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URIEL HEYD

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ḲĀNŪN AND *SHARĪʿA* IN OLD OTTOMAN CRIMINAL JUSTICE

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I

THE CRIMINAL LAW of the *sharīʿa*, as is well known, never had much practical importance in the lands of Islam. Its substantive law is rather deficient: fixed penalties are prescribed for a limited number of crimes only, many are not dealt with at all. Moreover, its rules of evidence are so strict that a number of offences cannot be punished adequately.[1]

Since the very first centuries of Islam, therefore, criminal justice remained largely outside the jurisdiction of the cadis. A wide range of crimes and misdemeanours was examined and punished by the head of the police (*ṣāḥib al-shurṭa*, *walīy al-jarā'im*, etc.), while the *muḥtasib*, or inspector of the market, dealt with trade contraventions and offences against Islamic morals. To check oppression by officials, to correct denials of justice and repress wrongdoers whom the cadis were unable to restrain, the caliphs instituted Courts of Complaint, the famous *maẓālim* jurisdiction which, in Ibn Khaldūn's definition, 'combines the power of the sovereign's authority with the justice of the cadi's judicature.'[2] The *maẓālim* courts were secular institutions, headed by the ruler, a vizier, governor or Palace official. Though often attended by cadis, they were distinct from the ordinary law courts in which the cadis administered justice according to the religious law.

All these extraordinary jurisdictions were free from the rigid rules of the *sharīʿa* penal law and criminal procedure, and were guided in the main by customary law (*'urf*), the public interest (*al-maṣlaḥa al-'āmma*) and, in particular, the consideration of administrative and political expediency

1 Full references to the sources quoted in or used for this paper will be found in the author's work, *Studies in Old Ottoman Criminal Law*, which is soon to be published in English.

2 Ibn Khaldūn, *Muqaddima*, Beirut 1900, p. 222.

(*siyāsa*). In trying to elicit the truth, they often used intimidation and even force. The punishment awarded may have been effective, but it tended to be arbitrary and excessively severe.

The Ottomans maintained these jurisdictions side by side with the cadis' law courts (*maḥkeme-i şer'īye*). David ben Zimrā, a Jewish rabbi in Ottoman Egypt in the first half of the sixteenth century, remarked in one of his responsa:

> ...They have two kinds of justice, the one *shar'ī* and the other *'urfī*. The *shar'ī* justice is entrusted to the chief cadi who decides [according to] the religious law [Hebrew: *dīn*] and the governor is charged with carrying out [his] sentences. The *'urfī* justice, [on the other hand,] which is [based on] a kind of temporary regulation [*hōrā'ath shā'āh*], is entrusted to the governor of the province.[3]

The Ottoman Sultans, however, made great and, at first, partly successful efforts to eliminate this dichotomy in regard both to the two separate jurisdictions, the administrative and the judicial, and to the two different systems of law, the customary and the religious. The efforts were made simultaneously in several directions.

First, by laying down the law which they had to apply, the Sultans tried to limit the discretion of the non-*sharī'a* judges to inflict punishment at their will. For this purpose, the Sultans did something unprecedented in Islam — they promulgated comprehensive and detailed regulations (called *ḳānūn*) of secular criminal law and procedure, and gave orders to assemble them in the form of codes known as *ḳānūnnāme*.

No similar acts of legislation are known from any other Muslim country outside Anatolia before the process of Westernization began in the nineteenth century. Customary criminal law different from the *sharī'a* existed in North Africa, South Arabia, Indonesia and many other parts of the Muslim world, but nowhere was it officially promulgated, like the Ottoman *ḳānūn*, in the form of codes. The only parallel that I can cite, in addition to the Dulkadır codes to be discussed, is much later and much more limited in scope — a kind of penal code issued in 1672 by Aurangzēb, the Muslim ruler of India.[4] This surely is no coincidence. The Mogul Empire, the only other great Sunnī Muslim power from the sixteenth to the eighteenth century, was, like the Ottoman, a centralistic, well-organized and

3 R. David b. Zimrā, *Shĕ'ēlōth u-Tĕshūvōth* (שאלות ותשובות), Venice 5509 (1748/9), I, fol. 53v, No. 296 (attention was drawn to this passage by I. Goldziher, *Die Zâhiriten*, Leipzig 1884, p. 205, n. 4).

4 See Ali Muhammad Khan, *Mirat-i-Ahmadi*, I, Baroda 1928, pp. 277–283 (Persian text); J. Sarkar, *Mughal Administration*, Calcutta 1935, pp. 125–132 (English translation).

military state with a very large non-Muslim population and institutions largely based on Turco-Mongol traditions.

The authorized Ottoman justification for the issuance of *ḳānūn*s in the field of penal law is twofold and reflects clearly the dual character of these regulations. On the one hand, the lengthy preface to the *ḳānūnnāme* of Egypt of 1525,[5] hitherto unpublished, points out that, in the course of time, crimes have multiplied to such an extent that 'disputes and feuds can no longer be decided by the swords of the tongue [*tīġ-i zebān*] of the guardians of the holy law [i.e., the cadis], but require the tongue of the sword [*zebān-i tīġ*] of those empowered to inflict heavy punishment [i.e., the non-*sharī'a* judges]'. Therefore, the preface goes on, the Ottoman Sultans have, since olden times, laid down regulations (*ḳānūn*) in conformity with the *sharī'a* and anyone who commits a crime is to be punished in accordance with them.

On the other hand, several other *ḳānūnnāme*s embodying criminal law affirm that the codes were issued in response to the complaints of the people about the tyranny of the local officials and fief-holders. A marginal note in one manuscript[6] pithily sums up this concept by defining the object of the *ḳānūn*s as *ḥimāyat al-ra'īya min maẓālim al-ḥukkām* (to protect the common people against the oppression of the authorities), a formulation which, incidentally, indicates the continuity of the idea of *maẓālim* jurisdiction.

To achieve this aim, orders were given to bring the contents of the *ḳānūnnāme*s to the knowledge of the people, sometimes by way of reading them out at public places. Every subject of the Sultan had the right to ask a Government office or a law court to let him have an official copy of any such code on payment of a fee statutorily fixed.

II

The oldest Ottoman *ḳānūnnāme* that so far has come to light is the text published in 1921, with a German translation, by Fr. Kraelitz-Greifenhorst from a unique manuscript in Vienna.[7] (Astonishingly, no copy of this important document has been preserved in any Turkish archive or library.) There is no reason to doubt that the first chapters of this *ḳānūnnāme*, with many criminal regulations in them, were compiled in the time of Meḥemmed the Conqueror in the second half of the fifteenth century; some of its statutes may be even older. It can, however, be proved that Kraelitz and others were wrong in assuming that the same applies to the

5 Aya Sofya Kütüphanesi, Istanbul, MS 4871, foll. 118v ff.

6 Üniversite Kütüphanesi, Istanbul, MS T 1807, folio preceding fol. 1r.

7 *Mitteilungen zur osmanischen Geschichte*, I, Vienna 1921, pp. 13–48.

last chapter, dealing with non-Muslim subjects. This seems to be a separate *ḳānūnnāme* issued in 1488, i.e., in the reign of Meḥemmed's son and successor, Sultan Bāyezīd II. Its most interesting penal statute prescribes the henceforth basic and, at first sight, somewhat surprising rule that non-Muslims shall pay only half of the fines imposed on Muslims for identical offences. Accordingly, special criminal codes were enacted for several Christian provinces, such as the island of Cephalonia, which was in Ottoman occupation in the years 1479–1500, and, soon afterwards, the province of Montenegro.

At about that time, it seems, a further stage of development was reached. The original penal code was enlarged by an additional chapter. While, in the earlier codes, the penalties prescribed are almost exclusively fines and *ta'zīr*, i.e. (in Ottoman usage) strokes, the supplementary statutes impose *siyāset*, i.e., capital or severe corporal punishment; they also regulate criminal procedure to some extent. Originally, they appear to have formed a separate code, a so-called *siyāsetnāme*. As such, this used to be sent out, in the form of an imperial decree in *nişān* form, to governors and other holders of large fiefs (*ḥāṣṣ*), but not to cadis, though cadis are called upon to collaborate in its execution.

The result of the addition of the *siyāsetnāme* to the penal statutes of Meḥemmed II's *ḳānūnnāme* is the criminal code which forms the first part of the well-known *Ḳānūnnāme-i Āl-i 'Oṣmān*. This deals with a variety of offences — fornication, homicide, wounding, the drinking of wine, theft, abduction, arson and many others — and, as previously stated, includes regulations on criminal procedure. Its text was published in 1913/4 in the *Ta'rīḫ-i 'Oṣmānī Encümeni Mecmū'ası* as the *Ḳānūnnāme* of Sultan Süleymān the Magnificent (*Ḳānūnī*) and it has since been generally accepted as having been compiled in his reign.

This attribution, however, is erroneous. There can hardly be any doubt that this *ḳānūnnāme*, of which many copies are found in Turkish and European libraries, originated in the time of Süleymān's grandfather, Bāyezīd II. In a private library in Turkey there is a manuscript of the text written in 1501, i.e., in Bāyezīd's reign, and an official copy is preserved in a cadastral register compiled by order of Sultan Selīm I in 1516.

This does not mean, however, that Sultan Süleymān does not deserve his epithet *Ḳānūnī* as far as criminal law is concerned. In fact, a new penal *ḳānūnnāme* came into existence in his reign. Its oldest copy found so far, a manuscript in the Cambridge University Library,[8] is dated 1545. It may have been compiled by the famous *nişāncı* Celālzāde Muṣṭafā Çelebi, possibly during the grand vizierate of Luṭfī Paşa, author of the *Āṣafnāme*,

8 MS Dd. 11.20, foll. 103v–109v.

in 1539–1541. This code, which I hope to publish soon, is considerably larger than those of Meḥemmed II and Bāyezīd II. The many additions are not mere elaborations of the older law but include regulations in fields not covered by it, such as sodomy, false evidence and counterfeiting, as well as certain offences dealt with by the *muḥtesib*, such as taking exorbitant interest (i.e., more than 10–15 per cent), non-attendance at the Friday prayer and non-observance of the fast of Ramaḍān, and immoral conduct. Moreover, it is composed differently. The division between offences punishable with strokes and/or fines and those entailing capital or severe corporal punishment has been abolished, and the statutes are arranged more systematically according to crimes. Another difference is lexicographical. The new *ḳānūnnāme* uses Arabic terms where most of the older ones had Turkish words, e.g., *ġanīy* for *bay* (rich), *yemīn* for *and* (oath), and *cāriye* for *karavaş* (female slave).

The last Ottoman criminal code to be compiled before the *Tanẓīmāt* period was the work of a clerk in a *sharī'a* law court in the seventeenth century.[9] Though this is the most comprehensive code in existence, with about a hundred statutes, it lacks uniformity and conciseness and, most important, is devoid of the official character of the earlier *ḳānūnnāmes*.

III

Besides the codes discussed so far, there are some penal regulations in other Ottoman *ḳānūns*, such as the *ḳānūn-i iḥtisāb* dealing with market offences, the *ḳānūns* on military organization and on mines, as well as several provincial *ḳānūnnāmes*.

In many Muslim provinces conquered in the early sixteenth century, the Ottomans at first confirmed local secular law, which dealt mainly with fiscal matters (taxes, tolls, custom duties, etc.) but also included criminal regulations. This they did so as not to uproot local usage and, above all, not to disorganize the economic life of the new provinces. After a short period of transition, however, the Ottoman Sultans, while preserving some of the fiscal regulations of the previous rulers, prescribed that in criminal matters the *Rūm*, i.e., the Ottoman, *ḳānūn* should be applied. As reason for this change, they emphasized the need to abrogate many *bida'*, i.e., illegal and oppressive innovations, introduced by those previous rulers, and to alleviate the plight of the population by reducing onerous impositions, including harsh fines and other penalties for criminal offences.

The outstanding local laws preserved in the first period of Ottoman occupation were the *ḳānūns* of Sultan Ḳā'itbāy in the hitherto Mamlūk

9 Belediye Kütüphanesi, Istanbul, M. Cevdet, MS K 223, foll. 4v–12v (and other MSS).

provinces, those of Uzun Ḥasan in the former Akkoyunlu territories and, especially, the penal code and lists of fines of the Dulkadır dynasty.

This Türkmen clan had gradually established its rule over a wide region of south-eastern Anatolia after the death of Abū Sa'īd, the last powerful Ilkhān ruler, in 1335. Forming a kind of buffer between the Mamlūk Sultanate of Egypt and the Ottoman, Akkoyunlu and finally the Ṣafawī States, its dominions were conquered by Sultan Selīm I in 1516 and formally annexed to the Ottoman Empire a few years later.

The Dulkadır penal code, of which two versions were copied into Ottoman cadastral registers, has been published by Ö. L. Barkan.[10] This is the only source of non-Ottoman Turkish criminal law from Anatolia that has survived. In many respects it is similar to the early Ottoman codes, but generally it imposes more severe penalties and in some matters reflects a surprisingly higher development of legal thought. Unfortunately, it is not dated, and there is no clear internal evidence pointing to the date of its compilation. Of course, the fact that one version is called *Ḳānūn-nāme* of 'Alā' al-Dawla, the Dulkadır ruler in 1479–1515, does not exclude the possibility that the code, or parts of it, are older. It is thus difficult to come to a definite conclusion whether it influenced the Ottoman criminal *ḳānūn* or *vice versa*, or whether both came from a common source.

The whole problem of the origin of the Ottoman penal law has yet to be solved. The Byzantine law and the Serbian code of King Stephan Dušan of the mid-fourteenth century may be reflected in certain Ottoman fiscal and feudal regulations. But, for various reasons, it seems improbable that they had any major influence on Ottoman criminal law, except perhaps in the sphere of monetary fines, the Serbo-Croat *udava*. It is more likely that the sources of the penal *ḳānūn* should be traced to older Turkish traditions and, as far as the general concept of a written secular law is concerned, to the law of the Mongol Empire and its successor States in western Persia, Iraq and eastern Anatolia. It may be significant that some of the Ottoman *ḳānūnnāmes* for provinces formerly ruled by Uzun Ḥasan are called *yasa*, the name of the famous code of laws of Chingīz Khān, which, according to Mamlūk historians, enjoyed high prestige even in Muslim countries beyond the Mongol Empire.

According to an Ilkhānid firman written in Persian and copied in a fourteenth-century *inṣā'* work,[11] criminals were to be punished *bär väjh-i shärī'at vä-yāsā* (in accordance with the religious law and the *yasa*), a

10 Ömer Lûtfi Barkan, *XV ve XVI ıncı asırlarda Osmanlı İmparatorluğunda ziraî ekonominin hukukî ve malî esasları*, I: *Kanunlar*, Istanbul 1945, pp. 119–129.

11 Muḥammad b. Hindūshāh, *Dastūr al-Kātib fī Ta'yīn al-Marātib*, Süleymaniye Kütüphanesi, Istanbul, MS Fatih 3763, fol. 376v.

formula which survived in Ottoman decrees in the form of *ṣer'* *ve ḳānūna göre* (according to the religious law and the *ḳānūn*). The Ottoman system of joining two separate jurisdictions, the religious and the secular, in their *dīwān*s, also had Mongol models, as shown, for instance, in an inscription of 758/1357 at the Marjānīya *madrasa* in Baghdad,[12] which refers to a *dīwān li-faṣl al-qaḍāyā al-shar'īya wa'l-yarghūjīya* (*dīwān* for rendering judgment in cases of both religious and secular law), *yarghūjī* denoting a Mongol, non-*sharī'a*, judge.

In its basic concept, too, the Ottoman penal *ḳānūn* seems to go back to Eastern models. The term *ḳānūn*, derived from the Greek κανών, was used since 'Abbāsid days in both Arabic and Persian in the meaning of tax assessment, tax register or tax regulation. As clearly stated in many Ilkhānid documents, the object of these *ḳānūn*s was to ensure that the peasantry and town population were not called upon to pay taxes in excess of the *māl-i muqannan*, the impositions laid down in the *ḳānūn*s. The same motive, as we have seen, prompted the Ottoman Sultans to issue their criminal *ḳānūnnāme*s.

IV

The major object of the penal *ḳānūn*, to control oppressive executive officers, could not have been achieved by merely ordering them to apply a certain code of laws. The Ottoman Government never seemed to have had much trust in the innate justice and fairness of its executive organs, the so-called *ehl-i 'örf*. It regarded it as imperative, therefore, to restrain and supervise them, and this could be done only by the local cadis. Consequently, it was laid down as a general rule that the governors and their subordinates (*subaṣı*s, *voyvoda*s, *'asasbaṣı*s, and the rest), as well as the fief-holders, must not punish any private citizen before he had been duly tried and convicted by a cadi. The cadi was not only authorized, but strictly enjoined, to report directly to the central Government any serious injustice done by the military or police authorities, if he could not prevent it in time. Until the decay of the Ottoman institutions, this system seems to have successfully checked some of the earlier tyranny of the executive.

The cadis fulfilled this function by trying the accused in their *maḥkeme*; if they found him guilty, they issued a certificate (*ḥüccet-i ṣer'īye*) authorizing the executive officers to punish him.

But the rule of bringing most criminal cases before a cadi did not mean that the penal law of the *sharī'a* was to be applied exclusively. The Ottoman Sultans, no less than previous Muslim rulers, were anxious to ensure efficient criminal justice, which would have been rendered impossible

12 L. Massignon, *Mission en Mésopotamie (1907–1908)*, II, Paris 1912, p. 15.

if only the religious law were enforced. They therefore decreed, and this is the second major innovation of the Ottoman Turks, that the penal regulations of the secular law were also to be applied by the cadis in their courts of law.

For this reason, Sultan Süleymān the Magnificent gave instructions to copy the *Ḳānūnnāme-i Āl-i 'Oṣmān* and deposit a bound copy in the *sharī'a* law courts in every town. When, later on in his reign, the new penal code was compiled, many cadis are known to have asked for a copy of it. Moreover, innumerable firmans issued in the sixteenth century required the cadis to administer justice in accordance with both the *sharī'a* and the *ḳānūn*. In this way, the Ottoman Government ensured a more unified administration of criminal justice, in which the several tribunals applied identical law.

With the same object in mind, the Sultans frequently went so far as to decide which religious law the cadis had to apply, particularly in cases in which there was an *iḫtilāf al-fuqahā'*, a difference of opinion among the great Muslim jurists of the past. This was often done in collaboration with the *ḳāḍī-'asker*s (*ḳāżi'asker*s), the highest judges, or the *ṣeyḫü'l-islām*s, the chief *muftī*s of the Empire, who submitted such controversial questions of law to the Sultan, made certain suggestions and asked for his decision. A collection of such questions is the well-known *Ma'rūżāt* of Ebu's-Su'ūd Efendi, the great *ṣeyḫü'l-islām* in the sixteenth century. For instance, at his seeking, Sultan Süleymān the Magnificent decided that under the statute of limitation no law-suits concerning *mīrī* land should be heard after ten years had passed, and no other suit or trial after fifteen years. Problems of substantive law were also dealt with in this way. To give one example: If a guest is killed in somebody's house and the murderer is not known, should blood-money (*diya*) be paid by the owner of the house, as Abū Ḥanīfa held, or by its actual occupier, as was the opinion of Abū Yūsuf? Ebu's-Su'ūd suggested following the second view, since this would add to the vigilance of the occupier. His proposal was accepted by the Sultan, and firmans were sent out bidding the cadis act accordingly.

It should be remembered here that, though the *ṣeyḫü'l-islām* was the highest religious authority and the head of the entire *'ulemā* corps in the Ottoman Empire, he could not give the cadis binding directives how to administer justice. Even a most powerful *ṣeyḫü'l-islām* like Ebu's-Su'ūd Efendi, if he wished to see his legal opinions applied in the courts, had to submit them to the Sultan and ask him to issue appropriate orders to the cadis, *his* officials.

In another respect, too, the authority of the *ṣeyḫü'l-islām* was more limited than is sometimes assumed. Contrary to a common view, the

*ḳānūn*s did not require his sanction for their validity. In fact, their sole legal basis was the Sultan's will as expressed in the imperial decrees. There is no evidence that *ḳānūn*s or *ḳānūnnāme*s were submitted to the *şeyḫü'l-islām* for his prior approval. Only after certain *ḳānūn*s had been issued, and in many cases long after, did a *şeyḫü'l-islām* or other *muftī* confirm their legality by a *fetvā*.

Finally, it is not always realized that in many of their *fetvā*s the Ottoman *şeyḫü'l-islām*s and lower-ranking *muftī*s dealt with matters regulated not by the religious law but by the *ḳānūn*. In not a few such cases, they first applied to the *nişāncı*, the member of the imperial *Dīvān* responsible for the *ḳānūn* and significantly called *müftī-i ḳānūn* (the *muftī* of the *ḳānūn*), and asked him what its regulations on the given question were. In their *fetvā*s they then quoted the *ḳānūn* or other State law as laid down in a firman, the *defter-i ḫāḳānī* (cadastral register), an *'ahdnāme* (Capitulation) with a foreign power, or the like. This clearly shows that, by the sixteenth century, the *ḳānūn* had been accepted as a recognized source of law even by the authoritative expounders of the *sharī'a*. It is not surprising, therefore, that, long before the law reforms of the *Tanẓīmāt* period, the term *meşrū'* (conforming to the *sharī'a*), tended in official Ottoman usage to acquire the meaning of 'legal' in a wider sense of the word, namely 'in accordance with both the *sharī'a* and the statutory regulations of the Sultans' *ḳānūn*s'.

V

This, however, does not mean, that the *ḳānūn* was considered to have the same dignity as the *sharī'a*. In the Muslims' view, the *sharī'a* leads the faithful to perfection and happiness both in this world and the next. The *ḳānūn*, on the other hand, has a more limited objective and, consequently, an inferior status. It is a law of human origin, and such laws, to quote Maimonides,[13] aim only at 'ensuring the good order of the State and of its affairs and at removing oppression and strife from it'.

Theoretically, the *ḳānūn* was supposed merely to amplify and supplement, but not to abrogate or supersede, the religious law. According to a *fetvā* of Ebu's-Su'ūd Efendi,[14] *nā-meşrū' olan nesneye emr-i sulṭānī olmaz* (there can be no decree of the Sultan ordering something that is illegal in the view of the *sharī'a*). Actually, however, a great number of such decrees were issued with the object of setting up a more effective administration of criminal justice.

13 *Le guide des égarés*, ed. S. Munk, II, Paris 1861, fol. 86v (translation: p. 311).

14 Paul Horster, *Zur Anwendung des Islamischen Rechts im 16. Jahrhundert*, Stuttgart 1935, p. 53.

In its form and ethos, the *ḳānūn* differs fundamentally from the religious law. The *sharī'a* is laid down in Arabic works and in a form which does not enable the layman easily to infer what the law prescribes in a given case. The *ḳānūn*, on the other hand, is written in the vernacular, Turkish, and formulated in simple, clear and unequivocal language. Unlike the *sharī'a*, it required no commentaries and was never studied in academic institutions. The *fiqh* works contain the opinions of the great jurists, who derived the law primarily from the Koran and the traditions of the early Muslim community, and who had little or no contact with the Government of their day. The regulations of the *ḳānūn*, by contrast, developed out of imperial decrees dealing with problems of everyday life in the Ottoman Empire; they are based on the decisions of the Sultan or the heads of his Government, who were mostly men of military education and considerable administrative and political experience. No wonder, therefore, that, where the *sharī'a* is formalistic and theoretical in its approach, the *ḳānūn* tends to be practical and pragmatic; where the *sharī'a* stresses religious and moral ideals and considers the welfare of the individual, the *ḳānūn* prefers efficiency and is concerned with the interest of the State. Finally, the *sharī'a*, founded as it is on divine revelation, is considered immutable, while the *ḳānūn* consists of temporary regulations which can and should be altered whenever necessary. Common to both, it may be added, is the lack of distinction between substantive law and rules of procedure as well as between civil and criminal law. Consequently, no separate criminal courts existed in the Ottoman Empire.

In the realm of criminal justice, clashes between *ḳānūn* and *sharī'a* are more numerous than in almost all other spheres of law. There may be several reasons for this. Generally, the *ḳānūn* deals only with matters of public law, such as Government, the Court, the Army and feudal institutions, which in the *sharī'a* are treated very sketchily, if they are treated at all. In comparison, criminal law forms a much more important part of the *sharī'a*. Moreover, in accordance with Islamic legal tradition, the Ottoman penal *ḳānūn* deals not only with criminal law in the modern sense of the term but also with torts and many questions of civil law, which are regarded as reserved for the religious law. The *ḳānūn* regulations on criminal procedure are in even more open contradiction to the *sharī'a*.

It has often been pointed out that, in many cases, the Ottoman *ḳānūn* either mitigates severe *sharī'a* penalties or presumes that they had commonly been commuted into lighter punishment, such as monetary fines instead of stoning to death for fornication or, in certain cases, instead of amputation of the hand for theft. The *ḳānūn* may thus appear, at first sight, to be a relatively humane and, compared with the *sharī'a*, more

lenient code. Nothing, I should like to submit, could be more mistaken. The Ottoman criminal codes, it is true, reflect the development of Islamic legal practice, which tended to limit the application of some of the *ḥudūd* penalties prescribed. But they inflict penalties more readily, for many more offences and, in numerous instances, with much greater severity than the *sharī'a*.

The fundamental attitude of the *ḳānūn* towards crime and punishment is very different from that of the religious law. The *sharī'a*, as is common knowledge, is inclined to render a conviction difficult by narrow definitions of the crimes, short terms of limitation, strict conditions of proof, consideration of the offender's having acted under duress and his active repentance, acknowledgement of the right to retract a confession, and, in many cases, by looking upon witnesses who prevent a conviction as behaving meritoriously.

The *ḳānūn* adopts the contrary attitude. By and large, it does everything to convict and punish the suspect. Like the *maẓālim* and *shurṭa* jurisdictions in earlier periods, the *ḳānūn* accepts kinds of evidence that the *sharī'a* does not consider admissible or sufficient. In particular, the torturing of suspects, not permitted by the *sharī'a* as a rule, is often explicitly prescribed, and the admission of guilt under torture deemed adequate proof, provided there also are 'indications' (*'alāyim*) — a rather vague term — of culpability. Circumstantial evidence is admitted and may suffice for a conviction, particularly if the suspect has a criminal past and his neighbours testify to his bad reputation. In certain cases, a person who has only made an attempt, such as entering a house with criminal intent, is to be punished as if he had verily committed the offence, and one who aids and abets as if he were the principal offender.

As to the severity of the penalties: a person who abducts a prisoner, lures a slave away from his or her master, or breaks into a shop is to be executed. The same punishment is to be inflicted for premeditated arson. Persons who habitually forge imperial decrees or certificates of cadis will have a hand cut off. For the repetition of certain crimes, such as theft, capital punishment is to be suffered.

Moreover, the *ḳānūn* prescribes penalties which are unknown to the religious law. Examples are emasculation for abducting a girl or boy, the branding of the forehead for certain kinds of fraud and procuring, and, in particular, fines.

Though monetary penalties were disapproved by most *fuqahā'* as tyrannical innovations, they became one of the commonest penalties in the *ḳānūn*. Fines are called *cürm*, *cerīme*, or, in old Ottoman, *kınlık*, a term which has been widely misread as *kanlık* and interpreted as blood-money.

Fines were not an Ottoman invention. Pecuniary mulcts in some form or other were certainly imposed by non-*sharī'a* judges in the Muslim world long before the Ottomans established their State. In the Dulkadır codes, too, fines play a major role, and some remnants of Mamlūk fines can be discovered in Ottoman *ḳānūnnāmes* for what were once Mamlūk provinces. Precedents have not been found, however, for two characteristics of fines as prescribed in the Ottoman *ḳānūn*. First, the fines were frequently graded in accordance with the financial circumstances of the offender (rich, medium, poor). The terms sometimes used — *a'lā*, *evsaṭ*, *ednā* — recall the similar grading of the *jizya*, the poll-tax levied on non-Muslims according to the *sharī'a*. Secondly, in numerous statutes of the Ottoman criminal code, the fines are linked to the *sharī'a* punishment of *ta'zīr*, i.e., strokes, whose number was to be fixed in every case by the cadi. The *ḳānūn* only lays down the amount of akças that the criminal had to pay for each stroke administered, generally on the soles of his feet. Some seventeenth-century miniatures depicting the punishment of bastinado show an official who seems to count the blows for this purpose. The grading of fines and the fixing of their amount in accordance with the cadi's *ta'zīr* penalty are additional examples of the tendency of the *ḳānūn* to give its regulations the form of supplements to *sharī'a* precepts.

One of the main reasons for making fines the virtually standard penalty for all but the gravest offences was fiscal. The Ottoman Government was anxious to grant governors, *subaṣıs*, fief-holders and others a substantial income from fines, which were assigned to them, together with taxes payable by the inhabitants of their districts or lands. In many respects, fines bore a close resemblance to taxes and, like them, used to be farmed out under the *iltizām* system for a fixed annual payment. It is the central place occupied by fines among the *ḳānūn* penalties that most probably explains what is at first sight the astonishing fact that, since Sultan Meḥemmed II's reign, the criminal code formed part of *ḳānūnnāmes* concerned mainly with feudal law and taxation.

VI

In spite of the obvious deviation of many *ḳānūn* regulations, such as fining, from the precepts of the religious law, the Ottoman *'ulemā*, by and large, accepted them, or at least acquiesced in them. To a large extent, this attitude can be explained by the power and prestige of the Sultans, the defenders of the faith and victorious warriors against the infidels. An important additional reason is to be found in the successful efforts of the Ottoman monarchs to raise the prestige of the *'ulemā* and to integrate them (especially their highest class, the cadis) into the ruling bureaucracy of their State. The leading members of the corps of *'ulemā*

were given prominent positions in the supreme tribunals, which had inherited the status of the *maẓālim* courts in earlier times. One of them was the so-called Wednesday *Dīvān*, in which justice was administered by the Grand Vizier and the four principal cadis of the capital, all of them of the Ḥanefī school, of course. Similarly, in the highest policy-making body, the imperial *Dīvān*, the chief cadis of the Empire, the two *ḳāḍī-'asker*s, had a decisive voice, and naturally became fully aware of, and often sympathetic with, the political and administrative considerations of the Government, including those concerning criminal justice. On a lower level, the provincial cadis, in addition to their judicial duties, were granted wide authority in civil administration. The traditional gulf between the *fuqahā'* and the *umarā'*, the men of the law and the men of the sword, was bridged for the most part, and the cadis loyally executed the Government's orders and secular regulations.

Even the *muftīs* and their chief, the *şeyḫü'l-islām*, as already mentioned, were usually willing to cooperate with the Government in carrying out the *ḳānūn*. In many cases, they agreed to the wishes of the secular authorities, when those asked for a legalization of non-*sharī'a* punishment. For instance, the Topkapı Sarayı archives at Istanbul preserve a collection of original *fetvā*s issued by several *şeyḫü'l-islām*s in response, it seems, to approaches from the Sultan or the Grand Vizier.[15] In these *fetvā*s, the Sultan in his capacity as *velīyü'l-emr*, or Muslim ruler, and *sebeb-i niẓām-i 'ālem* (the fountainhead of the order of the universe), is granted the discretionary right to inflict capital punishment on offenders liable, according to the *sharī'a*, to lighter penalties. For example, he is authorized to execute a person who was caught while attempting to break into the imperial Treasury, but had not actually stolen anything. In the case of a murder committed in the Palace, another *fetvā* permits the Sultan to order the criminal's execution at once, without waiting, as the *sharī'a* prescribes, for the victim's heir to come forward, bring action and, if he so wishes, renounce his right to have the murderer executed, in return for the payment of blood-money. Many other *fetvā*s lay down that people whose offences, according to the religious law, are not capital crimes may, nevertheless, be executed, if it is proved that it is their 'constant habit' (*'ādet-i müstemirre*) to commit such offences, so that they come under the category of *sā'ī bi'l-fesād*, or, in the full Koranic definition, *sā'in fi 'l-arḍ bi'l-fasād* (fomenter of corruption in the world). Punishment in all these cases is considered to be inflicted *siyāseten*, as an administrative measure, *niẓām-i memleket içün* (for the sake of the order of the country), *ṣıyāneten li'l-'ibād* (to protect the people), or *'ibreten li's-sā'irīn* (to give a warning example to others).

15 Topkapı Sarayı Arşivi, Istanbul, E 12079.

For their submission to the *ḳānūn* and the Sultan's will, the Ottoman *'ulemā* may have found some justification in the old Islamic theory of the *siyāsa shar'īya*, as elaborated by Ibn Taymīya and other great mediaeval authorities on public law. This is indicated by the very many manuscripts in Turkish libraries of an Arabic treatise on that subject, written by an Ottoman *'ālim* of the sixteenth century, Dede Efendi of Bursa, and translated several times into Turkish under the name of *Siyāsetnāme*. According to this theory, the Muslim ruler, for the sake of maintaining public order and security, is given wide discretion to deal with criminal affairs, provided that he recognizes the *sharī'a* as the only valid law in theory and his acts do not run violently counter to the principles of the religious law. The Sultan's *ḳānūn* and other decrees may be formally legitimized by an application of the Koranic precept that all Muslims are to obey the orders of 'those in authority' (*ūlu 'l-amr*) among them. As to substance, many of his regulations can be interpreted as instructions to the cadis on how to exercise their authority to inflict *ta'zīr*, the discretionary punishment of the *sharī'a*. And as far as procedure is concerned, prosecution by the executive officers in many cases which are dealt with in the *ḳānūn* may be regarded as a development of the *ḥisba* jurisdiction, under which offenders were prosecuted *nomine Dei*.

Most Ottoman *'ulemā*, however, had too little regard for non-*sharī'a* matters, and the secular officials of Government were too little interested in legal theory to engage at the time in a study of the basic concepts of the *ḳānūn* and its relationship to the *sharī'a*. This is to be regretted, since some of those concepts might have given rise to a development of legal thought. One example may be given. Theft is regarded by the *sharī'a* as a violation both of a *ḥaqq ādamī*, the right of a human person (and therefore the stolen property has to be returned), and of a *ḥaqq Allāh*, a right of God (for which the thief may be mutilated). Homicide and wounding, on the other hand, are generally considered a violation of a *ḥaqq ādamī* only, for which the *sharī'a* entitles the heir of the murdered person, or the injured person himself, to demand retaliation (*qiṣāṣ*) or blood-money (*diya*). The *ḳānūn*, however, goes further in this case and, if *diya* is agreed upon, also imposes a fine to be paid to the authorities. Thus the *ḳānūn* may be said to establish by implication that homicide and wounding, just as theft, also have a public law aspect, in other words, that they, too, are crimes, if not against Allāh, then — in modern terms — against society or the State. To the traditional legal concepts of *ḥaqq ādamī* and *ḥaqq Allāh* a third one is added which, to use a term found in al-Māwardī, could be called *ḥaqq al-salṭana* (the right of the secular authorities or of the State).

VII

In the heyday of Ottoman power, the criminal *ḳānūn* did not remain a dead letter. The official records (*sicillāt*) of the *sharī'a* law courts, the oldest of which (at Bursa) go back to Meḥemmed II's reign, prove that in the fifteenth and sixteenth centuries the cadis actually applied its regulations; they even cited passages from the *ḳānūnnāmes* as the basis for their sentences. Executive officers would bring their prisoners before the cadi and punish them only after they had been convicted by him and in accordance with his sentence. From the second half of the sixteenth century onwards, however, the *ḳānūn*, particularly its penal regulations, began to be disregarded more and more, both by the *ehl-i 'örf* and the cadis.

In many manuscripts of the penal code (especially two preserved today in Leningrad[16]), marginal notes, written in the late sixteenth and the seventeenth century, point out that certain regulations are wrong and have been abrogated as being contrary to the *sharī'a*. Many of the corrections were made by the *niṣāncı* himself. In several Ottoman provinces, fines, the backbone of the penalty system of the *ḳānūn*, were officially abolished in the second half of the seventeenth century. On the newly conquered island of Crete and on Midilli (Mytilene), for instance, the *rüsūm-i dīvānīye* or *'örfīye*, i.e., the non-*sharī'a* taxes, which included the fines, were no longer to be collected.

A similar policy in regard to the whole Empire was applied by the energetic Grand Vizier, Köprülüzāde Fāżıl Muṣṭafā Paşa, who introduced a *niẓām-i cedīd* (New Order) in fiscal affairs. A few years after his death in 1691, Sultan Muṣṭafā II issued a decree instructing his Grand Vizier that in future no penalties but those prescribed by Allāh and the Prophet should be inflicted, that all orders be based on the religious law only and the term *ḳānūn* no longer mentioned side by side with *sharī'a*.[17]

Though this prohibition was not enforced, it is remarkable that, from the seventeenth century on, firmans and other decrees refer less and less to the *ḳānūn*, which had been mentioned until then, together with the *sharī'a*, as the legal basis for many orders of the Sultan. By the eighteenth century, the criminal regulations of the *ḳānūn* seem to have been completely forgotten.

The reasons for this decline of the *ḳānūn* are manifold. The cadis and *muftīs*, whose political power and influence rose considerably in those centuries of Ottoman stagnation and decay, now dared to express their

16 Institut Narodov Azii, Leningrad, MSS A 250 and B 1882.

17 'Oşmān Nūrī, *Mecelle-i Umūr-i Beledīye*, I, Istanbul 1922, p. 568, n. 37.

latent objection to secular regulations which were contrary to the religious law of Islam.

The military authorities, too, were anxious to get rid of the *ḳānūn* statutes that limited their freedom of action, especially in regard to the imposition of excessive fines. It should be kept in mind that the monetary penalties constituted an important source of revenue for officials and fief-holders, while the central Treasury did not benefit from them at all. Consequently, the Ottoman Government by its *ḳānūn*s tried to keep the collection of fines within reasonable bounds and to prevent the impoverishment and dispersion of the population. The many 'declarations of justice' (*'adālet-nāme*) issued by the Sultans, especially after each accession, promised to restrain the oppressive officials, but their frequent repetition shows how little effect they had.

The inclination of the provincial officials and fief-holders to evade the restrictions of the *ḳānūn* had a certain justification. Owing to the rigid conservatism of the Ottoman institutions, the amounts of the fines fixed in akças were unaltered for several centuries in spite of the continuous devaluation of that coin. It is an almost unbelievable fact that a *ḳānūn-nāme* of 1716/7 prescribes exactly the same fines as Meḥemmed II's code in the fifteenth century, though the akça had in the meantime been reduced to less than 15 per cent of its original value.

VIII

The decline of the *ḳānūn* did not, however, result in the assertion of the *sharī'a* in the sphere of criminal justice. Since, at the same time, the control of the central Government weakened and the cadis, too, became more corrupt than before, the chief consequence was a renewed tyranny of the executive organs. The intimidation of the people became the major aim of criminal justice again, and no punishment was too arbitrary or cruel if it helped to achieve that end. Ample evidence to this effect is found in the European travel books of that period.

In the earlier periods, many Western observers had been impressed by the efficiency and even fairness of Ottoman administration of justice, which in their view compared favourably with the protracted and costly law-suits and trials in Europe. The speedy and often severe punishment inflicted, together with the competent police methods and the collective responsibility of a whole village or urban quarter for any crime committed in it, were, they held, the main reasons for the amazingly low crime rate, especially in towns.

On the other hand, they did not overlook the negative aspects of Ottoman criminal justice, in particular the often hasty, wanton and cruel punishment and the mounting tendency to accept suspicion as enough

evidence to convict. A perspicacious seventeenth-century traveller[18] observed that Ottoman justice 'will rather cut off two innocent men, than let one offender escape; for in execution of an innocent, they think if he be held guilty, the example works as well as if he were guilty indeed'.

Even in the high courts of law in the capital, and in the Government's intervention in criminal affairs, justice became more and more jeopardized by a deep-rooted propensity of Ottoman public law — the total predominance of the principle of *raison d'état* over other, religious, legal or moral, considerations. Perhaps the most significant example of this attitude are the countless cases of men sent to the galleys. The expansion of the Ottoman navy and the frequent need to build and man new ships in times of war required a very large complement of oarsmen. When not enough men could be mobilized on a voluntary basis and the supply of prisoners-of-war and other slaves ran out, criminals and alleged criminals became a principal source of the necessary manpower.

Though penal servitude on the galleys (*kürek*) is unknown to the *sharī'a* and the *ḳānūn*, from the sixteenth century onward it became a very common punishment. This can be learnt from a large number of firmans copied into the *Mühimme Defteri* and, in particular, from several official registers, also preserved in the State Archives at Istanbul. The oldest of these registers,[19] compiled in the last few years of the reign of Sultan Süleymān the Magnificent, list criminals who were sent to the galleys for a very wide range of offences. It includes crimes for which the *sharī'a* prescribes capital punishment, such as murder, or ordains mutilation, such as theft. Indeed, an interesting firman[20] issued in February/March 1572, i.e., about four months after the destruction of the Ottoman fleet in the sea-battle of Lepanto, explicitly orders that, in view of the urgent need for slaves to propel the new men-of-war, criminals should not suffer capital or severe corporal punishment but be sent to the galleys.

On the other hand, it became customary to condemn to the galleys men whom the religious law does not consider liable to any punishment. When lawlessness prevailed in a certain province (and this happened more and more in the period of Ottoman decay), the Government despatched a cadi there as investigator (*müfettiş*) and a *sancak-beği* or Court official as special commissioner (*mübāşir*). They were ordered to arrest and examine all potential offenders who had a criminal record and, provided that they were physically fit, send them, together with the official

18 Henry Blount, *A Voyage into the Levant*, London 1669, p.17.

19 Başbakanlık Arşivi, Istanbul, Ibnülemin catalogue, Adliye, Nos. 3 and 4; Kâmil Kepeci catalogue, No. 677.

20 Başbakanlık Arşivi, Istanbul, *Mühimme Defteri*, Vol. 10, No. 203.

files of their misdeeds in the past, to the naval arsenal at Istanbul or to other ports to work as galley slaves. This way of summary punishment violated not only the precepts of the *sharī'a* but also the regulations of the *ḳānūn*. The Ottoman Government had made criminal justice completely subservient to the requirements of the State.

Not until the issuance of the *Ḫaṭṭ-ı Şerīf* of Gülḫāne in 1839 did the Sultans solemnly recognize as sacred the life and limb, the property and honour of the individual citizen. It is noteworthy that the first law to be promulgated in the spirit of this proclamation was the criminal law of 1840. Even more striking is the fact that this law, to a large extent, aimed not at more effective protection of society against criminals but, characteristically, at stronger protection of the people against oppressive officials. It thus strove to maintain the traditional image of the Ottoman Sultan as 'God's shadow on earth, in whom every wronged person takes refuge' (*ya'wī ilayhi kullu maẓlūm*). Only the subsequent penal code of 1851 and especially that of 1858 reflected new, largely Western, concepts of criminal justice. But even these codes and, for that matter, the entire modern legislation of the *Tanẓīmāt* period were, in principle, a continuation of the age-long tradition of the enactment of secular State law, the *ḳānūn*, one of the major achievements of the Ottoman Sultans.

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