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MURDER ON THE NILE
HOMICIDE TRIALS IN 19TH CENTURY EGYPTIAN SHARIʿA COURTS*

BY

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Introduction

In this paper I intend to investigate the application of the Sharîʿa in homicide cases in 19th century Egypt, before the reception of French law codes in 1883.[1] The scope of enforcement of the Sharîʿa in the Islamic world before the introduction of Western law is still a matter of controversy. On the one hand there are many Western scholars maintaining that the Sharîʿa was merely a theoretical construction, hardly applied in practice except in matters of personal status and waqfs. On the other hand many Muslim authors claim nowadays that Muslim law was fully enforced until colonial rule imposed foreign law codes on the Muslim world.

In order to shed some light on this question I have examined the *Fatâwâ al-Mahdiyya fi l-Waqâʾiʿ al-Misriyya* (7 vols. Cairo: al-Matbaʿa al-Azhariyya, 1301-3; henceforth abbreviated as FM) by Muhammad al-ʿAbbâsî al-Mahdî (1243/1827-1315/1897), who was for more than fifty years Hanafite muftî of Egypt (*Muftî l-Diyâr al-*

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[1] Baer's studies on 19th century Ottoman and Egyptian statute law in criminal matters give us some insight in the scope and content of criminal legislation in this period. However, Baer approached the subject from a basically political angle and did hardly pay attention to the question of what laws were actually applied in the courts. Cf. G. Baer, "Tanzimat in Egypt: The Penal Code," in G. Baer, *Studies in the Social History of Modern Egypt* (Chicago, 1969), pp. 109-33, and id., "The Transition from Traditional to Western Criminal Law in Turkey and Egypt", *Studia Islamica* 45 (1977), pp. 139-58.

Misriyya).[2] Vol. 6 of his collected fatwâ-s, with the title *Kitâb al-Mahâdir wa-l-Sijillât*, contains queries from the qâdî-s which include as a rule the records of the trials. Analysing these records that span a period from 1266/1849 until 1303/1885 can give us insight in the working of Egyptian Sharîᶜa justice in the 19th century.

Sharîᶜa justice relies heavily on the advice of muftîs. In Egypt, as elsewhere, Sharîᶜa courts would have a muftî attached to them who could be consulted by the qâdî on the intricacies of the law. In the provincial councils (*majâlis al-mudîriyya*) in Egypt the provincial muftî (*muftî l-mudîriyya*) had a seat. There were other muftî-s attached to administrative bodies, like the Dîwân al-Awqâf and the Majlis al-Ahkâm. The muftî with the highest authority was the *Muftî l-Sâda al-Hanafiyya* or the *Muftî l-Diyâr al-Misriyya* (henceforth referred to as the Muftî), appointed by the Viceroy (Khedive). A qâdî who was in doubt with regard to some specific point of law during a process, would first consult the muftî attached to his court. If the muftî was not certain either, or if the qâdî and the muftî disagreed, the point would be submitted to the *Muftî l-Diyâr al-Misriyya*. Sometimes the qâdî would consult the Muftî directly. The Muftî's fatwâ would be read in court in the presence of the parties and regarded as binding (although officially this became only the case in 1880).[3] Occasionally the Muftî would issue special instruc-

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[2] He was *Muftî l-Diyâr al-Misriyya* from 1264/1847-8 until just before his death in 1315/1897. From 1287/1870 he combined this function with that of Shaykh al-Azhar. Cf. GAL S II, 740; Jurjî Zaydân, *Tarâjim mashâhîr al-sharq fî l-qarn al-tâsiᶜ ᶜashar* (2nd ed. 2 vols. Bayrût: Dâr Maktabat al-Hayât, n.d.) II, 250-5; ᶜAlî Mubârak, *Al-Khitat al-Tawfiqiyya al-Jadîda* (20 vols. Bûlâq: al-Matbaᶜa al-Mîriyya, 1306), XVII, 12; Gilbert Delanoue, *Moralistes et politiques musulmans dans l'Égypte du XIXᵉ siècle (1798-1882)* (Le Caire: IFAO, 1982), pp. 168-84.

[3] The Shariᶜa Courts Ordinance (*Lâᵓihat al-Mahâkim al-Sharᶜiyya*) of 1856 laid down that "the qâdî should consult the ᶜulamâᵓ and ask their fatwâ-s in difficult cases and not form his opinion independently as a precaution against errors in [applying] the rules of the Sharîᶜa." (art. 21). Text in Fîlîb Jallâd, *Qâmûs al-Idâra wa-l-qadâᵓ*. 5 vols. (Alexandria: Al-Matbaᶜa al-Bukhâriyya, 1890-5), vol. 4, pp. 129-31. In the Shariᶜa Courts Ordinance of 1880 this became obligatory and the Muftî's fatwâ-s became binding (art. 22), which reflected previous practice. Text in Jallâd, *Qâmûs*, vol. 4, pp. 145-56. See also *Al-Fatâwâ al-Islâmiyya min Dâr al-Iftâᵓ al-Misriyya*, X (Cairo: 1404/1983), pp. 3656-7. The situation was actually more complicated, due to the emergence of a hierarchical judiciary, with muftî-s attached to all levels. (See e.g. the decree No. 275 d.d. 5 Rab. II, 1290 that regulated the function of *iftâᵓ*; text in Jallâd, *Qâmûs*, vol. iv, pp. 136-6). Cases where capital punishment was demanded by the plaintiffs would be submitted to

tions to the qâdî-s to follow certain opinions within the Hanafite school in preference to others.[4] The Muftî's function bore some resemblance to that of the courts of cassation in French or Dutch law, who are the highest authorities to expound and interpret the law and do not investigate the facts of a case.

Of the 307 fatwâ-s included in volume VI of the FM, 137 deal with criminal matters,[5] almost exclusively homicide (129 cases).[6] In only one of these recorded homicide trials, a case of murder with robbery, the punishment was based on *hadd*,[7] in all others the rules of *jinâyât* were applied, i.e. the law with regard to homicide and bodily harm. The last of these fatwâ-s on murder dates from Safar 1302/December 1883.

Many of the fatwâ-s recorded in the FM offer vivid pictures of the fights and quarrels that were and sometimes still are typical of Egyptian social life in the countryside: conflicts about the distribution of water, assault and battery of peasants by Turkish officials, family quarrels, cases of revenge for injured honour, and theft of cattle are among the occasions leading to loss of life. They are worth being studied as contributions to Egyptian social history. Here, however, I will focus on the legal aspects of these trials.

We must be aware, however, that trial before the qâdî was only a part—but an essential one—of the procedure in case of homicide. The Sharî^{c}a trial was meant to deal with the private claims of the victim's heirs, whereas the state authorities would consider the crime in the light of public interest in accordance with the secular laws, i.e. the various criminal laws enacted by the viceroys and,

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the muftî of the court that heard the case, the muftî of the court of appeal (*isti'nâf*), a special committee from the Cairo High Court (Mahkamat Misr al-Kubrâ) or the muftî of the Majlis al-Ahkâm, and, usually, the *Muftî l-Diyâr al-Misriyya*.

[4] Cf. FM VI, p. 95 (29 Rab. II, 1278).

[5] These are the fatwâ-s included in vol. VI. Vol. V, in the chapter on *jinâyât* contains a few more fatwâ-s issued at the request of law courts (as distinct from fatwâ-s whose origins are not stated).

[6] The eight remaining cases deal with bodily harm. No cases concerning bodily harm are reported after 1285/1868.

[7] FM VI, pp. 505 (19 Rab. I, 1297). The verdict was based on *hadd*, and proven by confession of the culprits, but because in *hadd* cases the culprit is at liberty to retract his confession until the moment of punishment, the Muftî explained in his fatwâ in what way the wording of the verdict could be changed in order to obtain a basis for *qisâs* punishment.

from the early 1850s, the Qânûnnâmeh al-Sultânî,[8] which contains several articles with regard to homicide. This is not contrary to Sharîᶜa theory, since this authorizes the state to punish persons who commit undesirable acts on the basis of *taᶜzîr*.[9] The Egyptian state authorities held a firm grip on procedures in criminal matters. The following instructions were issued to the qâdî-s with regard to homicide cases:

The preliminary investigation and examination in cases of homicide must be carried out by the provincial administration (*mudîriyya*) of the province in which the case has taken place, as is the practice until now. Then the case must be examined with the most perfect scrutiny in the regional councils (*majâlis al-aqâlîm*) in the presence of the [provincial] muftî and the members of the council. As soon as the case is clear, the Sharîᶜa sentence (*al-iᶜlâm al-sharᶜî*) and the record containing the details of the procedure [i.e. the trial by the council] must be sent to the Majlis al-Ahkâm al-Misriyya[10] for inspection and approval (*taṣdîq*). Thereupon they must be sent to the Majlis al-Khuṣûsî[11] and from there to the Viceroy [for a decree ordering the execution of the sentence].[12]

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[8] Text in Ahmad Fathî Zaghlûl, *Al-Muhâmât* (Cairo: Matbaᶜat al-Maᶜârif, 1900/1318), mulhaqât, p. 157-178; Jallâd, *Qâmûs*, vol. ii, p. 90-102. See for the history of this code Baer, *a.c.* There is some doubt regarding the date of introduction of the codes. Baer assumes that it was not enforced unil 1855, whereas Toledano argues that the code was already applied in 1852. Cf. Ehud R. Toledano, "Law, Practice, and Social Reality: A Theft Case in Cairo, 1854," in *Studies in Islamic Society: Contributions in Memory of Gabriel Baer*. Ed. G. R. Warburg and G. Gilbar (Haifa: Haifa University Press, 1984), p. 169.

[9] Before the introduction of the Qânûnnâmeh al-Sultânî, it was customary for the state to execute a murderer on the basis of *taᶜzîr* if it was clear that he had committed a murder, but the plaintiff could not produce sufficient legal evidence before the qâdî, or if the plaintiff had pardoned him. For 17th century practice, see Galal H. El-Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century*. (Minneapolis etc.: Bibliotheca Islamica, 1979), p. 34. For the early 19th century, see E. W. Lane, *Manners and Customs of the Modern Egyptians*. Repr. (London etc.: Dent, 1966), p. 108.

[10] The Majlis al-Ahkâm al-Misriyya, or Council of Justice, established in 1849, was one of the two conciliar organs of the state. It acted as a high court that checked the decisions of lower courts, and issued legislation. Cf. F. R. Hunter, *Egypt under the Khedives, 1805-1879: From Household Government to Modern Bureaucracy* (Pittsburg: University of Pittsburg Press, 1984), p. 51.

[11] The Majlis al-Khusûsî, or Privy Council, created in 1847 was the most important conciliar body in Egypt and closest to the Khedive. It combined legislative, administrative and judicial functions. Cf. Hunter, *o.c.*, pp. 49-50.

[12] Sûrat harakât al-afandiya hukkâm al-sharᶜ fî ijrâ' al-ahkâm al-sharᶜiyya, Art. 6. Text in Jallâd, *Qâmûs*, vol. ii, p. 104. The Ordinance was issued as one of the appendices to the Qânûnnâmeh al-Sultânî. Cf. Zaghlûl, *al-Muhâmât*, p. 205.

What is clear from both this instruction and the FM is that in these councils homicide cases would be tried first, in the presence of the members of the council, by the qâdî according to the Sharîʿa and then, whenever the case required this, by the council itself, on the basis of secular laws. Since the councils were not bound by the strict Sharîʿa rules concerning evidence, it often happened that they sentenced suspects whose guilt was not proven before the qâdî, or who, if criminal intent could not be substantiated, were only condemned to pay bloodmoney, to prison terms.[13] Illustrative is the following question submitted to the Muftî:

When an official had sent a murderer into exile (most probably to Fayzoghli in the Sudan), after the heirs of the victim had settled for a *diya* consisting of land and an amount of money, the heirs anxiously consulted the Muftî asking whether they would loose their newly acquired property if the culprit were to die in exile (they would know, of course, that Fayzoghli was not a very healthy place). The Muftî could reassure them: the settlement would remain valid, whatever happened to the murderer.[14]

Categories of homicide and their legal effects

The Islamic law of homicide is essentially private law in the sense that a trial can only take place if the victim's heirs (or the state, if their are no heirs), acting as plaintiffs, want to sue the culprit. Moreover, if the murderer is sentenced by the qâdî, the execution of the sentence depends on the wish of the plaintiffs. If it is legally proven during the trial that someone has caused the death of another person, there are two possible outcomes: the culprit is sentenced either to death in retaliation (*qisâs*), or to payment of bloodmoney (*diya*). In both cases the plaintiffs may pardon the defendant—in *qisâs* cases the pardoning of only one heir is sufficient to prevent the execution—or settle for a sum of money which may

[13] Contrary to Ottoman practice (cf. Johan Krcmárik, "Beiträge zur Beleuchtung des islamitischen Strafrechts, mit Rücksicht auf Theorie und Praxis in der Türkei," *Zeitschrift der Deutschen Morgenländischen Gesellschaft*, 58 (1904), p. 571), the Egyptian laws did not allow the secular courts to condemn to capital punishment a murderer who was not given a death sentence by the qâdî, except in the case of officials (*maʾmûr*), who had committed intentional homicide but were pardoned by the victim's heirs (Cf. the Qânûnnâmeh al-Sultânî, Ch. 1, Art. 1 and 11).

[14] FM V, p. 441 (19 Muh., 1269).

be higher or lower than the legally fixed bloodmoney (*sulh*). There is, however, a complicating factor if there is a minor among the heirs. With regard to the execution of a death sentence, the other heirs may act for him in pardoning the murderer, if the minor is closely related to them (that is, if he is not an *ajnabî*). Otherwise, the decision regarding the execution must be suspended until the minor has come of age. If bloodmoney is at stake, the minor's guardian cannot remit the minor's share in it.

Capital punishment can be required if the murder is committed intentionally (*ʿamdan*) and without just cause (*taʿaddiyan* or *ʿudwânan*). There are however two exceptions to this rule: a father cannot be sentenced to death for the murder of his son, nor the master for the murder of his slave, and a death sentence cannot be required by the heirs if there is a descendant of the murderer amongst them.

The characteristic tendency towards objectivity in the Sharîʿa is also in evidence in this domain of the law: Criminal intent (*ʿamd*) is not only regarded as a subjective state of the mind but must also be apparent from the kind of weapon or object used to kill. There is some controversy on the question of what types of weapons or objects are considered to be indicative of criminal intent. Abû Hanîfa has taught that the killer must have used a weapon that can sever parts of the body or an object that has been sharpened, like a sharpened rock or piece of wood, or fire. Abû Yûsuf and Shaybânî hold that a weapon or implement must have been used that is as a rule lethal. The Egyptian judiciary, on the strength of a decree of the Viceroy, was obliged to follow the latter opinion,[15] not surprisingly in view of the many instances in our material of homicide committed with the *nabbût*, the long wooden stick Egyptian peasants usually carry with them.

For a sentence of retaliation it is also required that the killing be without just cause. For this reason, a murderer who acted e.g. in self-defence is not liable for his acts. In general the absence of a just cause is alleged by the plaintiff, but does not need to be proven. If the defendant, however, pleads that he acted with just cause, he

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[15] Cf. FM VI, p. 146 (25 Ram., 1278); FM VI, p. 147 (25 Ram., 1278).

must substantiate his plea, as is evident from the following ruling of the Muftî:

In a case where it was proven that the defendant had intentionally killed a Christian merchant, the defendant pleaded that he had acted with just cause because the Christian had once converted to Islam and then returned to his old belief and was therefore an apostate (*murtadd*) who must be executed and whose life is not protected by the law (*muhdar*). The Muftî ruled that if the defendant could prove his plea, he could not be sentenced to death or to payment of bloodmoney, but would only be liable for disciplinary punishment (*ta'dîb*) for not having given the apostate an opportunity to reconvert to Islam.[16]

If the murder is committed intentionally, but not all the conditions for a death sentence are satisfied, e.g. because the weapon was not a generally lethal one (for instance a bamboo cane or a foot used for kicking the victim)[17]—this is technically known as *shibh ʿamd*—, or because one of the plaintiffs is a descendant of the murderer, the defendant can be sentenced to payment of heavy bloodmoney (*diya mughallaza*). In all other forms of a homicide, subsumed under the heading of *qatl khata'* (killing by error), the normal *diya* is due, regardless of whether the victim's death is due to culpable negligence or accident. But in this case the bloodmoney is to be paid not by the defendant, but by his *ʿâqila*, his solidarity group. Examples of killing by error in our material are: death caused by someone firing his rifle during a festive occasion and accidentally hitting someone; a fatal accident when someone was felling a palmtree and, in spite of his warnings, a woman was hit by one of its branches; the killing of someone with a stick, whereas the blow was aimed at someone else; a watchman (*khafîr*) shooting someone at night believing that it was a robber.

There is, however, no difference between the normal and the heavy bloodmoney, except in the unlikely case that defendant wants to pay in camels.[18] The classical works of *fiqh* lay down that

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[16] However, as the defendant had not put forward his plea until the qâdî had pronounced his sentence, the qâdî would only be allowed to hear it after special permission from the head of state (*wâlî l-amr*). FM VI, p. 91 (1 Rab. II, 1278).

[17] FM VI, p. 523 (18 Shaw., 1297) (bamboo cane); FM VI, p. 490 (7 Shaw., 1296) (kicking).

[18] According to the classical authors, the *diya* could be paid in camels (100), gold (1.000 dinar) or silver (10.000 dirham). The amount of the *diya mughallaza* was

the height of the *diya* of a free man, Muslim or *dhimmî*, is 100 camels of a certain specification (for the *diya mughallaza* more expensive types of camels were specified) or 1.000 dinar (gold) or 10.000 dirham (silver). For a free woman the *diya* was half this amount and for a slave his market value. In Egypt, the highest judicial authority, the *Majlis al-Ahkâm* had issued a decree on 25 Rab. I, 1275 (1858) fixing the amount of bloodmoney at 15.093,75 piasters for payment in silver[19] and on 40.762 piasters for payment in gold and laying down that the choice was the defendant's.[20] This meant, in fact, that the qâdî-s would automatically sentence the defendant to payment of the lower amount. Although not as much as the value of 100 camels, this was by no means a small sum. In 1861 it represented the value of 15 horses or 34 donkeys or 13 buffaloes (*jâmûsa*),[21] or in terms of wages (taken from a budget of the two High Courts for 1279/1861-2): 200 times the monthly wage of the coffee man (*qahwajî*) (75 piasters), 20 times that of the High Court muftî (750 piasters), and 14 times that of the head clerk (*bâshkâtib*) (1.100 piasters).[22] Bloodmoney is due in three annual instalments of one third of the total.

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only specified with regard to camels: they must be of a more expensive quality. FM VI, p. 490 (7 Shaw., 1296). This made the category of *shibh ʿamd* very theoretical. In one fatwâ, where *shibh ʿamd* is mentioned, the muftî did not care to call the ensuing *diya "diya mughallaza"* (FM VI, p. 523 (18 Shaw., 1297)).

[19] The Ottoman Shaykh al-Islam had fixed the amount of blood money at 26.666 piasters and 20 paras. (ʿÖmer Hilmî, *Miʿyâr-i ʿadâlet* (Istanbul: 1301), p. 71). Taking into account that the value of the Ottoman piaster was about 10 to 15% less than the Egyptian one [Cf. Roger Owen, *The Middle East in the World Economy, 1800-1914* (London etc.: Methuen, 1981), p. xiii; Charles Issawi, *The Economic History of the Middle East, 1800-1914* (Chicago: The University of Chicago Press, 1966), pp. 523-4], this amount was about 50% higher than the Egyptian bloodmoney.

[20] FM VI, p. 49 (15 Rab. I, 1277). Art. 25 of the Qânûn al-Filâha, issued 1245 (1830), fixed the *diya*, in cases where death was caused by excessive beating by officials, at 3.600 piasters (Text in Zaghlûl, *Al-Muhâmât*, mulhaqât, p. 105). It is not clear, however, whether this was applicable to all cases of homicide or only to the cases mentioned in the article.

[21] Cf. FM VI, p. 91 (1 Rab. II, 1278), where a horse is sold for 1.000 and a donkey for 450 piasters, and FM VI, p. 134 (12 Ram., 1278), where in an inventory the price of a buffalo is 1.200 piasters.

[22] Amîn Sâmî, *Taqwîm al-Nil* (Cairo: Matbaʿat al-Kutub al-Misriyya, 1928-36), vol. I, part 3, p. 411-3; see also *ibid.* pp. 325-6 for the salaries of officials in ministries). E. H. Toledano mentions that in 1854 an unskilled labourer would earn 50 piasters monthly and a skilled labourer about twice that sum. See Toledano, *a.c.*, p. 158, n. 15.

Accomplicity

A complicating factor in this already complex system occurs when death is caused by more than one person. The law gives detailed rules for determining the liability of each of the perpetrators. The simplest case is when one person forces another to cause the death of a third person. The law lays down that if someone acts under coercion, i.e. as a result of fear for one's own life or for loss of a limb, the act is ascribed to the one who exerts the coercion, since the other is a mere instrument. It is expressly stated that an order of the sultan must be regarded as coercion, even if no specific threats are uttered.

Ibrâhîm Agha, the commander of a cavalry regiment stationed in the Sudanese town of al-Ubayyid had ordered some soldiers to give fifty strokes of the cane to Bâbâ ʿAbd Allâh, a soldier who, pleading illness, had refused to carry out a command. As a result of his chastisement the soldier died the same day. His heir (in this case, since the soldier had no next of kin, the provincial governor acting as the representative of the state) demanded from the officer his due according to the law. After the plaintiff had proven his accusations, the qâdî sentenced the officer to pay the *diya* to the state, as his orders, just like the Sultan's, must be regarded as constituting coercion.[23]

If the victim's death is caused by two or more persons, acting together, the plaintiff must allege and prove what precisely each of the defendants did. There is no such thing as collective liability for homicide. The plaintiff must identify the person(s) who have actually killed the victim, or his claim is not admitted.

A man was attacked by two others, one of whom hit him with a rock on his head. When he was found, just before he died from his wounds, he told that he had been attacked by two men, whom he identified, that one of them had hit him on his head with the rock, but that he did not know

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[23] FM VI, p. 69 (21 Raj., 1277). The Muftî in principle endorsed the qadi's decision, except that he required that the existence of coercion in the relationship between the officer and the soldiers who had carried out the caning be substantiated and not just assumed. In another case, where a civilian official ordered his servants to administer a bastinado to a merchant who did not immediately pay his taxes, whereby one of the victim's ribs were broken, as a result of which he died, the Muftî ruled without arguments, that no suit could be brought against the official. FM VI, p. 455 (30 Raj., 1295).

which of them it had been. When his heirs brought suit against the two men, their claim was declared inadmissible, since it did not identify the defendant, viz. the person who had caused the victim's death.[24]

For sentence to be passed against those who together caused the death of the victim, it must be clear whether the acts (blows, shots, cuts etc.) of each of them separately would have been lethal and whether they acted simultaneously or in succession. If the perpetrators have acted simultaneously and it is established that each of their acts, carried out separately, would have caused the death of the victim, they are all liable for his death. If criminal intention (*ʿamd*) is proven, they can all be sentenced to death. Otherwise they must pay the *diya* together. If all of their acts, if carried out separately, would have been lethal and if they have acted in succession, the one who first attacked the victim is liable if the victim dies within a day after the attack. Otherwise the victim's death is ascribed to the last attacker. The accomplices are then to be punished on the strength of *taʿzîr*. How complicated these rules are is illustrated by the following case:

Two man had entered the cattle pen (*dawwâr*) of Muhammad Bey ʿAbd Allâh at night (probably to steal cattle, although this is not mentioned in the record) and killed Ramadân Mûsâ, who was sleeping there. The first defendant had hit him on the head with a big stone and the second one, as the victim still showed signs of life, had stabbed him in his belly with his knife. Ramadân died two days after the attack. During the trial the first defendant's guilt was established by his admission that he, together with the second defendant, had murdered Ramadân. Further it was established that both acts would have been lethal if they had been carried out separately. Against the second defendant, however, nothing was proven. Asked for his opinion, the Muftî argued that the first defendant could not be sentenced to death. Since the hitting with a stone and the stabbing with the knife had been consecutive acts and the victim had lived for more than one day after the attack, the cause of his death was to be ascribed to the second defendant, against whom nothing was proven legally, whereas the first defendant was to be punished by the state authorities on the strength of *taʿzîr*.[25]

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[24] FM VI, p. 25 (22 Raj., 1274). In a similar case three watchmen (*khafîr*) had admitted that they had shot and killed someone, thinking he was a thief. However, they added that they did not know which of them had actually hit him. The suit brought against them was not admitted, since the plaintiff could not identify the defendant.

[25] FM VI, p. 480 (12 Rab. I, 1296).

Liability for bloodmoney

One of the characteristics of the Islamic law of *jinâyât* is that it is more anxious that the victim or his heirs will get their dues than that the culprit feels the consequences of his acts. A clear demonstration of this principle is the liability of the *ʿâqila*, which applies in cases of unintentional homicide: unless liability is based on the defendant's confession or on an agreement with the plaintiff (*sulh*), payment of blood money, with a few exceptions, is the liability of the defendant's solidarity group, the *ʿâqila*. This liability is, however, restricted: the members of the *ʿâqila* are not obliged to pay more than four dirhams and if the total is not enough for payment of the *diya*, the *ʿâqila* has to be expanded.[26] Originally restricted to one's agnatic group, the early Hanafites had extended the notion of *ʿâqila* to other groups practising mutual assistence (*tanâsur*) such as the soldiers registered in de Dîwân, members of guilds, or the merchants from the same market. If the killer does not belong to such a group, the state must take over the responsibility if the defendant is a Muslim and the state finances allow this. Otherwise the killer himself must pay.[27]

In the post-classical works on *fiqh* one can already see that the institution had lost much of its practical importance.[28] To my surprise, however, the rules concerning *ʿâqila* were applied in Egypt. The existence of a *ʿâqila* was assumed if one was the member of a group that "helped each other, in the sense that if for some reason one's house was destroyed, the others would help him to restore it."[29] In those cases of *qatl khataʾ* where evidence was not based on confession of the defendant, the qâdî would either decide that the *ʿâqila* pay the *diya*[30] or, what happened mostly, expressly argue that

[26] FM VI, p. 63 (24 Jum. II, 1277).

[27] Cf. Ibn ʿÂbidîn, *Radd al-Muhtâr* (Bûlâq: Dâr al-Tibâʿa al-Mîriyya, 1299), vol. V, p. 566.

[28] See e.g. Ibn ʿÂbidîn, *Radd al-muhtâr*, V, p. 566 and the authors quoted by him.

[29] FM VI, p. 4 (29 Raj., 1266).

[30] FM VI, p. 63 (24 Jum. II, 1277) (liability of the *ʿâqila* of a house owner, based on a *qasâma* procedure); FM VI, p. 66 (8 Raj. 1277); FM VI, p. 141 (25 Ram. 1278). In the last case the *ʿâqila* accepted its responsibility although the evidence was based on confession of the defendant. In this case, where the names of the four members of the *ʿâqila* are mentioned in the records, it is not clear what constituted its basis. Judging by the names they are not relatives. Since the defendant was a watchman, it is possible that his fellow watchmen acted as his *ʿâqila*.

the defendant pay it since he had no *ʿâqila*.[31] In the latter cases the state was not held liable contrary to authoritative Hanafite opinion.

Another demonstration of the concern of the Sharîʿa to ensure that the heirs of the victim get their due, is the institution of the *qasâma*. If a body is found with wounds or traces of beating or strangling and there is no evidence of the identity of the killer, the heirs can sue the owner of the house or the land where the body was found (including the state if the body was found on state land) or, if he was found on common or nobody's land, some or all of the adult males living within earshot of the place of the crime. If they cannot substantiate their claim, the owner or, in the case of collective liability, fifty free, adult, sane males to be picked by the plaintiff (if there are more than fifty people; if not, some people must repeat the oath), are made to swear fifty oaths that they have not killed the victim and do not know the murderer. This is called *qasâma*, derived from *qasam*, "oath". It creates a liability to pay the *diya* for the *ʿâqila* of the owner of the house or the land, or for the *ʿâqila*-s of the inhabitants of the village. The heirs, however, forfeit their right to start the *qasâma* procedure if they first sue someone else.

The records show that this procedure was still very much alive in 19th century Egypt.[32] There are several instances where the inhabitants of a village or the owner of land (or, in some cases their *ʿâqila*-s) were held responsible for an unsolved murder. And there are quite a number of cases where it is obvious who has killed the victim, but where the plaintiffs are unable to substantiate their claims and demand payment of *diya* on the basis of *qasâma*. The fifty oaths from the inhabitants of a village would be taken by an assistant of the qâdî (*maʾdhûn*) who would go with the plaintiff to the village to take the oaths of those whom the plaintiff would select.[33] If the owner of a house was subject to a *qasâma* procedure, he was

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[31] FM VI, p. 58 (4 Jum. II, 1277); FM VI, p. 78 (22 Shaʿ., 1278); FM VI, p. 111 (15 Jum. II, 1278).

[32] FM VI, p. 63 (24 Jum. II, 1277); FM VI, p. 65 (5 Raj., 1277); FM VI, p. 71 (22 Raj., 1277); FM VI, p. 76 (20 Shaʿ., 1277); FM VI, p. 77 (20 Shaʿ., 1277); FM VI, p. 78 (22 Shaʿ., 1277); FM VI, p. 80 (26 Shaʿ., 1277); FM VI, p. 98 (29 Rab. I, 1278); FM VI, p. 153 (28 Shaw., 1278); FM VI, p. 155 (8 DhQ, 1278); FM VI, p. 238 (8 Jum. II, 1284).

[33] FM VI, p. 80 (26 Shaʿ., 1277).

made to swear fifty times himself. Sometimes the result of the *qasâma* procedure was a fortunate one, in the sense that the suspect of murder, against whom nothing could be proven, was held liable on this score:

The mother of Fatûma, the deceased, representing the heirs, sued Fatûma's husband for her death alleging that he had taken hold of her in the presence of his other wife and his adult daughter, thrown her on the floor, stripped her and hit her about 500 times with the soft branch of a quince tree, that thereafter she stayed in bed until she died three days later. The husband, one of the shaykhs of the village, denied this and alleged that his wife had died from an illness she had caught about six days before her death. The plaintiff produced two witnesses (probably the shaykhs who had washed the body before the funeral) who testified that they had seen the naked body of the deceased after her death and that there were traces of beating and wounds on it, but that they did not know who has hit her. The judge, however, did not consider this as legal evidence against the defendant, and sentenced him, after the *qasâma* procedure and after having established that he had no *ʿâqila*, to pay his wife's *diya* to her heirs in his capacity of owner of the house where the deceased has been found with traces of violence on her body.[34]

In other cases, however, the plaintiffs would refuse to bring suit against the person who had obviously caused the victim's death, in order not to forfeit their right to start the *qasâma* procedure. This happened in the following case. The presence in court of the actual culprit, however, indicates that he had been arrested and would not escape trial by a secular court:

A man was found shot in a house owned by a ʿAbd al-Rahîm Hasan. His heirs, represented by Hasan b. Luqmân, sued ʿAbd al-Rahîm for killing the deceased. ʿAbd al-Rahîm admitted in court that the deceased was found shot in his house, but claimed that another person, a man named Hasan ʿAlî, also present in court, had admitted of killing him. The qâdî asked Hasan b. Luqmân, the plaintiff, to prove his claim, which he could not. Then he allowed ʿAbd al-Rahîm Hasan, the defendant, to substantiate his plea. The defendant produced six witnesses. Five of them testified that they had heard a shot of a pistol in the defendant's house, that they came to see what had happened and heard Hasan ʿAlî, after his arrest, saying: "I resign to God; I couldn't do anything about it (*Amrî li-Llâh qahr*^{an} *ʿannî*)." The sixth witness declared that he had seen that Hasan

[34] FM VI, p. 78 (27 Shaʿ., 1277).

ʿAlî came out of the defendant's house with a pistol in his hand, that he had stumbled over the threshold and that then the pistol went off and the victim was hit. The qâdî, arguing that legally nothing was proven against Hasan ʿAlî, demanded at the plaintiff's request that the defendant swear fifty times that he had not killed the deceased and that except for Hasan ʿAlî he did not know who had done so. After the defendant's oath sentence was passed against his *ʿâqila* to pay the *diya* to the heirs of the deceased.[35]

Procedure and evidence

That Sharîʿa justice is often unsatisfactory in our eyes, in the sense that defendants who, judging by the available evidence, have clearly committed the crime, but, for formal reasons, cannot be convicted, is partly due to the complexity of the substantive law of homicide and partly to the rules of procedure and evidence. The rules of procedure lay down that a plaintiff identify the defendant in his claim and cannot bring suit against two or more defendants collectively and further that the plaintiff cannot change his claim if after its introduction it becomes clear that not the defendant but someone else has committed the murder. In both cases the plaintiff's claim is inadmissible. The main difficulty in this context, however, is connected with the very strict rules of evidence. In a large number of cases the plaintiff is unable to substantiate his claim.

The Sharîʿa does not know an office of public prosecution[36] where evidence for the session can be prepared, and in theory it is the task of the plaintiff to find eyewitnesses to the crime and bring them to court or to obtain a confession of the defendant, in order to be able to prove all relevant facts during the court session. In practice, however, the state authorities would take care of this, as I mentioned before.[37] When a body was found, people would notify

[35] FM VI, p. 63 (24 Jum. II, 1277).

[36] Cf. E. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*. 2e éd. (Leiden: E. J. Brill, 1960), p. 601.

[37] The Ordinances appended to the Qânûnnâmeh al-Sultânî (introduced around 1852) contain some instructions concerning the investigation and procedure in case of homicide. Preliminary investigation is the responsibility of the local authorities (mudîr or hâkim). Immediately after the discovery of the body, a doctor must examine it and write a medical report. The results of the interrogations with the suspect and witnesses must be laid down in writing. Upon his arrest, the suspect and the victim's next of kin, with all the papers of the preliminary

the local or provincial authorities (*ʿumda, shaykh al-balad, shaykh al-khufarâʾ, maʾmûr, nâzir, mudîr*). If the murderer was caught in the act, or if there were indications as to his identity, they would imprison the suspect, collect evidence, and try to extract a confession, often by beating or otherwise torturing him.[38] Such a confession, however, was in itself of little use in a Sharîʿa court for, if the confession was not made before the qâdî during a court session, its existence had to be proven in court by an admission or by witnesses. Often a defendant would revoke his confession alleging that it had been obtained under duress. Although this is a legally valid plea,[39] no instance is recorded where the defendant succeeded in proving this. Surprisingly, in none of the cases the official who had interrogated the suspect was heard in court as a witness. Usually the existence of a confession was proven by witnesses who, judging by their professions, just happened to be present in the office (*dîwân*), when the suspect was interrogated. In one case the coffee man (*qahwajî*) and an acquaintance of the official conducting the interrogation, who just entered to say hello to him, were, among

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investigation, are to be sent to the nearest regional court (*majlis aqâlîm*) for trial. See Dhikr Wazâyif Mutafarriʿa bi-l-Majlis, Artt. 9, 11 and 13 (Text in Jallâd, *Qâmûs*, vol. II, pp. 105-6) and Bayân Khidmat wa-Harakat Mudîrî al-Aqâlîm, Art. 13 (Text in Jallâd, *Qâmûs*, vol. II, pp. 108-9). When local government was reorganized in 1871, the Lâʾihat al-Majâlis al-Markaziyya of 1871 (Decree 172 of 25 Jum. I. 1288, text in Zaghlûl, *Al-Muhâmât*, mulhaqât, pp. 181-206) laid down in detail the procedure to be followed in case of the detection of a heavy crime. The village council (*majlis al-balad*) had to notify immediately the district police officer. Awaiting his arrival, they and the village shaykhs were responsible for the arrest of the suspect and the investigation of the crime. The police officer had to come to the place of the crime with one or more members of the district council (*majlis al-markaz*), and, if necessary, a doctor or a deputy *qâdî* (*nâyib* [*sic*] *sharʿ*). They would then finish the investigation and the interrogation of witnesses together with the village council. Notes of the depositions of the witnesses and a report had to be sent to the district council, who would transfer the papers to the provincial administration (*mudîriyya*), to be sent finally to the provincial council (*majlis mahallî*) for trial. (Ch. 1, section 43; see also ch. 3, section 7 and ch. 4, section 2.)

[38] For cases where the defendants claimed that their confessions were obtained by beating and torture, see: FM VI, p. 291 (12 Saf., 1287); FM VI, p. 309 (5 Rab. II, 1287); FM VI, p. 401 (18 Muh., 1292); FM VI, p. 432 (11 Raj., 1294); FM VI, p. 436 (29 Shaʿ., 1294); FM VI, p. 447 (23 Rab. II, 1270). For a case where the suspect, his brother and his wife died in the course of the investigation, see FM VI, p. 2 (27 Muh., 1266).

[39] See e.g. FM VI, p. 436 (5 Jum. II 1268).

others, heard as witnesses to a confession.[40] It is not difficult to imagine how imprecise their testimonies often are. That the officials in charge of the investigation were not heard in court may be due to the fact that according to the Sharîᶜa they are not regarded as *ᶜadl*, of good reputation. For the *shaykh al-balad* and the *ᶜumda* this is confirmed by several fatwâ-s stating that because they are helpers of injustice (*aᶜwân ᶜalâ al-zulm*), their testimony cannot be accepted in court.[41]

In principle, evidence is based on either a confession (*iqrâr*) of the defendant, the testimony of two male or one male and two female witnesses and oath.[42] If capital punishment is at stake, the rules of evidence are stricter and female witnesses are not allowed. Even the slighest doubt (*shubha*) prevents its application and the evidence is very carefully scrutinized by the judge and the various other authorities. This often results in the acquittal of the defendant, although on the basis of the evidence, it is entirely clear that he has committed the murder. The degree of precision in examining the testimonies is evident from the following case:

During a session of the court in Burullus, a fight broke out between the qâdî and one of the litigants. The heirs of the litigant, who had died

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[40] FM VI, p. 519 (26 Raj., 1297). This is the only case I have seen where also a police officer was heard as a witness.

[41] According to Hanafite law, the testimony of the officials (*ᶜummâl*) of the sultan is accepted, unless they are "helpers of injustice (or oppression)". Some authors maintain that therefore the testimony of the *shaykh al-balad* and the tax collector is not accepted, unless they are known to be just. Cf. Ibn ᶜÂbidîn, *Radd al-Muhtâr*, IV, p. 524; Shaykhzâdeh, *Majmaᶜ al-Anhur* (Istanbul: 1309), II, p. 158-9. Cf. FM VI, p. 259 (3 Jum. II, 1286) and p. 277 (26 DhH., 1286): Village shaykh-s (*mashâyikh al-balad*, *mashâyikh al-nâhiya* may not be heard as witnesses; FM VI, p. 121 and 131 (5 Raj., and 10 Ram., 1278): *khafîr* (watchman) not per se unworthy of giving evidence; FM VI, p. 129 (29 Raj., 1278); FM VI, p. 466 (19 Muh., 1296): the *wakîl shaykh al-khufarâ' al-tawwâfîn* (deputy chief of the watchmen) may give evidence if he belongs to the police force (*darak*) and is not a subordinate of the village shaykhs (*mashâyikh al-qurâ*) and assists them in illegal acts and in dragging people to them.

[42] The oath is only of secondary importance. If a plaintiff cannot substantiate his claim against a defendant, the latter is made to swear the oath of innocence. If he takes the oath, the plaintiff may not sue him anymore, unless he produces better evidence. If the defendant refuses, however, and a death sentence was requested, he is imprisoned until he swears the oath or confesses. If bloodmoney was requested, refusal of the oath by the defendant entails the allowance of the plaintiff's claim.

shortly afterwards, sued the qâdî alleging that he had struck the deceased twice, on his head and on his face, with a thin palm branch, that he had then chased the deceased out of the courtroom, that he had then kicked him in the belly, that this had caused his belly and breast to swell up and that he had stayed in his bed until he died eight days later as a result of this assault. The qâdî stated that the deceased had been insolent during a session and admitted only of having lightly struck him twice on his turban in order to inspire respect in him. The plaintiffs produced three witnesses. The first one attested that he had seen that the deceased had attempted to prevent the qâdî from sealing a deposition against him, that the qâdî had struck him with his palm branch, that the deceased and the qâdî had left the court room and that he had heard the deceased shouting: "You must be my witnesses!" The second witness stated that he was sitting outside the court and had suddenly seen the deceased coming out of the court room with the qâdî behind him, that the qâdî had kicked him once in his belly with his left foot, which had caused the deceased to fall, that the qâdî had then kicked him twice with his right foot in his belly and given him two strokes with a medium sized palm branch, once on his brow and once under his ear, that the deceased had lost consciousness, was carried to the district officer (*hâkim al-balad*) and had remained ill until he died as a result of the assault. The third witness declared that he was also sitting outside the court, that he had suddenly seen the deceased coming bareheaded out of the courtroom, shouting: "Be witness of this, folks!", that the qâdî had come after him, that he had struck the deceased twice with a palm branch, once on his left ear and once on his right eye, that he had kicked him twice in his belly with his left foot, which had caused the deceased to fall down, that he was carried to the district officer and that he had remained in bed until he died as a result of the assault. After consultation of the muftî, the judge who heard this case decided that the testimony of the first witness was irrelevant as he had not seen the fatal blows and kicks and that the testimonies of the second and third witnesses were contradictory and could not serve as a basis for a sentence against the defendant.[43]

Cases like these are no exception. Legion trials with the same unsatisfactory result can be found in the material. The Sharîʿa requires a standard of precision and detailedness in testimonies, that is very difficult to satisfy. A testimony with the words: "I saw the defendant here present beating a man called ʿAlî" will be rejected as the victim must as a rule be identified by his *ism thulâthî*, i.e. his given name and the names of his father and grandfather.

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[43] FM VI, p. 58 (4 Jum. II, 1277).

Not only the testimonies are scrutinized, but also the witnesses themselves. A witness must be Muslim and *ʿadl*, i.e. of good reputation. An indispensable part of the procedure is the *taʿdîl* and *tazkiya* of the witnesses who have given evidence. As a rule, this seldom causes problems. However, in one exceptional case the testimony of two witnesses was rejected because, when interrogated by the qâdî, it appeared that they were not able to recite the *Fâtiha* correctly nor any other part of the Koran (which means that they cannot correctly perform the *salâh*). In the same case the defendant failed in challenging another witness by trying to prove that on market days this witness used to visit bars and brothels, and, equally damaging to his reputation, used to eat in the street.[44]

There are more limitations, all stemming from a healthy tendency to preclude biased testimonies. However, in its rigid application, they often make it impossible to prove a case. Evidence against a party given by an enemy, or in favour of a party given by someone who is under his authority (an employee with regard to his employer, a peasant with regard to the landowner, the inhabitant of a village with regard to the village shaykh), is not admitted, nor is the testimony of those who live close by the place of the crime and who may be held responsible for the murder on the strength of the *qasâma* procedure. In the material there are quite a number of instances where the testimonies of the only witnesses to the crime were challenged for these reasons.

Conclusion

From the material in the FM it is clear that until the introduction of French law codes in 1883, the Sharîʿa was fully applied in homicide cases, side by side with secular criminal justice on the strength of enacted laws. This leads to the question of why the government maintained and supported this complicated system of dual trial and why the subjects, both Muslims and Copts, continued to bring suit before the qâdî in these cases. One could think of several explanations. In the first place, it seems that this system

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[44] FM VI, p. 543 (18 Jum. I, 1299).

had existed already for a long time in the Ottoman Empire[45] and was therefore also followed in Egypt. In the Ottoman Empire the office of the qâdî was a strong one and the Sharîʿa, supplemented by secular legislation, was almost universally and carefully applied. It is noteworthy that the Egyptian authorities, by instituting several bodies and offices for the supervision of qâdî justice, showed their reverence and concern for the correct application of the Sharîʿa. This revence is also apparent from the fact that the state did act as a party in homicide trials before the qâdî, if the victim had no heirs.

Secondly, on the level of the litigants the Sharîʿa procedure had two advantages which made them eager to submit homicide cases to the qâdî. One is the fact that according to the Sharîʿa the next of kin of the victim can play an active role in the proceedings, whereas, according to the secular, Western type laws, they are left out of the trial, unless summoned as witnesses. The Sharîʿa procedure offers them a possibility to satisfy their feelings of revenge legally. The other reason is, I believe, of a financial nature. One must not forget that the *diya* for homicide represented a considerable sum of money. For this reason people would even sue friends and relatives who, by intervening in fights on the side of the deceased, had accidentally killed him.[46]

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[45] Cf. Krcmárik, *a.c.*, pp. 565 ff. This is probably due to the strong position of Sharîʿa justice in the Ottoman Empire. In other periods of Islamic history, it was not customary that the qâdî had jurisdiction in criminal matters, these being dealt with by other state organs like the *shurta* (police). See E. Tyan, *Histoire*, pp. 601 ff.

[46] See e.g. FM VI, p. 144 (25 Ram., 1278) and FM VI, p. 156 (15 DhH., 1278).

[Footnotes]

[1] **The Transition from Traditional to Western Criminal Law in Turkey and Egypt**
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