"British and French colonial encounters with Islamic law in Africa"

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Part I of the volume is entitled *Colonizing Islamic Law in Africa*. As the title suggests, each article in part I of the volume deals with the effects of colonialism on Islamic law. The first article by Shouket Allie article is an historical exposition of the development of Muslim Personal Law at the Cape and the coloniser's response to the law. Shamil Jeppie in his study of native shaiks and Qadis in Sudan illustrates the way in which the colonial power manipulated the relationship between these two groups and enforced their concept of the difference between Sharia and custom to create, in effect, two distinct legal camps. The legal religious leader is also the focus of Hassan Mwakimako's research. He provides a chronological study of the careers of the Shaykh-al-Islam and the Chief Kadhi in Kenya. He argues that ethnic rivalry and colonial acquiescence were instrumental factors in determining who would assume the post of Kahdi.

Moving from Anglophone Africa to Francophone West Africa, Ghislaine Lydon examines civil litigation in the Muslim tribunal of Ndar. Importantly, she notes that the enforced linguistic shift from Arabic to French in the courts affected women's ability to obtain divorces as colonial authorities became more involved in the court processes. Barbara Cooper analyses the many legal and quasi-legal systems operative during the colonial period in Maradi, Niger and argues that various fora available for mediating conflict permitted more nuanced engagement with structured or informal legal spaces. Her findings suggest that contrary to the established clear cut notions of chiefs as either fronts for colonial subjugation or emasculated men, what played out was considerably more complex. Finally, Richard Roberts in his study of French Soudan illustrates the way in which local inhabitants used the new legal system established by the French in 1903 to their advantage. Far from regularising and simplifying the legal system, the new system created brought to the fore cultural and religious differences which were manipulated to achieve desired ends.

Part II of the volume, *Islamic Family Law, the Postcolonial State, and Constitutionalism in Africa* focuses on the role of Islamic law in postcolonial Africa. Abdulkadir Hashim discusses the difficulties which arise as a result of the hybrid legal system existing in Kenya. A case may be brought before a Kahdi Court as well as a High Court and this sharing of jurisdiction has created problems. Similarly, Robert Makaramba discusses the role of Muslim Family Law in Tanzania's plural legal system however his focus is on the interplay between the constitution and Muslim family law. Susan Hirsh's article then compares state intervention in Kenya with that which has occurred in Tanzania and argues that the form which intervention takes affects and shapes gender relations as well as influencing the power dynamics which exist between the state and the Muslim Community. Abdoulaye Sounaye analyses the controversy surrounding the introduction of a religious oath for magistrates in Niger. He examines the politicization of religion in this context and argues that recourse to Islam in public affairs is used to placate and accommodate Muslims. Finally, Allan Christelow's article deals with the current Islamic revival in Northern Nigeria most clearly seen in the establishment of Islamic courts. His paper highlights the importance of staying clear of a reductionist view on this phenomenon since there is considerably more to the Islamic revival than the dominant discourse surrounding contentious and highly publicised cases such as the adultery cases.

The making and unmaking of colonial Shariah in the Sudan

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Political and Legal Contexts

Until Sudanese independence in 1956 Sharīa courts were part of the colonial machinery. Sharīa was a key component of a three-tier judicial system, the two others being the English common law courts and so-called native courts. Sharīa was partly codified in the Manshūrāt al-mahākim al-Sharīa (circulars). It was part of a modernising colonial bureaucracy and was given a modern shape and to an extent modern content as reflected in certain legal reforms.[i]

The dominant madhhab ('school' of legal interpretation) in the Sudan was Maliki but the Egyptian Grand Qadis often ignored this fact and based their decisions on the Hanafi madhhab, dominant among the 'ulama in Egypt since Ottoman times.[ii] But the Qadis also made innovations in their application of the Sharīa especially in the area of family and personal law. Thus numerous of their judgements drew on both Hanafi and Maliki opinions.[iii]

The highest authority was the Governor General, in "supreme military and civilian command of the Sudan", and the colonial bureaucracy under him staffed by Britons. The civil courts would serve the British, Europeans and other "non-Mohammedans" in the country such as the Greek community or local and Egyptian Copts. These courts were called "Ordinary courts" revealing the norm set by the British. Muslims, with the means and desire to, could also bring their cases to these courts. Indeed, in all areas not covered by the Sharīa or native courts the "ordinary courts" had jurisdiction.

Muslims, the subjects of Sharīa, and who were the majority in the northern regions, and the biggest religious group in the country as a whole, primarily had recourse to the Sharīa courts. In the South, and among the nomadic Muslim peoples in the North, native or tribal courts practising "customary law" were steadily given more authority in the 1920s and 1930s.[iv] But each sphere of authority was ultimately subject to the approval of the English Governor-General. Egypt was supposed to be a co-domini of the Sudan but the Egyptians played a secondary role in the running of the colony. The Egyptians were kept at bay and in the 1920s their presence was even further reduced.[v] Insofar as the law went, the Egyptians were sent to Khartūm to oversee the operation of the Sharia courts. Thus, until independence an Egyptian was always the Grand Qadi.[vi]

The British regarded the civil courts, their methods, and precepts as the superior system. The legal triad was not one of equally valid components. The civil courts effectively applied English common law and this legal tradition through the sheer weight of British colonial dominance became the pre-eminent tradition in the country. The Civil Justice Ordinance of 1929 had a "justice, equity and good conscience" clause for cases for which there was no precedent or clear-cut legislation. This clause however was interpreted to mean English common law, and thus colonial Chief Justices and judges drew extensively on English precedents, legal (Latin) terminology and treatises.[vii] Section 5 of the Civil Justice Ordinance of 1929 gives custom and "Mohammedan law" preference in personal law matters unless contrary to "justice, equity and good conscience".[viii] A separate Sudan Penal Code was

promulgated wholly based on the Indian Penal Code drawn up in British India.[ix]

Sharīa was seen as substantially less significant but some measure of it had to be tolerated because of the Muslim population and especially the fear of offending the "traditional" Muslim elite. After the conquest of the Sudan in late 1898 Lord Cromer, British agent and consul-general in Cairo, travelled from Cairo to Khartūm and proclaimed the new authority, and the government's respect for "Mohammedan Law" to the religious notables he met. Very soon afterwards legislation was passed giving effect to Cromer's promises.

The Mohammedan Law Courts Ordinance of 1902 and subsequently the Mohammedan Law Courts Procedute Act of 1915 would govern the administration of Sharīa.[x] The first Act (section D) provided for the Grand Qadi (Qādi al-Qudāt) to issue regulations relating to Sharīa for the courts to apply. These regulations would take the form of periodic circulars issued by the Grand Qadis. However, the circulars had to have the approval of the Governor-General before becoming Sharīa. In due course, judicial circulars were regularly published reflecting respective Qadis' close interaction with Sudanese realities.[xi] These circulars (manshūrāt) largely displaced the fatwa as the source of law. It was a type of legal codification and the Egyptian 'ulamā appear not to have opposed this innovation.

The "native courts" were given official recognition twenty years after the conquest, immediately after the 1920 inspection tour by Lord Milner, after which he recommended the use of "native authorities" and decentralisation to achieve effective government. In the North the British began by promoting these courts' judicial functions,

largely to displace the Sharīa courts. In the South they fostered the courts' administrative role such as how and why to collect taxes.

This was the beginning of the end of "direct rule" and the beginning of indirect rule. From then on "native courts" were gradually used in attempts to displace Sharīa courts in the North. For instance, on personal status issues the native courts were given concurrent jurisdiction with Sharīa courts. This led to several conflicts between colonial officials and native shaykhs, on the one hand, and Qadis on the other.

There were also attempts in the 1920s to halt the work of the Qadi College established in Umdurmān in 1902 to train Sharīa judges.

By 1929 numerous Sharīa courts had been abolished and native Shaykhs' courts established. In the same year one third of the Sharīa judges were pensioned off, and about half of the 42 Sharīa courts were abolished.[xii] But the efforts to completely displace the role of Sharīa were never successful. So Sharīa remained, but as a poor relation in the family of laws applicable in the Sudan. The British after all did not operate anything close to the Ottoman millet system. On the contrary, they were highly interventionist in the field of law.

It is however significant that the British entertained Sharīa at all. They could have restricted its legal space or hampered its operation from the outset but only began in the late 1920s'. The recognition of Sharīa was strategic. Its sphere of jurisdiction was also slowly but substantially narrowed. Fear of Mahdist revivals and placating the religious elite who could be moved to mobilise against the infidels running the country were

primary considerations. By allowing the courts to operate they also incorporated Egyptians and a handful of locals in the structure of authority. Egyptians were supposed to be co-partners in ruling the Sudan and served in numerous positions throughout the country but never above the British.[xiii]

In the legal structure the Egyptians were given pre-eminent positions in the Sharīa courts. However, the Sudan Political Service and the Civil Service staffed by an Oxbridge educated elite had ultimate authority. In the provinces the District Commissioners often also took on the role of judges although they had no legal training in most instances. The D.C. was, "judge, administrator, chief surveyor, inspector of education, chief of police, and military ruler all in one".[xiv] In all, the number of senior British administrators was small. Between 1899 and 1959 they numbered no more than 400 members in total, "rarely reaching one hundred and twenty-five officials on the ground to administer almost a million square miles".[xv] Indirect rule, through the native authorities but also to an extent the Sharia courts, was therefore an absolutely necessary device in the apparatus of rule. This was certainly the case from the 1920s onward.

Mahmood Mamdani has argued that the late colonial state was bifurcated between a small, urbanised civil society and a vast rural domain dominated by despotic native chiefs and tribal authorities.[xvi] The Sudan is an example of this argument especially after 1920 when the elevation of native authorities became a priority of the state. However, the Anglo-Egyptian Sudan also complicates Mamdani's thesis for the "Mohammedan law Courts" were neither the courts of dependent native chiefs nor an

expression of urban colonial civil society. The Sharīa courts were a problem because they were neither, they were in a sense in-between. While they were dependent on colonial power they also demonstrated the potential for autonomy. Colonial officials said they feared that the Sharīa courts were capable of assuming executive authority in addition to their prescribed judicial powers.

In Mamdani's argument urban civil society was non-racial but open only to those with the 'civilised' standards of education. This opening of civil society to the Sudanese happened in the 1920s as the graduates from Gordon Memorial College found employment in the lower ranks of the civil service. This group was also the first to agitate for independence. But this movement remained small even at independence. The native chiefs and the traditional religious figures maintained their dominance over the majority in the rural areas. The Sharīa courts were in a curious in-between position: it was neither English nor customary and often conflicted with both. Sharīa judges were not hereditary chiefs but educated in a specialised college for the purpose. But these were not the western institutions that would admit them to privileged status in colonial civil society.

After World War One a number of factors led to the attempts to weaken the Sharīa courts while giving native administration more influence. Extensive anti-colonial protests in Cairo between 1919 and 1922, fears about their spread to the Sudan, and glimmers of nationalist agitation in Khartūm made the British acutely concerned about their somewhat unstable position in the Nile Valley. In March 1919 thousands of Egyptians took to the streets in what was to become a sustained period of protest against the British

presence. Nationalist mobilisation against the British in Cairo resonated in Khartum. The Governor-General of the Sudan, Sir Lee Stack, while on a visit to Cairo was assassinated during the nationalist protests. In 1924, there was a pro-Egyptian uprising in Khartum.[xvii]

Large numbers of the Egyptian military and civilian staff of the Anglo-Egyptian Condominium were then immediately evacuated from the Sudan. Such staff had not cost the regime a lot, and in any case until 1913 the Egyptians had borne most of the costs of the Condominium.

As a result of these developments the state drastically slowed down its efforts to "Sudanize" the bureaucracy. Thus in the 1920s native administration was given great weight; it started off as pragmatic policy and became a creed after 1924. Native authorities would be one way in which the emerging Sudanese educated elite could be displaced. Since the Qadis in the "Mohammedan Law Courts" had the potential to cross the boundaries of their office into the spheres of "executive authority" they too had to be curtailed.

Milner's tour of the country had resulted in his 1921 Report recommending decentralisation and increasing use of native authorities. Thus the "Power of Nomad Sheikhs Ordinance" was passed in 1922 (repealed in 1928 and replaced by the "Power of Sheikhs Ord."), and the 'Village Courts Ordinance' in 1925 (amended in 1930). By 1929 there were 72 such courts and they had tried over ten thousand cases by the end of that year.[xviii] It is clear that one of the reasons for "recognising and organising native administration in the North was to minimize reliance upon the Sudanese educated class . . . (and) judicial and administrative powers were transferred from the Sudan civil

servants and judicial staff to the native authorities."[xix] Therefore very little was done to develop a modern educated elite. Education in the North did not expand and definitely not legal education in either Sharīa or the common law.

This in outline is the broad setting in which the various shifts and moves were made to restrict what I term "colonial Sharīa", or Islamic law practised and constructed in and enabled by a colonial setting. Through this colonial Sharīa Muslims had access to key legal symbols and practices of Islam but limited by the fact of state power being in non-Islamic, British, colonial hands. The rest of the paper takes a closer look at the late 1920s and 1930s when the encounter between the colonial bureaucracy and representatives of the "Mohammedan law courts" to inhibit their expansion and replace them with native courts was at its height.

The school and court of Fiki wad Hashi: a native Shaykh and a model Qadi.[xx]

Shaykh Abd al-Qadir Ahmad al-Badawi, or Fiki wad Hashi as he is known in colonial correspondence, ran a Quranic school and presided over a "customary" court serving the Red Sea and Kassala provinces, mainly groups classified Mesellamia, Hadendowa, Bisharin and Amarer. In late 1927 his school had forty pupils coming from throughout these provinces and from among these groups. During the cultivation season the pupils would disperse to work in the fields and reassemble after their period of work. While they paid no fixed fee they offered their teacher gifts in return. He also supplied them with basic food and clothing during school terms. He cultivated some land himself,

enough to allow him "to live the life of a scholar, with dignity, in modest comfort". His school, which offered classes in Quranic reading, literacy, and "Mohammedan law as set out in the Risala of al-Khalil", earned high praise from the colonial officials who had met him. But **more** than the school it was the court that was given **more** accolades.

Fiki wad Hashi was born around 1863. A young man during the Mahdiyya he had not supported the movement that swept through northern Sudan and was in fact meant to be executed by Osman Digna, the eastern region's prominent Mahdist leader. Wad Hashi belonged to the Qadiriyya tariqa and had made the hajj in 1915. In 1914 the colonial authorities awarded him a "Second Class Religious Robe", one of the recently invented ranks and regalia for Sudanese notables and civil servants whom the British wanted to reward for loyal service.[xxi]

But his honorary Robe came before his recognition as a judge. His function as a judge in his informal court, possibly at his tukl or his mud-brick home, made him a man of unique importance to the officials. The moment of his "discovery" coincides with renewed attempts to restrict Sharīa courts and foster their "native" counterparts, or any other courts but the Sharīa ones. Attention to him came during the late 1920s, late 1927 to be exact, when legislative efforts were renewed to enforce recognition of native tribal Shaykhs and restrict Sharīa courts.

Wad Hashi was seen as the model customary judge. He had local legitimacy, administered "customary law" which had a strong Islamic element but did not attempt to make it part of the Mohammedan Law Courts infrastructure. If he had requested to be recognised as an official colonial Qadi, the Qadis may have been divided whether to accept him

into their fraternity since he appears not to have come through the official college in Umdurmān for training Qadis **but** was a decidedly local man.

Moreover, Wad Hashi apparently claimed no judicial authority except that he "exercise(s/ed) the common right to arbitrate in disputes voluntarily brought to him for settlement." His was the epitome of the native court whose authority was widely respected, whose judgements were recognised and who was simply "found" by the state and not appointed or imposed. What made him particularly attractive was that he handled "all types of cases, criminal, civil and Sharīa", except homicide cases. Furthermore, "controversial" cases, such as slavery, were simply not taken to him, say the officials. Thus the description given in the official transcript runs:

> His personal reputation for legal learning, knowledge of tribal custom, and equity, added to his family tradition, causes Arabs to resort to him to an extent which attracts considerable notice and gives to his decisions a very considerable weight in their eyes: but there is no other compulsion, either to take cases to him or to accept his decisions.

Furthermore, cases that he could or would not deal with he sent along to the provincial colonial authority. He awarded only compensations, not punishments, and thus he had no need to refer back to colonial authorities. He kept no records except of "serious cases" which in any case would land up with the colonial authorities at the "Merkaz".

Wad Hashi's informal court was considered as a "well-established native institution of great value". It was considered unnecessary to bring his court under the "Powers

of Sheikhs Ordinance", which sought to increase and bolster the authority of heads of "tribes" through giving them judicial powers, at the expense of the Sharīa courts.

This court was recognised neither as a Sharīa court nor as a customary native court. It had elements of both and was viewed as useful since it had legitimacy and yet its head made no attempt to expand its role and scope, which is what worried the state about the Sharīa courts. The Qadis were expansionary, local officials felt. It was feared that the Qadis were always on the verge of transforming their judicial authority into executive authority, of breaking out of the limits of "colonial Sharīa". Wad Hashi was thus a model shaykh, far more than any Qadi or "conventional" native Shaykh.

It is quite possible to read the story of Wad Hashi as a colonial fiction necessary to the work of the colonial administrators at the time. All parts of the discourse on the Fiki fit too neatly together: it has loyalty to the state, legitimacy at the grassroots, schooling, legal order, and even efficiency. His image was possibly "constructed" so as to demonstrate to the colonial bureaucracy itself, in the first instance, that there were workable institutions and men who just needed to be "discovered" and fostered. Finally, that constraining if not abolishing completely the institutions of colonial Sharīa was a proper course of action.

The case for native authorities.

Despite Milner's recommendation that "native authorities" be cultivated in the years immediately after his inspection, central authority in fact was extended to more areas of the country. Ordinances were issued in 1922 and

1925 giving *umdas*, *nazirs*, and nomad Shaykhs various powers but in practice these ordinances were only partially implemented when not wholly neglected. From 1927 onward bold attempts at decentralisation began, or as the discussion paper of the Assistant Legal Secretary was entitled, there were "further steps in devolution".[xxii] The "Powers of Sheikhs' Ordinance" of 1928 was a key piece of legislation in the development of indirect rule.

One of the reasons for giving "tribal" Shaykhs judicial authority was to prepare the way for conferring on them executive authority later. In this way the colonial bureaucracy would not be burdened with administrative details in each province but would rely on "tribal" or "native" authorities to exercise control over their people.

Officials believed that the tribal Shaykhs deserved to have power - judicial and executive - for they were the "natural" leaders and rulers over their respective peoples. These leaders understood the "custom" of their "tribes" which could in many cases be altered and changed by the leaders. They were not "alienated" from their people through urbanization or modern education, as was the case with what they liked to call "the intelligentsia", nor were they like the Qadis who were literate and a potential challenge to colonial authority. The fear of a return of Mahdism was still very much alive.

So we could argue that by the 1920s the state in a sense attempted to undo the "mistake" made at the foundation of the Anglo-Egyptian condominium which was to give Sharīa a high albeit unequal status in the judicial order of the new state. This "mistake" was committed in a moment when the British were still somewhat dizzy with victory over the Mahdist "dervishes". Lord Cromer promised

the Sudanese notables whom he met in Khartūm after the reconquest that Sharīa would not be violated but respected. While the thought of winning them over instead of losing them to residual Mahdism was the dominant idea in Cromer's promise he possibly also had in mind the few "reformist" 'ulama he had encountered in Cairo. There is some indication that he relied on the Mufti of Egypt, his friend Shaykh Muhammad Abduh, to make appointments to the Sudanese Sharīa bench.[xxiii] Thus the first chief Qadi of the Sudan was Shaykh Muhammad Shakir a prize student of Abduh. Abduh would himself visit the Sudan in 1905, the year of his death.[xxiv]

But the growth in the number of Qadis led in many places to them wanting to displace the tribal Shaykhs, and criticising their judgements. There was a feeling that the Qadis were difficult to keep in line. In the late 1920s and through the early 1930s reports flowed in from District-Commissioners and lesser officials in the provinces complaining about cantankerous Qadis.[xxv] In Kordofan province in particular there were reports of problems with Qadis. For example in Rashad in 1931 a new Qadi arrived described as a "very northern-minded pedant of a type particularly unsuitable to a district like Rashad" and was "making very heavy weather" for everyone by "simply raking up charges".[xxvi] In the same province the Ma'zuns (clerks in the Sharīa courts) were "used as propaganda agents on behalf of the M.L.C. to which they were attached" and it was suggested that they be withdrawn. Moreover, the Ma'zuns (further down small m/not sure which should apply) were "probably the least satisfactory class of M.L.C. employee".[xxvii] In these conflicts the Qadis were

usually objecting to the encroachment of native courts, in other words to the containment of their authority.[xxviii]

In Kordofan the colonial officials reported growing conflict over jurisdictions and advised the abolition of Qadi courts in a number of villages and towns. In the South and West of the province there were great difficulties and the conflicts were fierce while in the East no conflict was reported.[xxix] There was consensus that "Colonial Sharīa" had to be contained if not undone especially where customary courts could be established.

The "clash of jurisdictions".

Examples of native and Sharīa court decisions conflicting recur in the field of family law in the period when native courts were expanding. A typical case occurred in 1930 in Kordofan when a man was convicted by a native court for stabbing his wife and was fined by the court.[xxx] The wife then also petitioned the Qadi for divorce on grounds of maltreatment. The Qadi refused to grant her a divorce on the grounds of lack of evidence. The case landed up with the Governor of Kordofan, J.A. Gillan. He found it hard to accept that the Sharīa court would not accept evidence presented in the native court and sent along the case to the Legal Secretary in Khartūm where correspondence then circulates between him and the Grand Qadi on the question of evidence and jurisdiction. The Legal Secretary writes to the Governor that a civil court would have the same approach to evidence presented elsewhere although he would himself admit such evidence. (He adds that he doubts whether it would stand on appeal to the Privy Council.) The Grand Qadi's response is that a Qadi may need

additional evidence to what has already been presented without necessarily rejecting the existing evidence.

Another case occurred in 1932 in Kordofan when a customary court found one Ahmed Gabr el Dar al-Hamari guilty of adultery with one Umm Khawwal whereas the Sharīa court accepted his marriage to her.[xxxi] He had married the latter before a ma'zūn (and two witnesses, and a wakīl (guardian) but not her father) at the Sharīa court but her father complained to the native court that Ahmed had forced her to separate from her first husband and then married her. The native court dissolved the marriage. The judgement of the native court argues that since Ahmed had admitted to having committed adultery and causing the break-up of a home and then married the woman the only option for the court was to decree the dissolution of the marriage. As the judgement says: "If a man commits adultery with a woman and has not given up the adulterous union, and then marries the woman in question the marriage is irregular (fasid) and the marriage is dissolved (yufsakh) legally". However, Ahmed was dissatisfied with the judgement and took his case to the Grand Qadi himself. In presenting his case to the Grand Qadi Ahmed claimed that Umm Khawwal had a valid "bill of divorce". When Ahmed had gone to the Sharīa court to complain about the native court's decision he was told that the Sharīa court does not interfere in the work of the native courts. The Grand Qadi was also of no help to Ahmed for the Grand Qadi writes a single line to the Legal Secretary on this case: "Passed for any action as you may deem fit". Here the Grand Qadi simply withdraws from a legal question that fits into his area of jurisdiction and hands over authority to the

secular colonial power. But this was not a common occurrence it would appear.

These clashes landed up with the Legal Secretary and in the Civil Secretary's office frequently and taxed the resources and energies of the Khartūm administration. Reducing the number of Sharīa courts and replacing them with native courts was a simple way of dealing with the situation. But this would not happen without a struggle.

The strategy against "colonial Sharīa".

Shaykh Muhammad Amīn Qurā'ah, the Grand Qadi, and his Qadi colleagues soon felt the moves against them. The Grand Qadi began a prolonged correspondence with the Legal and Civil Secretaries over the general thrust of reforms against the Sharīa courts and on specific issues and encounters at provincial level between Qadis and colonial officials. The officials represented themselves as referees in a struggle between the Sharīa courts and the native courts whereas they were in fact promoting the latter against the former. While the exchange of correspondence continued colonial action against the Sharīa courts began. Eliminating Sharīa courts one by one was the final move. In their place native courts were given jurisdiction. By April 1929 more than 18 Sharīa courts had been abolished while 38 native Shaykhs' courts were established. In the same year one third of the Sharīa judges were pensioned off, and 20 of the 42 Sharīa courts were abolished.[xxxii] More courts would be closed in the 1930s and Qadis pensioned-off.

In closing the courts the state had to avoid clashes and the Legal Secretary and District Commissioners attempted to offer reasons for their closure. Reasons

varied but ran along these lines: they were underused, were in too much conflict with the native courts, the personality of the local Qadi was unsuited for the area, and curiously also a particular Sharīa court was over-used. In the thick correspondence on this subject there emerges details on what the officials felt were the excesses of the Qadis. More telling details emerge about what they believed was "custom" and how this clashed with "Sharīa". For example, Khartūm is informed that the Sharīa courts in Nahud and El-Odaiya in western Kordofan assessed, "maintenance and alimony on a scale absolutely disproportionate with the economic conditions of the people". Not only that, these court had "tardy methods of hearing cases which frequently entailed five or more attendances at the court". Finally, their "bias in favour of women all tend to cause this unpopularity". Yet "the tribe"(the Hamar in this case) avoided taking Sharīa matters to the native court even when "given the opportunity of avoiding the Mohammedan Law Courts".[xxxiii]

Abolition was vital because the officials took seriously the revised clause in the 1928 native Shaykhs ordinance, which said that native courts may "not exercise Sharīa jurisdiction in cases where either party lives in a town where there is a Mekhama Sharīa".[xxxiv] The officials argued among themselves as to which courts should be closed and what should be the grounds for their abolition. But they were on the whole united in the belief that the fewer of these courts they had to deal with the better it was for them, and of course, they believed, **the Sudanese**. Civil Secretary Harold MacMichael wrote in November 1927 to the Legal Secretary:

> I think that you would be safe in assuring the Sharīa authorities that there is no intention of abolishing any Sharīa court which is doing good work on a scale which justifies its existence. . . . At the same time I look forward myself to the day when, under a system of native administration it may have proved possible gradually to do away with Sharīa courts in several out-districts, where they will have ceased to justify their existence.[xxxv]

The Qadis without work were powerless and could simply write letters? asking for transfers to courts still in operation. A few were given measly pensions. The administration was also faced with the problem of current students at the Qadi college in 'Umdurmān and the Qadi training section of Gordon Memorial College. The office of the Grand Qadi however remained untouched. Reducing or abolishing this position would have been a cause for political rallying. But his formal authority and influence reached over an increasingly diminished realm.

Conclusion: colonial orientalism and the construction of "colonial Sharīa"

At the height of the controversy over the endowment of tribal shaykhs with legal powers in customary courts Muhammad Amīn Qurā'ah, the Grand Qadi at the time, wrote to the Legal Secretary complaining about this development. Giving Sharīa powers to tribal shaykhs "would curtail useful Native hands", it transfers these powers from those "who have shown efficiency" to those who "are unlikely to do good work at all".[xxxvi] He did not disqualify the native shaykhs on the grounds of inadequate knowledge of Sharīa,

or of possibly confusing "Sharīa" and "custom". No doubt, these criticisms would also appear but they were far less scathing and absolute than one would expect. There is plenty of reference to detail but little absolute condemnation of the native shaykhs: the native courts get the division of inheritance wrong, fines are imposed unnecessarily e.g. for not entering the court without shoes and so on. The Qadis also want the native shaykhs' decisions on matters relating to Sharīa to be referred to them for final scrutiny.[xxxvii]

However, the official view was that the Sharīa establishment and the customary authorities are always bound to conflict. The official perspective was that ultimately Sharīa and custom were two different matters completely. The logic was: the native shaykhs could operate on their own in a field defined as customary or tribal law which in most cases mixed local customs and Sharīa. Furthermore, the Qadis in the Mohammedan Law Courts would only apply a textbook Sharīa unfettered by custom. This reflects the developing orientalist discourse on the way Sharīa worked and what it means; it was "holy law", fixed, unchanging, unalterable, in conflict with custom, and so on. As the Legal Secretary put it to the Governor of Kordofan regarding the question of evidence in the case mentioned above: "I am afraid you have overlooked the fact that it purports to be the word of the Prophet and therefore unalterable."[xxxviii] The place accorded to "custom" in Maliki fiqh is either not known to the colonial orientalists or conveniently ignored. Classical legal categories such as maslaha, istihsan, istislah, and ʻurf, all in various ways cover the question of "custom" and actually existing practice which could potentially be

incorporated into legal reasoning. Officials were ordered to compile replies on what laws were applied by native shaykhs in family law matters such as marriage, alimony, dowry, divorce, inheritance, idda, gifts and so on in their respective provinces. These replies contributed to the standardisation of customary law. The officials were more confused than enlightened when they saw the extent of fiqh in the replies by the native shaykhs.[xxxix]

In the adultery case referred to above the translator for the Legal Secretary is the Arabist S. Hillelson who notes that for the word fasakh he has to "see Vesey-Vitzgerald (sic), p.70" referring to a work on Islamic law by two European orientalists. Sharīa is not a living law but a textual tradition. Thus it is necessary to refer back to the earlier, preferably the earliest interpreters, as compiled by orientalists, of this tradition irrespective of changes in place or time.

In the same way the gap between the Qadis and the native shaykhs was made unbridgeable for the one deals with texts the other with "custom", which is oral. Fiki Wad Hashi for example kept no written records. The textual tradition is frozen in time. This orientalist prejudice about "the holy law of Islam" enables the type of colonial policy attempting to create a water-tight division between the Qadis and the tribal shaykhs as operators of two wholly separate systems of law and authority. The articulation of the policy of indirect rule in the 1920s gave impetus to further widen the gulf between the two groups. In the process colonial Sharīa is restricted. The Qadis who were once seen as "useful and efficient hands", to use the Grand Qadis formulation, were then marginalised and the native shaykhs elevated. This was a political move but no more

than the intellectual elaboration of the differences between Sharīa and custom.

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[i] On the circulars and reforms see Carolyn Fluehr-Lobban and Babiker Hillawi (trans. and eds), Ciruclars of the Sharīa courts in the Sudan (Manshurat el-Mahakim el-Sharīa fi Sudan) 1902 - 1979" in Journal of African Law, vol.27, 1983, pp79 - 140.

ii For an introduction to these schools see any introduction to Islamic law such as, for instance, N.J. Coulson, An introduction to Islamic law (Edinburgh, 1964).

iii On the application of these legal techniques, called Talfiq and takhayyur, see Coulson, Introduction to Islamic law, pp185-201, and 208.

[iv] For a case study of one southern group see, Douglas H. Johnson, "Judicial regulations and administrative control: customary law and the Nuer 1898 - 1954", in Journal of African history 27 (1986), pp. 59 - 78.

[v] Heather Sharkey-Balasubramaniam, 'The Egyptian colonial presence in the Anglo-Egyptian Sudan 1898-1932,' in Stephanie Beswick and Jay Spaulding (eds), White Nile, black blood (Lawrenceville NJ: Red Sea Press, 1999).

[vi] The Egyptian Grand Qadis in the Sudan were: Shaykh Muhammad Shakir (1900-04), Sh. Muhammad Harun (1904), Sh. Mustafa al-Maraghi (1904-19)), Sh. Muhammad Amin Quraa (1919-32), Sh. Nuaman al-Jarim (1932-41), Sh. Hasan Mamun (1941-47), Sh. Hasan Muddathir (1956).

[vii] See Zaki Mustafa, The Common law in the Sudan: an account of the 'justice, equity and good conscience provision' (Oxford: 1971).

[viii] Section 5 & 9 of the Civil Justice Ordinance of 1929 (previously section 3 & 4 of CJO of 1900 read:

'Where in any suit or other proceedings in a civil court any question arises regarding succession, inheritance, wills, legacies, gifts, marriage, 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 and good conscience, and has not been by this or any other enactment altered or abolished and has not been declared void by decision of a competent court; (b) the Mohammedan Law, in cases where the parties are Mohammedans, except in so far as that law has been modified by such custom as above mentioned.

[ix] For a British view of the legal administration in the Sudan see Sir Donald Hawley, "Law in the Sudan under the Anglo-Egyptian Condominium", in Deborah Lavin (ed.), The Condominium Remembered: Proceedings of the Durham Sudan Historical Records Conference 1982, vol.1. (Durham, 1991)pp.39 - 53.

[x] See The Laws of Sudan, vol.2, title 28: Sharia.

[xi] Between 1902 and 1979 sixty-two circulars were issued. See Fleuhr-Lobban and Hillawi in Journal of African law, 1983.

[xii] Salman M.A. Salman, 'Lay tribunals in the Sudan: an historical and socio-legal analysis,' Journal of legal pluralism 21 (1983), 61-128.

[xiii] Sharkey-Balasubramanian, 'The Egyptian colonial presence.'

[xiv] Mudadthir ‘Abd al-Rahim, Imperialism and nationalism in the Sudan: a study in constitutional and political development 1899-1956 (Oxford:
1969), 51.
[xv] See A.H.M. Kirk-Greene, The Sudan Political Service: a preliminary profile (Oxford: 1982).
[xvi] Mahmood Mamdani, Citizen and subject: contemporary Africa and the legacy of late colonialism (Oxford: 1996).
[xvii] Ahmad Diyāb, Al-'Alāqāt al-Misriyyah al-Sudāniyyah 1919 - 1924 (Cairo, 1985), pp.37 - 51.
[xviii] ‘Abd al-Rahim, Imperialism and nationalism, 70.
[xix] Salman, ‘Lay tribunals in the Sudan’.
[xx] The story of Fiki wad Hashi is reported among papers in National Records Office (NRO), Khartūm; Civsec File, 42.A.2. vol. 1. See Note from F.T.C. Young to R. Davies dated November 20, 1927.
[xxi] See "Personality Report Form" attached to the correspondence in Civsec File 42.A.2. vol. 1, which gives some biographical details on him including an assessment of his "political sympathies.

[xxii] NRO, Civsec 42.A.2, vol. 1; R. Davis, Assistant Civil Secretary, "Further steps in Devolution", circulated by the Civil Secretary, January 20, 1930.
[xxiii] On Cromer's respect for and friendship with Abduh see Earl of Cromer, *Modern Egypt* (London, 1908), vol. 2, p178.
[xxiv] On Abduh's influence over appointments in the Sudan see Muhammad Sulayman, *Dawr al-Azhar fi al-Sudan* (Cairo, 1985), 103 - 115.
[xxv] A good article on this period and on the conflict is Abdullahi Ali Ibrahim, "Tale of two Sudanese courts: colonial governmentality revisited", African studies review, 40(1), 1979, pp.13 - 33.
[xxvi] NRO, Civsec 42.A.2, vol. 2, Governor of Kordofan to Civil Secretary, May 24 1931.
[xxvii] NRO, Civsec 42.A.2, vol. 2, "Sharīa vis a vis Native Administration in Kordofan Province", November 21 1931.
[xxviii] See for instance Civil Secretary to Legal Secretary, January 2, 1930 in NRO, Civsec 42.A.2, vol. 1.
[xxix] Governor of Kordofan to Civil Secretary, November 21 1931.
[xxx] Governor of Kordofan to Legal Secretary, March 27, 1930, in NRO, Civsec 42.A.2 vol 1.
[xxxi] NRO, Civsec 42.A.2, vol. 2, Legal Secretary to Civil Secretary, October 4, 1932
[xxxii] Salman M.A. Salman, ‘Lay tribunals in the Sudan: an historical and socio-legal analysis,’ Journal of legal pluralism 21 (1983), 61-128. Another figure on the suppression of the Sharīa courts is that between June 1927 and January 1930, ten such courts were suppressed of which four were in Kordofan. See Civsec 42.A.2, vol 2. See Memorandum entitled "Sharīa courts and the Native Courts" dated February 16 1932.
[xxxiii] NRO, Civsec 42.A.2, vol. 1, Report by Assistant District Commisioner for Western District of Kordofan Province on situation in Dar Hamar. December 21 1928.
[xxxiv] NRO, Civsec 42.A.2, vol 1. "Some revisions of the Sheikhs ordinance issued by the

Civil Secretary", April 01, 1928.
[xxxv] NRO, Civsec 42.A.2, vol.1, Macmichael to Legal Secretary, November 17, 1927.
[xxxvi] Grand qadi to Legal Secretary, November 01, 1927, NRO, Civsec 42.1.1.
[xxxvii] See NRO, Civsec 42.A.2, vol. 1, Enclosure to letter dated January 11 1931.
[xxxviii] NRO, Civsec 42.A.2, vol. 1, Legal Secretary to Governor of Kordofan April 05, 1930.
[xxxix] See for instance, NRO, Civsec 42.A.2, vol.2, submission by District Commissioner at El-Dueim, February 04 1931.