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Published in:
State and Islam

Citation for published version (APA):

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SHARIA AND THE STATE
CRIMINAL LAW IN NINETEENTH CENTURY EGYPT

R. Peters

Introduction

For a long time conventional historiography has regarded the French occupation of Egypt (1798-1801) as a watershed in the history of Egypt. Believed to have aroused the country from slumber and lethargy and to have put in motion a process of modernization, it thus set the stage for Mehmed Ali to play his role as a reformer. Recently subject to revision, this idea has lost its general acceptance. More attention is paid nowadays to the continuity between the periods before and after the relatively brief interval of Bonaparte’s Egyptian adventure, and there is a growing awareness that the rift between the two periods is not perhaps as wide as it was believed. The changes in Egyptian society, to a great extent the result of increasing Western impact, were part of a gradual process that only began in the first half of the nineteenth century. These changes, however, affected only slightly the indigenous, Islamic traditions and institutions, which as a rule continued to exist side by side with new ones.

A case in point is the enforcement of criminal laws enacted by the state, side by side with the penal provisions of the Sharia in nineteenth century Egypt before the introduction of French law codes in 1883. The late Gabriel Baer has already studied these criminal laws, but failed to grasp the precise relationship between the two sets of rules. In this article I will examine this relationship, with the aim of shedding light on the Egyptian state’s attitude towards religious law. In this respect, the general assumption used to be that with the increasing modernization or westernization of Egypt, the importance of Sharia justice gradually diminished. Against this, I will argue that as a result of the centralization and better organization of the state, the state began to pay more respect to Sharia justice and created institutions to ensure the correct application of the Islamic criminal provisions.

Islamic criminal law

What we consider as criminal law falls under three separate headings according to the Sharia. The first category 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 with death; and for intentional wounding causing a loss of limbs or senses, with the infliction of the same injury on the perpetrator. If the death or 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, fixed at 100 camels of a certain specification or 1,000 dinars in gold or 10,000 dirhams in silver for the death of a free man. For injuries the books on fiqh contain a tariff, according to which the amount of blood-money for a specific injury is computed as a fraction of the complete blood-money. In most cases not the culprit but his aqila (solidarity group, i.e. his tribe, the soldiers of the same regiment, the merchants from the same market) was obliged to pay blood-money.

The second category, which has a certain symbolic function to present-day advocates of the reintroduction of the Sharia, consists of the crimes for which fixed penalties (hudud, sing. hadd) are provided in the Sharia. These crimes are armed robbery, fornication, theft, the drinking of alcohol, and false accusation of fornication. They are punishable with capital punishment, crucifixion, stoning to death, amputation of limbs, banishment, or flogging.

The third category of criminal provisions 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 implemented only if the stolen goods had a certain minimum value and had been taken away from a locked or guarded place (hizr). Embezzlement cannot, therefore, be punished with the hadd penalty for theft. With regard to intentional murder, the death penalty can only be enforced if criminal intent was evident from the use of a weapon (e.g. a sword or knife), a sharp instrument or fire (according to Abu Hanifa), or any generally lethal instrument (according to the other Hanafite authorities). Murder by strangling or beating with a stick cannot be classified as intentional murder since hands and sticks are not considered as generally lethal weapons. Such instances of homicide do 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 must be very strictly interpreted and the slightest doubt (shubha) prevents the application of the penalty. In hudud crimes, the withdrawal of testimonies and confessions, which is allowed 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. Therefore, a third category of criminal law was created called tazir or siyyasa, this being the exercise of discretionary powers by the ruler or the qadi to punish any sinful or otherwise...
undesirable act. This third field, although least developed with regard to the theory of law, 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 mentioned in the books on *fiqh*. Moreover, this third category permits the authorities to punish *hadd* crimes or murder if the available evidence is insufficient according to the rules of the Sharia. *Tazir* and *siyasa* are not meant to replace the Sharia and they presuppose that important offences such as homicide or the *hudud* crimes are first tried by the qadi according to the strict rules of the Sharia. However, if his verdict does not coincide with the public interest, the case can be tried again by a secular authority, such as the ruler himself, his governor, or a special court. In this new trial the strict rules of evidence of the Sharia can be disregarded. For criminal acts not punishable under the Sharia, such a secular authority constitutes the only judicial instance. In order to regulate the exercise of the powers of *tazir* and *siyasa* Muslim rulers could, and indeed did, issue criminal legislation (*qanun*). 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.

**Egyptian nineteenth century criminal legislation**

During the nineteenth century Egyptian rulers made use of their prerogative to issue legislation in criminal matters. The first to do so was Mehmed Ali who enacted the following penal laws:

1. Penal decree on 21 Rabi 1 1245 A.H./1829 A.D. concerning murder, highway robbery, forgery, theft, and embezzlement.
2. *Qanun al-Filaha* (henceforth referred to as QF) in 55 articles issued in Shaban 1245 A.H./1830 A.D.. It deals mainly with crimes and offences connected with agriculture and village life and aimed at disciplining the rural population and the officials serving in rural areas. But it also provided the peasants with some protection against the arbitrary measures of their village shaykhs and district commissioners. The *Qanun al-Filaha* forms the first part of the *Qanun al-Muntakhabat* (see under 3).
3. A number of other laws issued between 1830 and 1844 and all included in *Qanun al-Muntakhabat* (henceforth referred to as QM). They deal with the maintenance of dams and dikes (arts. 76-80, 87-97, 199), the duties of officials (*Qanun al-Siyasatnameh* also called *Qanun al-Siyasa al-Mulkiyya*, arts. 56-75, 81-86, 98-102, 195, 200, 202, 203), and a number of general crimes (arts. 122-194, 196-197 QM). Of these arts. 122-194 are rather clumsily translated from the French *Code Pénal* of 1810, arranged in a different order with little apparent system. The last section of the QM contains some articles with regard to the Alexandria prison and the execution of prison sentences (arts. 198, 201).

In 1852, during Abbas’s reign, a new penal code was promulgated with the title *al-Qanunnameh al-Sultani*. This new code was a result of negotiations between the Khedive and the Ottoman Government. The first three chapters are largely identical with the Ottoman Penal Code of 1851. To these, two chapters have been added containing provisions taken from previous Egyptian penal legislation.

**Criminal legislation and the Sharia**

The question of the precise relationship between this legislation and the Sharia is not an easy one to answer since, owing to the low level of legislative technique, these enacted laws were not very clearly drafted. Procedures and rules that were self-evident at the time to the Egyptian administrator or judge are often not mentioned at all or just referred to without further explanation. Art. 6 chap. 2 QS is a case in point. Its aim is to enjoin the qadis and state officials to cooperate in judicial matters and not to interfere with one another’s business. By way of introduction, it mentions that it is customary in Egypt that cases connected with the rules of the Sharia are dealt with by the qadis that affairs regarding the civil and financial administration are judged by state officials (*muḍiran* and *mamurun*) and that some cases are looked into by a council consisting of both Sharia judges and state officials (*mamuru l-mulkiyya*) applying the Sharia and the enacted laws (*qanun*). However, with the exception of murder cases (Chap. 1, artt. 2 and 3), the QS contains no information as to the competence of the different courts. Only by combining the bits of information to be found in these laws with archival material are we able to reconstruct the rules of criminal procedure.

One of the problems is that these laws contain provisions apparently in conflict with the rules of the Sharia. The Decree of 1829, to take just one example, specifies that murderers and highway-robbers will be condemned to forced labour for life, which is apparently contrary to the provisions of the Sharia. However, as we shall see, this does not always necessarily imply that these laws were in conflict with the Sharia. In the following, I shall review the articles from the various codes dealing with crimes mentioned in the Sharia (*jinayat* and *hudud*) and establish, with the help of archival material, the precise relationship between secular and religious justice in criminal matters.

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2 Ibn Abidin 1299: III, 259.
4 Toledano 1984: 169.
5 Baer 1969.
The jinayat (homicide and wounding)

HOMICIDE (QATL)

a. Intentional homicide (qatl amd)
The first law dealing with homicide is the decree of 1829, which reads:

Those who commit homicide (qatl) as well as highway robbers whose crimes cannot be proved [according to the Sharia], will be sentenced to the Alexandria Dockyards (luman)\(^4\) for life.

In 1844 art. 201 QM was issued:

\(\ldots\) If a murderer (qatil) has been sentenced to death according to the Sharia and the victim's heirs do not accept bloodmoney, the death penalty shall be carried out. If the heirs do not demand the death penalty, he shall be sent to Fayzoghli for life. If the heirs accept [bloodmoney], he shall be sent to Fayzoghli for two to five years after the bloodmoney has been paid. However, it is required that the murderer who has been sentenced to life [imprisonment] shall be sent to Fayzoghli, whereas the murderer who has been sentenced to a specified period [of imprisonment] shall be sent to the Alexandria Dockyards (luman). (\ldots\)

This article is included in a chapter with the title: "Decree issued by the Council of the Department of Finance with regard to the Alexandria Dockyards". It was apparently intended to modify the mode of execution of short prison sentences, substituting the Alexandria Dockyards for Fayzoghli in cases of relatively short prison terms. Further, it reflected the existing procedure in the trial of murder cases. This is corroborated by the fact that article 60 QM, enacted seven years before and dealing with murder by government officials, departed from exactly the same procedure.\(^7\)

\(^4\) The Alexandria Dockyards were used as a hard labour prison. Serious criminals were either sent to Alexandria or to Fayzoghli labour camp in the Sudan. The word luman still means prison in colloquial Egyptian Arabic.

\(^7\) Article 60 reads: "(...) If one of the government officials (al-mustakhdamin fi masalih al-miri) for private reasons kills someone or incites someone to kill a person, regardless of whether the killing takes place by beating or otherwise, shall, if the victim has heirs who do not accept bloodmoney, be condemned to capital punishment or shall be sent to Fayzoghli for life. If [the heirs] accept bloodmoney, then, after it has been collected from him, he shall be sent to Fayzoghli for his education (li-tarbiya) for two to five years."
Thus, if intentional murder was proved to the satisfaction of the qadi and he could not sentence the culprit to death, the qadi's sentence had to be sent to the Diwan of the khedive for confirmation (Chap. 1, art. 3). The Penal Code of 1852 is more explicit about the procedure to be followed. Arts. 2 and 3 of Chap. 1 lay down that in Cairo murder cases were to be tried by the Majlis al-Ahkam in the presence of the qadi of Cairo or his deputy (naib). The sentence had to be sent to the Diwan of the wali (khedive) for confirmation (Chap. 1, art. 2). When in 1859 a court of first instance was created in Cairo, the Majlis al-Ahkam began to act only as an appellate court. The Code prescribes also that in the provinces murder cases were to be tried by the provincial courts (majalis al-aqalim) in the presence of the local qadi. The qadi's sentence (ilam shari) and the record of the proceedings (madbata) were to be sent to the Majlis al-Ahkam for ratification and then to the Diwan of the Khedive (Chap. 1, art. 3). The criminal codes enacted before 1852 gave no provisions for cases where murder was indeed intentional, but the qadi could not sentence the culprit to death, either because a specific rule prevented this or because there was not sufficient proof according to the Sharia. In the past, secular authorities would convict such a suspect on the basis of siyasa and it is plausible that this practice continued. The new Penal Code of 1852 provided a legal base for the first type of cases:

If in a murder case a death sentence should have been pronounced, but [the murderer] was only sentenced to pay bloodmoney because the heirs [of the victim] pardoned [the murderer] or accepted a settlement, or if bloodmoney was due from the beginning, then [...] the murderer, after the execution of the qadi's sentence had to be sent to the Diwan of the Khedive (Chap. 1, art. 1). If someone has been killed unintentionally whereas the killer has never been involved in any other crime, he is innocent by law. The defendant, as in cases of intentional homicide, would suffer a double punishment: payment of bloodmoney and imprisonment for a period of one year.

Thus, if intentional murder was proved to the satisfaction of the qadi and he could not pass a death sentence -- because the plaintiffs had pardoned the defendant or accepted a settlement, or if a rule of Islamic law prevented the imposition of the death penalty, such as would be the case for example 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 -- the secular court could sentence the defendant to hard labour. If the murderer was an official, he could even be sentenced to death in such cases (Chap. 1, art. 1). It is evident that the law considered payment of bloodmoney insufficient penalty for homicide, the more so as many killers would not be able to pay such an amount of money. The article does not prescribe what should be done if the plaintiffs could not produce the evidence required by the Sharia (al-adilla al-shariyya), although the guilt of the defendant was established by other means (al-adilla al-siyasiyya). In these cases the existing practice was followed (cf. the text of the Decree of 1829) and art. 11 was applied by analogy. This practice was authorized by a decree of the Majlis al-Ahkam issued in Muharram 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 a defendant who was merely suspected of having committed a murder, would nevertheless be punished, but receive a lighter sentence than one whose guilt was established beyond reasonable doubt.

b. Unintentional homicide (qatl khata)
The system of trial followed in cases of intentional homicide was applied too when someone was killed unintentionally: Trial by the qadi followed by trial by the secular authorities. Art. 161 QM (corresponding with arts. 319-320 of the French Code Pénal) lays down that the culprit shall be convicted to pay bloodmoney if the act results in the victim's death and to eight days to three months imprisonment or fifty to three hundred lashes if the victim is only wounded. It is clear that this article is not complete, for what should the secular judge do if the culprit was not capable of paying bloodmoney? In such cases the judge would impose some other form of punishment -- as is borne out by the archival material. This practice seems to have been so self-evident that the Qumumeh al-Sultani (Chap. 1, art. 13) fails to mention it in the article dealing with unintentional homicide:

If someone has been killed unintentionally whereas the killer has never before committed a similar act, has a good reputation among the people and it has been established before the qadi that he is not suspected of having had evil intentions, then he shall be convicted only to what the Sharia requires. However, if he is suspected of having had evil intentions, then he must be punished with deportation (nafy) or incarceration (al-wad fi l-hadid) for the period of one year.

From the archival material it is clear that with "bad intentions" culpable negligence is meant. If this could be proved before the secular courts, the defendant, as in cases of intentional homicide, would suffer a double punishment: payment of bloodmoney...
and a prison term. If the defendant was capable of paying bloodmoney, he had to offer security for the amount. 16

Miscarriage as a result of a fight or a quarrel or induced by special potions or food is dealt with as a special form of homicide and referred to the qadi. According to the Sharia, he can sentence the one who unintentionally caused the miscarriage to the payment of the ghurra, the bloodmoney for the unborn child, amounting to one tenth of the full bloodmoney (Art. 28 QM, Chap. 5, art. 3 QS). The plaintiff would be examined immediately by a female doctor (hakima). If the case could not be proved according to the Sharia, but there was some form of evidence and the plaintiff persisted in her claim, the secular court would sentence the culprit to short prison terms of e.g. one month. In the case of induced abortion, the one who committed it could also be sentenced to imprisonment (Art. 160 QM, chap. 5, art. 5 QS).

WOUNDING (JARH)

Assault resulting in injuries (jarh) was dealt with in courts in the same way as homicide, i.e., it was subject to a double trial. The police would refer these cases first to the qadi for trial according to the Sharia. 17 After that they would be tried according to the secular laws. Both the QM and QS contain articles dealing with wounding (art. 7, 24 QF, 161, 166 QM; chap. 1, arts. 16, 17 QS). They lay down that the assailant shall be imprisoned or lashed and give rules concerning compensation for damages (medical treatment and lost income). Three of these articles mention the Sharia procedure: two in connection with the subsequent decease of a victim, in which case the procedure for homicide can be started, and only one in connection with wounding (Art. 7 QF). This last article deals with brawls occasioned by the collection of taxes and resulting in permanent bodily harm such as the loss of an eye, an ear, a nose, or a limb and lays down that the case must be referred to the qadi and that the district commissioner (hakim al-khutt) must carry out the qadi’s sentence.

The conditions for the application of qisas for injuries were even more difficult to satisfy than those for retaliation for homicide. I have only come across one case where qisas was discussed at some point during the proceedings:

During a fight between two men one of them took hold of the other’s leg. The latter fell down and broke his forearm in such a way that it seemed to

be attached to the rest of the body by the skin only. The victim was brought to the hospital where his forearm was amputated from the elbow. He then sued his adversary, who was condemned by the qadi of al-Mansura to pay bloodmoney for the loss of an arm, half of the bloodmoney of a free man. The Mufti of the Majlis al-Ahkam, whose task it was to check most Sharia sentences, noticed that, according to the facts mentioned in the sentence, qisas ought to be applied, since the act had been committed intentionally and without just cause. He immediately required that all papers of the case be sent to him. Having studied these he finally concluded that the qadi’s sentence was justified. There was no ground for the application of qisas as this, in the case of loss of limbs, is allowed only if the defendant has caused its loss from a joint. Otherwise exact retribution is impossible. The mufti reasoned that the defendant had not caused the loss of the forearm from the elbow, as the remaining part of the forearm had been amputated by a surgeon for fear of gangrene.18

In one other case where a ruling based on qisas could have been given, the plaintiff, a woman whose finger had been bitten off by another woman during a fight, finally pardoned the defendant. 19 In my sample of judicial records I have found no evidence that qisas for injuries was actually applied. My assumption is that in those cases where the terms for the application of qisas might be present, the law was interpreted very strictly or the plaintiff was induced to pardon the defendant or to accept a settlement.

In those cases where the act resulting in an injury was legally proved, but there were no terms for the application of retaliation bloodmoney for injuries would be awarded according to the classical theory. If the disability resulting from the injury was not included in the tariff lists of the fiqh books, the bloodmoney would be calculated in proportion to the loss of value of a slave that had incurred the same disability. This had to be assessed by experts -- most probably slave dealers -- during the trial. 20

The hudud

The situation regarding the application of the rules concerning the hudud crimes is less clear cut than the judicial practice concerning the jinayat. In the following I

16 See e.g. DWQ, Sin/7/10 (Majlis al-Ahkam, al-Madabit al-Sadira) sijill 25, p. 76.
17 See e.g. DWQ, Lam/4/18 (Dabiyiyat al-Iskandariyya, Qayd al-Nataj bi-Qalam al-Daawi) sijill 2 (1877/1294) contains the files of cases prepared by the police to be submitted to the Majlis. In case of injuries, the standard phrase is: “Must be dealt with according to the Sharia. Art. 6 of the supplement to the Qadis’ Ordinance (Dhayl Laihat al-Qudah) of 1274 (1857), entitled An al-aqal ala l-sar ilanatuhu bi-t-Majlis fixes the legal fees for sentences in cases of injuries: no fee in cases of qisas and one percent for a sentence awarding bloodmoney or a settlement (Lahd, 1889, QS, IV, 134).
18 DWQ Sin/7/31 (Majlis al-Ahkam, Qayd al-llamah al-shariyya), sijill 3, No 63, 22 Rab. I 1279, 5 Djam. I 1279.
19 DWQ Sin/7/26 (Majlis al-Ahkam, Sadir wa-warid qalam al-ulama al-shari), sijill 4, No 98 15 Rab. I 1275.
shall review the pertinent sections from the legislation and the judicial practice regarding the *hadd* crimes in order to find out how state legislation and the Sharia related to each other.

**HIGHWAY ROBBERY**

Highway robbery in the Sharia comprises a number of related offences, each with its own specific penalty, having in common the element of going out to a public road with the intention of holding up traffic and/or robbing and/or attacking travellers. The penalties mentioned in the Koran (5:33, 34), viz. capital punishment, crucifixion, amputation of hand and foot, and banishment, are applied according to the occurrence of other accompanying acts. If the hold-up only results in the frightening of the passers-by the punishment is banishment or, according to some authorities, imprisonment. In case of robbery without homicide, the perpetrator's right hand and left foot are cut off. If the hold-up ends in homicide, without any property being taken, the culprit will be executed by the sword. If, finally, there is loss of both life and property, the robber will be both "crucified" and "put to death". There is some controversy as to how to combine these two penalties. Some hold that the condemned must first be crucified and then, after some time, put to death. Others argue that crucifixion here means exhibiting the body of the robber after his execution. If the author repents before he is apprehended, the punishment for highway robbery lapses, but not those for other crimes he has committed during the event, such as theft, homicide, or inflicting injuries.

The Decree of 1829 lays down that highway robbers (*qutta al-tariq*), whose crimes cannot be proved [according to the Sharia] will be sentenced to be sent to the Alexandria Dockyards for life. Since highway robbers are mentioned together with murderers there is reason to believe that if highway robbery with murder was proved according to the Sharia, the culprit would be convicted to capital punishment as was the case with murderers. The wording of art. 201 QM (issued in 1844) is too brief to give more clarity: "(...) As to highway robbers and counterfeiters, they shall be sent to Fayzogli for life(...)". The QS, however, is more explicit:

If highway robbers (*qutta al-tariq*) have not killed but only taken away goods, they shall be punished with seven years imprisonment. However, if they have killed someone and this is proved against them in the investigation, then their punishment is death in conformity with the Sharia. (Chap. 1, art. 9.)

From the texts it is not clear whether highway robbers were to be tried by the qadi or by secular courts. My impression is that highway robbers who had committed a murder would first be tried by the qadi for homicide and then, if the qadi had not pronounced a death sentence, by a secular court for highway robbery, whereas, if no blood had been shed, the robbers would be tried directly by the secular courts. This impression is based on the absence of highway robbery cases in my sample of Sharia court records and on Lane's remark that in his time (around 1830) amputation was not applied as punishment. That the law of homicide was applied before the qadi rather than the rules with regard to highway robbery with murder had to do with the procedural complications arising from the provisions concerning highway robbery. The most important of these is the rule that the defendant can retract his confession at any moment before the execution of the punishment, thereby nullifying his conviction if this was based solely on his confession. The following fatwa (dated 19 Rabi 1, 1297 A.H./30 March, 1880), which was issued after a qadi had given a sentence based on the *hadd* punishment for highway robbery with murder, illustrates this point and makes it clear that the higher judicial authorities preferred to apply the rules of homicide:

Three men attacked someone to rob him. During the assault, one of them hit him with a sword, another shot at 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 qadi 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 be carried out only on the strength of an order of the Khedive, the Khedive, before issuing the order in this case, 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 either by eyewitnesses of the original crime or by witnesses testifying to the culprits' previous admissions.

In one murder case where there were terms for a conviction for highway robbery with homicide the qadi applied the rules for simple murder. The local mufti then suggested that the rules of highway robbery be applied to save time. For one of the heirs of the victim was pregnant and according to the law of homicide the execution of the murderer had to be postponed until she had given birth, as the baby's gender would determine who would inherit and give their consent to the execution. The mufti of the *Majlis al-Ahkam*, however, did not accept this view and the *Majlis al-
Ahkam ruled accordingly. This case then confirms the impression that highway robbery resulting in homicide would be dealt with first by the qadi as murder and then tried by a secular court on the strength of the enacted law. Highway robbery resulting only in the taking of property would only be tried according to the laws of the state.

THEFT

The definition of theft is in the Sharia much narrower than in Western systems of law. In the fiqh the following elements are mentioned: the taking away by stealth of a movable object with a value higher than a certain minimum (nisab), in which the perpetrator has no right of ownership, out of custody (hirz, i.e. a properly secured or guarded place). This definition excludes e.g. open robbery (because the stolen good is not taken away by stealth) and embezzlement (because the stolen good is not in a properly secured place). The punishment for theft is the amputation of the right hand and, in case of a second offence, the left foot.

During Mehmed Ali’s rule amputation as a punishment for theft does not seem to have been put into practice. At the occasion of describing the Koranic punishment for theft, and the additional punitive amputations for second and third offenders, Lane observes: "In Egypt, of late years, these punishments have not been inflicted. Beating and hard labour have been substituted for the first, second, and third offence, and frequently death for the fourth". The first legislation on theft, the Decree of 1829, is not very specific:

"Persons who commit theft, regardless of whether it is proved or not proved by decisive evidence, will be sentenced by the Majlis Mulki Ali, after the necessary investigation, to what the Majlis sees fit."

Lane’s observation that in his time the punishment for repeated offenders was death is corroborated by art. 197 QM, issued in 1844, laying down that henceforth “professional” thieves (“If a thief is an inveterate robber, has taken up robbery as a custom, and has committed evil acts like highway robbers...”) must not be executed but sent to Fayzogli for life. The other articles in the QM dealing with theft (169-172) are adopted from the French CP and contain no reference whatsoever to the Sharia.

"For theft cases that cannot be proved according to the rules of the Sharia, and wherein the value of the stolen goods is more than the minimum value required for the application of the hadd punishment (nisab) ..., [the thief] will do forced labour in chains for a period of three months to three years according to the value of the goods taken..."

In addition to this article, a decree was issued in 29 Jumada II, 1277 H (1861) to the effect that second offenders would be punished with lifelong imprisonment. In view of the earlier legislation dating from Muhammad Ali’s time, this new decree would appear to confirm standing practice.

The Sharia court records indicate that as a rule theft cases would be first tried by the qadi. He would settle the property claims with regard to the stolen goods and see that these were returned to the rightful owner. This would be done in court -- the records mention that e.g. the stolen cows or donkeys were present during the session -- and then, in order to prevent the application of the hadd punishment, the plaintiff would declare that he had no claims against the defendant. Often the qadi would expressly mention in his verdict that therefore there were no terms for amputation. This, however, did not exclude tazir-punishment and sometimes the qadi would condemn the thief to a tazir punishment of 39 lashes. I have not been able to find out if there was any policy behind the application of tazir in theft cases. After the trial before the qadi, the secular court would try the thief again according to the state laws.

I have only come across one case where a qadi, at the instigation of the local mufti, has condemned a defendant in a theft case to amputation. The judgement, however, was not confirmed on appeal. The case is illustrative in that it shows how reluctant the judicial authorities were in enforcing the punishment of amputation.

Two men had forced access to a storehouse of a country estate by removing the bricks closing off an opening in the wall and had stolen from it one ardabb (198 liter) and eight kaylat (132 liter) barsim seed. The men were apprehended and confessed to having taken the seed from the storehouse. At the trial before the qadi only the property claim was dealt with. Of the stolen seed one ardabb was returned to the owner during the session and the defendants promised to return the rest after they would have gained their village. The plaintiff agreed and the qadi gave judgement accordingly. When the sentence was submitted to the provincial mufti (mufti al-mudiriyya) he pointed out that no attention had been paid to the criminal aspects of the case and that the hadd punishment ought to be applied with regard to the..."
part of the seed that had not been returned during the session. The case was referred back to the qadi who then on the strength of this fatwa sentenced the two defendants to amputation. The case was then put before the Court of Appeal of the Northern Region (Majlis Istinaf Bahri). The ulama of the Majlis first examine the sentence and come to the conclusion that it cannot be upheld for three reasons:

1. In the plaintiff's claim and the defendant's confessions the word "taking" (akhadha) was used and not "stealing" (saraqa). This constitutes a well-known uncertainty (shubha), which prevents the application of the hadd penalty.

2. The sentence does not mention whether the remainder of the seed still exists or not, e.g. because it has perished or been consumed. If the seed does not exist any more, the hadd punishment cannot be enforced since the plaintiff then does not claim the originally stolen goods but only their replacement (badal).

3. The sentence does not mention whether the eight kaylat had been taken out of the storehouse at once or in smaller portions. This is also relevant for the application of the hadd penalty [as the possibility exists that none of the portions amounted to the value of the nisab. RP]

The qadi and the provincial mufti are told that "they ought to be very cautious with regard to this kind of judgement" and only venture to pronounce it after reaching complete certainty "because in a case like this no sentence of amputation is to be pronounced in this way [by only] dipping the fingertips in the sea of Abu Hanifa's jurisprudence." In a long exposé the qadi defended his sentence and then the papers were sent to the "Diwan", a further undefined higher judicial authority.

The outcome of the case is not known to me, but it is highly unlikely that the qadi's sentence has been carried out. This case shows how meticulously the Sharia was applied in trials involving hadd penalties: so meticulously that a sentence of amputation is to be pronounced in this way by [only] dipping the fingertips in the sea of Abu Hanifa's jurisprudence. If the culprit has had lawful intercourse before, he or she is then called muhsan(a), and the punishment is death by stoning. For a conviction in case of unlawful intercourse, the Sharia requires stricter proof than for the other hadd crimes: the act must be proven by four confessions pronounced at different occasions or the testimony of four male Muslim eye witnesses of good reputation.

Interestingly, none of the criminal laws enacted in 19th century Egypt mentions punishment for fornication (zina). Actually, prostitution was tolerated during most of the nineteenth century and at times even taxed by the state. Art. 16 QF only mentions (illegal) defloration and refers its trial expressly to the qadi:

"If someone . . . [illegally] deflowers a girl, his case will be referred to the Sharia because this belongs to what should be dealt with according to the Sharia. If the Sharia judge (hakim shari) passes a verdict, the secular authorities (hakim urfi) must carry it out on the strength of the written sentence."

The Qanunnameh Sultanii contains no comparable article. In practice morality cases, mainly illegal defloration, belonged in the first place to the qadi's competence. I have found only one morality case which was not based on defloration. Unfortunately it was only summarily recorded and did not mention more than that the defendant was condemned to a hadd punishment of 100 lashes for violation of honour. In view of the number of lashes and the express mention of hadd punishment, it must have been a case of unlawful sexual intercourse committed by a man who was not muhsan.

All the other cases in my sample were about illegal defloration. This was in the first place considered as a form of injury for which an indemnity was to be paid to the amount of the brideprice a comparable woman would receive if she married (mahr al-mithl). The exact amount, was as a rule subject to negotiation. In order

25 Decree of Ministry of Interior (Dakhiliyya) of 20 Muh., 1297 (3 Jan. 1880) to the effect that theft cases were henceforth not to be referred to the qadi, but to be dealt with by the secular authorities on the basis of qanun and that the property claims were to be settled before the qadi only after the state authorities had investigated the matter. Jallad 1990-5: IV, 145.
27 Ch. 2 art. 1 mentions "violation of honour" which can also imply sexual assault. However the text of the article defines it as insulting language, beating, and abuse.
28 DWQ, Sin/7/31 (Majlis al-Ahkam, Qayd al-ilamat al-shariyya), sijill 1, No 24, 4 Safar 1270.
29 See e.g. DM, Makhzan 46, ayn 22 (Makhkamat Mir al-Ibtidaiyya al-Shariyya, Dabiyyat al-murafaqat), sijill 1238, p. 84, 17 Rab. 1 1283, where the woman claimed 12,500 piaster as her mahr al-mithl since her cousin had recently been married for that amount, but was awarded only 2,500 since the
to stress the involuntary character of the loss of the hymen the plaintiffs in these cases would as a rule claim that intercourse had taken place in their sleep or after they had been drugged. For obvious reasons the plaintiff could only win the case if the defendant was willing to confess. If he did, he would typically admit that he had deflowered the girl with his finger so as to avoid prosecution for zina. Often the qadi would condemn the defendant to tazir punishment of flogging. After the trial before the qadi, the secular court would also look into the case and convict the defendant to a prison term, if the gravity of the act would require this.32

CALUMNY

If someone accuses another person of having had illicit sexual relations and cannot furnish the evidence required for a conviction, he is liable according to the Sharia to be punished with eighty lashes and, in addition, with the loss of the right to bear testimony in court. The QF does not expressly mention the Koranic crime of calumny (qadhf), i.e. the unfounded accusation of fornication) but refers all cases of violation of honour to the qadi (art. 16), who would deal with it on the basis of tazir, unless, of course, qadhf could be proved and the hadd punishment could be imposed. The QS is more explicit in this respect:

...Since calumny (qadhf) by means of words violating a person's standing and prestige, or beating or abusing him without any provocation is regarded as a violation of his honour and a defilement of his respect, therefore he who has been proved according to the rules of the Sharia to have committed a violation of honour which requires a hadd punishment, shall suffer the hadd punishment according to the Sharia. (Chap. 2, art. 1)

In the sample of court records I have found one case where the hadd punishment for calumny was imposed and carried out during the session:

A woman had run away from her husband and gone to live with her father. When the husband, after some time, came to visit her father to talk about a reconciliation, his father-in-law reproached him for not having paid attention to his wife, in spite of her being pregnant. The man became angry and retorted that he had not made her pregnant and that the child was someone else's. The woman sued him and could prove her words, on the strength of which he was condemned to eighty lashes.33

The next article (Chap. 2, art. 2) imposes tazir for these acts (if not punishable by hadd), and specifies, in conformity with the classical theory of fiqh, that the punishment varies with the rank of the culprit.34 The Qadi's Ordinance of 1856 also mentions that violation of honour in the form of abuse, brawls, and fights belonged typically to the qadi's competence. The overwhelming majority of cases of this kind concern abuse, often between women. These records are amusing to read since they mention the exact, often rather obscene words that had been used. Brawls were also dealt with by the qadi. If abusive language or fighting could be proved, the qadi would condemn the defendants to tazir. In two cases the abusive language was also an insult to religion. A Copt had shouted at a Muslim woman who wanted to sue him before the qadi: "I don't give a tinker's damn about your Sharia!" He was sentenced to tazir and, contrary to the usual procedure, handed over to the administrative authorities for carrying out the punishment, which was further not specified.36 In another case a man had shouted at two other persons: "May God curse your religion!" The qadi condemned the defendant to 39 lashes and 10 days imprisonment.37

DRINKING ALCOHOL

The Koran forbids Muslims to drink wine. Tradition has fixed its punishment at forty or eighty lashes. Opinions vary with regard to other alcoholic beverages and drugs. Some authorities hold that these must be equated to wine, whereas others maintain that their consumption can only be made punishable on the basis of tazir.

32 See e.g. DWQ, Sin/7/31 (Majlis al-Ahkam, Qayd al-ilamat al-shariyya), sijill 3, No 253, 17 Rajah 1279.
33 DM, Makhzan 46, ayn 142 (Mahkamat al-Mansura al-Ibtidaiyya al-Shariyya, Madabit al-muraafaati), sijill 281, p. 19, 6 DH 1273.
34 The article specifies that notables will be brought before the Majlis al-Abham to receive a fitting punishment (a reprimand), people from the middle classes can be punished with banishment (nafy) or imprisonment, whereas people from the lower classes can, in addition to banishment and imprisonment, be lashed with three to 79 lashes. This is in conformity with the classical Hanafite theory. Cf. Ibn Abidin 1299 H.: II 246.
35 See e.g. art. 28 of the Annex to the Qadis' Ordinance (Dhayl Laihat al-Qudah) of 1856 laying down that a qadi may not demand legal fees for helping parties (plaintiff and defendant) involved in a trial for beating, exchange of abuse or calumny arrive at a settlement, nor for a sentence based on tazir or hadd or qadhf. The list of legal fees issued in 1876 (Jallad 1890-5: iv, 141 f) states that: "A fee of 5 to 50 piaster is collected for settlements in cases of beating, insults or calumny. (...) For sentences based on hadd or tazir no fees are due." (art. 64).
37 See e.g. art. 28 of the Annex to the Qadis' Ordinance (Dhayl Laihat al-Qudah) of 1856 laying down that a qadi may not demand legal fees for helping parties (plaintiff and defendant) involved in a trial for beating, exchange of abuse or calumny arrive at a settlement, nor for a sentence based on tazir or hadd or qadhf. The list of legal fees issued in 1876 (Jallad 1890-5: iv, 141 f) states that: "A fee of 5 to 50 piaster is collected for settlements in cases of beating, insults or calumny. (...) For sentences based on hadd or tazir no fees are due." (art. 64).

unless drunkenness results, in which case the hadd punishment applies. Some argue that the consumption of alcoholic beverages other than wine is allowed in quantities that do not produce inebriation.

In nineteenth century Egypt the state authorities had a tolerant attitude towards alcohol. It was allowed to be drunk at home or in bars and the government collected a special tax on spirits. Mehmed Ali’s penal legislation does not include any offence connected with the drinking of alcohol or drunkenness. The Qanunnameh al-Sultani of 1852 was more explicit about it (art. 5, chap. 2 QS):

A drunk who is quarrelsome and molests and assaults people in the markets and other places shall suffer the hadd punishment after his drunkenness has been proved according to the Sharia.

In my sample of qadi’s records I have found no cases of drunkenness. Moreover, it seems that the police authorities, at least in Cairo, did not prosecute or punish drunks.

The state’s attitude towards the Sharia

From the above it is clear that during the nineteenth century Sharia justice continued to play an important role in criminal matters. This is especially true for homicide and wounding (jinayat) and to a lesser extent for hadd crimes. That in trying the first categories of crimes the Sharia was meticulously followed can be attributed, I believe, to the fact that jinayat give rise to private claims. Many of the provisions of the Sharia concerning homicide serve the purpose of giving the victim’s heirs their due, rather than seeing to it that the murderer is punished. The victim or his heirs were first given a chance to take revenge by means of a legal procedure or claim a financial compensation and only if the outcome was unsatisfactory in view of the gravity of the offence and the public interest, would the state take action.

With regard to the enforcement of the provisions concerning hadd crimes by the qadi, it would seem that these were mainly applied where private claims were involved: theft, unlawful intercourse resulting in defloration, violation of honour (insulting behaviour, defamation, abuse and fighting). In first instance, the qadi would give judgement regarding these private claims, and, if there were terms for applying the hadd provisions, he would deal with the facts from this angle. However, only seldom would this result in a conviction to a hadd punishment, and then only if the hadd punishment would consist in flogging. More often the outcome would be a tazir punishment, usually flogging, meted out during the court session. That so few convictions to hadd punishment were pronounced is due to the fact that the definitions and the rules of evidence were so complicated and impractical that in practice few offenders could ever be convicted. Moreover, it would seem that the authorities were reluctant to apply mutilating punishments and that in these cases, as opposed to cases were only flogging was at stake, the law was applied so meticulously that it was impossible to reach a conviction.

So with the exception of some hadd crimes the penal provisions of the Sharia were fully applied in nineteenth century Egypt. And what is even more significant, most of the criminal legislation enacted in this period fitted very well in the framework of the Sharia, as it was in fact legislation based on tazir and siyasa. On the whole one cannot but conclude that the State gave the Sharia due respect. This is evident not only from the legislation enacted in 1856 and 1880 with regard to the organisation of Sharia justice, but also on other scores. One of these is that the state and its organs took trials before the qadi very seriously. Another is that the State from time to time issued decrees with regard to the application of the Sharia. And finally, especially during the second half of the century, it created organisational structures to ensure the correct application of the Sharia.

Trial before the qadi, especially in murder cases, was a serious affair for the authorities. The police or local authorities were responsible for collecting the evidence for the Sharia trial. If necessary, they would go to great length in their search for a victim’s heirs in order to obtain the depositions required by the rules of the Sharia. This could involve a lengthy correspondence continuing in some cases for months. As a murder trial could only be initiated by a claim of the victim’s heirs, the local authorities were responsible for ensuring their appearance in court together with the suspect and the witnesses. In the absence of heirs to act as plaintiffs, the State authorities would, according to the rules of the Sharia, take their place and decide the suspect’s fate by demanding his life, settling for bloodmoney, or pardoning him.

According to the classical doctrine of fiqih, the state must abide by the Sharia and has no authority to change the prescriptions of the sacred law. It can, however, ...

38 Toledano, 1990: 244-7.
nary power given by the Sharia to the state to punish sinful and undesirable behaviour. Until the introduction of the French law codes in 1883, the criminal provisions of the Sharia were nearly fully enforced by the qadis and the state (the latter being responsible for the execution of the qadis’ sentences). That certain hadd punishments like amputation or lapidation were not carried out in practice, did not mean that the relevant provisions were not applied, but only that they were applied very meticulously. The state took the qadi’s justice very seriously. In spite of the increasing modernization of the country, one does not observe a tendency to abandon the Sharia. To the contrary, with the better organization of the Egyptian state apparatus, Sharia justice during the second half of the nineteenth century, became better organized too by means of clearer legislation, the regulation of the function of the mutfi, and the creation of procedures to watch over the qadis’ decisions. But this development came to a halt when French law came to replace the Sharia in most fields in 1883.

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The published texts of the nineteenth century Egyptian criminal laws

The first criminal decree, issued by Mehmed Ali on 21 Rabi I, 1245 (1829), was published in Zaghlul 1900: 163-4. The Qanun al-Filaha, which was actually a collection of the penal provisions contained in the Layhat ziraat al-fallah, introduced a monarchical earlier, and subsequent penal codes were collected and printed in a separate booklet under the title al-Qanun al-Muntakhab in 1261 A.H./1845 A.D. (Baer 1969: 110, 112). The articles are numbered consecutively. The text is published in Zaghlul 1900: app., 100-155 and Jallad 1890-95: III, 351-378. Both versions are identical. In this article I have used the abbreviation QM to refer to this code. In 1265 A.H./1849 A.D. a General Law that had been issued in 1259 A.H./1844 A.D was published. It contains a summary of Mehmed Ali’s penal legislation and lists the

I have argued this point in detail in Peters 1991.
same crimes and offences as the *Qanun al-Muntakhab*. There is, however, some difference in the penalties (Sami 1928-36: III, 1, 22; Baer 1969: 113). I have not been able to find a copy of this law. The *Qanunnameh al-Sultani* has been published in two identical versions in Zaghlul 1900: app., 156-178 and Jallad 1890-95: 11, 90-102. Jallad also gives the administrative regulations issued together with the Code (pp. 102-111). In this article this Code is referred to as QS.

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