IN SEARCH OF A LEGAL
PHILOSOPHY IN THE SUDAN

AN ANALYTICAL STUDY OF SOME LEGAL THEORIES
AND THEIR RELEVANCE TO THE SUDAN

A THESIS SUBMITTED IN
PARTIAL FULFILMENT OF THE REQUIREMENT FOR
THE DEGREE OF MASTER OF LAWS

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SEPTEMBER 1991
To those who contributed their best to our Law in its formative era.
To the honourable judges of the former High Court.
## Contents

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ACKNOWLEDGEMENT

I am really grateful to Dr. Peter N. Puk, Dr. A/Saad M. Omer and Dr. Sedig Abdel Gai, my supervisors, without whose assistance and close supervision this work would not be accomplished.

I am also grateful to my seniors in the Judiciary since I started doing this work. They have helped me a lot and showed a good spirit at all stages of my study.

My thanks are also due to my colleagues, the judges, in an innumerable instances of co-operation which pushed me to complete this work.

I would like to name Mr. Justice Henry Riyad, Mr. Justice Mahdi Mohammed Ahmed, Mr. Justice Mohammed Mohammed El Hassan Shehata, Mr. Justice Sabker Zein El Abdien, Mr. Justice Dr. Ali Ibrahim El Imam, Judges of the Supreme Court and Mr. Justice Eldad Hassan Khalifa, from the Court of Appeal who gave me an invaluable opportunity to make use of their experience.

The Training Administration and the Technical Office in the Judiciary also deserve my gratitude.

I am further thankful to the obediently helpful staff of the Printing Office, University of Khartoum and Mr. Abdalla Abbas for typing the manuscript.

I finally say that what is right and praiseworthy in this work is due to the above mentioned and what is wrong and blameworthy is due to myself.
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<td>The general</td>
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<td>adli</td>
<td>proofs</td>
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<tr>
<td>amr</td>
<td>Command/order</td>
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<tr>
<td>asl</td>
<td>(p. asul) root</td>
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<td>darar</td>
<td>injury</td>
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<td>dala'il, al.</td>
<td>The demonstration</td>
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<td>fitrah</td>
<td>The science of law or jurisprudence and is sometimes used from &quot;Law&quot; in Islam</td>
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<tr>
<td>fugah</td>
<td>(sin foith) Muslim jurists</td>
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<td>hadd</td>
<td>(pl. hadud) boundary, the bound prescribed by God, a punishment</td>
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<tr>
<td>hadd</td>
<td>(pl. hadd) prescribe punishment</td>
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<tr>
<td>asr</td>
<td>vital and religious observations</td>
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<td>ijma</td>
<td>consensus</td>
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<td>isharah</td>
<td>al, the sign</td>
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<td>independent reasoning</td>
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<td>ijtihad-fardi</td>
<td>individual judgement</td>
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<td>ijcihad-mutlaq</td>
<td>absolute reasoning</td>
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<td>'illah</td>
<td>(pl. 'illāl) cause</td>
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kalam: scholastic theology ........................................ 335
khali: hidden .................................................................. 346
Khas, al-: The particular ................................................. 350
ma'hum al-: understood: ................................................... 349
Maliki: belonging to Imam Malik ........................................ 362
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Ma'zhab: also ma'adhab: a doctrine or school of law. ........ 355
mawalat: matters of social life, transactions ....................... 332
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nabat: basic or fundamental ............................................... 346
nejma: collective ................................................................ 346, 347
nusrati: an authoritative expounder of the law, interpreter and one who uses his independent reasoning .................................................. 339
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A.A.   Acquisition Act (1971)
C.A.   Company Act (1925)
C.C.   Civil Code (1971)
C.C.O.  Chief's Courts Ordinances (1931)
C.J.O.  Civil Justice Ordinance, 1900, 1929.
I.C.C.A.  Interpretation and General Clauses Act, 1974.
J(S.R)A.  Judgments (Basic Rules) Act, 1983.
N.C.O.  Native Courts Ordinance, 1912.
P.L.O.  Prescription and Limitation Ordinance, 1926.
S.L.J.R.  Sudan Law Journal and Reports.
S.L.R.   Sudan Law Reports.
S.N.R.  Sudan Notes and Records.
The search for a legal philosophy in the Sudan is not novel. The law since the Funj Kingdom shows the different trends which have been aiming at founding such a philosophy. Many and different laws have, in fact, been made and different theories expressed.

This study examines the laws and the theories in search of the predominant legal theory in the Sudan. Thus, questions relating to the ends of law, the structure of legal logic as well as the legal theories become an essential part of it.

The methodology applied is an analytical and a comparative one. The Sudanese law is examined against the background of the general principles in jurisprudence and legal theory.

The whole thesis is divided into two parts: Part one which is entitled "Law and the Legal System", deals with questions concerning the nature of law, its sources and the inner working of the judicial system in general and in relation to the Sudan in particular.

Part two which is entitled "Some Legal Theories" considers certain theories and studies their relevance to legal theory in the Sudan in an attempt to find out the predominant theory of law in the Sudan.

Part (I) is subdivided into three chapters: Chapter (I) deals with the main question: What is Law? The nature of law is discussed in the light of the points of view of
different jurists as to the definition of the world "law". This embraces questions concerning the meaning, characteristics and purpose of law in society.

It is submitted that the word "law" in Sudan largely refers to "legislation" whether primary or secondary.

Chapter (II) is about the sources of law. The relation of the idea of the sources of law to legal theory is that there has been a desire to know the authority behind law. By the term "sources of law" is meant the authoritative sources. In the Sudan, these were legislation, custom, precedent, justice, equity or good conscience and the Islamic Shari'a. Legislation was the primary source of law and the others were considered as secondary sources applicable only in absence of legislation.

Since 1961, Islamic Shari'a has become the most largely considered source. However, legislation still remains the primary source of law. In absence of law the courts shall apply the Qur'an, Sunna, Ijma' (consensus), Qiyas (analogy), Istihsan (juristic preference) and al-Kasalih al-Kurnala (unrestricted interests). The other sources, namely, custom, precedent, justice, equity etc., became governed by the principles and rules of Shari'a.

Chapter (III), which is the last one in this part, is concerned with the judicial process. This is examined in relation to the following three theories namely: The theory of judicial law-making, the theory of judicial reasoning and the theory of judicial interpretation of statutes.

Our courts have acted upon the idea that, they are
not authorised to make law to interpret the law and that it is the duty of the legislature alone to make the law.

As to the field of judicial reasoning, there has been a deductive method of reasoning in the application of statutes and an inductive method in the application of precedent.

However, an analogical method of reasoning was followed in accordance with the system of stare decisis where like cases were treated alike.

In their interpretation of the law judges strive to discover the intention of the legislature as he is considered the author of the law.

Since recently, there has been an unrebuttable presumption of law that the legislator does not intend to contradict Shari'a rules and its general principles. Thus, any law shall be interpreted in accordance with these rules and principles. If any law exists which contradicts Shari'a rules and principles, such law will be considered null and void.

In Part (II) there are four chapters i.e. chapters (IV), (V), (VI) and (VII). Chapter (IV) deals with the "Natural Law Theory". Natural law, the law of nature, is the one which is said to be universal, immutable and just. Its principles are recognised by the Constitution of the Sudan and law. Signs of this recognition are the provisions
of the fundamental rights and freedoms and their realization. However, these principles have much been infringed when we came to practice.

Chapter (V) is about "Positivism" which is adopted by this work. Reference here is made to its standpoint as to the definition of law and the relation of law and the sovereign authority.

Chapter (VI) discusses the "Historical and Sociological Approaches to Law". The organic connection between law and the nature of the people is apparent in the historical approach to law. Accordingly, law grows with the growth of the people, strengthens with their strength and dies with their death. So law is defined as the general consciousness of the people or their spirit.

Custom was always the nearest to this definition. There had been a persistent search in the Sudan for a national law specially after Independence.

There were three trends, namely:

1. A trend led by a group of Muslims from the Northern Sudan advocated the application of Islamic law in all matters since the Sudan is an Islamic country or the majority of its people are Muslims.

2. A trend led by those who were in favour of a close relation with the Arab World in general and Egypt in particular, who called for the adoption of the Egyptian law, as it was the law applied in nearly all other Arab countries, and
3. A trend led by a group of eclecticists who advocated the adoption of the best laws of each country from all over the world.

However, none of these trends dominated the others and the common law continued to be applied.

Chapter (VII) is concerned with the "Islamic Theory of Law". This theory has never been studied as one of the theories of law in the books of jurisprudence. We believe that it really deserves discussion as a distinct theory of law and not only as part of Natural Law theory.

In fact, the Islamic Law of Shari'a has never been alien to the Sudan. It has been applied since the Funi kingdom. But its application has, up to recently, been limited to personal matters among Muslims. In 1983, the Islamic Law was introduced to govern other matters, relating to criminal law and the sources of law. Accordingly the crimes of hudud have become part of the penal code and the Qur'an, Sunna, Ijma (consensus), Ijtihaud (independent reasoning) become supplementary sources of law.

The predominant trend has been that any law shall be interpreted in accordance with Islamic Shari'a and its principles. Thus, we might venture to say that it could hardly be denied that the Islamic theory of law has found its way to our legal philosophy and become part of it.

What ties all the chapters of the thesis together is
that, they represent the outlines of the general theory and philosophy of law in the Sudan, which have never, to my knowledge, been properly treated.

The thesis is that, many theories of law are traceable in the Sudan. However, "Positivism" is the most influential one. What tempts one to say this is the following:

In their application of law, judges apply the law as it is and bother little about what it ought to be. They are trained not to make but to declare law. There was, before 1981, some sort of distinction between law and morality. The method of judicial reasoning has been the deductive one especially in the application of statutes and an analogical method was followed in the application of precedent. "Law" is defined as meaning "legislation", which is, in the positivist outlook, the direct will of the sovereign.

In fact, law has remained to be governed by that will.
إن النواحي التي تشكل على سطح الجلبة صورةً وضوحاً، تتألف من رئيس القانون، أمير في إسماء بإجلاسه من المسائل، الدائمة في نسبتها إلى القانون، والقانون التأديبي.

تُعدد النواحي السابقة إلى ضياع: "السلاطين والسلطانات". تُميز في إسماء إلى إجلاسه في المسائل، الدائمة في نسبتها إلى القانون، والقانون التأديبي، يجعلنا نحن بدورنا حسبنا في النواحي التأديبية، ويجعلنا نحن بدورنا جهاداً في النواحي القانونية في السوابق أن تعتمد على النواحي القانونية أو السوابق القانونية.

كتمت النواحي إلى ضياع "السلاطين والسلطانات"، تُعدنا حسبنا في النواحي التأديبية، وجودنا بدورنا جهاداً في النواحي القانونية في السوابق أن تعتمد على النواحي القانونية أو السوابق القانونية.
يفضل ذلك لِمَا فِي السَّؤالين الفَالِقَاتين الفَعَّالين، وَالْغَرَّامَاتِ، وَالْعَدْافِ.

لَتَكُنْ قَمَةُ الْمَسَاءَلَةِ، وَلَقَلَّةُ خَلاَبَةِ "الْفَعَّالين"، في السؤالين لتَهْيَـِّيـ‍ٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰـٰ~
ال겠습니다 في مختلف الأقسام، فقد يبدو الإيضاح بالبعض

من تعميم الخريطة، والبعض الآخر.

ويعد هذه القائمةadaptée لبعض أفراداً قانونية

تظهر إلى الدرجة بأن العنصر لم يتمكن من حالة السارية

الإسلامية، ويساويها لغة حديثاً إذا أن أي تحليل يجب أن يكون

بما لا يضفي ذلك العنصر والبعض الآخر، وإذا ورد أن تكون خاصة، لا تقدم

اللغة بالطريقة، إذا لم يكمن إلاً، وكان لا يكمن.

في الدور، العنصر يوجد أن هذه ترجمة من النص الأصلي، بإسم

العالمة، والباسم، والخيل، كما في النص الأصلي وصلة التدريس

السياسي، رمز النظام الذي يصور بوضوح أنه مفهوم ود المعنى.

لم يكتب، ويفيد، القانون الدورية بين الدستور والناصري

المسلم أن كتبنا في كتابة اللغة، والبعض الآخر، لا يوجد

إلى الدرجة إذا لم يكمن إلاً، وكان لا يكمن.

بعض للدستور، والبعض الآخر.

يحتوي الفصل الأعظم بال.done، ووصف التوضيحات التي

النصوص، ومن شرط القانون، وادارة القرار، بال นอกจาก، ويحتوي على واحد

ديموغرافية، مما يعكس بالوضوح في السوء أن هناك شبه هذا الطبي.

ويحتوي الفصل الأعظم في النص القانون، والبعض الآخر في

القانون، في الفصل القانون، واستراتيجية الرابطة العربية، في بعض

القانون، ويتم التصويت بالنص

السياسي.
いただける

إجابة: يُقدر عدد المسلمين في العالم اليوم بـ 1.8 مليار نسمة، ويشمل الإسلام جميع الحضارات والثقافات في العالم.

إجابة: إذن، الإسلام برغم ونوعية تنوع التقاليد وثقافة المسلمين، فإن الإسلام هو رسالة إلهية، ودائمًا ما يتمتع الشريعة الإسلامية بحالة عالية من الاحترام واحترام الفقهاء وعلماء الدين.

إجابة: الإسلام هو دين يعتمد على معاني الألفاظ والعبارات، ولهذا يمكننا القول أن الإسلام هو مأخوذ من القرآن الكريم، ويعتمد على نصوص القرآن الكريم وسنة النبي محمد صلى الله عليه وسلم، ويعتمد على معاني الألفاظ والعبارات.

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هل ي破损 في مدرس الراحلة؟ ما هو المدرس الراحلة؟

تعداد هذه الراحلة نسبة إلى إعادة تشريعة المدرسية، وما الذي استثنى منها في الدارية الإلزامية، وما الذي استثنى منها في الدارية الإلزامية.

لا يمكنني تعويض هذه الراحلة، بل إذا تقبلت بذلك لا يمكنني إكمال موضوع المدرسية، والدورة الإلزامية هي، ما الذي استثنى منها في الدارية الإلزامية، وما الذي استثنى منها في الدارية الإلزامية.

يجب أن يكون تعلم الجسم، كما أن التعلم، قد تم على علم التعليم، ومثل ذلك، كان آل ما، ما الذي استثنى منها في الدارية الإلزامية.

لا يمكنني تعويض هذه الراحلة، بل إذا تقبلت بذلك لا يمكنني إكمال موضوع المدرسية.
PART ONE

LAW AND THE LEGAL SYSTEM
CHAPTER ONE

THE NATURE OF LAW

1. Introduction

The most celebrated question and one which has been persistently asked and answered in legal theory, is the question "What is Law". Surely, a search for a legal theory in almost all legal systems, is an immensely difficult task. No two writers on jurisprudence may agree even on the very purpose of defining law. Thus, no consensus is expected on a unified meaning of nature and purpose of law.

However, the attempt to define the word "law", and to ascertain the essence and function of law, remains interesting and profitable. It has preoccupied legal theorists since Plato. Its importance comes from the fact that the whole legal theory is seen to be but an attempt to answer that question.

Actually, the existence of legal theories owes much to the existence of the different attitudes towards the nature of law.

In dealing with the question "What is Law?", it is not only the meaning which has been sought, but equally the nature and purpose of law. Whether a certain rule is law e.g. statute, moral rule .. etc., or a certain "law"
is really law e.g. unjust law, are not really questions of meaning since no definition to the word "law" can avail us. Attention has to be paid to exteriorizing explanations by reference to factors like "justice", "morality", "legality", etc., for the cling to justice and or morality excludes laws from having such a nature e.g. Nazi Laws. Thus, the philosophy behind the law is also always sought.

Moreover, jurists have also been either directly or indirectly influenced by the role of law in society to which the question "What is law"? looks to mean what is needed by having a law? or what purpose does the law purport to serve?

The coming pages in this chapter are reserved for the ananalysis concerning the meaning of law, its characteristics or main features and its purposes. In fact, so many a controversy has arisen in answering the perennial question "What is Law?". The trend in the Sudan has not been an exception to such a controversy. In applying the analysis of the nature of law here, the aim is to work out the general philosophy adopted in the Sudan. Our thesis is that different theories have emerged. However, the positivist outlook has been the prevalent one. The predominant exploration of the term "law" has meant "legislation", the direct expression of the will of sovereign authority.
Before starting the examination of the above matters, it is relevant to delimit the terminology of our field of research i.e. legal theory, legal philosophy or philosophy of law and jurisprudence or the science of law.

2. Terminology

The terms "legal theory", "jurisprudence", "philosophy of law" and "legal philosophy" have been used interchangeably. "Legal theory" is used by Salmond, Friedmann, Moscoo Pound, and others, in a variety of senses. It appears that they all seem to pose the question "What is Law?", and proceed to state the different legal theories since the Greeks. To them, legal theory is equated with legal theories i.e. Natural Law, Positivism, Historical and Sociological Approaches to Law, Marxism, Legal Realism etc., and perhaps little more is added by expressing the writers' own viewpoints.

To Salmond, legal theory is in general an attempt to answer the question "What is Law?". By this, Salmond means to focus on the purpose of legal theory. Friedmann links legal theory with philosophy and politics. His main theories is that: "All systematic thinking about legal theory is linked at one end with philosophy and at the other with political theory". He goes on throughout his work to clarify this. According to Pound, juristic discussion of the theories of law has been embraced by the multiplicity of meanings of the term to be defined. In addition to his examination of the term "law", Pound uses legal theory to
distinguish the theory of law from other theories e.g. political, philosophical etc., of the state. From this standpoint he states: "The legal theory has reference to the immediate practical sources of rules and sanctions." Perhaps by stressing the definite article i.e. "the", Pound refers to a narrow meaning. This is the legal theory of the state as against its political, philosophical etc., theories. However, as will be seen, legal theory has a wider meaning.

Moreover, there is overlapping between "legal theory" "legal science" or "the science of law" and "jurisprudence". When he speaks of "law without legal theory" Jones paraphrased and substituted this for "law without jurisprudence", and "law without legal science". It seems that, Jones means to say that "legal theory", "legal science" and "jurisprudence", are all the same. In fact, jurisprudence is commonly referred to as the science or knowledge of law. The contemporary usage of the term shows that it is somewhat wider than legal theory.

Hall considers legal theory as based on general principles, and jurisprudence as based on more universal conceptions. It is, however, believed that no vital distinction is necessary between the two terms, save to suggest that jurisprudence is perhaps the wider philosophy of law to which legal theory makes a contribution. Curzon's contention brings into play one recurrent phrase i.e. "philosophy of law". Philosophy of law broadly means general theory of law. It may also be taken to include
studies of legal concepts or the methods of legal order
by the use of criteria developed in the traditional bran-
ches of philosophy i.e., metaphysics, logic, ethics and
occasionally aesthetics. This expression i.e. philosophy
of law, is hardly fashionable today in the common law
countries. Legal theory and jurisprudence are much
adopted. The study of the legal is but one aspect, albeit
a major one, of jurisprudence.

We believe that legal theory, like any other theory,
is an explanation of the general principles of an art or
science contrasted with the practice. This art or science
is law. It is a persistent search for values, solution
for legal, social and philosophical questions of which
the question of law is the cardinal one. It is, however,
not a mere theoretical exercise since realistic outlooks
do emerge to find the proper field of law to be the expe-
rience and not formal logic. Here, we are only concerned
with the study of legal theory in the sense of legal theories.

Legal philosophy deals with the purpose or end of
law. There is supposed to be a supreme end to every
law and legal system which is "justice" in its fullest
sense. Moreover, there appears to be in the professional
field an obvious need to ensure the consolidation of social
control in a way conductive to the social interest of peace
and order. Thus, ideas behind the law aim at providing
order, stability and legal certainty. Though this has been
the case in the Sudan, our law remains far from being stable
and--or certain. Since recently, the sovereign power has been
entrenched through a number of legislative instruments. For this and other reasons, the predominant legal theory in the Sudan has been legal Positivism. The law has largely been the command of the sovereign power. Its purpose has become the general security.

However, justice is sought and realized. The courts in their administration of justice do maintain fairness and tend to give every man his due according to law by using analogical and deductive methods of reasoning. The rules of natural justice have been provided for. Natural rights in the sense of general freedoms and individual rights have been provided for by law since years ago. Now, they are part of our legal philosophy.

Social interests e.g. in general security, in safety, in the preservation of social institutions etc., are respected and the courts have paid attention to our civic, economic and social realities.

The application of 'Sharia' law has never been alien to our legal philosophy, especially in the field of personal matters of Muslims. The period since 1983 has moreover, witnessed the introduction of the Islamic punishments for crimes of (mud). However, this shift is still in the process of becoming an established legal philosophy in the Sudan.

Now, it is within the purview of this study to analyze the question pertaining to the nature of law by examining the meaning, characteristics and function of law, generally
and in relation to the Sudan.

3. The Meaning of Law

We have seen that legal theory is largely an attempt to answer the question "What is Law"? This question will reveal itself to be the most difficult one. It is an old-age question which has worried philosophers and jurists since philosophy and jurisprudence were known. As for the written history, it was the philosopher and not the lawyer who first asked the question "What is Law"?. However, nothing concrete enough to be recognised as definition could provide a satisfactory answer to it. So, we really add nothing by stating that, the term "law" has assumed so many and different meanings.

Tentatively, law refers to general rules of conduct which are taken as binding in a society. They are general in the sense that they apply to all persons and not to a single individual or group of individuals; and are binding to distinguish them from other rules of conduct which are not so binding e.g. morals, which have no binding force as law. This binding force of law is backed by sanctions to the extent that the violation of law carries with it punishment of violator. These points will be elaborated upon in the coming pages. It is convenient to deal with the dictionary and some writers definitions of the word "law".

(a) Dictionary Definitions

In the Oxford English Dictionary, law is defined as the
body of rules, whether formally enacted or customary, which a state or community recognizes as binding on its members. By this definition, custom as well as legislation assumes the character of law. According to the Dictionary of English Law, law means a rule of action to which men are obliged to make their conduct conformable. This definition deals only with positive law. It is not known whether the men making their conduct conformable to law expect or believe that non-conformity entails the risk of punishment. Black thinks that the law is that which must be obeyed and followed by citizens, subject to sanctions or legal consequences. Comparatively speaking, this last definition is a good definition since it stresses the obligatory nature of the law and the sanctions or legal consequences which will follow in case of violation.

(b) **Some Writers' Definitions**

Some writers on jurisprudence, generally present law as rules or principles. Pollock uses the term "law" in a concrete sense to refer to any particular rule, having the nature of law in the abstract sense, which is expressly prescribed by the supreme power in the state, or by some person or body having authority for that purpose, though not generally supreme. In this sense, what is important is the existence of authority whether having supreme power or not to prescribe any rule which only for that purpose becomes law. For Holland, laws are rules of human action commanding the doing, or abstaining from certain class of actions,
disobedience to which is followed, or is likely to be followed, by some sort of penalty or inconvenience.\textsuperscript{23} Holland aims at distinguishing propositions of legal rules from other propositions e.g. honour, etiquette .. etc., and called the first laws properly so-called. His definition is largely conceivable as delimiting the scope and nature of law.

As for Salmond, law is those "principles" applied by the state in the administration of justice.\textsuperscript{24} In this connection, Salmond tries to be realistic. His definition includes only the rules recognised by the state and acted upon by the courts of justice. However, the definition is also intended to show that it is within the function of law to attain justice.\textsuperscript{25} Accordingly, law is but the principles applied by the courts in their administration of justice.

Therefore, most of the definitions prevalent in the books of jurisprudence present law as rules. Legal rules differ from other rules because they are set or recognised by the state authority and in the violation of which penalty or inconvenience follows. This leads us to inquire into the characteristics of law as distinct from other rules of conduct in society.

4. The Characteristics of Law

The above definitions also tend to express the general characteristics of law. The most recurrent characteristics are, the binding, coercive, and, sometimes, moral character of law.
(i) **Binding Character of Law**

Law has a binding force. It is intended to bind and be obeyed by those to whom it is directed. Aquinas is one of the first theorists who pays much attention to this aspect of law when he states: "lex, law is derived from ligare (to bind)." The Dictionary of English Law adopts this idea. It states: "law, lex, ligare, (to bind)." Pollock who speaks about rules binding the members of the state, concludes that the sum of such rules i.e. rules binding members of the state, as existing in a given commonwealth, under particular form, is what in common speech we understand by law." He makes this point more articulate by adding that: "in one sense we may well enough say that there is no law without sanction. For a rule of law must at least be a rule conceived as binding." The binding force is always an indispensably characteristic of law without which it becomes only rules of etiquette, morality or honour.

(ii) **Coercive Character of Law**

Apart from its binding character, there is also the coercive character of law. To Kelsen, law is a coercive order of human behaviour. Kelsen's ideas may be paraphrased as follows:

For a law, there is a sanction. The sanction consists of the deprivation of possessions e.g. life, health, etc., and more especially freedom. These possessions are taken by force of law against the will of the violator. So, this
sanction has the character of coercion. Physical force may be used to effect the sanction if necessary. Contrasting those orders that employ punitive measures and those which do not employ such measures, Kelsen conceives the efficiency of the latter to rest not on coercion but on voluntary obedience. Kelsen appears to say that, coercion is an essential or indispensable element in law unless society, in the future, can exist without law.

Against that background, Hart rejects any model of law based simply on coercive orders, on the ground that this is derived too exclusively from the criminal pattern of law. However, the existence of coercion is an unchallengeable nature of law especially in penal laws. But such element should not be over-emphasized.

(iii) Moral Character of Law

In general, law contains an element of morality though it may not be expressed in that form. However, some rules have nothing to do with morality or immorality e.g. some rules of proceedings of courts and their jurisdiction, traffic laws etc. Nonetheless, most rules have moral characteristics.

Hart expresses himself in the following words: "The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideas."
Penal laws, specially criminal law and personal laws are the most apparent examples expressing the morality of law. The kind of morality law keeps is better termed by Fuller as being morality of duty i.e., morality which lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed towards certain specific goals must fall of its mark.  

In theocratic societies, law and morality are closely linked for law is always seen as divinely-given. In secular societies, on the other hand, a separation between law and morality exists since law is positive, sanctioned by the state authority and is largely a distinct area or at least not necessarily the same as morality. The correlation or separation between law and morality is an old-age controversy which has found its full examination as between the natural law theorists and positivists and/or the theocratic and secular philosophers. However, a strict separation between law and morality is hardly possible. Thus, law has a binding, coercive, and largely moral characteristic which gives it its feature as law. Furthermore, legal philosophy necessitates also the examination of the purpose of law.

5. **The Purpose of Law**

It is within the compass of the nature of law to briefly look into the function and purpose of law. For, in addition to the discussion so far carried out which mainly centered on the form of law, the aims of law equally require examination. The question to be answered here is what is the aim
of law? or what does, or should law achieve?

Different views may be expressed on the contention that law is oriented towards ends and is not an end in itself but means to those ends. However, the following points need be examined.

Firstly: Justice: Law is thought to aim at justice. This is the most valuable goal of any legal system. Law itself is viewed as being "just" or "unjust". Jurists have unequivocally dealt with many classes of justice, e.g. universal and particular justice, distributive and corrective or remedial justice, justice according to law etc. Justice has undoubtedly been the most celebrated subject in legal theory since Aristotle.

Rawls presents a unique theory of justice abstracted from the familiar theory of social contract. He describes the role of justice in social co-operation and presents the main idea of justice as fairness.

Justice is the first virtue of social institutions. Laws, however, efficient and well-arranged, must be reformed or abolished if they are unjust. In a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. An injustice is tolerable only when it is necessary to avoid even greater injustice. Being a first virtue, justice is
uncompromising. In the Aristotelian scheme, justice means a complete virtue. The law aims at the common interest. Nor have recourse to a judge, as Aristotle observes, to animate justice. For Aquinas, three conditions must be fulfilled for a judgement to be an act of justice: first, it must come from one who is in authority, secondly, it must come from the inclination of justice and thirdly, it must be pronounced with that intellectual discernment which perceives the golden mean of moral virtue and the way to perceive that mean. By this Aquinas is seeking to locate justice as part of the judicial process or in other words to imply that the decisions of the courts have to be based on justice.

The judge's function is equated with the administration of justice and the courts are termed "the courts of justice". The aim of the judge's office is to do justice between litigants; no more than that. Justice according to law is the proper sphere of judges where justice becomes but the process of adjudication. Justice points at a fair trial where judges should primarily be independent of the government, have no interest in any matters they have to try, that no one ought to be condemned unheard, that the judge must act on the evidence and arguments properly before him and give reasons for his decision. These are the rules of natural
justice.

Moreover, the distinction between just and unjust law remains interesting. But what is "just" and "unjust" is always a problem. However, Aquinas states: An unjust law is an unreasonable law; one which is repugnant to the law of nature is not a law, but a perversion of law. That is the celebrated maxim "lex injusta non est lex". Generally, the just law is seen to be the lawful, natural, moral or in accordance to law. Therefore, the unjust law is the unlawful, immoral, unfair or unreasonable law. Obedience and disobedience follow. The unjust law does not deserve obedience. For obedience is largely induced by morals or idea of justice.

Law and justice are interrelated. We need to stress that justice is the most valuable goal to which law has been striving.

Secondly: Producing men who are completely good: This is an old idea once expressed by Plato who believed that the end of law is to produce men who are completely good. This could only be perceived in the light of what Plato's philosophy allows. Human nature Plato believes, is capable of almost unlimited modification; the method to be used was a benevolent dictatorship, philosophers must become kings or kings become philosophers. However, Plato's Republic is still a highly idealistic and hardly attainable Republic.

Thirdly: Protection of individual liberties: The protection of individual liberties is properly within the
purview of legal theory. This task has much been associated with the natural law theory.\textsuperscript{50} It is asserted that human rights including individual freedoms, have their foundation in the truth concerning human nature and natural law, and that they can be neither adequately understood nor adequately defended without reference to this truth.\textsuperscript{51} Which means that the basis of individual liberties is natural and not only legal and shall, therefore, be explained and defended by reference to natural law.

Law is one way that societies have tried in order to provide protection for individual to maximize civil liberties and to promote equality.\textsuperscript{52} In the view of the thinkers that succeeded Kant, the end of law was visualized as the effort to secure the maximum amount of liberty to each individual. This is always counterbalanced by the preservation of order in society.

Fourthly: \textit{Preservation of order}: Law is to preserve order and provide the basis of a stable society. This role is mainly assigned to criminal law and it concerns legal theory in so far as the balance between freedom and order has to be maintained.\textsuperscript{53}

Fifthly: \textit{Protection of interests}: Recently, a distinct class of jurisprudence termed "the jurisprudence of interests"\textsuperscript{54} came to be fashionable. It is Dean Pound who is famous for presenting law as a means of a protecting social, individual and public interests.\textsuperscript{55}
The old view is that law aimed at striking a balance between the competing interests in a community. Now, law does not only purport to balance competing interests, but to weigh and take some interests in preference to others.

The interests law is intended to protect are numerous. Broadly speaking, there are public, social and private interests. This classification is found's. To him: 56

"Individual interests are claims or demands involved immediately in the individual life and asserted in title of that life. Public interests are claims or demands or desires involved in life in politically organised society and asserted in title of that organisation. They are commonly treated as the claims of a politically organised society thought of as a legal entity. Social interests are claims or demands or desires involved in social life in civilized society and asserted in title of that life. It is not uncommon to treat them as the claims of the whole social group as such."

Much analysis and criticism have been directed against classification of interests. 57 However, what remains unchallengable is that, as a social phenomenon and a means of social control, law does protect interests in society.

To the socialist jurists there are but the interests of the ruling class. 58 Law thus, has its importance in society from protecting interest in that society. To the individual, these are largely personal; to the state they are public. There is an interrelation between these interests and sometimes also there is a conflict between them. There is a public interest in preventing disorder, but the protection of the citizen is also an important individual
interest. Therefore, law stands for protecting, balancing and making preference of some interests. Roscoe Pound regards law as a species of social engineering, whose function is to maximize the fulfilment of the interests of the community and its members and to promote the smooth running of the machinery of society. Law has a dynamic role as a means of adjustment and of social order. By means of social engineering law protects, balances, consolidates certain social interests, and acts as rules by means of social order in aid of development.

Sixthly: Law in aid of development—Recently, a well-founded trend arose defending the proposition that law contributes to fostering social and economic development. Laws, stand for the protection and for encouraging investment and providing economic planning. There are examples of the proper laws in aid of development. The underdeveloped states employ statutory and other forms of law as part of an effect to reach the goals they define as development.

In this context, law is taken not only as rules but as a form of social order. It is the means through which social policies become social action. More basically, however, law invades the territory of economics, for it is by means of legal institutions that prices are in fact agreed upon, wages set, business organizations formed, and so forth. A theory of perfect competition assumes the existence of a system of contract law. A theory of socialist economics assumes the existence of a system of administrative
law and so on. The ways by which law aids in development are generally:

(i) providing for development;
(ii) education
(iii) balancing and consolidation of group-interests in society and attributing to lawyers a new role to aid in economic development.

6. The Nature of Law in the Sudan

(a) Introduction

The key-issue in the Sudanese theory of law, is the answer given to the question "What is Law?".

We put the enquiry as follows: Do professional lawyers in the Sudan have in mind any definition while dealing with the term "law"? And does the legislator have the same or a different meaning? What are the main characteristics of Sudanese law? And does law purport to fulfil any function in the Sudan?

The answers to these questions and to similar ones, which will further be made very shortly, suggest the very aim of this section. Our contention is that, owing to the diversity of attitudes produced by the introduction of the formula, "justice, equity and good conscience", and the existence of indigenous legal systems before and after 1899, different answers have been given. However, the positivist outlook has been the predominant one.
(b) **Meaning of Law**

The prevailing idea about law held both at the Bar and the Bench has been amazingly vague. The enquiry might be formulated as follows:

(i) What did the legislator mean by "law" as used in the following quotations:

(a) "In cases not provided for by any law, the court shall act according to ..." 64

(b) Parties may object before the Supreme Court against judgments made by the Court of Appeal ... where the judgment objected against is based on inconsistency with the law or mistake of its application". 65

(ii) What did a judge mean by deciding that "ignorance of law in absence of a proper notification is a defence". 66

(iii) What did a commentator mean when declaring:

"Much of the law we now apply in this Province (former province) is peculiar to the nature of litigation we have and we can strictly call it Sudanese law. This law we can find only in our judgements, let us collect the pieces of this law." 67

(iv) What did a writer mean by stating that, "there were fields where there was no law". 68

To answer the above questions, three points need to be made at the outset: one is that, prior to 1955, there had not been any formal definition of the word "law" in the Sudan. The second is that, though that was the case, the courts in the Sudan continued to apply many (foreign and national) laws
taking the word "law" to give many meanings as they could attribute to it, specially under section 9 of the Civil Justice Ordinance, 1929. The third and last point is that, by section 3 of the Interpretation and General Clauses Ordinance 1955, the word "law" assumed an official meaning to which judges had to refer and by which they have been largely influenced.

Surely, here as elsewhere, the endeavour to define law was faced with the difficulty inherent in definitions in general. Alan Gledhill, who had the opportunity to write on the Penal Codes of Northern Nigeria and the Sudan, is convinced that there are rival definitions of law all open to objection. He then comes to define law as a body of rules of social behaviour in a state for the enforcement of which the state maintains special machinery. This definition stresses the nature of law as rules and distinguishes the rules of law from other rules of behaviour in the sense that the rules of law are enforceable by the state power and therefore binding and backed by sanctions.

In 1955 the word "law" was defined. Perhaps that was the first official definition to which professional lawyers were supposed to refer. Section (3) of the Interpretation and General Clauses Ordinance 1955 presented "law" to mean:

"any legislative enactment other than Self-Government Statute, and includes Ordinances, and Provisional Orders and any regulation, rule, by-law or order made under the authority of any Ordinance or Provisional Order".
The Sudan Transitional Constitution (Amended) 1964 upheld the above definition with minor alterations to the effect that "law" came to mean:

"any Ordinance, Act or Provisional Order by-law, rule, regulation or notification, having the force of law within the Republic of the Sudan or any part thereof".73

Ten years later, the Interpretation and General Clauses Act, 1974, redefined law as:

"any enactment other than the constitution and includes Acts, Provisional Orders and any regulations, rules, subsidiary enactments or orders issued under Acts".74

A quick reflection reveals that these definitions, save for the replacement of "ordinances" for "legislative enactments" and "Acts" for "ordinances", are almost identical. However, the following remarks need to be stated: The exclusion of the Self-Government Statute and the [1973] Constitution from the definition of the word "law" is not unusual, since the constitution is rather "the basic law" to which all other laws are subordinate. Moreover, the word "law" has been defined in subordinate laws i.e. the Interpretation and General Clauses Ordinance 1955 and Act 1974, (which could not provide for the Constitution).

Secondly, as defined above, "law" stands for two categories of laws, namely, (a) primary and (b) secondary legislation. The first includes, any legislative enactment including the Acts Provisional Orders etc. The second contains, any order or subsidiary enactment passed under Acts or Provisional Orders. Thus, in the above formal definitions, law surely
means "legislation".

Therefore, the fields of "absence of law" were the fields not covered by legislation.

Law also meant custom. The law applied in Damer Province (land cases) which was termed by the former Chief Justice as Sudanese law, was customary law.

This law when we later come to find it in our judgements and purport to act upon it, we call it case law. Therefore, law also meant case law.

(c) Characteristics of Law

Law in the Sudan has assumed many features of which the following are the most remarkable, namely:-

1. The Binding Character of Law - Law has a binding force both upon the government and the individuals. The government shall be bound by all enactments unless expressly exempted therefrom. The exceptions are governed by law. Acts of the state and certain court rules denying the courts the jurisdiction of adjudication in certain matters, are clear examples. However, the danger of having laws creating as many exceptions as the government may like, will not only affect the effectiveness of law but will certainly pave the way for tyranny and chaos.
Save for certain instances of privilege, individuals are countable to measures specified by law in cases of violations. They, furthermore, have to adjust their conduct and transactions with the specific wording of the law. Law is authoritative and the judicial system which has been set forth since 1899, and extensively rearranged, has mainly been entrusted with the application of the law. The Code of Criminal Procedure, 1983, specifies the various procedural measures to effect legal order. Powers of arrest, search, execution as well as the day-to-day police duties are obvious manifestations of the force of law.

Pre-trial, trial and post-trial proceedings, exemplify the above force and thus stress the binding character of law in this country. Parties, on the other hand, may compound their mutual disputes, or else make civil arbitration under the supervision of the court. The state may, in the person of the President of the Republic, grant mercy to convicted persons or remit sentences. The judge may remand on bail, and make probation. Yet all these powers do not negate the binding character of law. They occur within and in accordance with the legal order. Moreover, they may, with the same force that made them, be curtailed, restricted or even cancelled.
The Coercive Character of Law—What does the average layman in the streets of Khartoum mean when he says: "Isn't there any Law?", or "There should be a Law"? Does he have in mind the statutes, the judges or the police?

We believe that he hardly remembers the enactment and even if he does, he will still say there is no law though a provision exists. So, he obviously has the policeman in mind. He scarcely thinks of the judge. People feel the coercive measures of the police and avoid committing crimes for fear of arrest, detention and of jail.

Force may be used to effect the arrest of an accused person "who has the opportunity to enter into any premises. The arrest may be effected even within these premises.

In execution proceedings women may be imprisoned for debt. The compulsory demolition of premises by government authorities for reasons of public health or planning, is also undeniable.

The use of force is, however, organised by law e.g. Code of Criminal Procedure 1983 and Civil Procedure Act 1983.

The penal laws provide in case of violation, for punishments such as imprisonment, whipping, and the death penalty. It always remains a fact that the
coercive nature of law is undoubted. It will be made clear, that the force of the state has persistently grown stronger by the constant resort to the medium of law.\textsuperscript{84}

(iii) The moral character of law. Sudanese law, like any other law, reflects some kind of morality specially in the fields of criminal and personal laws. The Penal Codes of 1899, 1925 and 1974, provided for many rules which had clear moral significance though they were not primarily promulgated to enforce morality.

It is submitted that these rules may, represent the minimum standard of morality without which society could not exist. They may be classified as follows:\textsuperscript{85}

a- Rules relating to crimes against human body which include cases of homicide (e.g. murder,\textsuperscript{85} culpable homicide not amounting to murder),\textsuperscript{86} infanticide,\textsuperscript{87} attempting suicide,\textsuperscript{88} and hurts.\textsuperscript{89}

b- Rules relating to crimes against property e.g. theft,\textsuperscript{90} robbery,\textsuperscript{91} extortion,\textsuperscript{92} breach of trust,\textsuperscript{93} and cheating.\textsuperscript{94}

c- Rules relating to crimes against public health, and decency e.g. adulteration of food,\textsuperscript{95} nuisance,\textsuperscript{56} and indecent or immoral acts.\textsuperscript{96}

d- Rules relating to sexual crimes e.g.\textsuperscript{98} rape, unnatural sexual crimes,\textsuperscript{99} gross indecency and adultery.\textsuperscript{100}

All these immoral acts were punishable. In fact not
every act that was immoral was made a crime. Moreover, it is obvious that these rules may be said to have had the following characteristics:

i. Generality: In the sense that they applied to all Sudanese without regard to culture origin, race or locality.

ii. Secularity: These rules are secular in the sense that they were not necessarily based on religion or religious motivation and

iii. Universality: By which is meant that the moral rules embodied in all penal laws in the Sudan were, in fact, universally known (and applied in each state according to its national laws).

Now, the penal law drastically changes. The scope of moral rules expands and includes acts which were not among the punishable offences. Here drinking of intoxicating beverages is made an offence punishable with forty stripes. Sexual intercourse with a girl of more than eighteen years of age and with her consent is also a crime (in fact it is a capital one). However, of the Islamic hudud (prescribed punishments), some are much counted as crimes against the family and morality. They include adultery which is punishable by death (for the married offender) or a hundred lashes (for the single offender) and defamation (i.e. false accusation of adultery) which is punishable by eighty lashes.
These rules are, no doubt, moral rules. They are, as crimes of hudud, known to be applied, in addition to the Sudan, in another Muslim country i.e. Saudi Arabia. In the last analysis, some of them e.g. mere drinking of intoxicating beverages under section 443 of the Penal Code 1983 and adultery, which is punishable as hudud under section 429(c), apply only to persons who are Muslims. Accordingly, for adultery, Muslims are punishable by death penalty or by a hundred lashes while non-Muslims receive a punishment of imprisonment, whipping and fine. Muslims are penalised for mere drinking of intoxicating beverages, while non-Muslims are only punished when and only when they make annoyance to others as consequence of intoxication.

It is not only the Penal Code but equally other laws that have clear moral nature. The Punishment of Corruption Act, 1981, the Unlawful Enrichment Act, 1981, and Promotion of Virtue and Prohibition of Vice Act 1983, are the remarkable examples.

The fact remains that law in the Sudan, specially penal law, does have a moral character which has become much more asserted in the period since 1983.

(d) Purpose of law

Law has been pursued, made and enforced for certain ends. It is believed that there exists a purpose in law viz: that it is not an end in itself, but means to an end. Of the most observable ends are the following:

Firstly: Law is a means of social control. Law has extensively been used in the Sudan for such a purpose.
There is, however, an overemphasis on the role law plays in this respect. The number of legislative enactments going this direction in the last ten years is amazing.

It is observed that: "Law is now an important means of social control regulating and balancing conflicting social interests found in the society. It is no doubt the view of many modern jurists and lawyers. It is obvious that law has an increasing role in social life. At first, the colonial system ruled by direct orders. Laws were few in number. Life then came to be largely regulated by law and legal order. Other means of social control e.g., religion, morals etc., have been incorporated in law and enforced by the state power."

Secondly: The protection of social interests: This is a corollary of the above i.e., law as a means of social control. Pound's scheme is relevant in the Sudan. The Penal Code continued to protect both public and private interests in society. However, here, public interests are largely state or political interests. Crimes against the state, or in relation to public tranquility or safety and morality are punishable under the Penal Code of 1983. The state Security Act 1971, which is now largely incorporated in the Penal Code of 1983, is another example.

Private interests vis-a-vis public interests are of secondary importance. Even individual rights are made subject to many laws curtailing them. Still the law does recognize and protect private property, privacy and
individual fundamental rights.\textsuperscript{115}

Thirdly: The protection of individual rights:

This field has been the concern of both the constitution and the law. Mr. Abolawin is convinced in this connection that legislation has to aim at providing equality and equal protection of the law, equal opportunities in employment and institutions of learning.\textsuperscript{116} This was guaranteed by Article 38 of the 1973 Constitution which provided:

"All persons in the Democratic Republic of the Sudan are equal before courts of law. The Sudanese have equal rights and duties, irrespective of origin, race, locality, sex, language or religion".

Other individual rights e.g. rights to freedom of religion,\textsuperscript{117} movement,\textsuperscript{118} expression,\textsuperscript{119} association,\textsuperscript{120} press\textsuperscript{121} and liberty\textsuperscript{122} are also guaranteed.

Obviously, the bare constitutional provisions guaranteeing certain rights to the citizen cannot be a useful instrument unless there is some procedure by which he can effectively exercise that right. It is for this reason that the constitution of the Sudan confers on the individual the further right to apply to the Supreme Court for the protection or enforcement of the rights conferred under the Constitution. The Supreme Court has the power to make all such orders as might be necessary and appropriate to secure to an applicant the enjoyment of any of his constitutional rights.\textsuperscript{123}
Fourthly: Law in aid of development: Law is found to participate in aid of development by the protection of national economy, encouraging and protecting investment and by bringing about change. In *Sudan Government v. Mohamed Ahmed Nur El Galli*, it was held that: 124

"Section 351(a) of the Penal Code 1974 was introduced by the legislator to make certain acts offenses in order to protect the national economy at a time when the state authority had been extended to economic activity and its role in public sector had been enlarged by the involvement of the state in commercial fields or by means of sharing in investment. This new activity is meant to be protected by section 351(a)."

By the above decision, the protection of the national economy was made part and parcel of the role of criminal law. This is due to the state participation in commercial and industrial investments.

Fifthly: Law and social-engineering: The function of law as one of social engineering as advocated by Roscoe Pound, has not been totally alien to our legal theory. Tambal J. made the following dicta in *El Tahir v. Mohamed Ali Adam*, that "the role of law, as described by Roscoe Pound, is social engineering.: Unfortunately, the learned judge did not give logical link between the case (regarding the liability of the owner of an animal for injuries caused by the animal) and the idea of social engineering. However, he may be understood as meaning that by filling in the gaps of law, the judge will be shouldering the role of social engineering through law.
Lastly: Aiming at justice: The quest for justice is well rooted in the Sudanese history. There has been a general tendency to take justice as meaning equality in a broad sense including equality before the courts of law, equal rights and duties without discrimination for reasons of origin, race, locality, sex, language or religion.

This meaning has lasted longer. To it, is added justice as fairness which refers to fair and speedy trial. In which an accused person is given the benefit of being presumed innocent, confronted with the witnesses giving evidence against him, given the opportunity to defend himself by having a counsel and not to be tortured, incited or ill-treated.

What the courts do is found to be an administration of justice. The rules of natural justice are properly applied within the scope of justice as fairness as stated above.

It is evident then, that the law aims at justice but whether it really attains that aim is another question.

(a) The Nature of Law and Legal Theories in the Sudan

It seems, that a court in the Sudan came to interpret "law" as meaning as much as it could mean in all theories. It is stated that "

"The law in section 207(1) of the Civil Procedure Act 1974, does not only mean what the legislator stipulates according to the methods stated for by the Constitution but it is equally all what is derived from binding rules of behaviour in
transactions whether commanded or not and sanctioned by the sovereign or otherwise in the form of custom, religion, principles of justice and equity scattered in natural law".

Moreover, it was believed that rules implicitly derived from the provision of law of the spirit of legislation and its wisdom were also part and parcel of that meaning. The reason is that there has been a different view as to what the law means.

Therefore, many ideas may be deduced therefrom with an important reserve that the terminology here i.e. in section 207 of the CPA, 1983 deals with "the law" in "a law" i.e. the Civil Procedure Act 1974, and limited to a certain case i.e. the objection against the judgement made by the Court Of Appeal in the Supreme Court. With this reserve, the law here means legislation, its spirit, wisdom and principles derived therefrom, the binding rules of behaviour in transactions whether commanded by the sovereign authority or not i.e. custom, religion, and principles of justice and equity. These ideas will be detailed in the following theories.

1. **Natural Law Theory**

Law was at a time taken to mean the universal principles of justice. The courts applied principles of justice underlining the foreign statutes in preference to the application of the detailed rules embodied in these statutes themselves.
Judges sometimes find themselves applying what conforms to their own sense of justice and they have sometimes specifically stated that in absence of law they should find a legal basis for the issues raised by the case according to the rules of justice and principles of natural law. Equitable rules and remedies have special place and have played special role in the Sudan legal system. Furthermore, the general principles of justice, are taken to guide the Courts in their application of law. In this regard, the doctrine of resulting trust and equitable remedies of mandamus, certiorari, and specific performance stand as examples. In absence of express procedural matters, the courts shall act according to the principles of justice.

It is now such apparent that law is also the command of God. Reference to the Qur'an, Sunna, consensus and analogy points to this direction. The adoption of Islamic law, to be exact, is reminiscent of the Thomistic approach and presents law as dictate divine wisdom.

ii. Historical approach to law

Customary law is law in the Sudan, or in other words, "custom" is taken to represent "law", It was in the case of Kerima Bint Boulo Saleh V. Heir of Boulo Saleh that the word "custom" in section 5 of the Civil Justice Ordinance 1929 was taken to include law, and that accordingly, if by applying a law, a result is arrived at,
which is contrary to justice, equity or good conscience, we ought not to apply such a law. The idea is that, custom here means personal law which, therefore, has to be in conformity with justice, equity or good conscience.

It will be seen that, custom has been applied as a law, a base of legal rights in different (even, criminal) matters in the Chiefs and Native Courts. It has equally been law even without the express recognition of the state or its command. That is to say it stands intrinsically and independently. In the sense that it has a binding force in society apart from its embodiment in statutes.

iii. Legal Reallam

What judges do has also been law. Judicial creativity by filling in the gaps in the law and the legal system has been the continuous effort of judges. Thus, unlike the positivist outlook, judges did not only declare but sometimes make law by the process just mentioned.

Therefore, precedent or judge-made law has also formed one of the proper meanings of the term "law" in the Sudan. The core of what is termed "Sudanese common law", is of this kind. Judges have had wide discretion to make law under section 9 of the Civil Justice Ordinance 1923. The inherent powers of the courts to make just orders as against the abuse of procedural rules, is remarkable as giving judges additional powers to do justice.

Our case law is rich particularly in land cases where the adoption of local custom is greatly interesting.
It is not true that we blindly applied English law. On the contrary, we scrutinized that law, moulded it to make it subject to reserve and became only guided and not strictly bound by it. 157 What we have made by case to case analysis is largely our own law, relying upon our own realities and customs. 158

iv- Islamic theory of law

Law has not only been positive but also religious. After 1895, Sharia was at once recognized as the law of the land for all Muslims in the personal spheres of marriage and inheritance and the Government's policy was to improve and organize the Sharia courts (which existed then as they have existed before and ever since) and bring them into the new Legal Department, but otherwise to interfere with them as little as possible. 159

Before that, Sharia Law had been the concern of the Punj Saltantes, the Kingdom of Kordofan and Harhour as well as the law during the Mahdist State. 160

Since then, the Sharia courts have been applying the rules of Sharia in personal and family matters. Now almost all the substantive areas of law are taken to be governed by the Islamic law. 161 But since these religious rules are incorporated into the law and reduced to formal rules, they have become positive law.

However, what cannot be denied is that law in the Sudan has also been taken to mean Sharia law. This is not only for Sharia courts but also for civil courts where
in personal matters of Muslims who consented to the jurisdiction of the civil court, the judge has to apply only one sort of law i.e. Islamic law. 162

v. Positivism

Notwithstanding the above mentioned contentions, as to the nature of law in the Sudan, law has overwhelmingly meant legislation. The formal definition appears in the Interpretation and General Clauses Act 1974 which takes law as referring to any enactment (other than the Constitution) including Acts, Provisional Orders, regulations, rules etc., speaks, in fact, about legislation primary and subordinance. However, whether primary (Acts, Provisional Orders), or subordinance (Orders issued under Acts) law is but legislation. 163

Before 1953, Courts had considered themselves as bound by the express provisions of law. It is clear from section 4 of the Civil Justice Ordinance 1920, 164 that they should apply the justice, equity or good conscience, only in absence of legislation. When such a legislation existed they had to act according to its express wording.

Many pieces of legislation have been passed since that time. The application of Islamic law and custom were largely governed by and subject to legislation. 165 It is therefore relevant to state that, the present Islamization may also be understood in this framework. Sharia has been reduced into positive legislations e.g. the Penal Code 1983, the Code of Criminal Procedure 1983, the Civil

7. Conclusion

Of the many definitions of law, none of them is perfect, they are only speculations about the idea of law. In fact, law may neither be the sum total of these definitions nor any one of them. The simple reason for this lies in the fact that, every jurist or philosopher expresses his own view which only sees the matter side way.

Writers on jurisprudence and legal dictionaries try to strike a balance between these definition. Broadly speaking, law stands for the body of rules, whether formally enacted or customary, which a state or community recognises as binding on its members or subjects for the violation of which punishment or inconvenience results. It has a moral content though it must not necessarily convey moral ideas. It is used as a means for social control. Additionally, law can do many thing e.g. preserves justice, protects social, public, private interests and individual fundamental rights, though there may of course, be differing points of view.

The above controversy has an interesting development in the legal history of the Sudan. Judges at first took the word "law" to mean universal principles of justice, judges' own sense of justice, customary law, judge-made and Sharia law. However, the official definition came to present "law" to mean "legislation" whether primary or
secondary. In fact, law has largely been positive. It has been the direct expression of the will of the sovereign authority.
NOTES


2. Idem.


24. See Salmond, op. cit., p. 60. Moreover, Salmond, once stated that: the law may be defined as the body of principles recognised and applied by the state in the administration of justice. In other words, the law consists of the rules recognised and acted on by courts of justice. See Salmond, "Jurisprudence", (7th ed.), p. 39.

25. See Salmond, op. cit., p. 60.

26. See Aquinas, "Summa Theologica" (1266) from Curzon, op. cit., p. 25.

27. See Jowitt, op. cit., p. 1063.


29. Idem.


34. Ibid., at p. 181.

35. See Fuller, Leo, "the Morality of Law", (Yale University Press, 1969), pp. 6, 7.


38. Ibid.

39. Ibid., at p. 4.

40. See Aristotle from Cairns, op.cit., p. 119.

41. Ibid., at p. 197.

42. Ibid.


45. Cairns, op.cit., p. 163.

46. See Aquinas, from Curzon, op.cit., p. 39.

47. See generally Hock's, "Law and Philosophy", (New York University Press, 1964), passim.


49. Ibid., at p. 24.
50. See supra chap. (iv).


53. See supra, chap. (v).

54. Schoch's N.M., (ed) "The Jurisprudence of Interests", (Harvard University Press, 1948) Passion, may be mentioned as a notable contribution.

55. See supra chap. VIII.


57. See supra chap. (VI).

58. See supra, chap. IX.

59. Ibid.

60. From Salmon, op.cit., p. 64.

61. See "Law and Development", op.cit., p. 16.


63. Ibid., p. 13.

64. See sec. 6 (2), of the CPA, 1983.
65. See sec. 207 of the CPA, 1983.


67. This commentary was made by the former Chief Justice Osman El Tayeb, Damer Province, Court-Gen-2-7, of 15.2.1950 Sudan Law Project Collection, from Thompson, Formative Era of the Law of the Sudan, (1965), S.I.J.R., p. 483.


70. Idem.

71. Sec. 3 of the Interpretation Ordinance, 1953.


74. See sec. 3 of the Interpretation and General Clauses Act, 1974.

75. See sec., 5 of the Interpretation and General Clauses Act, 1974.

76. See Art 151 of the SPC, 1983.
77. See sec. 270 of the CCP, 1983.
78. See chap. IV of the CPA, 1983.
80. See chap. XXXX of the GCP, 1983.
81. See sec. 24 of the GCP, 1983.
84. See infra chap. (V).
85. See the RC 1974, sec. 251.
86. Ibid., sec. 253.
87. Ibid., sec. 263.
88. Ibid., sec. 267.
89. Ibid., sec. 272.
90. Ibid., sec. 321.
91. Ibid., sec. 334.
92. Ibid., sec. 326.
93. Ibid., sec. 348.
94. Ibid., sec. 359-61.
95. Ibid., sec. 217.
96. Ibid., sec. 216.
97. Ibid., sec. 234.
58. Ibid., sec. 317.
59. Ibid., sec. 3.
60. Ibid., sec. 318.
61. Ibid., sec. 429.
62. Ibid., sec. 443.
63. Ibid., sec. 318.
64. Ibid., sec. 429 (2).
65. Ibid., sec. 434.
66. Ibid., sec. 444.
69. See Offences against the state e.g. waging or attempting to wage war against the state (s. 96 PC 1983), sedition (sec. 105 PC 1983), and generally chap. VIII of the Penal Code, 1983.
70. See Offences against the public tranquility e.g. unlawful assembly and rioting (ss. 115, 121 P.C. 1983).
71. See Offences against the public health safety, convenience, decency, e.g. public nuisance (sec. 232 PC 1983), sale of adulterated food or drink (sec. 219 PC 1983), obscene and indecent acts (sec. 234 PC 1983) and generally chap. XIV of the PC, 1983.
112. Of these laws are the Exercise of Political Rights Act 1974, the State Security Act 1973, and "the Amendment o. the Constitution, 1975".


114. See ibid., Art. 42.

115. See below.


118. See the SPC, Art, 42.

119. Ibid., Art. 48.

120. Ibid., Art. 51.

121. Ibid., Art. 49.

122. Ibid., Art. 66.

123. Ibid., Art. 58 and see generally the commentary made by Olusade Aguda and Adinola Aguda in their "Judicial Protection of Some Fundamental Rights in Nigeria and in the Sudan Before and During Military Rule, (1972) J.A.I., Vol. 2, p. 132.


125. Idem.
127. KRCA-Cir. App-55-1978, unrep.
128. Idem.
129. Art. 5 of the SGS, 1953 read:
   1) All persons in the Sudan are free and equal before the Law.
   2) No disability shall attach to any Sudanese by reason of birth, religion, race, or sex.
130. Art. 5 of the PCS, 1973, became article 4 of the TC (Amendment) 1964 and substantially reproduced in the present SPC, 1973 in article 32 of it.
131. See the PCS, 1973, Art. 64.
132. Ibid., Art. 65.
133. Ibid., Art. 68.
134. Ibid., Art. 63.
135. Ibid., Art. 65.
136. This is fully dealt with in chap. (IV).
138. Ibid., at p. 250.
139. See the judgement of Bonam Carter J.C. in Bawood Cohain V. Suliman Hillali, J.C. App-2-1900.
142. See the dictum of Hassan Moneys Elbakir in Fazhri Abd El Shafei v. Leinda Zaki Routtos, (1975)


145. See Sudan Government v. Zahra Adam Omer, (1965),
S.L.J.R. p. 31.

146. See Mohamed El Kheir Saad v. El Awad Omer (1962)

147. See sec. 6(1) of the CPA, 1983.

148. See sec. 3 of the Judgements (Basic Rules) Act, 1983
to which reference will extensively be made under:
II & VII.

149. AC-REV-17-1982, S.J.R. Civil Cases, Vol. II p. 4,
at p. 6.

150. Sec. 5 of the C.I.G. 1929 provided:

"Where in any suit or other proceedings in a Civil
Court any question arises regarding succession,
inheritance, wills, legacies, gifts, marriage,
divorce, family relations, or the constitution of
Wakfs, the rule of decision shall be:

a) any, custom applicable to the parties concerned
which is not contrary to justice, equity or good
conscience".
151. See Heirs of Marjam Bint Boulo's case, above.

152. For more elaboration, see supra pp. 294-300.

153. For more analysis, see supra pp. 297-301.


155. Sec. 9 of the C2O, 1929 read:

"In cases not provided for by this or any other enactment for the time being in force, the court shall act according to justice, equity or good conscience".

156. See sec. 6(2) of the CPA, 1984.

157. English Law was not not applied if it was found to be repugnant to the judges own ideas of justice, equity and good conscience, see the judgement of Dun J. in Mansour El Shouhei and others v. Abu Fating Sharif, Acc. App-3-1970-7-S.L.R. p. 203. The court also followed English Law only such law would be reasonably applied. See Peacock's decision in Michael E. Saba v. Phillips, H.C.C.S - 228-1917.

158. Mudawi J. in Khartoum Municipal Council v. Michel Cotran, (1958) S.L.R. p. 85 did not advocate the blind reception of English Law and put it a responsibility upon the Sudanese Courts to set the pace and lay the foundation for our law. Such a law was also thought to spring from the recognition and giving effect to local customs, the adoption of imposed legal rule and local precedents. See Mustafa, "The Common Law in the Sudan" op.cit., pp. 219-220.

160. See El Mufti, *op.cit.*, passim.

161. See supra chap., VII.

162. See sec. 5(a) of the CPA, 1983.

163. See infra p. 32.

164. Sec. 4 of the Civil Justice Ordinance 1960 was identical to sec. 4 of the C.J.O. n. 155.

165. For the control of Islamic Law see infra p. and for custom see supra pp. 73-78.
There is hardly any consensus on the meaning of sources of law, though legal theorists have extensively analysed legislation; and precedent as the sources of law. There are, of course, other sources which repeatedly appear in the books of jurisprudence e.g. Equity; Religion etc. However, no attempt is made here to deal with all sources of law. The main concern of this Chapter is to assess the place of the source of law in legal theory. It will be an analytical survey including the meaning and classification of the sources of law and the position in the Sudan regarding the idea of the sources of law. It will appear that the sources of law have been the authoritative sources particularly, legislation, custom and precedent.

Since 1983 a new trend has emerged. It is dependent on the Islamic view of the sources of law i.e. the Qur'an, Sunna, Ijmā' (consensus) and qiyas (analogy). However, legislation is still the primary source of law, though it has to be interpreted in accordance with rules, principles and the spirit of Shari'a and there is now a presumption that the legislature does not contradict Shari'a.
This insistence on legislation as the primary source of law points to a positivist outlook as legislation is the direct expression of the will of the sovereign authority.

2. The Meaning and Classification of the Sources of Law

There is scarcely any hard and fast definition or unique classification of the sources of law. This is due to the difficulty inherent in the definitions and classifications in general and the ambiguities regarding the term "Sources of Law" in particular. Holland, for example, is convinced that:

"The absurdity which has involved the whole subject of the origin and mutual relation of customary, judge made, and statute law, is largely due to the ambiguous use of the term "Source".

However, for the sake of definition, "Source of law" may mean the historical origin of the law. The authority from which law derives its force, or those types of forms of legal rules in the shape of which law appears, viz. law generating sources. The historical origin of law differs from place to place. The final authority from which the force of all laws is derived, has been equated with the state. The objection to this meaning is that, the state is rather some organisation, external so far as law is concerned, enforcing it, and as such it is not a source in the general meaning of the term. Nevertheless, the state may still be the source of law upon the definition that the source of law is its immediate author."
Within the forms of the law, or the law - generating sources, it is accepted that the official decisions, applicable to a concrete individual case, can generate law. In this regard, the constitution, statutes, and statutory instruments, judge made law and custom are considered as sources of law.

Keeton believes that, the only meaning which can properly be attached to the term "Sources of Law", is that which relates law to the materials out of which the law is eventually fashioned.

However, those precepts which are considered by law to be formally authoritative so far as the courts of a state are concerned, are normally legislation, custom and precedent.

As for classification, Salmond distinguished legal and historical sources. The legal sources are those which are recognised as such by the law itself. They are authoritative, followed by the courts as of right and are the only gates through which new principles can find entrance into the law. Historical sources are on the other hand, unauthoritative lacking formal recognition by the law, not allowed by the law courts as of right, and they operate only mediately or indirectly.

Salmond's classification is a modification of his distinction between "formal" and "material sources". The formal sources, represent the sources whence the law derives its force and validity, which he believes is
the will and power of the State as manifested in the courts of justice. The material sources meant the agency by which any particular rule first came into existence. However, examples of the legal sources are: Legislation, precedents and custom. The historical sources are exemplified by the position of the English Common Law in America.  

Austin speaks about "immediate" and mediate," "direct" or "indirect" or "oblique" sources of law. The immediate sources are the followings:

a) The sovereign person or body acting either as a legislature or Judiciary.

b) A political subordinate acting as a legislature or Judiciary.

c) The persons whose conduct forms a custom.

d) The persons who by contract subject themselves to a rule of conduct towards each other.

Only the first category is the proper source of law in the Austinian scheme since the sovereign is the source of all laws. The common law, custom, precedents and equity, though notable distinct sources of law in England, are only subordinate sources "of law".

The above distinction symptomizes the weakness of the whole theory of sovereignty enunciated by Austin. The "immediate" and "subordinate" sources are a contradiction in terms. Both the supreme legislature and bodies acting as its subordinates, fall according to Austin under the immediate
sources. But the subordinate bodies are not sources for they are not the direct authors of law. It seems then, only one class of sources deserves Austin's consideration, viz.: the immediate source of precisely the state.

Other classifications are relevant. Distinction is drawn between "material", "formal", and residual" sources of law. 20

The material sources of law are Salmond's legal and historical sources. The formal sources of law are Austin's immediate sources i.e., the State. As for the "residual sources", they are part of the legal sources in Salmond's classification. They are recognised by law as authoritative but they are, however, subordinate in the sense that they are the sources to which the judge has to refer when there are no legislative enactments. 21 The philosophy of having such a category is that legislation as a source of law does not depend only upon the detailed rules of positive law but also upon the general principles on which much law as built. 22

The classification adopted by the following analysis is Salmond's legal sources in addition to the residual sources of law i.e., the authoritative sources.

3. The Sources of Law in the Sudan

1) Meaning and Classification of the Sources of Law in the Sudan

Little efforts have been exerted to define and classify the sources of law in the Sudan. An example of such effort
is found in the Civil Procedure Acts. This is because the
Civil Procedure is seen to be the general legislation which
regulates all other laws.\textsuperscript{23}

In his unique article entitled "Custom and the
Constitution".\textsuperscript{24} Mr. Justice Shaggag refers to the term
"Sources of Law" as designating those sources which are
recognized by the courts as authoritative.\textsuperscript{25} Shaggag's
definition does not accept Kelsen's definition which takes
the sources of law as an independent entity from law.\textsuperscript{25A}

According to his above definition, Mr. Shaggag
classified the sources into: legal; historical and
immanent sources. The first category stands for those
sources which are recognized by the courts as authoritative.
This includes legislation, precedent and custom. The second
category includes juristic writings, principles of public
policy, justice and utility. These are considered as
guidances where there are gaps in the law, or where the
legal sources are ambiguous or in need of interpretation.
The third category is an abstraction intended to describe
the various rules, principles and concepts which jointly
operate in the mind of a judge prior to the passing of a
decision in a given case.\textsuperscript{26}

The first and second categories resemble Salmond's
present classification of sources. The immanent sources
in the third category are reflective of a realist conception.
But, even, with this "immanent source" Salmond's legal
and historical sources are inevitably intermingled, since
the judge will not think in a vacuum. He will eventually apply legislation, custom, precedent, juristic writings, principles of policy etc., i.e. legal or other sources, which he either consciously or subconsciously has in mind.

In regard to the meaning and classification of sources, Thompson views the sources of legal system as including the authoritative ones. He states:

"Sources" has a variety of meanings, such as the historical or psychological origin, but initial concern will be with the authorising source within the legal system which gives a particular rule its validity as the applicable law. The major sources of formally authorised law in the Sudanese legal system are three: Islamic law, customary law, and general territorial law.

Thompson suggests three sources of "legal systems" namely, the Islamic, customary and general territorial law. By the general territorial law Thompson means the legislations and judge-made law applicable to all Sudanese regardless of their ethnic origin or religion. The content of the general territorial law has predominantly reflected English law. Each of Thompson's three major sources is supposed to have two major characteristics:

1) A remarkable degree of prescriptiveness or officials administering the source, and
2) Substantial gaps or uncertainties caused in part by undermining consequences of the prescriptiveness.

So, Mr. Shaggag and Professor Thompson (though, to
accurately, quoting him, the latter is speaking about the sources of legal system do agree on the idea that the sources are the authoritative ones. Shagag, save for his "irrelevant sources", adopts Salmond's classification. Thompson reflects an approach that believes in the Pluralism of the legal system applied in the Sudan.

2) **Historical Background**

The idea of the sources of law in the Sudan has passed through different stages. However, the period since 1981, as will be seen, deserves special consideration.

The sources of law during the Funj kingdom were a blend of Islamic law and custom. But, Islam itself, both as religion and as a legal philosophy, was superficially known and vaguely conceived.

In the period of Turkiyya (1821-84), Islamic law and local customs were also acted upon. Moreover, it will be relevant to try to explain the form of sovereign power at that time. One believes that the state had itself been a source of law in the Austinian view. The period is famous for its cruelty and injustice. Rulers resorted to direct commands and no legislative activities were made.

In the Mamluk state (1884-88), the basic philosophy became that justice was to be administered upon the dual basis of Qur'an and Sunna.

In the period of the Condominium (1858-1956), legislation, custom, precedent and justice, equity and good conscience were recognized as sources of law.
and in land cases. In certain areas, even criminal cases were dealt with in accordance with custom.

The doctrine of binding precedents had also been followed. At first, judges referred to cases decided in England, India and other places. Later Sudanese precedents were accumulated and were eventually followed.

Shari'a law was referred to in personal matters of Muslims. If the parties were non-Muslims, custom was resorted to as a source of law.

The justice, equity and good conscience formula was applied in cases where there was no law. In the period under consideration, the formula, justice, equity and good conscience was interpreted to mean English law.

In the period from independence to 1981, all the above sources were considered with the same philosophy i.e.: 1) legislation is the primary source of law 2) other sources i.e. custom, precedent, Shari'a and justice, equity and good conscience were secondary sources which were only applied in absence of legislation.
This period was the formative stage of our law and legal philosophy and deserves special consideration.

3) The Sources of Law Before 1981

We have seen that the sources of law have much been considered. The thesis has been that the sources of law are the authoritative ones. However, the Constitution and the law have failed to give a clear and convincing idea about the sources of law in the Sudan. Against this background it looks that the idea of sources is obvious and may well be clearly presented. Our law, as will be seen, depends not merely upon direct and authoritative sources. It equally has regard for indirect or unauthoritative sources.

The problem is that the introduction of the formula "justice, equity and good conscience", in 1900, made it difficult to delimit the sources of our law.

However, it is suggested here that there are in fact three kinds of sources; namely: (a) legal, (b) residual and (c) historical or indirect sources of law.

When the law provides that the judge, in absence of legislative enactment, may apply rules that are just, equitable and in conformity with good conscience, then this allows resource to sources which may be termed as "residual sources". These are, in fact, authoritative though uncertain sources. The judge is not bound by a specific law but has to apply what he considers just or equitable.

It worth noting that since 1974 judges have, in the
absence of law, became bound to apply Islamic law, precedents, custom and justice, equity or good conscience. In fact all these may well be applied, under the guise of justice, equity and good conscience.

Thus both legal and residual sources have been formally recognised and equally authoritative. The sources which lack that recognition are, using Salmon's terminology "historical" or indirect sources. They are, unlike legal and residual sources, unauthoritative but merely persuasive. They represent the ultimate bases or historical origins of our law. The attempt will be made shortly to explore these sources.

We present the three classes of sources in the following pattern:-

a) Legal sources,
b) Residual sources, and
c) Historical sources,

(1) Legal Sources

Upon the definition just stated, legal sources in the Sudan are (i) legislation, (ii) custom, (iii) Islamic law and (iv) precedents.

(1) Legislation

Legislation has been the primary and most important source of law in the Sudan. Courts must apply its express provisions and laws in the official Gazette are judicially noticed.41
1899 e.g. the Penal Code 1899, the Civil Justice Ordinance 1900 and the Mohammedan Law Courts Ordinance 1902. Under section 4 of the CJO 1900, the Courts were given a residual power to fill in the gaps of legislation by reference to the formula justice, equity and good conscience.

The colonial administrators depended on their direct power of ruling to keep order and stability\(^2\) and custom was left, save for the few enactments which themselves recognised custom, to reign supreme.

Gradually, many pieces of legislation were enacted to cover different areas and were published in the "Laws of the Sudan" and made accessible to courts and to all others concerned.

Not only is legislation the primary source of law, but it has also positively minimised the role of other sources e.g. custom. Custom might be altered or abolished by legislation\(^3\). The courts may also (through the process of judicial decision-making) declare a custom void\(^4\).

There is much involved in the theory of legislation...
in the Sudan. Legislation is of two kinds (a) primary, and (b) subsidiary legislation. The first category stands for the legislative enactments: acts, ordinance etc., made by legislature in its proper legislative capacity. The second stands for rules, regulations, by-laws, orders etc., made under the authority of the primary legislation or other empowering ordinances by bodies normally exercising administrative functions and as such they have to be subjected to certain limitations.

Subordinate legislation must satisfy certain requirements, namely:

i. It should not be inconsistent with the provisions or the ordinance under which it is made,

ii. It may be amended or cancelled by the same authority, in the same manner and with the same conditions to which it was made, and,

iii. It must be published in the official Gazette. 47

These requirements were reaffirmed in Sudan Government v. Abdel Wahab Mohamed and Others, 48 where it was held that delegated powers must be exercised strictly in accordance with the conditions and limitations laid down in the ordinance delegating such power. 49 And where the proof of an offence requires knowledge of promulgation of an order, such knowledge cannot be imputed from mere publication of such order in the local press and on public notice boards. 50 The order is purportedly to be made under section 18 of the Foodstuffs and
Necessaries Ordinance 1926. That section requires, *inter alia*, the previous consent of the Minister of Commerce to an order of the Governor. Being made without the previous consent of the Minister that order was held to be null and void.51

It may be deduced from the courts' decision that 
1. Subsidiary legislations ought to be made within the limits of the empowering Ordinance etc. otherwise it would be null and void and that 
2. It must be properly publicized otherwise it may not have the force of law.

Over the last two decades, there has been a consistent resort to legislation as a source of law perhaps with a view to implement social change or governmental policies. The statutes enacted during the period between 1970-1985, are almost more than two thirds of all those promulgated in the period between 1956-1970.

The issuing of statutes and amendments have become as frequent as the Courts and lawyers could grasp. There is uncertainty in the legislative process. But the primary of legislation has always been asserted.

11. **Custom**

Although it is regretted "that customary law is a forgotten source of Sudanese Law," 52 it will be seen that custom has been an important source of law in the Sudan to the extent that a Sudanese common law, it was thought, could develop upon it.53
As a legal source, custom has been recognized by the state and given formal validity by its law. For the period under discussion, section 5(a) of the Civil Procedure Act 1974 stated:

"Where in any suit or proceedings in a Civil Court, any question arises regarding succession, inheritance, wills, legacies, gifts, marriage, divorce, family relationship or the constitution of wakfa, the rule for decision 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 been declared void by the decree of a competent court."

The history of the word "Custom" shows that various attempts have been made to define and delimit its scope. In *Bamboulis v. Bamboulis*, Lindsay C.J., found that:

"The Ecclesiastical rules of a church ... are in my view incapable of being altered, abolished, or declared void, and surely not contemplated by the wording of the section (i.e.s. 5 of S-J-O. 1925) to be within the meaning of the word custom. Custom in its content refers to local custom originating by usage in the Sudan and not applicable to imported rules or rules of foreign law."

This decision which found custom to mean the local custom originating by usage in the Sudan has been heavily criticised and found to be novel. It has lastly been abandoned. However, its sense depends on the idea that, since custom, as stated in section (5), might be altered, abolished or declared void, it could not apply to a religious law which is supposed to be immutable.
However, it was generally accepted that, the word "custom" in section 5(a) of the Civil Procedure Act 1974, referred to the personal law of the religious community other than Muslims to which the parties belong. Thus, custom stood as a source of law in personal matters of non-Muslims in so far as it was not contrary to justice, equity and good conscience etc. For Muslims, Islamic Law remained the source of law. A question here is whether section 5(a) could be applied to Muslims or, in other words, do Muslims have customs in so far as personal matters are concerned?

Mr. Justice Abu Rannat believes that it is wrong to say that there is no customary law which concerns Muslims in the Sudan. As a matter of fact, Muslims do have customs in personal matters. As a matter of law and when the parties are Muslims, it was section 5(b) and not section 5(a) which would be applied. But the problem (up to 1983) remained that, since Islamic law could be modified by custom, logically there could (at least in theory) be a possibility of applying section 5(a) i.e. custom as between Muslims, in so far as the Islamic law governing their case was modified by a custom. No decision is traced involving a case where a custom modified Islamic law.

In criminal and other matters, custom has been a legal source in the Chiefs' and Native courts. Section 7(1)(a) of the Chiefs' Courts Ordinance, 1931 and section 9 of the Native Courts Ordinance 1932, to which reference was made earlier stipulated that in Chiefs' and Native Courts the native law and custom prevailing in the area over which
the court exercise its jurisdiction, native law and custom which were not contrary to justice, morality and order, should be applied.

Native law and custom were not defined. However, they seemed to be the local customs of the tribal groups in the area where the court had jurisdiction.

Custom has also been a source of legal rights in the Sultan, but those who rely on customary rights must generally establish the existence of the custom by evidence, which must show that, inter alia: (a) it is prevalent in the locality in question; (b) it is applied to a specified class or relationship of persons.

Land law incorporates certain customary rights. Section 13(iii) of the Land Settlement and Registration Ordinance 1925 adopts the right of "amara". Moreover, section 27 of the same law provides that:

"Land, unless the contrary is expressed in the register shall be deemed to be subject to such of the following liabilities, rights, and interests as may be for the time being subsisting or capable of taking effect in reference thereto without notification in the register:

(a) 
(b) 
(c) 
(d) 
(e) rights to date-trees and other, and all rights incidental to the ownership thereof.
(h) the customary right of occupation of houses built on the land with the consent of the proprietor or his predecessor in title".

Section 27(e) has codified the customary law where the ownership of the land is distinct from the ownership of trees.

The right of occupation under section 27(h) of LSO(, 1925 must have its origin in a custom prevalent in the locality between persons of a defined relationship.

Other customary rights, though not specifically provided for by legislation are also applied as law. Hag el quas, 65 hag el 'ard, 66 hag el tokia, 67 hag el mugan, 68 mudrata 69 etc., have been applied by the Sudan Courts as giving cause to rights land specially in the northern province.

To be valid, custom must not be contrary to justice, equity or good conscience, 70 or justice, morality and order. 71

The policy behind this was to preserve the custom of the people while giving the courts power to scrutinize such customs to ensure that they are in accordance with its ideas of justice, equity and good conscience. 72

It is submitted that, although there is still no reported case to that effect, the Sudan Courts might perhaps rule that the established custom of the Azande royal class of the Azande people by which a marriage between father and daughter, half-brother and sister, uncle and niece, is
lawful, is directly contrary to the court's own standards of "good conscience" and in consequence not a valid customary marriage. In 1985, the Court of Appeal overruled a custom which it regarded as contrary to Islamic legality.

In Sudan Government v. Raino Legge, a Bari custom whereby a man is punished for pre-marital intercourse with a virgin he is not willing to marry, was found to be in accordance with justice, morality and order. Mr. Justice Tambal observed that:

"One need not read too much into the import of the term "morality" otherwise the whole object of the Chiefs' Courts Ordinance will be defeated. Many are the customs which go deep down to the root of village life here in the South with which not many of us, if indeed any at all, would agree."

However, he did not mention those cases with which we may not agree but rather reached the conclusion that the Bari custom stated above was, in his view, valid.

Moreover, the Court might refuse to accord custom judicial recognition if it does not conform with the demands of justice or public order. This is a different way of rephrasing the formula justice, equity and good conscience.

Another requirement of validity is that the custom must not be altered or abolished by a legislative enactment. This gives the legislator full control over custom. It is believed that custom in the above cannot mean religious rules since such rules cannot be altered or abolished."
The control by legislation is surely relevant to our discussion. The Unregistered Land Act 1970, for example, brought about a drastic change in the concept of ownership of unregistered land. Section 4 provided that all land of any kind whatsoever whether waste, forest, occupied or unoccupied, which is not registered before the commencement of the Act, shall on such commencement (5-4-1970) be the property of the Government and shall be deemed to have been registered as such, as if the provisions of the Land Settlement and Registration Ordinance, 1925, have been duly complied with.

However, the Act further provided for a significant exception. Land which was not registered before the commencement of the Act, but had been wholly or partially subject to use or enjoyment by private persons for a long time before such commencement, may with the approval of the Council of Ministers if the Council of Ministers was satisfied that it would be unjust to apply the provisions of the Act, be registered.

What is relevant to our discussion is that, according to the above Act, the acquisition of riverbed unregistered land by means ofסג and traffic system or the right of land opposite and below their high lands, is made hardly possible. The only way of enjoying such customary rights was by equitable means.

The courts might further declare a custom void. This happens, one believes, when they come to discover that the custom is contrary to justice, equity and good
conscience, or justice, morality and order and sometimes
when it is in conflict with Shari'a's Law.

Thus, custom, as we have seen, has occupied a dis-
tinct place as a legal source of law in personal matters
of non-Muslims, as well as a basis for legal rights over
land. The courts were given power to scrutinize custom
in the extent of declaring it void. So the state recogni-
tion of custom was accompanied by a complete control over
it. It may be altered or abolished by legislation.

(111) Islamic Law

Before 1983, Islamic Law was one of the bases of
law in the Sudan in personal matters of Muslims or non-
Muslims if they submit to the jurisdiction of Shari'a's
Courts. Section 9(2) of the Civil Procedure Act, 1974
provided:

"Where in any suit or other proceedings in a
Civil Court, any question arises regarding
succession, inheritance, legacies, gifts,
marrage, divorce, family relations or the
constitution of waifs the rule of such quest-
ion should be 1-

(b) the Shari'a Law where the parties are Muslims
except in so far as it has been modified by
such customs as is above referred to".

The limitations of the Islamic Law as a legal source
of law were (a) that the parties should be Muslims (b)
submission to the jurisdiction of the Civil Court (c)
that the Islamic Law is not modified by custom.

There is no reported case, as far as I could dis-
cover, involving the question of modification of Islamic
Law by custom nor is there any articulated policy behind that rule. However, the late Mr. Justice Abu Rannat asked the question: What happens where the custom prevailing in the area conflicts with the Shari'a? That question concerned both the Civil and Native Courts where custom was applied. He illustrated that by a problem which arose in Kordofan with regard to the property of married women. The Messeriyah, who inhabit western Kordofan did not recognize the dower of estate of a married woman. They claimed that the purpose of this was to protect the married woman by making it impossible for the husband to acquire it for his own benefit. According to their custom, if the woman committed a tort, her blood relations and not her husband were responsible for the payment of damages to the aggrieved party.

A conflict arose in cases of inheritance. If a married woman went before a Shari'a court she would be given or put in possession of any property she might be entitled to under Muhammadan Law of inheritance. If the question arose in a Native Court it would hold that she could acquire separate property. The difficulty, added Abu Rannat, was resolved by referring the matter to the Province Council, who agreed to declare the custom contrary to justice, morality and order. ¹⁰

Another example is given from the Kurar District. The relations of Kurar (a Muslim tribe of Baggara people in Southern Kordofan) are in practice governed in most spheres by customs. Many of these customs fall outside the scope of
Normally, in case of conflict between Shari'a and custom, the Native Court might apply custom which conflicts with Shari'a in matters of personal status and there is no reason why Civil Courts should not do the same.

Even in cases of conversion to Islam, it was custom and Shari'a law which were sometimes applied. An example was also given by Abu Rannat in case where a Dinka girl was converted to Islam and subsequently she married a Mohomedan man. According to Dinka tribal custom the man must pay bride-price to the girl's family, but according to Shari'a such a gift goes to the girl, not her family. If this was in issue before a Shari'a Court the Shari'a rule would be applied, but in fact on occasions, says Abu Rannat, when this has come before a Chiefs' Court, tribal law and custom have prevailed.

Therefore, Islamic law was liable to modification in Civil, Chiefs' and Native's Courts. As a religious law Islamic Law is not capable of such modification.

Islamic law has principally been applied in Shari'a Courts. Section 53 of the Sudan Mohomedan Law Court's Organization and Procedure Regulation, 1916, stated:

"Decisions of the Mohomedan Law Courts shall be in accordance with the authoritative doctrines of the Hanafia Jurists except in matters in which the Grand Rahl otherwise directs in a judicial circular or memorandum in which cases the decisions shall be in accordance with such other doctrines of the Hanafia or other Mohomedan jurists as are set forth in such circular or memorandum."
By this law, the Shari'a Courts were linked with the Hanafi School in which the Qur'an, the Sunna, consensus, analogy, juristic preference and custom are the most recognised sources.

However, after the promulgation of these regulations, the Grand Kadi had issued so many circulars shifting the emphasis to other schools and principles of Islamic jurisprudence.

Section 53 was reproduced in section 16 of the Second Schedule to the Civil Procedure Act, 1974 with a formal modification replacing the Supreme Court (Alwal Shakhdiya Circuit) for the Grand Kadi.

The tenor of the application of Islamic Law in Civil and Shari'a Courts is not now unconceivable. The personal and family matters of Muslims were the only fields reserved for Shari'a Law. Perhaps not exclusively since that law could (at least in theory) be modified by custom.

Now, almost all the areas of law are supposed to be within the purview of Shari'a law as the legislature is supposed not to contradict Shari'a. This will be the theme of our analysis under the sources of law after 1982.

(iv) Procedure

It is undoubted that one of the essentials of good law are certainty, uniformity and consistency. Our legal system was based on the Common Law in which the judge-made law is of paramount importance. The practice has
been that judges of the lower courts are bound by the decisions of the higher courts in previous cases.

The indispensability of the use of precedent has been due not only to the fact that we followed the English Common law in which judge-made law is a cornerstone, but also to the fact that we came to found our own common law on Sudanese custom and case law. Therefore, it is important that the choice of the doctrine of judicial precedent should not be looked upon as mere automatic adoption of English practice. 65 Local conditions were consciously considered and English law was modified in response to local conditions.

However, certain problems have arisen and made the application of the doctrine uneasy and inconsistent. Three of these are worth mentioning here, namely (1) the hierarchy of the courts in the Sudan has been constantly changing, (2) the law reporting system was disorganized and irregular, this was much apparent in the first fifty years after the Condominium. The authority of judicial precedent from 1900 to 1936 is a special problem primarily because the pre-1936 cases were not yet generally available to courts and (3) though this doctrine is rightly stated, it is, no doubt, improperly and inconsistently applied.

It will be seen that cases are sometimes cited to support argument and-or justify already-made decisions. Perhaps this has been the common practice. It involves no real reasoning or proper application of the doctrine of
precedent. Moreover, courts also sometimes decide similar cases differently without regard to former decisions.

However, using the analytical method of reasoning our courts have generally adhered to treating like cases alike. In this context lower court take the decisions of higher courts as binding upon them. The highest court i.e. the Supreme Court has sometimes been in a dilemma as to the bindingness of its own decision.

The interesting point is in regard to the judgement of the Supreme Court. In recent times, one cannot hardly say whether the Supreme Court is bound by its own decision or not. No literature is available as to this issue. However, one may need only to look at the reviews of the Supreme Court to show the confusion prevalent during the last ten years.

The fact is that, there has been remarkable inconsistency as to whether the judgement of the Supreme Court should be subject to review or not.

In 1974, the law was that:

"Judgement of the Supreme Court shall be subject to review, provided that a judgement shall be reviewed once only".

In 1982, this view was reversed when the judgement of the Supreme Court was declared not subject to review. Under the present Civil Procedure Act, 1983 the rule is that:

"The judgement of the Supreme Court shall not be subject to review though the Supreme Court
may collectively review any judgment made by it if it is contrary to Shari'a law. The decision shall be made by a majority.

These days, section 215 of the CPA, 1983, is causing so much controversy to the effect that a Committee was formed whose purpose is to interpret it and specially to make out what collectively means. The phrase "contrary to Shari'a Law is as problematic as "collectively".

However, five years earlier the Supreme Court was in exceptional circumstances ready to review its judgment even in absence of a law. In Sudan Government v. Khalil Patel El-Mula Mulah, it was decided that, the Supreme Court may review its judgment in exceptional circumstances even though there is no law which provides for that. This decision overruled the Supreme Court's former decision in the same case.

The above provisions and the case raise three points: One is that the trend of inconsistency of law has always been manifest. Secondly, there has been an unsettled issue of whether or not the (same) Supreme Court is bound by its own final judgement. Thirdly, this idea of review of the judgment of the Supreme Court may further be analyzed within the doctrine of binding precedent. Our contention is that: The judgment of the Supreme Court shall not be subject to review. Change has to be made through the system of precedent by the Supreme Court making a reverse decision repelling the former one upon different arguments. To review its judgement, the Supreme Court will be less ambitious in passing new judgements since it would always be possible
to review them and the trend of decision-making thus runs into a state of flux.

Furthermore, the contention is that there has been a general uncertainty surrounding the doctrine in the Sudan. The clearest examples in this connection are the decisions relating to the definition of words like "custom," and "essential need" as well as the decisions relating to the interpretation of the formula, "justice, equity and good conscience".

However, there is still an insistence that traditions, as well as law, place on the lower courts a moral and legal obligation to follow and act according to the decisions of the higher courts.

Thus, precedent, though it contributed much to our law and theory, remains unsettled, uncertain and in fact causes great confusion.

B. Residual Sources

The development of residual sources in the Sudan is worth discussing. At first only justice, equity and good conscience had been considered to be the source of law in absence of express provision. The philosophy behind the introduction of the formula was to fill in the gaps of the law and the legal system. The difficulty was in delimiting the exact meaning of this formula. However, "justice, equity and good conscience" was, for many reasons, equated with English Law.
Later in 1974, precedents principles of Shari'a Law and custom were introduced in addition to justice, equity and good conscience.

In its early days, the formula, justice, equity and good conscience, was so remarkable that much of our civil law came through its gate. The reason is that there were few legislative enactments and the judge had to resort to the formula as an excuse for filling in the gaps through reception of foreign law.

Gradually, many legislative enactments had been issued and the scope of the application of the formula narrowed.

The formula was introduced by section 4 of the Civil Justice Ordinance, 1900, which read:

"In cases not provided for by section 3 (dealing with personal matters) or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience".

The section excluded personal matters and cases provided for by any other law at that time. The latter category was then so limited and included only the Penal Code, 1895 and the Code of Criminal Procedure, 1895. It is questionable whether it was applicable to cases not provided for in the Civil Justice Ordinance, 1900, itself i.e. procedural matters.

The philosophy underlying the formula has been latent in its use as a residual source intended to fill in the gaps in the positive law. In the first ten years of the application of section 4 of the Civil Justice Ordinance, 1900,
the formula was interpreted to mean universally accepted
principles of justice. English Law was then generally
applied. At the end of the period (1900-1925) different
trends emerged. English Law and its application were put
under scrutiny.

Though section 9 of the then Civil Justice Ordinance,
1929 was based on section 4 of the Civil Justice Ordinance,
1905, it was, however, a little different. It read:

"In case not provided for by this or any other
enactment for the time being in force, the Court
shall act according to justice, equity and good
conscience".

The section applied not only to cases not provided
for by the Civil Justice Ordinance, but also to all cases
not provided for in the Ordinance and any other enactment
in force at the time. In this period the Courts inter-
preted the formula in accordance with civic, economic or
social realities of the Sudanese life.

It is worth mentioning that, precedent is equally
applicable in this context i.e. in absence of legislation.
It is only, in this connection, that precedent may be con-
sidered as an original source of law. If there is a legis-
lative enactment, reference to precedent will only be limited
to interpreting that law or delimiting its scope.

As to residual sources and especially the application
of the formula "justice, equity and good conscience", it
is worth mentioning that, although the wording of the form-
ula permitted the application of Islamic law, the formula
was scarcely interpreted as referring to that law. This is, perhaps, because of the fact that the formula itself was introduced to Sudan from India and to India from the Roman—colonial learning.\(^{114}\) Another reason is that it was intended as a clock for the introduction of English Law into the Sudan.\(^{115}\) A third reason is that there was a general tendency towards applying English law for practical reasons.\(^{116}\) Professor Zak\(\text{I}\) Mustafa was surprised that the Courts made no serious attempt to equate justice, equity and good conscience with Islamic Law.\(^{117}\) However, the rules of Shari'a were applied in a case of damages for pain and suffering and/or compensation for shorthand expectation of life.\(^{118}\) The court (Civil Court) relied upon a fatwa issued at its request by the Grand Kadi, explaining the position of Shari'a Law on the issues involved. The court found the rules to be most conductive to justice, equity and good conscience.

It is also worth mentioning that, by 1974, the residual sources were, precedent, principles of Shari'a Law, custom, justice, equity and good conscience. One believes that these same sources might be applied under the old formula and by the same force as being just, equitable and in conformity with good conscience.

The idea of residual sources is, known for its permissiveness and flexibility. This is clear specially in the period when only justice, equity and good conscience were sources of law. Judges were free to apply what they believed just, equitable etc.: it gave them extremely wide
powers to develop and make the law.

The idea of residual sources has also reasserted the primary of legislation as a source of law, since the sources are only applied when no such legislation exists. If there is a legislation the courts are bound by it. But no doubt it remains relevant to have a residual source to which reference can be made when express law is absent or even, one suggests, when law is vague or unjust.

CI Historical Sources

It is submitted that all legal rules have historical origins. As a matter of fact, they derive their origin from extra legal sources.

The search for the ultimate or basic legal principles which determines our present laws and their historical origin, is part of the writer's search for a legal theory in the Sudan.

Sudan is an emerging state. It was only recently that it has become governed by a central legal system. Though, historically, there were, however, law and order in the Funj and Mahdist states. In both states Islamic and customary law were applied. The origins of the law were then uncertain.

In the Anglo-Egyptian Sudan English Law was supreme. In the criminal sphere a penal code based on western law was promulgated. It was founded on English Law as distilled in the Indian Penal Code drafted by Lord Macaulay in 1837.
It was reproduced in 1925 and then 1974. The present Penal Code is principally based on the former codes.

The noticeable change is the introduction of the Hadis punishments in 1983. The Code of Criminal Procedure of 1899 was based on a corresponding Indian enactment and then reproduced in the Code of Criminal Procedure of 1925, 1974 and 1983.

In the sphere of civil law, on the other hand, no code was introduced; instead, the courts were in absence of local legislation, authorized to decide cases in accordance with justice, equity and good conscience. This resulted, as in India years before, in judges trained in English Law largely importing the principles and precepts of that law. However, the courts considered that they were guided but not bound by English Common Law. Because of the application of the formula justice, equity and good conscience, the origins of law were also uncertain.

In personal matters, Islamic Law and custom have been considered as sources. There has been no code for the law of personal status and family relations in the Sudan whether for Muslims or non-Muslims.

The law applied by Shari'a courts - unlike civil courts - was not based on Western Law but on principles derived from Shari'a. As the courts were officially instructed to apply the dominant view in the Hanafi School, the Manafita texts constituted the basic legal sources for personal law of Muslims in the Sudan. It was only in 1984 that
Islamic Law became codified. Reference is made here to the Civil Transactions Act 1984. The earliest codification was the Ottoman Majalla. The Majalla inspired codification of Islamic Law in many Arab countries of which Jordan is the prominent example. Our law i.e. the Civil Transactions Act 1984, was based on the Jordan Civil Law which was in turn based on the Majalla.

Custom existed from time immemorial. The courts applied customs derived from the locality. The enunciation of a certain custom not itself the direct but the indirect source of law today.

Now, our historical sources of law contribute a lot in the codification, reforming and interpretation of our law and legal sources.

4) Sources of Law After 1983

The passing of the Judgement (Basic Rules) Act 1983, and the Civil Procedure Act 1983 paved the way for a new trend regarding the idea of the sources of law in the Sudan which is mainly based on Islamic Jurisprudence.

The Civil Procedure Act of 1983, is in general, similar to that of 1974. However, some differences are remarkable. Section 5 of the Civil Procedure Act 1983 reads:

"Where in any suit or other proceeding in a Civil Court, any question arises regarding succession, inheritance, wills, the constitution of waqf, the rule of decision shall be:

(a) Sharia law, in cases where the parties are
Muslims or that marriage is concluded in accordance with Shari'a Law.

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

What is observable in this connection is that:

Firstly, Shari'a in the Civil Court, comes to be applicable to both Muslims and non-Muslims if, for the non-Muslims, marriage has been concluded according to Shari'a Law.

It is contented that, until 1967, the Shari'a Law had not been applied to non-Muslims in personal matters. It could only be applied if both parties to the suit make a written request asking the Shari'a Court to entertain their suit and pledged that they shall be bound by Shari'a Law.

However, this same power given by section 5(a) of the Civil Procedure Act 1983, was once exercised by Shari'a Courts under the Sudan Mohammedan Law Courts Ordinance 1902. Under section 6(a) of the 1902 Ordinance, the Shari'a Courts had jurisdiction in family matters if:

"(i) the marriage to which the question related concluded in accordance with Shari'a Law;

(ii) the parties are all Muslims.

Secondly: Shari'a Law could not now be modified by custom
Thirdly: Shari'a Law is placed before custom which, formally, means that, reference should first be made to Shari'a Law unless the requirements of the section are not satisfied.

Though we know that the sources of law are normally provided for in the civil law, as it is the general law, it is really novel to have a Code of Criminal Procedure attempting to tackle exactly the same issue. 307 of the Code of Criminal Procedure 1983, states:

"The Chief Justice shall from time to time issue circulars specifying:-

(a) the school or schools which the courts are to follow in their application of legal rules".

In the Shari'a Courts, the still authoritative doctrine of the Hanafia jurists shall be followed, unless and until circulars are issued by the Supreme Court (Ahwal Shakhsia Circuit) stating otherwise.

It will be seen that, instead of specifying the school or schools of Islamic jurisprudence to be followed, the Chief Justice issued circulars stating the detailed rules to be applied by the Courts. This makes his circulars themselves a source of law and turns his function into one of judicial legislating via circulars.
Moreover, the drastic change is brought about by the Judgments (Basic Rules) Act, 1983. Section 3 of this Act provides:

"In cases not provided for - notwithstanding any provision in any other law—

(a) The judge shall act according to the Shari'a rule as provided for in the Book (the Qur'an) and Sunna.

(b) And if he finds no law therein he shall use his independent reasoning and seek guidance in the following principles:

Firstly: The observation of jima'i (consensus) and the fundamentals of Shari'a. Its general principles and its general principles and guidance regarding the detailed rule for the case in issue.

Secondly: the application of qiyas (analogy) according to Shari'a law in order to realise the causes (ilm), exemplify the similitudes and to compare matters according to the methodology of Shari'a Law.

Thirdly: the consideration of whatever procures public interest and avoids corruptions; and taking this in relation to the ends of Shari'a and purposes of the complete and sacred life and what the branches of Shari'a law do not—declare invalid.

Fourthly: the presumption of the continuity (for things are presumed to be as they are), the permission for acts (for acts are presumed to be permissible), and easiness as to the impositions of liabilities.

Fifthly: the persuasion of Sudanese judicial precedents which do not contradict Shari'a law, the branch jurisconsults of the community of jurists and their decisions regarding the jurisprudential questions.

Sixthly: the taking into account of custom and reason in transactions in a manner not contrary to Shari'a law and—of the principles of natural justice."
selves, being intent upon the senses of justice
which as declared by the respected human laws and
the rule of equity are good conscience".

The following remarks will be made regarding this
law, namely:

1) This law is — by its very nature, novel in the
sense that it applies, in all matters, penal, civil, personal,
substantive or procedural, unlike the history of residual
sources which applied only to civil law (procedural) or
substantive). Criminal law had been out of the proper pur-
view of the gap-filling upon the maxim nullus corpus a sin leg.

According to section 3 of the Judgements (Basic Rules)
Act, the Court might in absence of a provision fill in the
gap of the Penal Code and find persons guilty of crimes
unknown to the Penal Code.

In Laliet, the Indian Merchant’s case, section 3
was invoked. The facts of the case may be briefly stated
as follows: Laliet, a merchant and an Indian national
was reported to have been practicing exchange and banking
business without licence, giving loans to many merchants and
businessmen for high usuary interests reaching to 10% per
annum and to have been smuggling hard currency abroad.

Laliet was charged under many provisions of the law
of which section 3 of the Judgements (Basic Rules) Act,
1952, was one. The court resorted to this section to meet
the question of usuary which is not an offence under the
Penal Code. It stated that.
The dealing in usury is punishable (in the Islamic Law) by way of tazir (punishment inflicted for transgression where no punishment is prescribed as a hadd) by the confirmation of the means by which the prohibited act was done according to the Judgements (Basic Rules) Act 1983 which gives the judge the right to refer to a rule in the Qur'an or the Sunna where there is no provision in the law. The accused will be liable under section 3 of the Judgements (Basic Rules) Act, 1983. 126

The Council for the defence argued that: 127

The accused faces a charge under section 3 of the Judgements (Basic Rules) Act 1983, and this section is against Article 70 of the Constitution and therefore unconstitutional.

In fact, two issues arise here: One is the reference to section 3 to fill in the gaps of the criminal law by introducing a crime unknown to the Penal Code, and the second is the constitutionality of that section.

As to the first point, and since the Judgements (Basic Rules) Act applies to all matters, it is possible to resort to section 3 of this act to fill in the gaps of criminal as well as other laws, but it has to be taken into consideration that, section 3 is only a rule of construction and not a penal provision. 132 So reference has to be made to section 459(3) of the Penal Code which provides:

"... the absence of a law does not prevent the infliction of any legal punishment which is a hadd."

This section gives the judge the power to inflict punishment even in the absence of an express provision if there is an act constituting a hadd. In Laijet case, no reference was made to a provision in the Penal Code to empower
the criminal Court to inflict the punishment, nor could the court avail itself of the wording of section 458(3) since this only applies to hadīd crimes.

ii) The above argument is concerned with the law as it is. The question whether section 3 is constitutional is a different one. Here two views are stated. One arguing for its constitutionality on finding that Article 9 of the Constitution (to which reference was made earlier) provided that the Shari'a Law is a source of legislation and section 3 is but a derivation from that source. Consequently, the judge is justified and constitutionally backed in resorting to this section.

The other view was held by the council for the defence in Latif's case, to the effect that, this section is against Article 70 of the Constitution (which stated:

No person shall be punished for an act which was not an offence at the time he committed that act.

And the Penal Provision is therefore against the constitutional right not to be subjected to retroactive laws. Perhaps people were aware of this fact, for this same article was affected by the proposed third amendment of the Constitution 1984, to the effect of introducing the provision, "except in accordance with Shari'a rules".

The courts still believe in the "principle of legality" and the non-retroactivity of Penal Law.
In 1983, the Court of Appeal stated that: 125

"The penal laws which restrict the freedoms of the people, shall not be applied retroactively. Since the essential wisdom of the principle of legality is that, people, all of them, should know the wrong before falling in it and should also know whether their conduct might result in punishment. For this reason God says (we punish not till we send a messenger)."

This was based on the celebrated maxim: Nulla poena sine lege, or nulla poena sine lege or there must be no crime or punishment except in accordance with fixed predetermined law. The Universal Declaration of Human Rights was equally cited in this regard. 126

The former view was criticised by the defenders of the latter view upon the analysis that Article 5 of the Constitution points to the idea that Islamic Law is a source of legislation. That is to say, it concerns the Legislature, and not a source of "law" for the judge to base his decisions on except in so far as the law specifically so provided.

iii) Now section 6(a) of the Civil Procedure Act, 1983 is made subject to the Judgements (Basic Rules) Act 1983. Reference to Shari'a in section 6(a) then means reference to Qur'an, Sunna, Ijma, Ijtihad etc. as in section 3 of the Judgements (Basic Rules) Act 1983. These are the sources of law in Islamic jurisprudence according to the orthodox theory.

iv) Sudanese precedent and custom are still sources but they have been made subject to Shari'a.

v) Reason is made a source of law in civil
transactions together with business usage or custom. What "reason" really means is still a matter to be met by the courts. The formula justice, equity and good conscience is rephrased but appears substantially similar to its known form and content. "Kind human laws" may be understood in the history of the formula to mean "universal principles of justice".

Two more points are relevant in the discussion of the sources of law after 1983. One relates to the place of Shari'a as a source of law in relation to the other sources and the second concerns the place of legislation after 1983.

Shari'a does not only stand as the first residual source of law but it also governs the validity of other sources. The admissibility of both custom and precedent is made subject to Shari'a rules. Legislation is also governed by Shari'a in two aspects; one is that legislation is presumed not to contradict the Islamic Shari'a and the second is that legislative enactments shall be interpreted in accordance with rules, principles and the general spirit of Shari'a.

Moreover, Islamic law has become the source of legislation for enactments such as the Penal Code 1983, the Code of Criminal Procedure 1983, the Civil Procedure Act 1983, the Zakat and Taxation Act 1984 and the Civil Transactions Act
1984. This is so because the legislation is based on the principles of Shari'a.  

As regards legislation, it is the primary source of law. No independent reasoning is allowed when there is an express enactment. Section 5(27) of the Civil transactions Act, 1984 states: No independent reasoning is allowed where there is a specific provision in existence.

It is also understood from the wording of section 2 of the Judgement (Basic Rules) Act 1983 that when there is legislation, the judge has to apply it; otherwise the whole section does not apply when there is a law governing the case before the judge.

The significant change is that relating to legislative interpretation and the presumption of conformity with Shari'a law, which have been stated above.

4. Conclusion

It looks quite clear that the idea of the sources of law in the Sudan has much been connected with the authoritative sources, that is to say, the sources which the law recognises as such. Legislation, has been the primary and overriding source of law. Courts have been very keen to act upon its express provisions unless and until it has been abrogated. In such a case, pre-recognised sources are applied.

Even after 1983's legislative changes, legislation
has not lost its primary. The real change is that it should be interpreted in accordance with the principles, rules and spirit of Shari'a and the presumption that the legislator does not intend to contradict Shari'a. The question is what is the practical significance of that presumption? It, suggests that any legislation or a provision in any law which contradicts Shari'a rules should be construed as null and void.

Custom has largely been a proper source of law. However it is controlled by legislation for it may be altered or abolished by status. Personal matters of non-Muslims and of legal rights over land, especially in the Northern Province in Ed-Damer, Merowe, Shardi, and Mansur Districts have been dealt with in accordance to custom.

Islamic law has never been alien to the idea of the sources of law in the Sudan. It has been applied by the Civil Courts in the personal matters of Muslims and now, even for non-Muslims if marriage is concluded in accordance with Shari'a law. It has equally been applied by Shari'a Courts in relation to the same area. The authoritative doctrines of the Hanfa jurists, except in so far as the Supreme Court (Ahwal Shakhna Circuit) has directed otherwise, have been followed.

Now, the area reserved for Shari'a has been extended, Crimes of hadd and their punishments, are within our Penal Code. The Code of Criminal Procedure, 1983 and the Civil Procedure Act, 1983 also contain rules derived from Shari'a law to which detail reference will be made in chapter seven. The Judgement (Basic Rules) Act 1983, makes it possible for
the judge in absence of express provisions, to resort to the Qur'an, Sunna, or jihada (independent reasoning), the consensus of the community of Muslim jurists, the analogical deduction, the unrestricted interests and (istihsan) juristic preference. What is novel in this law is its generality. That is to say, it applies to all matters whether civil or criminal, a fact which has been causing so many controversies to the constitutionality of this Act.

Therefore, as a source, Islamic law reaches the peak of consideration both in the legislative and judicial circles a place which it never come near before.

Precedent is an unsettled source of Sudanese law. The doctrine of precedent though rightly stated, is hardly ever correctly applied. This uncertainty in the application of the doctrine of precedent has been the common feature of our law and legal theory as well.

The formula, "justice, equity and good conscience", has an interesting history. Broadly speaking, this formula has caused so much confusion in the idea of the sources of law in the Sudan.

Under its guise, almost all the other sources of law have been applied. It was particularly English law which formed the most celebrated base for the courts in their interpretation of the formula.

So, there has always been in all stages of our legal history a reference to more than one source of law. However, legislation has always been the primary and overriding
source of law in the Sudan. As it largely represents the direct expression of the will of sovereign power the theory prevalent is then, a positivit theory of law.
NOTES

1. See Sec. 3 of the Judgments (Basic Rules) Act, 1983.


3. See supra chap. (VI).


10. Keeton, op.cit., p. 73.


13. Ibid., at., p. 110.

14. This distinction appeared in Salmond's "Jurisprudence" 5th ed. However, other reference to Salmond's
Jurisprudence here are to the 12th ed.

17. Idem.
19. Ibid., at chap. (v).
20. This distinction is adopted in most of Civil Law jurisprudential writings and followed in most of the Arab countries. See El Khashili, H.I., El-Kadi Khal Fi-Ullum el Kanunia, Algeria, 1980, p. 123.
21. Ibid., at p. 125.
22. Idem
25. Ibid., at p. 193.
25a. Ibid., at p. 192.
26. Ibid., at p. 194.
27. "Law", "legal system", or "system of law" have close but some what different meanings, since law is some- times used in its total comprehension including not
only its meaning in common usage but also the things associated with it including the officials by which it is made and enforced, what they do under the law, and even what laymen do under the law, (see Patterson op.cit., p. 73). In comparative law no distinction arises between legal system and the system of law. A system of law e.g. English, Chinese Hindu, Islamic etc., is also termed "Legal system". Thompson speaks here about the sources of the legal system in the sense of comparative law, since he suggests one of the Comparative Law Theories i.e. Legal Pluralism which is the existence of a number of legal systems within a given area.


29. Ibid.

30. Ibid., at p. 478.


32. Ibid.

33. Ibid., at p. 33.

34. Ibid., at p. 39.

35. See sec. 3(a) of the Civil Justice Ordinance, 1900 and sec. 5(a) of the Civil Justice Ordinance, 1925.

35a. See sec. 13(d)(ii) of the Land Settlement and Regulation Ordinance 1925 and supra, p. 168.

36. See sec. 7 of the Chiefs' Courts Ordinance, 1922.
37. See Sec. 3(b) of the Civil Justice Ordinance, 1900 and sec. 5(b) of the Civil Justice Ordinance, 1929.
38. Sec. 5(a) of the (C.J.O.) 1939.
39. Sec. a of the C.J.O., 1928.
40. See infra, p. 80
41. See sec. of the Interpretation and General Clause Act 1974.
42. See Akolawin, *The Role of Legislation in Modern Nation Building*, op.cit., p. 5.
43. I am indebted in this idea to Dr. Hassan Abdal El-Turrabi in a speech delivered at the Faculty of Law entitled: "The Movement of Legislation in the Sudan" on the 9th of Dec. 1984.
44. Custom was applied in personal matters (see sec. 3 of the C.J.O., 1900).
45. See sec. 5 of the C.P.A. 1974.
47. See sec. 4 of the Interpretation and General Clauses Act, 1974.
50. *Idem.*
51. *Idem.*


56. Bamboulis' case has ceased to represent Sudanese law since long time. It was disappeared by the Court of Appeal in *Maurice Goldemberg v. Rachad Goldemberg* (1960), *S.L.J.R.*, p. 36 and in *Saloons Khusous v. Hairs of John Ishander* (1967), *S.L.J.R.*, p. 536. The reason for the 'disappearance' was that the decision in Bamboulis' case represented a departure from the prevalent practice and was not reconcilable with the decision in *Abdalla Chrachia v. Maria Bekvarestis*, A.C. App-12-1934 where the "custom" included personal and religious law of the community.

58. Abu Rannat states two cases in Humar District west
Kordofan to that effect (see Abu Rannat the Relation-
ship Between Islamic Law and Customary Law in the Sudan
op.cit., p. 10.

59. However, see infra, p. 97.

60. See sec. 9 of the Native Courts Ordinance, 1933
1932.

61. See El Mahdi, S.M.A. "A guide to Land Settlement and
Registration", (Khartoum University Press, 1971) p. 42.

62. The right of "esara" is a customary right whereby the
person who holds such right (sid al-esara)cultivates
the land owned by another (sid al-esal) and have a right
to share of the crop.

and Registration, "op.cit.," p. 36.

64. Idem.

65. It has been the local embodiment of a principle of
law that ownership of river bank land prima facie
carries with it the ownership of riverbed land as
argue medium filum aquae. See Ali Abdul Sadek Nour
and v. Sudan Government and Heirs of Salijan Ahmed

66. It is a local custom in Merowe District where the
land owner is entitled to a share in any date tree
planted by another on his land. Which right arises upon the maturity of trees and differs according to whether the land is fertile or fasud. See Osman Omer and Others, (1964) S.L.J.E., p. 29.

67. It is a local custom in El-Damer District giving the right to one-half of the produce of the date trees on the land. It does not give the ownership of an undivided share in the trees but merely a right to share of one half of the crop, a profit a prendre. See Omar Ali Omer v. Fadi El Mula El Hussein and others (1962) S.L.J.E., p. 42.

68. This is a recognised custom in Mansir area in Northern Province which means the right to cultivate over the land, besides the original right had el sal i.e. the owner of the land. Such a right is registered as an encumbrance. See Heirs of Abdel Aziz Khansa v. Heir of Habib Habran (1967) S.L.J.E., p. 64.

69. The System of Mudair is a custom applicable in Berber and Shendi whereby the shares, as numbered and shown on the register, are given no recognition by the owners, and that the one who owns a number of weds, each one of them appearing in the register in different shares, on land holds and cultivates the same number of weds as one piece of land allotted somewhere in the magh, according to the mudair. See Abdulla El Kassan Kanza v. Saliya Ali Abu Ali and Another. (1962), S.L.J.E.
70. See sec. 5(a) of the CBA 1974 and now sec. 5(b) of the CBA 1983.

71. Sec. 7(1)(a) of the CCO, 1931 and sec. 7 of the NCO, 1932.


73. Ibid., at p. 146.

74. In the Appeal Order 05-1405 dated 16th Jan. 1985, the Court of Appeal Khartoum (Personal Matters) ruled that a domicile based on a custom that children born illegitimate are regarded sons of dead husband of their mother, is invalid and of no weight for it is contrary to Sharia rules. See AO-105-1405 (1985), S.L.J.R., p. 32.


76. Ibid., at p. 55.


78. Per Lindsay, C.J. in Bamboulis' case.

79. Per Lindsay, C.J. in Bamboulis' case.

81. Sec. 3 of the Urula, 1970.
82. See sec. 4 of the Urula, 1970.
83. Ibid.
84. Sec. 5(a) of the CPA, 1983.
86. (a) Custom is also "law" see infra chap. (f).
87. Now the philosophy seems that any custom which contravene with Shari'a is void.
88. Sec. 38 of the MCO Pr., 1916.
90. Ibid.
91. Ibid.
92. Ibid., at p. 12.
93. Ibid., at p. 13.
94. See Circular No. 31-1939.
95. See Thompson, *The Formative Stage of Law in the Sudan*, op. cit., p. 496.

96. supra chap. [III].


98. Sec. 215 of the CPA, 1974.


100. Sec. 215 of the CPA, 1983.


102. Idem.


108. The assumptions under which English Law was applied under the formula were: (a) it is the law to which English judges are accustomed (b) it is more likely to be the just law (c) it is accessible to our judges and advocates all of them trained in or with a sound working knowledge of it. See the decision of Wasey-Sterry, C.J. in Griyas Brothers v. Nicola Rothfoss, K - App. - 54 & 55-1940, S.L.J.R., Vol. I, p. 37 & Lindsay C.J. in Emboulis v. Emboulis, AC-REV -50-53. Cases in the Court of Appeal and the H.C. p. 76. (d) that it is the law with which British judges were familiar and is thus more likely to be just law. As a rule, the application of that law is more likely to confer justice than the application of any other law. See Williamson J. decision in Mansour El Sioubi and Others v. Abu Fatima Sharif, AC-App-3-1920 S.L.R. Vol. I, p. 147.
(c) The English Law is accessible to judges and advocates, all of them trained in it or with a sound working knowledge of this system of jurisprudence and it is of great importance that our administer a law which is understood, which is accessible to both parties and to the court. See Lindsay C.J. in Bamboulis v. Bamboulis, ACC-REV-58-53, cases in the Court of Appeal, and the High Court, p. 76.


110. See the cases of Dawood v. Suliman Hilal v. Mariam Bint Dosta, H.C-Apr-1918.


114. For the origin and introduction of the formula into Sudan, see Mustafa, "The Common Law in the Sudan," op.cit., p. 1-2.


118. Idem.


120. See Akojawin, The Role of Legislation in Modern Nation Building, op.cit., p. 14. However, it was observed that "if there was a dispute related to a marriage involving a Muslim and non-Muslim, the Shari'a Court had jurisdiction if such a marriage was celebrated in accordance with Shari'a Law." See Ibid., p. 12.

121. See sec. 16 Schedule II, CPA, 1983.

122. It is a pre-requisite of analogy that the cause must be the idea intended by the Shari'a. It should be apparent and complete. See Supra chap. (VII).

123. This law was amended in 24th of April 1986. Section (3) is now applicable only to civil matters.

124. Published under this title in Al-Sahafa 9th Nov. 1984, pp. 2-7.

125. Ibid., at p. 7.

126. Idem.
127. Idem.

128. (1) It is remarkable that the Supreme Court reached the same view in the case of Asma Mahamoud Mohamed and Another v. Sudan Government, (1986) 8 LJ JR p. 98 the Court stated:

"The Judgements (Basic Rules) Act, 1983, was not in principle, a penal law. However, section (3) of that Act conferred upon the court an unusual power in introducing the principles which were not provided for. It seems that no body stopped to see whether the confering of such power would give the Courts, a legislative power to introduce crimes contrary to the jurisprudentially and legally settled principle as to non-retroactivity of penal laws and whether the power so conferred as in section 3 could be used to dispense with the express provision or could replace it in conformity with Article 70 of the Constitution of 1973, which used to read: "No person shall be punished for an act which was not an offence at the time he committed that act."

We see at the outset, that the nature of section 3 was not legislative and could not give the courts a legislative power which they inherently lack. We also believe that Article 70 of the Constitution could not be interpreted in manner which makes reference to "law" a reference to a body having no power of making law i.e. courts. See ibid., at p. 180.

130. Art. 1(2) of the UDHR states: No one shall be guilty of any penal offence in account of any act or omission which did not constitute a penal offence at the time when it was committed.

131. It is believed that there is a printing mistake and that the word "nâker" (Unusual) and not "fiker" (reason) if this is so, the meaning would be: It is for the judge to avoid the unusual and apply what is usual i.e. customary.

132. See sec. 2(b) of the JPRS, 1983.

133. See sec. 2(a) of the *J.H.R.* & 1983.

134. For more elaboration see *supra* chap. VII.
CHAPTER THREE

THE JUDICIAL PROCESS

1. Introduction

Nowadays the inner working of the judicial system has much to do with legal theory. There is particularly a growing concern over judicial law-making, judicial reasoning and the judicial interpretation of statutes.

The controversy in England for example over judicial creativity is still continuing. English judges have been suspicious of any attempt towards judicial creativity though they could not deny that almost all the English common law is but judge-made law.

In the Sudan, though a good opportunity for judicial creativity has existed under the guise of the formula justice, equity and good conscience, the courts did little more than adopt English Law. Our judges strictly adhered to the will of the legislator and purported not to make but simply to declare the law as it is.

This chapter is devoted to explaining the theories regarding the three mechanisms of the judicial process, namely:

(a) the theory of judicial law-making. (b) the theory of judicial reasoning and (c) the theory of judicial interpretation of statutes.
2. The Theory of Judicial Law-Making

What do courts really do? Do they make or only declare law? These and similar questions have caused many controversies. It is contended that arguments in this connection include contradictory contentions namely: (a) that the judges never make laws, (b) that they alone make law, (c) that there are no laws but only individual decisions.

However, two trends may be distinguished, namely (i) The traditional trend and (ii) The liberal trend. The ensuing discussion is devoted to the arguments regarding these two trends and to other related subjects.

(a) The Traditional Trend: This trend advocates the common law approach that judges have no power to make but only to declare law as it actually exists. Such a law being ready-made and determined prior to the judicial decision. It conforms with the positivist approach believes in law as it is as opposed to law as it ought to be. It is further built on Montesquieu’s doctrine of separation of powers whereby the organ of the government e.g., the judiciary, should not exercise or interfere with the functions of the other e.g., the legislature. It is also supported by the orthodox English theory of the supremacy of Parliament.

Advocating such a trend, Snyder states that the traditional theory is that the judge never makes but always merely declares pre-existing law. Therefore, since the function of the court is supposed to be limited to declaration rather
than making or changing of law, this theory is conveniently termed the "declaratory theory".

The initial assumptions of this trend, may be summarized as follows:

1. That the law is a pre-existent, ready-made, pre-determined state of affairs.

2. That what the Courts are supposed to do is only to declare law as it already exists.

3. That it is only the legislature which has the full power and right to change or make law.

Properly the role of the courts is rather legislative than declarative. In the landmark case of Court Hotel v. Parish, it was found that: "what the court is to do ... is to declare the law as written leaving it to the people themselves to make such changes as new circumstances may require". Nowadays this decision does not represent the prevalent view in North America. It is commonplace that the courts in the United States do participate in making law.

It is Bacon who has been reported to have said that judges ought to remember that their office is to interpret law, and not to make law or give law. Bacon's view stands for the earliest enunciation of the trend in England. Likewise Blackstone observes that the duty of the court is not to pronounce a new law but to maintain and expound the old one. However, Blackstone's followers do not understand him correctly. To "expound" i.e. to explain fully, is much broader than to "declare" i.e. to make known or announce. Surely, the most
conservative statement which has persistently been quoted
is that of Lord Jowitt in which he confirms:

"Please do not get yourself into the frame of
mind of entrusting to the judges the working
out of a whole new set of principles which do
not accord with the requirements of modern condi-
tions. Leave that to the legislative and leave
us (i.e. judges) to confine ourselves to trying
to find out what the law is".

Jowitt's statement represents the English judges'
attitude regarding judicial law - making and the function of
judges. It stresses that the sole function of judges is to
try to find out the law as it is and to make no endeavour, on
pretence of change and requirements of modern social condi-
tions to make law. It is rightly found that Lord Jowitt had
refused to see the judiciary as a creative element in the
continuous interplay of legal and social changes. Frank,
who terms this traditional trend the "conventional view",
summarises it as follows:

"Law is a complete body of rules existing from time
immemorial and unchangeable except to the limited
extent that legislatures are expressly empowered thus
to change the law. But judges are not to make or
change the law but apply it. The law, ready-made,
pre-existent to the judicial decision."

Accordingly, the judicial opinions are declarative
of what the law is, and not more than that. The judge
does not invent but only discover the law. He stands passive.

Against this background, Friedmann accused this trend
of being little more than a ghost. Friedmann, in fact,
does not question the capacity of judges to make law, but
instead goes further to assert the limits of judicial law -
making, yet the English common law has been a judge-made law.13

For all considerations, the blind adherence to such a trend proves to be ungrounded. The legislature cannot cater for all situations. The supposition that law is a ready-made, pre-determined, and pre-existent to the judicial decision, is in many respects, fallacious. We may fail to find such a law. Gaps in the law and the legal system are always there. Judges cannot be heard to say that, "there is nothing we can do about them." What to do and how to do it is the concern of the coming trend i.e. the liberal trend.

(b) The liberal trend: This trend is enthusiastically held by Pollock,14 Cardozo,15 Friedmann,16 and Davis,17 who are convinced that a creative role is played by the courts law in response to modern social requirements. Their contention may be formulated in two points: Firstly, the failure, inability or refusal to act on the part of the legislature, are sometimes inevitable. This leaves gaps in the law. Old cases may be redundant, obsolete, unreasonable or outmoded. Sometimes no previous decision of law exists that can be applied to a certain state of affairs. Secondly, in this or similar cases, the court has to recognize the growing needs of changing social and economic conditions and develop the law to keep in line with them. This will better be done through the moulding of the body of case law that will satisfactorily serve needs, close the gaps left open by the legislature and supplement the law.

The above contention is well reasserted by professor Davis in his analysis against the orthodox English attitude.
Davis states: 18

"My assertion is . . . judges ought to remember that the easier part of their office is to discover and apply previously existing law to the problems that come before them, but that the most important and most difficult task they perform is the moulding of body of case law that will satisfactorily serve the needs of society".

By these words we encounter the most refined theory of judicial creativity which professor Davis endeavours to formulate. He believes that the judicial process should largely be creative. Such creativity is part and parcel of the office of the judge. His view is strikingly counter to Bacon's. 19

Reflecting on experience, Cardozo, in the same way, asserts that the judicial process has recurrently been creative. 20 Moreover, the most daring statement is offered by Professor Borchard where he believes that "part of the message of the contemporary jurisprudence is that the judge does to some extent unavoidably exercise a creative choice and that he has the responsibility to exercise it in an intelligent manner". 21 This, is largely a policy choice, specially in the interpretation of statutes. The courts in other fields always have a discretion which can also be creatively exercised.

It is worth mentioning that the legislature in many systems has ascribed a creative role to the courts. This has been done through provisions stating the ways in which judges should act when there is no express provision of law.
The most prevalent formula in this connection is that of justice, equity and good conscience. The courts are called upon to act upon principles of justice, order, morality etc. without being limited by any exact law. They are free within that frame.

The most obvious example is the Swiss Civil Code of (1967) where the judge is directed, in absence of guidance by the text of the Code or other accepted methods of construction, to decide according to the principles that he would have adopted as a legislator.22 This is clearly an attribution of a legislative function to the judiciary. In the Sudan, as we will see later, it is contended that, the power conferred on the courts under section (b) of the Civil Justice Ordinance, 1929, which directed the courts in absence of a provision of law to act according to justice, equity, and good conscience, was expressive of a legislative rather than a judicial function.21 Thus, where there is no statutory law in force, the judge may make law subject only to the directive principles to which he gives concrete content. In support of this contention Friedmann states:24

"Courts can and indeed are called upon to adjust rights and liabilities in accordance with changing canons of public policy".

The means by which this and similar views may be implemented and the ends underlying them, deserve discussion. It is through the medium of the decision-making process that courts do aspire to and largely accomplish the
most needed goals such as serving of the social and economic requirements, the development of law and establishment of justice upon earth.

Obvious examples of judicial creativity exist in law specially in the field of negligence. In the famous case of Donoghue v. Stevenson, the liability of the manufacturer in respect of personal injures sustained by the ultimate consumer, was created after a long time of development. It has been persistently quoted as a good example of judicial law-making. Another example is offered by Rylands v. Fletcher, which established a rule of strict liability rule regarding the situation where a person who for his own purposes brings and keeps on lands under his occupation anything likely to do mischief if it escapes, he must safely keep that thing at his own peril, and if he fails to do so, he is liable for damage naturally accruing from the escape. The origin of Ryland's rule had been in the tort of nuisance. But the rule has subsequently been applied to other torts. The rule is taken as one which was reached through methods extremely characteristic of judicial development of the law, the creation of new law behind a screen of analogies drawn from existing law. It was further observed in (1949) that what was novel in Rylands v. Fletcher, or at least clearly decided for the first time, was that, as between adjacent occupiers, isolated escape is actionable.

Furthermore, law may be created through the medium of reception of foreign law. This is supposed to be the case
in the former British colonies (of which the Sudan was one). In the United States, it was found that the judges made law by the reception of the common law of England. Hence, through the reception of a foreign law, the judges introduce new laws and principles which were unknown to the receptacle system. However, attacks against judicial creativity are directed towards the impropriety of endowing the courts with such a legislative function. That judicial law-making is against the doctrines of the separation of powers and parliamentary supremacy. Evershed who finds the opportunity to comment on professor Davis’ ideas, aforementioned, argues that: "if Professor Davis’ view is that the judiciary should assume the function of law makers in spite of, or in conflict with the enacted law, then it would appear he is disregarding the essential meaning of accepted parliamentary supremacy in twentieth century democratic England." Evershed seems to speak about the present rather than the past. In earlier days such a parliamentary supremacy was not emphasised and the courts did develop the law from case to case and created so many principles. He further missed the point. Professor Davis does not suggest that the judiciary should assume the function of law making in spite of, or in conflict with, the enacted law but merely to supplement that law.

Perhaps the most severe attack which has been directed against judicial creativity is that invoked by Austin who maintains that "the judicial creative activity in modern states was at best a survival of a relatively primitive stage of legal development before the separation of powers had been
achieved. Austin, in fact, admits, that the judicial law-making was a fact in England but fails to reconcile between the judicial law-making and his theory of the derivation of all law from the command of a sovereign.

However, the above remarks do not negate the judicial creativity at least as a historical fact in England and a growing concern in America and all over the world. The social requirements, development of law, filling the gaps in law or the legal system have shown the judicial creativity which has been accomplished by moulding of cases, recognition of social needs and keeping law responsive to them. The models which the judges use in achieving such aims may well be discussed under the theory of judicial reasoning.

3. The Theory of Judicial Reasoning

The search in judicial reasoning is virtually a search in the old-age controversy over the relation of logic to law. Questions concerning the relationship between logic and the law have been of intimate concern to legal theorists, jurists and others seeking to understand and make intelligible the basic structure of the law. The importance of the subject comes from the role judicial reasoning plays as a tool for arriving at a just and fair decision. It is used in case law, interpretation of statutes and the Constitution. It relates to the whole field of the decision-making process. Conventionally, there are two kinds of reasoning. One which the judge gives for the decision he makes and the other is the one by which he reaches that decision. Being concerned
with the dynamic working of the decision-making process and the relation of logic to law, we prefer to concentrate on that part of reasoning by which the judge reaches his decision.

Conveniently, three theories in this regard may be identified, namely: (a) deductive reasoning (b) inductive reasoning (c) analogical reasoning.

(a) **The Deductive Reasoning**

Allen and Paton are the champions in enunciating this and the coming model of reasoning.

Allen states:

"The legal rule applicable to any particular case is fixed and certain from the beginning and all that is required of the judge is to apply this rule as justice—according to law demands, without regard to his personal view. His decision is deduced directly from general to particular, from the general rule to the particular circumstances before him".

Allen’s statement is the classical presentation of this model of reasoning. What happens is that the legal rule is deduced syllogistically from the general to the particular. The general rule becomes the major premise, the factual situation before the judge the minor premise and the court’s decision is the conclusion. The symbolic construction of that is as follows:

All men are mortal;
Socrates is a man;
Therefore, Socrates is mortal.
In judicial reasoning, such argument does not stand in the air. A general theory is always discoverable and the factual situation is dealt with in accordance with that general theory in order to reach a logical conclusion. From Allen's statement the general theory is that the rule applicable to any particular case is fixed and certain from the beginning. Boonin gives a similar theory when he states:

"The general legal theory which prevailed from the time of Blackstone until the twentieth century, treated the law as a coherent and complete rational system. It was thought to contain legal rules, principles, standards and maxims, by the application of which one could deductively arrive at the appropriate decision in any given case".

The existence of such general rule makes judicial deduction possible and it is only then could we make a deduction from the legal rules, principles, standards and maxims. A practical significance of this model of reasoning will appear from the coming examples:

1. All persons who steal shall be punished (F.P.)
   - X steals (S.F.) - Therefore, X shall be punished (C).

2. Whoever brings and keeps for his own use, and on land in his occupation any thing likely to do mischief if it escapes, must keep it at his peril, and if he fails to do so he will be
liable for all damage naturally accruing from the escape (F.P.). 41
- X brings and keeps for his own use a thing of the above mentioned description (S.P.). 42
- Therefore, X does that at his peril and is therefore liable for all damage naturally resulting from the escape (C).

It is, however, obvious that this formal logic—i.e., the syllogistic deductive reasoning, may not be applied in the judicial process without qualifications. Simply because the facts in logic are naturally settled and undisputable, e.g. "All men are mortal". They are not relative in nature and subject to no exception. In legal reasoning the general rule is not likewise settled and it allows for exceptions. 43

It is Holmes, directing his attention towards the formal logic, i.e., the deductive syllogism, who severely criticized the deductive method of reasoning. He maintains that "the life of law has not been logic, it has been experience". 44 Holmes means by that that the legal argument cannot be all in the form of an absolute deductive syllogism. 45 It is also stated by way of objection that this approach automatically precludes considerations of justice or social utility from serving as, or being involved in, the selection of the premises of the syllogism, and that such a view denies the possibility of meaningful change by limiting the judge's role to applying existing rules to the facts before him, making no provision for the creation of new rules or significant
modification of old ones.46 For this and other reasons, Sinclair concludes that "the attempt to describe the legal process as a single magnificent deduction fails. The legal rules which would form the major premise are too diverse and contradictory; the factual minor premise is often problematic."47

Surely, the strict adoption of the syllogistic argument can hardly suit the judicial reasoning. Nonetheless, some sort of deduction e.g. in relation to the application of statutes, is inevitable. Even in case law when a general rule is established, a deductive reasoning will invaluably help the court. It is to be emphasised that legal reasoning always allows for exceptions. Such exceptions must be taken into consideration.

(b) The Inductive Reasoning

The inductive reasoning is the reverse of the deductive one. The argument goes from the particular to the general and aims at generalizations. It is found to be an inference from the observed to the unobserved. Being put symbolically, it appears as follows:

All xs observed in the past have been y. Therefore, all xs are y.

It is commonly claimed that inductive reasoning is the mainstay of legal reasoning on the ground that since law is still uncodified we must review prior cases to determine the appropriate rules.48 Thus, instead
of starting with a general rule the judge has to turn to the relevant cases and discover the general rule implicit in them. Unlike the deductive reasoning method, the inductive reasoning method does not assume the major premises; it sets forth to discover it from particular instances.

In fact, the inductive model of reasoning is particularly relevant when reference is made to previous cases. Since the existence of the general principles, maxims, rules in the deductive reasoning is sometimes fallacious, the strict deduction would be impossible. The judge is in many instances has to discover the general rule. He refers to prior cases to discover the appropriate rules. Such rules are implicit in prior cases, i.e. the instances from which the judge comes to the decision in the case before him. What happens is that the judge through observations, finds that a certain state of affairs has always been governed by a certain rule of law. He then concludes that that state of affairs is governed, as a general rule, by that rule of law. This process is not always an easy one. The judge, "combs through prior cases" in order to determine proper rules which may not be identifiable at first glance. They are implicit in the prior cases and it is for the judge to work them out. The difference between this and the deductive reasoning as Paton says, lies in the source of the major premise. The deductive method assumes it, whereas the inductive sets out to discover it from the particular instances. 49

The above can be illustrated by an example. In
attempting to find out whether or not a photocopy is a property and therefore can or cannot be a subject of theft, the court has to search through the prior cases for the general rule. If it is observed that in all or the majority of instances, the photocopy has been taken not to be a property, the court then comes to a conclusion, or a general rule, that all photocopies are not property. A concrete example was given by Lord Atkin's judgement in *Conochie v. Stevenson* in which he made a general survey of prior cases, i.e., particular instances and found that in English Law there must be and there is some general conception of relationship giving rise to duty of care, of which the particular cases found in the books are but instances. Atkin reached the general rule regarding the liability of the manufacturer for injuries sustained by the ultimate consumer, by an inductive model of reasoning.

It may be said by way of objection that this model of reasoning is not adequately applicable to all kinds of judicial decision-making. It is largely applied to case law. Application of statutes may hardly fit in this connection. Lord *...* thinks that this model of reasoning is erroneous, but has some meaning. He states:

"It is customary to think of case-law reasoning as inductive and the application of statutes as deductive. The thought seems erroneous but the emphasis has some meaning. With case law the concept can be created out of particular instances. This is not truly inductive, but the direction appears to be from particular to general. It has been pointed out that the general finds its meaning in the relationship between the particular. Yet it has the capacity by the implication of hypothetical cases which it carries and even by its ability to suggest other categories..."
which sound the same. 53

What Levi wants to make clear is that we do not really grasp the general rule from the particular instances by simple induction. The general rule is always there. It is implicit in the relationship between the particulars. However, two points may be stated here: one is that the idea that the general finds its meaning in the relationship between the particulars, if it is true, does not of itself provide us with any general rule. We need some sort of reasoning to work out that general rule which is supposed to be there. What the inductive reasoning suggests is that, the general rule which may, as Levi believes, be implicit in the relation between the instances, is always discoverable. What the judge does is that he discovers that general rule. Secondly, Levi is seeking to establish a moving system where the general suggests hypothetical cases and overshadows coming decisions. Such is a going concern and seemingly interesting. The inductive model of reasoning still has an important role to play in the judicial process specially by reference to case law.

(c) The Analogical Reasoning

The simplest enunciation of the analogical model of reasoning is that similar cases are treated alike. It is probably the most widely accepted description of argument in Anglo-American legal thought54 and the oldest style of reasoning which has been, largely dependent on experience. Lloyd states that, “Legal like any other reasoning leans heavily
on argument by analogy. "The human mind", he adds, "feels a natural disposition towards treating like cases alike."

Since it is concerned with particular cases or with each case in relation to another case it is sometimes referred to as reasoning by example". Aristotle who uses this expression states that, "to argue by example is neither reasoning from part to whole, nor reasoning from whole to part. Rather it is reasoning from part to part". The cardinal element is the similarity between the two parts.

It is always felt that justice requires that similar cases should be treated alike but establishing the similarity is always problematic. There are surely no strikingly similar instances in life. What the judge does is that he similarly treats the particular case before him as a former one was. This is clearly followed or purported to be followed in the Anglo-American system of precedent and in places where the common law system is dominant.

In assessing this kind of reasoning it is contended that "the analogical model's weakness is its focus on the evolution of specific rules. It speaks mainly of the end product of legal reasoning not the argument bringing it about. However, some sort of analogy is always used in legal reasoning, but the strict adherence to the theory will defeat the ends of justice instead of serving them. Not all like cases should be or are actually treated alike since the law allows for exceptions. The law itself does change from time to time and in accordance with the change of circumstances and social
needs. A strict analogy might hinder the judicial creativity.

Surely, the judicial reasoning is the most recurrently stressed issue. The whole process may not go out of the grasp of either deductive or inductive reasoning. What remains is for the court to find an easy and sound model of reasoning to make its decision. The deductive model is the most suitable when the application of statutes is in issue. The inductive method is suitable in the sorting out of case law.

4. The Judicial Interpretation of Statutes

This field has been the concern of different jurists since the time of Blackstone. It is the process by which the courts determine the meaning of a statutory provision for the purpose of applying it to the situation before them. By interpretation of statutes the courts may exercise a creative role to fill in the gaps in the law.

The rules of interpretation of statutes take so many forms, but for the sake of this section only the coming points will be dealt with, namely (a) the traditional approach to judicial interpretation, (b) the basic rules of judicial interpretation, and (c) the maxims of judicial interpretation.

(a) The Traditional Approach to Judicial Interpretation of Statutes

It is Salmon who contends that, "the duty of the
judicature is to discover and to act upon the true intention of the legislature. He believes that the essence of the law lies in its spirit not its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Moreover, the same idea was once declared by the judgement of Lord Simpson of Claisdale in Raling London Borough v. Race Relations Board, where he stated that, "it is the duty of a court so to interpret an act to give effect to its intention. The court sometimes asks itself what the draftsman must have intended." The idea behind such an approach is that in applying law, the courts have to look for the intention of the legislature in order to give the statute the proper meaning that serves the purpose for which it is enacted.

Whether it is the "intention" or "purpose" of the legislature, it is thought, the approach has been a direct revolt against the strict rule of literal interpretation of statutes especially where the latter has resulted in absurdity or injustice. Furthermore, though it has reigned for a long time, the traditional approach has become the target for so many attacks. The proof of the legislature's intention is a priori hardly possible. Radin is convinced that a legislature certainly has no intention, even though some people would like to believe so much in its existence. Sometimes this approach appears unreasonable especially when the courts found themselves searching for the intention of the legislature regarding an Act issued a century or half
a century ago. If such an intention actually existed, there is of course a possible circumstantial change which may have resulted since that time. The courts are not well equipped to go through the whole materials, pre-materials, discussions etc. of the legislature to grasp its intention. The legislature itself is aware of this fact and for that it makes premisses as preludes expressing of the legislator’s intention. People now speak about the presumed intention since actual intention is something out of hand. That intention, i.e., the presumed intention, deals with the purpose that the legislature is aware of as one he is supposed to have or presumed to have. 68

However, the idea is not wholly nonsensical. We still approve of the intention of the legislature as the internal element of the statute when a strict interpretation of it does not avail us.

(b) The Basic Rules of Judicial Interpretation of Statutes

Of the basic rules of interpretation, are the literal meaning rule, the mischief rule; and the golden rule. The three will be analyzed as follows i—

(i) The literal meaning rule— The courts were supposed not to go beyond the literal text i.e. the letter of the law. 69 This model is now revived and followed particularly in penal statutes. According to this rule the courts apply the statutory words in a strictly literal sense.
The rule is sometimes referred to as the "plain", "strict", "ordinary" or "natural" meaning rule. With all these labels, it reflects a very strict and narrow model of interpretation. In his judgement in *Ashley v. Boul*, Jervis C.J. stated:

"If the precise words are plain and unambiguous, in our judgement we are bound to construe them in their ordinary sense, even though it does lead to our view of the case to an absurdity or manifest injustice".

Thirty three years later, Tindal C.J. stated in *Susse*, Pearsage Claim, that:

"If the statutes are in themselves precise and unambiguous, then no more can be necessary to expound those words in that natural and ordinary sense. The words themselves do, in such a case best declare the intention of the legislature".

The rule thus requires that in absence of ambiguity or absurdity or uncertainty, the literal meaning of the words should be followed. Lord Denning attacks this rule most heavily and is convinced that time has come to abandon such a rule as being out of date. He endeavours to replace it by a purposive rule in which the purpose of the legislature is the all important element. Nonetheless, the rule still serves a purpose with some qualifications specially in penal statutes. Such qualifications are that, considerations of justice and reasonableness should always be taken into account.

(ii) The mischief rule: This rule requires that the judge
shall partake of avoiding the mischief which the statute
is intended to remedy. He is to promote the remedy and
suppress the mischief. Where the statute has been clearly
enacted to suppress mischief of one sort, this rule will
not allow it to be so interpreted as to suppress mischief
of different sort what was quite outside the intention of
the legislature. The leading case in this regard is
Heydon's Case, where four things were considered, namely,
(a) what was the common law before the making of the Act
(b) what was the mischief and defect for which the common
law did not provide? (c) what remedy hath Parliament re-
solved and appointed to cure the disease of the common
wealth? (d) what is the true reason for the remedy? Judges
shall make such construction as shall suppress the mischief
and advance the remedy. Heydon's case is supposed to
be only applicable when the court finds that the statutory
words are absurd and ambiguous. In Corris v. Scott, the
plaintiff claimed against the defendant in respect of
the loss of his sheep which were washed overboard and
crowned while the defendant was engaged in carrying them by
sea. The loss was due to the fact that pens had been
provided for the sheep, and this was in breach of a duty
imposed by a certain enactment to provide pens for animals
carried by sea. The plaintiff asserted that since the loss
followed upon the breach of this duty he ought to succeed,
but it was held that the purpose of the relevant regulation
was not to prevent loss abroad but to minimize the spread
of contagious disease, and it, therefore, followed that
the claim did not fall within the "mischief" sought to be prevented by the rule. The rule then aims at the curing of the mischief which may result from the application of a statute and promote the remedy.

(iii) The golden rule

This is fairly near to the literal rule, though it is supposed to be an exception to it. According to the golden rule the words of statute will, as far as possible, be construed according to that ordinary plain and natural meaning, unless this leads to an absurd result. Then and only then, the language of the statute may be varied or modified so as to avoid the absurdity or the injustice which would otherwise result. This latter step is the real departure from the literal rule.

The golden rule is always used by the courts where the statutory provision is capable of more than one literal meaning or where a study of the statute reveals that the conclusion reached by applying the literal rule is contrary to the intention of the legislature. Hence, the judge must give effect to the ordinary or, where appropriate the technical meaning of words with in the general context of statute; he must also determine the extent of general words with reference to that context. In Pegler v. Smith, it was stated that:

"It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction unless that is at variance with the intention of the legislature, in which case the language may be varied or modified, so as to avoid such inconvenience but no further".
This supports what has just been stated. It is submitted that the words of a statute have to be interpreted on the basis of their ordinary, plain, natural or grammatical meaning as far as possible, but such interpretation cannot be taken to a step where it leads to injustice, absurdity, repugnance or inconsistency with other provisions of the same statute. What the golden rule suggests is to give the words their ordinary and natural meaning. If such leads to absurdity or repugnance, such ordinary meaning will be varied i.e. the court will deviate from it.

(c) The Maxima Pertaining to Judicial Interpretation of Statutes:

The relevant maxima are (i) the *ejusdem generis*,
(ii) *noscitur a sociis*, and (iii) *expressio unius est exclusio alterius*. They are originally rules of language which have now have special use in jurisprudence.

(1) Ejusdem generis (of the same kind): The above maxims serve to restrict the meaning of general words to things or matters of the same kind (genus) as the prescribing particular words. One understands from this that: the particular restricts the general. Mr. Driedger thinks that where general words, are found following an enumeration of persons or things all susceptible of being regarded as species of a single genus or a category, but not exhaustive of them, their construction should be restricted to the thing of that class or category unless it is reasonably clear from the context, general scope and purview of the Act, that Parliament intended that they should be given a
broader significance. Accordingly, the general terms following particular ones apply to such persons or things as sicutem generis with those comprehended in the language of the legislature. We mention in this connection the interesting decision in Evans v. Cross, where the applicant was charged with having driven a car outside the white line when overtaking on a bend on the road. He was charged under the Road Traffic Act (1930), section 49, for ignoring a traffic sign and was duly convicted by the justices. He then appealed contesting the construction that a white painted line on a road was a traffic sign within the meaning of the Act. Section 48(1) of the Act defines a traffic sign as all signals, warning signposts, direction posts, signs or other devices. It was found that the last three words must be construed as something sicutem generis with preceding words and therefore, a white painted line on a road was not a traffic sign

(ii) Noscitur a sociis (The meaning of a word can be gathered from its context): This second linguistic rule requires that the meaning of a word is to be judged by the company it keeps. Under it, words of doubtful meaning may better be understood from the nature of the words and phrases with which they are associated. In Muir v. Keay, where section (6) of the Refreshment Houses Act (1860), states that all houses, rooms, shops or buildings, kept open for public refreshment, resort and entertainment during certain hours of sight must be licenced. The defendant had premises called "The cafe". Certain persons were found there during the night when the cafe was open. They were
being supplied with coffee and ginger beer which they were seen consuming. The justice convicted the defendant because the premises were not licenced. He appealed to the divisional court arguing that a licence was required only if music or dancing was involved. The divisional court, applying the noscitur a sociis rule, held that entertainment "meant bodily comfort, not matters of public enjoyment such as music and dancing so that the justices were right to convict."

\[\text{Expressio unius est exclusio alterius}\]

(that which is expressed excludes the other)

The maxim refers to the idea that the statute refers only to what it expresses and does not refer to anything else. That what is expressed puts an end to what is silent. For example, where a statute contains an express statement that certain statutes are repealed, there is a presumption that other relevant statutes not mentioned are not repealed.

It is further contended that, where words are used and followed by general words the Act applies only to the instances mentioned. The simplest presentation of this is to state that the expression of one thing implies the exclusion of another and that the statute expresses only things it refers to, and not anything else.

These are of course not the whole linguistic rules for the construction of statutes but only examples which are commonly used in the judicial interpretation of statutes.
5. The Judicial Process in the Sudan

There has been an amazing uncertainty and confusion regarding the judicial process in the Sudan. This is a natural consequence of the frequent change of legislation regarding the judicial system specially in the last ten years. However, it is still possible to work out the general features regarding judicial law-making, judicial reasoning, and judicial interpretation of statutes in the Sudan.

It is apparent that the Austrian view of the function of courts, or, in other words, the declaratory function, has generally been applied. The courts advertently or inadvertently declare the law as it is. As the legislator is generally obeyed, his intention is sought as an indispensable element in judicial interpretation of statutes. However, one may still start with a different and perhaps a unique opinion which may be taken as an exception to the general rule that the courts only declare and do not make law.

(a) Judicial Law-making

There has been a wide opportunity that lent itself to Sudanese Courts to make law, and they have narrowly used that chance to add to our law. Customary rights became part of our land law. Judicial creativity through the interpretation of the formula justice, equity and good conscience could not be ignored as many rules, principles, maxims and even definitions of legal terms were formulated by the judges. Though the innovation of law has been very
limited.

The main objection to this assertion must be that judges here did not really invent law but only discover what was already there or, in other words, they did not create or make what may be called a "judicial legislation" in the strict sense of the term. They only declared either the English law or existent local customs.

But a creative role has been played even if the above objection is conceded to. English law was not blindly applied. It was in many instances modified and subjected to the local conditions and social realities. This happened as a matter of course. It is the formula "justice, equity and good conscience" which has given judges a legislative power which could hardly be denied. It is observed that:

"Section 9 of the C.J.U. 1929 gives the Civil Courts wide legislative power by way of judicial decision to fill the gaps in the law, for which the legislature has not made any positive rule of law".

It is not possible in this context to state all the cases in which the court, acting on this formula made law. But three examples may be given:

In the case of Saleh Sibhi v. Sibbi, Corman C.J., refused to apply the English Statute of Fraud and held that a guarantee may be enforced in the Sudan though not in writing. The test, for applying English statutes, he believed, is whether the statute affords equity, justice
and conscience. The grounds for the rule may well be found to rest on the fact that the population of this country was largely illiterate and the courts could not therefore require guarantee or all contracts to be in writing in order to be enforceable.

The second case is *Khartoum Municipal Council v.* Michel Cotrag, in which Madawi J. refused to be guided by English (or any foreign) cases over the question of assessment of quantum of damages. He rightly believed that such a question is particularly local 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.

The third case decided by Awadalla J. in 1958 was *Adam Mansour v. Khadiga el Bredar*, where he ruled that the English law rule that a tenant remains liable to pay rent even though he is deprived of the use of the premises by frustration was not to be applied in the Sudan.

Awadalla J., then stated in this regard that:

"I do not think that it would be in accordance with justice, equity 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 deviation from the English law in this case was justified by the hardship which such a rule would cause.
supplemented existing statutes.

The same thing may be said about the rule under section 6(2) of the Civil Procedure Act 1974\textsuperscript{112} (which is now reproduced with some modification under section 6(2) of the Civil Procedure Act, 1983). Tamba J. once said that:\textsuperscript{113}

"It is right to say that the Courts exercise what resemble legislation in the judicial level by filling in gaps of the law for which the legislature does not make a rule".

However, the above examples and similar other cases are but exceptions. The general rule was that the courts generally received the English common law and even sometimes English statutes. They tended to declare the law as it existed in England and when they applied the local custom they only gave custom when it had been given a legal validity through its recognition and adoption by statute.

With the exception of the above cases, judges became convinced therefore that their task was not to make but
only to interpret and apply the law as it existed — whether just, unjust, moral or immoral.

There is abundant evidence to justify the preceding observations. Many examples may be given in this regard. In *Civac Brothers v. Nicola Pattilo*, 114 (1910) it was believed that, the deviation from English law under the formula, "justice, equity and good conscience", would not only be a legislation by judges decision but also an introduction of a new philosophy.

It is deducible from this decision that:

a) the courts were bound by English Law.
b) legislation by judges was wrong, and
c) the deviation from English law was an introduction of a new philosophy.

What concerns us here is point (b) which seems to have been announced for the first time.

Two other decisions were later made by Bennet C.J. The first was in 1936, in the case of *Hengin Mantos v. Boxall* 115 & Co. He stated there that:

"Whatever may be the scope and meaning of section 9 of the Civil Justice Ordinance, 1927, it does not enable this Court to set itself up as a legislature to enact any foreign statutory enactment of its own imagination that may recommend itself. It is confined so far as many body of foreign law is concerned to the application of general principles but cannot borrow any artificial qualifications which may be grafted on the principles by foreign statute."
This decision was principally against the reception of the "artificial qualification" regarding a foreign statute and was for the application of the general principles of the statute. It is possible to maintain that it also meant that:

(a) The Courts by all means and under whatever justification should not assume the function of the legislature (whose function is to make law) to enact any foreign law (i.e., by bringing into the law a foreign statute and applying it as law).

(b) The Courts were restricted (in so far as a foreign statute was concerned) to applying the general principles of the foreign statute. Of course if the statute was a national one, the Courts were bound to apply it. Foreign statutes or exactly their general principles were only referred to in absence of express national statutes.

In his second decision Bennet C.J. was more clear on the point when he stated in *Abdalla Ahmad Suliman v. Estate of Yousef Elias* (1944), 117 that 118

"The Courts existed to interpret the law not to make it, and the latter action, apart from deliberate injustice is the worst in which a court can indulge".

This is similar to Jowitt's cry regarding the task of judges. The only task which the Courts are made to accomplish is to interpret the law. The making of law was regarded not only to be wrong but the worst of what the Court might do. Moreover, the Courts were not allowed to make law even if the law which they endeavour to interpret was itself unjust.
Bennet C.J. was certainly influenced by the doctrines that existed under the English common law. He was not aware that our judges would thereafter follow him in this respect almost blindly and for ages.

Thirteen years later, Mr. Justice Abu Rannat reaffirmed the contention that "the legislature made the law and we are bound to apply it".

The result was that the courts in the Sudan were to declare law (sometimes as it existed in England) and not to make or change the law. Hence, the claim that our courts blindly adhered to the will of the legislature and abstained from any creative role was then confirmed. Abu Rannat's contention, which was a reproduction of Bennet's, has, one believes influenced judges up to the present day.

(b) Judicial Reasoning

The process of judging in the Sudan appears to correspond to formal logic or syllogistic reasoning. A deductive method in which the major premise is predetermined rule of law, already in existence, is therefore, common. This, one believes, is due to the positivist outlook which has been predominant in our legal theory. It explains the respect of the judges for the legislator or, more precisely, for the sovereign whose law i.e. commands, is made major premises. The validity of such law is hardly questioned. Judges take the legal rules as the firm basis upon which they build their conclusions.
However, they adopt other forms of reasoning in addition to reasoning by examples and by analogy.

It is regretted that there has not been a unique judicial reasoning in the Sudan. In fact, the general instability, uncertainty and constant change in the judicial system, have made for different kinds of reasoning.

How the following kinds of reasoning will be analysed, namely:

(1) Deductive Reasoning—The deductive method is applied with much confidence and almost mechanically. This is true whether the legal rule is a statute, a custom or a general principle. It is true even in case of precedent.

The legal process has in many instances consisted of the application of a fixed and ascertained rule in a statute e.g. section 301 of the Penal Code 1983 reads:—

"Whoever by force compels or by any deceitful means induces any person to go from any place, is said to abduct that person". This section of the Penal Code constitutes the major premise. The minor premise is a factual situation e.g. accused who took a 12 years old boy to a lonely place, tied his hands, pushed him into a house, threatened the boy with death if he refused unnatural intercourse. The conclusion is that he was said to be guilty of abduction.

The judging process starts in this connection with asking many questions like:— "Did the accused compel by
force or by any deceitful means the complainant to go to the place." If so, did he intend to do that? etc. The rule in the statute may be delimited by means of defining the words of the provision. The facts are then stated. If the case is one of defamation, for example, and the crime relates to words used by the plaintiff, the whole statement or the words used are recorded. The law will then be applied to the facts. In the final analysis, the court will determine whether the accused is guilty or not "as a conclusion."

If the rule of law is to be derived from a local custom, the custom must firstly be proved and the courts must further ascertain that such a custom is valid. The factual situation is then presented and the custom is applied to the facts. The facts may be stated before the legal rule, i.e. the custom. However, they must be reconsidered in the light of that rule. The court at the end makes its own conclusion as to whether upon such reasoning, the party claiming the customary right is entitled to it.

In case of precedent, the ratio decidendi of the first case represents the rule of law which is the major premise. The factual situation in the second case is considered as the minor premise. Such a rule is then applied to the facts of the second case. The ratio may contain a general principle of law or an interpretation of a statute. In all cases the ratio remains the major premise. The problem here is whether the higher court has expressed any rule of law. Such a rule must first be ascertained and then applied to the facts of the case before the lower courts.
In all these cases the rule of law is assumed to exist and to be binding. It is taken as the major premise. The minor premise is the factual situation before the court. The conclusion which is reached is the court's decision. The system is thus one of applying known rules to diverse facts. The judge begins with some rule as his premise, applies this rule to the facts and thus arrives at his decision. It is worth noting that one has mainly depended on the process of judging in the courts of first instance where judges make full arguments and explicit reasoning upon the facts which they hear and the rules of law which they consider and apply.

(11) Analogical reasoning

In cases where there is no statutory rule and the law has to be drawn from cases, a process of reasoning is normally used. The argument is whether or not there is a factual similarity between the first and second cases.

Analogy is used and like cases are treated alike in a system of binding precedents. This is because of our common law orientation which has remained unchanged even though many things have changed since we first looked at common law for guidance.

The use of the rule of binding precedents in the Sudan implies the following methods:

a) Cases are cited in legal arguments and in judgement to provide support for arguments and/or justification for decisions.
b) Cases are cited in the no-law areas to fill in the gaps of law.

c) Reference is sometimes made to many cases in an attempt to ascertain the law, and

d) The law in earlier cases is in many instances sought and thereafter applied to latter similar cases by treating like cases alike.

Point (a) is the common practice in the lower courts. It involves no real reasoning since the art of binding precedent is an art of extracting rules from cases. The judge gives reasons for his decision, i.e., shows why his decision comes this way and not otherwise, i.e., an answer to "why," and he does not adopt reasoning, i.e., address argument showing how he reached his decision (an answer to "how").

As to point (b), it is a case of judicial law-making which is dealt with earlier.

Point (c) is an approach of inductive reasoning. What concerns us here is the analogical reasoning which is suggested in point (a).

The matter involves two stages. One is the stage of the search for the ratio and the second is the application of the ratio. The whole system involved is one of binding precedents. Judges use analogy and tend to discover the factual similarity and differences between cases. The facts may not, however, be quite similar. The issue however, must be the same. The court in the second case normally states the facts of the first case and the rule
which was applied thereto. Usually more than one case are cited. The court may not state that the two cases are similar. But the similarity is always sought, otherwise the appellate authority will rule that the court has wrongly applied the law. The courts tend to extract the principles established by former cases and then apply them to latter cases. The practice does not involve only Sudanese cases. It also involves English and other foreign cases.

The rule of the binding precedent is after all understood to mean:

"That the facts, upon which the legal rule was built in the first case, shall be the similar and the same as those in the latter case." 135

This fails to mention whether or not such a principle requires that the cause of action, and the issue shall also be the same.

Although the rule has been accepted since 1899 it has not yet been consistently applied, and the courts, even the higher courts, sometimes do not apply it. Thus, though the courts in theory adhere to the reasoning by analogy, they in practice decide similar cases differently. They sometimes take no notice of earlier decisions concerning issues of conflict before them. Much confusion is now apparent, for example, in the meaning of "sufficient cause" in cases of a default decree.137

(iii) **Judicial Reasoning in Civil and Criminal Courts**

In Civil Courts, the judge is asked to order the framing
of issues or he himself may make the same. Every issue will be discussed separately. The facts are reproduced and analysed in connection with the law relating to the issue.

No specific method of reasoning is applied. When a precedent is relevant, the deductive reasoning is reversed. The judge makes his contention and cites the case to support it. Few do it correctly. That is to say, they put the ratio or the rule as the major premise, then put the relevant facts as the minor premise and make their decision by the deductive method. They state the facts of the first case and the facts of the second case and, if they are similar - apply the rule embodied in the ratio of the first case to the facts of the second case.

In criminal courts, the method applied is unequivocal. The rule in the penal statute is stated e.g. the provision in the penal Code defining the offence. The judge then considers the factual situation and applies the law to the facts.

(c) Judicial Interpretation of Statutes

Our courts strive to find the intention and will of the legislator as well as the objects of the legislation. The two are taken to represent two faces of one coin. What has been conclusively established is that the courts exist only to interpret the law. The rules of interpretation used are those applied in England and as such English common law textbooks are always cited.
The topic may, however, be dealt with under the headings of (a) statutory definitions and general rules of construction, and (b) judicial interpretation. The rules relating to the former are no doubt relevant and important to the latter.

(1) **Statutory Definitions and the General Rules of Construction**

The legislature has formally been providing for the general rules regarding the construction of statutes in the Sudan since 1953. Such rules have appeared in the Interpretation Ordinance, 1953, the Interpretation and General Clauses Ordinance, 1955, and the Interpretation of Law and General Clauses Act, 1974. Moreover, statutory definitions do equally appear at the beginnings of almost all laws. Now words like "law", "person", "year" etc. are officially defined. The courts are bound with these definitions and should judicially notice them. The content of the general rules of construction appearing in the statutes may be summarized as follows:

1- The provisions of every law shall be construed in such a manner as to achieve the purpose for which it has been enacted and in all cases the construction which achieves such a purpose shall be preferred to any other construction.
2. If any provision in any law is inconsistent with any provision of the Constitution the provision of the Constitution shall prevail to the extent of removing that inconsistency. 136

3. The provisions of a subsequent law shall prevail over the provisions of a preceding law to the extent of neutralizing any inconsistency. 140

4. Any special law or any special provision in any by-law in respect of any matter shall be deemed to be an exception to any general law or general provision in any law governing that matter, and also that.

5. Words importing the masculine gender include females, words in the singular include the plural and vice versa. 142

The above rules had been principally taken from English law. 143 In 1983, a totally new philosophy was adopted. Section 2 of the judgements (Basic Rules) Act 1983 provides that:

In the Construction of the enactments and unless the law is plain or articulate:

(a) The judge shall presume that the legislature does not intend to contradict Islamic Shari'a nor to abrogate a definite command or permit a plain prohibition and that it (i.e., the legislature) considers the guidance of Shari'a regarding promotion of virtue and prevention of vice, important.
(b) The judges shall construe the ambiguous and discretionary phrases in accordance with the rules of Shari'a, its principles and general spirit.

(c) The judge shall construe the expressions in the light of the legal and linguistic rules in Islamic Jurisprudence".

The importance of this provision is that it lays down new principles for bringing the law in conformity with Shari'a. It is observable that:

1- The judge has to apply the plain and definite meaning whenever the provisions of the law are not ambiguous.

2- The judge is to presume that the legislature does not intend to contradict Islamic Shari'a. If there is any law contrary to Shari'a he consider it to be null and void and shall apply Shari'a law instead.

3- The general rules of construction in Islamic jurisprudence and all methods of interpretation of the texts including linguistic rules shall be followed.

This law does not, however, intend to adopt any specific Islamic School of jurisprudence as may be observed and as such the judge can apply the doctrine or doctrines of interpretation according to the school or schools he chooses.

It is usual to find statutory definitions at the beginning of any Act etc., but it is unusual to find
general rules of construction. However, section 458 of the Penal Code 1983 provides for general rules to be considered by the court in applying the provisions of the Codes. The section is an incorporation of procedural rules and rules of evidence. Section 458(5) states that: "No provision in this Code shall be interpreted contrary to any principle of Shari'a. This is obviously part of the theory stated for in section 2 of the Judgments (Basic Rules) Act, 1983 which has just been mentioned.

The interpretation of statutes and General Clauses Act of 1974, still in effect, gives by its wording cite section 6 (31), prevalence to the Judgments (Basic Rules) Act 1983, to prevail as being the later in time.

(i) Judicial Interpretation

The judicial power to interpret the law is undoubted. The Constitution vests upon the Supreme Court the jurisdiction to interpret constitutional and legal enactments. This jurisdiction has always been reaffirmed. The Courts generally consider themselves as mainly concerned with the interpretation and not with the making of the law. The types and rules of interpretation they use are numerous. They repeatedly state that they seek the real intention of the legislature.

The scope of this power of interpretation is not wide. It does not amount to judicial legislation even in cases of absence of law. In the period which preceded
the third day of June 1972, i.e. the date of the issuance of the Judicial Authority Act, 1972, there was a dilemma as to the identity of applicable law. An obvious gap was created. This is because an old law was abrogated and the philosophy upon which it was built was abandoned, while a new law and a new legal philosophy were introduced. The legal persons were not familiar with it, had no training on it and no legal materials were available with regard to such law. The gap was thus created by the absence of having the exact meaning of the new law. It was, however, declared that: 197

"What has been enacted since the 3rd day of June 1972, the date of issuing the Judicial Authority Act 1972, forces us to make use of relevant (existing) enactments, and to utilize the rules of interpretation to fill in any gap. If such means do not avail us we have legally nothing to do but to stick to our judicial function and say that the legislature does not show us his will in a complete and clear manner in order to apply it - perhaps we may call upon him to fill in that gap. We cannot intentionally breach the law upon whatever justification as we are ourselves entrusted with applying it."

This statement is especially relevant to the theme of the thesis. The reasons are stated as follows:

(a) By interpretation or construction the courts endeavoured to fill in the gaps of the law or lessen of their vigorous ramifications.

(b) At the same moment they stood firmly for what they took as the function of the judicial authority i.e. to interpret and apply the law. They expressly declare that they were not to
act beyond that function and interfere with that of the legislative authority.\textsuperscript{145}

Judges sometimes volunteer to make out the doctrine of interpretation which is followed in the Sudan but they miss its whereabouts.\textsuperscript{146} However, two types of interpretation are suggested, namely: The \textit{literal} and the \textit{functional} interpretations.\textsuperscript{150} The latter which is one in which the intention of the legislature is sought. It is not therefore limited to the literal meaning but beyond that it makes use of the relevant evidence which show the intention of the legislature.

Nonetheless, the Courts were taken not to be \textbf{absolutely free} in their interpretation of the statutes. They should not, for instance, go to the extent of adding to or subtracting from the legislation on the \textit{pretence} of realizing the intention of the legislature. They must stick to the settled rules of interpretation which are but rules recommended by logic, guided by natural sequence of things and governed by the rules of language.\textsuperscript{152}

The courts should not, therefore, hesitate from referring to dictionaries scientific and linguistic references in so far as this reference would help explain the meaning of the word in need of interpretation.\textsuperscript{153}

\textbf{In Sudan Government v. Oleid Hassan Ahmed}, it was stated that:

\textbf{In the Sudanese Law, there is no definition to the word "government", save for that in the Interpretation and General Clauses Ordinance (1955), which referred to "government" as meaning the government}
of the Sudan. Such a definition will not avail us. We refer to the rules of interpretation and primarily to the "literal interpretation rule in order to ascertain the intention of the legislature. If such a rule does not avail us reference will be made to the "Golden Rule" and lastly to the "Mischief Rule".

The court firstly applies the plain meaning rule and gives the words their ordinary and natural meaning for it is always presumed that the legislature when uses certain words intends their ordinary and natural meaning. Such presumption is irrefutable.

The courts accept the dictionary meaning to be the ordinary and natural meaning of the words. If the court fails to grasp the literal and ordinary meaning it will then resort to the golden rule. That is to say when the words are ambiguous the court has to avoid the ambiguity.

The mischief rule is, however, applied as a last resort.

The maxims of judicial interpretation of statutes were only referred to occasionally.

Courts are now called upon to apply principles of construction and detailed rules of interpretation of Islamic jurisprudence without being limited to a specific school. If they do make reference to such principles and rules new jurisprudence will certainly emerge where the courts seek not the intention of a human legislature but the ends of Shari'a as a law of heaven.

Conclusion

The inner working of the judicial system in the
Sudan is by no means a marginal issue. Its study should constitute an essential ingredient of our legal theory. Words are tools judges (and lawyers) use in their profession. These words are used in the statement of law and of facts. The way of dealing with law and facts is the art of judging. Whether they used English or Arabic, our judges really managed to make what we may enthusiastically call "Sudanese Law". Such a law may be ambiguous, uncertain and its parts may be irreconcilable but it is, essential in studying our legal history.

It is not a secret that we have been very much embarrassed by the common law doctrine that the judges' task is not to make but to declare law. It is for the legislature and the legislature alone to make law. This owes much to the positivist outlook judges hold. They stick to the law as it is whether just or unjust, moral or immoral. Their duty as they perceive is to apply the law without questioning its wisdom. It has however been very lately suggested that they may cause the legislature to change such a law. Any attempt by the judges to make law or change it is against the law.

In fact, our judges as well as English judges found themselves in a contradictory situation. By and large, they made law through filling in the gaps of the law. The large part of the principles, legal rules and maxims in our law have evolved in that way. It is true that our courts failed to fully make use of the opportunity given to them by the formula "justice equity and good conscience"
but they no doubt did make law. The bulk of case law today in existence, guides the judicial practice in both civil and criminal law - to the effect that nearly all judges resort to the law developed through precedent.

Moreover, the judging process tends to use formal logic. The deductive way of reasoning, whether in relation to statutory provisions, custom, a ratio decidendi of a case or any legal principle, is normally applied. Other kinds of reasoning do exist but remain insignificant. In the system of precedent, the analogical reasoning is of course followed and the similarity is sought but eventually the ratio of the first case is applied syllogistically to the second case.

In the field of interpretation of statute our courts started by adopting the English rules of construction and even statutory definitions. These rules continued to be influential for a long time. However, in 1983, a radical change took place by section 2 of the Judgments (Basic Rules) Act, 1983 which instructs judges to presume that the legislature does not intend to contradict Shari'a and to apply the rules and principles of interpretation of Islamic jurisprudence.

The writer is of the opinion that no genuine development has taken place in the judging process in the Sudan. One can hardly find his way through the many decided cases as to the exact method or methods of reasoning applied i.e. whether deductive, inductive, or even "hunching".
Cases are normally cited to support premises or conclusions already made by the judge making the decision. Issues are framed and then the facts are stated as made by the parties or reproduced in a similar way. These and many other misgivings are obvious in the minor courts where the judging process looks untidy, the premises and conclusions are not logically arranged and the law is stated not as premise from which a decision upon facts to be made but to support an idea already upheld. The above shows the absence of a clear technique of judicial reasoning in the Sudan.
NOTES


2. Ibid., at p. 417.


4. Ibid.


7. Ibid., at p. 523.


9. Ibid., at p. 822.

10. Frank, op.cit., p. 32.


12. See Frank, op.cit., p. 52.


16. See supra, p. 120.

17. See above n. 12.

18. Davis, op.cit., p. 311.

19. Bacon’s is referred to in infra p. 95.


23. See infra.


29. See Sinclair, op.cit., p. 419.
30. See infra, p. 116.
32. Ibid., pp. 761-762 n.i.
35. See Boonin, op.cit., p. 155.
36. See Allen, op.cit., p. 2.
37. See Paton, "A Text book of Jurisprudence" op.cit., p. 118. However, Paton is much concerned with the inductive than the deductive model.
40. A hypothetical situation.
41. This is the rule in Ryland v. Fletcher see supra,
42. PP, (first premise) SP, (second premise) and C, (conclusion).
45. Boonin construed Holmes as making two points: First, that the changes and development of legal rule and principles cannot be be fully explained and made intelligible in terms of purely logical analysis of legal concepts. Second that such logical analysis is not a sufficient tool for rationally deciding legal controversies. See Boonin, op.cit., p. 160.
47. Ibid., at p. 833.
48. Ibid., at p. 832.
51. Idem.

53. Ibid., at p. 20.


57. Ibid., at p. 1-2.

58. Per Sinclair, op.cit., p. 830.


60. Interpretation and construction may be distinguishable in meaning see Curzon, op.cit., p. 253.

61. Interpretation as used here stands for both meanings.


63. Ibid.

64. (1972), A.C., p. 342 at p. 360.

65. Radin distinguishes between "intent" as intended meaning and "intent" as purpose. The first (as also the second) is discoverable from the records of the legislative proceedings. See Mac Radin in Mac Callum, "Legislative Intent", (1965-66), Y.L.J., Vol. 75, p. 754.
66. Fort the strict rule, see infra, p. 28.


69. See Pinner v. Everitt (1862), All, R.R., p. 257 at p. 258.

70. See the judgment of Jerris J., Berthon, from Cross, op. cit., p. 22.

71. See Ibid., pp. 22-3.

72. See Pinner v. Everitt, see above.

73. (1851), from Cross, op. cit., p. 13.

74. (1885) from Cross, Ibid., at p. 13.

75. Ibid., at p. 11.


77. See Salmon, op. cit., p. 130.


79. Idem.
80. See Cross, op.cit., p. 133.
81. (1874) L.R. CEX, p. 125.
82. Smith & Keenan op.cit., p. 121.
83. Ibid., at p. 123.
84. See Cross, op.cit., p. 43.
85. (1836) 2M2 W 195 from Cross, Ibid., at p. 15.
86. Ibid., at p. 16.
87. Perhaps the last word here is "Construction" below.
88. See Salmond, op.cit., p. 133.
90. Ibid., at p. 116.
93. Idem.
94. Salmond, op.cit., p. 133.
95. Cross, op.cit., p. 120.
98. Smith & Keenan, op.cit., p. 123.
99. See supra, pp. 310-311.

100. This is more clear in the application of the formula: justice, equity and good conscience.

101. See below.


103. Section 9 of the Civil Justice Ordinance 1925 reads: "In cases not provided for by this or any other enactment for the time being in force the court shall act according to justice, equity and good conscience".


105. Idem.


107. Ibid., at p. 113.


109. Ibid., at p. 81, 1.


111. Ibid., at p. 243.

112. See infra chap. 11 pp. 108, 111.

116. Ibid., at pp. 238-239.
118. Ibid., p. 307.
120. Ibid, p. 174.
121. See supra, p. 52-5.
123. See, as an example Sudan Government v. Koyal El Jack, (1965) S.L.J.R., 166 for the meaning of "probable" and "likely" in s. 248(b) of the Sudan Penal Code, 1925.
125. See ibid., at p. 31.
126. The Courts, as we have seen, takes judicial notice of the custom, as well as the statute. As such the
rule in custom is predetermined, already existing rule of law.

127. In the many decided cases I have not managed to come across one, I find my colleagues citing cases in this way i.e. in order to justify contentions which they already made. Even higher courts do the same, see Osman El Sheikh Mohamed v. Abdel Rahim Fadel El Mula (1975) S.I.R., pp. 158, at pp. 222-225.

128. See Mustafa, Z. The Common Law in the Sudan, op.cit. passim.

129. See further infra, p.

130. See supra, p. 118.

131. The two stages are relevant to the deductive reasoning see supra, p. 124.

132. For similarity of the issue or issues see Osman El Sheikh v. Abdel Fadel Al-Mula (1975), S.I.R., 319 at p. 222 for a process of stating the facts of the earlier case, the rule in that case etc. see infra, pp. 222, 223 and 224.


138. See the IGCA? 1974, see 6(1).

139. See ibid., see 6(2).

140. See ibid., see 6(3).

141. Ibid., sec. 6(4).

142. Ibid., sec. 6(4)(2).

143. See the Interpretation Act, 1889 (England).


145. See sec. 320 of the CPA, 1983 which states for the power of the supreme court to see cases relating to the interpretation of law.

146. See supra, p. 246-250.


148. Ibid., at p. 268.
145. It is believed that Article 9 of the Constitution (See supra Chap. 2) governs the general doctrine of interpretation in the Sunna. It is obvious that Article 9 is the concern of the legislature not the courts and it relates to the sources of legislation not the doctrine of interpretation. See a Judgement in the Interpretation of Certain Provisions of the Civil Procedure Act 1974 1st Mar. 1979 from Riyadh, Al-, Namaq min ahkam al-Mahkama al-'Aliya fi Kadaib al-Kaabi (Examples of the Supreme Court Judgements in Cases of Homicide) 1984, p. 324.

150. Ibid., at p. 323. This classification is adopted by Salmond, see Salmond, op. cit., p. 132.

151. See Riyadh, op.cit., p. 323.

152. Ibid., at p. 324.

153. Idem.


155. Idem.

156. Idem.
PART TWO

SOME LEGAL THEORIES
CHAPTER FOUR

THE NATURAL LAW THEORY

1. Introduction

No legal or philosophical theory has ever evoked so much controversy and copious reaction like the natural law theory. It justifies both the conservative as well as the revolutionary viewpoints.

Historically, it played a revolutionary role at certain stages of Western civilization; but it equally played a conservative function at other stages.

It is worth noting that the discussion of the natural law philosophy should be delimited lest one goes astray. Primarily, man's quest for justice, his tendency to appeal to a higher law and to live in society and the persistent argument pertaining to natural and inalienable rights of citizens in a state, are the main fields of natural law thinking which will be discussed in this chapter. Since ample literature exists on the subject, I shall be fairly selective in my references.

After examining the main theses of naturalist theories, I shall examine those theories in relation to the Sudanese political and legal experience.

2. What is Natural Law

The phrase "Natural Law" has been employed in diverse contexts in legal theory. It is used to indicate those ideas by which positive law can be judged and to emphasise
the unchanging basis of the law. For Justinian, the law of nature is the law which nature has taught all animals. It is, then, not peculiar to the human race, but belongs to all living creatures. This asserts the principle of universality of natural law which will be explained later. St. Thomas Aquinas believes that natural law is nothing else than the rational creatures' participation in the eternal law. It is but a dictate of or something appointed by reason.

In English language, it appears that natural law has two meanings: It is firstly used to refer to the body of natural and the moral laws governing man's entire rational activity i.e. in respect to God, to himself and to his fellowmen. The second meaning is attached to natural law when it denotes exclusively to regulation of man's actions in the legal and social spheres i.e. natural rights.

Whatever meaning it may have, the most remarkable characteristics of natural law are: (a) It has a universal validity. That is to say, its principles are valid for all men of all centuries and in all places. It is Justinian who clearly maintained that the law which natural reason has prescribed for all mankind is held in equal observance amongst all people and is called universal law, i.e., the law which all people use. Perhaps one of the greatest achievements of natural law lies in the foundation of a system of laws of universal validity. (b) It is immutable. This means that it is unchangeable. Cicero asserts that the true law which is right reason in agreement with nature, is of universal
application, unchanging and everlasting. He maintains further that, it is a sin to alter such a law, that it is not allowed to attempt to repeal any part of it, and it is impossible to abolish it entirely. Justinian states in this connection:

"Natural law... which is observed equally in all nations, being established by divine providence, remains for ever settled and immutable: but that law which each state established for itself is often changed."

Accordingly, natural law stands unchangeable. Both universality and immutability confer on natural laws special preference and maintain its superiority over positive law.

Natural law as metaphysical speculations in the Platonic teachings has little relevance today. Natural law is now principally concerned with the natural rather than the supernatural phenomenon. It has, since the beginning of the nineteenth century, been centered on the political and legal life of the individual and society. It has become a basis of natural and inalienable rights.

3. Some Natural Law Ideas

(a) The Theory of Justice

We have seen that law aims at justice and that judges in particular are called upon to follow the rules of natural justice. What is just is equated with what is reasonable or according to the law of nature. In fact the main question addressed by Plato's "Republic" is: What does justice mean and how can it be realized in human society?
Plato calls for an ideal society where human life might be so organized that there would exist a just society composed of just men. The justice of society, he believes would secure that each member of it should perform his duties and enjoy his rights. He adopts the Greek philosophy that as a quality residing in each individual, justice would mean that his soul or his personal life was ordered with respect to the rights and duties of each part of his nature.

It is masterly stated that the whole history of natural law is a tale of the search of mankind for absolute justice and of its failure. Now, one of the characteristics of modern natural law theories is that justice is emphasized as an indispensable standard for the evaluation of law. Such a statement finds its roots in Augustine’s bold statement that: There is no law unless it be just. Commenting on this statement, Aquinas agrees that the validity of law depends upon its justice.

What is interesting in this field is the equation of natural law itself with justice. A thing is said to be just when it accords with the rule of reason and the first rule of reason is the natural law.

The jurists used to take justice in a broad sense meaning “right”, “lawful”, “fair”, “honest”, due to or from a person and is what one ought to do. All these meanings in fact have been dealt with by jurists and are still included in the theory of justice now known in different countries.
countries.

(b) The Theory of Social Contract

The starting point in the social contract theory is the earliest assertion by the scholastic theorists that man is a rational being, capable of guiding himself and that he is born free and equal to all other men and having natural rights. Though such ideas appeared before Grotius, Hobbes, Locke and Rousseau, it is only with those prominent philosophers that the theory of social contract gained much of its importance. In modern times, the theory of social contract is resorted to as a means of justifying political ideologies or in a highly abstract form to sanction a theory of justice as fairness. Moreover, the idea of contract was found to be the only possible means of setting the natural rights of the individual, within the framework of the state. Thus, the theory is much quoted in the origins of political societies. It is taken as a rational explanation of the state, the only explanation compatible with the pattern of thought laid down in the modern notion of natural law. It is not to be understood, however, that there is a unified set of principles pertaining to this theory. On the contrary, there are different viewpoints. Nonetheless, they have certain features in common. They assert inter alia the individual natural rights, maintain his free will, believe in the capacity of a group to organize itself in a rational way and in the government's duty to preserve the natural rights of individuals. Whether or not the individuals are justified to disobey in case the government fails to perform its duty is a controversial issue.
For Grotius, the constitution of each state had been preceded by a social contract, by means of which each people had chosen the form of government which they considered most suitable for themselves. Thereafter, each people has the right to choose the government they prefer, but once the people have transferred their rights to the ruler they forfeit their right to control or punish the ruler however bad his government. Grotius' theory of social contract is then anti-revolution and most conservative.

Hobbes, on the other hand, acknowledges the authority of natural law in terms of natural rights to which a subjective individual claim is justifiable. He describes the state of nature in a way as to support his own doctrine of social contract. To him, nature has made men so equal in the faculties of the body and mind. This he calls the "equality of ability". From this equality of ability arises "the equality of hope" in attaining the individual ends. The sequence is that, when two men desire the same thing, they become enemies and endeavour to destroy or subdue one another. Therefore, men live insecure. Man will then be in a condition in which every man is against every man, which is called "war. The fundamental laws of nature come to be necessary. The first law is that:

"Every man ought to endeavour peace, as far as he has hope of obtaining it, and when he cannot obtain it, that he may seek and use, all helps, and advantages of war".

This law provides for the original state of nature in which man is to attempt to make for peace and hope for its achievement. This is because man is in an imminent danger.
of his life. He is insecure. And the fundamental law of
to nature, thus, is to seek peace, and follow it. From this law of nature which tends to preserve
peace, arises the second law of nature, namely that:

"Man be willing, when others are so too for peace
and defence of himself he shall think it necessary
to lay down his right to all things and he con-
tented with so much liberty against other men, as
he would allow other men against himself".

By this law, man - as he and others are willing recognizes
their reciprocals right to peace and liberty and concedes
that where others beings. Man in fact transfers his rights
and thus enters into a contract by which he is obliged or
bound not to hinder others' rights. Hobbes' social con-
tract then is a matter of necessity.

For Locke, men are by nature free, equal, and
independent. No one can be put out of his estate and sub-
ject to the political power of another without his own
consent, which is done by agreeing with other men to join
and unite in community for their safe and peaceful living.

Locke believes that the power that every individual
gave the society when he entered into it can never re-
vert to the individuals again, as long as the society
lasts, but will always remain in the community, because
without this there can be no community which is against the
original contract.

On the other hand if the people set limits to their
government or supreme power, the power they gave reverts
to the society upon the breach of such limits by the government or rulers and the people then will have the right to act as supreme and assume legislative power by themselves or place it in a new form or new hands as they think good. 33

Locke's theory justifies revolution or radical change. This is so because the people have the unfettered right to restore the status quo. Locke's ideas had a direct influence on the French and American Revolutions.

Rousseau believes that the fundamental problem for which the social contract provides the solution is the problem of finding a form of association which will defend and protect with the whole common force the person and goods of each associate and in which, while uniting himself with all each associate may still obey himself alone and remain as free as before. 34 Three stages are identified. One is the starting point of the total alienation of each associate, together with all his rights, to the whole community.

The second stage is that, alienation being without reserve, the union is as perfect as it can be, and no associate has anything more to demand, for if the individuals retained certain rights - as there would be no common superior to decide between them and the public - each being his own judge, the state of nature would continue and the association becomes inoperative. Finally, each man in giving himself to all, gives himself to nobody. He does not retain his right that exists in the state of nature, but is given an equivalent for everything he loses. And all are under
the supreme direction of the general will. 35

These ideas point to the very formation of the political societies. The terms of the social contract necessitate the alienation by the individual of his rights to the whole community but the individual retains peace, a political life and a community. Still, natural rights are not absolutely alienable save for the terms of the contract.

As sovereignty is vested in the general will, people will have every right to overthrow the government which acts against this will.

Being built on natural law, the theory of social contract asserts the natural rights of man and maintains his free will. It further asserts the belief in the ability of a society to organize itself in a government whose duty is to preserve individuals' rights and provide them with security.

(d) The Theory of Natural and Inalienable Rights

The theory of natural rights is perhaps the most fascinating area of discussion in contemporary legal theory. Man has become conscious of his rights since birth, and the assertions that: Man is born free "or that men are born and remain free and equal in rights", 36 are but expressions of an axiomatic reality which existed and was known centuries ago.

Fundamental human rights are found to depend on human nature and natural law. 38
The modern theory of natural law is taken to be not a theory of law but one of rights. This is because of the growing emphasis on the human rights both nationally and internationally as in the national constitutions and in international documents on human rights e.g. the International Declaration on Human Rights, 1948. Such rights provide a basis for a social contract where, inter alia, man possesses certain fundamental or natural rights as man. That when the civil society came into being man took over these rights into the newly gained civil status and there they still remain protected by natural law. Hence, the idea of natural rights depends on the existence of natural law, for such rights could only be valid and binding by reason of the law of nature. Examples of these rights are, the right to life, freedom, equality, the right to property etc. being natural, such rights are taken to be sacred, immutable as well as universal.

The contemporary expression of the inalienable rights means that some rights e.g. right to life, liberty etc. are based on nature and cannot be alienated by the individual or the government. We read in the American Declaration of Independence that:

"... all men are created equal, with certain inalienable Rights... among these are life, liberty and the pursuit of happiness... to secure these Rights, Governments are instituted among men.

Being inalienable, the above rights may not be waived i.e. no one may consent to alienate his own inalienable rights. Upon this contention suicide is prohibited. The
government is under a duty to secure the inalienable rights. Nonetheless, the government is taken to be justified in certain instance to usurp individual's inalienable rights for the purpose of social utility and common good.

It is observed in this connection that:

"Although natural law theories have generally assumed respect for life as a primary principle, there also has been a tradition of qualification or limitation of the general principle. Two types of qualifications or limitations are most common. First, the lives of those who attack the common good are not always considered inviolable, thus there have been theories of justifiable capital punishment and of the just war. Second, actions which have a deadly effect but which are primarily directed towards some other good purpose have sometimes been considered justifiable, thus killing in self defence and indirect abortion have been justified."

The idea of inalienable rights though dependent on natural law is more attainable than that of natural rights. It is observed that "inalienable" is predicate of rights "to indicate the moral and logical impossibility of transferring and violating them". "Natural rights" may and may not be understood to be inalienable. To understand natural rights as inalienable, we need to provide an objective ground for political and civil rights. However, both natural and inalienable rights belong to human beings in general and are in theory immune from abridgement and most sacred. It is upon this idea of natural and inalienable rights that the Bill of Rights in all written constitutions of the world today is founded.
Moreover, the political system in natural law thinking approves of liberty and condemns tyranny. There is supposed to be two sorts of tyranny, one real which is symbolized by oppression, the other is subjective and is sure to be felt, whenever those who govern do things shocking to the ideas of a nation. What is always asserted is the dignity of human life and humanity in general.

Many other ideas may be dealt with but for the broadness of the subject we mean to be selective.

It is now clear that the natural law theories are rooted in legal and political philosophy. The ideas of justice, social contract, natural and inalienable rights find their basis in the law of nature as stated by Plato, Aristotle, Augustine, Aquinas, Grotius, Locke, Rousseau and others.

4. The Evolution and Application of the Natural Law Theories in the Sudan

The existence and application of natural law principles in Sudan have been self-evident. This is clear in our constitutions, legislative enactments and judge-made law. Now we will trace the evolution and application of the natural law theory in the Sudan since Funj Kingdom.

a) Historical Background

The superiority of natural law in the Sudan has remained for there has always been a persistent quest for justice and an ideal law. Earlier in the Funj Kingdom a
blend of Islamic law was applied. Justice as the application of law was said to be based on the Maliki doctrine. For the Shari'a Courts the Chief Justice, "quadi al-Islam", administered justice on behalf of the Sultan and the "Mufti al-Islam" was deputed for the interpretation of Islamic law in personal matters of Muslims according to jurisprudence in Shari'a books. Therefore, a Thomist outlook is traceable. The law was given a theological foundation. It was taken to be divine. Moreover, the application of the Islamic law may also be looked at as a quest for a higher and ideal law in contrast to the human positive law. Nonetheless, one could hardly prove or propound with certainty that the principles of natural law were actually observed at that time.

The period between 1821-1844, is referred to in the history of the Sudan as the period of Turkiyya. Its connection with the Khedive was only honorary. One finds it very difficult to speak of a theory of natural law in this period. What was mostly apparent: justifies an essay against such a theory. The period was famous for its tyranny and injustice. The Egyptian rule was associated throughout this period with excessive taxation, cruel inhuman methods for collecting them, oppression, injustice and corruption in the government machinery and personnel.

However, within this period the Shari'a courts were instituted in the districts and provinces. They were, for a short period, entrusted with the adjudication in both
criminal and civil cases together with their power to deal with cases of personal matters of Muslims. But it is authoritatively reported that there was no proper application of Islamic law.

Hence, in this period the principles of natural law rather than being applied were in fact openly violated.

The theological conception of law which reigned supreme in the Funj Kingdom re-emerged with much more emphasis in El-Mahdi state (1883-1899). The very idea of "Nahdism" in Islam is connected with justice. El-Mahdi, so the followers believe, will appear and make the world full of justice as it was full of injustice. Accordingly, most of El-Mahdi's circulars came to be issued with clear instructions to people to promote justice and prevent and combat injustice, and to take justice as an indispensable religious virtue.

Justice according to El-Mahdi's teachings was to be administered upon the "dual basis of Qur'an and Sunna." Furthermore, the moral significance of El-Mahdi's legislation was undeniable. In most of the circulars he issued in this respect, El-Mahdi insisted on the correction of society by prohibiting and punishing certain immoral acts specially those relating to woman veiling, adultery, smoking, drinking of wine, gambling and similar acts.

Law, therefore, was a divine one and is much connected with morality.

The period 1859-1933 witnessed different constitutional
and legal changes. Natural law ideas found their way in the statute and case law.

The formula, "justice, equity, and good conscience", which appeared in section (4) of Civil Justice Ordinance 1903, and section (9) of the Civil Justice Ordinance 1929, was sometimes interpreted to mean natural and universal principles of justice. The Self-Government Statute, 1951, guaranteed certain fundamental rights i.e. the right to freedom and equality, the freedom of religion, opinion association and individual liberty. The rule of law was upheld as well as the independence of the Judiciary. The importance of this document came from the fact that it represented the first written constitution of the Sudan. It laid down the basis of the idea of rights which has influenced the makers of the constitution up to the present time.

Upon Independence, the Transitional Constitution of 1956 was promulgated. The same rights were reaffirmed. On the eve of the October Revolution 1964, a National Charter was agreed upon. It was meant to be an expression of the spirit of the Revolution. Certain matters were emphasised namely: (1) the liquidation of the military regime, (2) the setting off of common freedoms as freedom of the press, freedom of speech, and freedom of organization and association, (3) the lifting of the state of emergency and repeal of all laws fettering liberties in areas where there are no security risks, (4) making more
secure the independence of the University. The Charter was the direct manifestation of the convictions of the people who had overthrown a tyrannical military regime and was an expression of their strenuous for justice and freedom.

The inalienable rights of man were further guaranteed in the Transitional Constitution (amended) 1964. It was, accordingly, decided in 1965, that the courts have inherited task as guardians of the constitutional rights of citizens by holding such rights to be immune from abridgement.

The inviolability of these rights derives from the allegation that they are natural rights and are, therefore, immutable. The constitution does not give but only declares and guarantees the rights.

Moreover, the attempts since the Independence to make an Islamic Constitution, and Islamic law, have much contributed to the consolidation of natural law thinking in our legal history. They represent a direct quest for a theological state and law.

In 1973 the Permanent Constitution of the Sudan was promulgated. It restated the fundamental rights of citizens and adopted a theory of social contract on the vague idea of the alliance of the working forces of the people. It further recognizes the rule of law and its supremacy. Both the state and the individuals were made subject to the rule of law. The accused's rights to freely choose his council,
to be presumed innocent until his guilt is proved beyond reasonable doubt, his rights not to be subjected to double jeopardy, ill, inhuman treatment or torture and his right to have a fair and speedy trial were all re-affirmed.

The recognition of the individual's rights was made secured by the adoption of the doctrine of separation of powers which maintained the independence of the Judiciary. The individual might, in this regard, resort to the Supreme Court to declare void any law on the ground of its violation of the freedoms and rights guaranteed by the Constitution. These principles have in fact been adopted in almost all the constitutions of the Sudan and specially the Transitional Constitution of 1985. However, the discrepancy between what is declared and what is actually enforced is illustrated by the fact that most of these principles have, as a matter of fact, always been encroached upon.

(b) Some Natural Law Ideas

(i) The theory of justice

The terms justice, equity and good conscience, in the Sudan were found to mean natural justice. By section (4) of the repealed Civil Code of 1971, the Courts were directed in absence of express provision to act on the rules of justice. In procedural matters the courts are now also called upon to apply what is conducive to justice.
To be in harmony with our legal system, the rules of justice stated in section (4) of the Civil Code 1971, can hardly be explained to mean anything other than "natural justice". This is supported by the fact that this same law reiterated that the principles of natural law and the rules of justice were to be considered as sources of law and be followed in absence of an express provision. The court was directed to make an objective and not a subjective interpretation of the law taking into consideration the suitable rule in relation to the circumstances which the law does not regulate. If justice, equity and good conscience and rules of justice mean natural justice, then the courts were free to apply the law which conforms to universal principles of justice. In fact they only received English positive law.

Moreover, the courts see the promotion of the ends of justice as their primary task. In Asma Mohamed Ali and Others v. Hassan Mahmoud, it was affirmed that, when seeking to apply the law, the court should be guided by its primary duty to promote and not to obstruct the ends of justice. Accordingly, the conclusion as to whether or not to dismiss a suit for abandonment or otherwise, could not be decided by the time factor alone but primarily in the interests of justice. To find out what the court meant by the phrases "the promotion of justice" and the "interests of justice", it is helpful to quote Babiker Zawilalla, who stated that:
"When coming to apply its powers under the section (s. 217 of the C.J.O. 1929), 84 the court has to look at the whole record, and then decide whether it would be fair to assume that plaintiff is no longer interested in the case, so that if the case is dismissed, it is not likely to see that it would be reopened".

Justice then means fairness. This is also provided for in section (3) of the Code of Criminal Procedure 1974, where it should be observed, that every person shall have the right to a fair and speedy trial. 85

In civil matters and in the absence of any procedural enactment, the courts are directed to apply the rules that provide justice. 86

(11) **The theory of social contract**

The idea of the alliance of the working forces of the people is the one which could be dealt with within the framework of the theory of social contract. It will be seen that the state and the party were supposed to be based on that alliance.

Article (3) of the Permanent Constitution stated:

"The Democratic Republic of the Sudan is founded on the alliance of the working forces of the people as represented by the farmers, workers, intellectuals, national capitalists and soldiers in accordance with the Charter for National Action".

The Charter for National Action expressed that the regime was born as a result of the struggle of workers, farmers, the intellectuals and national capitalists and other revolutionary forces.
The party (the sole political organisation, the Sudanese Socialist Union) was also said to be founded on the alliance of the working forces of the people and to represent the authority to the alliance in the leadership of the National Action. 87

The idea explains the nature of a political system which was said to be based on the will of the allaying social forces. The Constitution was based on a form of contract i.e. alliance and solidarity of the working forces of the people. 88 The whole political set up was looked at from this angle.

The people of the Sudan, it was stated, 89 in belief of their pursuit of freedom, socialism and democracy and their endeavour to achieve the society of abundance, justice and equality, in exercise of their sovereignty, in determination of their will, in codification of their determination, and in affirming their right to be sovereign and to choose their representatives to rule on their behalf, firmly determine to lay the foundations of a new, democratic socialist society based on the alliance and the solidarity of the working forces of the people. The Constitution was based on the above principles. The determination then became to defend and obey such Constitution. 90

The idea of alliance may be analysed in the light of the following: –

(a) As a matter of fact, the whole idea of social
contract is now one of historical importance. It is no more better than that. The idea of alliance of the working forces of the people is, in particular, fallacious and uncompromising. This will be articulated in the coming points.

(b) It is understandable that the alliance preceded the constitution and then the people firmly determined to obey the constitution. This is the case in the basic idea of social contract. But the alliance was only a supposition, there was in fact no alliance of this kind.

(c) The people did not choose the de facto government and did not claim the right to disobey it or revolt against it in case of its failure. To provide them with the rights guaranteed by the Constitution. In fact, the law e.g. the State Security Act, 1973, the Penal Code, 1983, rather than conferring on the people a right to dissolve or disobey the government, restricted the fundamental freedoms and rights and provided criminal punishments for disobedience.

(d) The classification of the working forces of the people as only workers, intellectuals, national capitalists, is not acceptable, for other forces e.g. shepherds were not included. The alliance between these forces is, however, false. It did
not exist, is not existing and will not exist. They are forces of conflicting interests.

(e) In fact, the alliance itself was not defined i.e. alliance for what and on what basis? The whole idea is therefore not correct.

One believes that ideas like "national unity" and "representative government", deserve a close observation.

The idea of national unity in the Sudan which has been a political slogan since a long time, shows an endeavour, to make peace and follow it for the sake of peaceful living. Unity in diversity is in fact a recognition of each other natural rights and liberties. It is more practical than the ambiguous idea of "alliance". 92

By the idea of a "representative government" which is now stated in the Transitional Constitution 1985, the people freely choose the government they consider suitable (upon a certain programme or programmes) through free elections. The representative government is thus, a democratic government. It is under a duty to preserve the natural rights of the individuals. The individuals are in fact justified, through their representatives, to dissolve the government in case of its failure to perform its duties.

This may well be termed the "will of the people". Such an expression is now more familiar than social contract. This "will of the people" or the general will are basic social contract ideas of today.
(iii) The Theory of Natural and Inalienable Rights

It is one of the basic roles of law to preserve the individual's natural and inalienable rights. The experience since the Self-Government Statute, 1953, has shown the emphasis on natural law. The place occupied by the natural and inalienable rights in Sudan is unique. The philosophy is not only to guarantee such rights but also to provide the means for their realization and enforcement. These rights were found to be immutable and immune from abridgement by legislation or constitutional amendment.

In Joseph A. Grang & Others v. The Supreme Commission and Others, the plaintiffs, who were members of Communist Party in the Constituent Assembly, contested amendments to the Sudan Transitional Constitution (Amended) 1964. The amendments were made with a majority of 125 votes. The Constituent Assembly comprised then 223 seats. At the time of the constitutional amendments, the total membership of the Assembly stood at 192. 142 votes were cast in favour and 17 votes were cast against the motion. The Plaintiffs contended that the amendments were unconstitutional because they infringed the fundamental rights embodied in article 5(2) of the Constitution (i.e. the right of free expression of opinion and the right to free association and combination). They also contended that the Constituent Assembly was not empowered to amend the Transitional Constitution (amended 1964).

The Court held that the fundamental rights secured by article 5(2) of the Transitional Constitution are amended
in 1964, were immune from abridgement by legislation or constitutional amendment by the Constituent Assembly. The Constitution makers by omitting to provide machinery for constitutional amendment, intended that guaranteed fundamental rights should not be subject to any abridgement by Constitutional amendment or legislation during the transitional period of two years.96

In Sudan Government v. Nasr El Din El Sayed Murgas,97 the accused made a speech at the Khartoum North Club in which he stated that the Government was under foreign influence and was suppressing liberties and jailing liberal minded people. Abu Rannat C.J., found that the constitutional guarantee of free speech did not protect a man from prosecution for uttering words which arouse illegal opposition or hatred or contempt against Government.98 No right is absolute but the Chief Justice’s language makes the scope of many rights e.g. the right to free speech, association and opinion, very narrow.

As for the realization of rights, Article (58) of the Constitution (1973) stated:

"... any person aggrieved by any law passed by any legislative authority may institute a civil suit before the Supreme Court to declare such law void on the ground of its violation of the freedom and rights guaranteed by this Constitution".

By declaring laws encroaching upon the guaranteed rights void, the court secures to the applicant the enjoyment of these rights. The argument against this is that the power of the Court has only been a declaratory one. Moreover, all the
rights, as will be seen, may be suspended by the government in exercise of its powers of emergency under the Constitution.

The individual rights are not only stated in the Constitution, they are well reaffirmed in the statutes and case law. This is clear in section (3) of the Code of Criminal Procedure 1974 to which reference is made earlier. The legal rights are the reaffirmation and reinforcement of the Constitutional rights. The observance of these rights in the course of law enforcement i.e. in making arrests or searches, consolidates the principles of natural law. And since the procedural law is the direct field of practice, the whole procedural steps i.e. pre-trial, trial and post-trial, must take into consideration the natural rights.

Natural rights therefore, occupy a distinct place in our Constitution and law. They are not only recognized but also enforceable.

(c) Abridgement of the Natural Law Principles
in the Sudan

It will be seen that though natural law principles have persistently been reiterated in the Sudan, they have in fact, always been encroached upon.

Historically speaking, the Governor General, who was the Supreme military and civil ruler in the Sudan, had had the full and absolute power to make, alter or abrogate
by proclamation, any laws, Orders and regulations.\footnote{95}

In exercising of this power, he issued the Defence of the Sudan Ordinance, 1939 which gave him primary and residual powers, in case of invasion of the Sudan or upon the occurrence of war, insurrection, civil commotion, riot, strikes or lock-out which in his own opinion constituted an imminent threat to the defence of the Sudan or to the public safety to declare a state of emergency in the whole Sudan or any part or parts, thereof so threatened.\footnote{100} Persons might be tried by Court Martial.\footnote{101} Individual rights became at stake. The law relating to state of emergency in the Sudan has been an excessive one. Article (111) of the Permanent Constitution widened the scope of the instances for which a state of emergency may be declared.\footnote{102} The rights guaranteed by the Constitution may be suspended save the right to resort to court. In 1971, the accused's right to be presumed innocent until his guilt is proved beyond reasonable doubt, was denied. Section 45 of the Protection of National Security Act 1971, read: "It shall be upon the accused alone to prove his innocence. The rights to freedom of expression, association and combination were defeated by section (15) of the State Security Act 1973. The section authorised the arrest and search without a warrant of any person in connection with any crime against the state and further denied the accused his constitutional right to bail.\footnote{103}

In 1975 the above mentioned legislative encroachments upon individual rights were endorsed by the constitution.
Article 41 of the Constitution which related to the right of movement was amended to support preventive detention and residence orders. The 1975 amendments of the Constitution abridged the natural rights of the individual to equality before the courts of law and militated against the independence of the Judiciary for Courts-Martial and State Security Courts were sanctioned by the constitution. The freedom of movement was also abridged. It became evident that the fundamental rights stated in the Constitution were meaningless and the Constitution became a contradictory document.

5. Conclusion

Natural law principles can hardly be set aside. They have always remained applicable all times.

To recapitulate, a Thomist approach to law took place in the funj Kingdom and the Mahdist State. Even at present time the new trend towards applying the Shari’a law may by looked at from this angle.

Natural and inalienable rights have persistently been guaranteed and the means for their realization and enforcement have been explicitly provided for by law and the Constitution.

The thesis of natural justice has also been introduced into our legal system through the form of justice, equity and good conscience provision, or in other forms like rules of justice, "the interests of justice" and "fairness".
The trend since 1983 is the clearest example today for a natural law outlook by taking law as divine or heavenly ordained.

However, the natural law principles have always been abridged.
NOTES


2. See Justinian, "Institutes", from Lloyd, "Introduction to jurisprudence", *op. cit.*, p. 108.


7. *Idem*.

8. See *ibid.*, p. 105.

5. It worth noting that Aquinas argues that natural law can be changed. A change in the natural law, states Aquinas, may be understood in two ways: Firstly by way of addition. In this sense nothing hinders the natural law from being changed. Since many things for the benefit of human life may be added by divine law or by human laws. Secondly, a change in the natural law may be understood by way of subtraction, so that what previously was according to the natural law, cease to be so. See also Aquinas.
from Morris, *op.cit.*, p. 65.

10. See supra pp. 16, 17, 18.

11. See supra p. 18.


16. See below.


18. Ibid., at p. 47.


26. Ibid., at p. 82.

27. Ibid., at p. 85. See also Morris, *op.cit.*, p. 118.
29. Idem.
31. Ibid., at p. 149.
32. Ibid., at p. 158.
33. Idem.
35. Idem.
39. Ibid., at p. 61.
41. Idem.
43. Grisez, G.G. *Toward A Consistent Natural Law Ethics*

44. Ibid. For the right of killing enemies and killing in war, see Hugo Grotius, "On Rights of War and Peace," from Morris, op.cit., pp. 104, 106.

45. Glenn, op.cit., p. 64.

46. See Locke, from Morris, op.cit., p. 155.

47. Mustafa, "The Common Law in the Sudan", op.cit., p. 34.

48. El Mufit, op.cit., p. 76.

49. i.e. law is to be divinely given to man. See Celinas 15 (1970), Amer. J.J., 154 at p. 1055.


51. El Mufit, op.cit., p. 76.


54. Ibid., at pp. 35-40.


57. Ibid., Art. 7.
58. Ibid., Art. 7.
59. Ibid., Art. 6.
60. Ibid., Art 8.
61. Ibid., Art. 8.
62. Ibid., Art. 8.
64. See Arts. 4-9 of the Sudan Transitional Constitution (Amended) 1964.
66. Ibid., at p. 2.
67. There have been the draft constitution of 1968 and the proposed amendments of the Constitution in 1984 and the 1983 legislative changes. However, "Islamic law", is not strictly speaking "natural law". This is made clear in Chapter (VIII). The statement is mainly based on St. Thomas Aquinas natural law theory. St. Thomas believes that law is ultimately derived from God. In fact there are, St. Thomas adds, four kinds of law. The eternal law, the natural law, the human law and the divine law. Divine law is the body of precepts promulgated for mankind by God himself and revealed in the Scripture. There is a Divine Reason and man's duty is to follow the dictates of Divine
Reason. It is believed that St. Thomas himself was influenced by the influx of knowledge to the Latin West from Greece, Byzantium and Islam through translation of Greek and Islamic Philosophy and Science. (See Cairns, R., Legal Philosophy from Plato to Hegel, the Johns Hopkins Press, Baltimore, 1945, pp. 175, 176.

68. See infra, p. 165.


70. Ibid., Art. 63, 68.

71. Ibid., Art. 69.

72. Ibid., Arts. 65.

73. Ibid., Art. 64.

74. Ibid., Art. 15.


76. See supra, p. 201.

77. See below our discussion of Section 4 of C.C. (1971).

78. See Section 4 C.C. (1971).

79. Idem.

80. See supra chap. 3 passim.


83. Ibid., at p. 133.

84. It provided that:

"Where a suit is adjourned indefinitely or until application is made or where an order is made staying a suit such a suit shall be dismissed if no application is made by either party within one year of the date on which the order for adjournment or stay was made".

85. It provided that :

"It shall be observed in the application of this Act, that every accused person shall have the right of fair and speedy trial; that every accused is presumed innocent until his guilt is proved beyond reasonable doubt; that no punishment shall be inflicted upon any person exceeding that prescribed by the law in force at the time such offence was committed and that no person shall be subject to cruel or inhuman treatment or punishment".

86. See b(i) of the CPA, 1983.


88. See the preamble of the SPC, 1973.

89. Iden.

90. Iden.


93. Arts.21, 22, 24, 26, 27, 28, 25, 30, 31, 32, (1) 33, 83 (f), 87 (4) 96 (2) (e).

9. Ibid., at p. 2.

6. Ibid., at pp. 2, 3


8. at p. 82.

9. See Art. IV of the Anglo-Egyptian Agreement, 1885.

10. Sec. 3 of the Defence of the Sudan Ordinance, 1935.

10.1. Ibid.

10.2. Under section 3 of the Defence of the Sudan Ordinance, the reasons for declaring of a state of emergency are limited in certain clearly defined situations, namely, securing the public safety, the defence of the Sudan, the maintenance of public order and the efficient prosecution of war etc. Under Art. 111 of the 1973 Constitution, matters like that are eminent, danger threatening the independence of the country or its integrity and safety of its territory, or its economy, or the republican organs of the State and its constitutional institutions, or the fulfilment of its international obligations, or the achievements of the people are reasons for the declaration of the state of emergency.
CHAPTER FIVE

POSITIVISM

1. Introduction

The direct revolt against Natural Law thinking and its great rival is Positivism. The positivist attacks against natural law ideas, are mainly directed to inherent morality which is attributed to law without which it would not be law at all and which gives law an established sanctity and binds law reform.

Perhaps the most vital issues on which there is much emphasis are the problems of "is" and "ought" "law" and morality" and the conceptual analysis of the legal terms.

A clear demarcation between "law as it is and" law as it ought to be "or a strict separation between "law" and "morality" is hardly attainable.

Still, the contribution of positivism to legal theory is undoubtedly. Through positivism, the law assumes a distinct autonomy, precision and force. The distinction between "is" and "ought" is not without practical benefits though this distinction itself does not escape criticism.

Now it has to be made clear that we do not propose, as may appear from the foregoing chapters, that the theory applied in the Sudan is certainly positivism. In fact, there are so many traceable theories as it is now obvious. The positivist outlook is suggested to be the predominant
one. In the previous (as well as the coming) chapters, it has been and will be shown how has largely been the will of the sovereign authority. Legislation as the direct expression of that will is equated with the term "law" as well as the primary source of law to which judges must refer and by which they are strictly bound. There has also been, clear adherence to the legislative commands together with an unshaken belief in the doctrine of the separation of powers, the result of which is that judges hold themselves as strictly bound by what the legislator has declared as law. They themselves endeavoured not to make but only to declare law for it is the legislator who alone can make law.

It will further be emphasized in this chapter that there has been a sharp distinction between law that is and law that ought to be and, save for the period since 1983, a noticeable separation between law and morality. The conceptual approach is perhaps the richest field in the law of the Sudan for the legal concepts e.g. person, property possession, ownership etc., have been thoroughly analysed.

2. Meaning

"Positivism" in legal theory connotes a method of examining man-made law (i.e. positive law) which has actually been set down by men for men, or "posited". It connotes also the study of law as it is, as distinct from law as it ought to be.

In fact, five meanings of "positivism" are identified in a contemporary jurisprudence. 2
(1) the contention that laws are commands of human beings;

(2) the contention that there is no necessary connection between law and morals or law as it is and as it ought to be;

(3) the contention that the analysis (or the study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the cause of origins of law, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims "functions" or otherwise;

(4) the contention that a legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards; and

(5) the contention that moral judgments cannot be established or defended, as a statement of fact can, by rational arguments, evidence or proof.

All these contentions cannot be dealt with here both for lack of space and consideration of relevance. However, the distinction between law that is and law that ought to be, the separation of law from morals and the legal concepts deserve special emphasis here as almost all the positivists seem to meet at these points though they somewhat differ.
on the ways they see them.

The equation of law with commands will also be discussed. The interrelation of law and logic has been mentioned elsewhere. 4

3. Law that "is" and Law that "ought" to be

Positivism in law embodies a direction of legal thought which insists on drawing a clear distinction between the law that "is" and the law that "ought" to be. It is a distinction between the law as it actually exists and the law as it ought to exist.

Positivists believe that law must concern itself exclusively with the "is" and never bother itself with the "ought". The judge, therefore, has to apply the law in the form it exists whatever its content might be i.e. whether just or unjust, moral or immoral.

It is noted at the outset that the separation between "is" and "ought" is not identical to that between "law" and "moral". The confusion, one believes, comes from the equation of "ought" propositions with moral propositions. The word "ought", it is submitted, merely reflects the presence of some standards of criticism. Morality is one of these standards. 5 It is certain that "is" propositions contain moral standards as law in many instances exhibits morality.

In fact, this thesis of the distinction between "is" and "ought" was an opposition to the natural law theories
in political and legal philosophy where the concept of what ought to be follows from what is. As an example: "Human beings are born equal and, therefore, ought to be treated as equals".

Austin is quoted as saying:  

"The existence of law is one thing; its merits or demerits is another. Whether it be or be not in one enquiry, whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or thought it vary from the text, by which we regulate our approbation and disapprobation".

Austin calls for the scientific and empirical research in law. To him, the existence of law is distinct from its content. The law "as it is" is a valid law even though it does not conform to an assumed standard. In this sense unjust law is nonetheless law and has to be obeyed.

It is, therefore, rightly remarked that the separation made by legal positivism between consideration of what law "is", and of what the law "ought" to be necessarily involves the view that even an immoral "ought" would count as law if it satisfied a formal test of legal validity. In other words, if it counted as law in a legal system.  

This separation of "is" and "ought" is sometime seen to be superficial and wrong. This contention however, is itself erroneous as it is built on a misunderstanding and built on a wrong premise that the distinction between "is" and "ought" is synonymous with the separation between law and morality. One believes that the distinction serves
a purpose. Not only because it gives law a distinct autonomy and certainty, but also because it facilitates realization of certain principles of justice e.g. the principle that: No person shall be punished for an act which is not an offence at the time of its commission i.e. the principle of legality. Moreover, the distinction serves to safeguard against two dangers: The danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.

However, what now "is" was perhaps an "ought" of yesterday and an "ought" of today may be an "is" for tomorrow. The moral or natural law notions of what law ought to be in the past may find their way to law in the present and the present standards may materialize in the future.

4. The Separation of Law from Morals

The separation of law from morals (as well as from other extraneous elements i.e. religion, history etc.) is a crucial point in positivism. Austin, Bentham and Kelsen stand firmly for this separation upon the thesis that law is a self confined science which does not need the assistance of the other social disciplines for its proper functioning. Value considerations are excluded.

This is again a revolt against natural law ideas which annexed moral to legal questions. For the positivists, law is law proper and valid though it does not conform to morality.
Kelsen makes it abundantly clear that the theory of positive law tends to free law from morals and any thing which does not strictly belong to the subject matter of law.

The positivists attack the natural law idea not merely because it makes for muddled thought but also because it regards a certain inherent moral quality as an essential feature of law without which it is no law at all.\textsuperscript{12}

In this sense, immoral laws, are nonetheless laws and have to be obeyed.

A strict separation of law and morality, is hardly possible. The reasons for that, which are undoubtedly known to positivists, may be summarised as follows:

(a) As a matter of historical fact, the development of legal systems had been profoundly influenced by morals so that the content of many rules mirrored moral rules or principles.\textsuperscript{13} Consequently, the law of every nation - today - shows at a thousand points the influence of the accepted social morality and wider moral ideas. This influence enters into law through legislation or judicial precedent.\textsuperscript{14}

(b) By expressed legal provisions moral principles might at different points be brought into a legal system and form part of its rules.

(c) Courts might be legally bound to decide in accordance with what they think just or best.
Law, therefore, is inseparable from morals. Not only that many legal rules have moral content e.g. rules requiring fairness, justice, good faith, etc. but also that legal rules do sometimes enforce morality i.e. rules relating to sexual offences e.g. adultery, rape etc. or rules relating to crimes of homicide i.e. murder, culpable homicide not amount to murder and indecent or immoral acts which are equally punished.¹⁵

For these reasons, the contention should rather be that, there is no necessary connection between law and morality than that there is or should be a strict separation between law and morality.

5. The Legal Concepts

It is submitted that the study of law cannot be undertaken without conceptualization. In addition to their distinction of law, and, morals the positivist contend that a purely analytical study of legal concepts was vital to our study of the nature of law.¹⁶

Legal concepts and generalizations represent approximation to the patterns and uniformities which exist in natural and human social life and are indispensable instruments of legal stability and justice. They assist in the formation of external standards in the absence of which reasonable men would be reluctant to submit their controversies to the courts.¹⁷ They may, however, be analysed according to the following pattern:-
(a) Jural relations

In legal analysis, the starting point is the problem of jural (legal) relations. A jural relation is a situation where one person (called the dominus) can control his conduct adversely as against another person (called servus) or where the dominus can control the act of the servus by the law. The dominus in a legal relation has a certain advantage as against the servus. This advantage, is either a power, or privilege or an immunity, or a claim (right).\(^{18}\)

Likewise, when a jural relation exists, the servus has a certain disadvantage as against the dominus. This disadvantage must be either of a liability or a disability or duty.\(^ {19}\)

Law deals, it is submitted, with duties and rights of persons. These duties and rights are determined by the relations of persons with each other, depending partly on their acts and partly on events independent of them and connecting those persons either immediately or through the medium of conflicting interests.\(^ {20}\)

Professor Wesley N. Hohfeld arranged the legal concepts in the following pairs of jural opposites and correlatives.\(^ {21}\)

<table>
<thead>
<tr>
<th>Opposites</th>
<th>Right</th>
<th>Privilege</th>
<th>Power</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No-right</td>
<td>Duty</td>
<td>Disability</td>
<td>Liability</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Correlatives</th>
<th>Duty</th>
<th>No-right</th>
<th>Liability</th>
<th>Disability</th>
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<td></td>
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</table>
This means that, for examples, right is the correlative of duty and the opposite of no-right.

When A has a right, another person B is under a duty to provide him with that right or at least not to interfere with A's right.

Right is opposite to no-right in the sense that A who has a right to a certain thing could not be said, at the same time, to have no-right or a person who is immune to be liable.

Salmond puts the correlative and opposites in the following table.\textsuperscript{22}

<table>
<thead>
<tr>
<th>Right (Strictly) (i.e. no-duty)</th>
<th>Liberty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duty</td>
<td>No-right</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Power (i.e. no-liability)</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disability</td>
<td>Liability (i.e. no power)</td>
</tr>
</tbody>
</table>

This, and generally the whole Kelsenian scheme, do not escape criticism\textsuperscript{23} but the fact remains that legal relations do exist between persons in society. They take the forms of rights and duties or advantages and disadvantages. Everyone affects the position of another by having a right or any advantage and has his position affected by another whom he owes a duty or any other disadvantage. The legal opposites may, however, be only logical inferences applicable subject to many reservations or qualifications viz: A who is under a
duty may still be immune having regard to different transactions. 24

One finds that the conceptual approach to legal theory is particularly interesting not only because it concerns itself with legal relations but also because the legal concepts themselves are keenly analysed indipth. Now of the legal concepts which modern analytical positivists much discussed are the concepts of rights, duties, persons, ownership, possession and property which will be dealt with here.

(b) Some Legal Concepts

(i) Right

The concept of a right is one of fundamental significance in legal theory for the administration of justice is mainly concerned with the recognition and enforcement of rights and duties.

Salmond expresses himself as to the meaning of "a right" in the following words: 25

"To say that a man has a right to something is roughly to say that it is right for him to obtain it. This may entail that others ought to provide him with it, or that they ought not to prevent him getting it, or merely it would not be wrong for him to get it". 26

This is the jural relation which is created by the existence of a right. For Bentham, rights are in themselves advantages or benefits, for the one who enjoys them. 27 They are inseparable in their nature from obligations, for the law cannot grant a benefit to one without imposing, at the
same time, some burden upon another.

The rights with which we are concerned are, therefore, legal rights i.e. legally enforceable claims. In Austin's view, every legal right is the creature of positive law and it answers to a relative duty imposed by that law and incumbent on a person or persons in whom the right resides. The right itself is also relative i.e. not absolute or independent.

(11) Duty

The legal concept of duty is interconnected with the legal right. They are correlatives. To recall Salsom's expression, when a man has a right, others ought to provide him with it, or that they ought not to prevent him getting it, which means that they are under a duty. Austin makes it obvious that every legal right answers to a relative duty. If rights are, in Bentham's analysis, advantages, duties are on the contrary, disadvantages. They place the person under an obligation to do or undo a certain thing. Therefore, a duty is, roughly speaking, an act which one ought to do. Only legal duties, i.e. acts which the law recognises and imposes as such, are relevant to this part.

It is rightly deduced that to say that A is under a duty is to assume the existence of a legal system with all the appendices necessary for inducing general obedience, and securing the operation of the sanction of the system and the general likelihood that this will continue. This applies with the same force to the statement that X has a right for
the two are correlatives.

(111) Persons

The concept "personality" is much connected with rights and duties. In fact, law necessarily deals with rights and duties of persons. Persons are the subject of rights and duties.

The term "person" denotes a being capable of exercising legal rights and duties.32 Pound states: 33 Person is only the personificative expression for the unity of a bundle of legal rights and duties. Therefore, it is a person not because it is a human being but because rights and duties are ascribed to it.

In this sense persons are divided into "natural and "juristic" or legal persons.34 "Natural persons" refers to human beings. To have a legal personality an infant should be born alive. The law recognises various grades of legal personality in a human being and these are generally presumed to correspond to that of the human being mental or legal capacity.

Juristic or legal persons may be defined as those things or groups of persons which the law deems capable of holding rights and duties. They include corporate bodies.

After its incorporation, a company has a distinct legal personality. Therefore, the law treats a corporation as a legal person separate from its members and consequently may in its own name and its own account engage in all the
ordinary transactions of the law as having a distinct legal personality.  

There are some jurists who believe that the personality of the corporation is a mere fiction. This is the "fiction theory" which asserts that a corporation does not, as a matter of legal analysis, exist and has no real entity.

Now, it is established that the legal existence or personality of a corporation, though limited in various ways, is quite as real as that of an individual.

It is worth noting that a juristic person can act only by means of some natural person or persons having authority to represent it. It is created for special purposes and its powers are limited to the execution of those purposes and that which is reasonably incidental thereto. It may, however, be liable for civil wrongs committed by its agents in the course of their employment. It has, on the other hand, rights and duties not only as against persons outside, it, but against its own members.

(iv) Ownership

Ownership is described as the entirety of the powers of use and disposal allowed by the law. It denotes the relation between a person and an object forming the subject-matter of his ownership. The contention is also that, ownership consists of a complex bundle of rights of which the owners' right to possess the thing which he owns,
his rights to use and manage it, and his right to consume, destroy or alienate the thing are only examples.

Ownership has certain characteristics. Firstly, it has the characteristic of being indeterminate in duration. In this sense, the possession of an owner differs from that of a non-owner in possession in that the latter's interest is subject to be determined upon a future date whereas the interest of the owner endures theoretically, for ever, and secondly, ownership has a residual character i.e. it consists of residual right or rights remaining when all other rights are given away. 42

As a legal concept, ownership is sometimes relative in nature. 43 The owner is deemed as such not because he holds an absolute title but because he holds one better than the title of others.

It is possible so to speak of ownership as the entirety of the powers of use and disposal allowed by law 44 or the sum total of rights to use and enjoy property including the right to transfer it to others. 45 This implies a full dominion over a thing.

These powers and rights characteristics ownership as a distinct legal concept. However, it will be seen that "ownership" and "possession" though they have much in common, are essentially distinguishable. 46

Now if one is to choose, Austin's explanation to ownership is worth mentioning. It is that: 47
"Ownership is a right over a determinate thing, indefinite in point of use, unrestricted in point of disposition, and unlimited in point of duration." 

However, this does not mean that ownership is an absolute concept, it is, as other concepts, relative.

(v) Possession

Possession is generally known as the visible possibility of exercising physical control over a thing, coupled with the intention of doing so either against all the world or against all the world except certain persons. There are, therefore, three requisites of possession. Firstly, there must be actual or potential physical control; secondly, physical control is not possession, unless accompanied by intention; thirdly the possibility and intention must be visible or evidenced by external signs for, if the thing shows no signs of being under the control of anyone, it is not possessed.

Possession may connote different kinds of control according to the nature of the thing or right over which it is being exercised. A moveable thing is said to be in possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons.

A man may possess an estate, if he leases it he will be in possession of the rents and profits and the reversion, but not of the land which is in the lessor who may bring an action for trespass.
Possession is, after all, actual or constructive, in fact or in law. Actual possession is the effective and the exclusive physical control of a thing. Possession in the sense of detention (possession) as compared with ownership, is the actual exercise of the power over a thing including the right to exclude others. Ownership is, here, the legal capacity to operate on a thing according to man's pleasure, and to exclude everybody else from doing so. Therefore, the two concepts are interconnected. However, they are still distinguishable. Possession in fact - the effective and exclusive control of thing - is prior to ownership and indeed to every legal rule (possession) but possession as a fact is of interest to lawyers only so far as legal results and incidents attach to it (possession in law) and give definite rights to a possessor because he is in possession.

This suggests that possession is evidence and a sign of ownership. It is right to presume, in absence of evidence to the contrary, that existing peaceable possession is rightful and justifies an inference of ownership.

Certain rights are therefore, granted by law to persons who, for legal purpose, are regarded as being in possession. These are: (a) the possessor has an individual right of exclusive use and enjoyment of the subject matter, (b) there is a right to possess and continue in possession. In this sense dispossession, calls for a remedy. The right to possess is a necessary incident of ownership for ownership must include
the right to maintain or claim possession, a right which, though it may be suspended or deferred, cannot be wholly disassociated from the owners relation to the thing owned, and (c) possession is taken as evidence of title. In fact, possession is apparently a sign of ownership and therefore it is presumed in absence or proof to the contrary, that existing peaceable possession is rightful and further to infer ownership from the right to possess. Thus, possession also confers a relatively good title by lapse of time. This is called prescription.

Moreover, the law does not only protect actual possession but also protects constructive possession. A person has constructive possession (or possession in law) when someone representing him has actual possession of the thing. Thus if A, the owner of the land, leases it to B, A has constructive possession by B. If B wrongfully and dishonestly converted the land register to his name the law will penalize him and A will retain possession.

The relativity of the concept is evident. English judges have not adopted any consistent meaning of possession. They have used "possession" in the various rules of law as a functional and relative concept, which gives them some discretion in applying an abstract rule to the concrete set of facts.

The importance of the concept really comes from the fact that it allows for those certain legal rights including the right to possess.
(vi) **Property**

Similar to ownership and possession, property has much to do with the exclusive and effective control of a thing, within the boundary of what its nature allows, at one's will and pleasure or with the systematic expression of the degrees and forms of control and enjoyment recognized and protected by law. In fact, property includes the rights to possession and consequently ownership.

Property is sometimes known as only the right in external things. However, it certainly includes other rights for it generally refers to all that a person has dominion over, be it a real or personal thing. It is the most comprehensive term — in as much as it is indicative and descriptive of every possible interest which the party can have over a thing. Thus, every "property" includes as much rights as the context in which it occurs allows. In this sense, property may signify a beneficiary right in or to a thing, or things and rights having money value, especially those connected with transfer and succession. It includes not only ownership, estate and interests in corporeal things, but also rights such as trade marks, copyright, patents and sometimes even debts.

Property is classified into real and personal property. Real property in the common law means that form of property which could be specifically recovered by a real action (actio in rem) if possession were lost. In this sense only freeholdings of land were recoverable in
realty. However, this expression (real action) is now outdated. Land and, generally whatever is erected or grown on, or affixed, to it is referred to as property. This also, includes rights issuing out of, annexed to, and exercisable within land which property passes to the heirs when the owner dies intestate. Personal property was that form of property for which only a personal action lay and where the plaintiff, could insist on specific restitution. In the present time, personal property, in broad and general sense, includes everything that is the subject of ownership, not coming under denomination of real estate. The term is applied to property of a personal or movable nature as opposed to property of a local or immovable character (such as land or houses), the latter being called “real property”.

This shows also the known distinction between movable and immovable property. Anything other than land or things attached to land is personal and movable property. Land and things attached to it e.g. houses, trees etc., are immovables.

6. The Positivist Theories of Law

(a) Austin’s Analytical Positivism

Austin’s concern is to state and identify the distinguishing characteristics of positive law, and free it from the confusion with the concepts of religion and morality which had been encouraged by Natural Law theorists and exploited by the opponents of legal reform.
Of the known notions in this regard is the idea of command as comprising law. This notion may be discussed under the following headings:

(i) The Theory of Command

The term "command" is equated with wish or desire. It is distinguishable, however, from other significations of desire by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. Austin observes in this regard that:

"If you cannot or will not harm me in case I comply not with your wishes the expression of your wish is not a command, although you utter your wish in imperative phrases, if you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command although you are prompted by a spirit of courtesy to utter it in the shape of request."

A command, is a signification of desire in which the party to whom it is directed is liable to evil from the other in case he complies not with the desire. The ideas or notions comprehended by the term command are restated as comprising the following:

1. A wish or desire conceived by a rational being that another rational being shall do or forbear with regard to a certain thing.

2. An evil to proceed from the former, and be incurred by the latter, in case the latter complies not with the wish.

3. An expression or intimation of the wish by words or other signs. The idea thus signifies the existence
of a threat of harm as to motivate obedience or compliance with the law.\footnote{72}

This is oversimplification. Threat of harm can never alone be a motive to obedience. Law must carry a minimum standard of morality and social values. It is not precisely fear but rather the respect of the authority which really motivates obedience and it is highly fallacious to speak of a citizen feeling threats or expecting the infliction of harm behind any provision of the law.

Hart tends to modify Austin's definition by stating that:\footnote{73}

"To command is characteristically to exercise authority over men not power to inflict harm and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect authority".

Hart's idea of command is intended to be of a strong connection with authority and is supposed, so to speak, to be much closer to that of law. Austin's idea of command is equated with the gun-man situation (who says to the bankclerk. "Hand over the money or I will shoot) or order backed by threats.\footnote{74}

Commands are classified into two species: The commands which are law or rules and the commands which are not laws (named occasional or particular commands). The two are obviously distinguishable.

For the commands which are laws or rules (this is another way of defining the word "law") there is always
an obligation to do or forbear and therefore the notion becomes, when the command generally obliges acts or forbearances of a class, the command is a law or rule.\textsuperscript{75} In such a state of affairs the class or description of acts is determined by law or rule and the acts or forbearances are enjoined or forbidden generally.\textsuperscript{76}

Thus, generality is crucial to the application of law.

For the commands which are not law i.e. occasional or particular commands, the matter is as follows: Where it applies to a specific act or forbearance, or to acts or forbearances which it determines specifically or individually, a command is occasional or particular.\textsuperscript{77} That is to say it is not law or rule.

Where the command is of the above description, the acts which it enjoins or forbids, are assigned or determined by their specific or individual nature as well as by the class or description to which they belong.

Judicial commands are termed occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.\textsuperscript{78} This simply means that what the judge commands e.g. that the thief shall be hanged is not, accordingly, law. It is when the lawgiver commands that thieves shall be hanged that a law is made. For the lawgiver determines a class or description of acts, prohibits acts of the class generally and indefinitely and therefore commands with generality. His command is, thus
law or rule, but the command of the judge is occasional or particular for a specific punishment, as the consequence of a specific offence.\footnote{79}

This may be taken within the general framework of Austin's thesis regarding the nature of law. Law is the will of the sovereign authority. The sovereign is the sole source of law. This sovereign simply means, as we have mentioned, a determinate human superior not in a habit of obedience to another but in receipt of habitual obedience from the bulk of society. In this sense, the judge is not a sovereign and law cannot emanate from a judge. Secondly, the law properly so-called is set by a political superior to political inferior. In its literal sense, as we have seen, it is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. What the judge does is not a law strictly so-called as the judge is not a political superior or sovereign, and any law not set by a political superior is a law improperly so-called and is not therefore law but a kind of positive morality.

Moreover, Austin's theory of command can best be understood in the light of his theory of sanctions. However, the theory of sanction will conveniently be dealt with separately.

(ii) The theory of sanctions

We have mentioned that the party to whom the command is directed is liable to evil from the commander in case that person disobeys the commander. This evil (which will be
incurred in case a command be disobeyed) is called a sanction. It is restated as the enforcement of obedience.\textsuperscript{81} The command is said to be enforced by the chance of incurring the evil.\textsuperscript{81}

To Austin, a reward (or conditioned good) is not a sanction. Rewards, states\textsuperscript{82} Austin are indisputably motives to comply with the wishes of others. But to talk of commands as sanctioned or enforced by rewards, or talk of rewards as obliging or constraining to obedience, is surely a wide departure from the established meaning of the terms.\textsuperscript{83}

It is not difficult, however, to understand this within Austin's whole imperative theory. He emphasizes the coercive or compulsive nature of the command (though this does not necessitate violence). An evil is, speaking in Bentham's way, a disadvantage to be suffered in case of disobedience or a kind of pain. A reward is surely advantage or pleasure. It is natural then not to speak of a reward as itself a sanction.

(iii) Theory of sovereignty

Austin places the sovereign authority in a solitary status, vests it with the right to be obeyed by the bulk of the society and gives it an immunity from obeying other sovereign powers. He thus, explains sovereignty as follows:\textsuperscript{84}

"If a determinate human superior, not in a habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent".
The sovereign is then a determinate human superior not in the habit of obedience to a like superior but in receipt of habitual obedience from the bulk of a given society.

This supposed habit of obedience has become the target for much criticism. It is submitted that obedience often suggests deference to authority and not merely compliance with order backed by threats (i.e. command in Austin's view). A general habit of obedience can only be imagined in a very simple case of an absolute monarch reigning for a long time and controlling the people by general orders backed by threats. Even here, one believes, obedience is not in the strict Austinian sense, habitual. The obedience within this imperative theory is only a kind of subjection. If Austin's analysis is to be accepted, the continuity of law (in case the monarch dies or otherwise ceases to hold power) will always be a problem which can hardly be solved within the Austinian thesis.

The idea of habit of obedience, one believes, is not totally alien to the idea of law. For people may, as civilized citizens, obey the law with the feeling (a) that they are doing what is right and good or (b) that they are making a reciprocal conduct with the expectation that others will do the same or (c) that they act without questioning the merits or demerits of their conduct but at the same time they automatically obey the law as this becomes their habit.
The latter is much more evident in fairly civilised societies in regard to rules of public health, traffic etc., with an important qualification that such a thesis is intended to cover only a group or a class of actions and of persons.

Mart in this same line believes that men can indeed quite literally acquire the habit of complying with certain laws, driving on the left side of the road, he remarks, is perhaps a paradigm for Englishmen for such a general habit. Moreover, habitual obedience cannot be made a general rule for law, and particularly where it runs counter to strong inclination, belief or social value, can hardly be said to be habitually obeyed. It remains to be criticized and even sometimes disobeyed.

The link between these ideas is that law is taken to be a command of the sovereign which command is backed by sanction. The sovereign (which is the source of law) is said to be habitually obeyed by the bulk of the society. The whole idea looks logical but has to be taken with the qualifications and remarks that we have mentioned here.

B. Kelsen: The Pure Theory of Law

(1) What is the Pure Theory of Law

The Pure Theory of Law, says Kelsen, is a theory of positive law. It endeavours, he adds, to answer the question "What is Law"? but not the question "What ought it to be". Consequently, the theory is concerned with stating the law as it is, without legitimizing it as just,
or unjust. It seeks the real, the positive law, not the right law. In this sense it is a radically realistic theory of law. 91

This theory is described as "pure" theory of law to show that it is concerned solely with that part of knowledge which deals with law, excluding from such knowledge everything which does not strictly belong to the subject matter. 92 It tends to liberate law from moral and all other foreign elements e.g. values, ideologies etc. Upon this thesis, it tends to separate the concept of the legal completely from that of the moral norm and establishes the norm as a specific system independent even of the moral law. 93

In these directions the autonomy of the theory is developed. Law becomes a system or specific legal order and the theory stands as the specific science of law in the sense.

We propose to analyse Kelsen's ideas or some of them in connection with the above themes.

(11) The idea of norm
(1) The theory of norm

To Kelsen, law is a norm and legal science is restricted to knowledge of norms. 94 The norm is an "ought proposition" setting out, what, under certain circumstances ought to happen e.g. that men ought to behave in a certain way. In this line only the provisions as to how individuals should behave are the objects of jurisprudence. 95
One finds it relevant here to argue whether or not the pure theory of law by its insistence on the study of norms which deal with how men ought to behave, is still concerned with the law as it is. In other words, is the statement that the pure theory of law attempts to answer the question what is law? but not the question what it ought to be, reconcilable with the statement that only the provisions which state how men ought to behave (i.e. norms) are the object of jurisprudence?

The two statements, one believe, are reconcilable. The study of the law "as it is" is not contrary to the studying of norms. This is simply because the Pure Theory of Law is primarily concerned with the law as it is and this law in itself of a normative character. It is a norm of "an ought" proposition stated in a coercive manner e.g. men should not steal etc. The analysis of norms is an elucidation of the rules and regulations stating expected standards of behaviour. The measure is not morality or justice but the predetermined rules and regulations stating expected human behaviour.

Two more points are also relevant here. One is the validity of a norm and the second is the hierarchy of norms. They will be dealt with as follows:

(2) The validity of a norm

The contention is that if we say that a norm "exists" we mean that a norm is valid. Jurisprudence regards a
a legal norm as valid only if it belongs to a legal order that is by and large efficacious. That is if the individuals whose conduct is regulated by the legal order in the main, actually conduct themselves as they should according to legal order.97

3. The hierarchy of norms

The legal system is made up of the sum total of inter-dependent norms. Every norm receives its meaning and validity from another norm in a hierarchical system. A higher norm determines the process of creation of a lower norm as well as its content. Thus, the Constitution both regulates the procedure by which statutes are created and contains provisions concerning their contents.98

To explain the theory, a norm against stealing by which a judge punishes a thief is said to depend on a statute prescribing sanction against theft. This is derived from the legal authority of the legislative body that has created the statute. The Constitution does not derive from any higher legal source. Since it is itself the highest legal source from which all other legal norms are derived. However, the constitution is not itself the grandnorm. It is the belief that the constitution should be the highest legal source which is the grandnorm.99

It appears, however, that both the analytical positivism of Austin and the pure theory of Kelsen study positive law as it is and not as it ought to be. They take law as a distinct phenomenon which must be looked at in this context.
As a command law is founded on the sovereign power and backed by its sanction and as a norm law is based on a legal hierarchy of valid norms.

It is possible to take the ideas of command and norms together to explain how positive law works in a secular society. In this connection law will be looked upon as a norm which is backed by a sanction for it is not possible for a legal norm to be valid without being effective. A norm is not effective, though it is valid according to the hierarchical order, if it is not backed by sanctions.

7. Positiveism in the Sudan

(a) Introduction

It is elsewhere remarked that the word "law" in the Sudan, refers to "legislation" whether primary or secondary. In effect law has overwhelmingly been the direct expression of the will of the sovereign power. Legislation in this sense has also been the primary source of law. In the last ten years there has been a consistent resort to "legislation" in order to strengthen the power of the sovereign authority.
<table>
<thead>
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<th>Year</th>
<th>Legislation</th>
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<td>1971</td>
<td>1. The Republican Order No. 5, 1971 (containing the basic law by which the government was to be regulated up to the issuing of the Permanent Constitution).</td>
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<td>2. The Interpretation and General Clauses Act, 1971.</td>
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<td>5. The Unregistered Land (Amendment) Act, 1971.</td>
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<td>6. The Interpretation and General Clauses Act, 1974.</td>
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<td>2. The Code of Criminal Procedure 1983</td>
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<td>5. The Judiciary Act, 1983.**</td>
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* It was announced as one which enforced the rule of Islamic Shari’a Law as the core of a new legal structure. See Sudan Law, Vol. 8 No. 10 October, 1983.

** It was termed as the judicial revolution to achieve efficient justice, see ibid.
The Sudan Courts have chosen to apply the law as it is and made very little attempt to deviate from the express wording. Sometimes this conformity was at the expense of some moral considerations. This showed a tendency for making an obvious distinction between law as it is and law as it ought to be and also a separation between law and morals. Such a separation has almost ceased since September 1983 and the Courts have been able to apply the law as it ought to be conformable with Shari'a principles.

The ensuing discussion deals with the distinction between "the law as it is" and "the law as it ought to be", the separation of law from morality and the analysis of legal concepts.

(b) *The law as it is and the law as it ought to be*

In the Sudan, the judicial attitude though inarticulate, has been one of strict separation of law as it is and law as it ought to be. Academic Lawyers have been more explicit. Abdalla El Nimeiry, for instance, sees that:

"What is always needed is that a distinction should be made between the law as it is and the law as it ought to be. It is, in fact, an essential distinction and of great importance. Nonetheless, the parties as well as the Courts in some instances failed to comprehend it."

Akolerin is of the opinion that the courts should leave the law as it is and take no step to fill in its gaps not even under the guise of justice, equity and good conscience. It is for the legislature to do that. He states in this connection
that:

"In the Sudan, the judge or the court has a double task theoretically. He has first to examine foreign legal systems, in order to find the principles that should be applied, and adapt them as far as they can be adapted to the conditions in the Sudan. This indeed should be the job of the legislature and not of the judge or the court".

This was seen to be the proper policy even at the time when there were many gaps in the law of the Sudan. Thus the courts should be relieved of the responsibility of filling gaps in the law. The reason Akolawin believes, is that they are not qualified to perform such a responsibility and because the courts by the nature of their function are limited to the actual issues and parties operate within a limited sphere, their process being inevitably gradual and piece-meal.

It is concluded, therefore, that the burden of filling in the gaps in the law as it is should be carried by the legislature which is the legally free and responsible body and the best to express the sense of the nation as to the choice of legislation or law that ought to be.

El Nass and Akolawin are clear as to the fact that the law as it is should be unequivocally distinguished from the law as it ought to be, and that the court should concern itself with the law as it is and leave the law as it ought to be to the legislature which alone is empowered and best qualified to make the law.

The view is held in regard to the judicial practice as well as to law reform. The criticism which may be directed against a certain provision of the law and the
basis for a further recommendation of a law reform should take into consideration the distinction between law as it is now and the law as it ought to be in the future. This means that the law reformists should be aware of this distinction for their study is mainly concerned with the law as it is and their recommendation with the law as it ought to be. In this respect judges see themselves to be bound by the law which the legislature makes whether it is just or unjust. As Abu Hammat C.J. stated in Omar Abdel Cader Ali & Two Others v. Sudan Government, that the legislature made the law and we are bound to apply it. It is not for us to question the wisdom of such law. It is relevant to note that in this case some people who had been owners of land by prescription were affected by the introduction of a law depriving them of the ownership of the land. Such a law was alleged to be unjust and the court was convinced that great injustice was caused, yet it ruled that such a contention, i.e., that the law was unjust, would not find support in law and consequently applied the law though it was admittedly unjust.

Moreover, the law for reasons other than its being unjust, may require an amendment. Judges though aware of such facts, deal with the law as it stands and do not even propose an amendment. In a 1944 case, Bennett C.J., stated that:
"The law requires for the acquisition of a prescriptive title only public, peaceable and uninterrupted possession by a person not a usufructuary, and the attempts which have been previously made by judgements delivered in this court to read into the word "possession" qualities which are not carried by its ordinary meaning are not justified by the words of the Prescription and Limitation Ordinance. That law, requires amendment. I do not dispute, but that is a matter for the legislature and not for the courts". 106

This statement supports the contention that judges do not and shall not make law, and that the legislature alone performs this task. This is misleading on occasions judges attempted and did actually make law. 105 What is relevant here is not whether they make or only declare law but whether or not, in the final analysis, they concern themselves with the law as it ought to be or only stick to the law as it is. Generally speaking, judges tend to declare an already existing law, i.e., law as it is an concern themselves little with the law as it ought to be. Their role as law-makers is too narrow and almost negligible.

However, the distinction between the law as it is and the law as it ought to be has been blurred especially since 1983. Section 438(5) of the Penal Code 1983 states that "No provision under this law (the Penal Code) shall be interpreted in a manner contrary to a legal principle". Reference here is made to Shari'a principles. It followed if there is any provision in the Penal Code which the judge finds to be contrary to Shari'a principles, he should not apply it as it is. He should interpret it in accordance with Shari'a principles. That is to say he should apply the
relevant Shari'a rule.

It is stated that "No personal reasoning is possible in the existence of a provision" but such provision must in turn be interpreted in accordance with Shari'a rules and principles. If it runs counter to them it would be interpreted in a way which brings it in conformity with such rules and principles or else be regarded as null and void.

The distinction between law as it is and law as it ought to be one believes, is still of vital importance for the following:

(i) the application of law requires that judges should ascertain what law they ought to apply and how to apply it. Their description is not in the choice of law but in the methodology and policy of applying it which means when they ascertain the law (the existing law) they ought to apply that law;

(ii) the law as it ought to be can hardly be applied for the judge will be applying something which the parties do not expect to govern their relations. Furthermore, the search for the law as it ought to be is deemed not to be in issue;

(iii) the law as it ought to be is uncertain even in the general direction of section (2) of the judgements. (Basic Rules) Act, 1983 and 458(5)
of the Penal Code 1983;

(iv) the distinction may be relied upon to support
a rule against the retroactivity of law for,
since the law as it actually exists does not
contain a punishment for a certain act, or does
not even regard it as a crime, it could not be
said, therefore, that the law should have punished
that act.

(c) **Separation of law from morals**

The contention was that, in the period before 1983,
there was no necessary connection between law and morals.
Sexual intercourse with a girl over eighteen years of age,
with her consent, constituted no crime, though such an
act may have been morally unacceptable. To fall under legal
prohibition certain immoral acts must satisfy certain condi-
tions. These can be stated, as follows: (a) Abandonment
of children must threaten child’s existence, (b) there
can be no attempt of a sexual offence which does not fall
under Penal Code section 379 (dealing with gross indecency)
i.e., preparation for sexual intercourse short of doing an
overt act towards the commission of the offence are not
crimes unless they constitute abortive acts exceeding the
stage of preparation; (c) obscene or indecent acts must
have been actually seen by others in a public place and
must annoy them in order to constitute an offence under
section 234 of the Penal Code (1929).
We mean to establish by the above examples that in absence of the conditions attached, these acts did not, though immoral, constitute crimes.

Two sets of cases are relevant. The first deals with provocation as a defence and the second with private defence. In the first category, two decisions in which provocation was raised as a defence show a leaning towards separation between law and morality. The first decision was by Abu Bannat C.J. in Sudan Government v. El Asin Rayoma El Hadd, in which the question of provocation was dealt with as follows: 116

"The question of provocation is purely psychological question and one cannot apply considerations of social morality to such purely psychological question. Consequently, when a man sees a woman in the arms of another and loses control over himself, the circumstances that she was his mistress and not his wife does not make any real difference for the purpose of the Penal Code s. 245(1)".

In determining whether or not a man is deprived of his control by means of grave and sudden provocation, the court did not consider social morality. The same argument was followed in Sudan, v. Rashdan Baya Rashdan, 117 where Salah Hassan J. stated: 118

"What constituted .. provocation as to bring the case within the exception is a question of fact which depends upon circumstances of each case. The question is psychological and questions of social morality are irrelevant".

The two decisions adopted the Indian Law. Their arguments is explained as pointing to the idea that moral considerations should be disregarded in applying legal
provisions. Though it attempted to liberate law from moral considerations, this approach introduces psychological ones into the law which is surely against the positivist outlook as emphasised by Kelsen’s Pure Theory of Law.

In 1975 an obviously contrary decision was made. It was the decision in Sudan Government v. Mohamed Belawi El Sheikh, where it was ruled that the courts in the Sudan do not accept the thesis that the question of provocation is a psychological question in which no distinction is drawn between the husband and the friend for that is against our values, morals and religion.

The two other cases in which the exercise of the rights of private defence was in issue require brief analysis here. The accused in the first case was a “prostitute”. She was convicted of culpable homicide not amounting to murder for causing the death of the deceased with whom she had been in sexually intimate terms. The deceased, who was drunk, tried to have sexual intercourse with the accused by force, but she managed to free herself from the deceased and went back into the house. She hit him with the sharp end of the axe on his forehead and then hit him twice with the handle of the axe on his back. He was found dead the next morning.

The facts of the second case are: The accused who was a “married” woman, was threatened by the deceased with a knife. The deceased then attempted to rape her. She snatched the knife from his hand and stabbed him mortally. She was found not to exceed her right of private
defence" as she always has the right to defend her chastity from savage attacks of a persistent drunken brute who wanted to force her will in order to satisfy his lusts.

In the two cases the deceased were drunk, attempted to force sexual intercourse and the two women defended themselves against attacks on their persons and caused the death of their attackers. The only difference seems to be that the first was a prostitute and the second was a married woman and upon these basis the court in dealing with the former case (regarding the prostitute) found her guilty of culpable homicide not amounting to murder as she was seen to have exceeded her right of private defence. As for the married women she was found not guilty of any crime as she did not exceed her right of private defence as she had always had the right to defend her chastity etc. The reasoning of the latter case seems to suggest that "a prostitute" has no chastity to defend. Commenting on the two decisions, Professor Vasdev states:

"Does the difference in the result lie in the fact that, in the first case, the accused was a prostitute, whereas in the second case she was a respectable married woman? If such a distinction were to be accepted we would be sacrificing fairness in order to uphold morality."

If the premise is true then Professor Vasdev's conclusion is also true. The manner as he sees it, and as the writer agrees, is one of "fairness" or justice. In this sense the law should equally protect respectable married women and prostitutes.
Comparing the two sets of cases, it is remarkable that the former cases, in so far as the separation between law and morals is concerned, were totally adverse to the latter. We mean to say that, though both the former and latter cases seem to distinguish between the legal and illegal relations, yet the latter did not only annex law to morality but further tended to enforce morality by protecting the chastity of a married woman. In the first set of cases the law was totally different for it cared little for social morality. Today one can hardly say that the law recognizes any distinction between law and morality. 125

(d) The Legal Concepts

The relativity of the legal concepts has largely been apparent in our law and generally legal concepts have different meanings according to the contexts in which they are found. Perrot adopts Professor Hart's view that: 127

"The meaning of legal concepts can only be elucidated by considering the conditions under which statements in which they have their characteristic use are true". 128

In Banet's decision of Estate of Yousef Elias case, the court was directed to read into the qualities of the concept "possession" which were not carried by its ordinary meaning as in the Prescription and Limitation Ordinance 1925, s. 3 but assumed a wider meaning. 129 We start now with discussing the jural relations.
(1) **The jural relations**

There is no comprehensive scheme for the jural relations i.e. the jural corollaries or jural opposites in our legal theory. However, many examples may be given to show how the courts in the Sudan have utilized these relations:

Ex. 1. It is remarked in Khartoum People's Council v. Hassan Mohammed Saleh,¹³⁰ that the occupier (a tenant in the case) is placed under duties and so it is not reasonable that he should not have rights. It was decided, therefore, that because of his being under duties (e.g. to pay rent and keep the premises in a good condition) the occupier has rights of which the right to sublet the premises is one and can object against an order to demolish the premises.¹³¹

Ex. 2. In Mohammed El Mag Osman v. Hilla Commercial Office,¹³² It was ruled that: (1) where an agent has become liable to third party under a contract entered into by him within the mandate of his authority etc., he (i.e. the agent) is entitled to be indemnified by the principal, and (2) where an agent has a right to be indemnified by the principal etc. and the agent is held liable to a third party for damage which is not the natural consequences of the breach of the contract, the principal must indemnify the agent to the full amount of his liability.

Ex. 3. It is not strange, as stated by Zaki J., in Shell Company (Sudan) Ltd. v. Sedeig Elias,¹³³ that a person can make a contract with another for the benefit of a third
party and upon that contract the third party comes to have rights and becomes entitled to oblige the person under duty and at the same time faces what that party has in terms of rights against those under duty according to the terms of the contract.

(ii) Some Legal Concepts

Of the most currently analyzed concepts in our law are the concepts of (i) persons, (ii) property, (iii) ownership, (iv) possession (v) rights and (vi) duties. They may therefore be examined in this order.

(1) Persons

Persons are either natural or legal, i.e., human beings or corporations. Article (4) of the interpretation of laws and General clauses Act, 1974 reads:

"person means any natural person and includes any company or association or body of persons whether corporate or not".

As to natural person, even the newly born infant is a person provided that he is born alive. Its personality, however, ceases on its death.

According to the above provision, in regard to legal persons, the concept of incorporation is not a condition for legal personality. In fact, any legal person is only subject to the law upon which it is founded.134 If such a law requires incorporation it must be incorporated. If not, the incorporation as a general rule is not a necessity. How the consequences of incorporation are obvious. The association,
will be able to sue and be sued. That is to say, it will have rights and be subject to duties. It will have its distinct personality which is different from that of its members. Now, new forms of business are adopted and the law does not state any procedure for incorporation or that incorporation is of necessity. Only companies which are formed, or will be formed in accordance with the Companies Act 1925, follow the requirement of incorporation.

Of the main characteristics of the legal person in the Sudan is that it enjoys all the rights save for those associated with the human nature, in accordance with the law, including the right to sue, which has been asserted. The Sudanese courts ruled that a religious sect is a "person" within the meaning of the Prescription and Limitation Ordinance 1928, sections (2) and (3) and may, therefore, bring an action for prescriptive title. In this respect, our law deviates from the principles of English common law which make it impossible for the fluctuating body to prescribe. Akgalla J. stated in this regard:

"Our Ordinance (i.e. the Prescription and Limitation Ordinance, 1928) ... is not ... affected by any principle of a general nature recognised by the English common law. I think that by giving the word 'person' a wider definition than is recognised for the purpose in England, the prescription is that we meant to deviate from the principles of English common law. That is so is borne out by the fact that our Prescription and Limitation Ordinance. Section (3) allows prescription even in favour of the general public if the subject-matter of the claim is an easement. Such a claim is impossible in England because easement there cannot be acquired by the general public, as no grant can be made to an indefinite
body of persons".  

The decision is not a solitary assertion in our law regarding a wide definition of "person". The word is exemplified by: the state, its public and other institutions, the corporations, the religious groups, the wakfs, the commercial companies, the associations and any institution which is founded in accordance with the law. Therefore, reference to religious sects or groups is unequivocal.

As for companies, it is worth mentioning that the "company" is defined to mean a company formed and registered under the Companies Act 1925, and having the liability of its members limited to the amount, if any, unpaid on the shares respectively held by them. This limited liability distinguishes the company from partnership. There are, however, private companies which, by their articles, restrict the right to transfer shares, limit the number of the members and prohibit any invitation to the public to subscribe for any shares or debentures of the company. Since section (3) of the Penal Code 1983 states "person" includes any company or association or a body of persons whether corporate or not, then it is logically deduced that a company or corporate personality may be criminally liable or, in other words, may commit an offence under the Penal Code or any penal law. The proof of the ingredients of a certain crime as well as the measure of the proper
the different qualities of the word "property". Property is every thing or right which has a material value in transactions.¹⁴⁶

Moreover, different kinds of property are distinguishable. Property is movable or immovable, and public or private. Immovable property refers to land and things attached thereto. Movable property includes corporal things of every kind and description except land and things attached to the earth or permanently fastened to anything which is attached to the earth.¹⁴⁷

This does not mean that the concept of property becomes absolutely limited and carries no further qualities. Practice shows that it is sometimes not easy to state whether a certain thing is property. The word "property" has provoked so many and sometimes intelligent interpretations. As an example, El Fadil Hassan Khalifa, J. in Sudan Government v. Abdelali Mustafa Abu Nuba,¹⁴⁸ reached the conclusion that the licence (which proves a right) is a property and, consequently, a crime under the Penal Code 1974, section (351) relating to criminal breach of trust by a public servant, might be committed in regard to such a licence. It seems that the definition of the word "property" under section (16) of the Penal Code 1974 did not avail the court and hence other qualities were looked for upon the thesis that:
Papers upon which the rights are mixed with the things and which prove the existence of such rights, are themselves (i.e. the papers) property. The dictum of Tambal, J., in this case suggested further that even the "energy" of a vessel, used in breach of trust, is a property.¹⁴⁹

Land, is a property whose acquisition, use, registration as well as transfer of title, have been regulated by law. Unregistered land was deemed to be registered in the name of the Government.¹⁵⁰ However, private persons might nevertheless acquire ownership of land by prescription after twenty years even against the Government.¹⁵¹

In fact, all unclaimed and ownerless property of whatever description and whether movable or immovable is deemed to be the property of the Government, unless and until the contrary is proved.¹⁵²

(3) Ownership

Ownership means the ability of the owner to protect his property by a legal action and give an absolute title.¹⁵³

Questions of ownership of personal property have largely been associated with those of title and possession. Common law rules regarding these concepts, are for minor differences, are generally followed. The relativity of the concept is exemplified by the right of a finder. A finder of a property though not the original owner may if, the original owner cannot be traced, have a good title against everyone except the original owner.¹⁵⁴
Ownership of land may be acquired by a peaceable, public and uninterrupted possession by a person not being an usufructuary for a period of ten years, provided always that if such ownership be claimed as against the Government the period shall be twenty years instead of ten.

Co-ownership raises many problems as to the rights of the parties. In a case of rents in respect of an undivided share in a house, a co-owner (in undivided shares) is entitled to his share of the rental value of land when (a) he is being prevented from the enjoyment of possession by his co-owner, and (b) the co-owner is received rent for the land from a third party. The rule is that a co-owner owns every particle in the whole and because of this he is entitled to enjoy it with co-owners. It follows that he is debarred from claiming rents in case he is not in actual possession.

The law protects the right to ownership. Such a right is taken to mean the authority of the owner to deal absolutely with his property whether by way of use or disposal. The owner of a thing is alone entitled to benefit from the object owned. He owns all its material parts. The owner of land, for example, owns what is above and beneath the land to the extent of his use and enjoyment unless there is an agreement to the contrary.

No ownership of anyone shall be taken without lawful reasons e.g. for public interests and after payment of equitable damages in accordance with the law.
The owner has the right to deal with the things he owns as he pleases. The only condition is that this should be in accordance with the law. 161

Ownership may be acquired by means of customary right e.g. *qasad*, 162 or by means of pre-emption, 165 inheritance, 164 legacy, 165 and by peaceful public and uninterrupted possession. 166

What is unique is our law is that ownership may be acquired by customary rights. In this respect the case of *Mires of Ahmad El Hussein and Others v. Mires of Omar El Rehabi and Others*, 167 may be a good example. In a land dispute over certain *gezira* land in Berber District, plaintiffs claimed ownership by *mirin* customary right to whatever *gezira* land appearing above water in a given area of the river bed. Defendants claimed the land above water by prescription, and the land below water by *qasad*, (a customary right whereby owner of the land adjacent to the river is presumed to own all lands appearing in the river between their banks and the middle of the river bed). In this case plaintiffs proved in fact their ownership of the *mirin* over these lands by proving ancient ownership in their predecessor. Defendants proved that they had held adversely the cultivatable land above water for more than the prescription period, and that they owned the land adjacent to the river on the west bank. The court ruled that (i) Since in this area the river is divided into *mirin*, the owners of the bank may not claim *gezira* land by *qasad*, (ii) when land appears
in an area of the river owners for the prescription period become owners by prescription and (iii) therefore, defendants owned the cultivated land which had been above water and held adversely for the prescription period (i.e. the right of prescription against the owner); plaintiff held their mirin rights to all lands which may further appear elsewhere within their mirin and to the sandy and uncultivatable sezira land (prescription unlike mirin is mere sand).

(4) Possession

The learned Chief Justice Abu Rannat, in the case of the Hellenic Community v. The Petit Bazarr, 168 remarked that "possession is acquired whenever the two elements of corpus and animus coexist and is lost as soon as either of them disappears. This simply means that possession consists of physical control (corpus) with the intention to hold as one's own (animus)." The thing must be placed in the actual effective control of the person in possession. The animus is the willingness and consciousness of that fact.

This definition is heavily criticised by Ferrot. He suggests that it would be, as a general rule, unwise if not impracticable, for a legal system to attempt to bind itself to any one rigid a priori definition of a concept like possession, without regard to the indefinite variety of factual situations and the very great number of legal rules with which the concept may be called upon to work. 170 This is to emphasize that the concept of possession is also a
Possession is an evidence of title. When it is peaceable, public and uninterrupted, it gives the possessor a good title to the land possessed. The search for the exact meanings of the words "peaceable", public "and" uninterrupted "or" continuous possession, shows the variety of qualities given to the word "possession". However, possession becomes the actual authority which the possessor exercised by himself, or through another, over a material object, and which is apparent and according to the intention of the possessor, and an exercise of ownership or proprietary right. This, one believes, includes both actual and constructive possession.

In fact, actual possession is in many instances important and actual dispossession is a must for the proof of the interruption of a continuous, peaceable possession over land. One claiming land adversely, therefore, must in order that his claim may be effective as against the owner, be in actual possession, otherwise the law will assume the owner (who has the legal title) to be still in possession.

By adverse possession, persons in the Sudan secure title to land. The possessor would be protected against a claim of trespass by the owner if the claim is neglected for ten years. The possessor becomes the owner by means of prescription.

Constructive possession is adopted in the same way as
actual possession save for the fact that control is here exercised by a mediator. Section 632 of the Civil Transactions Act 1984 reads:

"Possession through another is evident when the mediator exercises control over the thing on behalf of the possessor."

Persons always retain possession if they uninterruptedly possessed the land through tenants who have paid them rents. 176

A person who possesses for another cannot by himself, as a general rule, change the nature of his possession. 177 The nature of possession changes by the act of another or by the act of the possessor which is considered to be adverse to the right of the owner. 178 Such possession does not start unless and until such change takes place. Moreover, a person under incapacity can possess through a legal representative 175 and his possession may be, as such, considered as constructive possession.

Unlike those regarding ownership, the rules regarding possession are not widely analysed. The opinion of Bawory as to the necessity of the co-existence of both corpus and animus for the acquisition of possession once, adopted by Abu Rannat C.J. seems to be the definition still applied in the Sudan though it is heavily criticised.

(5) Rights and Duties

Rights refers to personal propriety rights. 180 The
law also recognizes what is called "subjective rights" which relate to things that are not material e.g. the copy-right, the right to trade marks etc. Personal right refers to legal relations between debtors and creditors upon which the creditors bind the debtors to transfer a property right and do, or abstain from doing, an act.¹⁸² Property right is the direct authority over a thing which the law confers on a certain person.¹⁸²

A right is not with a duty. Whoever exercises his right in an unlawful manner is liable to pay compensation 'with regard to the damage caused by him in that manner."¹⁸³ The law in fact places on the same person who has the right the duty to exercise his right in a lawful manner.¹⁸⁴

The Islamic principles against causing injury, which are adopted in the Sudan,¹⁸⁵ may be read to suggest the following:

(i) There is a duty upon everyone not to injure his neighbour, which neighbour includes anyone who will be directly affected by his act or otherwise sustain damage.

(ii) The person who unlawfully uses his right to the inconvenience of others or causes them damage has to pay them compensation.

(iii) A necessity makes permissible the doing of an unlawful act and hence the person doing such act will be immune from liability provided that such necessity should be taken in connection with the circumstances.
All contracts which are not, for one reason or another defective or unenforceable, put the parties in a special situation. They confer rights and duties, on the parties themselves but cannot, however, place a third party under a duty though they can give him rights. The theory of "Obligation" in the Civil Law and specially the Egyptian law (as interpreted by Sahuri) was once adopted in the Sudan to the exclusion of the English common law principles. Now the Civil Code of 1971 is principally reproduced in the the Civil Transaction Act 1984, but the Bar and the Bench have little enthusiasm to equate such a law with the Egyptian and much less with the French Civil Law. Islamic, and common law principles regarding obligations are still applied.

The codification of the law of torts is a novelty in our legal system. The law now bases tortious liability on the Islamic rules regarding the responsibility for injuries. That he who causes an injury to another is obliged to pay compensation even if he is a minor.

8. Conclusion

The writer is of the opinion that the predominant theory of law in the Sudan has been positivism. What makes one adopt such a contention is that the nature of law suggests that it has been but the direct expression of the will of the sovereign power. Judges take themselves to be strictly bound by what the legislature has stated and they, therefore, tend to declare what the law actually is and not what it, upon consideration of justice or morality -
ought to be. There was an obvious distinction between the law that is and the law that ought to be as well as between law itself and morality though this latter distinction has been narrowed or it has disappeared.

As the positivist regards the sovereign to be the proper source of law, and that legislation is the direct expression of the sovereign's will, the idea in the Sudan, as well as the practice, has been that legislation is the primary and most important source of law.

The change in our law has largely been influenced by change of politics and policies. The reception of English law through the formula justice, equity and good conscience, the introduction of Egyptian law in 1971 and its abandonment after a short interval, the adoption of Islamic Laws in 1983 are all examples.

The positivist outlook in the Sudan is not itself a disaster. The conceptual analysis of the legal terms such as "persons", "property", "ownership" etc., is intelligently utilized. The distinction between the law as it is and the law as it ought to be may be relied upon to support the rule against the retroactivity of laws. Morality, one believes, is a wide concept and a line must be drawn somewhere as between morality which should be law and morality which should not come into the ambit of law. The distinction is no doubt indispensable; otherwise the penal code should embrace the whole range of acts which was immoral. The social, economic and legal conditions, one believes, should replace the mere will of
the sovereign power. In a democratic state, the law develops as an integral part of the society, and does not change on the exercise of the sovereign power.

Finally, the reader will find out that most of the theories presented in this work are criticised in a way to show that a positivist outlook is always traceable and always dominant. In fact, our judges and lawyers are in large measure positivist minded.
NOTES


3. The writer of the opinion that the distinction between law as it is and as it ought to be is not synonymous with the separation between law and morality. See below p. 593.

4. See infra Chap. III.


6. There is an interesting analysis regarding "is" and "ought" presented by Arnold Brecht, see Brecht, "The Myth of Is" and Ought, 11 (1940-41), Harv. L. Rev., Vol. 54, pp. 830-31.


8. Finch, op.cit., p. 44.


10. Idem.


19. idem.


23. Dias observes that various allegations have been made that Moisfeld's analysis was incorrect and incomplete in place. There is, Dias believes, some truth in this and many critics have done constructive service in
removing the errors and that *Maitland* himself would very likely have corrected these had he lived to revise his work. His premature death was a loss, for the form in which his work is to be found is not that in which he hoped to have left it. *Dias*, *op. cit.*, p. 61.

24. Thus, *Dias* observes that when operating *Maitland’s* scheme it should be noted that jural relations between any two parties should be considered only as between them. See *Dias*, *op. cit.*, p. 35.


30. See above.


35. This is the rule in Salmon v. Salmond Ltd. (1897).

36. For fiction theory see Dias, op.cit., pp. 361-362.


38. Ibid., at pp. 69-70.

39. Ibid., at p. 70.

40. Ibid., at p. 97.

41. Salmond, op.cit., p. 246.

42. Ibid., pp. 247-8.

43. One believes that all legal concepts are relative.


46. See supra, pp. 224-230.


50. Idem.


52. Idem.


54. Ibid., at p. 1366.


56. See Goodhart, op.cit., p. 41.


58. The principle is that a possessor has a presumptive title that is to say, he is presumed to be the absolute owner until the contrary is shown, and is protected by law in his possession against all who cannot show a better title to the possession than he has (Asher v. Whitlock (1866), L.R.1., p. 1.


63. See Eral Jowitt, op. cit., p. 1426.

64. Under the law of Property Act, 1925 (England), sec. 205 "property" includes anything in action and any interest in real or personal property.


66. Idem.


68. See Hart's Introduction to Austin's The Province of Jurisprudence Determined, op. cit., p. x.

69. Ibid., at p. 14.

70. Idem.

71. Ibid., at p. 17.

72. Ibid., at p. 17.

73. See Hart, "The Concept of Law", op. cit., p. 20
   The underlining is mine.


75. See Austin, "The Province of Jurisprudence Determined", op. cit., p. 19.
76. Ibid., p at p. 20.

77. Ibid., at p. 19.

78. Ibid., at p. 21.

79. Ibid., at p. 22.

80. Ibid., at p. 15.

81. Ibid., at p. 16.

82. Ibid., at p. 15.

83. Ibid., at pp. 15, 16.

84. Ibid., at p. 19.4.


86. Idem.

87. However, Hart resolved this problem by adopting the idea of a tacit command for what the new sovereign does not reject it commands. See ibid., p. 62.

88. Idem.

89. Idem.


91. Ibid., at p. 482.

92. Ibid., at p. 477.

93. Ibid., pp. 484-5
54. Ibid., at p. 480.


56. Ibid., at p. 50.

57. Ibid., at p. 51.


59. One believes that it is not the Constitution itself which is the grand norm but the idea that we shall be governed by it, or "that it is the basic law, is the grand norm. This conclusion is based on the idea that the Constitution in the positive Legal sense is part of the law or norm-creating process within the system of positive law itself. The grand norm is presupposed in a juristic thing.

60. See figure (1).

61. See El Naem, A.A. "El Qanun el Canai, fi el Sudan" (The Criminal Law in the Sudan) Temporary Edition, Faculty of Law, University of Khartoum, 1984, p. 87.


63. Ibid., at p. 161.

105. See supra, p. 177 and p. 172 note 179.

Abu Sulaha Ac - App - 3 1944 - S.L.R. (civ) vol. VIII
p. 204 at p. 207.


108. Idem.

109. See infra chap. (III).

110. See sec. 5(27) of the CTA, 1984.

111. See sec. 2 of the JBRA, 1983.

112. See sec. 316 of the FC 1974.

113. This is the obiter dictum of Bakir Abdalla J.
In Sudan Government v. El Mahdi Abdalla Kodeid,
(1961) S.L.R., p. 86 at p. 87.

114. Ibid., at p. 86.


116. Ibid., at p. 97.


118. Idem.

119. (1975) S.L.R., p. 139.

120. Ibid., at p. 442, per Omer Bakhit El Med, J.

p. 58.


124. Idem.

125. See supra, p. 360-372.

126. "Relatively" here means that quality of a concept whereby the term used to denote the general concept is not used with any simple unitary meaning but with a variety of more or less related meanings the whole collection of which must be elucidated by reference to the specific context in which it occurs. See Perrot, some Notes on Possession and Title in the Sudanese Law of Personal Property (1962), S.L.J.R., p. 323, at p. 333.

127. See ibid., at p. 337.

128. This is because the concept "possession" is extremely relative.

129. The concept is not used with any single unitary meaning but with a variety of meanings more or less related to each other.


131. Idem.


134. See sec. 24(1) of the CTA, 1984.

135. By part VII of the Civil Transaction Act 1984 the new forms of business created are in a sense similar to partnerships though termed companies.

136. See the CTA, 1984, § 24(1).

137. Ibid., sec. 24(2) (d).

138. Sec. 2 of the PLO, 1928 stated : "person" includes persons or body or class of persons or any corporate body sec. 3 of the same Act provided that "ownership of land may be acquired by a peaceable, public and uninterrupted possession thereof by a person not being an usufructuary for a period of ten years.


140. Ibid.

141. Ibid., at pp. 258-9.

142. Sec. 23 of the CTA, 1984.

143. Sec the Companies Act, 1925, sec. 2(2).

144. See Ibid., sec. 2(13).


146. See § 2(13) of the Civil Code 1971.

147. Ibid., sec. 26, 27, of the CTA, 1984 states: Every
thing attached and fixed to certain place from which it cannot be diverted without causing damage or change of its structure, is an immovable property and everything else is movable property.


146. Ibid., p. 28.

150. See sec. 4 of the ULA, 1971.

151. See the PLO, 1928, sec 3.

152. See ibid., sec. 16.


155. See the PLO, 1928, sec. A.

156. Ibid.


158. See the CTA, 1983, sec. 516(11).

159. Ibid., sec. 516 (4).

160. Ibid., sec. sec. 517.

161. Ibid., sec. 518.

162. Ibid., sec. 605.

163. Ibid., 516.
164. Ibid., sec. 655.

165. Ibid., sec. 682.

166. Sec. 3 of the PLO, 1328.


169. It is Savigny who has been the first to state this principle. Later writers speak of the intention to hold the thing to the exclusion of anyone else (see Buckland, A Text Book of Roman Law, 3rd ed. (Cambridge, 1966, p. 197). However, the principle has much been criticised. (see Perrot, op.cit., note 35 p. 335).


171. See sec. 3 of the PLO, 1928.

172. Sec. 651 of the CTA, 1984.

173. Interruption is a physical entry upon the land by any person aiming it in opposition to the person in possession.


175. Idem.

177. See the CTA, 1984, sec. 634(10).
178. Ibid., sec. 634(2).
179. Idem.
180. Ibid., sec. 30.
181. Ibid., sec. 3(a).
182. Ibid., sec. 30(b).
183. Ibid., sec. 28.
184. Ibid., sec. 29.
185. Ibid., sec. 3(a) and (b), 28, and sec. 25.
186. Reference is made here to Sanhuri’s “Masāʾil fi El Fiqh El Islam,” op. cit., passim.
187. See the CTA, 1984, sec. 5.
188. See the CTA, 1984, sec. 128.
CHAPTER SIX

THE HISTORICAL AND SOCIOLOGICAL
APPROACHES TO LAW

1. Introduction

This chapter treats both the "Historical" and
"Sociological approaches to law as having much in common
(though they have some points of difference).

Like positivism the two approaches to law were a
reaction against natural law, its rationalism and universalism. Law is, however, regarded as an integral part of
society. It is not static but organically dynamic as
society moves and develops.

The distinctive feature of law, therefore, is that
law is a social phenomenon. This is why it has its
impact on social institution and why it tends to bring
about social changes.

Whereas the historical approach is essentially seeking
historical precedents and explanations for law as it has
developed in modern society, the sociological approach is
forward-looking, being concerned with the moulding of law to
enable it to tackle new social problems as these arise.¹
Therefore, the historical jurists tend to consider the
past rather than the present state of law. They regard the
law as something that is not and in the long run cannot be
made consciously and take custom as their type of law.²
The sociological jurists look at the present social facts
as the basis of law.
Moreover, the idea that law expresses the spirit of the people or the popular consciousness is part of the teaching of the historical approach to law. But for the sociological approach, law is viewed as one of the means of social control and thus an expression of integrative force used as a means of a constant social change and a tool in the process of social engineering.

In the Sudan, the search for a national law is particularly interesting. The law under the colonial regime is viewed as being alien to the "spirit of the people". Yet the nature and the wherabouts of that spirit are still unascertainable. Some see that custom and, therefore, customary law best represents that spirit. Others believe that Islamic law or Shari'a shows that spirit. Yet others call for a Sudanese common law developed from custom, judicial precedents, justice, equity and good conscience and Shari'a law for the spirit of the people, it seems, springs from the reality concerning the historical background of the whole Sudanese political, social and legal life. For these reasons the "law of the people" remains to be disputable.

The customary and native law, the case law developed by Sudanese courts and the Islamic Law have, in varying degrees, been suggested as representing the Sudanese national law. However, the common law, which has evolved through moulding of rules and principles to local conditions and social realities, is the most remarkable experience of search for Sudanese law i.e. "the common law of the Sudan".
It is the law from which the bulk of the legal rules in Sudan has emerged and become part of our national heritage.

Custom and Islamic law are relevant because they have their basis in popular consciousness. But except as applied to Native and Chief's Courts and with regard to land cases and personal matters in civil courts they had been governing a comparatively narrow field. But as far as the total amount of litigations is concerned the field of the Islamic Law has been extending since 1985.

The further believers, as for the social compulsion and social basis of law, that the courts were generally inclined to pay attention to social conditions in applying foreign law in the Sudan and have been considering those conditions in most cases of eviction, damages and sentencing policy. However, they have sometimes tended to adhere to the strict wording of the law and to apply it almost mechanically.

2. Historical Approach

The historical approach to law was part of the Romantic movement which was itself part of an ampler surge of human mind against the classical and rationalistic standards of the eighteenth century. The most illuminating characteristic of this approach is its denial that law is the product of conscious or determinate human will. It doubts the efficacy of legislation as being an arbitrary interference with the gradual
of law and legal systems. They consider the past rather than the present of the law. They regard the law as something that is not and in the long run cannot consciously be made. They see chiefly the social pressure behind legal rules. Their type of law is custom or the customary modes of decision.

Undoubtedly, such outlook has contributed an important insight to modern legal thinking by grasping the valuable truth that law is not just an abstract set of rules imposed on society but is part of the social and economic order in which it functions and embodies traditional value systems which confer meaning and purpose upon the given society.⁵

This approach is conveniently divided into two schools.

(a) The German Schools

Part of the Romantic Movement in Europe in the eighteenth century was the historical school in Germany. The very basis of the school is the idea that there was an organic connection between law and a people's nature and character as developed through history. Law did not emerge from the will of any arbitrary law-giver but from internal, silently operating forces within the community.⁶

The main thesis of this school is that the existence of a relation of one sort or another, between law and the
people, has never been denied in legal theory. The uniqueness of the historical school is that it takes this relation as an organic connection. Law, it is believed, is like language, it grows and dies with the people.

Savigny (1779-1861) is a prominent German jurist who contributed a lot to the German school. To him, law is connected with the being and character of the people and like language, manners etc., it grows with their growth, strength with their strength and finally dies away with them.

Savigny further believes that law was a slow organic distillation of the particular people. The concept which is termed the Volksgeist is specially associated with him. A people's law is viewed to be the product of this Volksgeist. This simply means that it is the product of the people's spirit or their sense of right as manifested in custom and tradition. It is the general consciousness of the people which lives in positive law. Positive law becomes the law of the people (Volksrecht). Savigny states:

"In the general consciousness of a people lives positive law and hence we have to call it people's law (Volksrecht).... the spirit of a people living and working in common in all the individuals is what gives birth to positive law".

This is the first teaching of Savigny, i.e. the organic connection between law and the people. The second teaching is the relation between law and custom. He argues that, since law comes from the people and not from the state and it represents their spirit, it is custom which largely
qualifies for that definition. Hence, custom is superior to legislation. The third teaching relates to codes which were held up as the models to be followed in Germany. These were rather examples of the pitfalls which lay in the path of lawyers whose native ability and industry were not combined with the accurate historical knowledge. He rather looked for the inner organic consistency which seemed to him to have provided the Roman lawyers with an ever present touchstone for the correct formulation of detailed rules. Thus, it is logical for his theory to be against codification as being futile, crude and dangerous. As he puts it: "it would be useless to codify the law of marriage, for instance, until the public mind had shown a 'decided and commendable tendency'.

The main criticism against Savigny is directed towards his concept of Volksgeist as being ambiguous and incorrect. One may hardly prove the existence of the spirit of a people or ascertain its whereabouts even in custom and traditions for they are not only local but also could not embrace the whole consciousness of the people.

Savigny underestimates the role of legislation and overestimates the role of custom. Legislation is surely the most remarkable expression of law which is actually enforced. Savigny seems to have placed the cart before the horse.

(b) The English School

This school is sometimes referred to as the
Anthropological school of law. It will be seen why the above subtitle is nevertheless adopted here.

In fact, the English historical school is much connected with Sir Henry Maine and is, however, different from the German School. It neither implies same hostility to codification nor places the same emphasis on custom.

Two of Maine's Chief contributions to legal theory, it is believed, were his analysis of the method of legal change and his "status to contract", generalization. Primarily, Maine studied the nature and development of early law in the historical context as well as the early societies.

The early law passed through three stages, namely:
(a) the stage of royal judgement, (b) aristocracies, i.e. the epoch of customary law, (c) the Age of Codes.

As to the stages in the development of the law, the first stage is equated by Maine with the Cretan Themistes (or themis criminal) who interpreted the will of the gods or the Goddess of Justice. This is the earliest notion of law in the primitive condition of mankind. In this stage law is connected with the personal commands and judgment of particular rulers who were mostly kings thought to be divinely inspired.

The second stage is termed the "epoch of customary law". In this stage law is said to be known exclusively to a privileged minority e.g. a caste, an aristocracy, a tribe etc., and is unwritten.
The third stage is called the era of Codes, those ancient codes of which the Twelve Tables of Rome were the most famous examples.

The other contribution for which Maine is also known, is the evolution of the legal condition of individuals within society from a rigid status where family dependency is paramount to free contract through the dissolution of family dependency and growth of individual obligation in its place.14

This evolution depends on the nature of the particular society. There are, in Maine's teachings, two types of societies, i.e. static or stationary and progressive or dynamic societies. The first is of a stationary nature in which there is a lack of desire of the members of society to improve their institutions from the era of codification and thus law tends to be inflexible. The second is of dynamic nature and the members are in a state of permanent modification of their law by means of legal fictions,15 equity and legislation.16

The movement of progressive societies, Maine believes, has been a movement from a status to contract. That is to say from a rigid and fixed condition imposed without reference to the individual to a new stage and by his own efforts where he becomes able to negotiate and deal freely with others on basis of contract.

It is, however, a narrow way of stating the whole matter as one of two groups one termed "primitive"17 "tribal" society with primitive or tribal "law" (law here
is equated with custom enforceable by power of group sentiment) and the other is "civilized" society which is supposed to be governed by law in the proper sense.

This is obviously misleading and causes much confusion as to the definitional aspect of the term. Moreover those who still stick to this distinction have in mind the western societies as representing the civilized societies and the Third World, most probably African societies, as being "primitive". It goes without saying that such a generalization and materialist outlook, is equally misleading.

There are, still some ideas by which Maine mainly contributes to legal theory. He, as we have seen, stresses the importance of legislation and codification. His emphasis on the continuous development of law stands a credit to his approach. Moreover, his perception of the connection between law and society whereby law becomes a significant aspect of social development is also remarkable.

Savigny and Maine, are taken as representatives of the German and English historical approaches to law. In this regard it looks plain that the natural law ideology was disregarded. The character of historical development, the people's attributes and the indispensable connection between law and the people, are duly considered. Perhaps, Savigny's Vorkgeist and Maine's classification of societies were the most unfortunate points in this regard. Nevertheless, the whole school: German or English, is really worth
studying for what we have stated throughout this discussion.

8. Historical Approach to Law in the Sudan

It was once stated that "18

"The sign of a good law is that, it should be springing from the conscience of the people to whom it is directed, meeting their demands, expressing their aims, loyal to their heritage, paying regard to their traditions and not siding away from their customs".

This statement is a pointer to the influence of the historical approach on some of judges in the Sudan. It conceives law as rooted in the popular consciousness of the people and in accordance with their spirit.

Moreover, there have been conscious attempts to make the law reflective of our traditions. This became clear by the promulgation of the October Charter 1964,19 the attempts at law reforms in 196720 and 197721 and by the socially-based judicial interpretation of the formula "justice, equity and good conscience".22

The search for a national law in our legal history is worth discussing. The Mahdiyya revolted against a colonial regime and raised the banner of Sudanese nationalisms.23 The revolution, as any other revolution, fostered radical change particularly in legal theory and practice by the emphasis it placed on Islamic law and state.

Not every rise of nationalism carries with it a search for a national law but may sometimes call for the
abolition of those laws made under Colonialism. The
Graduate Congress which was formed in 1938, called, among
other things for the separation of the Judiciary from
the Executive, the abolition of Ordinance on "Closed
Districts", the promulgation of legislation defining
Sudanese nationality, the formation of a representative
body of Sudanese to approve the Budget and the Ordinance,
and the issue, by the British and Egyptian governments, of
a joint declaration granting the Sudan the right of self-
determination which should be safeguarded by guarantees
assuring full liberty of expression in connection therewith. 23a

After Independence in 1956, nationalist fervor
began to show its mark on the different aspects of life in
the country. In many fields new ideas emerged calling for
a radical change of what is foreign and alien. The law
then in effect was no exception to the prevalent general
trend. 24 Different arguments were advanced in favour of
casting away the present system and adopting new laws suit-
able to the conditions of the whole country. Though the
rhetoric is one, that is doing away with the foreign laws,
the advocates of such ideas do not agree among themselves,
as to what law to adopt and what mode of reception to
follow. 25 There were, however, three trends: one calling
for the application of Islamic law in all matters as most
of the Northern Sudanese are Muslims, the second calling
for the adoption of the Egyptian law, which is the basic
law for nearly all Arab countries, and the third group
believed in eclecticism, i.e. the idea that the suitable law to be adopted should be a blend of the best of the laws of each country from all over the world.\textsuperscript{26}

The Islamic trend has never ceased. Sheikh Hassan Mustathir presented "A Memorandum for the enactment of a Sudan Constitution devised from the Principles of Islam.\textsuperscript{27} in which he stated:\textsuperscript{28}

In an Islamic country like the Sudan the social organisation of which has been built upon Arab 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 an Islamic constitution and in accordance with Islamic ideals out of which such community has been shaped.\textsuperscript{29}

This invitation to make an Islamic constitution was reaffirmed in 1968 by the Bill of the Islamic Constitution in which Shari'a was suggested to govern not only the law but also the state. In fact, the call for an Islamic Constitution did not result in Islamic legislation. It was only in 1977, when a Committee was formed to revise the positive laws in the light of Shari'a, that Islamic legislation came to be formulated as law in the Sudan. Exactly, since 1983, legislative changes have operated towards the application of Islamic laws.\textsuperscript{30}

The second trend was the call for the adoption of the civil and particularly Egyptian law. The Egyptian law was said to be the most suitable law for the Sudan. This is
because - it was believed - of the fact that Egyptian law is codified, written in the Arabic language which the majority of people speak in the country, it is a good gesture of friendship with the Arab world and a step towards Arab unity. However, the real attempt to apply the Egyptian law was made in 1971 when the Civil Code 1971, was issued. That law was based mainly on the law of Egypt. However, it did not last long for it was repealed twenty months later. In 1984, the Civil Transactions Act, 1984 was issued. It is many ways similar to the Civil Code, 1971, though not identical with it. It depends on Shari'a principles as codified in some Arab countries and early in the Majallah.

The eclectic trend sought to draft codes incorporating elements of civil, common, Islamic and customary law. In many times this appears as the idea to choose the best from all over the world. It is observed in this regard that in theory it sounds perfect and the best method to be followed. But in practice, and particularly in the Sudan, it does not work. The reasons given are: First, because we already have a working system in our country, and secondly, even if we open our heart to it, we do not possess the machinery to carry out such a difficult task which requires a sound knowledge of foreign law. However, an eclectic approach may practically emerge as a result of the application of the formula, justice, equity and good conscience in the Sudan where the judge could receive the
best laws from all over the world.

There has been a fourth trend to adopt law mainly based on the social customs and ethics of the Sudan as a whole without regard to religious adherence. This was called "Sudanese common law". Mr. Justice Abu Rannat stated that:

"As Sudan common law will develop as an integral part of the society now emerging in the Sudan, it will not be based on religious adherence but upon the social custom."

The main problem here is that social custom is by nature local and bearing in mind the social diversities involved - one can hardly make a customary or ethically-based law for the whole Sudan.

The law of the Sudan cannot be identified with any of these trends. The result, as one sees it, is the continuation of the general principles of common law and unless a radical change takes place the future will witness a mature Sudanese law based on the common law principles, local conditions, customs and the principles of Islamic law.

b. Custom and the Law

The study of custom is relevant here since customary law reflects the life of a people and designates their sense of right.

In the African context, it is believed that customary law, the law of the African people, reflects the traditional African culture, whereas the imposed systems of West European
law reflect European values and attitudes. For this reason, it is contended that jurisprudence gave African nations an opportunity to Africanise their law and diminish the influence of the European law received during the colonial regime. This conclusion, though logical, will only be accepted with reservation in the Sudan.

We have done much to adopt our local customs and even to codify them. There has always been a formal recognition of custom both as law and a source of law. The influence of English law has been mitigated by the constant resort to custom, the recognition of local conditions and realities and the issuing of new legislation modifying the common law principles or customary rules and or rules based on Egyptian or Islamic law.

The anthropological account of custom is also noteworthy. Custom and native law have formally been sanctioned since 1931, yet no reporting system, for custom and native law, has ever been created. Howell's Manual on Nuer Law, is a unique contribution in this field.

Moreover, Clark, Evans, Lewis, 42 Keith, 43 and Stubbs, 44 do mirror the different customs of different areas e.g. the manners customs beliefs of Northern Beggas, 45 In-semana marriage customs, 46 customary law of the Murle, 47 land customs and tenure in Sinoa District and customary laws of Aweil District Dinkas. 48
The interrelation of custom and social change is also part of this anthropological research. The general attitude is that custom changes with social change. Thompson believes that:

"... because customary law reflects the life of a people, the internal social and economic evolution of a tribal group brings corresponding changes in its customary law which lead to change in custom by change of social life. Some of the most significant changes are due to impact of external influences, primarily those brought by the Anglo-Egyptian Condominium and by the government since Independence."

It is submitted that the vital changes are surely brought about by sovereign authority whether colonial or national.

The last point as to the analysis regarding the application of custom in the Sudan is the question of the codification of custom. It is a fact that customary law in its original form was neither written nor influenced by western legal traditions. It was, nonetheless, applied by indigenous people with the full force of the law. There was no formal code or system for the native custom but a vast corpus of unwritten law, kept in the minds of the tribal and village elders, varying from place to place in accordance with the local requirements, changing to meet new needs and acceptable to the people. Local customs were then applied through the provision of justice, equity and good conscience and hence became subject to formal limits.

It stated in 1952 that...
In Africa, there were two approaches: The first approach was represented by the Ethiopian codification project which proposed radical reform of the whole legal system, including the almost total abolition of customary law. The second approach advocated a Code in close conformity with customary law; a policy based on the thesis that customary law is the system best adapted to the needs of the people, and thus, in accordance with traditions and social values. The drafter of the Ethiopian Civil Code decided that customary law varied too much from area to area, was unstable and often lacked true judicial characteristics. He felt that because it impeded development, it was responsible for the undeveloped nature of African society.\textsuperscript{56}

In the Sudan neither of the two approaches was consciously adopted. The codification of custom was piecemeal. At first custom was made a source of law. Afterwards certain customary rights over land became part of case law and then came to be partly incorporated into legislative enactments e.g. the Land Settlement and Registration Ordinance 1925. Now, the Civil Transactions Act 1984 is the culmination of the trend of codification of customary law where the customary right of 
\textit{wetrud},\textsuperscript{57} and other customary rights over land and particularly customary rights to river land,
are incorporated.

Moreover, two remarks need to be made regarding the application of custom in the Sudan:

Firstly, custom as applied before the Condominium period and even after that, did represent the law of the people, their manners, beliefs, convictions and, therefore, their spirit.

Secondly, custom was nevertheless of a marginal importance for as we have seen in chapters two, and four, legislation has been the important source of law.

(4) The Sociological Approach to Law

The search for a social basis of law is the province of sociology of law. Sociology of law is thus, the science of the reality of laws which investigates the genesis of law in the life of society as the result of social process, the effect of law on social life and conceives law as a regulator of social action.

Broadly speaking, the sociological jurists are mainly concerned with the conception of law as a means towards social ends and the idea that law exists to accrue interests whether social, public or private.

The classical sociologists e.g. Ehrlich, Max Weber etc. devoted most of their attention to the genetic aspect of the sociology of law i.e. the investigation of the genesis of law in the life of the social process.
Pound shifted the attention to the more practical, operational aspect, i.e. the investigation of the effect of law on social life. Accordingly, the following jurists will be dealt with, namely: Jhering, Ehrlich and then Pound, to illustrate the two sides of the sociology of law and see how sociological jurists tackle the idea of law in general.

(1) Jhering

Jhering saw the law not as a formal system of rules but as a prime method of ordinary society. His doctrine is sometimes known as the "social utilitarianism". To him, society is composed of a mass of competing economic and other interests. An unfettered clash of these interests could only lead to chaos and anarchy. They could not however, all be satisfied, for many of them were in conflict with one another.

Radical change in jurisprudence began when the social utilitarians turned their attention from the nature of law to its purpose. Purpose was, according to Jhering, the creator of the entire law, so that there is no single local rule which does not owe its origin to some purpose that is, to some practical motives. Law emerges from social struggle over purposes. The purpose of law does not cease by, and is not the harmonisation, individual interests in order to give the greatest possible scope for individual free will but is the social good for the interest of the whole community. Jhering believes that the means of securing human ends are discovered and fashioned consciously into law, law thus, is
a means to social ends. The true aim of law, it is seen, is the realisation of an equilibrium of individual and social principles and purposes. It is the realised partnership of the individual and society. Committing interests in society can, and must, be resolved by the impartial mediation of the law basing its content on changing standards and purposes of society.

(b) Ehrlich

Ehrlich's main theses are based on the "living law". The living law is the law that dominates the life of society even though it has not always been reduced to formal rules. Law has a social basis. It is derived from social facts. It is derived from social facts and ultimately depends not on the state authority but on social compulsion.

The contention is that, there was always "a gap" between the living law and the positive law. It was the task of the legislator and judges to study the living law so as to recognise the existence and the extent of the gap and try to bridge it.

Ehrlich also adopts a theory of interests. He assumes that the legal preposition owes its existence not to any considerations of class or group of interests but those of the interests of all social strata.

(c) Pound

Pound's main contribution to legal theory is his
"social engineering" and theory of interests. For him jurisprudence is not so much a social science as technology, but a science of social engineering. The analogy of engineering is applied to social conflicting interests. So, Pound links the task of the lawyer to engineering. He states:

What the law has been trying to do is to adjust relations and order conduct so as to give the most effect to the whole schemes of expectations of men in civilized society with a minimum of friction and waste.

He adds:

"We may come near, for practical purposes, to systematic adjustments and reasoned orderings according to an authoritative technique. I have called this process one of social engineering. The science of law is a science of social engineering having to do with that part of the whole field which may be achieved by the ordering of human relations through the action of politically organized society".

The task of the legal order is stated to be an engineering task of achieving practical results with a minimum of friction. Thus, the methodology used is a practical one. Recourse was made to statistics, the establishment of a Ministry of Justice and the accumulation of information.

Pound taught that law is a social institution of satisfactory social wants with the least of sacrifice. In this way law is used to enable just claims and desires be satisfied in relation to the existing social needs. There is at any rate an engineering value in what serves to eliminate or minimise friction and waste."
contention became that legal history is but a record of continuous recognition and satisfaction of human wants or claims or desires through social control, securing of social interests and elimination of waste i.e. continuous social engineering.

The idea of social engineering is after all an interpretation of the legal process as a type of social control. We know that law is, among other things, a means of social control. As there are other agencies of social control e.g. schools, households etc., each does a greater or lesser part of the task of social engineering; law or the legal order becomes only part of these agencies. However, Pound believes that the blunt of the task of social engineering falls on the legal order.

The whole idea of social engineering as one sees it, is dependent upon this idea of social control. Pound asserts that we must speed up social control and make law to control man, and yet have man in control of law. The problem of developing law and effective social engineering through law is sought to be met by an applied jurisprudence on the scale and in the manner society demands. Such jurisprudence will be embracing, as it must, the whole field of social control through law. This is because law is man's principal peaceful means of controlling his collective environment. To control man's social environment is to control man. This is the main task of law. It is a task of human engineering with men in society as its raw
Pound further believes that:

"What the law has been trying to do is to adjust relations and order conduct so as to give the most effect to the whole scheme of expectations of men in civilized society with a minimum of friction and waste".

Law should not only strike a balance between competing interests but further weigh the interests and favour some over others.

The interests were classified into:-

Individual interests: Public interests and social interests. These are illustrated as follows:

(i) Individual Interests

They are the claims or demands or desires involved immediately in individual life and asserted in title of that life. E.g. individual interests of personality, individual interests in the domestic relations and individual interests of substance. Interests of personality are those involved in the individual physical and spiritual existence; in one's body and life, i.e., security of his physical person, freedom from coercion and from deception, freedom to contract and enter into relations with others etc.

Individual interests in domestic relations relate to the claims or demands of wife and husband as regards their domestic relation (marriage) against the whole world not to interfere with that relation. This includes also their claims
or demands, upon this relation, interest.

By interests of substance is meant the claims or demands by individuals in title of the individual economic existence.

All these, i.e., interests of personality, of domestic relations and of substance, are principally individual interests. Yet they are protected by the society since there is a society's interest in the individual life of its members.

(iii) Public Interests

Public interests are on the other hand the claims or demands or desires involved in life in a politically organized society thought of as a legal entity e.g., public interests in the integrity of the state personality. However, these interests do intermingle with social interests as will be seen.

(iii) Social Interests

These are the claims or demands or desires involved in social life in civilized society. Pound does not hesitate to treat them as the claims of the whole social group. They may, however, be subdivided interests.

a. Social interests in general security, viz. - the safety from aggression, interests in health, peace and security of transactions and acquisitions.

b. Social interests in the security of social institutions, viz. - domestic, religious, political and
c. Social interests in the public morals, viz., the protection of moral sentiments of the community by penalizing morally offensive conduct.

d. Social interests in conservation of social resources whether physical e.g. conservation of forests etc. or human e.g. protection of dependents and defective persons.

e. Social interests, in general progress relating to economic life e.g. free trade, free competition encouragement of investment etc. political e.g. freedom of opinion, and cultural e.g. free science, free letters and encouragement of arts.

The above scheme is by no means perfect. Pound himself is convinced that these interests do overlap. Moreover, he assumes that de facto claims pre-exist law, which is required to "do something" about them. But it can be contended that some claims are consequential upon law, e.g. those that have resulted from welfare legislation.

The scheme is further criticised. It is argued that it is not interests but the yardstick with reference to which they are measured that matters. The balancing metaphor is also misleading. If two interests are to be balanced, that presupposes some scale or "yardstick" with reference to which they are measured.
In practice, the interests are known only when presented in litigation. The recognition of new interests is only the product of personal opinion for every writer. However, it still serves to show the role law plays in securing the interest in society which role, as we have mentioned, oversteps the weighing of those interests to the favouring of some interests over the others. Individual interest of substance is no doubt prevalent over social interest in the general progress. It should not be understood that law alone protects those interests. In fact, law is, as we have seen, one agency of social control. Other agencies e.g. schools, religious institutions, households etc., do contribute towards security of interests in society. What matters here is that, law is the most effective and most direct means to that end.

Thirdly, the formal recognition of custom as a source of law and the trend to codify customary rights gave custom a new dimension where its role and place in our legal theory became more significant. Though the law of the people, customary law is still far from being the law of the Sudan, simply because it is, by its very nature, local.

(c) Sociological Approach to Law in the Sudan

The words of Khawaji J. in Khartoum Municipal Council vs. Michael Cotran, may be recalled here specially his statements regarding the question of quantum of damages. In that respect he maintained that...
"The question of the quantum of damages is particularly a 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".  

This decision is a landmark in the sociology of law in the Sudan. The social factors which have been considered in our case law since then are: (a) the standard of living, (b) the wealth of the country, (c) the economic realities, (d) the civic and social realities, (e) the customs and traditions, (f) the literacy of the people, and (g) the religious convictions.

The settled practice is that the local conditions and social realities are judicially noticed. Illiteracy, as an example, is a fact which could hardly be ignored and, thus, law has to afford protection to illiterates. It is stated that:  

"In a country where almost 80% of the population were illiterate, law had to play a distinctive role in affording a protection to illiterates. Such protection was considered to be of a vital importance especially in cases calling for literacy where documents were written in English to persons who had little or no knowledge of that language."  

For a considerable part of the population illiteracy in Arabic language is equally a problem. However, still ignorance of law, even for illiterates, is no defence. The result of such a rule seems harsh owing to the conditions of the Sudan where illiteracy is still showing a high rate
and where there are still customs well rooted which run counter to the law. The rule could hardly be applied to some people who do not know even of the existence of a government.

The law of social welfare is of recent development in the Sudan. By the Social Insurance Act, 1963, a system of insurance was established with regard to establishments which usually employ 30 or more employees, having its central office in Khartoum Province or Northern Province or less than 30 in other provinces. If an insured person sustains an industrial injury causing him incapacity for work or causing him death or if he sustains incapacity by reason of sickness, he shall be entitled to cash benefits. This system worked under an institution called "the Public Social Insurance" which was established as an independent corporate body for this task.

In 1974, the National Council for Social Welfare was established under the chairmanship of the Minister of Health and Social Welfare. The Council was not meant to be responsible for social insurance as such but generally to act as a coordinator between the social welfare institutions, advise the government units working in the field of social services, to endeavour to establish welfare institutions and to study the social services and plan for the speedy expansion and promotion thereof within the limits of the national, economic and social objects.

The Social Insurance Act of 1974, widened the system
of social insurance to all employees in the central and
regional governments, the organs of the People's Local
Government, public corporations and the organisations
and in the private sector.

A system of pensions has also been adopted since
a long time and regulated by law. It is now one of the
functions of social insurance to pay pensions to the widows
and or children of the deceased insureds. Old age pensions
have also been paid for persons who attained the age of
sixty. Additionally, minimum wages have under the
Minimum Wage Act, 1973 from time to time been fixed.

Lastly, Pound's scheme of social interests may
equally be relevant here. The law recognises these
interests and the 1973 constitution further guarantees them.
Moreover, there is a machinery for their realization through
effective legal actions and by the law courts.

These interests may be analysed as follows:-

(a) Social interests in public safety

These are the social interests in the general security
and embrace those in relation to peace, stability and
safety. In this regard, the Penal Code punishes crimes of
hurt, homicide, trespass, and abortion.

Public health and safety are made part of the concern
of law as well as public peace and order.

A balance has to be struck between stability and order
and individual liberties. We have seen that there has
been a growing emphasis on the state security laws which has resulted in excessive measures including preventative detention and residence orders. One believes that, though there is a social interest in public peace and order or public safety, this should not be taken too far as to affect the individual interest in personal liberty.

If the above is the "criminal side of the security the civil side is manifest in the security of transactions including the enforcement of contracts and the security of acquisition. It was once made clear that the law is keen to provide for the stability and security of transactions. This appeared in 1971. The reason for such a policy is that people should know before hand the rules which govern their relations.

The law generally enforces all legal and valid contracts. The theory that the contract is the free agreement of the parties which is now followed, suggests that the contract is enforceable by the court according to the terms the parties have agreed upon and subject to the rules of estoppel,

(b) Social interests in security of social institutions

The domestic, religious, political and economic institutions in the Sudan are protected not only by law but equally by popular, social and political consciousness,
religious consciousness, religious conviction and habit.

Domestic institutions are also protected not only by the personal law which provides the legal framework for these institutions and for the rights and duties connected therewith, but also by the criminal law which punishes irregular social relations i.e. rape, adultery, homosexuality, abduction and thus negatively protects regular relations e.g. marriage.

The religious institutions are protected by the penal laws punishing acts injurious to religious feelings e.g.:
insulting or exciting contempt of religious creed, insulate
of religion, injuring or defiling place of worshipping
with intent to insult the religion of any class.

As for the protection of political institutions, i.e. the state and its organs, one needs to differentiate between the "state" and a "regime". The state is a juristic person which has an interest of substance and an interest of personality in the international sphere unlike any regime which shall only exist in so far as it protects the social interests. It has no "right" of substance. The people have.

The protection of the social interests in the economic institutions overlap, as Pound himself is convinced, with the social interest in the security of the transactions which has just been discussed.
(c) **Social Interests in Public Morals**

Much has now been said about law and morals. There is nothing new to add here but to emphasise that the punishment of immoral acts, either by the Penal Code or other Penal Laws, in various ways, aims at protecting the moral sentiments of the community for there is a social interest in public morals.

(d) **Social Interest in Conservation of Social Resources**

The physical or natural resources are of special importance in this land. Forests, agriculture, petroleum and other resources have been protected by legal as well as administrative actions since the colonial period. As an example, the Provincial Forests Ordinance created provincial forest reserves and set out the unappropriated rights over them. Once reserved, the exploitation of the forest is prohibited except for persons having licences.

The human resources are considered within the purview of public policy by means of legal provisions dealing with the protection of lunatics, the establishment of juvenile courts, the reformation of delinquents by means of probation and reformatory schools and through social security and social insurance legislation.

(e) **Social Interest in General Progress**

The concepts of economic, political and cultural interests have special importance as having a dynamic
aspect. General progress is principally dependent on freedoms i.e. free trade, free opinion and free science. It also depends on the creative side of the social life where in the economic field, there has to be an encouragement of invention and of arts, letters and higher education in the cultural life. It is regretted that there has been a persistent tendency against such ideas by means of censorship.  

122. limitation of free expression and opinion.

It is not tenable then to speak about arts, science, inventions etc. when there is no freedom of expression, opinion and personal liberties.

Lastly, as for the social interests in individual life, one believes that there is a need for a quick review for the individual interests themselves. The individual interest to honour is reinforced by means of the legal right of reputation and protected by punitive provisions against defamation in the Penal Code.  

123. Stillde defamation is a tort actionable per se. Individual interest in domestic relations seems to overlap with the social interest in the preservation of domestic institutions. However, in this respect what is meant is the personal rights of spouses. For the sake of individual rights there is always the imitatibility of the physical person which is guaranteed by the Constitution  

125. as representing the individual interest in body. The individual interest in life is positively protected by rules of social welfare and negatively by punishing crimes of homicide.
6. **Conclusion**

The law is not after all a group of provisions. It is surely an entity rooted in the past, reflective of the present and responsive to the future.

The law does not shut its eyes before social realities. The practice since 1900 has shown a persistent trend to consider the local conditions and pay attention to the special realities of Sudanese life.
NOTES


7. However, the connection between law and the people exists almost in all known theories of law. In the natural theory, though, nature and reason or will predetermine law, it is remarkable that natural law itself is seen to be the participation of man in the eternal law. The people had consented to come into agreement through which they accept the state and law in what is termed "social contract". When the whole theory of natural law came to be revised it was asserted that law is based on recognition of the fact of interdependence which unites the members of a social group "by reason of the common unity of needs and the division of labour. Sentiments of solidarity are reflected in the law and justice towards its enforce- ment (see Duguit, The Principles of Social Solidarity,.
from curzon, op.cit. p. 86. Law is then taken to be a means to the accomplishment of the greatest happiness of the people which is the utilitarian outlook. The sociological view is one essentially dependent on the recognition of social realities. The marxists stress the will of the working forces of the people i.e. the workers and peasants and view law as being mainly dependent upon the will of the ruling class. So the historical approach is not a solitary one in this respect (i.e., the connection between law and the people).


10. Idem.

11. See Jones, op.cit., p. 49.


13. See Dias, op.cit., p. 533.


15. I.E., assumptions which conceal the fact that a rule of law has undergone alterations, its letter remaining unchanged, its operation being modified.


19. See the National Charter of October 1964.


21. This stands for the Committee for the Revision of Law in Accordance with Shari'a, established in 1977.

22. See supra, Chap. v.


24a. Ibid., at pp. 127, 128.


25. Ibid., at p. 220.

26. Ibid.

27. Published in November, 1950 by the Corquodale (Sudan) Ltd.

28. Ibid.

29. Ibid.

30. See infra chap. [VII].
33. Lutfi, op.cit., p. 237.
34. Ibid., at p. 238.
36. Ibid., at p. 10.
38. Idem.
40. See Clark, W.T., Manners, Customs, and Beliefs of the Northern Bagi, S.N.R., Vol. 21 (1939), pp. 1-25.
45. See Clark, op.cit., passim.
46. See Evans, *op.cit.*, passim.

47. See Lewis, *op.cit.*, passim.

48. See Mathew, *op.cit.*, passim.

49. See Cook, *op.cit.*, passim.


54. See *infra*, chap. v.


56. See Beasit and Vergenheits, *op.cit.*, p. 298.

57. See the CTA, 1984.

58. See *ibid.*, pp. 597, 600, 601, e.g. *Mag el Manil*.

59. See *ibid.*, pp. 643, 645, e.g. *Mag el Manin Mag el qasid*.


63. See Patterson, op. cit., pp. 450–469.

64. See Curzon, op. cit., p. 140.


69. Ibid., p. 30.

70. Ibid., and also Curzon, op. cit., p. 149.

71. See ibid. However, Pound develops a scheme of interests and sees the satisfaction of social wants as the core of law.


73. See infra, chap. 1.

74. See Pound, from Lloyd, "Introduction to Jurisprudence", op. cit., p. 353.

76. Ibid.
77. Ibid.
79. Ibid.
80. Ibid.
81. Ibid., at p. 2.
82. Pound was working on his theory of interests as early as 1921. He revised it and republished it in 1943.
83. Patterson, op. cit., p. 602.
84. Ibid.
85. Ibid., at p. 603.
86. [1958], S.I.J.R., p. 131.
87. His statement regarding the reception of English Law has been cited in chapter v
88. See Michael Cotras's case.
89. Ibid.
90. See Joseph Tabet v. Osman Saleh's case.
91. See Heneg Manios v. Boxall & Co. a case.
92. See Heirs of Naeema Ahmed Wagealla's case.
24. Ibid.

25. See the case of Abdel Ehab Koh, and Others (1960) S.J.R., p. 66.

26. See supra., p. Moreover, in the Eastern Nuba Mountains the kidnapping or abduction of a girl for premarital sexual relation is not considered as rape but a settled custom where marriage follows as the consequence of pregnancy. See also here the case of Sudan Government v. Rainardo Legge (1963) S.J.R., p. 54.

27. I have been told that some people in Jabel Merra know very little, if any, about the central government and I have the opportunity to meet some of the nomads in Northern Kordofan who bother also very little for government officials and to them their chiefs are the all important persons.


29. See the Government Pensions Act, 1910, the Civil Service Pensions Act, 1962.

30. See sec. 61 of the STA, 1974.

101. See (as an example) the Minimum Wages Provisional Order 1974.

102. See the SPC, 1983, 273-278.

103. Ibid., sec. 253.

104. Ibid., secs. 386, 387.
105. Ibid., sec. 326.

106. Of the offences affecting the public health and safety are: public nuisance (sec. 216) adulteration of food or drink intended to sale (ibid. ss. 217, 218, 219, 221) and negligent conduct causing danger (ibid., sec. 219).

107. See chap. XII of the HC 1983 for crimes of the lawful full assembly (ibid. sections 717, 118, 119), rioting (ibid. as 121, 122 and disturbance of public (ibid. sections 127, 128).

108. See the Preamble of the Civil Code, 1571.

109. Ibid.,

110. el And Shari'at el Mut'amadien.

111. CTA, 1984, Art. 5(23).

112. Ibid., Arts. 33-42.

113. See the HC, 1983, 242.

114. Ibid., sec. 242.

115. Ibid., sec. 243.

116. See infra, chaps. LVI.

117. See Sec. 5.4 of the Provincial Forest Ordinance, 1932.

118. See CTA, 1985, Section 266.

119. See ibid., sec.
120. See ibid, Section 24.

121. See Social Insurance, Act 1662.

122. See (e.g.) the Censorship of Cinematographic Act, 1974.


125. See the PCS 1973, Art. 42.
CHAPTER SEVEN

THE ISLAMIC THEORY OF LAW

1. Introduction

The strife of the Islamic jurists for the deduction of the detailed legal rules from their original sources, i.e. the Qur'an and the Sunna, by means of deductive reasoning, or analogy, and their application of these rules to practical legal issues, form the cornerstone of the Islamic theory of law.

The historical background against which such a theory stands is not an odd one though it may be taken as being peculiar and fascinating. However, the main theme of this chapter is to trace back the development of the legal thinking in the Islamic history, to give a brief account of both Fiqh i.e., law and usul-al-Fiqh i.e. sources of law. To this end, the nature of Shari'a and its objectives will also be discussed.

Ijtihad; "independent reasoning", is the most interesting area of Islamic jurisprudence and deserves special treatment. Tahlid, i.e. copying which is the opposite of Ijtihad (independent reasoning) will also be discussed.

The door of Ijtihad was alleged to have been closed for reasons connected with the venture of unlearned, unskilled and laymen in the field of Ijtihad and the fear of distortion of Fiqh. It was then felt necessary to reopen it for almost
practical reasons to meet new situations. Therefore, *ijtihad* is the proper means for law reform in the Islamic theory of law.

The application of Islamic law in the Sudan has an important background and remarkable evolution. The background of an Islamic theory of law in the Sudan and the recent and present changes will be examined.

The underlying thesis of this chapter is that, though Islamic law has never been alien to the Sudan legal history, since the Funj Kingdom, yet its application has largely been influenced by the will of the sovereign power.

This will be clear by showing that in the Funj Kingdom, and as the society was still tribal and traditional, a blend of Islamic Law together with customary law and superstitution had been applied. In the Mahdist state El Mahdi himself interpreted the rules of *Shari'a* and passed legislation relating to matters of morality. He further issued circulars on matters of religion and policy. The personal matters of Muslims were treated in accordance with the Hanafi School in the period of the Condominium though the popular School was the Maliki School. The Hanafi School had been the school of the Ottoman Empire to which the Sudan had loosely been connected. English and Indian Law were applied in preference to and to exclusion of Islamic Law except in personal matters of Muslims. Now the sovereign power decided to turn to *Islam* even in criminal law, and specially the *mudéb* were introduced. That was surely not possible in 1925 when the *Penal Code* was
reissued as the trend was to apply Indian and English Laws.

2. **Terminology**

A discussion of "Islamic jurisprudence" necessitates the examination of a host terminologies. To start with, the term "Islamic jurisprudence" itself is a general term which has been used to cover the classical theory of Islamic law, the essentials of which were stated by Imam Shafi'.

Such a term is also used to denote both *fikh* and *usul al-figh*. The Islamic jurisprudence and "the Islamic legal theory" are sometimes interchangeably used.

The term *fikh*, in its literal meaning refers to "knowledge" "understanding". In its technical meaning, it signifies the knowledge about the practical prescriptions which are derived from the detailed proofs. However, it is not part of *fikh* to study the beliefs, dogmas or all the matters of faith, but it is mainly concerned with practical questions. Moreover *fikh* is a doctrinal system based on the authority of sources which is either revealed or of recognised infallibility. The Ottoman mejelle "Majalla" referred to *fikh* as meaning "the knowledge of the practical legal questions."

This definition adopts the prevalent meaning of the term *fikh*.

*Fikh* is sometimes equated with "law" and the whole science of Islamic jurisprudence. It is observed in this connection that:

"The law in Islam is called *fikh*, it is *the name given to the whole science of jurisprudence because it implies the exercise of law in the absence of a binding *nass* (text) from the Qur'an or Sunna".
Fiqh, here is a dynamic concept by which the jurist uses his intelligence to develop the law as well as to find its expressed standards. To compare fiqh with the Roman jurisprudentia, it is contended that fiqh is the name given to the science of law in Islam which resembles a wide concept of rerum divinarum et humanarum notitiae and its widest sense covers all aspects of religious, political and civil life. It thus covers ibalat (ritual and religious observations and numalat (matters of social life). It also includes criminal law and procedures, constitutional law and laws regulating the administration of state. Therefore, fiqh has a wide and inclusive meaning. It refers both to the thinking and to the law derived or regulated by jurists.

Usul-al-fiqh, on the other hand is rightly taken to represent the science of law, i.e., jurisprudence. It is defined as the science of knowing the rules of the practical legal questions from their detailed proofs (adils). It is the methodology of Muslim jurisprudence, the science of proofs which leads to the establishment of legal standards. Usul itself is the plural of asl which means origin or principle.

It is apparent that Usul-al-fiqh is the science on which fiqh is built. The object of this science is the search in the proofs as being the sources of legal prescriptions or in the legal prescriptions themselves. Thus, it is the basis of the juristic deduction of jurisprudential questions in a systematic way by the use of analogy and reasoning. It descends from the general to the particular, i.e., from the sources
to the legal prescriptions. On this same point, *usul-al-figh* appears to be more particular than *figh*, which is wider in scope as we have seen.

Figh and Sharī'a also need to be distinguished for the expression *figh* is considered to be particular than Sharī'a. Sharī'a means the rules whether the beliefs, faith or dogma. It includes the creeds, questions relating to faith or shortly the whole law in Islam.

The term "Islamic theory of law" is used in this work to refer both to *figh* and *usul-al-figh* and particularly to the "science of law in Islam".

2. The Development of the Islamic Theory of Law

One comes across a statement that the science of law in its theoretical sense did not exist in the world before Islam, and that, although it existed in Rome, Greece, China, India, Mesopotamia, Egypt, Pre-Columbian America and elsewhere, Imam Shafi'i was the one who first thought of the science of law or jurisprudence as case law.

Shafi'i's contribution to the Islamic jurisprudence of which he was surely the founder, and to jurisprudence in general, is hardly deniable, but being the first one to think of jurisprudence in this way is hardly maintainable.

The science of law or jurisprudence, in so far as history may lend support to that, has existed since Plato.

The real history of the Islamic jurisprudence evolved
in the second century of Hijra and exactly at the later period of the Umayyads. Though fiqh and usul-al-fiqh in their technical meaning did not appear at that time, they were nevertheless known.

The shift made by Imam Shafi'i is that he was the first one to organize and write down the science of usul-al-fiqh in his Risala, which was taken to be the first book written in this field. In it, Imam Shafi'i speaks about the sources of law, the methods of legislation, interpretation of law, application of law and other related topics. His reference to usul i.e. basis, was made in contrast to the general laws of land which were named branches (furu) shooting out from these basis. Shafi'i's in Risala were taken to represent the classical theory of Islamic jurisprudence according to which more emphasis were placed on the four sources of law i.e. the Qur'an, Sunna, consensus and analogy. For Shafi'i the function of jurisprudence is not to make law but simply to discover it from the substance of divine revelation and where necessary apply the principles enthrined to new problems by analogical reasoning. His avowed aim in formulating a firm theory of the sources from which law should be derived, was to instil into the Muslim jurisprudence a uniformity which was said to be consciously lacking at that time. Shafi'i is much concerned with Traditions and their authenticity. Though it includes many issues, Shafi'i's Risala is not a complete treatise on the nature and use of the sources of Shafi'i. It's originality rests on its new departure in the study of jurisprudence.
Such a departure appears in the way Shafi' i deals with the sources, specially the traditions, style of deduction, analysis and his organisation of the science of usul-al-fiqh. Shafi' i, therefore, is the pioneer of Islamic jurisprudence. With him, legal thought becomes conscious of itself and becomes a science through which we argue not only occasionally and on an ad hoc basis but throughout, and on principle and, he finally discusses the starting points and methods of argumentation in jurisprudence. 19

Those who came after Imam Shafi' i did not really add much to his theory but sought to elaborate it. Two styles may be distinguished. One is termed the style of theologians (mutakallimun) and the other is the style of jurists (fuqaha). The former is attributed to the followers of Imam Shafi' i and the second to the followers of Imam Abu Hanifa. The first style is known of its declaration of the original rules according to the analogical deduction. The jurists here approve of what has already been proved by signs and contest the contrary. No specific doctrine or school of law was followed. Islamic theological jurisprudence may be summarized as follows:

(a) The jurists relied much on observation of the textual rules and tended to use the mental deductive reasoning. They approved of what reason and evidence supported, and did not follow a certain school for its own sake.

(b) They placed special importance on the science of kalam (scholastic theology). They use this in their contribution to the science of law. Therefore, the rules of
language and the functions of words are relevant to this style.

They are rightly found to be famous for their abandon-
ment of particular matters of figh and for their dedu-
cction of practical questions.

Iman Ghazzali summarised their style in the following words:

"The style of the mutakallimun (theologians) is concerned
with the editing of matters, the deduction of rules (and
tends to use mental deductions as far as possible). It
abstracts the original matters from the jurisprudential
branches similar to what the school of kalām (Theology)
does."

The style of jurists or as, commonly known the style
of the Hanafia, tends to making hypothesis with regard to
the branches of rules. The rules are derived from the
branches. People are, however, much concerned with the
style of the theologians. It is the nearest to the
linguistic knowledge which they master. There was a third
style which was meant to combine the best of the two styles.

Now, a number of justists have made efforts to make accessible the knowledge of the Islamic jurisprudence by simplifying its language and approaches thereto and by smoothing the classical way of writing in this field. One does not need to go through the arid examples of Shatibi, Ghazzali, Ibn Hazm, etc., for the main ideas of these writers can now be easily obtained and in a modern reproduction and development. The most remarkable contributions of the modern writers on
Islamic jurisprudence are those of Abu Zafra, and Sheikh Mohamed El Nasr. Their style is that of... 

7. The General Framework of the Islamic Theory of Law

(a) The nature of law

Our previous discussion on the nature of law generally and on the terminology pertaining to Islamic jurisprudence ends with the distinction between Shari'a and fiqh which distinction is to be retained here for the sake of discussion in relation to the nature of law in Shari'a.

Primarily, we have seen that the term "Shari'a" which is rendered in English as "law" is rather the whole "Duty of Man", moral and pastoral, theology and ethics, high spiritual aspirations and detailed ritualistic and formal observance of all aspects of law, public and private.

Law in its common usage is not the same as Shari'a in the Islamic theory of law. Nonetheless, Shari'a is still the law in Islam. It has the character of a
religious obligation and at the same time it constitutes political and religious prescriptions. In the Islamic theory of law, Shari'a embodies the divine source of law expressing the will of God. The fact that Shari'a is taken as spiritual way of life, made for spiritual and social purposes, makes Islamic law a theological one like the principles of natural law. Shari'a is, therefore, viewed as immutable and valid for all persons, at all times and places i.e. of universal validity and application. Although immutable, it possesses an amazing capacity to absorb changes in life. It is stated in this connection that [32]

"The immutable nature of Muslim law cannot be denied, but it must also be realised that it is a resourceful system. It's flexibility should be emphasized just as much as its immutability".

To reconcile immutability with flexibility it is observed that: The fact that Islamic Law or Shari'a is from God, makes it divinely ordained and gives it immutable nature for man cannot change what God has ordained. But the fact is that in Islamic jurisprudence the adoption of certain methods such as analogy and ijtihad, makes it possible for the jurists to adapt the law to changing social conditions.

(b) The Proofs

The Qur'an, Sunna, consensus and analogy are proofs "adila" or sources of Islamic jurisprudence. Qur'an and the Sunna are the main and the others are the secondary proofs.
i. The Qur'an

The Qur'an is the recited revelation to Prophet Muhammad during the first twenty-three years of his prophetrical mission and is the basis of all rules of conduct. According to the classical and the modern theories of law, the Qur'an is the first source of law from which the legal rules are deduced by way of analogy. It's importance is not only due to its being a spiritual or a religious book, but also as a source of legal rules. Certainly it is not itself a code of law. To Imam Shafi'i, it is the basis of legal knowledge whose provisions constitute a conspicuous declaration on all matters, spiritual and temporal which men are under obligation to observe. It was not all revealed to Prophet Muhammad in one place at one time. It is generally revealed in Mekka and Medina. The verses revealed in Mekka are called Mekkan verses and deal mainly with creeds, the Unity of God, the punishment and reward after death. They hardly speak about legislation in civil matters. The verses revealed in Medina are called Medinitc verses which contain teachings, regulations of social life and specially of personal matters and civil transactions like sales, contracts etc.

The Qur'anic verses were generally revealed for certain instances and causes and this fact made the wustahd (interpreter) pious of studying the reasons of revelation which explain the inspiring wisdom of legislation and aid in the interpretation of the verses themselves and contributing to their understanding.
The deduction of rules from the Qur'an is specially relevant to this part since such a deduction is the real field of the jurist as will be seen.

The Qur'anic legislation has three descriptions:

(a) That it came according to the need and for the interests of the people.

(b) That there is a gradualism in legislation which is apparent in the prohibition of wine which took the following pattern:—Firstly, it was revealed that there was a sin and a benefit in wine but the sin is more. This took place at a time when wine was commonly drunk as in the verse: “They ask thy concerning wine and gambling say: ‘In them is great sin and some profit, for men’ (s.11.219)”. Then gradually came the rule which prohibits the drinking of wine before praying in the verse: “O ye who believe. Approach not prayers—With a mind befogged:—Until ye can understand (s.1.23)”. Then lastly came the final stage when wine and other things were strictly prohibited by the verse: “O ye who believe—Intoxication and gambling, (Dedication of stones. And (divination by) arrows. — Are an abomination (s.4.3)”. 

(c) And that the Qur'anic legislation tends to avoid hardship as in the verse: Good tends every facility—For you: He does not want—To put you to difficulties (s.11.185).
ii. The Sunna

The saying of the Prophet, his deeds and approvals, are called the Sunna (Tradition). The function of Sunna has been the explanation and clarification of Qur'an and it also has complementary function. In all these cases it is equally taken to be revelation. As the Qur'an reads "Your companion (i.e. Prophet Mohamed) is neither Astray nor being misled, Nor does he say (aught) his own desire. It is no less than Inspiration sent down to him (S.I.iii. 2, 34)"

As a source of law, we have seen that Sunna comes as the second source after the Qur'an. Both the Qur'an and the Sunna represent the primary sources from which law is deduced.

iii. The Consensus _Ijma_

The consensus as referred to by the classical jurists is the unanimous agreement of the qualified legal scholars in a given generation. Such a consensus is deemed infallible. Shafi'i's earlier school considered consensus as the agreement of a number of scholars in a certain community and permeated as the consensus of the whole Muslim community. It is now generally known that the consensus of the Muslim jurists during a particular era on a question of law is both possible and legitimate.

Consensus is the third source after the Qur'an and
the Sunna and is based on them. In addition, it is an essential and characteristic principle of jurisprudence upon which the Muslim community acts as soon as Muslims are left to their devices and are called upon to solve the most important problems. One example is the agreement of Muslims in the election of Abu Bakr to Caliphate, after the death of the Prophet. Another example is the agreement of the whole Muslim community that the Qur'an and the Sunna are true and obligatory and constitute the religion of Islam. To the jurist it is relevant as a proof or source of law and means the unity of the Muslim community.

(iv) The Analogy (Ijtihad)

Analogy is the cornerstone of the Islamic jurisprudential reasoning. For the judge, it is a method used to reach a correct judicial decision. For the jurist, it is one of the proofs (wahla) of al-fiqh and a source of law. Imam Shafi'i state that:

"The analogy is of two kinds: one is that where the thing (the subject of analogy) is in the meaning of the original, in this case there should be no difference in the rule (between the original subject matter and the subject of analogy). (The other is that) when the thing (the subject of an analogy) has similar examples in the original case. In this case it (the analogy) is applied to the appropriate and most similar one".

The analogical jurist is not confined to these two kinds of analogy. By using effort he may be able to build up a refined jurisprudence. The primary task of the jurist is the search for the cause of the original rule (which is stated in the Qur'an and the Sunna) and for the existence of the cause in the case for decision and then apply the
the original rule to the case for decision because of the unity of the cause.

The Shari' a do not advocate analogy. Ibn Hazm has written a treatise on "the Abrogation of Analogy (Ibtal al-Oiyas)," in which he opposes the use of analogy in legislation and contends that the sources of law are three, namely, the Book (Qur'an), the Sunna and the consensus. That God keeps for Himself, the wisdom of the orders and the prohibitions and, therefore, it is not for the people to reason a prohibited or a permitted thing for which God and His Prophet do not declare the cause.

The rationale behind analogy is that the events are indefinite and the rules are finite and limited and could not cover all the events. Thus, new events become uncovered and everyone will be left to do what he pleases. Therefore, analogy is always needed to apply the original rules which had been declared earlier for certain instances to latter similar instances by means of analogy, i.e., like cases are treated like.

Lastly, the proofs are summarized as follows:

"The facts covered by texts from the Qur'an or the Sunna should be subject to those texts. Facts not covered by expressed texts but the community of scholars had agreed on a law concerning them, such an agreement should be followed. For facts for which there are no express texts and no agreement, the law should be deduced by way of analogy upon the express texts or by the application of the general rules of Shari'a and its principles. If the analogy or the general rule (in part) leads to an injury or hardship, there should be a deviation towards the interests and what the juristic preference requires. The absolute interest should then be referred to. Lastly, (the
jurist) retains, the original rule of things that is the rule for matters left indifferent is permissiveness".

c. The Rules of Language

The Islamic jurists have much been concerned with the rules of language. The importance of language springs from the fact that the texts from which the legal prescriptions are deduced deserve understanding which largely comes from the knowledges of language itself and from the demonstration of its expressions. For this same reason, it has been one of the everlasting requirements that the "mujtahid" (interpreter) should have a good understanding of language, its grammatical rules and signs of words. Consequently, the rules of interpretation of texts have been stated according to the rules of Arabic language. The more important rules or canons of interpretation evolved by Islamic jurists (i.e. Hanafia and Mutakalmin (theologians) are:

1. Wadah (apparent): When the word is apparent i.e. its meaning is exact or plain, the judge has to act upon its plain meaning unless there is an authority (from Qur'an, Sunna etc.) to a contrary meaning or tends to limit or abrogate the apparent meaning.

This is similar to the literal construction in the sense that when the language which the statute contains is plain it must be construed according to the ordinary and natural meaning of the words and sentences.
2. **mubah** (equivocal): When the meaning is equivocal i.e. ambiguous, uncertain or doubtful, the judge has to make an effort to find out, by interpretation, the meaning or meanings of the words used. The meaning for which the judge searches is the meaning intended by the legislator. His part (the judge’s part) is to interpret the text according to the intention of the legislator.

The Hanafis subdivided the *mubah* (apparent) into four categories or degrees of plainness:

(a) **zahir** (plain, patent). It refers to every phrase or words the meaning of which is plain for the listener from the words used themselves and there is no need for further interpretation (Absoluta sententia expositore non invisi). E.g.: In the Qur’anic verse (Allah permiteth trading and forbiddeth usury), (s.11.275) This is plain with regard to the permission of trading and the forbidding of usury. The judge is under a duty to apply this plain rule unless there exists an evidence that it is explained, restricted or abrogated.

(b) **nass** (wording). This is more clear than the plain (*zahir*) for there is an extra meaning added by the speaker. The example just given is a *nass* (wording) for the dissimilarity (with regard to the permission and prohibition) of trading and usury. The statement or the text is principally given to show the rule of its wording. The judge has to
apply the rule as it is unless it is explained or abrogated by an authority.

(c) **mutassar** (explained) the meaning of the word here is entirely plain though the rule might be abrogated at the time of the Prophet. E.g.: God says: (and wage war on all the idolaters) s. i.x. 36). "The idolaters" is made subject to no specification. The word "all" makes it entirely plain that the rule applies to "all" idolaters without exception.

(d) **muhimm** (basic or fundamental) it is when the words show their meaning in a way that makes no room for any explanation, specification or abrogation at the time of the Prophet or after his death. E.g.: God says: (Allah knows everything). It is clear that this rule is a permanent statement for a fact that could not be changed.

The Hanafi also subdivided the muhimm (equivocal) into four categories or degrees of ambiguity: (a) **khafi** (latent, hidden) (b) **mishkil** (ambiguous), (c) **nawzal** (collective) and (d) **mutashabah** (allegorical).

(a) **Khafi** (latent, hidden). Here the meaning is concealed or hidden and the words themselves do not clearly convey their meaning. The judge or the interpreter needs to exert his efforts to know that meaning or the intention behind the text. Or that the word is clear or plain in its meaning for a rule relating to a certain individual or individuals of a certain category but not plain for other individuals. That is to say the rule becomes ambiguous with
regard to its application to certain species comprised in
the category. E.g.: The Prophet says: (The killer shall
not inherent [from the deceased]. The word (killer) here is
plain for the person who commits murder but hidden for
others who either causes death by mistake or otherwise not
intentionally.

(b) muḥkīl (ambiguous). The name is given for the
words where the meaning becomes ambiguous for the listener
as the meaning is latent in the words themselves to the
extent that it could not be understood without reference
to presumptions and by exerting efforts and making inter-
pretations. E.g.: God says: [(Your women are a tith for you
[to cultivate) so go to your tith as (anna) ye will] (s.1.2/3).
The word anna as) may mean (wherever) or (whenever) but there
is one intended meaning i.e. the natural way. The judge
has to look for the intended meaning out of the different
possible meanings.

(c) muṣūma (collective). Here the meanings are so
assembled in one word or phrase and the intended meaning
becomes ambiguous to the extent that it could hardly be
understood from the wording without explanation. E.g.: The
word "salah" (prayer) as an example has a linguistic meaning
i.e. worship. Islam gives it a special meaning i.e. technical
meaning, where it refers to the specified 'prayer' in Islam.
The judge shall believe in the muṣūma (collective) and the
reality of its meaning and shall not act upon it unless
there is an explanation.
(d) mutashabih (allegorical). It is the most hidden meaning which could not be understood save for God Himself. God says: "He it is who hath revealed unto thee (Muhammed) the scripture wherein are clear revelations - they are substance of the book - and others (which are) allegorical. But those in whose hearts is doubt pursue, foreseeth, that which is allegorical seeking to cause dissention by seeking to explain it. None knoweth its explanation. Save Allah and those who are of sound instruction say we believe therein (s.iii.7). An example is the letters of the Arabic alphabet at the beginning of suras. The judge is to believe on the reality of God's intention behind them but God alone knows their meaning.

The mutakallimun (theologians) do speak about the foregoing subjects but their contribution is much connected with the following ideas:

(a) The demonstration (al-Dalalabu and the sign (al-Isharah))

Words always signify certain meanings. They may be referential. The Islamic jurisprudence in this regard pays much attention to rules of semantics. However, the demonstration of a text is taken to stand for the rule which the text was originally and not consequentially made for, without making any contemplation. It is a strict and literal meaning rule in which express words mean their express meaning, i.e. expressive uniform est exclusio alterius. To act upon the
demonstration of the text is to act upon the plain and ordinary meaning to which the words were primarily assigned.

The sign of a text is fairly a rule of semantics. It refers to the idea that the signification of the word pertains to a certain legal rule which is either intended or the text is made for it.

But it should necessarily follow. This may be the interpretation of the following Qur'anic verse: (11.233).

"And mothers shall suckle their children for two whole years for him who desires to complete the time of suckling. And their maintenance and their clothing must be borne by the father according to usage".

The verse as interpreted signifies two things: Firstly, by its statement, it hints the rule that the maintenance of mothers of children is the responsibility of fathers. This what appears from the patent expression and for which the words are assigned and it is, therefore, the demonstration of the words. Secondly, by its sign, it signifies that the child is to be attributed to his father; for the text runs as follows: (It is for the fathers - those to whom the mothers have borne). The child is added to his father by the sign of the words.

(b) The vocal *jal-Mansouri* and the *understood jal-Maghribi*.

The meaning of a word may be expressed or implied. The "vocal" stands for "expressio" and the "understood" for the
"tacitum" in general legal theory. The Islamic jurist speaks about two sets of meanings: *nashem al-Muafaka* which roughly stands for "ejusdem generis". It also embodies the extension of the expressed meaning to the unexpressed when the two are in agreement and *nashem al-Makhala*, which is the contrary meaning of the text. If we say that if somebody does so and so he will be rewarded, the contrary means i.e. *nashem al-mukhalafa* is that if he fails to do that thing he will not be rewarded.

(c) The general (al-a'am) and the particular (al-khas)

The general term which is stated for the whole genus without limitation, refers to the total sum and not only to a particular genus. Man, as an example, without limitation refers to all men.

The particular refers to the parts or individual to which it is assigned. The man who met me at the platform refers to a certain man.

If the particular comes after the general; the general is limited with the particular. The general, if not so limited, refers to the whole.

Now, many statutory definitions adopt a rule of this kind but sometimes they state that the singular also means the plural. Here, the plural includes the singular - unless of course otherwise stated.
Words sometimes state positive instructions to do certain things e.g. "Say your prayers" or negative instructions to abstain from doing certain things e.g. "Don't kill". In Islamic jurisprudence, the command and prohibition are not always intended to give a mandatory effect, they have to be taken and understood according to the intention of the legislator and according to the context in which they are found i.e. noncitur a sociis.

The knowledge of language should equally be connected with a knowledge of the general objectives of shari'a. Otherwise, the knowledge of language for the sake of deduction of rules becomes a body without a soul.

Thus, the rules of language are of special importance to the mujtahid as they are the tools by which he makes his deductions.

d. The general objectives of Shari'a

The making of laws aims at certain objectives, whether for the long or short term. Shari'a law is stated to aim at the interests of man in this world and the Hereafter. The Maturida (a group of Islamic Jurists) have stated that the commandments of God are reasoned by the interests of men. This is also the view of most contemporary jurists. Shari'a states:
"The fact is that we have made an induction in Shari'a and made out that it was made for the interests of man and that God reasons the mission of the Prophet by his statement: 'We sent you but for mercy'.

Therefore, it is always reaffirmed that Shari'a aims at the interest of man. The search in the objectives of Shari'a normally starts with an endeavour to prove that the rules in Shari'a are always reasoned either expressly or impliedly. These objectives have been seen to be:

1. The necessary objectives

The necessary objectives are the most important and their protection is always a duty. Such a protection can be maintained by means of faith, prayers etc. These necessary objectives in Shari'a are five, namely: The preservation of (1) religion, (2) self, (3) off-spring (4) property and (5) mind. Eating and drinking preserve life positively and punishment of murderers by means of qasam preserves it negatively. For the preservation of the off-spring, marriage was made legal. Prayers, Zakat (alms) fasting etc., preserves the religion. The mind is protected by the prohibition of drinking of wine etc. For property protection is made by provision of punishments of cutting and amputation in cases of theft and brigandage.

These objectives are necessary in the sense that life is impossible without them and because their omission leads certainly to corruption.

i) The needed objectives

These objectives are needed though to lesser degree
than that of the necessary ones. The only danger which is certain in their absence is not corruption but hardship. For example, in *ibadat* "worship," licences *"rukhsah* are given by sharia in case of illness and/or traveling e.g.: allowing people to adjourn fasting in *ramadan* because of illness and travelling. These objectives though less vital than the necessary ones are still important for the easy performance of religious duties, good life and for lifting hardship. 43

iii. The *complementary objectives*

These are only complementary and subservient to the necessary objectives. They include rules of etiquette such as cleanliness. They are of life. They are required by good manners and for the protection of life. Their absence involves no hardship or corruption.

The objectives of *Shari'a* are all collectively taken since they are interrelated and interconnected with each other. The needed and complementary objectives are subservient to the necessary ones. The jurist considers all the objectives as all important according to their pattern.

e. *Jihi'd* *(Independent Reasoning)*

The *jihi'd* literally means the exerting of one's effort to the utmost degree to attain an object and is used technically for the exerting of one's effort to form an opinion and to deduce the detailed rules from the original sources, i.e., the Qur'an and Sunna by means of analogy or
otherwise.

The Islamic jurists developed two different approaches to jurisprudence. The first emphasised the use of opinion and analogy and the second heavily relied on traditions.

The first approach was represented by the "Iraquis". The use of opinion had flourished in Iraq because of the fact that few traditions had circulated among the Iraqis. Therefore, they much used analogy and became skilled in it. That gave them the name of the representatives of opinion (ahl-al-ra'y). Their leader is Imam Abu Hanifa who has been favour for his skill in the use of opinion and analogical deduction. In fact, Imam Abu Hanifa did not only use opinion but also called for it and respected others opinions.

The second approach was represented by "Hijazis". The leading authority of Hijazis is Imam Malik whose opinion is that by virtue of their religion and traditionalism, the Medinense always necessarily followed their immediately preceding generation in what they cared to do or not to. This process led ultimately to reliance on traditions which were reported by people in contact with the actions of the Prophet and were likely to hear from him. The Medinense were called the representative of traditions (ahl-al-hadith).

The Medinense, therefore, depended on the reported traditions and scarcely used their personal opinion or
analogue deduction. The "Iraqis" on the contrary, resorted to analogy and opinion in reaching the legal rules.

(i) **The use of opinion (ra'y)**

The tradition reported by Muazzam 47 in which he replied to the Prophet's enquiry: "According to what shalt thou judge? (after resorting to Qur'an and Sunnah) 'I shall use my personal judgement". This answer is generally interpreted to mean the use of opinion, 'ra'y' or independent judgement ijtimad fardi. 48 It is also generally contended that the exercise of independent judgement within certain limits, is not only permissible but praise-worthy. This is dependent on the approval of the Prophet to Muaz's answer.

Opinion, literally means what sans intelligence leads to regarding a matter not covered by a text. 49 Historically, it was used before "himma" and even during the life of the Prophet. 50

There was a genuine controversy as to the validity of opinion as a method of deduction of the rules. It is believed that opinion is only a kind of subjective conjecture "zann" and the rules of law and religion generally cannot be founded upon such an opinion. 51 There has also been a genuine fear of misuses of this sort of reasoning by non-expert persons. Therefore, it was developed into a disciplined reasoning in the form of Qiyas.

(ii) **The use of analogy (Qiyas)**

Qiyas is a type of analogical deduction. It has
accumulated from the experience of independent judgement. Hence, the jurist arrived at the rule by means of analo-
geical deduction. However, the method is not syllogistic.

givān is different from logical deduction because of the
necessity of the existence of a cause, i.e., illa, upon
which the first legal rule is based. Thus the effort is
not mainly concerned with the making of conclusion upon
predetermined premises, but largely with the investi-
gation of the cause which moved the legislator to make the
first legal rule in the first case.

The second case, i.e., the case before the jurist
or judge is, in fact, decided like the first one upon
the similarity of the cause. This is done by way of analo-
geical reasoning, or, in other words, by way of treating
like cases alike, upon material similarity as in the common
law doctrine of stare decisis. The cause, becomes the ratio
decidendi.

One believes that there are essential differences
between the doctrine of givān and that of stare decisis.
This is simply because of: (a) the fact that the local
rule of givān is not part of the decision in the first
case but something independent of, and disconnected with,
it. It is, i.e., the legal rule, part of a revealed law
existent in the Qur'an, Sunna or ijmā. It is not human,
or of human origin but rooted in divine principles: and
(b) the jurist in givān does not deduce the rule from any
certain factual situation but searched for the cause "illa"
of the rule in the first case.
We will add nothing by stating that by its adoption of giyās, Islamic jurisprudence expresses the natural inclination inherent in men, of treating like cases alike.

(c) Personal Reasoning (ijtihād)

Much has been written today about ijtihād (personal reasoning) as the ever interesting concept in Islamic jurisprudence. The mechanism of ijtihād is meant to include the use of the effort and intelligence by the jurist to deduce the legal rules from their principal sources. It is, therefore, mainly concerned with the deduction of rules.

Historically, ijtihād has been a developing concept. It started as individual judgement (ijtihād fard) and developed into giyās and thus disciplined reasoning. At a time, ijma (consensus) began to take its place as the sanctioning authority for ijtihād conclusions and giyās became a highly disciplined method of extending by analogy the rules in the Qur'an and Sunna to similar situations in search of the illa (cause).

In fact, ijtihād is an intelligent means of reasoning by which the judge seeks the legal rule by making effort to extract these rules from their sources in Shari'a. Since such an effort is also made in giyās (analogy), giyās itself is taken to be a sort of ijtihād in which the illa (cause) is investigated by the jurist.

In the early times Islamic Scholars exercised an absolute reasoning (ijtihād mutlaq), where the usual, i.e., roots or principles of the madhab or schools of Islamic
jurisprudence, were determined. The jurists who exercised this type of *ijtiḥād* were the prophet companions, their successors and the four, A'īma', i.e., Abu Manifa, Malik, Shafi'i and Ahmad Ibn Hanbal. They derived the rules from the Qur'an and Sunna and used analogical deductions, jurist consults upon the interests (masa'il) as they saw them and juristic-preference (*istiḥād*). They originally practiced all types of reasoning.⁵⁵

Later, jurists became doctrinally restricted to exercising the right of *ijtiḥād* within their particular schools of law. This is a kind of restricted reasoning (*ijtiḥād *fi-*ṣīḥa). The jurists saw themselves as only empowered to search for the law within the boundaries of their schools.

Lastly, disciplined judgements were made on points of law within the available jurist-consults (*ijtiḥād fi-*ṣīḥa). The jurists here did not make any real deduction of rules, they only searched for the legal rule in the already existing jurist-consults.

The last two types are not real *ijtiḥād*, they are only imitation (*taqlīd*).⁵⁶ The Islamic world has to revive absolute disciplined reasoning.

(c) **How can one make *ijtiḥād***

Chazali summarises the style of making *ijtiḥād* in the following statement:⁵⁷

"If a case is raised to him who makes *ijtiḥād*, he should decide it according to the Book, i.e., the Qur'an if he fails to find the law there, he should seek the answer in the consecutive reported
Tradition, if he fails, he should refer to the patent wording of the Qur'anic text. If he fails he should see in the schools of law; if he finds a consensus on the matter he should follow it, if not he should consider the following factors:

To observe generally the general rules before the particular ones. To look in the texts, and in their absence, in the consensus. To make analogy and hypothesis*.

Reference to *ijtihad* is, therefore, made only in absence of texts where the *mujtahid* has to find the law either by analogy or whatever reasoning and, in so doing, he has to exert his thought and utilize his whole intellectual faculties to deduce the rule from the original sources.

The *muqallid* (copier) needs only to apply whatever a *mujtahid* says in the matter. For this reason the difference between *ijtihad* and *taqaddum* (copying) is worth discussion.

(v) *Ijtihad* (independent reasoning) and *taqaddum* (copying)

*Taqaddum* literally means clothing with authority in matters of religion. Technically, it refers to the adoption of utterances or actions of another as authoritative with faith in their correctness without investigating their underlying reasons. It is nothing more than imitation. In this sense, *taqaddum* is the opposite of *ijtihad* and in this same sense it is worthy of discussion. The copier, is normally a lay-man (not always) who adopts scholars opinions. The historical origins of *taqaddum* coincide with the formation of *mazahib* (schools) which, in part at least,
arose out of the adherence to the teaching of prominent jurists.⁵⁹

The mujtahid has on the other hand to originate the law and reasons out its causes and shall not blindly accept opinions of others. In fact, he is under a duty to do so. The consensus is that: it is *ijtihad* and not *taqlid* which is the obligatory one even for the layman.

Those who advocate *taqlid* cite the Prophet’s saying: "My companions are like the stars whom you follow you will not be going astray". The saying points to the following of the companions. The following of the Prophet himself is not a *taqlid*.

Those who are against *taqlid* adduce a counter argument. Ibn Hanbel believes that the following of a *taqlid* is void since it is not permissible and that the Companions or the Successors did not imitate each other in every matter and consequently any one who imitates another acts against the consensus.⁶⁰

Imam Ibn Hanbel also advocates *ijtihad* and is against mere copying. In fact, *ijtihad* is the proper instrument of Islamic law to make it adaptable to changing conditions and is thus the most dynamic concept. The death of the Prophet and the cease of revelation necessitate the use of *ijtihad* in cases where there is no express text.

Now the Islamic theory of law in the Sudan will be discussed in the light of the above analysis.
The Islamic Theory of Law in the Sudan

The Islamic theory of law has not been alien to the legal theory of this country. Yet its application has been influenced by the will of the sovereign authority. The Maliki doctrine was the earliest and has been the popular doctrine but in fact the Hanafi doctrine was officially backed and made the overriding philosophy.

The Development of the Islamic Theory of Law in the Sudan

The advent of Islam in the Sudan dates back to the period of the second Caliphate Omer Ibn al-Khattab when his deputy Amr Ibn Al-Aas was in Egypt. No doubt, the Sudan Muhammadan Law Courts Organization and Procedure Regulations of 1940, was taken from the Egyptian Shari'a Courts Regulation issued in 1887. The earliest judges were largely Egyptians and Egypt itself was part of the Ottoman Empire at that time.

Radical changes have occurred in 1977. A committee was set up to revise the totality of positive laws in accordance with Shari'a. It's recommendations showed that only 13% of the laws were actually against Shari'a. However, practical steps to change the laws were only taken latter.

In fact, the spread of the Islamic sciences dates back to the period of the intellectual backwardness which was prevailing in the Islamic world during which the scholars limited their efforts to the recited sciences without making any jihadd. They were, further, concerned with the writing
of the manuals and interpretations. Such a period also coincided with the spread of the Sufism which also found its way to Sudan one time. Accordingly, most of the Sudanese hardly preferred the jurisprudential studies and the religious sciences. They followed Sufism. It was only at the time of the Mahdist State that some part of Ḥijād appeared to be exercised by El-Mahdi himself through circulars of law and policy: El-Mahdi was a reformist. He aimed at the purification of Islam and the unification of Muslim jurists. He did not adopt a certain school of law for his avowed aim was to get rid of the differences between schools. In this sense El-Mahdi was a muijtahid.

In fact, before and after the Mahdist State, the Maliki school remained popular. Or at least the majority of Sudanese followed that school. That was the Maliki school. The reasons for the spread of this school in the Sudan are:

1. Most of the immigrants to the Sudan from the North (i.e. South East) or the West (i.e. Morocco), were the followers of Imam Malik.

2. Most of the pioneers (either Sudanese or Egyptians) who came to teach šī'ah in the Sudan were Malikis.

By 1916, the Hanafi school, instead of the Maliki school was officially adopted. The Courts were directed to apply - as law - the authoritative doctrines of the Hanafi jurists unless the Grand Ġādi by a circular or a memorandum stated otherwise. This shift was not based on the suitability or practicability of the Hanafi school itself but because it
was the school followed in the Ottoman Empire. Thus, the preference of the Hanafi school was influenced by the practice in Egypt although the majority of Muslims in the Sudan adhere to the Maliki school. 68

In 1982, the "Principles of Shari'a" was made the first residual source of law. Thus, in absence of express provision the principles of Shari'a were to be applied.

In 1983, the present Penal Code was issued. It was the first time to introduce crimes punishable by hudud, i.e. theft, robbery, brigandage, adultery, drinking of liquor, and false accusation of adultery (defamation of chastity).

The Judgements (Basic Rules) Act 1983, makes the Qur'an, the Sunna, consensus, analogy juristic preference and unrestricted interests, as the proper sources of law in absence of express positive law.

In 1984, the Zakat (alms) and the Civil Transactions Act, 1984 were issued. The Zakat was made a legal duty upon Muslims. The legal maxims or the general principles governing the application of law which are dominant in the Shafi'is e.g. la dirar wa la direr (do not inflict injury, nor repay one injury with another), al-darar, udafa' bi qadi al-imkan (the injury is avoided as far as possible) al-darar la uzala bi mithlihi (the injury should not be remedied by a similar injury), are all now part of the civil law. 71

As for procedural law, the Civil Procedure Act, 1983,
are also relevant. The Court could not now pass a judgement including the payment of interests. It is on the accused now to take oath (if the plaintiff so desires when he [i.e. the plaintiff] has no evidence) and the burden lies on the plaintiff to adduce evidence.

Thus, the whole philosophy of the substantive and procedural laws has now been changed.

(c) The General Frame of the Islamic Theory of Law in the Sudan

i. The Jurisdiction of Civil and Shari'a Courts

It was seen that the civil courts have power to adjudicate on questions of personal law of Muslims. Civil courts should apply Islamic law when the parties are Muslims, or that the marriage is concluded in accordance with Islam. Unlike Shari'a Courts, Civil Courts are not bound by any school of Islamic jurisprudence.

Civil Courts applied principles of Islamic law to cases other than personal matters e.g.: pre-emption. Of course Islamic law could have been applied under the formula justice, equity, and good conscience, but for unknown reasons, the formula was hardly interpreted to mean Islamic law.

The law relating to personal matters of Muslims, i.e., marriage, divorce, guardianship of minors or family relations etc. has principally been dealt with by Shari'a Courts. Though the Civil Courts might deal with the same matters, if the party submitted to their jurisdiction, their power is still
limited.

Other personal matters e.g. interdiction guardianship of an interdicted person, would normally be dealt with by Shari'a Courts only.

Moreover, since personal matters are connected with religious affairs the parties hardly go to a civil court. They normally go to Shari'a Courts. I did not manage to get any reported case where Muslims preferred to resort to a civil court in cases of marriage, divorce or inheritance.

In cases of non-Muslims, the law has been that:

a) Their personal law and custom should be applied.\(^76\)

b) If they submit to the jurisdiction of Shari'a Courts, Shari'a law should be applied.

c) Shari'a law should also be applied if marriage was concluded in accordance with Shari'a.\(^76\)

d) Now, if the personal law of non-Muslim contradicts with Shari'a law, Shari'a law should be applied.\(^5J\)

ii. The sources of law

The Qur'an, Sunna, consensus and analogy are taken for granted as both proofs and sources of law.\(^81\) Juristic preference, unrestricted interests (al-masalih al-mursala) and custom which is not contrary to Shari'a principles are also sources of law. Furthermore, the Islamic Shari'a and custom have been the essential sources of legislation.\(^22\)

The trend since 1982, has been to put Islamic principles
as the primary source of law in absence of legislation. Now legislative enactments themselves are to be in accordance with Shari'a law. There is therefore a superiority of Islamic law which is really worth discussing.

iii. The superiority of Shari'a Law

It is now established that Shari'a law is superior to any positive law in the Sudan. It was stated in 1876 that "Shari'a law is to be applied in the substantive matters for which there is no law." It is not precluded because the parties are non-Muslims for the Shari'a rules - are applicable also when the personal law of non-Muslims contradicts Shari'a.

The present laws make it a legal presumption that the legislator does not intend to contradict Shari'a or deviate from its principles and that the Courts in their interpretation and application of law should be guided by the principles of Shari'a.

On the other hand, there should be no creative interpretation when a clear provision exists and that the Courts should consider all laws duly published in the Sudan Gazette to be judicially noticed. The jurisprudential argument may arise in this connection as to the question: What should a judge who is faced with a provision against Shari'a law, should do?

The general theme of this thesis suggests that the
judge applies the law as it is - though contrary to Shari’a for the following reasons:

(a) The judge, is only an interpreter and not a legislator and

(b) He is directed by the law to take such a provision as law and not to make any creative interpretation when a clear provision exists.15 and

(c) It has been the general policy in our Courts to follow what the legislator say whatever it is, and

(d) Following that policy, even in cases of deviation from Shari’a law it is the positive law which was applied. An example for this is the case of Sudan Government v. Abdalla Marazl Mohamed,16 where a father had brutally killed his daughter by stapping her while she was sleeping. The background of the incident is hardly relevant here but the line of argument upon which the trial and appellate Courts depended is worth discussing. The trial court charged and tried the father for murder under section 251 of the Penal Code 1925 and sentenced him to life imprisonment instead of death. The reason for deviating from the application of capital punishment was seen to depend on Islamic Shari’a.17 Hence, the president of Court (Judge Babiker Zein El Abien) cited the Tradition (the father should not be killed for murdering his son). The appellate authority (Judge Abdi El Nusalib El Fahal) viewed the matter from the positivist view
point and started with the following inquiry:

"That is right (i.e. the fact that in Shari'a Law, the father is not to be killed for murdering his son), but it is not possible for the President of the Court to apply what is religiously right in this case. The power of altering the judgement from death to life imprisonment is not one of his discretion".

Accordingly, the Appellate Court ruled that, the trial judge was under a duty to pass the death sentence as required by the law and had no discretion to pass a judgement of life imprisonment (depending on Shari'a Law).

What was only open to him is to recommend the altering of that sentence to life imprisonment to the confirming authority. However, the superiority of Shari'a law is maintained. This may be argued along the following lines:

(a) Since 1983, every law which is against Shari'a is to be taken as null and void and Shari'a rules governing the matter shall be applied in such a case. This is because, the judgements (Basic Rules) Act, 1983 makes it a law that the judge shall interpret the law in accordance with Shari'a principles for the legislator intends to make law conformable to them.

(b) It is now a general feature of our law to find an express provision that a certain Act is to be applied "if not contrary to Islamic Shari'a".

(c) It was stated that Shari'a principles become the first residual sources of law. Furthermore, custom is now subject to Shari'a. If a custom is contrary to Shari'a, it will be taken as void and shall not be applied. The general trend then is directed towards applying
Shari'a principles in substantive as well as procedural law.

iv. The general objective of Shari'a

Criminal investigation is directed to run in accordance with the Shari'a laws in the conviction that the aim is the application of God's legislation and the filling of gaps which lead to injustice.

The very recent and present changes of laws are also seen to aim at the application of the commandments of God by the judge, which laws aim in turn to protect the society from corruption and more precisely to protect what is known in Islamic jurisprudence as the six wholeness, namely: Religion, self, property, mind, chastity and off-spring.

It is part of our law to recognize certain aims as basic: The avoidance of injury, the compensation of the grievance, the consideration of necessity and people's customs and traditions.

The case law reaffirmed these objectives of Shari'a. In Sudan Government v. Hussein Mohamed El Hak, it was maintained that the interests in Shari'a aim at the removal of corruption from men and the realization of peace for them. The ends of Islamic legislation are further made certain legislation of hudud as intended for deterrence and hence the punishments are made severe. The object of capital punishment in the positivist outlook depends on the interest of the community. In Shari'a law, it is seen to rest on the Qur'anic verse: "In the law of Equality, there is (saving
of life - to you. O. ye men of understanding (m.11.175)”,
that is to say capital punishment also aims at the saving
of life for all.

v. The Independent Reasoning (Ijtihad)

The prevalent trend in the Sudan has been more related
to taqdis than ijtihad though there are some signs of a
movement towards the use of personal judgement.

To begin with the first part of section 53 of the
Muhammadan Law Courts Organization and Procedure Regulations
1916 (which is now reproduced in section 16 of Schedule II
of the Civil Procedure Act, 1983) which directed the court
to apply the authoritative doctrines of the Hanafi jurists,
gave the courts no discretion even within a particular school.
Perhaps the Grand Kadi (now the Supreme Court) alone had
the power to make a restricted ijtihad within the Hanafi
school.

In the Sudan, as in other Muslim lands in the modern
world, the reformatory trend in the application of Islamic
Law has suggested a juristic criticism. No specific school
of Islamic jurisprudence was advocated. This has been a
trend towards ijtihad. This began restrictively - as we have
seen in 1916 when the Grand Kadi was given power to issue
circulars or memorandum stating the authoritative doctrines
to be applied.102 A similar power is now given to the Chief
Justice in criminal matters. Section 308 of the Penal Code
1983 states:
"The Chief Justice shall from time to time issue circulars in which he shall limit:

(a) "the school or schools which the courts should follow in their application of legal rules.

(b) ......."

For the Chief Justice, this is clearly a power to make *ijtihad* in a restricted sense. For judges, it is an obvious example of *taqdis*. In fact, the Chief Justice, as we have repeatedly mentioned, used this power to legislate by circulars. For the Chief Justice, according to the provisions of section 308, stated only the school or schools to be followed, the courts would practise a restricted *ijtihad* within those schools of law.

The full power of making an absolute *ijtihad* by judges is given by section (3) of Judgments (Basic Rules) Act, 1983. This law gives the judge an absolute power in absence of law to refer directly to the Qur'an, Sunna, consensus and analogy. This is the typical example of making *ijtihad*.

The danger of this - it is sometimes submitted - is that judges are not sufficiently experienced or well trained to shoulder this responsibility. They are not really *muhaideen* in the sense of the descriptions of persons who are competent to make *ijtihad*. They do not have good knowledge of the Qur'an, Sunna, Arabic language, Arab customs and the reasons of inspiration of verses. At least most if not all of the judges, are not so competent. The *fiqh* (law) is too broad and difficult to be comprehended. A period of training is needed. Until that happens a restrictive *ijtihad*
is advisable.

The Chief Justice found the opportunity to state that the judge under Islamic Shari'ah is considered as a jurist and interpreter which requires him to know the roots of Islamic jurisprudence and have the full understanding of the basis of the legal prescriptions. Accordingly, the new Islamic legislations have widely opened the gate of ijtihad for the judge. As an example, the Penal Code 1981, gives the judge the discretion, in cases other than the hudud, to limit the proper punishment in accordance with Shari'a restrictions and the Judgments (Basic Rules) Act, (1983), states the principles by which the judge should be guided in his application of prescriptions of the new laws." 106

This statement is to be viewed against a background in which the court is obliged by law to apply only the authoritative doctrines of a certain school of law.

There is a conviction that:

"a) It is unreasonable for modern Muslims to regard themselves as bound in every particular by the authoritative doctrines of any one school, when all the wealth of the divergent views attributed to the great jurists of the past may be considered equally available."

"b) Even if no claim is made today (in 1960) to the right of ijtihad or independent deduction from the original sources, the Muqadd (Copists) who is bound to follow the dicta of the great jurists of the past may choose which of several different dicta may be adopted". 107

The above contentions may now be more relevant. The claim for ijtihad becomes legally valid. Its door should be widely opened. The independent deduction from the original sources is now not only possible but a duty when there is no law as the Judgments (Basic Rules) Act, 1983, maintains.
5. Conclusions

It is clear that, though the idea of an Islamic theory of law has never been alien to this country, yet the application of Islamic law has much been influenced by the will of the sovereign power. This makes the future of Islamic law in the Sudan, and consequently the adoption of its theory not predictable.

There are keen steps towards establishing a new jurisprudence based on the Islamic law though the fullest realization of that ambition is left to the near or far future.
1. See supra, p. 322 and note 12 below.
2. See supra, pp. 321-333.
5. Art. 1, of the Ottman Majalla (Civil Code).
6. Per Schachet, op. cit., p. 17.
8. Idem.
9. Ibid., at p. 611.
11. Ibid., at p. 1243.
12. The writers of the "Shorter Encyclopaedia of Islam" state that: "In Shafi'i's, 204-820) we have the founder of Muslim jurisprudence. It is his great achievement that in his legal thought becomes conscious of itself and ... becomes a science". Per Gibb & Karamers, op. cit., p. 613.
13. Translated by Khadouri, see Khadouri, op. cit., p.
14. Shafi'i's pioneering status in this regard is not unchallengeable. It was alleged that it was Imam Mohamed El Baker who firstly wrote about this science and arranged it. This allegation is refuted
by Abu Zahra, see Abu Zahra, op.cit., p. 14.


17. Idem.


23. Ibid., at p. 16.


27. Abu Zahara, op.cit., passim.


30. See Infia, P. 332.

32. See Muslehuddin, op. cit., pp. 86-87.
34. See Kaddouri, op. cit., pp. 88-116 passim.
38. Ibid., at pp. 10-11.
42. See ibid., at p. 5.
43. Ibid., at p. 6.
44. Ibn Khaldun, Rosenthal, F., (trans.) "The Muqaddimah" "An Introduction to History" (Bollingen Series X, IIII New York 1958), p. 4. Another justification is that Iraqi jurists had been influenced by the rationalistic philosophies of the Persians, Greeks and Indians.
45. See Shalaby, op. cit., p. 103.
47. See ibid., chap. 11, pp. 86-95.
48. See Pyreese, op. cit., p. 18.

50. Reference here is made to the case of Nuur.


52. Historically, the jurists warned against the use of *ra'v* (opinion) as containing the element of *zaann* (subjective conjecture) inherent in individual *ijtihad*. They purported to eliminate this element through adequate *ijtihad*. This resulted in collective *ijtihad* (i.e., *jumla* gives analogy) was then introduced with systematisation and consistency. Where the systematisation appeared to lead to unforeseen or unaccepted results *istihsan* (juristic preference) was introduced. However, *ra'v* (which meant arbitrary opinion) *ijtihad* was developed to disciplined judgement through the persistent perfection and further highly disciplined. Thus it is observed that in recalling the historical development of the science of *fiqh* it will be found that a great deal of activity of the *fugaha*, or jurists of the past was concentrated on defining and redefining the mechanism of *ijtihad*. See Faruki, K.A. "Islamic Jurisprudence", Pakistan Publishing House, (Karachi, 1 A.H., 1882, 1862), p. 75.

53. Ibid., at p. 80.


55. Idem.

56. See Infra, pp. 556, 555.
59. Ibid., at p. 564.
62. Ibid.
63. Ibid.
65. Hassan, op.cit., p. 22.
66. See sec. 53 of the MIORD, 1916.
69. Ibid., sec. 336.
70. Ibid., sec. 358.
71. Ibid., sec. 316.
72. Ibid., sec. 443.
73. Ibid., sec. 434.
74. Sec. 5 of the CTA, 1984.
75. Sec. 110 of the CPA, 1983.
76. Sec. 3 of the CPA, 1983.
77. See infra chap. II.
78. Sec. 5(a) of the CPA, 1983.
79. See infra chap. II.
80. See the case of F.R.S.W.F.G.F., C-APP-235-1976.
81. See chap (II).
82. See Art. 9 of the Sudan Penal Code 1983.
83. See the Amendment of the Civil Procedure Act, 1982, sec. 6(2).
84. See the J.R.S.W., 1983, sec. 2.
86. Idem.
88. Idem.
89. Sec. 5 of the CPA, 1984.
90. Sec. 4 of Interpretation and General Clauses Act, 1984.
92. Ibid., at p. 13.
93. Ibid., at pp. 13-15.
94. Sec. 2 of the J.R.S.W., A, 1983.
95. Secs. 24, 39(1) and 170 of the CPA 1983.
96. Sec. 3 of the J(B.R.), A, 1983.
58. Criminal Circular, No. 95.


60. SC-CRI-REV-17-1-1985.

61. This idea was also expressed in the case of Sudan Government v. Balkis Khalifa Nimer (1976), *S.L.J.R.*, p. 31.

62. Sec. 53 of the MICOPR, 1976.

63. See infra, chap. (III).

64. Infra, chap. II.

65. The interview with the Chief Justice, see note 51 above.

66. Idem.


68. Idem.
CONCLUSIONS

The co-existence of a number of legal systems in the Sudan justifies the conclusion that the characteristic of our legal structure has been legal pluralism. Two divisions of the judiciary had been and are still in existence, i.e. the civil and Shari'a divisions. Moreover, there has been an indigenous system. It consists of the Chiefs' Native and Peoples' local Courts.

There has also been a plurality of laws. The English common law and statutes were applied by means of reception through the formula 'jurist, equity and good conscience under section 9 of the Civil Justice Ordinance, 1929 (which was a reproduction of section 4 of the Civil Justice Ordinance, 1900).

The civil, and particularly Egyptian Law, had rarely been adopted through that formula but, afterwards it flourished in 1971 when the Civil Code, 1971, was passed.

Islamic law has never been alien to our legal system. It is well rooted in our legal history. However, Shari'a Courts were only properly organized (in their modern form) in 1916 (by the issuance of the Muhammadan Law Courts Organization and Procedure Regulations 1916) to apply Shari'a Law in personal matters of Muslims. The Hanifi School was adopted though the Maliki School was the popular one. Civil Courts have also been able to apply Shari'a Law in personal matters of Muslims without being governed by a certain school of
Islamic jurisprudence. However, no single case has been reported in this regard. It was only in 1983 that fields other than personal law of Muslims came to be governed by Shari'a Law, e.g. crimes of ḥudud, socio-economic regulations, i.e., Zakat and even purely moral duties, e.g. the duty to order what is good and prohibit what is evil, i.e., al-mar bi al-ma'ruf wa al-nahi a'n al-munkar.

Customary law has not only been applied in the Chief's Native and Peoples Local Courts but equally and principally it has been applied in Civil Courts in matters relating to personal law of non-Muslims and in other fields of which land cases are the most obvious examples. In this latter field many customary rights have been adopted and incorporated into the law since 1900.

Our case law receives much consideration both by judges and lawyers as our system is a common law system and is, therefore, dependent on the doctrine of precedent. The reporting system of judicial decisions was not helpful and access to law was, therefore, difficult. In the period since 1957 the Sudan Law Journal and Reports has made reference to case law easier. Our courts have since then been able to cite cases decided earlier in higher courts and to follow them.

Statutory Law or Legislation, however, comes first as being the primary source of law. At early times, very few enactments were available. The legislator introduced the formula justice, equity and good conscience to fill in
the gaps of law in absence of legislation. Now, because of
the many statutes which have been passed in different areas of
since 1900 that gap has almost been filled in. Still, codifi-
cation of law is not to be proposed as it hinders judicial
creativity. Codified law being already settled and pre-
determined will be rigid and hardly responsive to changing
social conditions.

The official publication of Sudanese legis-
lation started in the year 1907-8 when the first edition of
the laws of the Sudan appeared and consisted of two volumes:
the first contained the general legislation in chronological
order while the second and more important volume contained
three Codes: namely, the Penal Code 1899, the Code of Criminal
Procedure 1895 and the Civil Justice Ordinance 1900 with their
subordinate legislation in addition to the Sudan Mohammedan
Law Courts Ordinance 1902.

Since then, law has been published in the Sudan
Gazette and promulgated. The Courts are bound to apply the
duly issued legislation and should not make reference to any
other source of law unless there is no such legislation.

The word "law" in the Sudan has meant "legislation"
which is the direct expression of the will of the legislator.
In personal matters the courts apply Islamic law if the parties
are Muslims or the marriage was concluded in accordance with
Shari'a. Custom is applicable in personal matters of non-
Muslims provided that it is not itself contrary to justice,
equity and good conscience, or justice, morality and order
or to general principles of Shari'a or legislation and has not been declared by a competent court to be null and void.

In their application of statutes and custom the Budoise courts have adopted a deductive method of reasoning. The common law orientation contributed to emergence of a tendency of treating like cases alike. This was obvious in cases of precedent. Thus an analogical approach of reasoning has also been followed both by lower and higher courts.

The formula justice, equity and good conscience has given the courts a golden opportunity to make law but little has been achieved in this regard. The courts did little more than receiving English Law.

There is, in fact, a general instability in the legal system and uncertainty of the law and of legal concepts. The judiciary has suffered much of all that. In the last ten years, too much legislations has been passed to the extent that in many occasions both the Bench and the Bar failed to get to know the proper law to be applied.

Law changes with the change of politics and policies. The evolutionary development of law could only be seen in the case law in the time between 1900-1973. Since then the courts have struggled to get and apply the too many legislative enactments which have been in turn subject to constant repeal and-or amendments.
It is, therefore, natural to have different legal theories in the Sudan. The writer is of the opinion that the positivist theory of law has been the predominant one. What makes one adopt such an idea are the following points:

1) Since legislation, according to the positivist outlook, is the direct will of the sovereign power and the superior authority is the direct source of law, the case in the Sudan has been that:

   a) the word "law" has meant legislation whether superior or subordinate,

   b) the executive power has been empowered to make laws by means of provisional order and to participate in making laws through legislative orders during some periods. The power of making laws by the executive has not only been potential but actual power where in 1975 the Constitution was amended in a way to empowering the president of the Republic to make laws subject only to their own provisions.

   c) legislation has also been the primary source of law as we have seen and the court must apply its provisions.

2) The majority of judges have been positivist minded for:

   a) They have generally been adherent to the intention of the legislator and legislative enactments.
(b) They stick hardly to the law as it is whether just or unjust, moral or immoral. They are not even to question its "wisdom". It is not their duty, as they repeatedly state to make law. It is for the legislator and the legislator alone to do that.

(c) They normally use the deductive method of reasoning in applying statute and case law.

(3) There has been a good contribution to the conceptual analysis of legal terms. In fact, the legal concepts were at best uncertain. The courts paid special regard to founding their general frame by stating their relatively and indescripability. Concepts like "persons", "property", "possession", "ownership", "right" and "duty" become fixed in our jurisprudence.

(4) Although the idea of divine law and natural rights has since early times been obvious in the Sudanese law and Constitution, there has also always been a reverence for the sovereign power which contributed to the adoption of the law whether divine or positive. In fact the abridgment or violation of the natural and inalienable rights by the sovereign power has always been evident.

The application of customary and native law is no doubt an obvious example of a law which is connected
with the people, their social conditions and realities. Custom has since 1900, been governed by legislation.

It is certain that since 1983, a new theory has been introduced. This is the Islamic theory of law. It is remarkable that the step towards applying Shari'a Laws was taken by the sovereign authority by means of provisional orders. The People's Assembly was not able even to make some necessary amendments to these laws.

Our legal history has shown a growing power of the sovereign. In the period since 1971 so many legislations have been issued to consolidate power in the hands of the executive. It is frustrating that the courts are even denied the power to see cases relating to certain acts of the administrative agencies. Interference with the acts of the judiciary by the executive became known. The appointment and removal of judges provoked a strike by judges in 1983 and an outcry in 1984. Future visions are uncertain though one is not pessimistic.
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