latter should be adaptive and not adoptive. There should be an infusing of the spirit and not an indiscriminate transference of the body with all the disorders and ills of history. Law is not merely the expression of the genius of people, it is also a product of their history fashioned by the geography of the territory in which they dwell and by their way of life."

J.J. Gow was more sensitive to the Sudanese values than the troika of Abu Rannat, Mansur Khalid and Galal Ali Lutfi. He was more conscious of the dangers facing the future of English Law in the Sudan. Surprisingly the troika were more Orthodox than the Orthodox in their slavish

[18] Dr. Hasan at-Turabi is very well conversant with Islamic Law, English Law and French Law.

[19] Interview of author on Wed. Jan. 16, 1985, with the honourable then Chief Justice Fuad El Amin at his own office in the Judiciary at Khartoum, Sudan.

[20] J.J. Gow, "Law and the Sudan." S.N.R. Vol. 33, 1952, p. 306.

adherence to English Law.

There is more than one valid reason and more than one factor against the future of English Law in the Sudan. In addition to the aforementioned reasons and factors, the following are crucial:-

1. The Sudan was forcibly assimilated into English legal heritage. The reception of English Law could not have been achieved save by the presence of England in the Sudan. Professor A.L. Goodhart beautifully stated that:-[21]

   "It may seem strange therefore, if I begin today by pointing out that no country which has not at some time or other been part of the British Empire has ever voluntarily adopted the Common Law."

2. The body of English Law was imposed on the Sudan with all its disorders and ills of history. The separation of 'religion and the state' was viewed as essential in the Sudan no less than in England.[22] The same goes for the separation of 'law and morality' and 'law and religion'. This is a historical context that can never fit in an Islamic environment. The church as conceived by western people does not exist in Islam. It is an alien concept that has never obtained currency in Islamic thought. The British colonial era imposed on the legal system of the Sudan the basic characteristics which it exhibited. The idea of separation between 'religion and the state', 'law and religion', and 'law and morality' has never stemmed from any popular demand, but was imposed on the Sudanese people from above, in deference to foreign opinion.

3. English Law cannot be regarded merely as the growth of a system of abstract rules, but rather as a part of the history of English people. It has grown up with them. It has been adapted over centuries to meet the peculiar conditions of Britain. Its rules are not of universal validity.[23]

4. In tracing the development of English Law from the 'Ethelbert dooms',[24] which goes back to

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[21] Professor A.L. Goodhart, "What is the Common Law.", L. Quart. Rev. Vol. 76, Jan. 1960, p. 45.

[22] Gabriel Warburg, op. cit. , 65.

[23] Sir Kenneth Roberts Wray, "The Adaptation of Imported Law in Africa." J.A.L. Vol. 4, No. 2, 1960, p. 72.

[24] These are the oldest written English Law. They were laws given by a Christian King to Christian people. See W.J.V. Windeyer, "Lectures on Legal History." 2nd. ed. revised, The L. Book Co. Autl. 1974, p. 3.

the year A.D. 600, to the time when more than half the world was to be ruled by English Law, it is important to know that throughout the intervening centuries, English Law has been developed in close contact with the moral and intellectual traditions of the Christian Church.[25] No exact estimate has been made of the effect of Christianity on English Law, but there is no shadow of doubt that it was far-reaching. English Law has been moulded for centuries by judges who have been brought up in the Christian faith. The religion of Christianity, consciously or unconsciously, has been their guide in the administration of justice.[26] Lord Atkin's famous judgement in the case of Donoghue V. Stevenson ,[27] is a classic example of the foregoing premises. In this case Lord Atkin took the Christian precept, 'Thou shalt love thy neighbour as thyself', as the underlying basis of his decision. He said:-

> "The rule that you are to love your neighbour becomes in law you must not injure your neighbour: and the lawyer's question 'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being, so affected when I am directing my mind to the acts or omissions which are called in question."
>
> This statement is often quoted at length by some Sudanese lawyers who adamantly oppose the fusion of 'religion and law'!

5. By and large, the western culture has derived its roots from a dual source, viz, Christianity and the Hellenistic thought. Ultimately Christianity gave way to secularization. The Christian world accepted a legal system whose outstanding authors had been pagans, or to say the least, secularists. It is highly inconceivable that a Muslim country like the Sudan would voluntarily take this route.

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[25] Loc. cit.

[26] J.C. Smith and David N. Weisstub, "The Western Idea of Law." Butterworths, 1983, p. 391 where the authors quoted Alfred Lord Denning, "The Changing Law." London Stevens and Sons Ltd., 1953, pp. 106-109.

[27] [1932] A.C. 562.

6. The English Common Law as received in the Sudan was that of England and so remains, except that it has also become the Common Law of the Sudan. It can remain there if a western and secular society is desired in the Sudan.

7. The ethnocentric core conception in interpreting diverse cultures in terms of western history cannot deal effectively with the realities of legal life in the Sudan. This ethnocentric core conception and evolutionist generalization from western history is so subtly and deeply rooted in an unconscious racism that it ideally condones the tendency in the west to measure things by the very high regard the dominant west has of itself.[28] However, the general disillusion with the western civilization which followed World War 1 was reflected in the colonial sphere by the decline in imperial self-confidence. Sensitive British intellectuals began to question the pre-war assumption that they were the bearers of light to dark and sorely tried regions. There was in the West a growing sense of confusion and intellectual discontent with western culture and values.[29] At the same time the new science of anthropology was making it clear that there was much merit in cultures other than the western culture. One result of these two strands of thought was the regaining of self confidence by some Muslim intellectuals and the appreciation of their own Islamic culture. Most of the western oriented Muslims 'including the Marxists' started to reconsider most of their intellectual convictions as regards the superiority of the west.

8. Some Sudanese intellectuals were exposed to western societies. They were able to see the negative part of such societies. They realized that not all aspects of western culture are that fascinating. These intellectuals refused to be a captive audience of English Law which is based on conceptions of law that are altogether alien to the Sudan. They realized that it is quite possible to import and introduce the provisions of English Law and the final judgements of its precedents, but there is no way ever to import and introduce the historical and social

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[28] J.C. Smith and David N. Weisstub, op. cit., p. 8 where the authors quoted Jamke Highwater, "The Primal Mind." N.Y.: Harper and Row, 1981, pp. 18, 19.

[29] John Voll, "Islam: Its Future in the Sudan." The Muslim W. 63, The Hartford Seminary Foundation, U.S.A. 1973, p. 289.

framework that surrounds such provisions and rules.[30]

9. The British Administration in the Sudan reared a whole generation, brought it up and adapted such a generation to a particular order in which they were to live. The students in Gordon Memorial College were branded according to their remoteness or closeness to Islam. They were alienated from their own history, religion and culture. Their knowledge of Islam was poor, yet they were quick to despise Islamic culture. The situation is not quite so nowadays; a more objective approach is now used and a considerable number of the Sudanese intellectuals today have a solid grip on the different aspects of Islam. Their genuine quest for an entity has put them on the track of Islam. Now generations of Muslim intellectuals have grown up indifferent to the blandishments of western ideas.[31] These generations take pride in their own Islamic culture.

10. Less than a century ago, the Sudanese people witnessed, and participated in the defeat of the first agents of western influence. They established an Islamic state where Islamic Law reigned supreme. This fact gives credibility to any serious trend to fend off western influence and apply Islamic Law.

11. Throughout its legal history, the Sudan shuttled back and forth between Islamic Law and English Law, but stayed longer with Islamic Law. The interruption of the development of Islamic Law by forcible imposition of English Law created a sense of loss of heritage which, in return, stimulated an ongoing effort to recapture the roots. Such efforts culminated in the application of Islamic Law and the admission of Islam's rightful role in shaping the Sudanese Law.

12. The Sudan is neither an English speaking country nor is it politically or culturally linked with England. The weakness of cultural and political ties after the independence of the Sudan, among other factors, forced English Law to fade into oblivion. The language factor has a great

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[30] Constitutional Technical Committee, "Memorandum about the Proposed Constitution of the Sudan, 1968." Kh. Univ. Press, The Repub. of the Sudan, 1968, p.25

[31] Edward W. Said, "Covering Islam, How the Media and the Experts Determine How We See the Rest of the World." Pantheon Books, N.Y., 1981, p. 29.

impact. The retreat of the English language and the wide spread of Arabic language are relevant factors against any future of English Law in the Sudan. English Law flourished on both the usuage of English language and the English legal education; without either it dies.

13. The fact that the west is linked with colonization and oppression of the Muslim countries, along with the creation of Israel in the heart of the Islamic world and the full and unbridled support of some western countries to Israel brought along with it dissatisfaction and bitterness towards the West. Israel's security has become conveniently interchangeable with fending off Islam, perpetuating western hegemony, and demonstrating the virtues of modernization.[32] Israel embodies an ideal deeply embedded in western thought.[33]

14. The Muslim intellectuals have a perception that the west is very reluctant to transfer technology to the third world at large and to the Islamic world in particular. The same West is anxious to convert such regions into consumers of its surplus products in order to control them politically.

15. The experience of recent history has shown the Muslims that the West can be extremely fanatic, prejudiced and antagonistic to Islam. The western media is quick to brand Muslims as fanatics and terrorists. In many instances 'Islam' has licensed not only patent inaccuracy, but also expressions of unrestrained ethnocentrism, cultural and even racial hatred, deep yet paradoxically free-floating hostility. Neither Christianity nor Judaism is treated in so emotional a way.[34]

16. Law has always been an important element in the modernization and westernization of Muslim countries and a conscious instrument in the promotion of cultural change. Turkey lends itself as a classic example of this theory.[35] It has been realized in the Sudan that the Sudanese people can bring about change without being western. They can modernize the Sudan without having their culture undermined in the process. Modernity is not synonymous

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[32] Ibid., p. 31.
[33] Ibid., p. xi.
[34] Loc. cit.
[35] Herbert J. Liebesny, op. cit., p. 26.

with secularism or westernization. Japan maintained a level of high technological development and modernity without being western. Japan's experience of modernization further convinced the Sudanese intellectuals that modernization can very well be non western. The fusion of modernization and westernization will lead to the disintegration of Islamic communities. It is usual for western intellectuals to overrate the significance of doctrinal and credal problems of religion when facing the challenge of modernity, particularly in the light of the Christian experience where there has been a tension and a rift between Greek - style rationalism and Christianity or between science and religion. Such intellectual problems are peculiar to the Christian west and have not loomed in the Islamic culture, where the Hellenistic logic and rationalism were successfully utilized and not as crucial to later religious debates. This is especially true for the Sudan where, intellectually speaking, philosophy had absolutely no impact on the people.[36] These problems appear more real to the western intellectuals than they are in the actual life of Muslims.

17. There is a growing awareness among the Muslim intellectuals that it is to the benefit and interest of humanity to attribute originality to Islamic Law and Islamic culture. It is futile to echo western legal systems and western culture. Imitating the West can neither hold the present nor build the future. The overwhelming majority of Muslim intellectuals do not labour under any inferiority complex. They have all the intentions to present a legal system and a culture which are original, without this posing any threat to other cultures.

18. At one point the Sudanese intellectuals were polarized between the secularists and the Islamists. The first were dominant. Now the reverse is true. Islamic orientation in the Sudan this time is not that of one leader or one family or two. It is the Islam of a new generation of modern educated leaders with a radical outlook.[37]

19. With any political change legal change becomes a vital issue. This change cannot completely separate itself from Islam. There has always been a powerfully felt opinion that there must be

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[36] John Voll, op. cit., p. 290.

[37] Ibid., p. 292.

a law consistent with the values of the Sudanese people. There was a clear consensus among the members of the Sudanese legal profession and the laymen that English Law is alien and there is a need for a legal change.[38] There was always a desire to reject English Law.[39]

20. Instances of legal change have always emphasized the need for laws which reflect the Sudan's traditions, beliefs, customs and values. This is a frank admission that English Law does not measure up to this standard. English Law was unresponsive to Islamic values, and the Sudanese people found themselves dissociated from their legal relatedness. They broke away from English Law ocassionally. English Law became a target for change. It has no power of idealism, no credibility and no mass appeal.

21. The increasing instances of judicial departure from English Law,[40] the judicial evolution of the concept of Shariah as a source of law[41] and the legislative evolution of the concept of Shariah as a source of legislation,[42] together with the 1971 departure from English Law,[43] the 1983 total departure from English Law and the repatriation of Islamic Law,[44] cast a heavy dark shadow on the future of English Law in the Sudan, if there is any. In the face of the legal disintegration one government after another has been looking for alternative laws.

22. The institutions which were originally bequeathed by the West are stagnant and decaying.[45] The Sudanese Courts which were agents of the reception of English Law into the Sudan are relieved of this function. The legislature has already stepped in to assume its legislative role. The legislature expressed the sense of the nation as to the type of law to administer in the Sudan.[46] The legal profession trained in a western tradition to symbolize the continuing

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[38] Cliff F. Thompson, "The Sources of Law in the New Nations of Africa: A Case Study from the Republic of the Sudan." op. cit., p. 1181.

[39] Following the American Revolutionary War, four states 'Pennysylvania, New Jersey, Kentucky and New Hampshire' forbade the citation of English cases. An effort to impeach the justices of the Pennsylvania Supreme Court relied upon charges that the justices were guilty of contact with "the hated and exploded English Common Law." Ibid. where the author quoted Pound, "The Lawyer from Antiquity to Modern Times." (1953), pp. 180 - 181.

[40] See Pt. IV, Ch. 1, pp. 169-176 of this thesis.

[41] See Pt. IV, Ch. 4, S.A, pp. 202-205 of this thesis.

[42] Ibid., S. B, pp. 205-221.

[43] Ibid., Ch. 2, pp. 177-186.

[44] Ibid., Ch. 5, pp. 226-274.

[45] Ali Mazrui, "The Africans. A Triple Heritage." B.B.C. Publics., Lond. 1986, p. 207.

[46] Natale Olwak Akolawin, "The Courts and the Reception of English Law in the Sudan." S.L.J.R., 1968, pp. 259-261.

influence of English Law is another colonial legacy that has been stagnant and decaying.

# Chapter 2

## WHITHER ISLAMIC LAW?

Islam was received in the Sudan as a comprehensive way of life. Islamic Law has always been an integral part of the faith of the Sudanese people. The Sudanese people witnessed the application of Islamic Law as early as the 15th. Century with the establishment of Sinnar Sultanate, the first Sudanese Islamic state. Islamic Law was uninterruptedly applied in the Sinnar Islamic Sultanate until the 18th. Century. Instances of ignoring Islamic Law by individuals in the Sinnar Sultanate were visited with the wrath of the Muslim scholars.[47] Islamic Law was applied in Dar Fur Sultanate from 1596 until 1916.[48] It was also applied in Taqali Sultanate and it was the core of education in ad-Damer in the 18th. Century.[49] Until the beginning of the Turkish rule, Islamic Law reigned supreme. Discontent engendered by Turkish disregard of Islamic Law in the latter part of their rule in the Sudan was an important factor in the Mahdi successfully mobilizing the Sudanese poeple in a Jihad movement. Islamic Law became the territorial system of all the Sudan during the Mahdist epoch.[50]

The tragic fall of the Mahdist State was a shattering experience for the Sudanese people. There was a sense of loss, utter dismay, bitterness and resentment. However, even in such a milieu, there was a popular demand to apply Islamic Law. Responding to a serious question raised by a Shaykh in a meeting with Shaykhs and notables in 1899, the first year of the Condominium, Lord Cromer assured the audience that Islamic Law would be applied. Obviously Lord Cromer did not honour his word.

Islamic Law was the symbol of the group solidarity of Islam. It has often been the cause of revolts against the British Administration. Mahdist uprisings continued to occur at least once a year for well over twenty years.[51] Of all these uprisings, that of 'Abdel Gadir Wad Habbuba' in 1908 was the most serious one. He could not tolerate a non-Islamic government that defeated the Mahdist

[47] See Pt. I, Ch. 2, pp. 7-13 of this thesis.
[48] Ibid., Ch. 3, p. 14-19.
[49] Ibid., Ch. 4, p. 20-22.
[50] Ibid., Ch. 6, pp. 30-44.
[51] Muddathir Abdel Rahim, "Early Sudanese Nationalism: 1900-1938". SN and Rec. Vol. XLVII, Kh. 1966, p. 39.

State. For him the latter had applied Shariah. The British Administration tried to downplay Islamic Law. It was not only confined to statut personal, but was also considered as inferior to custom.[52] The British Administration delegated some of the powers and jurisdictions of Shariah Courts to the Native Courts.[53] In 1904 the Grand Qadi expressed his concern that Shariah Courts had lost more than half of their jurisdiction and were confined to statut personal. He felt that this diminishing range of jurisdiction undermined the authority of Islamic Law, which he regarded as superior to others. The Grand Qadi's attempt to regain some of the jurisdictions of Shariah Law was resisted by the British Administration.[54] In six to eight years time two Grand Qadis resigned. The second of the two, Mohamed Harun, was dedicated to Islamic Law and strongly opposed reforms proposed by the British Administration. Lord Cromer stated the following as far as this Grand Qadi was concerned:-[55]

> "...I am inclined to think that a qadi who holds the views set forth in the report I have just been reading is not altogether the man you want..."

Many cases, which should have been settled by Shariah Courts, were referred to the British inspectors. the introduction of codes and the establishment of a department of justice, to apply them, enabled the British Administration to limit Shariah Court's jurisdiction once again. Efforts to maintain their jurisdiction over matters such as land ownership, were resisted by the authorities.[56] Shariah Courts were placed under the supervision of the Legal Secretary who was a Christian British subject. However, Islamic Law was too deeply rooted to be abolished rapidly.

It was not only Islamic Law that was a target. Lord Cromer wrote to Wingate who was the Governor General of the Sudan, that:-[57]

> "Someone told me that the historical textbooks in schools were all of a nature to encourage Muslim feeling. If so, they should be changed."

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[52] S. 36 of the Civil Justice Ordinance, 1900 stipulated that Shariah could be modified by custom.

[53] Dr. Mekki Shibeikah, "A Compendium of the Modern History of the Sudan." op. cit., p.127.

[54] Gabriel Warburg, "The Sudan Under Wingate." op. cit., p. 131.

[55] Loc. cit.

[56] Ibid., pp. 132-133.

[57] Muddathir Abdel Rahim, op. cit., p. 40.

The Sudanese people were denied their Muslim feelings. This did not pass without resistance. In 1920 'A faithful advisor' distributed a pamphlet to different people all over the Sudan. That pamphlet was sent to Lord Allenby in Egypt by Stack and thence to Britain. It was circulated to the British cabinet. The pamphlet said:-[58]

"...If the government were an Islamic one, it would not enforce regulations which are against Islamic Law."

In 1953, the inspector of Native Courts found that in El Hammadi in Jebels District of Kordofan, there was for a time no Shariah Court and the local Native Court was applying 'Urf', custom, not Shariah, to statut personal. This was unacceptable to the people, who did not bring their cases to the Native Court during that period. The people of that area had to travel all the way to the city of El Obeid Shariah Court to have their cases decided by Islamic Law.[59]

Some Muslims refused to take their civil disputes to the Civil Courts. They wanted their disputes to be decided by Islamic Law. Sayyid Ibrahim Bec Rushdi V. Salim Ibn Awad El Karim ,[60] is a case in point. It was a debt dispute and it was settled according to Islamic Law. There were two unreported cases in which non-Muslims have asked that questions be determined by Shariah Courts. The parties were Copts, whose law of succession at that time was the same as Islamic Law.[61] Instances in which the Civil Courts relied on Shariah in deciding civil suits were considerable.[62]

No sooner had the British departed than the Shariah issue resurfaced.

The Grand Qadi Shaykh Hasan Muddathir presented "A memorandum for the enactment of a Sudan Constitution derived from the principles of Islam" on the eve of independence in 1956. He said:-[63]

"In an Islamic country like the Sudan the social organization of which has been built on Arab

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[58] Ibid., p. 48.

[59] Mohamed Ahmed Abu Rannat, op. cit., p. 9

[60] Khartoum Shariah Province Court 68/1910; The S.L.J.R., 1973, p.3.

[61] Egon Guttman, "A Survey of the Sudan Legal System." The Int. and Comp. L.Q. vol. 6 Lond. The Soc. of Comp. legis. 1957, p. 407; S.L.J.R., 1967, p. 234.

[62] See Pt. IV, Ch. 4, pp. 202-225 of this thesis.

[63] G.A. Lutfi, op. cit., pp. 219, 220; Akolda M. Tier op. cit., p. 146.

customs and Islamic ways and of which the majority are Muslims, it is essential that the general principles of the Constitution of such a country should be derived from the principles of Islam, and, consequently, the laws governing its people should be enacted from the principles of an Islamic Constitution and in accordance with Islamic ideals out of which such community has been shaped. It is regretted that some of the present laws are, in most cases, inappropriate and contrary to Islamic legislations and even to the general principles of Islam. These laws instead of protecting the people's inherited beliefs and customs have tended to defeat the same. In fact they were laid down by the colonists with a view to defeating the people's creeds and sentiments."

The judicial evolution of the concept of Shariah as a source of law was detrimental to the future of English Law.[64] In some cases English Law was considered alien and these cases were decided according to Islamic Law. The amalgamation of the separate divisions of the Judiciary, viz, Shariah and Civil into one judicial body in 1972 was another landmark in challenging the superiority of English Law that pervaded the Civil division of the Judiciary. The legislative evolution of the concept of Shariah as a source of legislation was one more big leap in the direction of departing from English Law and toward applying Islamic Law.[65] This trend culminated in the 1971 rejection of English Law. Shariah was praised as being lofty and resourceful. It ultimately culminated in the full application of Islamic Law and the total departure from English Law in 1983.[66]

Law may be viewed as an expression of human values or ethical principles and, simultaneously, as an influence on those values and principles.[67] It is a significant description of the way in which a society analyzes itself and projects its image to the world. It is a major articulation of a culture's self concept, representing the theory of society within that culture.[68] Law is not merely the expression of the genius of a people; it is also a product of their history. Obviously

[64] See Pt. IV, Ch. 4 of this thesis.

[65] See Pt. IV Ch. 4, Section B of this thesis.

[66] See. Pt. IV Ch. 5 of this thesis.

[67] Majid Khaduri, "Marriage in Islamic Law: The Modernist Viewpoints." The AM. J. of comp. L., Vo.. 26, 1978, p.221.

[68] J.C. Smith, op. cit. , p.VII.

English Law describes the way in which the English society analyzes itself and projects its image to the world. It is incapable of assuming such a role as far as the Sudanese society is concerned. It is only Islamic Law that expresses the values and ethics of the Sudanese people. It describes the way in which the Sudanese society analyzes itself and projects its image to the world.

Attempts were made to graft English Law into the Sudanese society, but the grafts did not 'take' and simply died off. Likewise attempts were made to eliminate Islamic Law, but in spite of such efforts the roots of Islamic Law are as alive as ever.

The divorce of Islamic Law from practical life did not stem from a popular demand. However, although such a divorce was long maintained, the concept of Islam as a total way of life never died and neither did the popular demand to apply Islamic Law. The latter was sometimes dormant, but returned in full after independence. At times this popular demand intensified and was accompanied by a desire for expressing the Sudanese self-image and an urge to reject English Law.

It stands to reason that in a country like Sudan which has been largely formed by Islamic Law, that the legislator should not detach the law from the values of the people. Unless that is done then the law is bound to fail.[69]

The secular ideology of nationalism has failed to provide a meaningful and functioning synthesis between Islam, 'the religion of the masses', and the law to be applied. Islamic Law is a double-edged sword that can be wielded both ways in a quest for legitimation. It was used by the ruled to challenge the non- Islamic establishments and by the Rulers to provide legitimacy to their own regimes.[70]

The advocates of English Law in the Sudan are an isolated group; this group is not, as in the west, a product of organic social growth, but rather a product of alien education.[71] This group dug, so to speak, its own political grave by coming out of the closet to declare its strong opposition to Islamic Law. Current waves of Islamic integration will ultimately wash it away. Shariah is the only

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[69] JJ. Gow, "Law and the Sudan", op. cit., p. 309.

[70] S. Parvez Manzoor, "The Power of Faith: Islamic Challenge to Contemporary History." Muslim W. Book. Rev., 4, No. 1, 1983, p. 5.

[71] Harry J. Benda, op. cit., p. 240.

Law to challenge the conscience of the Muslim intellectuals and Muslim people. It holds the key to the future.[72] Applying Shariah in the Sudan responds to a deep- seated urge in the Sudanese people not to be subject to alien un-Islamic Law. However, Islamic Law remains a vital force. It is an important part of the thinking of the Sudanese poeple. No change in the Sudan can be successful if it divorces itself from Islam, much more the legal change.

The bitter experiences of the past and the failure of the secular ideologies to provide viable solutions prompted the recent awakening of the Muslims and the increasing awareness that an Islamic integration is urgently needed.

The cultural and political trends prevailing in the Sudan will definitely retard any move to bring in English Law. On the other hand it will promote the tendency to apply Shariah in all its entirety in all fields of life.[73] It is almost certain that the Sudan is moving away from English Law for no return and towards a further adoption of Islamic Law. Law is an area in which a distinctive Islamic influence is destined to reassert itself in the Sudan. The trend to restore Islamic Law is too popular to ignore or obliterate.

The peaceful and spontaneous reception of Islamic Law in the Sudan, in the course of history, has been of a far greater consequence than the forcible imposition of English Law. The idea that Islamic Law ought to be the ideal to which the legislation of the Sudan ought to aspire, has gained the firmest possible hold on Sudanese public opinion. One of the present-day phenomena in the Islamic world is political pressure for a return to the full application of Islamic Law. The Sudan is not an exception.

Every time the secular and western forces thought that they have alienated the Sudan from its cultural bonds a big event comes as a shock to tell them otherwise. The Mahdist Revolution was one example; the 1983 application of Islamic Law is a second one.

The Application of Islamic Law is an issue which is electorally appealing. It is a central point in the Sudanese politics. It is an issue that excites the public opinion and mobilizes the people. Any

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[72] Anderson: "Significance of Islamic Law in the World Today." The Am. J. of Comp. L. vol. 9, 1969, p. 197.

[73] Yusuf Fadl Hasan, 'Sudan in Africa'. op. cit., p. 294.

political group that ignores it meets with political catastrophe.

The Sudanese people are trying to find their own solutions for their problems. Such solutions will not necessarily coincide with the western solutions, but will be based on the values of the Sudanese people and be far removed from the intellectual confusions which cloud the minds of the secularists.[74]

The repatriation of Islamic Law in 1983 took the Sudan out of the syndrome of slavish imitation of English Law. It enlarged the people's vision of themselves and put them to the challenge of providing a meaningful and functioning synthesis between Islamic Law and the given facts of contemporary life. This repatriation of Islamic Law mobilized the Sudanese people in an unprecedented way.

There is a universal Islamic integration and the Sudan is a link in this huge circle and the application of Islamic Law should be conceived in that setting.

Advocates of the adoption or adaptation of English Law to the Sudan underestimate the continuity of Islamic Law. They are proud of the adaptability and lasting value of English Law. They incorrectly deny Islamic Law these values which are inherent in its system. The only difference is that the development of English Law has always been uninterrupted whereas the development of Islamic Law has been seriously hindered and curtailed.

The advocates of English Law did not compare the values of the West with the values of Islam. Instead, they compared the western technological advance with the miserable conditions of the Sudan and the Muslim countries. Obviously they were attracted to the first. The public was not aware of this technological gap and was not overwhelmed by the West.[75]

To impose an alien conception of law, as was the case with English Law, on the Sudan, a country with an overwhelming Muslim majority would in my opinion cause suspicion as well as unrest among such a majority.

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[74] John Voll, Ibid. where the author quoted Sir Hamilton Gibb.

[75] Abul 'Ala-El Mawdudi, op. cit., p. 336.

The reaction of the West to the repatriation of Islamic Law has been interesting and revealing. The western media expressed shock and disbelief. The event was equated with the fall of Khartoum into the hands of the Mahdi and the killing of General Gordon. All the circles which are reminiscent of the old colonial days could not accept the event. It was too much for them. The western media, being conscious of the western political vested interest in the Sudan castigated the Sudan for its free option to break radically from English Law and repatriate Islamic Law. There was too much emphasis on the cliché that the Northern Sudanese are Muslims and Arabs while the Southerners are Africans and Christians. Such a statement is superficial, unacademic and misleading. It assumes the existence of a clear cut racial or cultural boundary between the regions and suggests a definition of Africanism and Arabism in racial terms, and therefore wrongly implies, inter alia, that the Northern Sudanese are not truly Africans.[76] As for the second part of the foregoing cliché, perhaps only the arrogance of a western press could describe a population which is only one-tenth Christian as being 'basically Christian'.[77]

Besides the political vested interest in the Sudan there are two more significant factors behind the wrath of the western media on the repatriation of Islamic Law and the total departure from English Law. These factors are:-

1. The British Government's 'Southern Policy' aimed, inter alia, at counteracting the spread of Islam and the Arabic language 'by every practical means' and imposing Christianity and the English language instead.[78] The Christian missionary efforts succeeded in fueling an elite in the Southern Sudan to turn the latter into a battlefield against Islam.[79] Such a policy was only successful in inculcating hatred against Islam and the rest of the Sudan. The education policy in the Southern Sudan was based on the principle that 'If a native wishes to read he must first be baptized'.[80] By and large, the British policy was that Christianity must prevail, not by

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[76] Muddathir Abd AL-Rahim, op. cit., p. 7, footnote No. 3.

[77] Ali A. Mazrui, 'The Multiple Marginalty of the Sudan', 'Sudan in Africa, edited by Yusuf Fadl Hasan.' op. cit., p. 244.

[78] Muddathir Abd Al-Rahim, op. cit., p. 6 where the author quoted the 'Civil Secretary to Governors of the three Southern Provinces, 25 Jan. 1930 (CS/I.C.I/Khartoum, Government Archives, Khartoum).'

[79] Mohamed Omer Beshir, "The Southern Sudan, Background to Conflict." op. cit., p.27.

[80] Ibid. , p.31.

demonstration of its own truth, but by suppression of Islam. Islam is the only force that frustrates these plans. With the repatriation of Islamic Law the wave of Islamization is apt to cross the boundaries to the rest of Africa. That will be the last thing the West wants to hear.

2. Islam is the least appreciated faith in the West. It is portrayed as posing a serious challenge to western civilization.[81] The memory of the crusades is still alive, and has been rekindled by the repatriation of Islamic Law in the Sudan.[82]

The western media, in its ceaseless efforts to weaken the application of Shariah in the Sudan took issue with the distortions that accompanied such application rather than the basic principles of Shariah.

An often repeated cliché is that the repatriation of Islamic Law undermines the Christian minority in the Southern Sudan. This cliché intentionally ignores the 'Rule of Democracry' which allows the majority to demonstrate its convictions and programmes, without the minority's human rights being undermined. It can never be the right of any minority to fetter the hands of the overwhelming majority and impose its own programme on such a majority. The Southern problem looms large in the western media to exert pressure on the Sudan whenever it parts ways with the West. However, Shariah has not been applied to the Southern part of the Sudan and there is always room to exclude the Christians in the South from such application. The Christians shall be governed by their personal law as far as personal law is concerned. They can also be exempted from the prohibition of liquor and the 'hudud' punishments. It is not unusual to have variations in the legal system within the one country. U.S.A. offers such an example.

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[81] Wilfred Cantwell Smith, "Islam in Modern History." Princ. U. Press, Princ. N.Jer., 1977, p. 105.

[82] See David Blundy, "U.S. Watches anxiously as Sudan embraces Islam". London Sunday Times, reprinted in B-6 The Gazette, Montreal, Sat., May 19, 1984. The title graphically connotes that the Sudan was not a Muslim Country.

# Conclusion

Islamic Law has always been a significant element in the history of the Sudan. It has been there with the reception of Islam itself. It stayed in full application in Sinnar Sultanate for over three hundred years (1504-1821); in Taqali from the year 1530 to the 20th. Century and in the Fur Sultanate from 1596 to 1916. It was fully applied throughout the beginning of the Turkish era in the Sudan and was partially observed towards the end of the same era (1885). This partial departure was the element that triggered the Mahdist jihad movement and fuelled the Islamic revolution of the Mahdi. The Mahdist State though shortlived (1885-1898) witnessed the full application of Islamic Law throughout the Sudan.

The genesis of Islamic Law in the Sudan was spontaneous and peaceful. Its development was part of the historical, political and social development of the Sudan. The Sudanese society with its mosaic ethnic composition positively responded to the Mahdist outcry for an Islamic integration and the full application of Shariah.

On the other hand the genesis of English Law in the Sudan was forceful. The Anglicization of laws in the Sudan could not have happened without the British armed forces invasion of the Sudan and the ruthless crushing of the Mahdist State in 1898. It is a fact that no country, which has not at sometime or other been part of the British Empire, has ever voluntarily adopted the Common Law. The Sudan was no exception. A driving force behind the British invasion of the Sudan was the urge to combat the spread of Islam. English Law was gradually imposed through the justice, equity and good conscience provision. This provision operated in the Sudan in the same ample manner as in British India to warrant the importation of foreign law.

The British occupation of the Sudan and the British staff who administered the judicial machinery in the Sudan enhanced the imposition of English Law. The British style legal education and legal profession were conducive to the further reception of English Law. However, English Law was alien and it so remained. It provoked a number of uprisings. It could not escape its colonial orientation and implementation.

With the independence of the Sudan, the demand to reject English Law and repatriate Islamic Law gained momentum and became popular once again. English Law was rejected twice, the first time in 1971, and again in 1983. Both instances enhanced the application of Shariah especially the 1983 total departure from English Law and the repatriation of Islamic Law.

The long partial suspension of Shariah in the Sudan did not diminish its influence nor the eagerness to have it reinstated. It is so deep seated that it makes its presence powerfully felt. It is the kernel of Islam itself and the desire of the people.

The Sudanese people obeyed English Law because they were conscious of a policeman at their elbow. When they obey Islamic Law it is because of its conformity with their concept of what is right and what is wrong. English Law imposed ideas contrary to those of the Sudanese society and that created disrespect for the legal system. English Law could not and cannot reach the hearts of the Sudanese people, because it does not respond to their needs and does not emanate from their history, culture and realities of their religious life. It is known only too well that any law which so qualifies, that is against the feelings of the people is a bad law.[83] Islamic Law draws on the history and culture of the Sudanese poeple, and thus it readily responds to their needs and aspirations. It is closer to their hearts and conscience than English Law or any other law for that matter.

Most Westerners fail to realize that the decline of religion in the West has not been matched with a similar decline in the Islamic countries. Secularism in these countries is imposed from above and not having a strong base it will ultimately wither away. The secularists in the Sudan do not really understand the feelings and dispositions of the Sudanese people. As perceived by western lawyer's Islamic Law does not fit in the conception of law. It is, they fail to understand, the very manifestation of the Islamic way of life. An Islamic society cannot dispense of Islamic Law and still claim to be Islamic.

Islamic integration has gathered momentum in the Islamic world, just as it has in the Sudan. This reduces the chances of a return of the English Law to nil. By the same token, it strengthens the repatriation of Islamic Law.

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[83] Zaki Mustafa," Common Law in the Sudan". op. cit., p. 147.

The weakness of cultural ties with England and the retreat in using English language and English style of education have dealt a crippling blow to the future of English Law in the Sudan.

In view of the premises set out in this thesis, one can say with full confidence that the curtain is down on English Law in the Sudan. There is no valid reason to believe that English Law can be revived and will ever have any future in the Sudan.

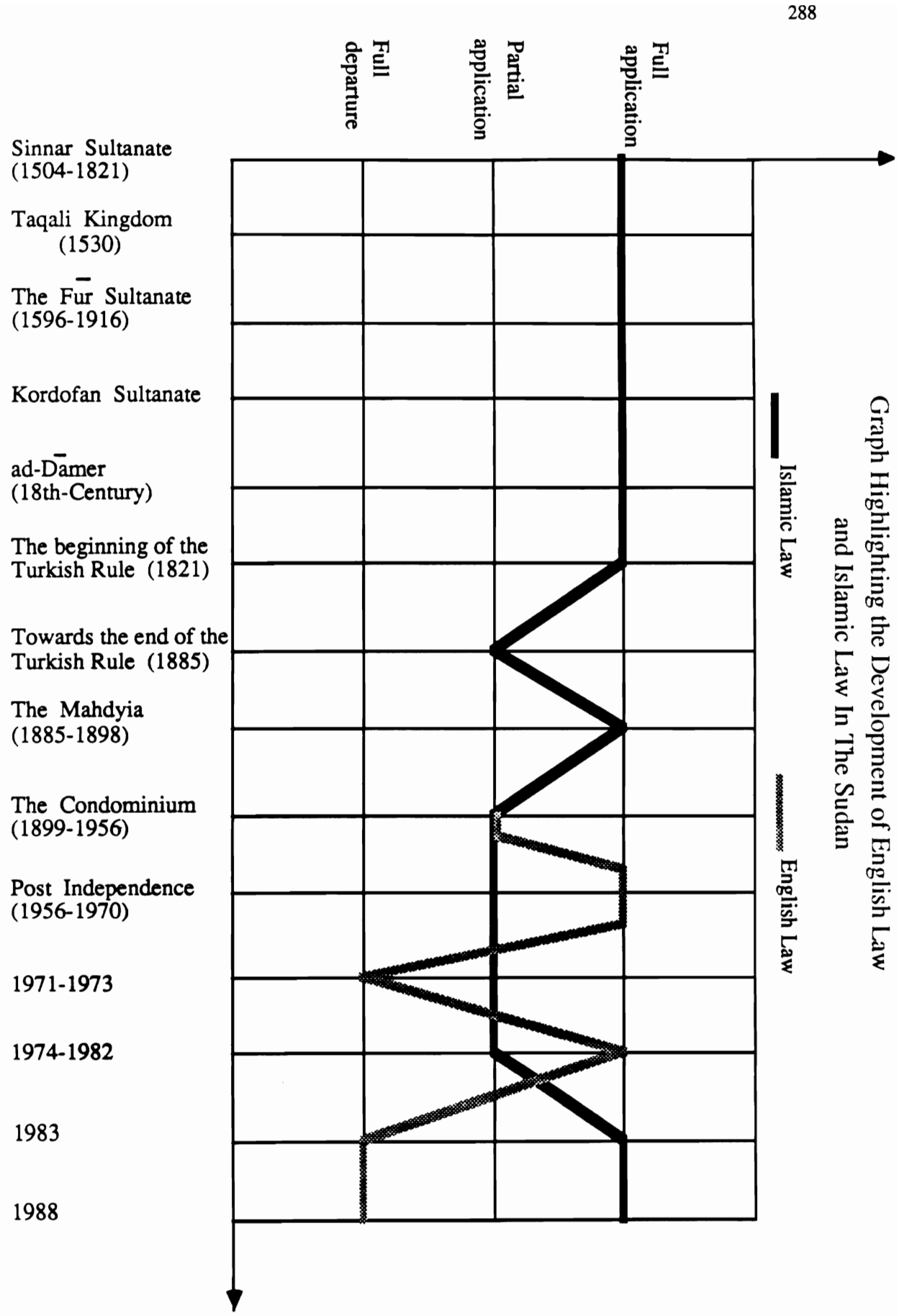
Islamic Law will remain a prime issue in Sudanese politics. Some additions and qualifications are likely to take place within the existing laws without affecting the predominance of Islamic Law as the source of legislation. However, the pressure on the Sudan to abondon Islamic Law will never cease. Such pressures started during the last days of Nimeri Regime and proved to be effective. It was subtle during the Revolution that toppled the Nimeri Regime because of the fear of the consequence of the strong public opinion favouring Islamic Law. With weak and ineffective governments in the Sudan, along with hopelessly miserable economic conditions, the pressure will resume and mount in a blunt and powerful way. The International Bank in Washington has been the spear head of this pressure. Financial aid to the Sudan is made conditional on the dumping of Islamic Law and reversing the gear to English Law and the interest banking system.[84] The weak political parties have to some extent accommodated this pressure. As well, most of the political leaders are secular in spite of the Islamic cloak they wear. Islam as a complete way of life has never been a serious programme of political parties other than the National Islamic Front. The Southern problem is the trap the West uses in its ceaseless efforts to keep the Sudan within its orbit. The West has shown no sign to let up unless the Sudan is brought down to its knees. For them it is irrelevent that the rebellions in the Southern Sudan are a product of a painstaking British policy designed to trigger hatred, feud and war on call.

The series of armed rebellions in the Sudan all broke out when English Law reigned in the Sudan. The current armed rebellion started long before the application of Islamic Law in the Sudan in 1983. Yet the facts are distorted and posed to look like it was the product of such application.

[84] The Islamic interest-free banking system in the Sudan has been a major concern to the I.B. in Washington. The I.B. is exerting ceaseless pressure on the successive Sudanese Governments to shift back to the interest based conventional banking system.

Nevertheless it continues to be frequently used as a crisis catalyst.

One important factor that works against the repatriation of English Law, obviously among other factors already discussed, is the fact that the question of legal change is no longer a monopoly of a handful of politicians and lawyers. It is now in the public arena. It attracts the people at large. It is volatile and can provoke friction and invite extreme tension. It is also very popular and strongly persistent. Any politician who flagrantly goes against the popular demand to apply Islamic Law is doing so against an electorally appealing issue and shall meet with a political catastrophe. Anyone who fails to read the signs in the political and social forum of the Sudan is apt to end up in oblivion. The pressure to subvert the trend of complete adherence to Islamic Law has made some inroads in different political parties. But there is no hope that the masses will succumb to it. The supporters of the repatriation of Shariah have to be alert. Indeed, they have to be astute to prevent the tactful secular Sudanese politicians and the covert and overt pressures of the anti- Islamic western circles in securing a reversal, if they are to guard against any depletion of their Islamic identity.




Graph Highlighting the Development of English Law and Islamic Law In The Sudan

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