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THE CODIFICATION OF CRIMINAL LAW IN NINETEENTH CENTURY EGYPT: TRADITION OR MODERNIZATION?

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INTRODUCTION

Before the introduction of Western law codes into the Islamic world in the second half of the nineteenth century, an Islamic tradition of criminal legislation had already existed for a long time. In the Ottoman empire, for instance, criminal codes (qawanín, sing. qânûn) had been enforced at a very early date (Heyd 1973). Egypt was no exception and when, under Muhammad ‘All (1805-1848), it obtained a certain measure of independence from the Ottoman empire, it began to enact its own criminal legislation (Baer 1969, 1977). This was abolished when the French Penal Code was introduced into Egypt in 1883. Because in the nineteenth century Egypt was rapidly changing and creating new institutions modelled on the West, it is appropriate to pose the question whether this Egyptian criminal legislation represented a continuation of the traditional Ottoman criminal legislation, or was rather a form of modernization. However, before we can answer this question, we must deal with the relationship between the Shari’a and criminal legislation.

What we consider as criminal law falls according to the Shari’a under three separate headings. The most spectacular part, which has a certain symbolic function to present-day advocates of the reintroduction of the Shari’a, are the crimes for which fixed penalties (hudûd, sing. hadd) are provided in the Shari’a, these being armed robbery, fornication, theft, the drinking of alcohol and false accusation of fornication, which are punishable respectively with crucifixion, stoning to death, amputation of limbs, or flogging. The second domain is that of homicide and wounding. This is essentially the domain of private prosecution, in the sense that the culprit can only be sentenced and punished if the victim or his heirs demand punishment. For intentional murder the culprit may be punished by death, and for intentional wounding causing a loss of limbs or senses by inflicting the same injury on him. If the death or the injury were not caused intentionally, or if the victim or his heirs were willing to forego punishment “in kind”, it is then replaced by the payment of blood money.
The third category arose out of necessity. A ruler determined to maintain law and order in his realm would find the law of *hudud* and the Islamic law of murder not altogether helpful. The definitions of the *hadd*-crimes are very strict and exclude many related acts that are equally undesirable. The punishment for theft could for example be applied only if the stolen goods had a certain minimum value and had been taken away from a locked or guarded place (*hizār*). Embezzlement cannot, therefore, be punished with the *hadd* penalty for theft. With regard to intentional murder, death penalty could only be applied if the criminal intent was evident from the use of a weapon, a sharp instrument, or fire (according to Abū Hanīfa), or any generally lethal instrument (according to the other Hanafite authorities). Murder by poisoning or strangling cannot be classified as intentional murder and does not, therefore, entail capital punishment. Moreover, with regard to *hudud* and murder, the rules of evidence require the testimony of two, for fornication four, male Muslim witnesses or a confession. These rules are usually very strictly interpreted and the slightest doubt (*shubha*) prevents the application of the penalty. In *hadd*-crimes, the withdrawal of testimonies and confessions, which can be done until the last moment before the punishment is carried out, invalidates the verdict.

For these reasons the authorities were not very keen on applying the law of *hudud*. This is illustrated by a fatwā (legal opinion), dated 19 Rabī' I, 1297 A.H./30 March 1880, of the Egyptian Grand Mufti (Muftī l-Diyār al-Misriyya):

Three men attacked someone to rob him. During the assault, one of them hit him with a sword, another hit him and the third hit him with a stick. As a result the victim died. His heirs demanded the application of the *hadd* punishment for highway robbery with murder, viz. capital punishment. As the accused confessed to the crime, the *qddī* of Kordofan pronounced a death sentence based on *hadd*. The verdict was later confirmed by the Court of Appeal in Cairo. As capital punishment could only be carried out on the strength of an order of the Khedive, before issuing the order in this case, the Khedive asked the Grand Mufti what would happen if the culprits retracted their confessions. The Mufti answered that in that case the heirs of the victim could sue the accused again for murder and demand capital punishment for them. They could prove their claim through the testimony either of eyewitnesses of the original crime or of witnesses testifying to the culprits' previous admissions (Al-Mahdī 1301:3; VI, 505-7).

The legal problem which arose from this case could be resolved under the Shari'a. In many other cases such solutions are not possible. For this reason a third category of criminal law was created called *ta’zīr* or *siyāsa*, this being the exercise of discretionary powers by the ruler or the *qddī* to punish any sinful or otherwise undesirable act. This third field is the least developed with regard to the theory of law but it is of utmost practical importance. On the strength of it the strict rules of Islamic criminal law could be supplemented for reasons of public interest, so that many more acts could be punished than the offences set out in the Shari'a. Moreover, it allowed the authorities to punish *hadd* crimes or murder even if the available evidence is insufficient according to the rules of the Shari'a. *Ta’zīr* and *siyāsa* are not meant to replace the Shari'a and they presuppose that important offences such as homicide or the *hudud* crimes are first tried before the *qddī*. However, if his verdict did not coincide with public interest, the case would be tried again by a secular authority, such as the ruler himself, his governor, or a special court, that could disregard the strict rules of evidence of the Shari'a (Ibn 'Abidīn 1299: III, 259). With regard to criminal acts not punishable under the Shari'a, such a secular authority would constitute the only judicial instance.

In order to regulate the exercise of the powers of *ta’zīr* and *siyāsa* Muslim rulers could, and indeed did, issue criminal legislation (*qānūn*). The laws they enacted were in fact instructions issued to the governors or local officials authorizing them to punish specified acts in a certain way. These officials, but not the ruler himself, would be bound by them, because, since he was the source of this legislation, he stood above it. He could always punish acts mentioned in the *qānūn* in a way different from its provisions. Moreover, *qānūn* were not meant to be exhaustive and consequently acts not mentioned in them could also be punished (Heyd 1973: 193).

In general *qānūn* legislation does not include sections on general principles of crime, criminal responsibility, criminal intent, complicity, attempted crime, punishment, and evidence. In these fields such concepts as existed in the Shari'a were applied. As far as the legislative technique is concerned, *qānūn* legislation is rather unsystematic and casuistic (Heyd 1973: 178). One of the aims of *ta’zīr* is individual deterrence. The punishment, therefore, must be one which would deter an offender from committing a second offence. Because of this aim, the theory of *ta’zīr* allows variations in the punishment of the same crime according to social rank. Because it was assumed that not more than a reprimand would be needed in order to lead notables back to the straight path, whereas with persons of a low rank a tougher treatment would be required in order to achieve the same aim, punishment of the latter under *ta’zīr* was as a rule harsher than that of the notables (Ibn 'Abidīn 1299: III, 246; Heyd 1973: 179). As a result, the concept of equality does not influence the theory of *ta’zīr*, although it is emphasized in the Shari'a as far as people of the same sex are concerned.

*Ta’zīr* and *siyāsa* played an important role in the administration of criminal justice in Egypt in the early part of the nineteenth century, when they were applied by the administrative authorities. Serious cases involving Koranic crimes or murder were first referred to the *qādī*. The chronicler al-Jabarti mentions that in the year 1227 A.H./1812 A.D. a gang of thieves were apprehended and brought before the *qādī*. They admitted their crimes, but refused to use the word stealing (*saraqna*) in their confession, using instead the word taking (*akhadhna*). As a result the *qādī* could not order the amputation of their hands as prescribed in the Koran. The case was then transferred to the Governor of Cairo (the Katkhoda Bey) who, on the basis of *siyāsa*, imposed the Koranic punishment (Jabarti 1290: IV, 144).
During the first decades of Muhammad ‘Ali’s reign, ta’zir or siyasa were exercised by himself or his diwan, or by his governors. Also the Chief of Police (da’bit), who at that time could sentence criminals summarily to death, but whose penal authority became limited before 1836 to beating or flogging criminals, could exercise ta’zir and siyasa at his discretion (Lane 1966: 123-4). The market inspector (muhtasib), who would punish shopkeepers and traders for contravention of price and weight regulations with flogging, mutilation (clipping earlobes, boring holes through noses), or even execution (Lane 1966: 126; Saml 1928-36: II, 250, 262), exercised them too. Hadith crimes, murder, and wounding were tried before the qāḍīs according to the strict rules of the Shari’a.

CRIMINAL LEGISLATION UNDER MUHAMMAD ‘ALI

Muhammad ‘Ali issued Egypt’s first substantial penal decree on 21 Rabī’ I 1245 A.H./1829 A.D. (Saml 1928-36: II, 354; Zaghīl 1900: 163-4). It provided for the imposition of fixed penalties on the basis of ta’zir and siyasa. For example, state officials who had embezzled state money could be sentenced, depending on their ranks, to from one to five years of hard labour in the Alexandria dockyards (lāmand), banishment to Abū Qīr, or to flogging. Counterfeiting was to be punished with lifelong hard labour. The decree also provides that “those who have committed a murder, as well as highway robbers, whose crimes cannot be proved [according to the Shari’a], will be sent to the Alexandria dockyards for life”. This means that murder and highway robbery were punished on the basis of siyasa in cases where the culprit was known, but the evidence against him did not meet the requirements of the Shari’a. It is plausible that a similar penalty was imposed when these crimes were proven according to the Shari’a, but the death penalty could not be carried out under its provisions because the plaintiffs pardoned the culprit or settled for a sum of money (Lane 1966: 108). The decree presupposes that murder and highway robbery were first tried by the qāḍī and lays down that, if the qāḍī could not pass the death sentence, a subsequent trial by a secular court called al-Majlis al-Mulkī al-‘All, which acted from 1825 until 1839 as High Court (Deny 1930: 108-9), would follow. With regard to theft, the decree is less clear. It lays down that “a person who commits theft, regardless of whether this has been proved according to the Shari’a or not, will be sentenced according to the discretion of the Majlis al-Mulkī al-‘All, if he is the obvious suspect (wa-l-tuhma fihi manhārin).” The object of this provision is probably to ensure that theft cases will be tried not by the qāḍī but only by secular courts.

Four months after the first penal decree was issued another penal law was enacted in Sha’bān 1245 A.H./1830 A.D. This is the Qānūn al-Fīlāhah (QM artt. 1-55), which mainly deals with crimes and offences connected with agriculture and village life. The aim of this law was to discipline the rural population and the officials serving in rural areas. But it also provided the peasants with some protection against arbitrary measures of their village shaykhs and district commissioners, which was also one of the main objectives of qānūn legislation in the Ottoman empire (Heyd 1973: 176).

With regard to homicide, the Qānūn al-Fīlāhah contains some articles which point to the interaction in it between Shari’a and secular justice. They deal with specific instances of violence causing loss of life, like the murder by peasants of an official demanding the payment of taxes (QM art. 26), or leading to bloodshed, such as attacks by the inhabitants of one village on those of another during irrigation time with the aim of usurping their water rights (QM art. 29), or the assailing of an official by groups of peasants (QM art. 24). Art. 26, which lays down the basic rule and to which the other articles refer, provides that the culprits must be put to death if their crimes could be proved according to the rules of the Shari’a. Although not clearly stated in the text, it can be assumed that the trial would be conducted before the qāḍī according to the rules of the Shari’a, but that the position of the victim’s heirs would be irrelevant to determining the punishment to be imposed. For even if they would pardon the murder(s) or accept a settlement (sulh), the culprit(s) would be killed on the basis of siyasa. The article also lays down that if someone was suspected of a crime (waqa’ ghlib al-tuhma ‘alā ba’d ashhds minhum) but the available evidence was insufficient to convict him, the district commissioner (hākim al-khutt) was authorized to put pressure on the suspect to make him confess. He was allowed to imprison or beat him, provided only that the beating should not lead to death. If no suspect could be found, or if, even after the aforementioned treatment (ba’d hadidi l-mu’āmalah), nothing could be proved against a suspect, the qasāma procedure provided for in the Shari’a would be applied. This means that fifty inhabitants of the village where the body was found would be made to take an oath that they were innocent and did not know the murderer, thereby making themselves collectively liable to the payment of the bloodmoney. Art. 30 of the law contains a rather enigmatic provision, laying down that if someone kills his son intentionally, the Shari’a shall be applied. Here one would expect something different, since according to the Shari’a, in these cases, the murderer cannot be sentenced to death.

The law also tried to curb the unbridled power of the state officials in the countryside, who ruled their subordinates and the peasants with the kurbāg (whip) and the nabbūt (stick). Not seldom the recipients of such physical ill-treatment by officials died (St. John 1852: I, 68; Saml 1928-36: II, 356; al-Mahdi 1301-1303: VI, 2, 58, 455, 523). Art. 25 of the law specifies that any official who causes death through exceeding the number of lashes with which a certain offence is punishable, or through administering the beating or flogging to parts of the body other than the feet or the buttocks, will be held liable according to the Shari’a to the payment of bloodmoney which is fixed in this article at 3,600 piasters. Since the dominant opinion in the Hanafite school did not consider sticks or whips to be weapons indicative of criminal intent, in such cases no death sentence could be pronounced by the qāḍī. Therefore art. 25 does not give officials a privileged
position, as Baer claims (Baer 1969: 110, n. 4). The article is clarified in a decree enacted in 1253 A.H./1837 A.D., dealing with the duties and offences of civil servants (Qānūn al Siyāsatināmē, QM artt. 56-75), which states expressly that an official who for personal reasons (bi-sisāb al-tharād) kills someone, or incites someone to kill another, will be sentenced to death if the heirs of the victim so wish. Alternatively he will be sent to the mines in the Sudanese district of Fayzoghlu for life, this penalty being applied evidently, if the murder could not be proved according to the Sharī'a rules of evidence. If the heirs agree to accept bloodmoney, the official, besides having to pay it, will be sent to Fayzoghlu "for his education" (il-l-tarbīya) for a term of two to five years (QM art. 60).

The Qānūn al-Fīlāhā also refers other offences to the qaddīs including assault against a tax collector resulting in permanent injury (art. 7), rape (al-ta'addi 'alā l-'ird), and (illegal) defloweration of a virgin (tākhut al-bakārā, art. 16). It is interesting that the term zānā (fornication) is not used, possibly because the law only intended to deal with breaches of public order and security. To be referred to the qaddīs are also a quarrel between a pregnant woman and her husband or someone else leading to miscarriage (art. 28); the abuse of power by village shaikh who marry or give in marriage girls already betrothed or contracted in marriage, without their parents' consent (art. 31); the refusal of wives to return to their husbands (art. 32); the mutilation of cattle (art. 33). This last article lays down that the culprit should be first punished with 100 lashes and that further punishment or liability for damages depends on the qaddī's sentence.

In Sha'bān 1260 A.H./1844 A.D. a supplementary penal code was enacted (QM artt. 122-194). It consists of a translation of selected articles from the French Code Pénal of 1810 (henceforth referred to as CP), adopted with changes concerning the penalties prescribed. The translation is often clumsy and the general provisions of the CP are not included. Only in one article is the text clearly adapted to the provisions of the Sharī'a. Art. 161 (corresponding to artt. 319 and 320 CP) lays down that in cases of unintentional homicide, the heirs can demand bloodmoney, whereas the provisions regarding the prison term and fine made for in the CP are omitted. No further references to the Sharī'a can be found in the law of 1844. On the basis of this law Baer assumed that a change in the official attitude towards the Sharī'a had occurred in Egypt around 1844 (Baer 1969: 113). Apparently he was not aware that this law was a translation of the French Code Pénal.

The few articles in the law of 1844 dealing with murder do not run counter to the Sharī'a. They stipulate that he who kills in self-defence and a husband who, finding his adulterous wife with her lover in his house, kills him, will not be punished (art. 162, corresponding with art. 321 and 322 of the CP; art. 163, corresponding with art. 324 CP; cf. Ibn 'Abīdīn 1299: III, 248). Art. 173, in connection with art. 164, lays down that he who causes death through arson or indecent acts (harakāt tuḥött bi-l-'īrād wa-l-nāmās) must be sentenced to death. It can be assumed that this rule applied only when trial by
murder passed in Egypt should henceforth be ratified by the Porte. However, the Khedive was granted for a period of seven years the right to execute murderers if the victims had heirs and they demanded execution, but not if the victims had no heirs. This provision remained a dead letter, for neither before nor after the expiration of the period of seven years were sentences sent to the Porte for ratification (Baer 1969: 120).

Unlike the Ottoman Code, no death penalties were imposed for crimes other than murder tried according to the Sharī'īa. Other modifications were related to administrative institutions which were peculiar to Egypt. In the Egyptian Code two chapters (ch. 4, 27 articles, and ch. 5, 11 articles) were included with provisions relevant to the Egyptian situation which were not derived from the Ottoman Code. They contained mainly rephrased articles from the Qānūn al-Fiḥālah and other laws collected in the Qānūn al-Muntakhab. In general the penalties mentioned in the new code were less severe than in Muhammad 'All's legislation.

From the point of view of legislative technique, the first three chapters of the new code, compared to the Qānūn al-Muntakhab, constituted an improvement. The wording is much clearer and the provisions are less casuistic than those in the previous code. The code defines to a certain extent the jurisdiction and competence of the courts and is more explicit with regard to the relationship between religious and secular justice. It specifies that murder (ch. 1, art. 11), highway robbery leading to murder (ch. 1, art. 9), theft (ch. 3, art. 11), public drunkenness (ch. 2, art. 5), defamation (qaddīf), beating and insult (ch. 2, artt. 1 and 2), miscarriage resulting from a fight between a pregnant woman and someone else (ch. 5, art. 3), and provoked abortion (ch. 5, art. 5) must be first dealt with by the qādī. With regard to corporal punishment the number of strokes does not exceed 79, as fixed in the Shart'a provisions for ta'zīr. Only chapters four and five, which were taken over from previous Egyptian legislation, contain articles setting a number of strokes higher than this maximum. The first three chapters begin with general statements regarding fundamental human rights, which echo the Ottoman Gūlhanе Decree of 1839, and lay down that no one may be killed except on the basis of a sentence passed according to the Sharī'īa, and affirm the inviolability of honour and private property. Through prescribing that all sentences should be ratified by the Majlis al-Ahkām, a legislative and judicial body established in 1849 which functioned, with two short intervals, until the British occupation, before being sent to the Khedive for an order of execution, the code bears witness to a greater awareness of the need for a stricter and more correct application of the law than in the past.

The code lays down that in Cairo murder cases were to be tried by the Majlis al-Ahkām in the presence of the qādī of Cairo or his deputy (mādīb). The sentence had to be sent to the Diwān of the Wālī (Khedive) for confirmation (ch. 1, art. 2). When in 1859 a court of first instance which tried murder cases was created in Cairo, the Majlis al-Ahkām came to act only as a high court (Sāmī 1928-36: III, 1, 322). The code prescribes also that in the provinces murder cases were to be tried by the provincial courts (majālis al-aqālim).

in the presence of the local qādī. The qādī's sentence (i'tām shar'īa) and the record of the proceedings (madbuta) were to be sent to the Majlis al-Ahkām for ratification and then to the Diwān of the Khedive (ch. 1, art. 3). Both articles stipulate that the murderer may not be executed until the Porte and the Shaykh al-Islam in Istanbul had approved the sentence, but as mentioned before, this rule was from the beginning a dead letter.

The crucial article dealing with murder (ch. 1, art. 11) lays down the procedure to be followed if intentional murder was proved to the satisfaction of the qādī and he nevertheless could not pass a death sentence. This would occur if the plaintiffs pardoned the defendant or accepted a settlement, or if a rule of Islamic law prevented the imposition of the death penalty, such as for example would be the case if the weapon was not one recognized under Islamic law as being indicative of criminal intent or if the murderer was the father of the victim. In these cases the secular court would sentence the murderer to be sent to the dockyards of Alexandria or a similar place of correction for a period of five to fifteen years. The article does not prescribe what should be done if the plaintiffs could not produce the evidence required by the Sharī'īa (al-adilla al-shar'iyya), although the guilt of the defendant was established by other means (al-adilla al-siyasīyya). In these cases art. 11 was applied by analogy. This practice was sanctioned by a decree of the Majlis al-Ahkām issued in Muḥarram 1275 A.H./1858 A.D.

According to this decree the severity of the punishment inflicted should also be determined by the strength of the evidence produced. This would mean that one who was merely suspected of having committed a murder would receive a lighter sentence than one whose guilt was sufficiently established.

Another provision of this decree was that the qādīs were ordered to follow the opinion of Abū Yūsuf and al-Shaybānī with regard to the murder weapon (Sāmī 1928-36: III, 1, 294-7, 301). According to the authoritative opinion within the Hanafī school of law hitherto applied in Egypt, in murder cases criminal intent was assumed to be absent if the weapon was not a sharp instrument such as a sword or a sharpened rock, or fire. This meant that a murder committed with the nābūt, the stick that Egyptian peasants usually carry, could not be punished with death. Since this was a common crime in Egypt, the government decreed that the less authoritative Hanafī opinion of Abū Yūsuf and al-Shaybānī should be applied, according to which the use of any generally lethal weapon or instrument is indicative of criminal intent.

According to the code female murderers incur the same punishment as men, except that they are to be sent to women's prisons (ch. 1, art. 15). An official who commits a murder will be sentenced to death on the basis of ahīda, even if the victim's heirs pardon him or accept bloodmoney (ch. 1, art. 1). Although according to the Sharī'īa the ta'zīr punishment of slaves is left to their masters, the code lays down that for reasons of public order (al-nizām al-lāmm) slaves will be punished for homicide by the state, if the death penalty or the payment of bloodmoney cannot be imposed. The punishment can
be either chained imprisonment for one to five years or banishment, probably to the Sudan, for the same period (ch. 3, art. 20). These are lighter penalties than those with which under the code free men will be punished for murder. He who kills armed rebels (arbâb al- fına wal-faszâd) or highway robbers (qattâ' al-tarçûl) will not be punished for murder, provided they were killed before their arrest (ch. 1, art. 10).

The Islamic rules of complicity are not well developed. The Shari'a has a provision according to which he who forces another to commit a crime by threatening to kill or severely wound him, will alone be held responsible for the crime, whereas the doer is regarded merely as an instrument. There is also a set of rather complicated rules with regard to murder committed by more than one person, all of whom took part in wounding the victim lethally. But the Shari'a does not contain any rules concerning the responsibility of an accessory before the act, such as one who incites another to commit a crime. The code of 1852 complements the Shari'a in this respect with regard to homicide. It lays down that he who, by means of threats which he cannot carry out or by gifts, induces another to commit murder or physical assault, will be punished with two to five years imprisonment. The actual killer will be presumed to have acted by his own choice and tried for murder. He who helps another in committing murder will be sentenced to five to seven years imprisonment. With regard to coercion, the rules are in conformity with the Shari'a rule mentioned above (ch. 1, art. 14, 15; ch. 3, art. 21, 22).

The code also complements the Shari'a provisions dealing with "unintentional killing" (qatl khata'), which, according to the Shari'a, entails liability for the payment of bloodmoney. It provides that if the culprit had never committed such an act before and was of good reputation, and if it became evident to the qâdl that he had no evil intentions (wa-tabayyan li-l-shar' an laysa lahu mazanna li-l-su'), he would only be convicted to pay bloodmoney. However, he could be sentenced or chained imprisonment for one year if doubt about his good behaviour existed (ch. 1, art. 13). In practice the culprit's ability to pay bloodmoney played also a role in determining whether he would be given a prison sentence or not. The secular court would investigate whether a culprit convicted by the qâdl to pay bloodmoney was able to do so and have him give sufficient security for its payment (see e.g. Dâr al-Wathâ'i'iq al-Qawmiyya (Egyptian National Archives), Majlis Muhafizat al-Iskandariyya, qayd al-dâ'wâ', L/3/28/1, case 66, p. 216). Because a murder trial under the Shari'a could only be initiated by a claim of the victim's heirs, the local authorities were responsible for ensuring the heirs' appearance in court together with the suspect and the witnesses. In the absence of an heir to make the claim, the state authorities would take his place in deciding about the suspect's fate by either demanding his life or settling for bloodmoney (QS, ch. 1, art 12). As from about 1850 all sentences passed by the local qâdîs in criminal cases or cases of unnatural death in which the qâdl would determine whether death was caused by an act of God (bi-l-qâdl' wa-l-qadar) or by human action were to be sent to the Majlis al-Ahkâm for confirmation by the mufîts serving in it. The state authorities could then act upon the information given by these sentences. If for example the body of someone without any known heirs was found, the Khedive would write to the local qâdl instructing him to start the qadarîa procedure for the benefit of the state (see e.g. Dâr al-Wathâ'i'iq al-Qawmiyya (Egyptian National Archives), Muhriyyat Daqahliyya, Sâdir li-taftish Tumây wa-qâdl al-Mansûra, L/5/21/1, p. 53).

According to the Shari'a, the ruler has the right to issue general instructions to the qâdîs ordering them to follow certain opinions of their school of law in preference to others, or defining practical points not precisely determined in the Shari'a. The Khedives made use of this right. Khedive Sa'id issued the aforementioned decree ordering the qâdîs to follow the opinion of Abû Yûsuf and al-Shaybânî rather than Abû Hanîfa's view with regard to the kind of murder weapon whose use would be construed as an indication of criminal intent, and another decree fixing the amount of bloodmoney in Egyptian currency (Al-Mahdî 1301-3: VI, 49). He also wanted to issue a decree which would have classified murder by strangling as intentional homicide. However, the matter was

TRADITION OR MODERNIZATION?

In order to answer the question whether Egyptian nineteenth century penal legislation must be regarded as a continuation of Ottoman qâdîn legislation or rather as a form of modernization, I shall examine the Egyptian law codes from three angles. The first one is the relationship between this legislation and the Shari'a. If these criminal laws were meant to supersede the Shari'a, this must be considered as an argument in favour of the

view that these laws represented a form of modernization. The second angle is the comparison between Ottoman qâdîn and the Egyptian laws. Finally the codes will be examined from the perspective of whether they contain such modern legal notions as the principle of the rule of law.

It is clear that Egyptian nineteenth century criminal legislation did not abolish Shari'a justice. Egyptian rulers and other official authorities showed great respect to the Shari'a. This is evident from the efforts they took to ensure the correct application of its rules of procedure, the state participation as a plaintiff in Shari'a trials in which the victim had no heirs, and finally from the decrees issued by the Khedive in matters related to the Shari'a.

The trial before the qâdî, especially in murder cases, was taken very seriously by the authorities. If necessary, they would go to great length in their search for the heirs of a victim in order to obtain the depositions required by the rules of the Shari'a. This could involve a lengthy correspondence continuing in some cases for months (see e.g. Dâr al-Wathâ'i'iq al-Qawmiyya (Egyptian National Archives), Majlis Muhamzafat al-Iskandariyya, qayd al-dâ'wâ', L/3/28/1, case 66, p. 216). Because a murder trial under the Shari'a could only be initiated by a claim of the victim's heirs, the local authorities were responsible for ensuring the heirs' appearance in court together with the suspect and the witnesses. In the absence of an heir to make the claim, the state authorities would take his place in deciding about the suspect's fate by either demanding his life or settling for bloodmoney (QS, ch. 1, art 12). As from about 1850 all sentences passed by the local qâdîs in criminal cases or cases of unnatural death in which the qâdl would determine whether death was caused by an act of God (bi-l-qâdl' wa-l-qadar) or by human action were to be sent to the Majlis al-Ahkâm for confirmation by the mufîts serving in it. The state authorities could then act upon the information given by these sentences. If for example the body of someone without any known heirs was found, the Khedive would write to the local qâdl instructing him to start the qadarîa procedure for the benefit of the state (see e.g. Dâr al-Wathâ'i'iq al-Qawmiyya (Egyptian National Archives), Muhriyyat Daqahliyya, Sâdir li-taftish Tumây wa-qâdl al-Mansûra, L/5/21/1, p. 53).

According to the Shari'a, the ruler has the right to issue general instructions to the qâdîs ordering them to follow certain opinions of their school of law in preference to others, or defining practical points not precisely determined in the Shari'a. The Khedives made use of this right. Khedive Sa'id issued the aforementioned decree ordering the qâdîs to follow the opinion of Abû Yûsuf and al-Shaybânî rather than Abû Hanîfa's view with regard to the kind of murder weapon whose use would be construed as an indication of criminal intent, and another decree fixing the amount of bloodmoney in Egyptian currency (Al-Mahdî 1301-3: VI, 49). He also wanted to issue a decree which would have classified murder by strangling as intentional homicide. However, the matter was
dropped when it appeared that no authoritative opinion in the Hanafite school could be found in support of it (Sāmi 1928-36:III, 1, 300).

Nineteenth century Egyptian criminal laws are not models of legislative clarity and precision. Although some progress is noticeable in the Qānūnname al-Sultāni, at least in the first three chapters borrowed from the Ottoman Penal Code, the definitions of crimes and offences are in general casuistic, unnecessarily lengthy and often somewhat clumsily formulated. A good illustration is art. 49 of the Qānūn al-Filāha:

If a peasant has two sons and the shaykh of his village takes one of them and sends him to the army when recruits are requested and then, later on, he takes his second son and sends him also to the army because he has something against this peasant and he [the peasant] is left on his own and unable to work [his fields], and if that peasant comes to the district commissioner (ḥākim) and complains about [his treatment], and if it is clear that in the village there are other persons fit for the army, who do not have to work in the fields, and that the shaykh has not taken these, but took especially the son of that peasant, then the district commissioner shall take the son of the shaykh who acted illegally or one of his relatives if he does not have a son and send him to the army instead of the son of that man and his [the peasant's] son shall be exempted from the army on the basis of the letter that the mu'mar (the local official) will send to the War Office (Diwan al-Jihādīyya) explaining the truth of the matter.

Although about one third of the criminal laws enacted during Muhammad 'All's rule were translated from the French Code Pénal, they do contain neither a classification of crimes as in French law, nor general definitions or principles concerning criminal responsibility or punishment. What was borrowed was selected rather haphazardly. In general the Egyptian laws are unsystematic and sometimes even sloppily drafted, mentioning for example the same offence twice with different penalties attached to them. In the Qānūn al-Muntakhab artt. 156 and 165 (both corresponding to art. 331 CP) deal with rape. The first article makes the act punishable with one to five years incarceration (al-rabt fi l-qal'a), the second with six months to three years forced labour or incarceration. A similar instance of inconsistency can be found in the Qānūnname al-Sultāni, where ch. 1, art. 15 and ch. 3, art. 22 both deal with the punishment of women accessories to a murder. One article lays down that she shall be imprisoned until she repents, a term adopted from the Sharī'a and often to be found in Ottoman criminal law (Heyd 1973: 302), and the other a prison term of five to seven years.

In the above mentioned aspects, the Egyptian laws clearly resemble the Ottoman qānūn legislation, which also was casuistic and imprecise and lacked a section dealing with general definitions and principles of criminal responsibility and punishment (Heyd 1973: passim). There were, however, also differences. The most important of these is that the Egyptian laws usually specify the punishment not only from a qualitative, but also from a quantitative point of view. They determine the number of lashes and the length of the prison term, whereas the Ottoman qānūn usually left these to the discretion of the judge (Baer 1977: 155).

THE CODIFICATION OF CRIMINAL LAW IN NINETEENTH CENTURY EGYPT

A crucial criterion of determining whether criminal legislation in nineteenth century Egypt constituted a continuation of the Ottoman practice of criminal legislation, or was rather a sign of modernization, is whether the principle of the rule of law was at all present in Egyptian legislation. In other words, was the Egyptian legislation meant to be exhaustive and was it founded on the rule of *nulla poena sine lege* to the extent that also the ruler would be bound by its provisions?

These questions must be answered in the negative. Many instances show that the Khedives regarded themselves as being above the law. In 1251 A.H./1835 A.D., five years after the introduction of the Qānūn al-Filāha, Muhammad 'All enquired of the mudir (governor) of the Buḥayra province about the correctness of a report he had received that an official cut off the nose and ears of someone accused of destroying cotton plants by pulling them out from the roots and later had him thrown into the Nile. When the mudir confirmed the first part of the report but stated that the culprit had not been thrown into the river, Muhammad 'All directed that in such cases culprits should be punished only by flogging, imprisonment or execution (Sāmi 1928-36: II, 456, 458).

Since the Qānūn al-Filāha did not include a provision dealing with the offence of destroying cotton plants, it must be assumed that the code was not meant to be exhaustive. In 1257 A.H./1841 A.D. Muhammad 'All ordered that village shykhys who incited their peasants to flee from their villages were to be killed by crucifixion (salb) (Sāmi 1928-36:II, 510), whereas art. 53 of the Qānūn al-Filāha laid down that such an offence would only be punished with 100 lashes. The attitude of Khedive Sa'id (1854-1863) to the Qānūnname al-Sultāni is revealed in his letter of 27 Rajab 1271 A.H./1855 A.D. addressed to the Majlis al-Ahkām:

> Whereas we have learnt from the résumés ([khulūdat] sent to us that life sentences have been passed against some criminals whose crime of murder had been proven according to the Sharī'a and siyāsa, and that some murderers whose crime was not proven without doubt (al-qatala al-mushtabah fi jindiyahim) were sentenced to five or ten years hard labour ([lāmān mu'abbad]), and whereas these penalties are not sufficiently exemplary as witnessed by the fact that the crime of murder is still being committed in the country, it is henceforth necessary to pass severe sentences which will be deterring, exemplary, and a cause of repentance. Consequently you must without any delay convict murderers whose guilt ([udda]) has been proven according to the Sharī'a and siyāsa to death by crucifixion, and murderers whose crime was not proven without doubt (al-qatala al-mushtabah fi jindiyahim) to hard labour for life ([lāmān mu'abbad]) (Sāmi 1928-36:III, 1, 114).

This order was issued by Khedive Sa'id although ch. 1, art. 11 of the Qānūnname al-Sultāni laid down that the penalty for a murderer not condemned to death by the qādl was five to fifteen years of hard labour. Sa'id had a bad reputation for his illegal and arbitrary executions (Baer 1969: 126-7). Thus, although the codes offered some protection against arbitrary and illegal behaviour of state officials of lower ranks, apparently they were not meant to bind the Khedives.
Closely connected with the rule of law is the principle of equality before the law. As mentioned above, this principle was not applied in ta'zir punishment because of the assumption that persons of high rank could be led back to the straight path by simpler and less painful means than those of low status. Although many articles in the Egyptian laws emphasize equality before the law and one frequently encounters in them the phrase "if someone, regardless of whether he is of low or high rank (ṣaghi, kān aw kabī)," the idea of penal differentiation according to social status is also found in some articles (see e.g. the penal decree of 21 Rabī‘ I 1245 A.H.; QM 163, 164, 165, borrowed from the CP but with the addition of a differentiation in punishment according to social status; QS ch. 2, art. 2; ch. 5, art. 2). Ch. 2, art. 2 of the Qanūnāt al-Sultānī clearly echoes the traditional theory when stating that "the categories and modes of disciplinary punishment (ta'zir) vary according to the status of the people [on which it is inflicted]."

The answer to the question posed in the introduction, whether nineteenth century Egyptian criminal laws should be regarded as a continuation of the Ottoman tradition of qānūn legislation or as a form of modernization, should have become clear now. It was indeed a continuation of Ottoman qānūn. In view of the respect paid by the authorities to the Shari‘a and because Egyptian legislation was not meant to supersede its provisions, it must be regarded, like the Ottoman qānūn, as being based on ta'zir or siyās and therefore as fitting within the framework of Islamic criminal law. With regard to legislative technique also, it closely resembles traditional Ottoman legislation in the absence of general definitions and principles and in its casuistic formulations. The final and decisive argument in support of my conclusion is that, like Ottoman qānūn, the Egyptian legislation of nineteenth century does not seem to have been meant to be exhaustive, is not based on the concept of nulla poena sine lege, and is, therefore, not rooted in the principle of the rule of law.

REFERENCES

A. THE PUBLISHED TEXTS OF THE NINETEENTH CENTURY EGYPTIAN CRIMINAL LAWS

The first criminal decree, issued by Muhammad ‘All in 1829, was published in Zaghlīl 1900: 163-4. The Qānūn al-Fīlāh, which was actually a collection of the penal provisions contained in the Lāihat zir‘at al-falāḥ, introduced a month earlier, and subsequent penal codes were collected and printed in a separate booklet under the title al-Qānūn al-Muntakhab in 1261 A.H./1845 A.D. (Baer 1969: 110, 112). The articles are numbered consecutively. The text is published in Zaghlīl 1900: app., 100-55 and Jallād 1890-95: III, 351-78. Both versions are identical. In my article I have used the abbreviation QM to refer to this code. In 1265 A.H./1849 A.D. a General Law was published, which had been issued in 1259 A.H./1844 A.D. It contains a summary of Muhammad ‘All’s penal legislation, and lists the same crimes and offences as the Qānūn al-Muntakhab. There is, however, some difference in the penalties (Sāmil 1928-36: III, 1, 22; Baer 1969: 113). I have not been able to find a copy of this law. The Qanūnāt al-Sultānī has been published in two identical versions in Zaghlīl 1900: app., 156-78 and Jallād 1890-95: II, 90-102. Jallād also gives the administrative regulations issued together with the code (pp. 102-11). In my article this code is referred to as QS.

B. OTHER REFERENCES


Baer, Gabriel (1977). The transition from traditional to Western criminal law in Turkey and Egypt. Studia Islamica 45, 139-58.


