Homicide and Islamic Criminal Law in 19th Century Muslim Jurisdictions

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Abstract

This dissertation analyzes the rules of homicide in Islamic jurisprudence (*fiqh*) and the penal codes of 19th century Muslim jurisdictions, namely the Ottoman Penal Code of 1858, the Indian Penal Code of 1860, and the Egyptian Penal Code of 1883. Challenging arguments that the *Sharīʿa* came to an end and was replaced with codes influenced by colonial powers, the dissertation argues that the new penal codes do not represent a divergence with Islamic law but a convergence of Islamic law, colonial influence, and the changing role of the state. Islamic legal norms continued to play an important role in the development of criminal law, from the environment in which the laws were applied to the actors who developed and justified the laws and, ultimately, to the content of the laws themselves.

Resumé

Cette thèse analyse les règles régissant l'homicide dans le cadre de la jurisprudence islamique (*fiqh*) ainsi que les codes pénaux issus par des juridictions musulmanes au courant du XIXe siècle, c'est-à-dire le Code pénal ottoman de 1858, le Code pénal indien de 1860 et le Code pénal égyptien de 1883. Contestant l'argumentaire que la *Sharīʿa* eût touché à sa fin et fût remplacée par des codes influencés par les puissances coloniales, cette thèse soutient que les nouveaux codes pénaux n'incarnent non pas une divergence vis-à-vis de la loi islamique, mais bien plutôt une convergence entre loi islamique, influence coloniale et un rôle de l'État en mutation. Les normes juridiques islamiques continuèrent de jouer un rôle important dans le développement du droit criminel, que ce soit au niveau de l'environnement au sein duquel les lois furent appliquées ou des acteurs qui développèrent et justifièrent ces lois, ou encore, ultimement, au niveau du contenu des lois elles-mêmes.

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Notes on Cases, Transliteration and Abbreviations

Citing Cases and Statutes

For published case records from Muslim jurisdictions I have used the following format:

Case Name (Year of Publication) Series Name, Volume Number, Court Location, Page Number

Example:

Sumadhan v. Roopun (1853) NA Nwp 1 Bareilly 311

Cases and statutes cited from common law jurisdictions (Britain and the United States) follow standard citation methods.

Abbreviations

CM	Ceride-ye Maḥākim, Ottoman Empire
FB	*Fatāwā* of Muḥammad al-Bannā, Grand Mufti of Egypt (d. 1896)
FM	*al-Fatāwā al-Mahdiyya* of Muḥammad al-Mahdī, Grand Mufti of Egypt (d. 1897)
EPC	Egyptian Penal Code of 1883
HC Nwp	High Court of India, Northwestern Provinces
IPC	Indian Penal Code of 1860
OPC	Ottoman Penal Code of 1858
NA Ben	Reports of the *Nizamut Adawlut*, Bengal
NA Nwp	Reports of the *Nizamut Adawlut*, North-Western Provinces
SCC	Supreme Court of India, Cases

Transliteration and Translation

This dissertation utilizes the transliteration system of the *International Journal of Middle East Studies* (IJMES). All names and quotations have been transliterated according to their source language of Arabic, Ottoman Turkish, Persian, or Urdu. Translations of the primary sources are those of the author, unless otherwise noted.

Introduction

In the Northern Indian district of Hamirpur, a region close to the current borders of the states of Uttar Pradesh and Madhya Pradesh and at the confluence of the Betwa and Yamuna rivers, villagers were under constant threat of a criminal named Lalooa. In the early 1870s and during one of his most daring acts, Lalooa shot and killed a police constable in the line of duty. In response, the police called on provincial authorities to issue an order for his capture "dead or alive," offering the incredible sum of 1,000 Rupees to anyone who helped in his capture. The government agreed and authorized the police to publish posters to be hung around the surrounding villages but cautioned them to remove the statement "dead or alive," an order that was not heeded by the police. A few months later, Lalooa came upon a man named Aman and asked him for food. Recognizing the criminal from the posters, Aman gave Lalooa some food and told him to wait around while he went to fetch more. Aman ran back to his village where he told his friends—a lumber merchant named Umrao, a police constable named Mahomed Nawaz, and another friend named Nund Kishore—that he knew of Lalooa's whereabouts. The four friends hatched a plan to capture Lalooa and turn him in for the reward. Nund Kishore picked up a sword and the group returned to where Lalooa was eating.

As Lalooa finished his meal, Aman gave the signal to attack and Nund Kishore struck Lalooa on the back of his neck with the sword. Lalooa started to run away but Nund Kishore swung his sword again, severing Lalooa's hand as he raised it to block the attack. Aman and Nund Kishore then struck Lalooa four more times until they confirmed that he had died. Mahomed Nawaz, who had been watching the events from afar, came forward and raised his own sword to execute another blow, but was stopped by Aman and Nund Kishore who said that the job was done.

All four villagers were then brought in front of the local magistrate who charged them with abetment of murder, believing that, because they had brought swords with them, their intent was clearly to kill and not simply capture Lalooa. The sessions judge agreed in the case of Aman and Nund Kishore and sentenced them to one year of prison each while the other two—because they had not actively participated in the events—were acquitted. Aman and Nund Kishore appealed the ruling, arguing that they believed that the reward was for the capture of Lalooa "dead or alive," and that therefore they should not be held criminally responsible for his death.

In the final judgment from the High Court of the North Western Provinces, the court held that the actions of the defendants fell under the third Exception to Section 302 of the Indian Penal code of 1860 which stated:

> Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.[1]

As a result, the court reduced the charge to one of "culpable homicide not amounting to murder," and reduced the sentences to four months of simple imprisonment.[2]

The events of this case illustrate several important elements of law in British India, the most important of which was the role of the state. Why were the defendants brought in front of the courts at all, much less charged by the magistrate with abetment of murder? Were they not simply following the orders of the provincial authorities who wanted Lalooa brought to justice "dead or

[1] Walter Morgan and Arthur George Macpherson. *The Indian Penal Code with Notes* (Calcutta: G.C. Hay & Co., 1863), 258.
[2] *Queen v. Aman and Nund Kishore* (1873) HC Nwp 1 Banda 130.

alive?" The answer to these questions lies in the colonial state's fear of vigilantism and threats to its power to administer justice. Had they allowed the defendants to go free, the courts would have set an example encouraging others to attack criminals seeking a reward, leading to chaos. To deter future offenders and prevent the application of the "dead or alive" standard in other cases, the courts felt they had to act and therefore charged the defendants with homicide.

Secondly, was the presence of a sword, a deadly weapon by any measure, sufficient for the magistrate and sessions judge to establish murderous intent? Clearly the judges thought so; however, they were conflicted in their rulings as the defendants clearly acted with the belief that they were participating with the sanction of the state. The judges should have sentenced them to execution or life in prison, the punishment set out in Section 302 of the code,[3] but chose to lessen it to merely one year in prison. The High Court, in their final judgement, followed the concerns of the lower court but found another way to solve the problem of intent. Rather than focus on the presence of a deadly weapon, the judges used an exception to Section 302 wherein defendants found to be acting "for the advancement of public justice" could have their sentence lessened to culpable homicide, the proscribed sentence for which was "imprisonment of either description for a term which may extend to ten years."[4] The High Court chose one of the shortest periods of punishment available, only four months each.

A final element of interest in this case was the degree of shared responsibility between the defendants. Why were the two other defendants acquitted so easily, even though they had both conspired with Aman and Nund Kishore to commit the crime? According to Section 107 of the Code, abettors were those who "engage with one or more person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy,

[3] Morgan and Macpherson, *Indian*, 271.
[4] Ibid, 258.

and in order to the doing of that thing."[5] Both Mahomed Nawaz and Umrao conspired to capture Lalooa and were present during the attack. Moreover, Mahomed Nawaz went so far as to raise his sword to strike another deadly blow but was stopped at the last minute by the two main defendants. On this point, the lower courts seem to have, once again, been perplexed by the idea that they were acting honestly in the interests of the state. Mahomed Nawaz and Umrao also never actually took part in the events and, therefore, could have intended to merely capture Lalooa while the two other defendants attacked and killed him.

Would the outcome have been different if the circumstances of the case had occurred under the jurisdiction of Islamic Law (*Sharīʿa*) following the understandings of the Ḥanafī School, the dominant legal tradition before the arrival of the British? If the points of the case raised above are analyzed, the ruling would have been the same. On the first point, individuals under the Islamic system do not have the right to take the law into their own hands, a principle established during the time of the Prophet Muḥammad.[6] Violators of this principle could be charged with spreading corruption in the land (*fasād fī al-ʿarḍ*) and unlawful warfare (*ḥirāba*), subject to execution, crucifixion, cutting off of their opposite hands and feet, or exile.[7] With regard to the second point, jurists of the Ḥanafī School would have seen the presence of a deadly weapon—the swords—as evidence of intent for the highest category of intentional murder (*qatl ʿamd*). The defendants would therefore be subject to execution, the highest punishment available. Finally, on the third point, since all defendants conspired together to capture Lalooa, they could have all been held responsible

[5] Ibid, 85.
[6] Vigilantism is specifically prohibited in Islamic law by a ḥadīth. A Companion of the Prophet, Saʿd ibn ʿUbāda, asked the Prophet "If I find a man sleeping with my wife, should I leave him alone until I come with four witnesses?" The Prophet responded, "Yes." Saʿd was angered by this response and said "Never! By the One who sent you with the Truth if it happened to me then I would have quickly struck him with a sword." The Prophet then responded by stating "Listen to your friend as he has a sense of honor, [but] I have a greater sense of honor than him and God has a greater sense of honor than me." See al-Nīsābūrī, *Ṣaḥīḥ Muslim,* 2:636, no. 3834.
[7] This is one of the proscribed punishments (*ḥudūd*) found in the Qur'ān. See Qur'ān, 5:33.

for his death. However, given that only Aman and Nund Kishore enacted the blows that directly caused the death, only they would be subject to punishment.

Beyond these points of substantive law, what can be said about the larger question of the role of the state in the prosecution of crime? Under the Ḥanafī system—and indeed all Islamic law—cases of homicide and personal injury (*qiṣāṣ*) were constructed by jurists as crimes not against the state but against the family of the victim. It would have been their responsibility to bring the defendants to court and request retaliation in the form of execution or the payment of blood money (*diyya*), although they could choose to forgive the defendants altogether. The British colonial state, taking that right of prosecution away from the family, fundamentally changed the way homicide was treated within India, acting in a manner antithetical to *fiqh* norms.

It is this change in the role of the state and the legal interventions made by the colonial authorities in the 19th century that have led observers to suggest that the Indian Penal Code of 1860 marks the end of Islamic Law's influence in the criminal system. According to Scott Kugle, for example, the code "legislated into oblivion many of the overtly Islamic facets of the law," and was part of a colonial project that was "wrestling political power away from Muslims."[8] Radhika Singha has described this project as a "despotism" that strove to "sweep away what has been described as an Anglo-Muhammadan construct, assembled over the preceding half century from various modifications of the Islamic law, supplemented by Company regulations, and clarified by various 'constructions' and circular orders."[9]

This view is not unique to the Indian context and is part of a larger argument within the historiography of Islamic law that sees the introduction of penal codes in the second half of the

[8] Scott Kugle. "Framed, Blamed, and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (May 2001), 258.
[9] Radhika Singha. *A Despotism of Law: Crime and justice in early Colonial India* (Delhi: Oxford University Press, 1998), vii.

19th century as the end of the influence of *Sharīʿa* in criminal law. The argument goes: through codification, the reduction of the role of jurists (*fuqahā',* sing. *faqīh*), and the direct implementation of laws from Europe, the Islamic system that had dominated for centuries was sidelined. Wael Hallaq framed this argument most strongly with his thesis of "demolish and replace," noting:

> The demise of the *sharīʿa* was ensured by the strategy of 'demolish and replace:' the weakening and final collapse of educational *waqf*s, the *madrasa*, positive Islamic law, and the *sharīʿa* court was made collateral, diachronically correlational, and causally conjoined with the introduction of state finance, Western law schools, European codes, and a European court system.[10]

As a result by 1900 "the *Sharīʿa* in the vast majority of Muslim lands had been reduced in scope of application to the area of personal status, including child custody, inheritance, gifts, and to some extent, *waqf*."[11] Writing specifically on criminal law, Rudolph Peters argued that the impact of Westernization and the desires of centralizing and modernizing states resulted in reforms that eventually "eclipsed" *fiqh* constructions of criminal punishments in order to create "effective and rational tools for disciplining its subjects, tools that are applied by a rational bureaucracy (in the Weberian sense) through impersonal procedures."[12]

When looking at the content of the new codes and the role of local actors in their development and application, an interesting phenomenon appears: the penal codes of the 19th century have much more to do *with* Islamic law than not. Muslim jurists actively participated in

[10] Wael Hallaq, "Can the Shari'a Be Restored?" in *Islamic Law and the Challenges of Modernity,* ed. Yvonne Haddad and Barbara Stowasser (Walnut Creek: Altamira Press, 2004), 24.
[11] Wael Hallaq. *An Introduction to Islamic Law* (New York: Cambridge University Press, 2009), 117.
[12] Rudolph Peters. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (New York: Cambridge University Press, 2005), 103.

the discussion of the role of the state in the development of law and gave states legitimacy to enact new laws to achieve greater justice for their populations through the Islamic legal category of *siyāsa*. Those who developed the codes had training in Islamic law and sought to achieve a compliance with Islamic legal understandings. And finally, in the content of the laws themselves, concepts and definitions matched those that had been developed in the Ḥanafī School, the dominant Islamic school of law in the 19th century. Even in the case of India, where the penal code was drafted and implemented by a British colonial law commission that had no input from Muslim scholars, the rules of the Ḥanafī School continued to influence their decisions, making the Indian Penal Code the closest of the new codes to the rulings as constructed in Ḥanafī works of jurisprudence. In the Ottoman Empire and Egypt, when the codes did depart from Ḥanafī rules, their results were still in line with those found in other schools, most importantly the Mālikī School.

Far from being a *divergence* from Islamic law, the penal codes of the 19th century should be seen as a *convergence* of multiple factors. Islamic juristic discourse, European influence, and local custom came together to create these new codes and form the foundation for the legal systems that would serve the needs of each jurisdiction. This process was not clear-cut and within each converging force there were debates that needed to be carefully navigated. For example, jurists who formed Islamic criminal law theory before the implementation of the new codes had to balance their desire to achieve the absolute justice of God through the application of punishment with their keen awareness of the human failure to reach that justice and, thus, admitted a strong sense of doubt when applying the most extreme punishments. Likewise, in European law, jurists in the 19th century debated whether it was best for society to deter criminals through the implementation of harsher punishments or to err on the side of caution and pass lighter

punishments that could reform criminals and help address the deeper social factors that drove them to commit the crime in the first place.[13]

This dissertation therefore studies the development and content of new penal codes in three different 19th century Muslim jurisdictions and examines how they dealt with the crime of homicide: The Ottoman Penal Code of 1858, the Indian Penal Code of 1860, and the Egyptian Penal Code of 1883. By investigating the role of local actors in the development and implementation of the codes, it attempts to challenge the thesis that the *Sharīʿa* came to an end in the 19th century and adds to a growing body of literature that incorporates the evolving role of the state in the definition of the *Sharīʿa*.

Before engaging the topic at hand, it is necessary to discuss the recent historiography of Islamic law which gave rise to the thesis that this dissertation seeks to challenge and to motivate the importance of focusing on the question of homicide and the comparative approach— between Egypt, India, and the Ottoman Empire—employed in this dissertation.

The End of the *Sharīʿa*

The argument for the 19th century end of the *Sharīʿa* in Islamic legal historiography rests on the following points of contention:

1. *Codification as antithetical to Islamic law*

The Islamic legal tradition, with its multiple schools, methods of interpretation, and differences of opinion, is pluralistic by its very nature. According to Rudolph Peters:

[13] This discourse was sparked by the work of Cesare Beccaria (d. 1794), who argued for a criminal justice system based on the idea of reforming and deterring criminals, as opposed to the idea of retribution that had dominated European discourse until the Enlightenment. See Cesare Beccaria. *On Crimes and Punishments*, translated and edited by Georg Koopmann (New York: Routledge, 2009).

> From the beginning, there were differences of opinion that resulted in the emergence of different schools of jurisprudence that ascribed their doctrines to and derived their names from famous jurists from the eighth and ninth centuries. Controversies did not only exist between these schools, but also among the jurists of one single school, even on essential legal issues…*fiqh* texts do not resemble law codes. They contain scholarly discussions and are, therefore, open discursive, and contradictory.[14]

The opinions of each school were viewed as equally valid and each scholar's judicial reasoning (*ijtihād)*—when meeting the proper requirements—was accepted as religiously legitimate for Muslims to follow. These differences between scholars are a "mercy" from God according to an oft-cited statement falsely attributed to the Prophet[15] and, in practice, such differences often worked in favor of litigants. According to Hallaq, "In pre-modern Sharīʿa, the individual Muslim had the freedom to choose among the schools, in whole or in part, but he or she was bound to whichever school chosen for a transaction."[16]

During the 19th century, the introduction of new codes removed that intrinsic diversity and selected singular points of legislation that were to be applied in a particular geographical region (*read:* nation-state). No longer could Muslims resort to multiple opinions of law, nor did differing schools matter to the legal discourse of the state. According to Hallaq,

> A direct effect of this shift [in the balance of legal power] was the adoption by the new nation-state of the model of codification that altered the nature of the law. Codification is

[14] Rudolph Peters "From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified." *Mediterranean Politics* 7, no. 3 (2002), 86.
[15] The statement "Differences [between] my nation is a mercy (*ikhtilāf al-umma raḥma*)" is often cited as a ḥadīth although no chain of transmission (*sanad*) connecting it to the Prophet has ever been established. However, its content is still widely considered as consistent with Islamic principles and is found in numerous discussions of comparative legal methodologies throughout Islamic legal history. See Jalāl al-Dīn al-Suyūṭī. *Jamʿ al-Jawāmiʿ* (Cairo: Dār al-Saʿāda li al-Ṭabāʿa, 2005), 1:202.
[16] Wael Hallaq. *Sharīʿa; Theory, Practice, Transformations* (New York: Cambridge University Press, 2009), 448.

> not an inherently neutral form of law, nor is it an innocent tool of legal practice, devoid of political or other goals. It is a deliberate choice in the exercise of political and legal power, a means by which conscious restriction is placed on the interpretive freedom of jurists, judges, and lawyers.[17]

However, others have pointed out that projects of codification are not new to Islamic legal history and noted that there have always been efforts to restrict the diversity of laws applied in a particular jurisdiction. Mohamed Fadel, for example, argued that the development of abbreviated jurisprudential texts—known as *mukhtaṣar* literature—in the 7th/13th century helped create a set of uniform rules that would make legal outcomes in the courts more certain.[18] Building on this idea, Ahmed Fekry Ibrahim believes that this rise of legal certainty and the limitation of opinions constituted an epistemological shift towards codification and that Islamic law, following what is referred to as the 'closing of the gates of *ijtihād*', came much closer to the codified civil law system.[19]

Additionally, Anver Emon has argued that the uneasiness of contemporary Western scholars towards the process of codification "does not sufficiently problematize the state or the experience of the law, Islamic or otherwise." Speaking specifically about the "demolish and replace" thesis he noted,

> Hallaq and others are certainly correct that this new reality of Shari'a differs from its sociological condition in the pre-modern period. Moreover, they are right to identify the colonial process as contributing to this shift. But to emphasize codification as being

[17] Hallaq, "Can the Shari'a Be Restored?," 22.
[18] Mohammad Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhtaṣar," *Islamic Law and Society* 3, no. 2 (January 1996): 193-233.
[19] Ahmed Fekry Ibrahim, "The Codification Episteme in Islamic Juristic Discourse between Inertia and Change," *Islamic Law and Society* 22, no. 3 (May 2015): 157-220.

> contrary to the Islamic legal tradition and elide it with a monolithic image of the state fails to account for the disaggregated nature of the state, the indeterminacy of codified law, and the various sites (state-based and otherwise) in which people experience the law.[20]

This dissertation agrees with the view of Emon. Labeling codification as antithetical to Islamic law from the outset ignores the complex legal realities that were lived by those taking part in and subject to codification projects in the Muslim World. As will be seen in the rest of this dissertation, new legal elites such as Nazeer Ahmed and Muḥammad Qadrī Bāshā embraced the concept of codification and worked with the state to create them. When it came to the application of codes the results were in line with Islamic understandings and when they differed, actors such as Khalīl Rifʿat—an explainer of the Ottoman Penal Code—found no problem placing the elements of the new penal code squarely within the Islamic tradition.

Finally, the dissertation also considers whether codification should be seen as part of a larger global theme. Described by Avi Rubin as an area of "glocalization," or where the local and global act together, during the 19th century many nation-states took up projects of codification, although it was carried out for different reasons and sought to attain different results in each jurisdiction. According to Rubin:

> The global dissemination of the codification momentum in the course of the nineteenth century does not conform with the East/West dichotomous convention. Motivations for codification varied, and the chronology does not sustain the timeline suggested by the notion of *westernization*.[21]

[20] Anver Emon, "Codification and Islamic Law: The ideology behind a tragic narrative," *Middle East Law and Governance* 8, no. 2-3 (November 2016), 309.
[21] Avi Rubin. "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification," *Journal of the Economic and Social History of the Orient* 59, no 5 (2016), 833.

In the specific case of the Ottoman Empire, Rubin argued that the development of the Empire's civil code, the *Mecelle-i Ahkâm-ı Adliye* (enacted in 1877), represents both an acceptance of the global idea of a civil code exemplified in the Napoleonic *Code civil* of 1804 and the development of a unique interpretation of Islamic Law, which became known as one of the greatest achievements of 19th and 20th century Middle Eastern law. It is important, therefore, to understand the process of codification as one that was taking place across the world and, as will be seen in this dissertation, is a shared theme throughout the jurisdictions covered and does not necessarily stand in contradiction to the *Sharīʿa*.

2. *Islamic Law is exclusively the domain of jurists* (*fuqahāʾ*)

Before the implementation of the new codes and the rise in the power of the state, law was debated and understood through works of jurisprudence (*fiqh*) constructed by jurists (*faqīh*, pl. *fuqahāʾ*) who held the keys to legal and religious legitimacy. Political actors such as Caliphs, Sultans, and their local counterparts held nothing more than enforcement power. Returning to Hallaq:

> The ruler's traditional role was generally limited to the appointment and dismissal of judges, coupled with the enforcement of the *qadi's* decisions. Interference in the legislative processes, in the determination of legal doctrine, and in the overall internal dynamics of the law was nearly, if not totally, absent.[22]

In the 19th century the focus shifted to the state, with rulers and their legislatures responsible for creating new laws. On this view, students and practitioners of the law were now being trained in schools and colleges that drew their legitimacy from the state rather than God; even the *Sharīʿa*

[22] Hallaq, "Can the *Sharīʿa* be Restored?," 1.

courts, which were the main centers of justice in the Muslim world, were replaced with non-*Sharīʿa* courts such as the new *Nizamiye* system in the Ottoman Empire[23] and the Native Courts (*al-Maḥākim al-Ahliyya*) in Egypt.[24]

However, scholars have pointed out that, throughout Islamic history, the state was always present in the law-making process. Guy Burak has argued that, through the creation of what he called the "dynastic law" of the Sultans during the Ottoman period, the state was "able to regulate the structure of the [Ḥanafī] School and its doctrine."[25] Samy Ayoub has built on this premise, showing that the state regularly influenced Ḥanafī legal discussions during the 17th and 18th centuries. He argued that the incorporation of state orders "was made possible by a turn in Ḥanafī legal culture that embraced the indispensability of the state in the law-making process."[26]

At the level of enforcement, the state used its discretionary power defined through political authority (*siyāsa*) to implement punishment when it was deemed necessary, whether or not such a punishment was sanctioned by juristic discourse. For example, when speaking about the role of the market inspector (*muḥtasib*) in Cairo, Kristen Stilt saw that, in Islamic law, "Choices about how to use the power of *siyāsa* are inherently discretionary, but, once examined closely, so are choices about the use of *fiqh.*"[27]

The most relevant work through which this dissertation has defined the role of the state in the development of the law in the 19th century is that of Khaled Fahmy. In his book on the introduction of forensic medicine into the Egyptian context, Fahmy argued "The *sharīʿa* that was

[23] Avi Rubin. *Ottoman Nizamiye Courts: Law and Modernity* (New York: Palgrave Macmillan, 2011), 28.
[24] See Leonard Wood. *Islamic Legal Revival: Reception of European law and transformations in Islamic legal thought in Egypt, 1875-1952* (Oxford: Oxford University Press, 2016), 25.
[25] Guy Burak. *The Second Formation of Islamic Law: the Ḥanafī School in the Early Modern Ottoman Empire* (New York: Cambridge University Press, 2015), 18.
[26] Samy Ayoub, "The Sultan Says: State Authority in the Late Hanafi Tradition," *Islamic Law and Society* 23, no. 3 (July 2016), 239.
[27] Kristen Stilt. *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2012), 207.

implemented in the nineteenth-century Egypt derived its flexibility and adaptability from coupling *fiqh* with *siyāsa*."[28] Although Fahmy's narrative comes to an end with the establishment of the Mixed and Native Courts, this dissertation continues his framework and takes it further into the remainder of the 19th century with the implementation of the new codes. The trends that Fahmy speaks of within Egyptian law—calling for political actors to increase their authority in the law toward the application of justice—were widespread and can be traced across the Muslim world. Additionally, as will be seen in Chapters Three to Five, the content of the codes cohered with *fiqhī* understandings. Even at what some might consider points of departure from the *Sharīʿa*, such as the role of the state in prosecuting homicide in place of the family of the victim, the explainers of the codes justified this shift in Islamic terms and clearly believed that they were continuing what Fahmy would describe as the "coupling" of *siyāsa* and *fiqh.*

3. The content of the new codes are copies of foreign laws and legal systems

In its content, the law as constructed by jurists before the 19th century was based on the interaction of jurists with two types of sources: those *from* which the law may be derived (the Qur'ān and Sunna), and those *through* which the law may be derived (legal reasoning, interpretation, or consensus).[29] Through these tools, jurists expounded upon laws and legal principles that rested on the ultimate authority of God through His message and messenger. If they chose to depart from the texts, it was only to handle the most absolutely necessary cases (*ḍarūra*),

[28] Khaled Fahmy. *In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt* (Oakland: University of California Press, 2018), 124.
[29] Wael Hallaq. *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (New York: Cambridge University Press, 1997), 1.

fulfill a pressing public good (*maṣlaḥa*), or cope with the inevitable collapse of society (*fasād al-zamān*).[30]

During the 19th century, laws were drawn from very different sources, directly inspired by the European tradition. Gabriel Baer, when speaking about the Ottoman penal code, remarked that during the second half of the 19th century "the French code was adopted— lock, stock and barrel."[31] Rudolph Peters has modified this thesis by stating that the introduction to the code retains a connection with the *Sharīʿa* since its introduction and some of its articles refer to rulings derived from *fiqh* discourse. However, at least according to Peters, the connection seems to stop there:

> Whereas the Penal Codes of 1840 and 1850 were very much a continuation of traditional Ottoman legislation in criminal matters, the 1858 Penal Code was different; it was clearly of French inspiration, especially in its structure, system, and general notions. Moreover, many sections dealing with the specific offenses are translations of the French Penal Code of 1810.[32]

In the Egyptian case, however, Peters is clearer in his belief of a removal of Islamic influence. "In 1883/1889," he argued, "Islamic criminal law was totally abolished in Egypt. The only rule that death sentences must be approved by the State Mufti provides a reminder of the role Islamic criminal law once played in the Egyptian legal system."[33] J.N.D. Anderson, writing in 1956, mentioned that the code was based "predominantly on French models – although they did include certain sections derived from the *Sharīʿa*."[34]

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[30] See for example Ahmed Fekry Ibrahim, "Customary Practices as Exigencies in Islamic Law," *Oriens* 46 (2018): 222-261.
[31] Gabriel Baer, "The Transition from Traditional to Western Criminal law in Turkey and Egypt," *Studia Islamica* 45 (1977), 158.
[32] Peters, *Crime and Punishment*, 131.
[33] Ibid, 141.
[34] J.N.D. Anderson, "Law Reform in the Middle East," *International Affairs* 32, no. 1 (Jan 1956): 43-51, 45.

One way that contemporary scholarship has sought to approach the thesis of Westernization has been to see the new laws as based upon local and national interests. Tobias Heinzelmann, when speaking about the Ottoman Code, suggested that the Penal Code of 1858 was an implementation of French law within an Ottoman legal context. Using what he called an "amalgamation of traditional rhetorics," Heinzelmann argued that the state incorporated Islamic language to legitimize the adoption of French law.[35] Khaled Fahmy puts forth a similar argument for the Egyptian context, that European legal categories were synthesized locally to facilitate "the desire of the khedives and their sultans (together with their numerous European advisors) to introduce in their respective realms a society that was disciplined and controlled—and hence efficient and productive."[36]

In the specific case of Indian law, however, little change in the view of the Penal Code of 1860 has been made since the work of Joseph Schacht. In his *Introduction to Islamic Law,* he argued that the colonial period created a mixed form of law that was a "result of the symbiosis of Islamic and of English legal thought," but was fully superseded by British-inspired codes in the second half of the 19th century.[37] Radhika Singha, as mentioned above, discussed in detail this development in criminal law through the first half of the 19th century but continues to place the dominance, or in her view "despotism," of British colonial officials as secondary to the work and influence of Muslim actors.[38] Finally, Bernard Cohn, when speaking about the development of British influence, noted:

[35] See Tobias Heinzelmann, "The Ruler's Monologue: The Rhetoric of the Ottoman Penal Code of 1858," *Die Welt Des Islams* 54 (2014): 292-321; Avi Rubin, "Ottoman Judicial Change in the Age of Modernity: A Reappraisal," *History Compass* 7, no. 1 (2009): 119-140.
[36] Khaled Fahmy, "The Anatomy of Justice: Forensic Medicine and Criminal Law in Nineteenth-Century Egypt," *Islamic Law and Society* 6, no. 2 (1999), 226.
[37] Joseph Schacht. *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982), 96.
[38] Singha, *Despotism.*

> After the reform of the judicial system in 1864, which abolished the Hindu and Muslim law officers of the various courts of India, and after the establishment of provincial high courts, publication of authoritative decisions in English had completely transformed "Hindu law" in to a form of English case law…What had started with Warren Hastings and Sir William Jones as a search for the "ancient Indian constitution" ended up with what they had so much wanted to avoid – with English law as the law of India.[39]

As a result, in Indian legal historiography, the underlying narrative of Westernization still stands strong: the Penal Code of 1860 is seen as a colonial product having little to do with previous local understandings.

In the application of the law outside of academic discourse, this view has recently been echoed by the Indian Supreme Court in its ruling surrounding more controversial sections of the code such as Section 377 which, among other things, criminalized homosexual intercourse as "against the order of nature."[40] In declaring that part of the article unconstitutional for instances of consensual acts by adults, the Supreme Court of India noted that the section "reflects the imposition of a particular set of morals by a colonial power at a particular point in history."[41] In their general description of the construction of the code, the Court noted that the "principal architect of the IPC," Lord Thomas Babington Macaulay, drew upon the French Penal Code of 1810, Edward Livingston's Louisiana Code, "the English common law and the British Royal Commission's 1843 Draft Code."[42]

It is because the view of the penal codes of the 19th century continues to dominate both the academic and juristic discourse that this dissertation investigates the development, content, and

[39] Bernard Cohn. *Colonialism and Its Forms of Knowledge* (Princeton: Princeton University Press, 1996), 75.
[40] Morgan and Macpherson, *Indian*, 326.
[41] *Navtej Singh Johar & Others v. Union of India* (2018) SCC 76, Part C, 13.
[42] Ibid.

implementation of the new penal codes themselves, challenging the thesis of Westernization and arguing that Islamic norms continued to form the basis of the law, even with codification. Though it is important, on the one hand, to not ignore or belittle the influence of colonialism and its impact on the Muslim world, it is also important, on the other hand, to give a voice to those local actors who worked both in the field of legal change and on the sidelines. Muslim muftis, jurists, and translators played a critical role throughout this process and were instrumental in every phase of reform. Other scholars such as Iza Hussin have already begun this process and argued that more attention should be given to local elites in the formation of law:

> Legal change in the colonial period afforded local elites new opportunities and resources for increasing their power and realizing their visions of society and state. Law and its institutions are the product of negotiations among elites both colonial and local, elites whose motivations were varied and whose strategies and resources were unequal.[43]

Speaking specifically about the construction of legal codes in Malaysia, Egypt, and India, Hussin holds that each code was produced "between local and British elites, invoking Islamic law and incorporating elements of ethnic and Islamic identity: the content and form of these codes continue to represent Islam in the state in each case."[44] As a result, Hussin advocates for a modification of Hallaq's thesis of "demolish and replace" to one of "occupy and renovate."[45]

Although Hussin warns of the power differential that existed between local elites and colonial influence, the fact that she shows that some local actors actively supported and worked towards the development of these codes should not be ignored. Muslims during this period worked with Western influence and believed that their work was fulfilling the most important goal of

[43] Iza Hussin. *The Politics of Islamic Law: Local elites, colonial authority, and the making of the Muslim state* (Chicago: University of Chicago Press: 2016), 15.
[44] Ibid, 19.
[45] Ibid, 103.

Islamic law: justice. This, in their view, could only be achieved with the implementation of a uniform criminal justice system that placed the state at the head of the prosecution. It was not until the implementation of legal thought into anti-colonial movements at the end of the 19th and beginning of the 20th centuries that we see new conceptions of the *Sharīʿa* which defined codification as marking the end of the *Sharīʿa*.

Homicide as a Point of Convergence

Taking the crime of homicide as a frame of reference places this dissertation at the heart of the convergence of forces that was taking place within the 19th century and reflected in the new penal codes. How homicide was defined and categorized, intent established, and the degree of criminal responsibility to which murderers could be held accountable was determined by an equilibrium between numerous opposing forces. Should the definition of homicide be restricted so that fewer perpetrators are subject to execution? Or do the circumstances of society necessitate a wider implementation of execution so that people will be deterred from committing homicide? How should a court determine the true intent of a killer? What happens when multiple individuals participate in the same crime? Should they all be judged equally or upon their specific actions? At what point can a child or mentally incapacitated person be held responsible for killing another? These and other questions were at the heart of legal discussions, and actors in the 19th century grappled with different answers to these questions in their attempt to construct law. As will be seen throughout the rest of the dissertation, Muslim and non-Muslims alike came to similar conclusions.

The issue of homicide is also important for the wider discussion of Islamic law because it straddles the boundary between personal and state crime and highlights the long-standing conflicts that occurred between state power and jurisprudence (*fiqh*). Works of jurisprudence, for example,

constructed homicide as a crime against the family of the victim and, in theory, left prosecution and retribution to them. Throughout history, however political actors used their authority to execute and imprison murderers because their actions constituted a threat to general safety. In the 19th century, as the state became the central player in the formation and implementation of the law, this conflict reached its climax and the prosecution of homicide was enshrined in the penal codes as exclusively in the hands of state authorities. Chapter Three will highlight the tension between the desire of jurists to lessen punishment through what has been called the "doubt canon" and the state's wish to punish murderers when they felt that by doing so they were protecting the public interest. In the 19th century scholars working with the penal codes accepted and justified this shift not as in line with the rulings of the jurists, but rather through the general Qur'ānic goal of putting a halt to revenge killings and bringing justice. Understanding the dynamics involved with the shift in the law of homicide is critical to evaluating the relationship of these laws to the *Sharīʿa* and helps frame larger debates within Islamic law. The fact that there was a conflict between the desires of the state and jurists also helps observers to problematize the narrative of the "end of the *Sharīʿa*" and integrate other documents, sources of law, and eventually viewpoints into the discussion.

The Shared Fates of India, Egypt, and the Ottoman Empire

Vastly different in their histories and legal dynamics, India, Egypt, and the Ottoman Empire share several factors that make a comparison of their criminal law systems salient and fruitful. Firstly, each jurisdiction, prior to the development of their contemporary legal system, was dominated by Ḥanafī legal discourse. The Ottoman Empire is the most well-known for this, as they designated the Ḥanafīs the official legal tradition of the empire and imposed the school's interpretation of law

on its many provinces, including Egypt.[46] In Northern India, the Mughal Empire also followed the Ḥanafīs and many important works in the school, such as the *Fatāwā ʿĀlamgīriyya,* which will be cited later in this dissertation, were constructed within the Mughal context. Although there was always a strong Shāfiʿī influence along the Western shores of the Indian Ocean, particularly in the contemporary state of Kerala, it was the Ḥanafī school, developed and implemented by the Mughals, that remained dominant throughout most of the subcontinent, particularly in the north, and that constitutes the focal point of this dissertation.

In addition, each of these jurisdictions in the second half of the 19th century sought the development of new penal codes and placed them at the heart of the reform of their legal systems; additionally, each of these codes is considered the benchmark of modernization and a departure from Islamic law. The Ottoman Empire began this wave with its 1858 Penal Code, which was soon followed by the Indian Penal Code of 1860. The Egyptians, although they started the process of codification in criminal law with Muḥammad ʿAlī's *Qānūn al-Filāḥa* in 1849,[47] did not institute a full penal code until the creation of the Mixed Courts in 1875. Although it represented an important development in the country's application of criminal justice, the content of this code is often not considered as having long-standing influence on the Egyptian legal system as a whole. The Mixed Courts were held in Cairo, Alexandria, and Mansoura, and were intended to handle cases that involved foreign nationals.[48] Most Egyptians were not subject to a unified criminal system until

[46] The influence of the Ottoman imposition of the Ḥanafī School has been the subject of recent scholarship. Most importantly, Reem Meshal has documented how Ḥanafī interpretations were forcefully implemented on the ground in Egypt. See Reem Meshal. *Sharia and the Making of the Modern Egyptian: Islamic law and custom in the courts of Ottoman Cairo* (Cairo: American University in Cairo Press, 2014).

[47] Rudolph Peters, "'For His Correction and as a Deterrent Example for Others:' Meḥmed ʿAlī's first criminal legislation (1829-30)," *Islamic Law and Society* 6, no. 2, The Legal History of Ottoman Egypt (1999): 164-92.

[48] Laṭīfa Muḥammad Sālim has documented in detail how these courts functioned and mentions that during the second half of the 19th century the Mixed Courts often interpreted their jurisdiction much more widely than originally intended, and at times intervened in cases in which a foreign "interest" was in play, and not simply the presence of a foreign party. However, the Mixed Courts only rarely dealt with criminal cases, and it was only with the establishment

the establishment of the Native Courts in 1883 and a new penal code was introduced in the same year, the focus of this dissertation. The Mixed and Native Courts continued to work side-by-side until 1949 when they were merged into the new National Court system, which continues to function today.

Where these jurisdictions differ is in the role and impact of colonialism. At one extreme, the central Ottoman provinces of Anatolia were never officially colonized until after World War I. Egypt, after first experiencing colonialism with the short-lived French Occupation (1798-1801), became semi-independent from the Ottoman Empire under the reign of the governor Muḥammad ʿAlī and his descendants, until the British occupied the country in 1882. At the opposite end of the spectrum in India, the British East India Company began expanding beyond commercial influence in the middle of the 18th century, winning administrative control of Bengal in 1757 following the Battle of Plassey. After briefly sharing power with the Mughal-appointed Naib, the Company became solely responsible for the court system and the prosecution of criminals in the first months of 1758. In the following century, the Company continued to expand its power into new areas, and by the middle of the 19th century controlled the court system for most of the Indian subcontinent. Following the Uprising of 1857, the British Crown took full control of all territories previously administrated by the Company and by 1858 India had officially become "the Jewel in the Crown" of the British Empire, until the end of colonial rule in 1948. Thus, the colonial experience differed across the jurisdictions covered by this dissertation, where Anatolia was never occupied in the 19th century, Egypt only in the last few decades, and India under full colonial control by the middle of the century.

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of the Native Courts in 1883 that a unified criminal system introduced for all Egyptians. See Laṭīfa Muḥammad Sālim. *Al-Niẓām al-Qaḍāʾī al-Miṣrī al-Ḥadīth* (Cairo: Dār al-Shurūq, 2010).

The degree of difference in the colonial experience of these jurisdictions stands as the greatest counter-argument to a fair comparison between their legal systems. The impact of colonial influence, expressed as a change in the dynamics of power of each jurisdiction covered, should not be underestimated. In India, for example, the changes brought to the Subcontinent by British rule fundamentally changed the way the colonized people thought about and expressed themselves. In the language of the judiciary, for example, during the Mughal Period the official language was Persian, with most scholarly works written in and accessed through Arabic. Although the British did initially accept that paradigm, they eventually changed it to promote English following the Education Act of 1835 whose architect Thomas Maccaulay, the same colonial officer who would draft the Indian Penal Code of 1860, remarked that there was a need to change Indian society by creating "a class of persons, Indian in blood and colour, but English in taste, in opinions, in morals, and in intellect."[49] In Egypt, the development of the Penal Code of 1883 was done in the shadow of a newly-established British occupation, following the failed revolution of Aḥmed ʿUrābī just one year earlier.[50] The new British administrator, Lord Cromer, influenced the development of the criminal system to violently punish offenders, creating new methods of supervision and control.[51]

However, what is important to note, and as will be seen throughout the subsequent chapters of this dissertation, is that, despite this difference, India, Egypt, and the Ottoman Empire dealt with similar issues in criminal law and came to the same conclusions, with Islamic concerns still at heart. Many of the actors—whether Muslim in the Ottoman Empire and Egypt or non-Muslim in India—felt that the introduction of a uniform criminal code was the best way to handle the needs

[49] Thomas Babington Macaulay. "Minute on Education," in *Selections from Educational Records, Part I (1781-1839)*, ed. H. Sharp. Delhi: National Archives of India, 1965, 107-117.
[50] For more on the ʿUrābī revolution, see Juan Cole. *Colonialism and Revolution in the Middle East: Social and cultural origins of Egypt's Urabi movement* (Princeton: Princeton University Press, 2001).
[51] See Timothy Mitchell. *Colonising Egypt* (Berkeley: University of California Press, 1988).

of their legal systems and each code produced struggled with the growing influence of European norms and a local context that was defined by Islamic and Ḥanafī law. Even in India, where the majority of the population in most areas was Hindu, Islamic legal discussions played an important role. As will be seen in the first chapter of this dissertation, many in the British administration saw themselves as continuing in the footsteps of the Mughal/Islamic legal tradition and made gradual changes to the system until the introduction of the Indian Penal Code in 1860. They sought the help of Muslim scholars, translated Islamic legal texts, and employed Muftis in their courts who acted as local verifiers who would make sure that their rulings received the backing of local religious custom. Within the code itself, as will be seen in Chapters Three to Five, Islamic juristic opinions on homicide continued to dominate. Finally, following the introduction of the Penal Code this process continued, with Muslim actors working as advocates and pleaders within the appellate courts and translating and commenting on the code in local languages.

Defining Sources

This dissertation relies upon four sets of sources collected during a research trip that took place from June 2017 to June 2018:

1. Political texts and works of general legal theory (Chapters 1 & 2)
2. Works of Islamic jurisprudence (Chapters 3-5)
3. Explanations of the Penal Codes of the 19th century (Chapters 3-5)
4. Selected cases from published reports in Egypt, Northern India, and the Ottoman Empire

The works of politics, legal theory, and the explanations of the Penal Codes of the 19th century were gathered from the Süleymaniye Library in Istanbul, the Shiblī Nuʿmānī Library of Nadwat

al-ʿUlāmāʾ in Lucknow, the Khuda Bakhsh Oriental Library in Patna, the Rampur Raza Library in Rampur, the library of Dār al-ʿUlūm Deoband, and the library of al-Azhar University in Cairo.

When speaking about Islamic Law, studies typically revolve around works of jurisprudence (*fiqh*). Significant attention has also been given to *Sharīʿa* court records (*sijjilāt al-maḥākim al-sharʿiyya*) and, more recently, the records of the court of the Ottoman governor (*al-Dīwān al-ʿAlī*) in Cairo.[52] This dissertation, particularly in Chapters Three to Five, considers additional sources of Islamic legal texts, namely, collections of specific legal questions (*fatāwā*) and published criminal case law from the jurisdictions surveyed.

In both India and Egypt courts regularly sought the advice of Muftis. This was done by either asking a mufti on the spot, as will be seen in the examples of British India and Egypt, or through consulting the works of earlier muftis that had been gathered into authoritative works of substantive law. Wael Hallaq has already shown the importance of the *fatwa* in the development of substantive law[53] and, in the particular case of *al-Fatāwā al-ʻĀlimgīriyya*, Alan Guenther has shown how the collection influenced the formation of laws and the actions of judges.[54]

As a result, in addition to *fiqh* texts this chapter also surveys the work of major *fatwa* collections that were frequently cited in both courts and by legal scholars in Egypt and British India.

1. *al-Fatāwā al-Sirājiyya* by Sirāj al-Dīn ʿAlī ibn ʿUthmān al-Tanīmī (d. 569/1173)

2. *Fatāwā Qāḍīkhān* by Ḥassan ibn Manṣūr al-ʾŪzajandī (d. 592/1195)

3. *al-Fatāwā al-Tātārkhāniyya* by ʿĀlim ibn al-ʿUlāʾ al-Indarbattī (d. 786/1384)

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[52] James Baldwin. *Islamic Law and Empire in Ottoman Cairo* (Edinburgh: Edinburgh University Press, 2017).
[53] Wael Hallaq, "From Fatwas to Furu': Growth and change in Islamic substantive law," *Islamic Law and Society* 1, no. 1 (1994): 29-65.
[54] Alan Guenther. "Hanafi Fiqh in Mughal India: The Fatawa-i Alamgiri," in *India's Islamic Traditions, 711-1750*, ed. Richard Eaton (New Delhi: Oxford University Press 2003): 209-34.

4. *al-Fatāwā al-Hindiyya* or *al-Fatāwā al-ʿĀlimgīriyya* by a group of scholars during the reign of the Mughal Emperor Aurangzeb between 1667-1675

5. *al-Fatāwā al-Anqarawiyya* by Muḥammad ibn al-Ḥussayn al-Anqarawī (d. 1098/1686)

The cases cited come from three sources. For North India the cited cases are from the published summaries of the *Nizamut Adawlut,* the highest criminal court in the British colonial system, while in Egypt the cases cited are reports from two 19th century *fatwa* collections entitled *al-Fatāwā al-Mahdiyya* compiled by the Grand Mufti of Egypt Muḥammad al-ʿAbbāsī al-Mahdī (1827-97), whose sixth volume includes more than 120 instances of homicide that occurred between 1849 and 1885,[55] as well as the *fatwas* of the Mufti Muḥammad Muḥammad al-Bannā who served from 1887-1889.[56] And finally, cases from the Ottoman Empire are cited from the *Ceride-ye Maḥākim*, a weekly publication of the Ottoman Ministry of Justice that regularly published case reports.

By integrating these different types of sources into the discussion of Islamic law, this dissertation aims to paint a more complete picture of how the legal system worked in both theory and practice. *Fiqh* discourse, while fundamental to understanding Islamic Law, does not stand alone and is incomplete, without knowing how it was modified by those who applied it to particular circumstances (*fatwas*). It was this more comprehensive understanding of the law that was applied in the courts, used in the development of penal codes, and applied on the ground once the new codes were in place. The dissertation also contributes to larger debates regarding the nature of the *Sharīʿa* itself, a point that needs to be further elaborated upon.

A Question of Terms: *Sharīʿa* vs. Law

[55] Muḥammad al-ʿAbbāsī al-Mahdī. *Al-Fatāwa al-Mahdiyya fī al-Waqāʾiʿ al-Miṣriyya* (Cairo: al-Maṭbaʿa al-Miṣriyya, 1883).

[56] Found in Nīfīn Muḥammad Mūsa. *Mukhtārāt min Wathāʾiq al-Iftāʾ al-Miṣrī fī al-Qarn al-T āsʿ ʿAshr* (Cairo: Dār al-Kutub wa al-Wathāʾiq al-Qawmiyya, 2013).

When approaching the critical historical period of legal transformation which this dissertation seeks to observe, the choice of terms between *Sharīʿa* and law becomes important.[57] For some scholars such as Wael Hallaq, to make the term "law" reflect what the *Sharīʿa* meant in the pre-modern period would require "so many omissions, additions, and qualifications that we would render the term itself largely, if not entirely, useless."[58] However, there is an alternative view that argues for the description of the *Sharīʿa* as a legal system and labels what it produced as "law," not so different from other legal systems as developed in the West. According to Mathias Rohe, all legal systems share a number of important features, such as "their self-image is that of being the guiding concept of society. The idea of justice immanent in them is meant to set standards."[59] Each legal system is also, in Rohe's view, "integrated within a social context and influenced by it to a significant degree."[60] To refer to the *Sharīʿa* as the "law" or legal system of Islam, therefore, is not as problematic as envisioned by Hallaq. Of course, the *Sharīʿa* encompasses a larger view than that of contemporary state law in that, for example, it regulates private and spiritual areas such as prayer and fasting that a modern nation-state has little interest in. However, that should not prohibit the *Sharīʿa* from also being understood *as* a legal system, nor should it render an analysis of a particular element of that system – such as homicide as is done in this dissertation – less important as it does not cover the entirety of the social interactions that take place within the *Sharīʿa*'s structure.

Therefore, this dissertation advocates for a view of the *Sharīʿa* closer to that of Rohe. However, that framework does not entail a dismissal of the work of Hallaq, nor a complete

[57] The historical search for the origins of the term *Sharīʿa* was the subject of a recent article. See Mohammad Omar Farooq and Nedal El-Ghattis. "In Search of the Shari'ah," *Arab Law Quarterly* 32, no. 4 (2018): 315-354.
[58] Wael Hallaq. "What is Shari'a?" *Yearbook of Islamic and Middle Eastern Law Online* 12, no. 1 (2005): 151-180.
[59] Mathias Rohe. *Islamic Law in Past and Present* (Leiden: Brill, 2015), 3.
[60] Ibid, 5.

departure from his vision of the *Sharīʿa*. The very integration of multiple sources, the reliance on actors other than jurists to include Muftis, contemporary law reformers, and litigants in cases is done specifically in an attempt to achieve a closer understanding of the broader social framework wthin which these legal changes were taking place. It is those sources that should define how the *Sharīʿa* was perceived during the second half of the 19th century, and how those actors understood the inner workings of their changing legal environments.

Defining the *Sharīʿa*

In the early decades of the 20th century the *Sharīʿa* became a rallying cry for Muslim anti-colonial movements, with Islamist groups calling for a "re-application" of *Sharʿī* rules. As a result, in the second half of the century, states such as Brunei, Iran, Pakistan, and semi-autonomous regions in Nigeria and Indonesia all sought to reshape their legal systems in order to fulfill that call and apply what they understand as the Law of God. In addition, movements continue elsewhere in places such as Egypt that seek similar changes. Kristen Stilt, for example, has shown that for the Muslim Brotherhood, the expansion of the role of the *Sharīʿa* in the Egyptian system continues to be the primary foundation of their policy platform.[61]

Key to these legal reform programs are the criminal punishments of Islam, including the amputation of the hand for stealing, lashing and stoning for adultery, and the death penalty for murder. In jurisdictions where these new systems have been put into place, however, most observers have noted that they bear little resemblance to the laws applied before the 19th century. For example, Rudolph Peters has noted

[61] Kristen Stilt, "'Islam is the Solution:' Constitutional Visions of the Egyptian Muslim Brotherhood," *Texas International Law Journal* 46 (2010): 73-108.

> The attitude of the regimes that have recently come to promulgate *Sharīʿa* penal codes and legislation differed from that adopted by Islamic governments of the past. For the latter, the Islamic legal order was a matter of fact; for the former it was an expression of cultural and political assertion against Western hegemony. It became the symbol for the Islamicity of a regime and its steadfastness against Western pressures.[62]

For observers like Hallaq, the impact of colonial influence represented an epistemological shift in the legal system. The new process of the judiciary, relying on the power of the modern state and not the absolute authority of God, meant that the *Sharīʿa* could no longer be understood as operative in these jurisdictions. The "form" of the state, as Hallaq has argued, is based on five distinct yet inseparable properties:

1. Its constitution as a historical experience that is fairly specific and local (European);
2. Its sovereignty and the metaphysics to which it has given rise;
3. Its legislative monopoly and the related feature of monopoly over so-called legitimate violence;
4. Its bureaucratic machinery; and
5. Its cultural-hegemonic engagement in the social order, including its production of the national subject.[63]

The content of the law that is produced and practiced within the state is in Hallaq's view immaterial and, whether controlled by "liberals, socialists, communists, oligarchs, or any such brand," the essential form of the modern state cannot be changed.[64]

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[62] Peters, *Crime and Punishment,* 189.
[63] Wael Hallaq. *The Impossible State: Islam, politics, and modernity's moral predicament* (New York: Columbia University Press, 2013), 26.
[64] Ibid, 25.

The question at hand is how to judge whether or to what extent an epistemic shift has occurred. For Hallaq, whose definition of the *Sharīʿa* is based on the works of *fiqh,* the outcome of the law in both substance and in the courts is not indicative of the episteme. This dissertation, on the other hand, questions whether the episteme can be judged without viewing its objective outcomes. Arguably, if an epistemic shift had indeed occurred it could be detected in the laws produced, the explanations given, and the judgements issued by the courts. The evidence considered in this dissertation indicates a continuity of the above, both before and after the implementation of the new penal codes.

Hallaq's analysis is useful for understanding the contradictions posed by the introduction of *Sharīʿa* statutes and constitutional articles produced under the influence of Islamist groups in the second half of 20th century as pointed out by Peters. This dissertation therefore agrees that Hallaq's thesis of the "impossible state" holds, however only for the second half of the 20th century. However, this thesis is not sufficient for describing what took place in the second half of the 19th century, which is the focus of this dissertation. During this period, although the modern state existed, the *Sharīʿa* was conceived more broadly. Local actors worked *outside* of the realm of *fiqh* to converge colonial influence with Islamic law, searching for the greater principles of the law and aware of the inherent differences between the Islamic and European systems.

The calls and steps taken to "re-apply" the *Sharīʿa* in the second half of the 20th century, by contrast, were based upon a reaction to the narrative established by the "end of the *Sharīʿa*" argument described above and a reimagination of what happened to Islamic Law during the period of colonization. These new legal reformers argue that, because of colonial interference in the law—primarily through the introduction of new penal codes—the criminal systems of the various regions of the Muslim world became governed by understandings of law which were antithetical to Islamic

beliefs. But what if this were not the case? What if, as this dissertation argues, the *Sharīʿa* continued to form the basis of the criminal law in the codes developed in the middle of the 19th century? If this were to be true, the narratives of Islamist movements that have dominated Muslim discourse in the 20th century could be understood as the *actual* divergence from Islamic legal history. This would also help explain *why* new legal systems seem to be so divorced from those in force before the implementation of the new codes. As a legal system, the *Sharīʿa*, through its interaction with colonialism, was reinterpreted and molded by local actors to fit new and changing circumstances. Just as it had done before the colonial period those working within the *Sharīʿa* debated, integrated, and sometimes pushed back against external influences. Critical to the development of this understanding is a re-envisioning of the definition of the *Sharīʿa* itself. Instead of being a collection of substantive rules constructed by pre-colonial scholars of *fiqh* and bound by a moral episteme antithetical to the modern state, this dissertation suggests that the *Sharīʿa* lies at the intersection of multiple forces where state power, *fiqh*, and the application of the law in the courts comes together. By seeing the *Sharīʿa* this way the very question of the modern state can be more completely interpreted and the state—the main actor in the new codes—integrated into broader discussions of Islamic law. Discussed as the category of *siyāsa*, observers of Islamic law often express apprehension with regards to the role of the state, particularly in the modern period, and see it as fundamentally separate from the *Sharīʿa.* This should not be the case, and *siyāsa* should be seen as a critical part of the law. This has already been suggested by Khaled Fahmy when he stated,

> If we take *siyāsa* seriously as we attempt to understand the historical evolution of the *sharīʿa*, the possibility emerges that law and morality might have already been uncoupled prior to the onslaught of modernity. Only a *fiqhī* legality would insist on excising *siyāsa*

> from *sharīʿa* and on seeing law and morality as intricately bound together. By contrast…a more accurate understanding of *sharīʿa* legality must grant *siyāsa* a central role in it, both as a legal concept and a historical practice.[65]

As Fahmy has rightly pointed out, the view of the *Sharīʿa* as bound to morality is central to a reality based upon the writings of *fiqh.*[66] If other elements are incorporated into this definition, such as the role the state and the courts, a different image appears of the *Sharīʿa* as a legal system, not so drastically different nor divergent from its counterparts in the common and civil law traditions. As will be seen in Chapter Three, for example, Muftis working in British courts during the first half of the 19th century before the introduction of the Indian Penal Code regularly expanded upon the rules of *fiqh* and issued categories of punishment never envisioned by the *fiqh* literature. Why they chose to do so—under a colonial government exercising its power to change the law with Muslim actors in the minority—is an important yet not determining factor in this analysis. They could have simply issued *fatwas* against the desire of the British judge and have judge overrule them. This sometimes happened however, as will be seen, upon appeal the higher courts often sided with the Mufti and overruled the lower judge meaning that local concerns, and not necessarily the struggle for political power, was their primary operating concern.

This more comprehensive definition of the *Sharīʿa*, viewed through the implementation of the penal codes described in Chapters Three through Five, is the primary contribution of this dissertation to larger debates within the field of Islamic law. If observers continue to, as Khaled

[65] Fahmy, *In Quest of Justice,* 279.
[66] In this statement, Fahmy is also challenging the work of others such as Talal Asad who, when writing about Egyptian legal reform in his theoretical work *Formations of the Secular*, argued that the secularization of Egyptian law also meant the disconnection of the law from its moral roots. See Talal Asad. *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

Fahmy has, return to the vast body of primary sources available to us and see them as *part* of the definition and not contingencies or anomalies in a debate of power.[67]

Organization

To explore the new penal codes of the 19th century and ascertain their relationship to the broader conception of the *Sharīʿa* it is first necessary to understand the political and legal environment in which these codes were produced. Chapter One therefore focuses on the writings of Muslim actors in each jurisdiction who argue that the true purpose of Islamic Law, that is, the establishment of justice, had been lost by corrupt rulers and resulted in an increase in crime. By utilizing the Islamic legal field of *siyāsa*, these actors argued that the state ought to play a greater role in the creation of law. In the case of India, this chapter will show how jurists and Muftis participated directly in the legal interventions of the British and believed that the colonial powers were continuing in the path of the Mughals who had come before them.

Chapter Two then then looks at those who developed the codes and the institutions that produced them, focusing on the examples of Nazeer Ahmed of India and Muḥammad Qadrī Bāshā of Egypt. As centuries-old centers of Muslim learning such as al-Azhar became perceived as incapable of meeting the needs of society, new educational institutions such as the Egyptian School of Translators and the Indian Delhi College were established. Rather than being merely copies of European institutions, however, these new colleges were vibrant environments wherein Muslim traditions, including legal traditions, coalesced with those from Europe, producing a new cadre of

[67] For example, in his description of the integration of forensic medicine into the 19th century Egyptian penal system, Fahmy suggested that by more closely observing the views of the *ʿUlamāʾ's* initial resistence to autopsies came not from a *Sharʿī* opposition, but rather from the Egyptian family's concerns about family honor and the trauma of seeing their loved one dissected in the name of science. In the latter decades of the century these local concerns abated, and Egyptians themselves sougth out autopsies of their dead relatives to find out the true cause of death and seek justice. See Ibid, 63.

intellectuals who could straddle both worlds. When approaching the new penal codes, each of these scholars took Islamic legal understandings to heart and sought to strike a balance between incorporating new ways of legal thinking and preserving the fundamental objects of Islamic legal tradition.

The final three chapters of the dissertation turn to the content of the new codes themselves, comparing them to understandings developed in Islamic law proper, with a focus on the Ḥanafī school. Each of these chapters takes up one aspect of homicide law: defining the criminal act, intent, and criminal responsibility. Chapter Three looks at the classification of homicide and argues that, although the new codes of the 19th century modified Ḥanafī categories of homicide and eliminated altogether the category of semi-intentional homicide (*shibh ʿamd*), the categories developed by the codes remained in line with Ḥanafī understandings, with some even being verbatim copies of examples found in works of Ḥanafī jurisprudence (*fiqh*). This chapter also raises the question of the role of the state in the prosecution of homicide and shows how explainers of the new codes, with a focus on Egypt, justified the expansion of state power within Islamic norms.

Chapter Four explores the establishment of intent and how the codes attempted to shift the primary method of establishment from the presence of a weapon to the motive of the accused. While this shift succeeded in the Ottoman Empire and Egypt, whereas in India the presence of an external measure—a deadly weapon—continued to form the basis of criminal intent. Finally, Chapter Five examines criminal responsibility and covers three areas shaped by the codes: juvenile offenders, insanity, and shared criminal responsibility. In each of these areas, European understandings of the law, which were undergoing their own process of development, were combined with Islamic views from Ḥanafī law to form the content of the new codes and were worked out in cases on the ground.

The conclusion of the dissertation summarizes the findings of each of the earlier chapters and reflects on how they shed light on the larger debates of defining the *Sharīʿa*, the impact of colonialism, and the problems of both Islamist and post-colonial narratives that continue to dominate the field of Islamic legal historiography.

Chapter 1: Establishing Justice through State Law

In the second half of the nineteenth century the preeminent scholar of Farangi Mahal in Lucknow, Muḥammad ʿAbd al-Ḥayy (1264-1304/1848-1886), was asked whether it is permissible in Islamic law to seek out the rulings of "contemporary judges" (*ʿuhda-e qażā*), a veiled reference to British courts. He responded accordingly:

> Taking [the judgment] of contemporary judges [appointed] by a Sultan, whether just or unjust, Muslim or Infidel is religiously permissible. However, if that Sultan prohibits the judge from applying what is right (*bi ḥaqq mamānʿat sāzad*), in this situation it is prohibited.[1]

In support of his ruling, he cites two classical sources of law, the *Radd al-Muḥtār* by the early nineteenth century Ḥanafī Syrian scholar Ibn ʿĀbidīn (d. 1252/1836) and the collection of *fatwas* composed and compiled for the Mughal emperor Aurangzeb (d. 1118/1707), known as the *Fatāwā ʿĀlamgiriyya* or *Fatāwā Hindiyya*. Both sources mention the permissibility of seeking a court judgment from a judge appointed by an unjust ruler (*sulṭān jā'ir*) but ʿAbd al-Ḥayy expands upon this previous opinion to include even judges appointed by non-Muslims, an innovation that clearly was meant to cover cases adjudicated by the British.[2]

It is difficult to determine exactly when this question was posed to ʿAbd al-Ḥayy, but it likely occurred following the transfer of power in India from the East India Company to the British Crown in 1858 and following the application of new laws such as the Indian Penal Code in 1862 and the re-organization of the court system under British rule. From that point onward until the

[1] Muḥammad ʿAbd al-Ḥayy. *Khulāṣat al-Fatāwa* (Lucknow: Munshī Nawal Kishor, ND), 4:3.
[2] The use of the term infidel (*kāfir*) could from a theological standpoint also include Hindus and other non-Muslims, however it is rare to see Hindus referred to using this term, and during the 19th century it was most commonly used to refer to the British colonial officers as they were not only non-Muslim, but foreign to the Indian system. See for example Yohanan Friedmann, "Islamic Thought in Relation to the Indian Context" in *India's Islamic Traditions, 711-1750,* ed. Richard Eaton (New Delhi: Oxford University Press, 2003), 52.

rise of independence movements in the first half of the 20th century, no Islamic courts could be found in British territories, Lucknow in this case, and the only places in which Muslim rulers and judges were able to exercise direct control over legal practice was in princely states, such as Bhopal and Hyderabad. In the immediately prior *fatwa* in the same section, ʿAbd al-Ḥayy is asked about the qualifications of a judge, to which he gives the classical response established in *fiqh* works: that a judge must be a free Muslim of sound mind, and that the capabilities of independent juristic reasoning (*ijtihād*) and proper morals of justice (*ʿadālat*) are primary, if not absolutely necessary, conditions (*sharṭ-e awwaliyyat*).[3]

Placing these two *fatwas* together, we find that ʿAbd al-Ḥayy seems to be torn between two conflicting ideas. On the one hand, he is grounded in his traditional Islamic training in theology, philosophy and law, characterized by norms established over many centuries based upon the primary assumption that an Islamic system is in place and that—at least nominally—Muslim rulers control political authority. On the other hand, he is faced with the new reality on the ground, one that, particularly following the failure of the 1857 uprising, reflected widening British control in India, a sidelining of traditionally trained Muslim jurists, and significant changes to the court system and laws governing Muslims and non-Muslims alike.

Because of this tension, ʿAbd al-Ḥayy sought some form of middle ground, keeping in place the *fiqh* interpretations of law while making some modifications, namely, allowing judges to be appointed by non-Muslim rulers. Instead of promoting non-cooperation and resistance to the British, an idea that would become mainstream in the Muslim community in the early 20th century, ʿAbd al-Ḥayy chose a path that did not challenge the British authority in the law. With this *fatwa*, Muslims who found themselves subject to crimes and disputes could approach the British courts

[3] ʿAbd al-Ḥayy, *Khulāṣa*, 4:2.

without fear of betraying Islamic principles. Additionally, ʿAbd al-Ḥayy seems to believe that what the British were doing in the courts was not *necessarily* against Islamic law—there were instances in which it could have constituted a violation of the *sharīʿa*, leading to his addition of the requirement that the judgement be based on that which is right (*ḥaqq*). However, the core of his ruling still held: taking the judgement of a British-appoint judge is not religiously problematic.

This form of compromise between traditional understandings and the practical realities can be found in many other *fatwas* of ʿAbd al-Ḥayy. For example, he ruled that it was permissible for Muslims to study English and other Western sciences, with the condition that they pursue such study not out of love for (*maḥabbat*) or an attempt to imitate non-believers (*mushābahat*), but only out of a desire for knowledge to read and study their works (*iṭlāʿ bar maẕāmīn-e kalām-e īshān*).[4]

Although the legal positions of ʿAbd al-Ḥayy might seem unique to the Indian context where the non-Muslim British were in full control of the legal and social system, the same sentiment can be found in the other jurisdiction studied in this dissertation, even though Muslim rulers remained in power. In the Gülhane Declaration of 1839, for example, the Ottoman Sultan Abdülmecid I announced his intention to embark on a series of broad legal and social changes that would eventually lead to the Penal Code of 1858. Although his predecessors had laid the groundwork for many of these reforms, it is this document that is often cited as marking the onset of the *Tanẓīmāt*, or the re-organization of the empire.[5]

Historians have argued that the *Tanẓīmāt* period was the result of pressure from Western powers, particularly Western-leaning Ottoman diplomats posted in the empire's European provinces. To these historians, the only way the Ottoman Empire could have reformed would have

[4] Muḥammad ʿAbd al-Ḥayy. *Majmūʿ-e Fatāwa* (Lucknow: Yūsufī Press, 1911), 3:20.
[5] See for example R.H. Davison, "Tanẓīmāt," *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs.

been to adopt European standards of law, citizenship and rights, thus, we should classify the *Tanzimāt* period as an episode in the slow march of westernization and secularization.[6] However, other scholars have challenged this approach, encouraging observers to see the Rescript of Gülhane and the subsequent laws produced in the second half of the 19th century as more complex. On this account, the *Tanzimāt* was the result of an *internal* desire to reform an empire that had seen its power and influence wane in the face of wars with Russia and rising nationalist sentiments in the provinces.[7] For example, Butrus Abu-Manneh argued that the contents of the Rescript "lend no evidence of ideas or ideals borrowed from Western theory" and was the product of a uniquely internal Ottoman discourse.[8]

There is a significant power difference between the *fatwa* of ʿAbd al-Ḥayy, an independent legal scholar working within a system which by this time is fully dominated by a colonial force, and the sovereign Ottoman Sultan. However, for the present discussion it is critical to note that we can locate within the text of the Rescript of Gülhane an effort to strike a similar balance to that of ʿAbd al-Ḥayy, between maintaining traditional Islamic understandings while introducing new concepts to adapt to the needs of the time despite the difference in power and position of both. The Rescript remarks that:

> Over the last one hundred and fifty years a series of wars and various other reasons have resulted in the Empire conforming neither to the *Sharīʿa* nor Imperial laws, the result of which is that strength and prosperity has been replaced by weakness and poverty. The situation is that an Empire not governed under the rules of the *Sharīʿa* loses its stability.[9]

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[6] See for example Niyazi Berkes. *The Development of Secularism in Turkey* (Montreal: McGill University Press, 1964).
[7] See for example Avi Rubin. "Was There a Rule of Law in the Late Ottoman Empire?" *British Journal of Middle Eastern Studies* (2017), published October 18 2017, http://dx.doi.org/10.1080/13530194.2017.1383883.
[8] Butrus Abu-Manneh. "The Islamic Roots of the Gülhane Rescript," *Die Welt des Islams* 34, No. 2 (1994): 174.
[9] *Düstur* (Istanbul: Maṭbaʿ-e ʿĀmire, 1873), 4.

To solve this problem and return the Empire to its former glory, the Sultan sought the help of God and the Prophet "to seek by new institutions to give the provinces composing the Ottoman Empire the benefit of a good administration" through the guarantee of all subjects to:

1. The security of life, honor and fortune,
2. A regular system for the assessing and levying of taxes, and
3. An equally regular system for the levying of troops and the duration of their service.

The language of the Rescript of Gülhane, although often cast in the light of European and Enlightenment values, maintains an attachment to Islamic religious values throughout and, most importantly, the concept of the *Sharīʿa*. The state ensured that, while incorporating new concepts and reforming the Empire, the ideological attachment to the *Sharīʿa* remained intact.[10]

This chapter, therefore, explores the views of local actors on the changes taking place in the late 18th and 19th centuries in the jurisdictions at hand. It places a particular focus on the role of the state in the formation of law, a theme that underlies the scholarly discussions of the time and looks at the role that Muslim thinkers envisioned for the state. The chapter argues that in each jurisdiction, local actors believed there was a growing need to change their criminal law system to respond to the problems of rising crime and corruption of the existing system. These changes were seen by those involved as in accordance with the *Sharīʿa*, in particular the concept of state authority (*siyāsa*), and as furthering and fulfilling the ultimate goal of Islamic Law: the establishment of justice. This viewpoint was by no means monolithic, and there were always scholars who were wary of the changes taking place. However, throughout most of the 19th century alternative views remained squarely in the minority and would only become prominent at the turn of the 20th.[11] By

[10] The attachment to the *Sharīʿa* in the rhetoric of the Rescript has been presented by Tobias Heinzelmann. See Tobias Heinzelmann, "The Ruler's Monologue."

[11] In personal law, for example, Tarek Elgawhary has shown that in Egypt the opposition to the process of codification developed only in the late 19th and early 20th centuries with the works of figures such as Muḥammad Rashīd Riḍā

understanding the evolving role of the state in the formation of law, the new criminal laws enacted during the second half of the 19th century can be placed in their proper historical and intellectual contexts.

India: Following in the Mughal Footsteps

Following the Battle of Plassey in 1757, the British East India Company took control of the administration of justice in Bengal and, after a brief period of dual government alongside the Mughal representative (*nā'ib*), became solely responsible for the court system and in particular the prosecution of criminals. The Company created a multi-tiered system of courts modeled both in name and structure on that of the Mughals, on whose behalf they were officially ruling.

Additionally, during the latter half of the 18th Century a number of British officers in Bengal, under the orders of the Governor General, began commissioning the compilation and translation of classical texts on Islamic law into English or Persian, languages with which many of the British orientalists were more. The most well-known of these projects was that undertaken by the orientalist Charles Hamilton (d. 1792) involving the translation of the Ḥanafī *fiqh* text *al-Hidāya*, initially composed by the Central Asian scholar al-Marghīnānī (d. 593/1197). In the introduction to the original publication, Hamilton tells us that the only way that the Bengal government had reached what he called a "flourishing state" was by continuing with the system that worked best for the local population.

> The permanency of any foreign dominion (and indeed, the justification of holding such a dominion) requires that a strict attention be paid to the ease and advantage, not only of the *governors,* but of the *governed;* and to this great end nothing can so effectually contribute

(1865-1935) and Aḥmad Shākir (1892-1958). Tarek Elgawhary. "Restructuring Islamic Law: The opinions of the 'Ulama' towards codification of personal status law in Egypt." PhD diss., Princeton University, 2014.

> as preserving to the latter their ancient established practices, civil and religious, and protecting them in the exercise of their own institutes; for however defective or absurd these may in many instances appear, still they must be infinitely more acceptable than any which *we* could offer; since they are supported by the accumulated prejudice of ages, and, in the opinion of their followers, derive their origin from the Divinity itself.[12]

While *al-Hidāya* was a general legal text that covered all aspects of the Ḥanafī School, there were other projects in this period specifically composed for criminal law. Also in the late 18th century, the British judge John Herbert Harrington (d. 1828) commissioned the compilation and translation of works on prescribed (*ḥudūd*) and discretionary punishments (*taʿzīr*) from a number of scholars including Salāmat ʿAlī Khān (alive in 1212/1797) who produced a compilation of criminal law from Ḥanafī *fiqh* works, Sirāj al-Dīn ʿAlī Khān (alive in 1236/1820) who produced an independent work on discretionary punishment, as well as Najm al-Dīn ʿAlī Khān (d. 1229/1814) and his son Muḥammad Khalīl-al Dīn Khān who produced Persian translations of the criminal sections of the *Fatāwā ʿĀlamgiriyya*.

Little information is available regarding the first two authors, but much more is available regarding Najm al-Dīn ʿAlī Khān. Described as one of the greatest jurists of the Northern Indian town of Kakori, he received his traditional education at the hands of his family members, all scholarly members of the Farangi Mahal in Lucknow. After a period working as a judge in Lucknow, his colleague Tafażżal Ḥasan Khān invited him to join the ranks of the judiciary of the British East India Company in Calcutta in 1205/1790. It is reported that when he finally arrived in 1793, then Governor General John Shore (d. 1834) welcomed the scholar warmly, hugging him and appointing him as the chief judge (*qāżi al-qużā*) regarding all the matters of Muslims in areas

[12] ʿAlī ibn Abī Bakr al-Marghīnānī. *The Hedaya, or Guide: A commentary of the Mussulman Laws,* trans. Charles Hamilton (London: T. Bensley, 1791), iv.

controlled by the Company. In addition to his translations in criminal law, Najm al-Dīn's career of almost 25 years included issuing *fatwas* and judicial rulings that were applied in "every district from Kabul to the Deccan."[13] Upon his death in 1814, then Governor General of Bengal, the Earl of Moira Francis Edward Rawdon-Hastings (1754-1826), issued a letter to Najm al-Dīn's wife expressing the government's gratitude for his service:

> The shock of the death of your husband, the High Judge, has been felt by the Company no less than yourself, given that it has caused the disappearance of such a modest and proficient individual, and such an irreplaceable man of learning. Since in the Workshop of Fate there is no remedy except patience and submission; there is no doubt that in the path of patience you will choose toleration. Though your four children are employed in the highest positions, and thus you shall not be burdened by strain during your period of mourning, the government has decided, in recognition of your husband's worth and reputation, to fix Rs. 150 per mensem as your pension for the remainder of your life.[14]

Once completed and published, these translations were to be used in the British courts, or at least could be referred to by judges in order to understand how their Muslim counterparts, the Law Officers or Muftis, were reaching particular conclusions in their *fatwas*. These were also not obscure texts, and various manuscript copies of each can be found throughout the major libraries of Northern India (Khuda Bakhsh in Patna and the Rampur Raza Library). Additionally, printed copies of each of these works were produced throughout the 19th and into the first half of the 20th century and can still be accessed in the libraries of the Muslim seminaries Nadwat al-ʿUlamāʾ in Lucknow and Deoband. For example, the most recent publication found in the course of the present study was an Urdu translation of the work of Salāmat ʿAlī Khān produced in 1929 at the request

[13] Hāfiẓ Muḥammad ʿAlī Ḥaydar. *Tadhkira-e Mashāhīr-e Kākūrī* (Lucknow: ʾAṣaḥ al-Maṭābiʿ, 1927), 432-3.
[14] Ḥaydar, *Tadhkira*, 433.

of the head advocate of the princely state of Hyderabad, Mīr Aḥmad Sharīf.[15]

Muhammad Qasim Zaman has described these efforts as an attempt by the colonial powers to exercise their authority and reduce what they perceived as the arbitrary nature of rulings provided by Hindu Pundits and Muslim Muftis to bring more uniformity to the law. He cites the orientalist Sir William Jones (d. 1794) stating "Pure Integrity is hardly to be found among the Pandits and Maulavis, few of whom give opinions without a culpable bias, if the parties can have access to them. I therefore always make them produce original texts and see them in their own books."[16] Zaman thus argues that these texts were meant to sideline Muslim scholars and take away their authority and make more room for the British to issue the kinds of rules that they saw fit for their own interests. Indeed, Zaman mentions a bit later, "The last vestiges of Islamic criminal law ceased to exist with the Penal Code of 1862."[17]

However, there are two main features of the legal landscape during the end of the 18th and the first half of the 19th centuries that should be considered in order to modify Zaman's view and show that the exercise of British power was not always meant to sideline the efforts of Muslim scholars, nor did those working with the British necessarily view British colonial intervention as antithetical to their system. First, the legal opinions of Najm al-Dīn ʿAlī Khān, a Muslim scholar, were not sidelined but, in fact, were welcomed and encouraged to a significant degree by the highest levels of the Company administration throughout their Indian holdings, as has already been attested to by the biographical text cited above. Second, in each of these translated texts, the British are not referred to as conquerors but are given the same honorific treatment demonstrated toward fellow Muslim scholars. For example, in the introduction to Salāmat ʿAlī Khān's work the author

[15] Salāmat ʿAlī Khān. *Islāmī Qānūn-e Faujdārī, Tarjuma-e Kitāb al-Ikhtiyār* (Azamgarh: Maṭbaʿ-e Maʿārif, ND).
[16] Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 21.
[17] Ibid, 23.

refers to his patron, Harrington, as "the Aristotle of his time"[18] while Najm al-Dīn ʿAlī Khān refers to him as the "protector of the scholars (*ʿulamāʾ*)" and asks God that his justice and influence spread across the world.[19] The most glowing of these praises is in the introduction written by Sirāj al-Dīn ʿAlī Khān, who states that he took it upon himself to compose his work:

> …when I took the position as a Mufti of the great courts during the reign of two great princes, the heads of the courts and the greatest of the [judges] in honor and pride, the most just in morals and disposition, the most complete in organization and efficiency, the highest in refinement and discipline, the bringers of security and the spreaders of justice and kindness, the shelter of scholars and refuge to the poor and downtrodden, Mr. Henry Corbick and Mr. John Herbert Harrington. May God grant them benefit in their justice and legal understanding (*fiqh*) to what is good and lasting.[20]

Although this type of honorific language was common in South Asian literature, there is more in this statement to indicate that Sirāj al-Dīn was paying more than just lip service to his British patrons. Beyond his positive depiction of two non-Muslim British judges, Sirāj al-Dīn ʿAlī Khān's use of the term 'jurisprudence' *(fiqh)* when referring to their court rulings is particularly striking and draws cause for further analysis. Traditionally, *fiqh* was used to denote the rules produced by Muslim scholars and, especially following the crystallization of the schools of law around the 11th or 12th century, only those rulings constructed by scholars within a certain school. In the case of South Asia, most of these scholars were in the Ḥanafī school. Comprehensive legal works using the Ḥanafī method of interpretation continued to be written until the middle of the 19th century, mainly coming to an end with the Syrian scholar Ibn ʿAbidīn (d. 1252/1836) whose work was cited

[18] Salāmat ʿAlī Khān. *Al-Ikhtiyār.* Ms. 2060, Khuda Baksh Library, Patna.
[19] Najm al-Dīn ʿAlī Khān. *Kitāb-e Jināyāt*. Ms. 3829, Khuda Baksh Library, Patna.
[20] Sirāj al-Dīn ʿAlī Khān. *Jāmiʿ al-Taʿzīrāt min Kutub al-Thiqāt* (Maṭbaʿ ʿAyn al-ʿAyān, 1820), 2-3.

by ʿAbd al-Ḥayy in the introduction to this chapter. That Sirāj al-Dīn ʿAlī Khān chose to use such a term to refer to the legal opinions of British judges in the 18th century indicates that he believed their work was consonant with Islamic law and that their rulings entailed some form of Islamic legal legitimacy. Unfortunately, little else is known about Sirāj al-Dīn ʿAlī Khān's opinions about the British so it is impossible to construct a complete analysis of exactly how, on his account, British judges could be considered to produce *fiqh.*

It will come as little surprise therefore that observers of the Muslim intellectual community in South Asia find little to no resistance to increasing on the part of Muslim scholars to British influence in the law during the 18th and 19th centuries. In his description of Muslim reception of changing laws and regulations, Francis Robinson speaks of a silence from Muslim scholars. In his view, except for the movement begun by Sayyed Ahmad in Sindh and the Faraizis in Bengal, most Muslim scholars expressed little open opposition to British changes in the legal system until the end of the 19th century and into the 20th.[21]

Whereas Robinson focuses his work on the scholars of Farangi Mahal in Lucknow, it is important to note that not all Muslims of South Asia were so silent with regard to legal changes ushered in by the British. This is most famously true of scholars from the Delhi School.[22] In a manuscript produced by one Abū Saʿīd Ẓuhūr al-Dīn in 1181/1767, the author remarks that, although the most just religion of the world was Islam and that Muslim scholars had for centuries dominated in the fields of law and order, the situation had changed following the Battle of Plassey.

> The religion of Muḥammad, the best of religions, has become abandoned and the Muslims have been defeated, every land of the Guided Path has become the prisoner of the infidels,

[21] Francis Robinson. *The 'Ulama of Farangi Mahall and Islamic Culture in South Asia* (London: C. Hurst, 2001), 186-7.

[22] This refers to the school of thought established by the preeminent scholar Shah Wali Ullah Dahlawi (d. 1762) and should not be confused with the Delhi College, a religious school that will be discussed further in the next chapter.

the oppression of the Muslims has been made clear and the knowledge of non-Muslims has been raised upon high.[23]

From the work of Robinson and the Muslim scholars who worked with the British during the late 18th and early 19th centuries cited above, we see that many within the South Asian Muslim scholarly community at the very least tolerated—and in many cases worked in cooperation with—the expansion of British authority in the realm of law. From their works they appear to have viewed the British as a continuation of the Mughal legal authority of the past, seeking appointments in the British judiciary and working as Muftis (in the case of Sirāj al-Dīn ʿAlī Khān and Najm al-Dīn ʿAlī Khān) and close advisors to their British counterparts. In the second half of the 19th century, with the introduction of the Indian Penal Code and the full incorporation of most of South Asia into direct Crown authority, the situation would slowly begin to change as scholars from new movements, like that based in Deoband, voiced their opposition to British domination. However, that opposition would, for the remainder of the 19th century, remain focused on an individualized spiritual reform of Muslims, only reaching the level of law in the beginning of the 20th century.

To illustrate this point, a figure in the legal field that has received significant recent attention is Justice Syed Mahmood (1850-1903), who was appointed as an officiating judge to the High Court of Allahabad in 1882 and became a permanent member of the Court in 1887 until his forced retirement in 1893. As the first Muslim judge appointed to such a position, the rulings of Justice Mahmood are described by Sohaira Siddiqui as a challenge to the British attempts to codify Islamic rules of inheritance. However, because of the dominance of "colonial legal structures and logic," he was unable to make any significant change to established precedent.[24] The life and work

[23] Abū Saʿīd Ẓuhūr al-Dīn. *Ḥīrat al-Fuqahāʾ wa Ḥujjat al-Quḍāʾ*. Ms. 2669, Khuda Baksh Library, Patna, Intro.
[24] Sohaira Siddiqui. "Navigating Colonial Power: Challenging Precedents and the Limitation of Local Elites," *Islamic Law and Society* 25, No. 4 (2018): 1-41.

of Justice Mahmood are important but should be seen in their context as occurring at the very end of the 19th century and we should be careful to avoid anachronistically placing them in the context of anti-colonial movements.

Ottoman Empire and Egypt: Corruption and the Perception of Crime

While Muslim scholars in India took up the task of creating a space in which the non-Muslim British could operate in the legal sphere thereby granting a degree of Islamic legitimacy to their actions, the wider Ottoman Empire and its Arab provinces were focused on something slightly different. Although these geographical areas never faced the problem of non-Muslim rule and Muslim political authorities were always attached to the religion at least by name, they and the systems that they governed were faced with the perceived problem of an increase in crime and a need to control the population.

Fariba Zarinebaf documented the rise of violent crime in the Ottoman capital, Istanbul. According to her figures, violent assault and injury made up more than 10 percent of convictions in the 1720s and in the second half of the 18th century, "10.4 percent of imperial orders to local officials in Istanbul and its dependencies concerned homicide."[25] This increase, according to Zarinebaf, was largely the result of economic downturns after long wars with Russia and the increase of single men and unemployed workers who settled in the city during this period. Recognizing this problem, the Ottoman government rapidly expanded its system of surveillance and policing during the 18th century and paved the way for the creation of a modern police force in the following century.[26]

[25] Fariba Zarinebaf. *Crime and Punishment in Istanbul: 1700-1800* (Berkeley: University of California Press, 2010), 113.
[26] Ibid, 176.

In the case of Egypt, there is little information regarding the prevalence of crime in the 18th or most of the 19th century. Regular statistical records regarding the operation of the courts and the police were not kept until after the establishment of the National Courts, and the first full figures from 1896 cited a violent crime rate of around 2.6 crimes per 10,000 inhabitants.[27] Most observers have noted that during the time of Muḥammad ʿAlī, the Ottoman governor for the majority of the first half of the 19th century (1805-1848), the desire on the part of the government to create new criminal law and become active in the judiciary was not motivated by a perceived rise in the crime rate, but rather by a shift in the organization of the state to one commanded by the central authority. The establishment of a regular army independent of that of the Ottomans, as well as the development of the agriculture sector and basic industries all required a steady workforce, mostly brought into service involuntarily.[28] As a result, the first criminal legislation created by Muḥammad ʿAlī in 1829 focused primarily on punishing state offenders, draft dodgers and those who damaged state property. Many of these prisoners were sentenced to manual labor or forced into military service as punishment, all in service of the greater state system.[29] This desire for control evolved further during the second half of the 19th century when a new local elite, known as the *Effendis*, sought to re-shape their nation and their rural counterparts, reforming the society through law, education and culture.[30]

With these motivations in mind, observers found their system of criminal punishment lacking in organization, rife with corruption and largely incapable of meeting these new

[27] Muṣṭafa Muḥammad Bek. "al-Ijrām fī Miṣr," in *al-Kitāb al-Dhahabī li al-Maḥākim al- Ahliyya* (Bulāq: al-Maṭbaʿa al-ʾAmīriyya, 1938), 22. For a comparison, in 2010 the average rate in the United States was 36.5 per 10,000 inhabitants.
[28] Khaled Fahmy. *All the Pasha's Men: Mehmed Ali, his army and the making of modern Egypt* (Cairo: American University in Cairo Press, 2002).
[29] Peters, "For His Correction."
[30] Michael Gasper. *The Power of Representation: Publics, peasants, and Islam in Egypt* (Stanford: Stanford University Press, 2009).

challenges. Writing about the environment before the French occupation of Egypt in 1789, the historian al-Jabartī, in cooperation with the Sheikh of al-Azhar Ḥasan al-ʿAṭṭār, praised the Ottoman Sultan Selim III for saving their nation from collapse. In their view, the Mamluks, though they had in the past held back Mongol and Crusader invasions, had fallen into the doldrums of corruption and become weak. Speaking about the Mamluk governors under the Ottoman Empire:

> They stood in the face of time but were not careful of its deceit. They destroyed the front lines and raised places. They replaced the heroes of men with the lords of backwardness, and brave cavalrymen with beautiful male servants. They race in dirt circles with pride and arrogance, to the square of every divergence. They want nothing except the resources of merriment, and they do not care about what harmful reasons they have ignored.[31]

According to al-Jabartī the Mamluks had not only relaxed their military obligations, thereby opening Egypt to foreign invasion, they had also contributed to the general disintegration of Egyptian society, including the collapse of the economy, the failure of the education system, and the ineffectiveness of the courts and application of justice.

Similar sentiments were echoed slightly more than a century later in *al-Muḥāmā*, a comprehensive study of the judiciary and practice of attorneys published by Aḥmad Fatḥī Zaghlūl, an Egyptian legal scholar working at the turn of the 20th century and brother to the infamous leader of the 1919 Revolution, Saʿd Zaghlūl. Speaking about criminal law, Aḥmad Fatḥī Zaghlūl noted that when the court system was ordered to bring forth and solve open cases in preparation for the launching of the new National Courts in 1883, they reported a large number of instances in which criminal proceedings had taken more than a decade to resolve. In one particular case—the murder of a man named Yūsuf Dardīr—the murder had occurred in 1281/1864 but, because of

[31] ʿAbd al-Raḥmān ibn Ḥasan al-Jabartī. *Maẓhar al-Taqdīs bi Zawāl Dawlat al-Fransīs* (Cairo: Dār al-Kutub al-Miṣriyya, 1998), 2-3.

inefficiencies in the court system, over 26 years had passed before the courts could reach a final verdict.[32] In another instance, two defendants were able to take advantage of the court inspectors, most likely through bribery, and were let off without any punishment whatsoever.[33] In the mind of Aḥmad Fatḥī Zaghlūl these problems were the result of the lack of a formal organized system to handle cases. Laws were arbitrary, and much was left to the whims of local governors and town administrators (*mashāikh*).

Writing in *al-Kitāb al-Dhahabī*, a commemorative work published in 1933 marking 50 years since the establishment of the National Courts, scholar and member of the Khedival Law School Muḥammad Labīb ʿAṭiyya, stated:

> At that time [before the new code], there was no law that clarified rulings, or defined with its texts types of crimes or named their punishments, and no executive authorities had defined a system responsible for issuing and implementing punishment. People were exposed to a penal system composed of pieces of rulings from the *Sharīʿa* and regulations issued by governors upon different occasions, without any comprehensive connection to what may be called penal justice and how to achieve it…
>
> Those who observe these various laws become aware from the first glance that the area defined for crimes expanded and contracted, and punishments lessened and were intensified, according to the whims of administrative rulers.[34]

Khaled Fahmy has warned about seeing the work of Aḥmad Fatḥī Zaghlūl and *al-Kitāb al-Dhahabī* as an accurate depiction of the Egyptian legal system. Speaking particularly about Zaghlūl he

[32] Aḥmad Fatḥī Zaghlūl. *al-Muḥāmā* (Cairo: Dār al-Kutub wa al-Wathā'iq al-Qawmiyya, 2015), 223.
[33] Ibid, 240-1.
[34] Muḥammad Labīb ʿAṭiyya, "Taṭawwur Qānūn al-ʿUqūbāt fī Miṣr min ʿAhd Inshāʾ al-Maḥākim al-Ahliyya" in *Al-Kitāb al-Dhahabī li al-Maḥākim al-Ahliyya* (Bulaq: al-Matba'a al-Amiriyya, 1933), 2:6.

stated:

> All in all, the book [al-Muhamah] is a damning indictment of the entire legal system, which is consistently described as despotic and inherently unjust. While he recounts the story of the establishment of the [judicial] councils by reproducing the original Khedival orders that founded them, Zaghlul failed to uncover the logic that informed their activity, and he could not help but reproduce his modernist thinking of them as failing to live up to Western legal principles.[35]

Fahmy is correct in pointing out Aḥmad Fatḥī Zaghlūl's biases in analyzing the court system. Additional studies, such as those by Rudolph Peters and Fahmy himself, have used original court documents to show that the inner-workings of the 19th century Egyptian legal system were, in actuality, much more complex.[36] However, *al-Muhāmā* and *al-Kitāb al-Dhahabī* accurately depict the reality that most Muslim observers in the late 18th and 19th centuries shared similar critiques of the legal system being corrupt, inefficient and despotic—a factor that is critical for understanding the introduction of the new penal codes in the jurisdictions of interest in this dissertation.

Perhaps the most prominent of these observers is the Syrian scholar ʿAbd al-Raḥmān al-Kawākibī (1271-1320 / 1855-1902). His seminal work, *Ṭabāʾiʿ al-Istibdād wa Maṣāriʿ al-Istiʿbād*, presents a call to wipe out what he described as the greatest disease threatening the Muslim world: tyranny. In his introduction he speaks about a growing desire amongst scholars to speak about political issues and search for the source (*ʾaṣl*) of the disease that has afflicted peoples "In the East in general and particularly amongst the Muslims."[37] He answers:

> Some will say that the source of the disease is negligence of religion…while others will

[35] Khaled Fahmy. "Rudolph Peters and the History of Modern Egyptian Law" in *Legal Documents as Sources for the History of Muslim Societies: Studies in Honour of Rudolph Peters,* ed. Maaike van Berkel (Leiden: Brill, 2017), 16.
[36] Ibid, 16-17.
[37] ʿAbd al-Raḥmān al-Kawākibī. *Ṭabāʾiʿ al-Istibdād wa Maṣāriʿ al-Istiʿbād* (Cairo: Muʾassasat al-Hindāwī, 2011), 7.

> say that is a difference of [political] opinions, [and still] others will claim that the reason is ignorance…I agree with the opinion that says the source of the disease is political tyranny, an opinion that after long contemplation I have determined is correct.[38]

al-Kawākibī does not mention any specific governments or officials in his work, but rather speaks generally about how tyranny is supported by the religious and educational establishments and permeates every element of society and hinders development.

Writing at roughly the same time as al-Kawākibī, ʿAbd Allāh ibn Ḥasan Barakat Zāda (1260-1318/1844-1900)[39] speaks more specifically about how in the Ottoman Empire officials and judges were constantly subject to bribery:

> This [bribery] is an old trouble of ours, and it has become more widespread in our time to the point that it has become a great tribulation, how cursed of a calamity it is and the greatness of its woe. How sorrowful it is that this vice has become permissible in our country with corrupt interpretations so much that it is now [considered] a respected device [in government].[40]

The result of bribery in the court system, according to Barakat Zāda, was that people no longer trusted one another and would file false reports, paying judges and other government officials to issue rulings that favored the unjust and destroyed families and property.[41] Many other political writers during this time would make similar comments from across the empire, as far afield as Iraq

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[38] al-Kawākibī, *Ṭabāʾiʿ*, 8.

[39] ʿAbd Allāh ibn Ḥasan Barakat Zāda was a Turkish judicial official who began his career as a scribe under the Ottoman Sheikh al-Islām Seyit Mehmed Sadettin Efendi (served from 1858-1863). He reached the position of Chief Scribe and was then appointed as a judge in Beirut and inspector in Syria. Later in his life, he became the Chief Judge of Egypt and Anatolia but remained a resident of Cairo until his death in 1900 and was buried close to the mausoleum of al-Shāfiʿī. ʿAbd Allāh ibn Ḥasan Barakat Zāda. *al-Siyāsa al-Sharʿiyya fī Ḥuqūq al-Rāʿi wa Saʿādat al-Raʿiyya* (Cairo: Maṭbaʿa al-Taraqqī, 1900), 4-6.

[40] Barakat Zāda, *al-Siyāsa*, 49.

[41] Ibid, 56.

and Tunisia.[42]

At the core of these calls to enact legal and administrative change was a growing belief in the ideal of justice (*ʿadl*). For example, when Muḥammad ʿAlī of Egypt issued an order to his cabinet to establish a selection of new criminal tribunals in 1842, he argued that "If an offender is sentenced to penalties laid down [by law] without the slightest partiality and with justice and equity, then that person will have no further objections."[43] He compared his order to similar movements made in Europe and noted the attention European courts give to investigation and the clear establishment of fault and the necessity of punishment. When al-Kawākibī wrote about the cure for tyranny he cites a strong court system based on the ideal of justice:

> The greatest achievement reached by human beings is their attachment to the foundations of organized government that builds a dam in the face of tyranny, the virus that causes all corruption. This creates a situation in which there is no strength or influence stronger than that of the Law, and the Law is God's strong rope. They place the power of legislation in the hands of the nation, and the nation can never be led astray. And when they make courts that hold accountable the Sultan and the vagrant alike, it emulates the Great Court of God in its justice.[44]

Expanding State Control through *Siyāsa*

In the midst of this environment of perceived rise in crime, state and judicial corruption, as well as the desire to expand state control over their populations and establish a greater ideal of

[42] See for example Aḥmad al-Barzanjī al-Ḥusaynī. *Al-Naṣīḥa al-ʿĀmma li Mulūk al-Islām wa al-ʿĀmma* (Damascus: Unknown, 1890) and Muḥammad Bayram al-Khāmis. *Mulāḥiẓāt Siyāsiyya ʿan al-Tanẓīmāt al-Lāzima li al-Dawla al-ʿUliya* (NP, 1880).
[43] Cited in Peters, "Correction," 172.
[44] al-Kawākibī, *Ṭabāʾiʿ,* 103-4.

justice, legal scholars and governments turned to the classical Islamic tool of political authority (*siyāsa*). Long used to justify the involvement of state power within an Islamic legal context, major advances in the theorization of *siyāsa* occurred during the 14th century with the Syrian Taqī al-Dīn Aḥmad Ibn Taymiyya (d. 728/1328) and his student Ibn Qayyim al-Jawziyya (d. 751/1350).[45] In his introduction to *al-Ṭuruq al-Ḥukmiyya fī al-Siyāsa al-Sharʿiyya,* Ibn Qayyim outlined the definition of *siyāsa* by emphasizing:

> Indeed, God sent His messengers and brought down His books to establish balance amongst humanity, and this is the justice upon which Heaven and Earth are placed. If the signs of justice show themselves in any manner, then there is found the Law (*Sharīʿa*) of God and His religion.[46]

Ibn Qayyim believed that the Islamic legal system had gone out of balance. One the one hand, stricter opinions, which argued that the interpretation and application of Islamic law in courts was exclusively bound by rules of evidence found in the fundamental texts of Islam (the Qur'ān and the Sunna of the Prophet Muḥammad), failed to account for the complexities of reality. On the other hand, political rulers who believed that they could do as they wish outside the bounds of the *Sharīʿa* ended up "suspending the prescribed punishments (*ʿaṭṭalū al-ḥudud*), disposing the rights of individuals (*ḍayyʿaū al-ḥuqūq*), emboldening the sinful in corruption (*jarraʾū ʾahl al-fujūr ʿala al-fasād*), and making the *Sharīʿa* limited [so that it does not] serve the benefits of the people."[47]

His solution to this problem was for political rulers to become more acquainted with two additional types of legal understanding (*fiqh*): the general rules of the physical world (*aḥkām al-*

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[45] Baber Johansen. "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof," *Islamic Law and Society* 9, No. 2 (2002): 168-193; For more on the movement of Ibn Taymiyya, see Ovamir Anjum. *Politics, Law, and Community in Islamic Thought: the Taymiyyan movement* (New York: Cambridge University Press, 2012).

[46] Muḥammad b. Qayyim al-Jawziyya. *al-Ṭuruq al-Ḥukmiyya fī al-Siyāsa al-Sharʿiyya* (Beirut: Maktabat al-Muʾayyad, 1989), 13.

[47] Ibid.

ḥawādith al-kulliyya) and the lived realities and conditions of the people (*nafs al-wāqiʿ wa aḥwāl al-nās*).[48] By combining these understandings with the interpretive methods and rules developed by the schools of Islamic law a political ruler could better apply God's law "…whose purpose is the establishment of justice amongst the believers, and creating balance between people."[49]

Ibn Qayyim sought to reign in the uncontrolled power of local rulers and judges to make law. His effort resulted in granting Islamic legitimacy to the actions of rulers within limits, and *siyāsa* became one of the pillars of the legal system of the later Ottoman Empire.[50] During the 18th and 19th centuries, the concept of *siyāsa* would be expanded even further, and used by scholars to encourage increased state involvement in the law. In India, for example, Sirāj al-Dīn ʿAlī Khān dedicated the final chapter of his work on discretionary punishment (*taʿzīr*) to defining the concept of *siyāsa* and encouraging local (British) leaders to take advantage of it, particularly in cases where literal understandings of Islamic legal norms would not suffice.

> Do you not see that if a man strangled another, threw him into a well, or off a cliff, and that death resulted, then he would be given discretionary punishment (*taʿzīr*) and not retaliation (*qiṣāṣ*), and that if this became a habit and he repeated the crime then he should be killed using political authority (*siyāsa*^{tan})?
>
> The essence of this topic [therefore] is that all serious crimes for which a specific punishment is not outlined, or in cases where a punishment is cannot be applied because of the presence of doubt (*shubha*), and in which there would be a great injustice [in setting the defendant free], the issue is given to the ruler (*imām*) for him to decide. In many

[48] al-Jawziyya, *al-Ṭuruq*, 4.
[49] Ibid, 13.
[50] See Halil İnalcık. *Osmanlı'da Devlet, Hukuk ve Adalet* (Istanbul: Kronik Yayıncılık, 2016).

instances, which are too numerous to even mention, seeking the opinion of the ruler is primary.[51]

ʿAbd al-Ḥayy, when asked about the same issue, gave a similar response and widened the scope further to include not only the main Islamic ruler (*imām*), but also secular leaders (*sulṭān*) and governors (*ḥākim*).

> …*siyāsa* is a form of discretionary punishment (*taʿzīr*) and includes all forms of extreme punishment (*ʿuqūbat-e shadīda*) such as execution, life imprisonment, and expulsion from the country. Execution as *siyāsa* is not limited to situations of a murderer who has choked a victim to death multiple times, rather it is general, and is [applicable] in every form of crime according to the general benefit [seen] by the *Sulṭān* or *Ḥākim*.[52]

Within the British courts in India, Muslim law officers often cited *siyāsa* as a way to allow British judges to issue rulings when direct evidence was not always available. In one case in Bengal in 1853, two defendants (Baij Roy and Suddoo Roy) were charged with the murder of Munshur Aheer and the wounding of Hurkoo Aheer, the prosecutor of the case. During the investigation, which included medical evidence and witness testimony, it became clear that the murder had occurred while a group of people had gotten into a fight over money to be paid for thatching grass. Under literal interpretations of Ḥanafī law, a conviction could not be produced, as no witness could directly identify one of the two defendants as having committed the murder. Despite this, the Muslim law officer issued a *fatwa* of guilty for both defendants and, according to the court records, "liable to *seeasut*." The judge sentenced them to six and five years respectively, a judgment that was approved upon review by the Nizamut Adawlut.[53]

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[51] Sirāj al-Dīn ʿAlī Khān. *Jāmiʿ*, 108-9.
[52] ʿAbd al-Ḥayy. *Majmūʿ,* 2:221.
[53] *Gov. v. Baij Roy* (1853) NA Ben 2 Shahabad 955.

In another case in the same collection, a man by the name of Sooltan Bhueemya was charged with the murder of his lover's husband, Pauchcowree. The *fatwa*, based on medical evidence and the witness testimony of one individual, named Roostom, who reached the scene of the crime and saw the defendant running away, "convicts the prisoner of the murder charged, on strong presumption, and declares him liable to the punishment of akoobut." The session's judge agreed and issued the death penalty, which was confirmed by the Nizamut Adawlut upon appeal.[54]

In this case, the Mufti could not directly convict the prisoner of any of the traditional punishments found in Islamic law as no eyewitness evidence has been provided and absolute certainty could not be established. However, the circumstances of the case were clear, and the defendant provided no witnesses in his defense. Therefore, in order to ensure that the rights of the deceased and his family are preserved and to facilitate the punishment of the British, he issued a conviction, for which the session's judge then recommended the highest punishment available by law.

In addition to the accommodation and justification of expanding state control by way of the classical legal concept of *siyāsa*, scholars also strongly discouraged Muslims from taking the law into their own hands, even if the crime committed was considered a serious breach of etiquette and threatened general harmony. ʿAbd al-Ḥayy, for example, refused to allow the application of the prescribed punishment (*ḥadd*) for adultery (*zina*), stating that "…carrying out a *ḥadd* punishment without the [approval of] a judge or ruler is not permissible, and applying the same punishment if ordered by an informal settlement (*taḥkīm wāsiṭe*) is also not correct."[55]

In the Ottoman Empire, the writings of Barakat Zāda, whose statements on corruption and bribery in the judicial system were mentioned earlier in this chapter, can be used to analyze the

[54] *Gov. v. Sooltan Bhueemya* (1853) NA Ben 2 Backergunge 480.
[55] ʿAbd al-Ḥayy. *Majmūʿ,* 2:226.

role of *siyāsa* in the application of law. Writing with the same tone as Ibn Qayyim, Barakat Zāda believed that the Ottoman Empire had lost its balance between two forms of extremism. On the one hand, some in the Empire had wrongly believed that *siyāsa* was to be used in any situation in which the public good (*maṣlaḥa*) necessitated it, causing "the doors of injustice to open, blood to be spilled, and property to be taken in opposition to what the *Sharīʿa* requires."[56] These voices had leaned too close to Europe, calling for the complete translation and application of European laws and court systems. On the other hand, there were too many who believed that *siyāsa* had no place within the legal system and that the *Sharīʿa* was limited to only the specific rules of *fiqh* created by previous scholars.

Speaking particularly about criminal law, Barakat Zāda's solution to this problem was to expand the realm of evidence within the *Sharīʿa*, allowing judges to convict with an "overwhelming belief (*al-ẓann al-ghālib*)" of the prisoner's guilt.[57] The expertise of police forces should be used more readily in investigation, and the accuracy of witness testimony and confessions should be complimented with the prior record and reputation of those making such statements. The second point is particularly important in situations of homicide in self-defense. For example, if a man comes before the court and confesses to murdering another but claims that he did so because the person had attacked him or was attempting to steal his property, before the verdict of retaliation (*qiṣāṣ*) is issued the judge should observe the general nature of the deceased. If the deceased were known for "disruption, corruption, and theft (*fitna, fasād, wa sariqa*)," the punishment should be mitigated, otherwise the defense of the perpetrator should be disregarded.[58]

[56] Barakat Zāda, *al-Siyāsa al-Sharʿiyya*, 8.
[57] Ibid, 37.
[58] Ibid, 48.

On the ground in Egypt, the state's power of *siyāsa* was being employed to expand the rules of evidence and bring more criminals to justice through the use of forensic evidence. As discussed in an article by Khaled Fahmy, the Egyptian state during the 19th century implemented types of forensic evidence such as autopsies in criminal procedure in order to "exercise greater control over society."[59] In one case cited from 1877, a man by the name of Muḥammad ʿAbd al-Raḥmān was sentenced to one year in prison for killing his mother-in-law. The case had been previously dropped by the victim's son based on witness statements who said that she had died of a stomach illness but was re-opened when the victim's son became suspicious of the son-in-law and insisted that an autopsy be carried out, which confirmed that she had been murdered.[60]

These new practices were not seen as contradictory to the *Sharīʿa* and "none of these medico-legal innovations was couched in a language that would be considered inimical to Islam, something that should not be seen as a polemical trick or a clever ploy resorted to in an attempt to placate the *ʿulamāʾ*."[61] Rather, during the rest of the century, both traditional scholars and new legal minds alike felt that the use of *siyāsa* and forensic medicine complemented and, ultimately, sought to help uphold the *Sharīʿa*. For example, when writing about rules of forensic medicine, a doctor named Muḥammad al-Shubāsī argued that if a student of forensic medicine found a dead body in the street and "says that the victim died as a result of a brain stroke but death was caused otherwise, then two errors are committed: first the *Sharīʿa*-stipulated capital punishment (*qiṣāṣ*) from his murderer is prevented, and, second, this case would be recorded wrongly in the death registers."[62]

[59] Fahmy, "Anatomy of Justice," 226.
[60] Ibid, 252-3.
[61] Ibid, 264.
[62] Cited in Ibid, 266.

Conclusion

The political and legal environment of the 18th and 19th centuries in the areas covered in this dissertation share a number of important themes. In each jurisdiction, there was a growing belief that the society needed reform to cope with a perceived rise in crime, the state exhibited a desire to centralize and control its population, and scholars advocated for the establishment of a greater sense of justice. Local observers of the existing legal systems saw a system that suffered from a high degree of corruption; for example, in Egypt, the application of a crude mixture of traditional Islamic principles modified by imperial orders and overlapping understandings of the law led to confusion and corruption, causing a loss of individual rights and hampering state control. Therefore, a comprehensive suite of reforms was needed to rectify this problem.

Change did not happen immediately; rather, as can be seen in each jurisdiction, reform occurred in a slow, piecemeal fashion that succeeded in some cases and failed in others. Egypt, for instance, witnessed the implementation of a number of new criminal laws during the 19th century until the establishment of the National Courts in the early 1880s and the final introduction of a Penal Code in 1883, with the greater Ottoman Empire going through similar iterative transitions both before and after the Penal Code of 1858. In India as well, numerous British circulars and criminal legislations slowly brought the legal system to a point of exhaustive change. Although the Law Commission initially composed the final Penal Code in the 1830s, it never saw the light of day and remained on the shelf until after the transfer to Crown control following the Uprising of 1857. Still, the motivations for legal reform persisted throughout the entirety of the 19th century and formed the impetus for the final implementation of new Penal Codes in the second half of the century.

All of these changes, including the new Penal Codes, occurred within a context thoroughly defined by traditional understandings of Islamic Law, particularly that of discretionary punishment (*taʿzīr*) and political authority (*siyāsa*), as we will see in detail throughout the subsequent chapters of this dissertation. In the Ottoman Empire and Egypt, as attested to in the political writings of scholars such as Barakat Zāda, the language of earlier scholars such as the 14th century Ḥanbalī Ibn Qayyim was employed to call for the expansion of the rules of evidence and for a more effective enactment of justice. In Egypt, this took the form of the introduction of forensic evidence which was not seen as a foreign import but rather was seen as complimenting the *Sharīʿa* and helping to achieve its ultimate goals. Additionally, in India, Muslim legal scholars worked hand-in-hand with their British counterparts—both outside and inside the courts—to facilitate these changes and grant them a degree of religious legitimacy. Each of these reformers was attempting to re-establish a balance that they thought had been lost by their respective governments and believed that the legal system should be reformed in light of the new realities and with consideration of Islamic legal traditions, as was exhibited in the work of ʿAbd al-Ḥayy whose *fatwas* on the state of the judiciary were introduced at the beginning of this chapter.

With this legal and political context in mind, the next chapter of this dissertation studies the actors who participated directly in the creation of the new Penal Codes of the 19th century. It highlights the rise of a new elite that came out of new forms of education heavily influenced by European norms. Members of this elite, tasked with the writing, translating, or interpreting the new laws, still sought to strike a balance between Islamic legal norms and external influence

Chapter 2: New Elites Changing the Law

This chapter focuses on the local actors who were critical to the development of the new penal codes during the 19th century. While the discussion of the first chapter shed light on how Muslim scholars worked within a changing environment and deployed classical Islamic legal concepts, such as *siyāsa*, to create room for increasing state power, during the second half of the 19th century a new group of Muslim elites rose to prominence and took commanding roles in the creation and application of the new Penal Codes. These scholars were the products of new educational institutions but existed in the same middle ground as those who were educated in traditional Islamic institutions, such as ʿAbd al-Ḥayy.

Much of the scholarship that has been done on these scholars and institutions has focused on the importance of European influence; namely, that the curriculums of each of these institutions was carried out in other languages than that of the local population, such as French in Egypt and the Ottoman Empire and English in India.[1] Some recent scholars argue that, when studying a curriculum in another language and under the influence of European forms of knowledge, the resulting legal outcomes would naturally reflect that foreign influence.

But this emphasis on European influence and state power dynamics should be tempered with an understanding of the condition of the state of Muslim education in these jurisdictions during the 19th century as expressed by those who viewed them on the ground. Similar to the calls for state intervention in the realm of law as seen in Chapter One, Muslim observers called for educational change because they viewed traditional institutions, such as al-Azhar, to be corrupt, overcrowded and incapable of serving the needs of a changing society. Some of these problems were clearly caused by the changing state, as Muḥammad ʿAli in Egypt restricted the financial

[1] See for example Wood, *Islamic Legal Revival*.

resources of al-Azhar and as the British in India, following the Education Minute of 1835 that placed the emphasis on English education, reduced the role of Muslim institutions. However, an analysis that examines only the role of the state, as demonstrated in the Introduction and Chapter One, does not produce a complete picture.

According to observers such as Robert Hefner, the educational reforms of the 19th century "took place outside of, rather than in collaboration with, the existing madrasa system."[2] Although this might be true in structure, the result was much more complex as we will see in this chapter. Islamic legal norms continued to dominate the legal discourse within these new institutions and is reflected in the works produced by its graduates. Many of these scholars, such as Muḥammad Qadrī Bāshā in Egypt, sought out the *ʿulamā'* in their studies. This chapter argues that, through their interaction with Islamic discourse and the development of the new codes, these scholars and the institutions that produced them should be seen as a bridge between cultures, negotiating with increasing European influence and local needs based on Islamic legal understandings.

This chapter begins by telling the story of these new institutions and how they came to dominate the legal discourse. It then describes the role of Muslim institutions and shows that, particularly in the second half of the 19th century, the *ʿulamā'* did not actively participate in the development of the law. In the case of India, even new institutions such as the *madrasa* at Deoband chose to focus rather on the personal development of Muslims and only interacted in the areas of personal and family law. This left a void in legal discourse that would be filled by a new generation of Muslim elites. The chapter then focuses on the lives of two of those new legal elites who worked directly on the new codes, Muḥammad Qadrī Bāshā of Egypt and Nazeer Ahmed of India, and demonstrates how they created a balance between growing European influence and Islamic norms.

[2] Robert Hefner. *Schooling Islam: The Culture and Politics of Modern Muslim Education* (Princeton: Princeton University Press, 2010), 14.

Finally, the chapter closes with a look at the question of translation, a theme found throughout the development of the new educational institutions.

Educating the New Elite

Beginning with India, the most important institution during this time period is known as the Delhi College. Reportedly founded in 1792 by Nawab Ghaziu'd-Din II, son of the founder of the Hyderabad state, the school occupies a mosque and a collection of surrounding buildings centered on the tomb of the founder's grandfather Nawab Ghaziu'd-Din I and is currently a campus belonging to Delhi University, known as the Zakir Husain Delhi College. During the British administration in the 1820s, the college was reorganized as the Anglo Arabic College. Studies at the college were based on the Nizamiyya system that had been the standard of Islamic education in the Indian Subcontinent for centuries; the British supplemented its Islamic curriculum with studies in English language, literature, and science.

The Nizamiyya education system, which remains in use throughout South Asian religious seminaries today, is based on the creation of a balance between two sources of Islamic thought. The first, revealed knowledge (*naql*), refers to studies based upon the Qur'an and Prophetic practice as recorded through the ḥadīth. This area requires intimate knowledge of Arabic, the language in which the Qur'an and ḥadīth were recorded, and therefore the Nizamiyya system places a heavy emphasis in the early stages of its curriculum on the mastery of Arabic grammar, morphology, and syntax. The second source of knowledge, reason (*ʿaql*), calls upon students to understand the complexities of Islamic theology and philosophy. Disciplines in other areas of Islamic studies, including law and the discussion of its sources (*fiqh* and *uṣūl al-fiqh*), are derived from a combination of revealed knowledge and reason.

Significant Muslim scholarly debates occurred throughout the centuries as to which of these two sources should take the commanding role in the creation of law, although the debates did not necessarily use the terminology given here. During the classical period, it was *naql* that took precedence. However, during the early years of the 18th century, the scholar and de facto founder of the school at Farangi Mahal in Lucknow, Mulla Niẓām al-Dīn (d. 1161/1748), established a Nizamiyya curriculum that sought to reaffirm the place of *ʿaql*. According to Francis Robinson, "the study of advanced books of logic, philosophy, and dialectics sharpened the rational faculties and, ideally, brought to the business of government men with better-trained minds and better-formed judgment."[3] In the 18th and 19th centuries, many of the traditional questions of Islamic law were being reviewed and revised, primarily due to calls from reformers such as Shāh Walī Allāh Dahlawī (d. 1762) who advocated for legal scholars to reopen legal debates long perceived as settled. Walī Allāh and others called for a new importance to be placed on independent judicial reasoning (*ijtihād*) in the creation of law, although Walī Allāh argued that *ijtihād* could be maintained only within the Ḥanafī legal tradition.[4] It was in this environment of revival of legal thought and the pedagogical balance between rational (*ʿaql*) and revealed (*naql*) knowledge within the Nizamiyya curriculum that the Delhi College came to full fruition.

The colonial officers who participated in and supervised the intellectual life of the Delhi College and the city of Delhi in general during the first half of the 19th century were usually far from the image of the staunchly Christian officers that would become famous in the latter half of the century.[5] Some of these individuals, termed "white Mughals" by historian William Dalrymple,

[3] Robinson, *ʿUlama,* 53.
[4] Shāh Walī Allāh Dahlawī. *The Conclusive Argument from God,* trans. Marcia Hermansen (Leiden: Brill, 1996), xxix-xxx.
[5] William Dalrymple, "Transculturation, Assimilation, and its Limits: The rise and fall of the Delhi White Mughals, 1805-57," in *The Delhi College: Traditional Elites, the Colonial State, and Education before 1857,* ed. Margrit Pernau (Delhi: Oxford University Press, 2006): 98-101.

lived according to Mughal customs, were well-versed in local languages, regularly visited the Mughal court, and often married Indian women.[6] The direction of the school was also international and not directly subject to British power, as the school's three principals—Felix Boutros, Aloys Sprenger, and Gottlieb Wilhelm Leitner—were also all non-British and actively engaged in the development and promotion of the college's Islamic teaching curriculum. Most of the teachers of the school were seen as staunch supporters of Shah Walī Allāh's school of religious thought that promoted *ijtihād*, and the local Mughal nobility provided financial support to further the college's goals. For example, in 1829 the prime minister of the king of Awadh, Iʿtimād al-Dawla Nawāb Faẓl ʿAlī Khan donated Rs 170,000 to the college.[7]

As a result, during the first half of the 19th century the Delhi College became a center of learning and its students, such as Nazeer Ahmed whose role in the legal system and the translation of the Indian Penal Code will be discussed later in this chapter, drove academic debate that is often described as a "revival" of the Indian intellectual tradition, at a time when cities like Delhi had been decimated by successive raids and political division.[8] By way of illustrating the intellectual climate of the College, we can note that it was home to a number of academic journals such as *The Meeting of the Two Planets* (*Qirān al-Ṣādayn*), *For the Benefit of the Observers* (*Fawā'id al-Nāẓirīn*), and *The Lover of India* (*Muḥibb-e Hind*). These journals "…made Western innovations in science and technology available to the literate public of north India, but also articulated an ideology of reform that involved openness to knowledge from wherever it issued."[9]

[6] Ibid.
[7] Ebba Koch, "The Madrasa of Ghaziu'd-Din Khan at Delhi," in Pernau, *Delhi College*, 38.
[8] Pernau, *Delhi College*, 1-2.
[9] Gail Minault. "The Perils of Cultural Mediation: Master Ram Chandra and Academic Journalism at Delhi College" in Pernau, *Delhi College,* 190.

Even as the relationship between the British and Indians began to change in the 1830s with the promotion of English education and as Christian missionary activities became more actively promoted by the colonial regime, Islamic education persisted. In fact, these changes in administration created a lively atmosphere of cross-religious and cultural debate in which many of the college's students, including Nazeer Ahmad, actively participated. One important figure during this period was Nazeer Ahmad's colleague at the College, Maulawi Zaka Ullah (d. 1910). According to Mushirul Hasan, "Both [Ahmed and Zaka Ullah] were prized products of Delhi College. Nazir Ahmed studied Urdu and Arabic, whereas 'Master' Ram Chandra, a recent convert to Christianity, 'sowed in Zaka Ullah's mind and heart a seed of another kind, namely a love for mathematics.'"[10] The three would regularly meet at Zaka Ullah's home during their studies, debating and discussing well into the night. Such meetings continued until Zaka Ullah's death and were even attended by Anglican priests such as Charles Freer Andrews, Zaka Ullah's biographer.[11]

This environment continued until the Delhi College was abruptly shut down as a result of the 1857 Uprising. Still, its mixed culture of Islamic and Western education continued to influence other institutions in the Subcontinent throughout the 19th and into the 20th century, in places such as Aligarh Muslim University established by Sir Syed Ahmed Khan in 1875. Even more conservative religious establishments, such as Dār al-ʿUlūm Deoband (est. 1866), were heavily influenced by the environment and organization of the Delhi College and one of Deoband's founders, Muḥammad Qāsim Nanotvi (1833-1880), was a graduate of the Delhi College.

In Egypt, there were two institutions that educated those who would work on the new codes: the School of Translators (*Madrasat al-Mutarjimīn*) which in the 20th century was

[10] Mushirul Hasan, "Maulawi Zaka Ullah: Sharif Culture and Colonial Rule," in *The Delhi College: Traditional Elites, the Colonial State, and Education before 1857,* ed. Margrit Pernau (Delhi: Oxford University Press, 2006): 261-298.
[11] Ibid, 274.

integrated into ʿAyn Shams University as the College of Languages (*Kuliyyat al-Alsun*), and the Khedival Law School (*Madrasat al-Ḥuqūq al-Khīdawiyya*), which eventually developed into the law school at Cairo University.

During the French occupation (1798-1801), Napoleon had brought a collection of European academics with his invading army who produced a number of works on Egyptian geography, language, and culture—compiled and published between 1808 and 1828 in the infamous *Description de l'Égypte.*[12] As a result of the occupation, interaction between Egyptian and European scholars reached a new high and Egyptian elites became increasingly interested in natural sciences. This marked a significant change from the form of interaction with Europe from the Middle Ages, as has been described by Ibrahim Abu-Lughod:

> The French expedition to Egypt in 1798 struck a crushing blow to the complacency of centuries, not just a humiliating one to the Mamluk defenders. Here was a new image of the European; here was an enforced contact of cultures; but here also was a situation more baffling and perplexing than it was illuminating.[13]

A major Muslim scholar who would later become the Sheikh of al-Azhar, Ḥasan al-ʿAṭṭār (1766-1835), for example, taught Arabic to some of the French officers and, in return, was given access to French works on the social and physical sciences. He stated:

> It is essential for our nation to change and renew its condition with the knowledge and sciences that it does not [currently] possess. It is amazing what this nation (France) has

[12] See Ibrāhīm b. Muḥammad b. Duqmāq. *Description de l'Égypte* (Cairo: Maṭbaʿat al-Bulāq, 1893). For the impact on the *Description* on European interest in Egypt, see John Taylor. "Holding Egypt: Tracing the Reception of the Description de l'Égypte in Nineteenth-Century Great Britain." *Journal of the History of Collections* 19, No. 1 (2007): 152-3.

[13] Ibrahim Abu-Lughod. *Arab Rediscovery of Europe: A Study in Cultural Encounters* (Princeton: Princeton University Press, 1963), 6.

achieved in science and knowledge; the amount of books they have published and how close they are to being beneficial.[14]

With an increased interest in European knowledge, the new government of Muḥammad ʿAlī in the 1820s began sending groups of students to Europe to broaden their education, a policy that would continue officially until the middle of the 20th century. Once their studies were complete, these individuals would come back to Egypt and work for the state, primarily in education but also in the military and other ministries. While in Europe, the government wanted to ensure that these students would remain attached to their Islamic roots and therefore sent along a chaperone and Imam trained at al-Azhar and selected by al-ʿAṭṭār: Rifāʿ Rāfʿ al-Ṭahṭāwī.

Born in Upper Egypt in 1801, al-Ṭahṭāwī arrived Cairo to study at al-Azhar in 1817 where he spent five years as a student after which he continued as a teacher. He was the top student of al-ʿAṭṭār, who introduced him to geography and math along with the traditional Islamic sciences. During his time as a religious advisor for the students in Europe, he also received permission from the Egyptian government to enroll in studies himself.

The first months of study in France were difficult for the Egyptians who found themselves thrown into an unfamiliar culture and intellectual environment. They spent most of their time together and lived in the same home, isolated from the rest of French society. "We would study history in the morning for two hours," records al-Ṭahṭāwī, "then after noon prayer drawing, then French grammar, and every Friday three lessons in accounting and engineering."[15] The majority of their free time was spent working on mastering the French language, which would allow them to read the texts they were studying. This environment did not last long and after a few months,

[14] Jamāl al-Dīn al-Shayyāl. *Tārīkh al-Tarjuma wa al-Ḥaraka al-Thiqāfiyya fī ʿAsr Muḥammad ʿAlī* (Cairo: Dār al-Fikr al-ʿArabī, 1951), 121.
[15] Jamāl al-Dīn al-Shayyāl. *Rifāʿ Rāfʿ al-Ṭahṭāwī* (Cairo: Dār al-Maʿārif, 1958), 25.

and in response to complaints from students and their French observers, the students were distributed to different colleges and specialties around the country.

For al-Ṭahṭāwī who remained in Paris, learning French and engaging in translation of works into Arabic became his top priority. After spending five years in France, he sat for his "final exam" in front of the mission's French supervisory committee. He presented Arabic translations and compilations of twelve French works in a variety of subjects, including metallurgy, morality, history, Greek mythology, geography, and military arts. The committee was unfortunately not convinced and asked al-Ṭahṭāwī to sit for a further exam where he was asked to write out the translation of a number of shorter texts on the spot and was then asked to orally translate and explain in French a number of paragraphs from the Egyptian government's newsletter, *al-Waqāʾiʿ al-Miṣriyya*. The committee was impressed and passed al-Ṭahṭāwī, allowing him to return to Egypt in Ramadan of 1246/1831.

Back in Cairo, al-Ṭahṭāwī worked for two years at the Royal Administrative Academy but continued to believe that the greatest need of Egyptian society was to continue the mission of translation. He fought for the establishment of an official school, calling on Muḥammad ʿAlī to "establish a school of languages that the nation could benefit from, and [thereby] dispense with the *alien."*[16] The term *alien* was in reference to the European advisors who had been brought to Egypt to assist the government in the reorganization and development of the military and administration. Muḥammad ʿAlī agreed, and the *Madrasat al-Mutarjimīn* was established in 1351/1835 with al-Ṭahṭāwī at its head. The first class, which graduated in 1839, initially consisted of 80 students and eventually bloomed to around 150, many of whom were personally chosen by al-Ṭahṭāwī. Alongside his administrative duties, al-Ṭahṭāwī also taught Islamic studies and law

[16] Quoted in al-Shayyāl, *Riṭāʿ Rāfiʿ al-Ṭahṭāwī*, 33.

and selected which works would be translated and printed at the official government press in Bulaq. For the next fourteen years, the school translated and published hundreds of works in a variety of different fields and graduates of the school took up powerful positions as translators, some eventually becoming ministers in the Egyptian government, such as Muḥammad Qadrī Bāshā.

However, as the power of Muḥammad ʿAlī began to wane in the 1840s in the face of military failures and increased European pressure, the translation school and in particular the personal influence of al-Ṭahṭāwī began to be seen by the government as an internal threat. Two of Muḥammad ʿAlī's sons, ʿAbbās Ḥelmī I and Saʿīd, used their influence as heirs to the throne to curb the school's cultural power by first cancelling Islamic legal studies and dismissing a number of students and professors, then by moving the school away from its original building and into a smaller public school, and finally by ordering the school to be closed in 1266/1849 and sending al-Ṭahṭāwī into exile in the Sudan, where he became the principal of the Khartoum primary school. He would eventually return to Cairo in the 1850s, where he would work as an administrator and teacher at the short-lived Royal Military Academy until it too was shut down in 1861, leaving al-Ṭahṭāwī unemployed.

It was during the rule of the Khedive Ismāʿīl (1863-67) when al-Ṭahṭāwī's mission of translation would return to prominence, but now with a new focus on the translation and interpretation of law. The judicial system of Egypt at the time was torn between multiple overlapping courts. On the one hand there were the Sharīʿa courts that had for centuries served as the primary administrators of justice. These courts and their jurisdictions were being slowly eroded, however, by two other court systems: the consular courts that adjudicated cases in which a foreigner was involved and a system of local councils (*majālis*) which handled most other

criminal, personal, and civil cases of Egyptians. There were also special councils that handled matters of the military and religious minorities. The laws of the consular courts were the rules of the host nation and appeal could only take place in Europe. The latter courts were supposed to apply the official pronouncements issued by Muḥammad ʿAlī and his successors and appeal could occur at the highest council in Cairo, which was presided over by the Khedive or his representative. In criminal law, this meant the penal codes issued by Muḥammad ʿAlī in 1829-30, the Ottoman Penal Code of 1858—although the question remains as to what extent judges in the Egyptian context actually referred to that law—and a number of subsequent other laws and royal proclamations.[17]

Khedive Ismāʿīl, along with a number of other contemporary and modern observers, believed that this system was unorganized and led to corruption and the failure of justice—as discussed in in Chapter 1. During the 1860s, the Khedive took more comprehensive and sweeping steps to change the law. With the support of new elites like Nubar Pasha, an Egyptian diplomat who was deeply concerned about the failure of the consular courts, the result was the creation of the Mixed Courts in 1875.[18] Proceedings in these courts were to be carried out in French and the law applied was a compilation of statues and procedures largely translated from the French codes with influence from the rulings of the previous councils published between 1866-68.[19]

The daily operation of these courts, the interpretation of their judgments, and the development of the laws that they applied required the training of a new generation of legal scholars comfortable within both the French and Egyptian contexts. As a result, the Khedive turned to al-Ṭahṭāwī and his former students ʿAbd Allāh al-Sayyid, Ṣāliḥ Majdī, Muḥammad Lāẓ, ʿAbd

[17] Peters, "Correction."
[18] *Mudhakkirāt Nubār Bāshā,* trans. *Jārū Rūbayr Ṭabaqiyyān* (Cairo: Dār al-Shurūq, 2009).
[19] Mark Hoyle. *Mixed Courts of Egypt* (London: Graham & Trotman, 1991).

Allāh Abū al-Saʿūd and Muḥammad Qadrī Bāshā and tasked them with the translation of French law into Arabic under the new Translation Administration, established within the Education Ministry in 1863. Their project was expanded in 1867, when the old College of Languages was reestablished, although this time the focus was primarily on legal studies and training judges, with translation taking a secondary position. In the 1880s, this college was split into two, with the College of Languages continuing to work on translation and training teachers for public schools, and with legal studies re-fashioned into the new Khedival Law School (*Madrassat al-Ḥuqūq al-Khīdawiyya*).[20]

Headed by both French and British principals, the Khedival Law School taught courses in Islamic, Roman, and French law and was the primary center of legal education in Egypt until it was integrated into the newly formed Cairo University as its law school in 1925. The school's curriculum was based upon translation, primarily from French, and many of the textbooks used were direct translations of French texts into Arabic. Graduates of the school worked within the Mixed Courts, which remained active in Egypt until 1949 when the totality of their functions was transferred to the National Courts. According to Leonard Wood, the primary function of the law school during this period was to allow Egyptians to "process the long-term consequences of reform policies set in motion in the early 1880s. They [Egyptians] had now witnessed the deepening impact of Europeanization in Egyptian culture."[21] However, a recent thesis from Cairo University has suggested that the work of this school was significantly more than an effort to "process" European influence; but rather, it represented a transformation in the understanding of Islamic law and jumpstarted an entire movement of comparative legal theory and history. According to its author, Muḥammad Ibrāhīm:

[20] al-Shayyāl, *Riṭāʿ Rāfiʿ al-Ṭahṭāwī*, 46-7.
[21] Wood, *Islamic Legal Revival,* 55.

> The men of the Khedival Law School were able to pull the rug from under the scholars of al-Azhar and move Islamic Law from the courtyards of the al-Azhar Mosque into the halls of Cairo University. The scholars of this institution led the race in many academic, legislative, and judicial fields.[22]

As with both the Delhi College in India and the College of Translators in Egypt, the work of these new educational institutions did not last long, mainly due to major administrative shifts that were occurring in the country. The Delhi College was shut down as a result of the 1857 Uprising and shifting understandings about the purpose and methods of education among both British colonialists and Muslim elites meant that such interaction between European and Islamic knowledge would never take the same form again. British officials, on the one hand, retreated into their residencies while Muslims, shocked by the horror of the massacres that occurred during the Uprising, turned to an insular focus on the development of the Muslim individual, as will be seen below.

In Egypt the College of Translators and the Khedival Law School continue to exist at ʿAyn Shams and Cairo Universities, respectively. Although a revivalist movement at al-Azhar at the turn of the 20th century and the rise of Islamism meant that Islamic legal concerns would partially be re-appropriated by scholars at al-Azhar, it is the non-Azhar colleges of Egypt: the Dār al-ʿUlūm and Law Schools at Cairo University, which have remained the primary source of discourse and development within Islamic law.

However, the importance of these institutions should not be underestimated. According to the Egyptian historian Jamāl al-Dīn al-Shayyāl, the 19th century in both Egyptian and Indian education resulted "…in the appearance of extraordinary individuals, pioneers of the social and

[22] Muḥammad Ibrāhīm. "Athar Madrassat al-Ḥuqūq al-Khīdawiyya fī Taṭwīr al-Dirāsāt al-Fiqhiyya." MA Thesis, Cairo University, 2015, 8.

intellectual reform movement who were qualified with the ability to combine between traditional Eastern and Arabic culture with that of modern Western Europe."[23] Through the development of these new institutions, local scholars who were brought up in traditional Islamic educational environments were exposed to new forms of knowledge, in particular new understandings of law.

The Fate of "Traditional" Muslim Institutions

Returning to the words of Muḥammad Ibrāhīm, cited above, who argued that the Khedival Law School "pulled the rug" out from under the scholars of al-Azhar an important question arises, we ask: what exactly happened to "traditional" institutions of Muslim learning? In the particular case of Egypt, the great halls of al-Azhar had been at the center of Muslim education and legal debate for a thousand years but in the course of 19th century reforms, the work of scholars from these institutions was sidelined in the public discourse, particularly in the creation of law.

Many of these changes can be attributed to the expanding and increasingly centralized power of the state. According to Indira Falk Gesink, who studied the development of al-Azhar throughout the 19th century, modernist reformers established "a narrative of decline" that saw al-Azhar as the reason for the "backwardness" of the country's education system.[24] As a result, individuals such as education minister ʿAlī Mubārak (1823-1893), considered one of the main reformers of Egypt's education system, sought to limit the role of al-Azhar and replace it with a European-inspired collection of schools and institutes.[25]

However, it is important to understand that this narrative of decline was not merely concocted by reformers looking for an excuse to adopt European norms: for most of the 19th

[23] al-Shayyāl, *Riſāʿ Rāfiʿ al-Ṭahṭāwī*, 21.
[24] Indira Falk Gesink. *Islamic Reform and Conservatism: Al-Azhar and the Evolution of Modern Sunni Islam* (London: I.B. Tauris, 2010) 7.
[25] See for example his autobiography. ʿAlī Mubārak. *Ḥayātī* (Cairo: Maktaba al-Ādāb, 1989).

century al-Azhar had suffered from several organizational and curricular problems. For example, al-Azhar witnessed an unprecedented growth in its student body yet the administration did little to adjust its facilities or curriculum in response to the growing number of students. At the turn of the century, the university was home to between 1,500 and 3,000 students but, by 1876, that number increased to 10,780. The number of teachers increased to keep pace, from around 40-60 at the turn of the century to 325 in 1876.[26] However, contrast this with the College of Languages that had only 30 students in 1882 and the Khedival Law School that had 62.[27] Students were coming to al-Azhar from all over the country and easily overwhelmed the surrounding lodges in the old city. Few new housing options were available for students who did not have family in Cairo so many simply slept in the courtyard of the mosque.

Some of these problems, such as the increased pressure on the charitable organizations (*waqfs*) established to provide for students, were due to mismanagement by the expanding state. In his attempt to control the administration of the *waqfs* and increase sources of revenue for the state, Muḥammad ʻAlī had already brought most of the agricultural endowments under state supervision by 1814 and by 1846 he issued a decree that no new agricultural land could be made into an endowment. As a result, the food rations that were provided for students through the *waqfs* were now fixed in their income, yet they needed to be divided amongst an increasing number of beneficiaries. In one instance from the 1860s, armed police were required to step in to break up a group of students from North Africa who assaulted an elderly professor when their bread rations were interrupted.[28] The crisis of overcrowding at al-Azhar caught the attention of ʿAlī Mubārak who stated:

[26] Gesink, 41-2.
[27] Cited in Shiblī Nuʿmānī. *Safarnāma-e Rūm wa Miṣr wa Shām* (Delhi: Qawmī Press, 1901), 150-1.
[28] Gesink, 56.

> Most of the time you can barely pass through al-Azhar as [students] are so packed together, and at times they might push each other around and fight in the middle of class. One can feel heat in the winter from the amount of bodies…the classes are filled with unacceptable smells that distract them from their legal interpretation (*ijtihad*). There are many who escape [from this] by studying in other locations.[29]

Tied to the problem of overcrowding was the growing failure of the curriculum. Following the same passage, ʿAlī Mubārak states:

> The majority of their attention aside from memorization is [given] to understanding phrases, solving grammatical problems, discussing through semantic debates, and that which is directly related to the text. You find many of them are mountains in understanding [that which is] in the text but if you ask about something outside [of the text] you will find few who can answer from their lack of awareness.[30]

This was not the unique view of Egyptian state officials, even others who visited al-Azhar during the 19th century echoed similar opinions. One of the most famous of these was the Indian scholar Shiblī Nuʿmānī (1857-1914), who visited Egypt in 1892 on his way back to India from visiting Istanbul. "The method of education [at al-Azhar] is even a greater sorrow," he remarked,

> Here only jurisprudence (*fiqh*) and grammar (*naḥw*) are taught as independent and original subjects...Logic, philosophy, math, and other rational sciences are not included. Foundations of jurisprudence (*uṣūl al-fiqh*), Qur'anic exegesis, ḥadīth, literature, and rhetoric are taught, but at such a small degree for an institution of such a great size. For [the teaching of] jurisprudence and grammar, there is no attention paid to investigation

[29] ʿAlī Mubārak. *Al-Khiṭaṭ al-Jadīda li Miṣr al-Qāhira wa Muduniha wa Bilādiha al-Qadīma wa al-Shahīra* (Bulāq: al-Maṭbaʿa al-Amīriyya, 1887), 4:27.
[30] Ibid, 4:27.

(*muḥaqqiqāna*) or interpretation (*mujtahidāna*). They teach and memorize the classical texts of law along with their explanations, commentaries, and glosses...Many of the students that I encountered were busy with completely impractical and unimportant side topics, from which I was saddened. The impact of this irrelevant method of education is that, for quite some time, al-Azhar has not produced a single valuable scholar or author.[31]

Shiblī Nuʿmānī held the same views of the *madrasas* of Istanbul:

> The greatest complaint [that I have] regarding the old system of education is that the standards [of teaching] are incredibly low. There is no reference at all to literature, logic and philosophy use the final texts of ʻĪsāghūjī and Shamiyya, and the six canonical collections of ḥadīth are taught in some of the shoos. Rhetoric and principles of jurisprudence are in the same condition. There is a great emphasis placed on jurisprudence (*fiqh*), however this teaching as well includes no preparation for interpretation (*mujtahidāna*) but rather [teaches at only a] level of the lay person (*ʿāmiyāna*) and imitation of older opinions (*muqallidāna*). I met a few scholars, and whether speaking on general or specific issues I was both astonished and sorrowed.[32]

Conversely, Shiblī Nuʿmānī praised the work of new schools in Istanbul such as the Military Academy and the Royal College, praising the services they offered to students such as comfortable housing, uniforms, as well as the high level of education that they received in both Islamic and Western topics.[33]

Back at Shiblī Nuʿmānī's home in India, the situation was largely the same. Traditional schools in Delhi had fallen in prominence as a result of political instability and military invasion

[31] Shiblī Nuʿmānī, *Safarnāma*, 167-8.
[32] Ibid 67-8.
[33] Ibid, 58.

during the 18th century, and only smaller family-based schools, such as that at Farangi Mahal in Lucknow, continued to function. As has been seen, the experiment of the Delhi College in combining Islamic education with European sciences had come to an end by 1857. The events of the Uprising, combined with an already established British policy to promote English as the main form of education for the Subcontinent, meant that little official attention was paid to traditional *madrasas* that taught in Arabic, Persian, and Urdu.

In the post-1857 environment, Muslim scholars created new institutions in cities and villages far from the centers of colonial power, the most important of which was the *madrasa* at Deoband, founded in 1867. Established by two students of the Delhi College professor Mamluk Ali Nanotvi, Rashid Ahmad Gangohi and Muhammad Qasim Nanotvi, this *madrasa* grew over the following decades to become one of the most influential model for Islamic education. During the first decades of the 20th century, students and scholars of the Deobandi tradition participated widely in anti-colonial movements such as the Khilafat Movement (1914-23), which sought to give new authority to the embattled Ottoman Sultan, and the Non-Cooperation Movement (1920-22), which called for Indians to protest British colonization.

However, during the second half of the 19th century, the focus of the Deobandi movement, as well as most other Muslim movements in South Asia, shifted away from focusing on interactions with the British colonists. Rather, they sought to develop what Barbara Metcalf called "a community both observant of detailed religious law and, to the extent possible, committed to a spiritual life as well."[34] This meant disengaging from larger discussions of public law, focusing instead on personal issues of Muslims. For example, one of the greatest scholars of Deoband, Ashraf 'Ali Thanawi (1863-1943), at no point engaged questions of civil or criminal law during

[34] Barbara Metcalf. *Islamic Revival in British India: Deoband, 1860-1900* (Princeton: Princeton University Press, 1982), 87.

the British period. The work for which he is most well-known, *Bihishti Zewar* (*Heavenly Ornaments*), was "intended specifically to inculcate the 'proper' understanding of Islamic norms among Muslim women."[35] When he did interact with the law, it was to deal with questions of personal status such as marriage and divorce.[36]

As a result, the role of Muslim religious institutions changed drastically during the second half of the 19th century. This was due, in part, to the role of the growing state, as was the case in Egypt, and also due to changes in the education system forced by colonial powers, as we saw with the British in India. However, there is also ample evidence that the *madrasas* such as al-Azhar—that had, for centuries, been influential in the development of the law—had fallen to corruption and disorganization. This is consistent with the general narrative of the legal environment of the same period, as discussed in Chapter One, wherein advocates for reform saw the problems of bribery and a lack of organization that permeated the system and thus called for new institutions to be created that would offer a new direction for their societies.

With this background in mind, we now turn to two students of these schools who played a direct role in the creation of the new Penal Codes of the 19th century: Muḥammad Qadrī Bāshā of Egypt and Nazeer Ahmed of India.

Muḥammad Qadrī Bāshā and the Egyptian Penal Code

Born around the year 1237/1821 in the Upper Egyptian city of Mallawī, Muḥammad Qadrī Bāshā was the son of a Turkish government official named Qadri Agha who had come to Egypt in the early part of the 19th century on orders of the Ottoman government and was granted administrative rights over the surrounding agricultural land by the regime of Muḥammad ʿAlī.

[35] Muhammad Qasim Zaman. *Ashraf 'Ali Thanawi: Islam in Modern South Asia* (Oxford: Oneworld, 2007), 1.
[36] Ibid, 107-8.

During his time in Mallawī, his father fell in love with and married an Egyptian woman who gave birth to Muḥammad. All of his early years were spent in Mallawī where he attended the local public school. After graduation, his father sent him to Cairo to join the prestigious School of Translators (*Madrasat al-Mutarjimīn*), which was run by Rifāʿa Rāfiʿal-Ṭahṭāwī at that time.

It is unclear exactly what languages he studied in Cairo, as the *madrasa* taught Turkish, Persian, French, Italian, and English over the course of a five-year program. The majority of his education was probably in Arabic, French, and Ottoman Turkish, as most of his works were directly related to these languages. Following his graduation, Muḥammad Qadrī was given a job as an assistant translator where he assisted in the college's numerous translations, a number that he placed at around 2,000. Both during his studies at *Madrasat al-Mutarjimīn* and while working as a translator Muḥammad Qadrī Bāshā became interested in Islamic Law and spent much of his free time studying legal texts and attending lessons at the al-Azhar Mosque.

In 1831, the son of Muḥammad ʿAlī, Ibrāhīm Pasha, undertook an invasion of Ottoman territories in Syria, and by 1833 had expanded Egyptian control all the way into Anatolia. During this time, Muḥammad Qadrī Bāshā was hired as a personal secretary to Ibrahim Pasha, an amazing feat considering that he could not have been more than 15 years old. The Egyptian occupation of Syria was short lived, however, and by 1841 Ottoman forces and a revolt of the local population forced the Egyptians to leave the country. Muḥammad Qadrī Bāshā came back to Cairo and continued to work for the government in numerous positions. He was appointed as an instructor of Arabic and Turkish at the Prince Muṣṭafa Fāḍil Bāshā School in Cairo, selected as a private teacher to the future Khedive Tawfiq, and later worked as a translator for the Egyptian Foreign Ministry and as a member of the Alexandria Trade Council.

During the 1860s and 70s, Muḥammad Qadrī Bāshā's focus shifted to law, as he participated in the translation of the French Penal Code into Arabic. Along with his colleague Mustafa Effendi, he was also chosen by the Ottoman Sultan Abdülaziz to conduct a review of and propose changes to the Ottoman constitution. As a result of his efforts, he was appointed as a judge in the Egyptian Mixed Courts and eventually became the Minister of Justice, where he oversaw the creation of the new Egyptian Penal Code of 1883. He later retired from government service and lost his sight due to illness, traveling to Austria in pursuit of treatment, but to no avail. Despite his declining health, he continued to work as an advisor to the Egyptian government until his death in 1886.[37]

The work that Muḥammad Qadrī Bāshā is best known for is his *Murshid al-Ḥayrān,* a comprehensive code of civil law modeled on the Ottoman *Mecelle* that was applied as law in the empire in 1877. *Murshid al-Ḥayrān* was not published until 1308/1891, almost five years after his death, and was never established as official law in Egypt. However, it is often considered one of the most important texts in Egyptian and Islamic civil law, was made part of the official school curriculum for imperial elementary schools in Egypt, and was regularly cited by both scholars and judges alike until the creation of the new Civil Code in 1949.[38] The writer of that code and perhaps the greatest Arab legal mind of the 20th century, ʿAbd al-Razzāq al-Sanhūrī, consistently cites *Murshid al-Ḥayrān* in his work and uses it as a basis for the 1949 code.[39]

Near the end of his life, Muḥammad Qadrī Bāshā composed another work that dealt directly with criminal law and the developing field of Egyptian criminology. Entitled *Le bon régime pour*

[37] Tawfīq Iskārū, "Muḥammad Qadrī Bāshā," *al-Muqtaṭaf* (March 1916): 253-63.
[38] Muḥammad Qadrī Bāshā. *Murshid al-Ḥayrān ila Maʿrifat Ahwāl al-Insān fī al-Muʿāmalāt al-Sharʿiyya ʿala Madhhab al-Imām al-Aʿẓam Abī Ḥanīfa al-Nuʿmān,* edited by Muḥammad Aḥmad Sirāj (Cairo: Dār al-Salām, 2011)
[39] ʿAbd al-Razzāq al-Sanhūrī. *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī* (Cairo: Maʿhad al-Buḥūth wa al-Dirāsāt al-ʿArabiyya, 1967-8).

diminuer le crime (Aḥāsin al-Iḥtiyāṭāt limā yataʿallaq bi taqlīl al-jināyāt), the draft text was presented by Muḥammad Qadrī's son to the Ministry of Justice for approval and publication after his death. Only one copy of the work exists in the Egyptian National Archives; however, it was not available in the course of the research for this dissertation.

Nazeer Ahmad and Translating the Indian Penal Code

Although the Indian Penal Code was first applied following the transfer of power from the East India Company to the British Crown in 1860, a law committee headed by Lord Macaulay initially drafted the code almost thirty years earlier. Once made into law, the British government ordered that the text of the code—written in English—be translated into local languages and published at well-known presses. In Northern India, the most important version of this translation was produced in Urdu, as it was the primary language of the literate classes and Hindi was not yet extensive in the region.[40] The task was handed to the secretary to the Lieutenant Governor of the North-West Provinces, now covered mostly by the contemporary Indian state of Uttar Pradesh, Sir William Muir.[41]

Nazeer Ahmed was born just outside of Bijnour in 1831 and received his early education in Arabic and Persian from his father Sayid Saʿādat ʿAlī. He then began studying under other local scholars but was unable to complete his studies as his family moved to Delhi in search of better job opportunities. While in Delhi, Ahmed spent most of his time in the local mosque, continuing his education and studying ḥadīth under the local imam Muḥammad ʿAbd al-Khāliq. It was during

[40] Christopher King. *One Language Two Scripts* (Delhi: Oxford University Press, 1999).
[41] Sir William Muir (1819-1905), was a Scottish Orientalist who first came to India in 1837 and worked in various positions for the colonial administration until his retirement from public service in 1903, and during his career wrote a number of works on Islamic history and theology. See Avril Powell. *Scottish Orientalists and India: the Muir brothers, religion, education, and empire* (Rochester, NY: Boydell Press, 2010).

this time that Ahmed began to show promise as a student, ʿAbd al-Khāliq was so impressed with his abilities that he offered his daughter in marriage.

While in Delhi, Nazeer Ahmed developed a relationship with the primary Arabic professor of the Delhi College, Mamlūk ʿAlī Nanutavi, and expressed a desire to officially join the institute; however, his father was not supportive because he believed that English was a heathen language inappropriate for Muslims to study and because of the British maintained a significant degree of control the over the institution. Mamlūk ʿAlī Nanutavi nevertheless agreed to help Ahmed by allowing him to follow him to school every day, teaching him whatever he could while on the road. This continued until Ahmed's father finally relented and allowed him to join the Delhi College and complete the Nizamiyya system. While at the college, the secretary to the Local Agency of Delhi and a main figure in the Delhi College, a British officer named John Henry Taylor, met constantly with Ahmed and encouraged him to pursue higher studies in English, which was met with an even stronger response from Ahmed's father who said he would rather face death than have his son learn the language of the British.

Following his graduation, however, Nazeer Ahmed immediately found work within the British education system, starting as an instructor but quickly being promoted to role of Deputy Inspector for Schools in Gujarat (Punjab) under the direction of Sir Richard Temple. During the events of 1857, Ahmed and his family took refuge within a British neighborhood, and he even saved the life of a British woman under attack by rebels. For his unwavering loyalty, he was repaid, following the re-establishment of British control over India, with an appointment as the Inspector of Schools in Allahabad.

It was there where the paths of Nazeer Ahmed and Sir William Muir crossed. Muir, as the secretary to the Lieutenant Governor of the North-Western Provinces, was stationed in Allahabad

and had just been tasked with the job of supervising the translation of the new Indian Penal Code into Urdu. Ahmed, awarded the position of Inspector of Schools, had also just taken it upon himself to study English, a task that he reportedly mastered in the span of a few short months. Two other Indian government employees were also been brought in as translators: Karīm Bakhsh, the Minister of Western Education, and ʿAẓamat Allāh, the Deputy Inspector of Schools in Shahjahanpur. Together, they devised a system in which the latter two members would be responsible for the translation, and every week they would send their results to Ahmed who would edit it and meet with Muir to discuss its accuracy.

Nazeer Ahmed's biographer Muḥammad Mahdī records an interesting moment during the translation process. One week, the mail was delayed and the translation work of Bakhsh and Allāh had not arrived. Afraid that he would have nothing to show to his supervisor, Nazeer Ahmed worked through the night and ended up translating far more than the normal weekly passage. Muir, surprised that so much work had been done in a single week, asked Ahmed who had done this, to which Ahmed answered that he had undertaken the translation on his own due to the mail delay. Muir seemed shocked at such an achievement and encouraged Ahmed to continue working directly on the translation in cooperation with Bakhsh and Allāh, and not simply acting as an editor.

Following his work on the translation of the Indian Penal Code, the British government further rewarded Nazeer Ahmed by granting him high-ranking positions in the tax collection service—a notably high position for an Indian subject in the post-1857 environment. Ahmed was called upon to help in the translation of the Income Tax Act of 1860 and the Stamp Act of 1899, along with the translations of works written by British officials, such as the Resident of Kashmir. His translation work caught the attention of other governments in the subcontinent as well, and he was offered a position in the government of Hyderabad under the rule of Salar Jung I. During this

period, he advised the government on the reform of the education system and also dedicated his free time to memorizing the Qur'ān, a task that he had not been able to complete in his childhood. After Salar Jung I's death in 1883, his son and successor, Salar Jang II, consistently fought with Ahmed and dismissed him from his post, forcing Ahmed to return to his family's home in Delhi where he spent the rest of his life writing and focusing on the development of the Indian Muslim community. He was highly supportive of Sir Sayed Ahmed Khan's Aligarh Muslim University and established charitable endowments for the establishment of schools such as the Islamiya High School in Etawah. Ahmed regularly taught and delivered lectures until his death in 1912.[42]

The resulting language of the Urdu translation of the Indian Penal Code is a reflection of Nazeer Ahmed's dual identities, English and Islamic: he took the English code and rendered it in an ideological and terminological form that was comprehensible to and applicable by Indian attorneys, defendants, and judges—many of whom were Muslim or had inherited the norms of an Islamic penal system applied during the Mughals and the early years of British occupation.

Beginning with the Urdu title, *Majmūʿ-e Qawānīn-e Taʿzīrāt-e Hind*, Nazeer Ahmed clearly attempts to place the new code within the classical Islamic legal concept of discretionary punishment (*taʿzīr*). As such, Ahmed sees himself continuing the tradition of integrating state law into the Islamic system, a point that was illustrated in the first chapter of this dissertation. In an explanation of Ahmed's translation of the Penal Code published in 1887, Bābū Kunj Bihārī Lāl and Munshī Muḥammad Naẓīr, both attorneys in the British court system, quote Ahmed's definition of the term *taʿzīrāt* as "to make laws based on political authority (*siyāsat karnā*), or the issuance of rulings (*ḥukm*) upon the entire ruled population (*raʿāyā*)."[43] The definition of *siyāsa*

[42] Muḥammad Mahdī. *Tadhkira Shams al-ʿUlamāʾ Ḥāfiẓ Naẓīr Aḥmad Marḥūm* (UP, ND).
[43] Bābū Kunj Bihārī Lāl and Munshī Muḥammad Naẓīr. *Sharḥ Majmūʿ-e Qawānīn-e Taʿzīrāt-e Hind* (Fatehpur: Maṭbaʿ Nasīm-e Hind, 1885), 1.

given by Nazeer Ahmed is almost identical to the discussions presented in the first chapter, but leaves out the restrictions placed in the 18th century regarding the repetition of crime and follows more closely the general definition of Indian scholars of the later 19th century such as ʿAbd al-Ḥayy. Nazeer Ahmed employs a wider definition of *siyāsa* in which the political authority, Muslim or not, is empowered to develop law within an Islamic context, thereby situating the Indian Penal Code within the Islamic definition of discretionary punishment. In so doing, Ahmed is at the very least attempting to keep the IPC within the fold of Islamic Law and did not view the British influence as antithetical nor alien to the Indian context.

Where there was no local counterpart, Ahmed chose to translate English terms directly. This is most clearly noted in his transliteration of the term India: prior to British presence in the subcontinent and until the transfer to Crown authority in 1858, there was no concept of a united India as the subcontinent was ruled by a number of divergent, and periodically warring, political entities. It is only in the second half of the 19th century, and in the lead-up to the independence movements of the 20th century, that a united image of India begins to appear.

The path that Ahmed navigates between the IPC and Islamic legal norms can be seen in the section of the code regarding homicide, specifically in the classification of crime. Ahmed translates the two English categories of murder and culpable homicide into *qatl-e ʿamd* and *qatl-e insān mustalzim-e sazā* respectively. The first, as it corresponds most closely to the 19th century Ḥanafī legal understanding of intentional murder, is given in a direct translation from classical Islamic sources in Arabic. The second, by contrast, did not have an counterpart in 19th century Islamic legal texts so Ahmed gives the closest Urdu rendering of the English category, directly translated as “The Killing of a Person which Mandates Punishment.”

The content and meaning of the categorization mentioned, and its relationship to Islamic law, is here set aside for a detailed discussion in the following chapter of this dissertation. It is here important to note that Nazeer Ahmed is not interested in creating a code that simply moves the English into Urdu. In the selection of *taʿzīr*, for example, he could just as easily have used *sazā, ʿuqūbat, or jazāʾ,* all terms that denote punishment in a more general sense. These terms were used by the other codes surveyed in this dissertation, with the Egyptians using the term *ʿuqūba* while the Ottomans used *jazāʾ*. The difference is the Egyptians and Ottomans are not dealing with the immediate crisis of Islamic authority or the question of whether law produced by a non-Muslim authority can have any relevance to Islamic law. The presence of these tensions made the task of translating the Indian Penal Code unique. This point was not lost on the observers of Nazeer Ahmed's life and work. Muḥammad Mahdī notes in his biography:

> He [Nazeer Ahmed] created a number of legal terms at which time were no equivalents in Urdu and [this achievement] is well-received by contemporary specialists and laymen alike including "criminal betrayal" (*khiyānat mujrimāna*), "from the methods of local custom" (*az āla ḥaythiyyat ʿurfī*), "attempted crime" (*iqdām-e jurm*), "commission of a crime" (*irtikāb-e jurm*), "forced exploitation" (*istiḥṣāl bi al-jabr*), "intentional murder" (*qatl-e ʿamd*), "unrestricted confinement" (*ḥabs bejā*), among many others. All of these are examples of Nazeer Ahmed's intelligence and nature.[44]

Through the development and application of these terms that trace their Urdu versions to the Persian/Arabic/Islamic tradition, it can be seen that Nazeer Ahmed viewed the code he was charged with translating as within the Indian and Islamic legal tradition. His work was meant to create a sense of understanding amongst the Urdu-literate classes of India at the time, many of

[44] Mahdī. *Tadhkira*, 9.

whom were Muslim or familiar with the Islamic criminal system as it had governed their territories for centuries. Therefore, although he did not have as much direct impact on the content of the law as Muḥammad Qadrī Bāshā in Egypt, Nazeer Ahmed's translation of the IPC nevertheless expressed the same desires of convergence and compatibility with Islamic norms.

Conclusion: The Role of Translation in Law

The purpose of this chapter has been to look at the lives of those who worked on the penal codes issued in the second half of the 19th century and the new institutions that educated them. Through a study of the lives of both Muḥammad Qadrī Bāshā and Nazeer Ahmed, this chapter sought to prove that by studying at new educational institutions, exposure to different legal traditions, and a multicultural and multi-legal environment, these and other individuals created the new codes and legal systems that synthesized Islamic and European legal norms. From this analysis, two important points emerge: the encounter with European knowledge and the role of translation.

Post-colonial studies have drawn attention to the fact that moving a text from one language to another raises much more than simply a question of language. In her *Disarming Words*, Shaden Tageldin has drawn attention to the impact of translation on Egyptian authors during the *Nahḍa* period of the 19th century. In her view, Egyptians were "seduced" by the colonial powers and their intellectual prowess, and were lured to "seek power *through* empire rather than against it, to translate their cultures into an empowered 'equivalence' with those of their dominators and thereby repress the inequalities between those dominators and themselves."[45] Translation, on this account, brought European knowledge and authority into the minds of local audiences and cemented ideas of Western superiority while at the attempting to work with and criticize it.

[45] Shaden Tageldin. *Disarming Words: Empire and the seductions of translation in Egypt* (Berkeley: University of California Press, 2011), 10.

However, Tageldin's work faces a number of challenges, many of which speak directly to the question of legal translation. It is true, as seen in the lives of both Muḥammad Qadrī Bāshā and Nazeer Ahmed, that translation of European texts into local languages did have a great influence on both their education and their resulting works. Still, there is no evidence that either of these two individuals were aloof of their local Islamic legal context or to what the adaptation of European influence meant for their own legal system, and each noticed points of contention between Islamic and European understandings of the law. One of Muḥammad Qadrī Bāshā's earliest works in civil law, *The Application of what is found in The French Civil Code in Agreement with the School of Abū Ḥanīfa (Taṭbīq mā wūjida fī al-qānūn al-madanī – al-faransī – muwāfiq^{an} li madhhab Abī Ḥanīfa)*, cites numerous instances in which French understandings contradict that found in the Ḥanafī School. He ultimately concludes, nonetheless, that the French code falls largely within the Islamic tradition.

Qadrī Bāshā's text presents an article-by-article discussion of the *Code civil* issued by Napoleon in 1804. Qadrī Bāshā validates the first article establishing the authority of the code across all French territories, with the condition that it does not contain elements that "contradict the *Sharīʿa*" (*ḥaythu lam yukhālif al-Sharʿ*). The next five articles that limit the code to future cases only, bind judges to its rules, and limit the validity of private agreements to those that do not contradict the code, are all found to be compatabile with the understandings of the Ḥanafī School (*li hādha al-band munāsaba bi al-madhhab*). At the end of each article, Qadrī Bāshā provides examples from Islamic law that justify his ruling, primarily from the work of Ibn ʿAbdīn. However, he rejects outright articles 7-128 that cover civil rights without any explanation, simply stating that they "do not comply with the [Ḥanafī] School" (*la yuwāfiq al-madhhab*).[46] Although Qadrī Bāshā

[46] Muḥammad Qadrī Bāshā. *Taṭbīq mā wūjida fī al-qānūn al-madanī – al-faransī – muwāfiq^{an} li madhhab Abī Ḥanīfa.* Mss. 48119 Dār al-Kutub, Cairo.

does not mention so specifically, he most likely excluded these articles as they dealt with issues that defined the French nation such as citizenship rules and the status of foreigners residing in France, issues that did not concern the Egyptian state. Other parts of this section stand in sharp contrast to the *Sharīʿa*, such as articles 22-33 which state that a peron convicted of certain crimes or who fails to comply with a court summons could be condemned to civil death (Latin: *civiliter mortuus)* and stripped of some of their basic rights. Article 25 would be particularly troubling for Qadrī Bāshā, as it states that a person condemned to civil death "loses his property in all the goods which he possessed; and the succession is open for the benefit of his heirs, on whom his estate devolves, in the same manner as if her were naturally dead and intestate."[47] This stands in stark contrast to the *Sharīʿa*, where inheritance is governed by proportions set out by the Qur'ān.[48]

In addition, the translation project of Nazeer Ahmed, as mentioned above, was also keenly aware of categories of crime that did not have a direct European counterpart and Ahmed actively worked to create new terms that imported foreign understandings into an Urdu/Islamic context. Even though Qadrī Bāshā Ahmed are adapting European concepts to the Islamic legal system, categorizing this as "seduction" would deprive them of agency, fail to recognize the intentions of thier scholarly efforts, and effectively reduce the complex dynamics at play to the trite categories of "colonizer" and "colonized."

A much better framework through which to make sense of the role of translation in law in the 18th and 19th century could be that of "interaction," as proposed by Peter Van der Veer in his *Imperial Encounters: Religion and Modernity in India and Britain.* In this work, Van der Veer argues that ideas taken by the colonial powers in India drove the development of spiritual movements of Britain and Europe as a whole and that transfer of ideologies from the East to the

[47] Art. 28 C. civ. 1804.
[48] See for example Qur'ān 4:11-12, 4:176.

West were just as influential as those coming from the West to the East.[49] This has already begun to bear true in legal studies, with John Makdisi showing that many of the earliest definitions of British commercial law found in the 12th century are direct transplants of traditional Ḥanafī understandings.[50]

This point requires significantly more research, particularly in the field of comparative legal history. Still, the translation movements that took place in the jurisdictions studied here and the resulting legal environments that they created cannot be seen simply as the transplantation of European legal norms into Muslim contexts. The work of the new elites and the educational institutions that produced them rather act as a bridge, carefully negotiating with increasing European influence and local needs based on Islamic legal understandings. This has been demonstrated with the work of Nazeer Ahmed and Muḥammad Qadrī Bāshā who both saw points of agreement and disagreement with the European legal tradition and synthesized them with their own Islamic tradition through the adaptation of terminology and concepts (Nazeer Ahmed) and a point-by-point engagement with the law (Muḥammad Qadrī Bāshā).

This concludes the first part of this dissertation that consisted of two chapters. The first chapter set the political and legal environment of the late 18th and 19th centuries, discussing the perceived problems faced by those on the ground and the adaptation to a growing role of the state within the Islamic legal environment of *siyāsa*. The second turned to the institutions and actors that created the new penal codes in the second half of the 19th century. The remainder of this dissertation is dedicated to analyzing the penal codes themselves. Focusing particularly on the topic of homicide,

[49] Peter Van der Veer. *Imperial Encounters: Religion and Modernity in India and Britain* (Princeton: Princeton University Press, 2001).
[50] John A. Makdisi. "The Islamic Origins of the Common Law," *North Carolina Law Review* 77 (June 1999): 1635-1739.

the following three chapters look at the content of the codes and their relationship to the Ḥanafī tradition. The development of the law is studied chronologically, tracing the development of the Ḥanafī School through the centuries and placing the new codes at the end of that development, thereby arguing that the new codes should be interpreted as a continuation of a longer history of legal development. Moreover, the tension between state involvement in the law and a juristic desire to reduce punishment, as for instance in the concept of categorization, is not a rupture entailed in the shift to modernity but, in fact, long-standing in Islamic legal and political history.

When introducing a topic of criminal law, students typically look for the definition of the act in question, then proceed to questions of intent, and then to the presence of other factors that can mitigate or aggravate criminal liability. In common law jurisdictions this is often described as the *actus reus, mens rea,* and defences respectively. The following section follows that analytic process with the concept of homicide, albeit not precisely as done within the common law. It begins by tracing the development of categorization and then moves to the establishment of intent, and ends with questions of criminal responsibility; examining how each of these concepts developed and the negotiations that gave rise to the new penal codes. Ultimately, these chapters will argue that, in much of their content, the new penal codes should be seen consistent with Islamic law.

Chapter 3: The Classification of Homicide

This chapter argues that the changes to the classification of homicide in the 19th century were the result of a growing tension between opposing forces within Islamic legal theory that came to a head with the introduction of the new codes. On the one hand, there were numerous scholars who, based on the fear that executing a criminal without absolute certainty of his/her guilt would result in a great religious injustice, created an increasingly complex system of classification that attempted to avoid the most extreme punishment of execution and favored the payment of blood money (*diyya*). This came into direct conflict with the political authority that both sought and needed extra leeway in punishment because they felt that the implementation of harsher punishments fulfilled the law's true objective, to deter potential offenders (*radʿ*).

This conflict resulted in a compromise in the Middle Ages wherein the political authority was able to administer execution through the concept of *siyāsa* and *taʿzīr* with legal scholars theoretically empowered to limit the reach of the political authority. This compromise took a different turn in the 19th century as state power increased and both the legal and judicial systems were changed. The majority of legal scholars either passively condoned or actively participated in the changes that were taking place and, as will be seen in this chapter, even in colonial contexts such as India, Muslim law officers worked hard to find ways for the British to punish convicted murderers outside of the traditional classification system.

When it came to the construction of the new penal codes in the second half of the century, *fiqh* scholars preferred simplified classifications of crime. Armed with the belief that the reduction of crime could only be achieved through clearly applied laws, legal scholars opened the field for a significant increase in the number of murderers punished by execution. They also sometimes sought solutions from outside of the dominant legal schools of their region, the Ḥanafī tradition in

the Ottoman Empire and Egypt, and incorporated alternative approaches, such as those of the Mālikīs, in order to construct laws that better suit their contemporary circumstances. This will be shown most clearly in the Egyptian context where Mālikī understandings were adopted by otherwise Ḥanafī scholars.

The greatest change to the homicide law during the 19th century, and the largest point of contention for contemporary Muslim scholars and observers of the law, is that the prosecution of homicide was placed exclusively in the hands of the state. Although murder was always treated in Islamic juristic discourse as a crime of personal retaliation (*qiṣāṣ*), the new codes removed the power of the victim's family to bring forth the perpetrator and instead placed the burden on the state alone to prosecute criminals. Although this appears to be a major divergence from traditional juristic norms, those working on the codes were aware of this difference and worked to justify this change through the deployment of a classical principle of criminal theory: in order to prevent blood feuds and endless cycles of retaliation, the state needed to intervene. This understanding was not new to the Islamic world and was long offered in the exegeses of Qur'ānic verses on *qiṣāṣ*; however, its application to justify the right of the state to prosecute homicide represents the climax of a conflict between the state and traditional Muslim scholars.

In order to speak about the content of the codes, it is necessary to provide an overview of how the dominant Islamic school of law in each of these jurisdictions (the Ḥanafī School) approached the issue of classification of homicide before the 19th century. This also requires a description of the reasons for punishment and the tension that existed within juristic discourse between a desire to reduce punishment in cases of doubt while allowing the state to implement harsher punishments in the name of protecting society. This will be illustrated in the specific example of Muftis in the courts of British India in the first half of the 19th century. The chapter

then moves to the codes and how the categories and levels of punishment compare to those constructed within the Ḥanafī School. It begins with the Indian Penal Code (IPC) and then moves to the Ottoman and Egyptian codes. The chapter concludes with a discussion of the shift in the new codes from understanding *qiṣāṣ* as a crime against the family of the victim to one against the state and how that shift was justified by the explainers of the codes.

Developing Ḥanafī Doctrine

In Ḥanafī *fiqh* works, homicide was developed as an element of law termed *jināyāt,* that is, an assault of one person on another by taking their life or limb. As such, this general category of crimes included personal injury as well as homicide. In the early centuries of Ḥanafī legal theory, there were three different ways that a person could kill another: intentionally (*ʿamd*), semi-intentionally (*shibh ʿamd*), and wrongfully (*khaṭaʾ*). According to the 10th Century Egyptian scholar al-Ṭaḥāwī (d. 321/935), *ʿamd* occurred when an individual intentionally attacked another with a weapon designed to kill, like a sword or a spear, and from which death was the ultimate result. For a crime to be considered *ʿamd*, death did not have to take place immediately, the victim could die from his/her injuries within a few days and the crime still be considered intentional. The punishment for *ʿamd* was execution of the perpetrator, unless they could come to an agreement with the relatives of the victim for the payment of blood money (*diyya*), defined as 100 camels divided into four categories of varying quality, or forgiveness (*ʿafū*) that would mitigate the individual penalty entirely.

At the opposite end of the spectrum, wrongful killing (*khaṭaʾ*) included instances in which a person was attacked and killed where the intent of the perpetrator was to kill another person. This category only carried a financial payment given to the family of the victim, defined as the

monetary equivalent of 100 female camels, divided into five separate categories of 20, with each category having a varying value. Again, a negotiation could take place between the victim's family and the perpetrator to mitigate the sentence. An example of such a crime would be when a person throws a spear at someone thinking they are an enemy soldier or an apostate, only to find upon further investigation that the victim was not the intended target.

The third category, semi-intentional homicide (*shibhʿamd*), covered instances in which a person was intentionally attacked and killed but the act was carried out with a weapon that was not designed to kill or would not normally be used for an act of murder. Al-Ṭaḥāwī gives the examples of a switch, a wooden stick, or a slap with the hand. He does add the exception that if such a weapon was repeatedly used to the point that it might be imagined (*mawhūm*) to cause death, the situation is aggravated into the first category of *ʿamd*. The punishment for semi-intentional homicide was the payment of a larger amount of blood money (*diyya mughallaẓa*), denoted by the monetary value of 100 female camels from the most expensive category.[1]

The first two categories, intentional and wrongful, find their textual backing in the Qur'ān in Sūrat al-Nisāʾ,

> Never should a believer kill a believer, but (if it so happens) by mistake (*khaṭaʾan*), (compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely…

[1] Aḥmad b. Muḥammad al-Ṭaḥāwī. *Mukhtaṣar al-Ṭaḥāwī* (Hyderabad: Lajnat Ihyāʾ al-Maʿārif al-Nuʿmāniyya, ND), 232-3.

> If a man kills a believer intentionally (*mutaʿammid*[an]), his recompense is Hell, to abide therein (forever): and the wrath and curse of Allah are upon him, and a dreadful penalty is prepared for him.[2]

The worldly punishment for intentional homicide comes from a ḥadīth where the Prophet is reported to have said "Intentional homicide [necessitates] execution (*al-ʿamd qawad*)." This ḥadīth is found in two collections: the *Muṣannaf* of *Ibn Abī Shayba* (d. 235/849) and the *Sunan* of al-Dārquṭnī (d. 385/995).[3]

Legal scholars used a court judgment made by the Prophet Muḥammad to develop the third category of semi-intentional homicide. In this case, two women from the Hudhayl tribe were fighting with one another, and one woman picked up a rock and threw it at the other, killing the victim and her unborn child. The victim's family then approached the Prophet with the situation and he ruled that the death would require enhanced blood money, to be paid by the family of the perpetrator to the family of the victim.[4] The fact that the Prophet didn't suggest the death penalty from the outset, although it was clear that such a punishment was warranted as all of the criteria—intent, act, and correct target—had been fulfilled. The only element that differed here was the weapon, where a single rock is typically unlikely to cause death, particularly of both a woman and her unborn child.

During the time of al-Ṭaḥāwī, which represents the early period of legal development, Ḥanafī law left out other situations in which death occurs and a punishment is usually warranted, for example deaths that occur from secondary actions in which no specific intent to kill existed,

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[2] Qur'ān 4:92-93. Yusuf Ali Translation.
[3] ʿAbd Allāh b. Muḥammad b. Abī Shayba. *Al-Muṣannaf* (Beirut: Dār al-Tāj, 1989), 5:436, no. 27763-7; ʿAlī b. ʿUmar al-Dārquṭnī. *Sunan al-Dārquṭnī* (Cairo: Dār al-Maḥāsin, 1966), 3:94, no. 47.
[4] This incident is found in every major ḥadīth collection. See for example Muḥammad b. Ismāʿīl al-Bukhārī. *Al-Jāmiʿ al-Musnad al-Ṣaḥīḥ* (Liechtenstein: Thesaurus Islamicus, 2000), 3:1394, no. 6996; Muslim b. al-Ḥajjāj al-Nīsābūrī. *Ṣaḥīḥ Muslim* (Liechtenstein: Thesaurus Islamicus, 2000), 2:729, no. 4483.

with a person dying because of another's unrelated legitimate or illegitimate acts. This and other categories were developed slightly later, beginning with the Central Asian scholar Abū Bakr b. Masʿūd al-Kāsānī (d. 587/1191). In his work, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ,* he defined three different categories of homicide, two of which—intentional (*ʿamd*) and semi-intentional (*shibh ʿamd*)—are similar to those proposed by al-Ṭaḥāwī. In the third category of wrongful homicide (*khaṭaʾ*), however, al-Kāsānī broke from al-Ṭaḥāwī's concept and identifies two sub-categories:

> Wrongful homicide could occur in the action itself or in the mind of the perpetrator. The first is in situations in which a person intends to strike game but injures a man, or that he intends to strike a particular person but injures someone else…The second is when a person attacks another with the belief that he is an enemy combatant or apostate, but [in fact] he is a Muslim.[5]

Both of these categories required the payment of blood money (*diyya*) and could be forgiven by the family of the victim. al-Kāsānī therefore expanded the realm of homicide to include a more diverse range of instances in which death occurred. However, there still remained actions in which no intention to kill existed at all. Two other scholars from the same part of Central Asia would fill in this gap: Aḥmad b. Muḥammad al-Qudūrī (d. 428/1036) and ʿAlī b. Abī Bakr al-Marghīnānī (d. 593 /1197). Their works, which would spark numerous commentaries and become primary texts taught in the later Ottoman and South Asian education systems,[6] added two additional categories: crimes which take the same ruling as wrongful killing (*ma ujriya majra al-khaṭaʾ*) and killing as a secondary outcome of an action (*al-qatl bi sabab*). The first denoted instances of death in which

[5] Abū Bakr ibn Masʿūd al-Kāsānī. *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2003), 10:234-5.
[6] Robinson, *'Ulama*, 240-51.

intent to kill was not present but occurred as an immediate result of a person's action, with the classical example given as a person rolling over and killing another in their sleep. The second included instances of death occurring as the secondary result of an action carried out by an individual. For example, if a person had dug a hole on a public street and, by consequence, someone else fell in and died.

In summary, the Ḥanafī School developed a total of five categories of homicide:

1. Intentional (*ʿamd*)
2. Semi-intentional (*shibh ʿamd*)
3. Wrongful (*khaṭaʾ*)
4. That which takes the same ruling as Wrongful (*ma ujriya majra al-khaṭaʾ*)
5. Killing as the secondary outcome of an action (*al-qatl bi sabab*)

Once established, these categories would remain largely fixed for the remainder of Ḥanafī legal history, and jurists made only minor adjustments to their definitions and boundaries. For example, the last major writer in the Ḥanafī School, the late 18th and early 19th century scholar Muḥammad Amīn b. ʿĀbidīn (d. 1252/1836), confirmed these categories yet stated that there were other instances of death that could be covered beyond the standard five. However, Ibn ʿĀbidīn holds that these cases do not belong in the discussion of *jināyāt* because they do not warrant the punishments of execution or the payment of blood money, nor do they include the same secondary legal and spiritual repercussions as those discussed in this section of the law.[7]

Thus, the history of categorization of homicide within the Ḥanafī School saw a simplified system that only covered areas of death in which intent was present slowly develop into one that subsumed most instances in which death occurred. While the spectrum of punishable offences was

[7] Muḥammad Amīn b. ʿĀbidīn. *Radd al-Muḥtār ʿala al-Durr al-Mukhtār* (Riyadh: Dār ʿĀlim al-Kutub, 2003), 10:155.

widened throughout Ḥanafī legal history, the area of the law that required the highest penalty of execution remained limited to only cases in which a deadly weapon was used. The question of the weapon in establishing intent will be set aside for the moment, as it is the focus of the following chapter, and this chapter will proceed with a discussion of the underlying methodology behind this categorization of crime and the desire to lessen the application of the most extreme punishments.

Avoiding Punishment and the Doubt Canon

The apparent question throughout the previous section is: why did Ḥanafī scholars create a system in which only the most certain cases of intentional homicide would be punished by execution? The answer to that question is given by al-Kāsānī:

> The fourth condition [for applying retaliation] is that the death must have been carried out with a clear intention, without the *doubt (shubha)* of intention being non-existent, as the Prophet's statement 'Intentional murder [necessitates] execution' carries the condition that it be completely free from all other elements, and such completeness cannot exist with the doubt of intent being non-existent, because doubt in this area of the law carries with it the assumption of fact.[8]

In al-Kāsānī's statement, he refers to the concept of doubt (*shubha*), or the idea that a punishment mandated by religious law cannot be carried out unless it is free of all forms of doubt. As detailed by Intisar Rabb in her study of fixed criminal punishments (*ḥudūd*) as the "doubt canon," Islamic legal scholars internalized the idea that the harshest punishments were to be avoided in as many cases as possible. Particularly regarding execution for murder, Rabb cites what she terms *The Case of the Falsely Accused Butcher*. During the time of the fourth Rightly Guided Caliph 'Ali (d.

[8] al-Kāsānī, *Badāʾiʿ,* 10:237.

40/661), a man was found standing over a murdered body holding a bloody knife. The man was arrested and immediately confessed to the crime, at which time he was brought in front of the Caliph. Right before the sentence was carried out another man rushed forward and claimed that he had committed the crime. In the face of contradictory confessions, ʿAlī chose to avoid punishment, letting both men go free.[9]

Rabb's analysis, although critical to understanding the underlying methodology and principles that drove *fiqh* discourse, raises two issues upon full investigation. The first is that, while the development and application of the doubt cannon in Islamic legal history is well documented in *ḥudūd*, it is more difficult to trace in the realm of homicide and personal injury (*qiṣāṣ*). Aside from the falsely accused butcher, for example, Rabb's table of 24 early cases in which punishment was avoided mentions only instances of *ḥudūd* crimes and not of personal injury or homicide (*qiṣāṣ*).[10]

The second issue is that, once the doubt canon is established in the first centuries of Islam, Rabb then relies almost entirely on *fiqh* works for the rest of her historical narrative. The role of the political authority, court cases, and other works are notably absent from her discussion. Therefore, the image of Islamic law from the point of view of jurists is well established, however, the question remains as to what happened on the ground? The lenity offered by the doubt constructions of jurists, important as it is for offenders, must therefore be analyzed together with other concerns of the state.

During the 19th century, clear instances of the application of the doubt canon can be found in the courts. In one case from the Egyptian city of Damanhur in 1861, a man (Abū Iltijāʾ Abī

[9] Intisar Rabb. *Doubt in Islamic Law: A history of legal maxims, interpretation, and Islamic criminal law* (New York: Cambridge University Press, 2015), 1-3.
[10] Ibid, 333-47.

Zayd) was charged with severely beating his wife who died from her injuries three days later. During the court proceedings, the defendant confirmed that his wife had died; however, he claimed that he had never laid a hand on her and that she had fallen ill six days prior—a natural illness placed upon her by God—which actually caused her death. The court then asked for further investigation and witnesses were brought forward who testified that they had seen the body of the deceased and it appeared to them that she had been severely beaten with either a staff or a whip. The court found this evidence sufficient to convict and, as there was no specific intent to cause death from the beating, ordered that the defendant pay a reduced amount of blood money.[11] The presence of the marks on the body of the wife clearly matched the initial charges brought against the husband, and the presence of multiple witnesses fulfilled all the requirements necessary to either execute him or allow the family of the victim to ask for an aggravated amount of blood money. The court chose not to, however, and rather used the doubt as to the exact cause of death to mitigate the sentence down to a lower amount.

Ibn ʿĀbidīn, writing about the conditions for applying *qiṣāṣ*, states that the general legal maxim regarding avoiding punishment "avoid criminal punishments in cases of doubt" (*idraʾū al-ḥudūd bi al-shubuhāt*) applies in the area of homicide; however, it is qualified with seven exceptions. Three exceptions are particularly important: (1) a judge may rule for punishment based on circumstantial evidence where in *ḥudūd* he may not, (2) there is no statute of limitations for witnesses in cases of *qiṣāṣ*, and (3) written testimony and the indication of mutes is acceptable in cases of *qiṣāṣ* while in *ḥudūd* it is not.[12] With these exceptions, Ibn ʿĀbidīn expands the applicability of punishment for homicide and personal injury beyond the much more stringent

[11] *Family of Fāṭūma bint Ismāʿīl Aghā Ṣāghūlī v. Abū Iltijāʾ Abī Zayd* (1861) FM 6 Damanhur 78.
[12] Ibn ʿĀbidīn, *Radd al-Muḥtār*, 10:197.

evidentiary requirements of the *ḥudūd,* which, in theory, would only convict with the presence of at least two male witnesses or the confession of the accused.

Ibn ʿĀbidīn perhaps chose this method because, while the *ḥudūd* crimes such as fornication, public drunkenness, and theft deal mainly with personal violations of morality, the commission of a murder creates a more general and immediate threat to public security. When investigating the reasons behind the implementation of the rules of *qiṣāṣ*, jurists often spoke about the pre-Islamic tendency to blood feuds. If one person was murdered from a particular tribe it often led to a chain reaction of back-and-forth revenge killings that would throw the entire society into disarray. The Qur'ānic verse cited as justification is "In the Law of Equality there is (saving of) life to you, O ye men of understanding; that ye may restrain yourselves."[13] One of the early explanations of this verse by Muḥammad b. Jarīr al-Ṭabarī (d. 310/923), mentions that it was revealed by God "to prevent you from killing one another, as a strike [to restrain] you against [harming] one another, and with this you are brought to life, as My ruling between you is life."[14] In a much later explanation by the early 20th century scholar Muḥammad al-Ṭāhir b.ʿĀshūr (d. 1394/1973), the rulings of *qiṣāṣ* "assure those on both sides [of the conflict] accept the ruling…as in [the verse] is a deterrent against killing…and if the issue was left to blood feuds as in pre-Islamic Arabia [people] would become extreme and start a chain of killing."[15] This sentiment is also echoed in the ḥadīth, with the Prophet reported to have said "Do not return after my [death] to disbelief, striking the necks of one another."[16]

[13] Qur'ān 2:179. Yusuf Ali Translation.
[14] Muḥammad b. Jarīr al-Ṭabarī. *Jāmiʿ al-Bayān ʿan Taʾwīl Āy al-Qurʾān* (Beirut: Muʾassasat al-Risāla, 1994), 1:483-4.
[15] Muḥammad al-Ṭāhir b.ʿĀshūr. *Tafsīr al-Taḥrīr wa al-Tanwīr* (Tūnis: al-Dār al-Tūnisiyya li al-Nashr, 1984), 2:144-5.
[16] al-Bukhārī, *Al-Jāmiʿ al-Musnad al-Ṣaḥīḥ,* 3:1385, no. 6952-3.

Stemming from this desire to protect and control society, both judges and political authorities regularly expanded their reach beyond the restrictions of *fiqh* and issued additional punishments to murderers. Christian Lange, for example, has documented how the military governors and their police force (*shiḥna*) in the Seljuq period regularly investigated and prosecuted murderers outside of the court system, sending many of them to the gallows to be hanged for public display.[17] In the Ottoman Empire, the Sultan and his governors did the same. Armed with the legal authority of local custom (*ʿurf*), political authority (*siyāsa*), and discretionary punishment (*taʿzīr*), the Empire executed individuals based on the notion of protecting the society and the political regime, including crimes of homicide.[18] In British courts during the first half of the 19th century in India, Muslim law officers or Muftis would continue this tradition of stretching the classical rules of punishment to allow British judges to pass execution or other punishments on murderers. The latter example has not been explored in the secondary literature and therefore requires additional explanation that will be offered in the following section.

Muftis in India: Adapting to accommodate punishment

During the first half of the 19th century in the courts of British India, the British sessions judge would often sit with a local counterpart, such as a Muslim Mufti, who would issue a ruling on each case according to custom. The *fatwa* of a Mufti was not always necessary, and British judges were increasingly relying upon juries made up of around three high-ranking members of the community. However, when a Mufti was called upon, the judge frequently sided with the *fatwa.* Even in cases when the session's judge and Mufti disagreed, a matter that would necessitate an

[17] Christian Lange. *Justice, Punishment, and the Medieval Muslim Imagination* (New York: Cambridge University Press, 2008), 53-3.
[18] Ahmet Mumcu. *Osmanlı Devletinde Siyaseten Katl* (Ankara: Ajans-Türk Matbaası, 1963).

appeal to the Nizamut Adawlut, the appeal's judges would usually side with the Mufti and follow his recommendation for punishment and overturn the ruling of the initial British judge.

For example, in one case adjudicated in Bengal in 1854, five defendants were charged with the willful murder of one Manik Bangal in a fight following the discovery of an affair between one of the defendants (Upoorbokisto Mundul) and a widow in the victim's family. The Mufti acquitted all of the defendants based on the fact that the eyewitnesses were questionable because they had all taken part in covering up the affair; however, the sessions judge disagreed and sentenced one to life in prison and each of the three others to seven years in prison. Upon review, the Nizamut Adawlut judges (A. Dick and B.J. Colvin) remarked that the Mufti was correct in his suspicion of the witness testimony and overruled the conviction, acquitting all of the defendants and ordering their immediate release.[19]

There is some evidence that the British were concerned about the competence of Muftis and whether they could view the circumstances of a case without prejudice. For example, in one case from Bengal in 1854, two defendants, Gowhur Ally and Choolahee Singh Rajpoot, were accused of carrying out the murder of Dhoomun Khan. The crime apparently occurred in the middle of a bazaar in broad daylight between an ex-police officer and a dacoit, and numerous eyewitnesses were presented for the prosecution. The Mufti believed that the charges were trumped-up and acquitted both prisoners. According to the session's judge, however, the Mufti "labors very incorrectly and in a very strained manner…to discredit the evidence for the prosecution, which, he is of opinion, is got up." He then implies that this was because the gang of dacoits could have intimidated the Mufti, something they apparently did to other witnesses,

[19] *Gov. v. Upoorbokisto Mundul* (1854) NA Ben 1 24-Pergunnahs 517.

torturing them to change their testimony. The Nizamut Adawlut judges agreed and sided with the session's judge in this case, sentencing both defendants to 14 years in prison.[20]

Aside from these limited examples, however, the cases surveyed for this dissertation show that the relationship between the Muftis and the British judges in India was largely one of cooperation, a fact that can be seen in the classification of punishments for homicide issued in their *fatwas*. Muftis issued punishments within five different categories, the first three were standard applications of Islamic legal theory and fit within the classification of homicide discussed above:

1. Kisas (Arabic *qiṣāṣ*), death penalty
2. Diyyut (Arabic *diyya*), payment of blood money
3. Seasut (Arabic *siyāsa*), discretionary punishment defined by the state

In a case from Bengal in 1854, four defendants were charged with the murder of a woman, Mussumat Gungea, and stealing jewelry that she had bought for her son from her home. During the investigation, it was clear that only one defendant (Sobow) had borrowed a sword and committed the murder, while the other three defendants had only come to the house later upon Sobow's command and taken the jewelry. Sobow confessed in front of the police magistrate, however recanted his confession when brought in front of the lower court. Two female eyewitnesses were brought forward and based upon their evidence and Sowbow's earlier confession the Mufti issued a *fatwa* of willful murder that "makes him liable to capital punishment by *kisas.*" Another defendant (Bissessur) was convicted of the robbery and held "liable by '*tazeer*.'" The Mufti acquitted the other two defendants of any wrongdoing. The conviction was approved by the session's judge who sentenced Sowbow to capital punishment and Bissessur to five years imprisonment. Upon review, however, the Nizamut Adawlut disagreed with both the

[20] *Rumjoo Khan and Gov. v. Gowhur Ally* (1854) NA Ben 1 Behar 230.

Mufti and the session's judge, citing the medical report that indicated Mussumat Gungea had not died as a direct result of the injuries caused to her by Sobow, and ultimately reduced his sentence to life in prison.[21]

In another case from Bengal in 1853, a defendant (Kirtinarain Shaha) was charged with the murder of his niece, after which he attempted suicide. The fatwa convicted and called for discretionary punishment (*seasut*), and the session's judge agreed. In their final review, the Nizamut Adawlut judge (J. Dunbar), took into consideration the fact that the defendant had been repeatedly committed to an insane asylum and acquitted him of the charge while ordering his stay in a mental hospital until the doctors were assured of his treatment and recovery.[22] In this particular situation, all of the evidentiary requirements of Ḥanafī *fiqh* had been proven: the defendant had, on multiple occasions, confessed to the crime for which he was charged. Under Ḥanafī law, if the question of insanity was raised it would be negated as he freely admitted his guilt and did not appear insane at the time of the case. However, the Mufti was clearly concerned by the defendant's repeated commitment for insanity and deferred the final details of the ruling to the state.[23]

The final two categories of punishment used by the Muftis in their *fatwas* are not found within standard works of Ḥanafī law:

1. *Akoobat* (punishment)
2. *Uqubat-e-shadid* (severe punishment)

For example, in Bengal in 1853, a man (Sooltan Bhueemya) was charged with the murder of his lover's husband, Pauchcowree. The fatwa, based on medical evidence and the witness testimony of one individual (Roostom) who reached the scene of the crime and saw the defendant running

[21] *Gov. v. Sobow* (1854) NA Ben 1 Sarun 281.
[22] *Gov. v. Kirtinarain Shaha* (1853) NA Ben 2 Tipperah 416.
[23] A comparison of the concept of insanity between Islamic and common law will be done in Chapter Five.

away, "convicts the prisoner of the murder charged, on strong presumption, and declares him liable to the punishment of akoobut." The session's judge agreed and issued the death penalty, which was confirmed by the Nizamut Adawlut upon appeal.[24]

In this case, the Mufti could not directly convict the prisoner of any of the traditional punishments found in Islamic Law as no eyewitness evidence had been provided and absolute certainty could not be established. In addition, most standardized *fatwa* collections do not punish a defendant who murders his wife and/or her lover if he catches them in the midst of unlawful intercourse.[25] However, the circumstances of the case are clear, and the defendant provided no witnesses in his defense. In order to ensure that the rights of the deceased and his family are preserved and to facilitate the punishment of the British, the Mufti issued a conviction, for which the sessions judge then recommended the highest punishment available by law. In another instance, the same *fatwa* was issued in order to convict accomplices to a murder, a case in which the sessions judge convicted and the Nizamut Adawlut confirmed a sentence of life in prison.[26]

Each of these cases show that during the first half of the 19th century the Muftis who worked in British courts regularly adapted categories of punishment created by Ḥanafī jurists in order to allow punishment to be carried out by the state. In so doing, the Muftis ensured that rulings issued by the British judges were well within the Islamic fold and retained legal legitimacy. Even when the categories established by Ḥanafī jurists conflicted with the circumstances of the case at hand, the Mufti issued recommendations that supported the British understandings of law. In the case of Government v. Nusseeruddeen, a man was arrested for the murder of his own son. The fatwa "declares him liable to discretionary punishment extending to death by *akoobut*" based on his

[24] *Gov. v. Sooltan Bhueemya* (1853) NA Ben 2 Backergunge 480.
[25] Muḥammad b. Ḥusayn al-Anqarawī. *Al-Fatāwa al-Anqarawiyya* (Bulāq: Unknown, 1865), 1:178.
[26] *Bunsee Singh v. Goolzar* (1853) NA Ben 2 Tirhoot 487.

confession. The Nizamut Adawlut confirmed the verdict, and the man was sentenced to death.[27] In classical Islamic legal theory, punishment for such a crime would be impossible and only blood money (*diyya*) would be required from the father.[28] However, the Mufti here saw no problem in calling for the death penalty and left it to the British judges to make the final decision.

In another case from Delhi in 1853, a woman, Mussumat Oodee, was charged with the willful murder of her five-week old child Kishna who had been found suffocated to death and wrapped up on a bench outside of her home. The investigation turned up no direct evidence that Mussumat Oodee had committed the crime, but it was discovered from questioning her family and other members of the community that Kishna was the product of a relationship between her and another man, Goomanee, and that she had run off from her husband. Her husband then went to the court and won a petition ordering Mussumat Oodee to return home. She had threatened to get back at her husband by framing him and other members of his family for the murder of the child, and it was upon this circumstantial evidence that the Muslim law officer issued a verdict of guilty and declared her liable for severe punishment (*uqubat-e shadid*). The sessions judge agreed and requested the death penalty, which was approved by the Nizamut Adawlut.[29] In this case as well, a child found dead from exposure to the elements would not have required a punishment under Islamic law unless someone was accused of placing them there,[30] and no direct evidence was available that Mussumat Oodee had committed the murder. Regardless, the Mufti decided to issue his *fatwa* in support of the British judge's desire to execute.

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[27] *Gov. v. Nusseeruddeen* (1854) NA Ben 1 24-Pergunnahs 72.
[28] This is not a universally accepted opinion, although it is a commonly understood concept within traditional Islamic Law that a father is not to be held criminally liable for the murder of his children based on the ḥadīth "Proscribed punishments are not to be carried out in mosques and a father is not to be killed for [the sake of his] son." See ʿĀlim ibn al-ʿAlāʾ al-Andarpatī. *Al-Fatāwa al-Tātārkhāniyya* (Deoband: Maktabat Zakariyyā, 2010), 19:22.
[29] *Gov. v. Mussumat Oodee* (1853) NA Nwp 1 Delhi 646.
[30] al-Andarpatī. *Al-Fatāwa al-Tātārkhāniyya,* 19:18.

With the implementation of the Indian Penal Code and the judicial reforms that followed, the position of the Mufti was removed and only a British judge, usually supported by a jury, was responsible for judging cases. For many observers, the removal of the position of the Mufti meant an end to the role of Islamic law and the system of Anglo-Muhammadan Law.[31] However, as will be argued, the content of the Indian Penal Code incorporated many concepts of Ḥanafī law and the influence of Islam continued even without the facilitation of Muftis.

Categorization in the Indian Penal Code

The Indian Penal Code places all instances of bodily harm under Chapter 16: "Of Offences Affecting the Human Body," which includes offenses not simply regarding homicide but also those of bodily harm. This excludes instances in which homicide is either accidental, "where death is caused by accident or misfortune without any criminal intention or knowledge by one who does a lawful act in a lawful manner and with proper care and caution,"[32] or justified, "where the taking away of life is justified because it is taken by a judicial act, or in pursuance of a judicial sentence pronounced by some Court or Judge, or because it is taken in the exercise of a power given, or supposed in good faith to be given, by law."[33]

This categorization mirrors that of the Ḥanafī School, establishing the rulings dealing with homicide and other forms of bodily harm under one chapter. According to the definition of Ibn ʿĀbidīn, these crimes (*jināyāt)* are legally defined as "forbidden actions that impact assets or the person. Legal scholars have [created] special categories of usurpation (*ghaṣb*) and theft (*sariqa*) for those which impact assets, and *jināya* for those that impact the person or [his] extremities." It

[31] See Kugle, "Framed, Blamed, and Renamed," 300-1.
[32] Morgan and Macpherson, *Indian*, 222.
[33] Morgan and Macpherson, *Indian*, 223.

excludes "killing that is legally permissible (*al-maʾdhūn bihi sharʿan*) such as [legally-sanctioned] retaliation (*qiṣāṣ*) or stoning."[34] However, there is a difference with the IPC here as Ibn ʿĀbidīn included in this chapter acts that would be considered accidental in the category discussed above as that which takes the same ruling as wrongful (*mā ujriya majrā al-khaṭaʾ*). The IPC then continues by creating a general category of culpable homicide with Section 299 that stated,

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

The code provides examples of this category as the following,

1. A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in, and is killed. A has committed the offence of culpable homicide.
2. A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.
3. A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush, A not knowing that he was there. Here, although A was doing an unlawful act, he is not guilty of culpable homicide, as he did not intend to kill B, or cause death by doing an act that he knew was likely to cause death.

The first example can be found in Ḥanafī law, however sometimes as a tort and not personal injury (*qiṣāṣ*). If only injury occurred it would be prosecuted as a tort, with the digger required to pay compensation (*ḍamān*) for the physical damage to the victim, while the outcome of death

[34] Ibn ʿĀbidīn. *Radd al-Muḥtār*, 10:155.

would classify it in the later Hanafi category of killing as the secondary outcome of an action (*al-qatl bi sabab*), subjecting the digger to the payment of blood money or discretionary punishment. Jurists, however, would have made three important distinctions: whether the pit was dug on the digger's property or not, whether the pit was dug on a regularly travelled path or out in the middle of the wilderness, and whether it was dug with the permission of the political authority (defined as the *imām*). A person who digs a pit is criminally liable only if it was dug outside of his property, on a path used by others (*ṭarīq*), and without the permission of the political authority.[35] In other situations, the Ḥanafīs would rule the death as not criminal. This seems to fit with the IPC, particularly as pits dug without permission on a public path would have been done "with the knowledge that death is likely to be caused," and those dug on an individual's property, in the wilderness, and/or with the permission of the political authority would not fulfill this condition of the code. The main difference, therefore, is that the IPC definition has clearly moved this type of act out of the category of tort and into that of homicide, whereas Ḥanafī law, although accepting a degree of criminal liability for the digger had the conditions been filled, kept this type of act within the realm of financial compensation. In second example, the IPC and Ḥanafī law match as Ḥanafī scholars would hold "A" criminally responsible for the death but not for intentional killing because he committed the act through his agent.[36] "B" would not be held criminally responsible for the death at all, as he did not know "Z" was there.

The third example is particularly important as it separates out death that occurred during the commission of another criminal act. This was a common element in 19th century European criminal law, particularly in Britain where it was known as the felony-murder rule and remained

[35] al-Anqarawī,. *Al-Fatāwa al-Anqarawiyya,* 1:176-7.
[36] al-Andarpatī. *Al-Fatāwa al-Tātārkhāniyya,* 19:10.

an element in British criminal law until it was finally removed in 1957.[37] The concept still exists, however in a lesser category known as constructive manslaughter.[38] In the Ottoman and Egyptian codes this type of homicide would be considered differently, with the commission of another criminal act being an aggravating factor in punishment. This point in relation to the Ottoman and Egyptian codes will be discussed later, however it is important to note that the IPC takes the opposite approach of what was dominant in Britain and chose to follow more closely the understanding established within the Ḥanafī School – seeing constructive murder as only wrongful (*khaṭaʾ*). According to Section 300, culpable homicide can be aggravated to the crime of murder:

> If the act by which the death is caused is done with the intention of causing death, or
>
> Secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused, or
>
> Thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
>
> Fourthly, if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and

[37] Lisa Surridge. "On the Offenses Against the Person Act, 1828," *BRANCH: Britain, Representation and Nineteenth-Century History*, ed. Dino Franco Felluga, Last modified January 2013; http://www.branchcollective.org/?ps_articles=lisa-surridge-on-the-offenses-against-the-person-act-1828; Homicide Act 1957, c. 11, § 1(1).
[38] See for example *R. v. Mitchell* (1983) 2 All ER 427.

commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.[39]

The code gives the following examples

1. A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.
2. A, knowing that Z is laboring under such a disease that a blow is likely to cause death, strikes him with intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is laboring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.
3. A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.
4. A, without any excuse, fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

The differences therefore between culpable homicide and murder according to the IPC are two elements: the gravity of the act (examples 1-4) and the direct intent of the perpetrator to cause death (examples 1-3). As in the category of culpable homicide, the illustrations provided for murder closely follow examples found in the Ḥanafī School. Example one would fall under the

[39] IPC § 300.

category of intentional (*ʿamd*), with the question of the weapon being the deciding factor. The issue of the weapon and its place in establishing intent will be left for the following chapter, as it necessitates a much larger discussion. It is sufficient here to note that by the 19th century, particularly according to Ibn ʿĀbidīn, example one would have fallen under intentional homicide as a gun was under the category of weapons which separate body parts (*tafrīq al-ajzāʾ*).[40]

The second example reflects a slight differentiation, as there is little evidence that the Ḥanafīs took into consideration the perpetrator's prior knowledge of the condition of a victim. In one question regarding the extent of shared responsibility, if one person struck a victim across the stomach, spilling his intestines, and another came later and slit his throat, the penalty would be applied to the person who slit his throat based on his intention—if he intended to cause death it would be *ʿamd* and if not *khaṭaʾ*—while the person who struck the stomach would be charged with one-third of the blood money. However, if it were clear that the victim would not have survived from the initial strike to the stomach—judged by whether the victim would have lived a for a day or so—then the full penalty would be applied upon the person who struck the stomach, and the second strike would be punished with discretionary punishment.[41] In this situation, the condition of the victim is taken into consideration but there is no mention made of whether the perpetrator's knowledge of the likelihood of victim to survive would have affected the punishment.

The third example is directly found in the *fatwa* collections. According to the *Fatāwā ʿĀlamgīriyya*, "Whomsoever injures a man and he remains in bed [from the injury] until he dies then he must be executed."[42] Finally, the fourth example would also fall under intentional murder (*ʿamd*) as the killer is known and fired into the crowd intentionally with the purpose of causing

[40] Ibn ʿĀbidīn, *Radd al-Muḥtār,* 10:155-6.
[41] *al-Fatāwā al-ʿĀlamgīriyya* (Bulāq: al-Maṭbaʿa al-Amīriyya, 1892), 6:6.
[42] *al-Fatāwā al-ʿĀlamgīriyya*, 6:5.

dea0h. It would not be necessary to establish that a particular victim was intended. This would only change if the situation had happened in the opposite fashion: the crowd killed an individual or the murderer was unknown. In the first case it would necessitate a series of oaths made by each member of the community that they did not know who killed him (*qasāma*), and in the second the blood money (*diyya*) for the victim would be paid by the state.[43]

The next few sections of the IPC, namely 302 and 304, name the punishments for the crimes established. Murder is to be punished "with death, or transportation for life, and shall also be liable to fine" while culpable homicide:

> Shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with a fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.[44]

It is in punishment where the IPC differs significantly from the Ḥanafī School. As mentioned previously, intentional murder would be normally punished with death or mitigated to blood money or forgiven, while wrongful homicide would be punished with either blood money or forgiven by the victim's family. The IPC adds the elements of fines and the punishment of prison. Punishment by fine could be understood as linked to the payment of blood money because it monetizes the value of human life as was done within the Ḥanafī School. However, in this case, the fine would be paid to the state and not the victim's family. This is not entirely without precedent

[43] Sirāj al-Dīn ʿAlī b. ʿUthmān al-Tanīmī. *Al-Fatāwa al-Sirājiyya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2011), 566.
[44] Morgan and Macpherson, *Indian*, 271-272.

in Islamic law, however, as the Ottoman Empire regularly imposed fines for crimes including murder.[45]

Imprisonment was also a regular feature of discretionary punishment (*taʿzīr*) in Islamic legal discourse. Beginning with a case where the Prophet commanded the arrest of a group of people for a fight that resulted in a homicide, the concept of punitive detention was expanded to include accessories to manslaughter, highway robbery not involving homicide, and repeat offenders of *ḥudūd* punishments.[46] As has already been seen in the work of Muftis in 19th century India British courts regularly sent murderers to long prison terms, extending to life in prison, with the Islamic backing of the Mufti's *fatwa.*

Therefore, the similarities between the IPC and the rulings of the Ḥanafī School in the categorization of homicide represent a continuation of the content of Islamic law in the new code. Some of the examples presented in the code find almost verbatim counterparts in Ḥanafī *fatwa* collections, while others closely mirror and develop upon Ḥanafī understandings of law. This means that the IPC, at least with respect to categorization of homicide, dealt directly with Ḥanafī Law. In the situation of the felony-murder rule, for example, the code ignored the established law in Britain and chose an interpretation that was closer to the local context, dominated by Islamic understandings. There are also clear differences and departures from the Hanafi tradition, most notably with the types of punishment and the removal of the rights of the victim's family. This can be connected directly to the changing nature of the state which, as has been seen throughout this dissertation, is one of the fundamental changes made during the 19th century. The nature of these

[45] See for example Uriel Heyd. *Studies in Old Ottoman Criminal Law* (Oxford: Clarendon Press, 1973), 15.
[46] Irene Schneider. "Imprisonment in Pre-Classical and Classical Islamic Law" in *Islamic Law and Society* 2, no. 2 (1995) 157-173.

changes, the evolution of the role of the state in homicide, and the reaction by scholars to it will be further discussed below.

Before that discussion, however, it remains to be seen how the Ottoman and Egyptian penal codes dealt with the classification of homicide, and whether the same situation can be found with traditional understandings of Islamic law present in the IPC.

The Ottoman and Egyptian Codes

The Ottoman Penal Code of 1858 defines three categories of homicide, intentional (*ʿamd*) unintentional (*ghayr mutʿammad*), and wrongful (*khaṭaʾ*). Intentional homicide, punishable by execution or a prison sentence of 25 years to life, requires that the perpetrator "constructed [the act] in his mind and settled upon it in his heart," a description of premeditation.[47] Unintentional homicide, on the other hand, covered acts in which a perpetrator "killed a person out of intensity or an outburst of anger without premeditation."[48] This covered acts that occurred as the result of a fight or during the commission of another crime. In the former the punishment was fifteen years in prison, while in the latter the punishment was execution. The third and final category, wrongful (*khaṭaʾ*) homicide, covered instances in which a person died as a result of another's actions or neglect to follow the law. Explanations of the code provide the example of a man carrying a loaded gun in the street. If the gun was to go off accidentally and a person died as a result the deaths would fall under this category, as carrying a loaded gun in the street is illegal. This category was to be punished with a prison sentence ranging from six months to two years.[49]

[47] Khalīl Rifʿat. *Kulliyyāt Sharḥ al-Jazāʾ* (Beirut: al-Maṭbaʿa al-ʿUmūmiyya, 1886), 177.
[48] Rifʿat, *Kulliyyāt,* 182.
[49] Rifʿat, *Kulliyyāt*, 202.

The Egyptian Code of 1883 follows similar lines, with Article 208 establishing intentional homicide (*ʿamd*) as requiring the presence of premeditation (*sabq iṣrār wa taraṣṣud*) and necessitating execution. Article 213 mentions that if premeditation did not exist then the punishment would be limited 15 years in prison, however if the homicide took place during the commission of another crime the punishment would automatically become aggravated to execution.[50] The second category of wrongful homicide (*khaṭaʾ*) entails death that occurs without intent or as a result of stupidity (*ruʿūna*), a lack of precaution (*iḥtiyāṭ*) or care (*taḥarruz*), or as the result of negligence (*ihmāl*). This type of crime is punished with a prison sentence ranging from six months to two years.[51] It adds an additional category, injury that leads to death (*ʾafḍā ila al-mawt*), which is punished with 3-5 years in prison, and if that injury was premeditated then the sentence is aggravated to 5-10 years in prison. This final category covers instances in which death occurred as the result of a fight.

Similar to the IPC, the Ottoman and Egyptian penal codes eliminate the Ḥanafī category of semi-intentional homicide (*shibh ʿamd*), and both maintain a slight distinction with a new category of wrongful killing (*khaṭaʾ*) in the Ottoman Code and non-premeditated homicide in the Egyptian Code. Crimes that would have fit into the semi-intentional category have either been moved up into intentional or dropped into wrongful killing. For example, the Prophetic case mentioned earlier in this chapter that was used to establish the category of semi-intentional homicide (a tribal fight in which a woman was killed by a rock thrown by the other party) would have fallen into wrongful (*khaṭaʾ*) in both the Ottoman and Egyptian penal codes as it occurred as the result of a fight. Alternatively, choking a person to death, an act that would have typically been judged as semi-intentional for the Ḥanafīs, would now be considered in the new codes as

[50] Egyptian Code, Article 215.
[51] Egyptian Code, Article 216.

intentional.[52] The new codes have also re-consolidated the Ḥanafī category of wrongful killing (*khaṭaʾ*), removing the distinctions created by later Ḥanafī scholars and returning to the more general classification found in the work of al-Ṭaḥāwī.

Another important departure from the Ḥanafī School is the factor of time. Both the Ottoman and Egyptian codes necessitate that death occur at the moment of the attack in order to be considered intentional (*ʿamd*) while the Ḥanafī School—and indeed the Indian Penal Code—allowed for death to occur a number of days later and still fall within the realm of intentional. The Egyptian code provides the most definitive example of this differentiation, creating a special category in which injuries that led to a later death would be separated out from the main categories of homicide.

In terms of punishment, the codes exhibit two new elements. Firstly, like the IPC they have widened the realm in which execution can take place. This is particularly the case in which the homicide took place as the result of another crime. In the explanation of the Ottoman code, the example of this is given when a man attempts to rape a woman who fights back or calls for help. If, in the attempt to continue the commission of the rape, the perpetrator kills the victim or those trying to stop him, the punishment is automatically extended to execution.[53] Secondly, and unlike the IPC, the new codes eliminated entirely the payment of money of any kind, whether through blood money (*diyya*) or fines, and replaced them with terms in prison.

As a result, the Ottoman and Egyptian Penal Codes appear to have significantly more divergences from the Ḥanafī classification of homicide and its punishments when compared to the IPC. Secondary sources have largely attributed this to the influence of French law, with evidence suggesting that these divergences reflect a direct application of the Napoleonic Code. While there

[52] See the discussion of the weapon in Chapter 4.
[53] Rifʿat, *Kulliyyāt,* 177.

is no doubt that French influence was important to the development of these codes, it is also true that in the late 18th and early 19th centuries the French participated in the study of Islamic law through their colonial holdings in North Africa and particularly in the Mālikī tradition. Muslim scholars working within the developing legal system, particularly in Egypt, were fully aware of these influences, and produced works to emphasize the similarities between the French and Islamic legal traditions. In their view, the connection between the Mālikī and French legal traditions meant that the resulting laws were still in line with Islamic understandings.

French Influence through Mālikī Rulings

Looking deeper into the Mālikī School can help explain many of the departures from Ḥanafī tradition found in the Ottoman and Egyptian penal codes and shows how comparative legal work ensured that Islamic Law remained at the core of the new codes. For example, the Mālikīs never developed a category of semi-intentional murder (*shibh ʿamd*) and their scholars kept all forms of murder within either intentional (*ʿamd*) or wrongful (*khaṭaʾ*). Mālik himself is reported to have said, "I don't know what semi-intentional homicide is. Homicide is either intentional or wrongful."[54] As will be seen in the following chapter, the influence of the Mālikīs does not stop with classification, and their discussions on establishing intent and premeditation were also critical to the creation of the new penal codes in the Ottoman Empire and Egypt.

This notion appears strange since the law in both Egypt and the Ottoman Empire before the introduction of the codes is usually seen as a product of Ḥanafī jurisprudence. The Empire declared its official school to be that of the Ḥanafīs and applied that declaration upon its provinces, such as Egypt. Reem Meshal has discussed this notion in detail, showing that through the Empire's

[54] Cited in al-Andarpatī. *Al-Fatāwā al-Tātārkhāniyya*, 19:11.

attempts to regulate law and procedure in the 16th century the state created "a new social orthodoxy fundamentally at odds with the pluralism of Islamic law, its multiple schools, and their standing conventions on local custom."[55] This set the stage for the centralizing changes of the 19th century. The influence of the opinions of other schools is also key to understanding these historical developments, and Ahmed Fekry Ibrahim has argued that judges in the 17th and 18th centuries often resorted to a form of "pragmatic eclecticism," choosing to apply rulings from different schools if that ruling fulfilled the needs of the case at hand. For example, although an individual might have approached a Ḥanafī court, the judge might resort to a Mālikī, Shāfiʿī, or Ḥanbalī ruling. According to Ibrahim, this process was not unique to the Ottoman courts and Islamic legal scholars regularly allowed the different positions of schools to be taken up if the case required it, albeit only by specialists.[56]

In the 19th century, the school of choice for many of the reformers in the Ottoman Empire and Egypt would be that of the Mālikīs, and that choice was heavily influenced by the work of French Orientalists. Leonard Wood, in his work on the development of what he refers to as the "Franco-Egyptian" legal system in the late 19th and early 20th century, places the beginning of this process in French Algeria with the intellectual movement that would culminate in the founding of the Algiers Law School (*Ecole de Droit d'Alger*) in 1879. During this period that stretches to the 1830s the French colonial government "produced translations, critical editions of classical texts, historical studies, analytical studies, field manuals, and new codifications, both official and unofficial."[57] Many of the chosen texts, such as the *Mukhtaṣar* of Khalīl ibn Isḥāq al-Jundī (d. 767/1374) and the *Tuḥfat al-Ḥukkām* of Muḥammad Ibn ʿĀṣim al-Andalusī (d. 869/1464), were

[55] Meshal, *Sharia,* 8.
[56] Ibrahim, *Pragmatism.*
[57] Wood, *Islamic Legal Revival,* 108-9.

standard manuals of the Maliki School. Wood argues that even Muḥammad Qadrī Bāshā's seminal work on civil law, the *Murshid al-Ḥayrān*, was directly influenced by a French work produced just two years earlier by Edouard Sautayra and Eugene Cherbonneau.[58]

Egyptian scholars were keenly aware of the French/Maliki connection, and other works appeared during the latter half of the 19th century taking this comparative approach. Aside from that of Qadrī Bāshā which was discussed in the previous chapter, the work of Muḥammad Ḥasanayn ibn Muḥammad Makhlūf al-ʿAdawī, known popularly as Makhlūf al-Minyāwī (d. 1878), stands out. Makhlūf al-Minyāwī was a judge by profession and had worked most of his life in the Sharīʿa courts of Upper Egypt. Sometime in the 1860s, Khedive Ismāʿīl ordered him to produce a work comparing the Napoleonic Civil Code with the rules of the Mālikī School, and the result was a work closely following the organization of Qadrī Bāshā's work.[59] This tradition of comparing Islamic (read Mālikī) to French law would continue well into the 20th century and another author, ʿAbd Allāh ʿAlī Ḥusayn, would produce yet another work in the 1940s entitled *Legislative Comparisons between Manmade Civil Law and Islamic Legislation* (*al-Muqāranāt al-Tashrīʿiyya bayn al-Qawānīn al-Waḍʿiyya al-Madaniyya wa al-Tashrīʿ al-Islāmī*).[60] As a result, the changes to classification found the Ottoman and Egyptian penal codes reflect not only a strong French influence but also a Mālikī influence. That influence was filtered through the French colonial interaction with the Mālikī tradition of North Africa, specifically in Algeria and the use of Mālikī rulings worked to temper French influence and ensure that it would comply with Islamic understandings.

[58] Aside from showing the similarity between the cover pages and table of contents of the two works, Wood gives little additional detail as to how the content of Qadrī Bāshā's work is influenced by that of the French orientalists.
[59] Muḥammad Ḥasanayn ibn Muḥammad Makhlūf al-Minyāwī. *Taṭbīq al-Qānūn al-Faransāwī al-Madanī wa al-Jināʾī ʿala Madhhab al-Imām Mālik* (Cairo: Dār al-Salām, 1999).
[60] ʿAbd Allāh ʿAlī Ḥusayn. *al-Muqāranāt al-Tashrīʿiyya bayn al-Qawānīn al-Waḍʿiyya al-Madaniyya wa al-Tashrīʿ al-Islāmī* (Cairo: Dār al-Salām, 2001).

When jurists selected opinions to adopt from other schools, particularly during the reform periods of the 19th and 20th centuries, it was normally discussed through the legal terminology of *takhayyur* and *talfīq*. In the former, translated as "selection," a minority opinion from within a school or a singular opinion from outside of the dominant tradition of a region (in this case Mālikī) is chosen from the body of *fiqh* opinions and brought into the system. This has been most often cited as the case of the Ottoman Civil Code of 1877 known as the *Mecelle*. In the latter term, known as "patching," elements from two or more schools are brought together to create a new form of the law. An example of this type of reform would be the changes to Egyptian divorce and child custody laws with the Decree/Law 25 of 1929 which augmented the Ḥanafī system of divorce by accepting the general Mālikī principle allowing a woman to divorce if she makes any claim of "harm" done by the husband.[61]

Contemporary scholars such as Hallaq have taken up the issue of *takhayyur* and *talfīq* as ineffective and symptomatic of the problems of codification. According to Hallaq, the selection of single opinions removed the "*ijtihādic* plurality" inherent within the law, and "did the bidding of the state in absorbing the Islamic legal tradition into its well-defined structures of codification."[62] Additionally, Hina Azam has pointed out that the method of *talfīq* used in contemporary Muslim rape laws such as Pakistan, combining Mālikī evidentiary requirements with the Ḥanafī system of prosecution, have led to the unjust imprisonment of countless women for the crime of adultery simply because they could not meet the evidentiary requriements for rape. In her view,

More specifically problematic is that in the process of this *talfīq*, the substantive,

[61] For a detailed discussion of *takhayyur* and *talfiq*, see Muhammad Hashim Kamali. "Sharīʿah and Civil Law: Towards a Methodology of Harmonization," *Islamic Law and Society*, 14 no. 3 (2007): 391-420.
[62] Hallaq, *Sharīʿa; Theory, Practice, Transformations,* 449.

> evidentiary, and procedural instruments developed in Mālikī jurisprudence that could help rape victims are consistently ignored in modern legislation in favor of the simplistic and highly problematic approach of Ḥanafī jurisprudence, while the few protections that are afforded by Ḥanafī jurisprudence are conversely dismissed.[63]

Both views are correct in presenting the problem of legislation in the second half of the 20th century, however they do not address the question of the penal codes of the 19th century. The problem with viewing *takhayyur* and *talfīq* as the primary explanations for 19th century reform is that both concepts rest upon fundamental assumptions regarding the nature of the *Sharīʿa* on the part of contemporary observers. That is, the belief that the *Sharīʿa*, and therefore the scope of Islamic law, is limited to the opinions constructed by *fiqh*. This is an assumption shared among many contemporary scholars of Islamic law, such as Hallaq and Azam, but was not universally adopted by legal scholars and actors of the mid-19th century. Examples of *takhayyur* and *talfīq* in the 20th century usually given in areas of family and inheritance law, where *fiqh* concerns hold significant sway, however when looking at criminal law the situation is more complex. When explaining the the Egyptian code of 1883, for example, the appellate court judge Amīn Afrām al-Bustānī mentioned, "The Egyptian legislature followed its [the French Code's] path, taking from it and *building upon it*."[64] He was therefore well aware of the French understanding but, as will be seen below, he did not view the *Sharīʿa* as a collection of *fiqh* rules from which to select the better option. Rather, al-Bustānī sought out broader principles of the *Sharīʿa* described in the Qur'ān and found–as in the broader discussion of justice and state power in Chapter One–that in order for the *Sharīʿa* to be properly realized the state must intervene in the prosecution of murderers.

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[63] Hina Azam. *Sexual Violation in Islamic Law: Substance, evidence, and procedure* (New York: Cambridge University Press, 2015), 243.
[64] Amīn Ifrām al-Bustānī. *Sharḥ Qānūn al-ʿUqūbāt al-Miṣrī* (Cairo: Maṭbaʿat al-Maḥrūsa, 1894), 8. Emphasis added.

From Personal to State Crime

As was seen in each of these codes, the primary departure from the Islamic understanding is in the role of the state, as the family of the victim has been removed from the equation and the prosecution of the crime of homicide is placed solely in the hands of the political authority. Typically, contemporary observers of Islamic law have viewed this difference as one of the largest substantive changes in criminal law in the Muslim world. According to Rudolph Peters:

> The most salient aspect of the Islamic law of homicide and bodily harm is the principle of private prosecution. The claims of the victim or of his next of kin are regarded as claims of men and not as claims of God. This means that the plaintiff is the *dominus litis* and that the prosecution, the continuation of the trail and the execution of the sentence are conditional upon his will.[65]

The punishment of homicide, once classified as the "personal" category of retaliation (*qiṣāṣ*), has now been made a crime against society. However, this should be seen not as a radical divergence from Islam, but rather, as a gradual shift that came to full fruition in the 19th century. Although rarely discussed in *fiqh* works, Muslim political authorities have, since the inception of Islam, regularly involved themselves in law, using the power of discretionary punishment to punish murderers, sometimes outside of the wishes of the victim's family. For example, Radika Singha has noted that in 19th century India, in cases of personal injury the family of the victim would sign—sometimes under the pressure of the state—a "deed of agreement" (*rāẓīnāma*) with the offender, which would in *most* circumstances mitigate capital punishment.[66] This put significantly more power in the hands of the state, and allowed them to punish the murderer according to the

[65] Peters, *Crime and Punishment,* 39.
[66] Singha. *Despotism,* 9.

will of the state once the rights of the family had been taken aside. As argued earlier in this chapter, during the first half of the 19th century Muftis working with the British invented new categories of punishment that allowed the colonial officers to issue punishments according to their desire.

The Ottoman and Egyptian codes provide a clearer example of this shift in the law, with the Ottoman law codifying the balance between the rights of the state and those of the victim's family. Article 171 states that the punishment issued by the state court (of execution or imprisonment) "does not invalidate personal rights" of the victim's family and that they have the additional recourse to pursue the case in the *Sharīʿa* court where they can petition for the payment of blood money. Additionally, Article 182, which defines the category of wrongful killing (*khaṭaʾ*), requires that the state punishment of imprisonment only be applied "after the *Sharīʿa* rights of the victim's family" have been fulfilled.[67] However, in the case of a conflict between the state court and that of the *Sharīʿa* judge, "the *Sharīʿa* court ruling is observed *after* the issuing of the royal order" and the state ruling remains the primary punishment for the crime.[68] For example, if the state court calls for execution and the *Sharīʿa* court calls for only the payment of blood money, the execution will be carried out and the blood money will be taken from the murderer's inheritance. In one case from Istanbul in 1880, a man named Muḥammad b. ʿUthmān is charged with the murder of two individuals, a Muslim named Rajab and a Spanish national named Jalabon. The court convicts him and sentences him to death; however, Rajab's surviving son makes a *Sharīʿa* claim against the perpetrator. The court pauses to review the claim, eventually ruling against him and insisting that the execution be carried out, citing the supremacy of the Nizamiyya court ruling and that it was carried out "according to the *Sharīʿa* (*bar nahaj-e Sharʿ*)."[69]

[67] Rifʿat, *Kulliyyāt,* 202.
[68] Ibid*,* 179.
[69] *State v. Muḥammad b. ʿUthmān* (1880) CM 79 Istanbul 3.

In Egypt, Amīn Ifrām al-Bustānī's explanation of the new penal code provides a detailed explanation of the role of state power particularly in cases of personal injury and homicide (*qiṣāṣ*). In an introductory section entitled "In the Assignment of Punishment to Government (*fī ikhtiṣaṣ al-ḥukūma bi al-muʿāqaba*)," he begins by stating that individuals are incapable of achieving justice alone, as:

> People are the furthest from balance, the most displaced from justice, and the most removed from truth if they possess the [ability to] discharge their affairs by their own hands…[Therefore] it is necessary to return to government alone to institute punishment legislated by the framers of the law.

As a result:

> If, for example, a man kills the son of his neighbor it is not permissible for his father to kill him for it, and if he did then he will be executed because the perpetrator has become with his crime in the grasp of the law, and the property of the justice of the law. And the law then has the option, according to the conditions of the crime, to apply retaliation (*qiṣāṣ*) or abstain.

This is nothing new, and:

> The framers of our penal code have not innovated in assigning punishment to government, as is stated in Article 1, as it is an ancient assignment in every legal system, as there is no meaning to adjudication, no authority for the government, and no protection for societal welfare if it is not present.[70]

Al-Bustānī then cites Article 1 of the Ottoman Penal Code of 1858, which uses more Islamic language, translating the article to state that, "The *Sharīʿa* guarantees the right of the political

[70] al-Bustānī. *Sharḥ*, 10-14.

authority (*Ulī al-amr*) to specify the categories of discretionary punishment (*taʿzīr*) and its punishments." He then states that Egyptian law has followed this precedent, something never mentioned in French law, without any contradiction to traditional Islamic legal discourse.

The lack of divergence from or contradiction with Islamic law can be explained by the fact that when murder is discussed as a crime against the person, the victim's family has the ability to waive their right to retaliation and forego punishment, an idea that is against the fundamental understandings of justice which is a more fundamental objective of Islamic law. Therefore, "the issue of applying retaliation (*qiṣāṣ*) for homicide is removed from the realm of personal rights that accept [the idea] of waiver and enters the field of general rights that never accept a waiver under any circumstances."

Al-Bustānī then cites a case of murder against one Fairūz Aghā from 1889 where the defendant's attorney argued that it was not the right of the public prosecutor to seek punishment. In his view, according to the Egyptian Penal Code "the rules of the *Sharīʿa* apply and the right of asking for retaliation are only for the family of the victim." In its verdict, the court of first instance refused the attorney's argument and explained that the rights of the *Sharīʿa*, "carry [only] the intended meaning of blood money (*diyya*)." Therefore, "it is the right of the descendants [of the victim] to only claim the payment of blood money, which is the demanding of compensation calculated according to the Holy *Sharīʿa*." The attorney appealed, and the lower court's decision was confirmed, and the defendant sentenced to death.[71]

As evidenced by this case and al-Bustānī's preceding explanation of the new code, the Egyptian legal system created a division between the rights of the individual and those of the state. Only the political authority, in this case the state, has the power to physically punish a murderer

[71] al-Bustānī. *Sharḥ*, 15-17.

through execution or imprisonment while the family of the victim can only make a civil claim for the payment of blood money. This division actually follows the standard procedure found in traditional Islamic courts for centuries as individuals were never allowed to take the law into their own hands and execute murderers. Those who did were categorized as criminals in their own right, subject to the proscribed punishment of "waging war against society (*ḥirāba*)" and "spreading disorder in the land (*fasād fī al-ʾarḍ*)."[72] Al-Bustānī was keenly aware of this and states throughout his introduction that it was always the prerogative of the political authority to punish. The innovation of the Egyptian Penal Code lies in its enshrining this principle within the law while also not ignoring the discussions of traditional scholars.

This legal innovation, establishing the state as the primary claimant in a case of homicide, finds its origins in case law from earlier in the 19th century. Prior to the implementation of the new code in 1883, the state was allowed to make a claim for execution—defined through retaliation (*qiṣāṣ*)—but only in cases where no descendants of the victim could be found. In such cases, the "family" of the deceased became the state, and numerous instances of the state making a claim for execution or the payment of blood money can be found in the court records. For example, in one particular case from the Sudanese region of Kurdafan in 1861, a man (Muḥammad walad Ṣāḥib al-Samʿāwī) was charged with stabbing his assumed wife to death. His case was brought to the court by the representative of the state named Ibrahim Effendi, who called for the execution of the defendant. The defendant confessed, and the sentence of execution was passed by the court and

[72] Vigilantism, or taking the law into one's own hands, is specifically prohibited in Islamic law by a ḥadīth. A Companion of the Prophet, Saʿd ibn ʿUbāda, asked the Prophet "If I find a man sleeping with my wife, should I leave him alone until I come with four witnesses?" The Prophet responded, "Yes." Saʿd was angered by this response, and said "Never! By the One who sent you with the Truth if it happened to me then I would have quickly struck him with a sword." The Prophet then responded by stating "Listen to your friend as he has a sense of honor, [but] I have a greater sense of honor than him and God has a greater sense of honor than me." See al-Nīsābūrī, *Ṣaḥīḥ Muslim,* 2:636, no. 3834.

confirmed by the Grand Mufti, with the justification that the victim "had no descendant with the exception of the state treasury (*bayt al-māl*)."[73]

Many of the cases that fall within this category speak of the necessity of the state to intervene in cases in which there was no descendant to make a claim for punishment because of the presence of "public harm (*ḍarar li al-ʿāmma*)." Citing the *fiqh* of Ibn ʿĀbidīn, "the judge is like the father in all cases like [those in which] a person was killed without a descendant. It is therefore for the ruler to kill him or come to an agreement [for the payment of blood money], and not to forgive because of the public harm."[74] In light of this precedent in the *Sharīʿa* courts, it is not surprising to see the laws implemented in the latter part of the century expanding the role of the state and the courts to act as the "father," or protector, of all victims of homicide and responsible for the prosecution of crime, a change explained by those explaining the new law such as al-Bustānī.

Conclusions

The classification of homicide found in the penal codes constructed in the second half of the 19th century is largely in line with understandings of Islamic law. The IPC is most similar to Ḥanafī norms, with many of the examples provided by the code following exactly theoretical situations discussed in both works of Ḥanafī *fiqh* and *fatwa* collections. The Ottomans and Egyptians took a slightly different path, adapting rulings found within the Mālikī School brought to them through the French interaction with Islamic Law in North Africa. Rather than seeing these French adaptations as foreign, Egyptian scholars adopted a comparative approach to find that the

[73] *State v. Muḥammad walad Ṣāḥib al-Samʿāwī* (1861) FM 6 Kurdafan 72.
[74] Cited in *State v. Ibrāhīm Aghā al-Sirsāwī* (1861) FM 6 Kurdafan 69, 70.

French laws were largely in compliance with the understandings of the Mālikīs, a trend that would continue until the middle of the 20th century.

In the most drastic change made by the new codes, the shift of prosecution of homicide from the family of the victim to the state, explainers of the codes such as al-Bustānī placed the change within the broader principles of Islamic Law. They justified the new role of the state as enacting the broader goal of protecting society, preventing revenge killings and blood feuds, an idea found in the explanation of the Qur'ānic verses establishing the category of *qiṣāṣ*.

The shifting classifications of homicide in the new penal codes, and most importantly the removal of the secondary Ḥanafī category of semi-intentional murder, were enacted primarily by altering the definition of intent. While the Ḥanafīs theoretically established intent by observing the method of killing and the weapon used, the new codes called for a search into the perpetrator's motives. How these motives were to be established and the role of intent in the classification of homicide is one of the most important points of contention in 19th century criminal law, a discussion taken up in the next chapter.

Chapter 4: Establishing Criminal Intent

Chapter three presented a discussion of the categorization of homicide to establish the types of criminal acts that would be understood legally as homicide and how they were to be punished. The present chapter takes up the second element in defining a crime—the establishment of criminal intent—like the contemporary legal realm of *mens rea*. How a legal system proposes to establish criminal intent is critical to a full understanding of the definition of a crime.

The present chapter takes up this point of establishing intent with a deadly weapon in cases of homicide and explores the differences of opinions that developed within the Ḥanafī School prior to the 19th century and how those differences influenced the development of the law. This chapter argues that although the new penal codes of the 19th century introduced new methods of establishing intent, the discussion of the weapon continued to dominate the discourse in each jurisdiction and remained the primary way that a specific intent to kill was established and through which the most extreme punishment of execution was justified. By examining the place of the deadly weapon and particularly its presence in the courts, this chapter further elaborates on the main point of the previous chapters, namely that Islamic understandings continued to dominate in each of the jurisdictions of interest, even after the implementation of new penal codes.

The chapter begins with a general presentation of the concept of the deadly weapon in the Ḥanafī School and shows how the school developed an increasingly material approach to defining the weapon. It then continues to the 19th century in British India where, in an attempt to expand the realm of punishment and move away from Islamic understandings of the law that were seen as too lenient, colonial authorities encouraged courts to look at the perpetrator's internal motive for committing the crime. However, a description of the weapon used in a crime continued to figure prominently in court rulings, and with the introduction of the IPC in 1860 the presence of a deadly

weapon would once again serve as the primary way of determining intent, a divergence from the practice in Britain at the time. The chapter then proceeds with a discussion of the establishment of intent in the Ottoman and Egyptian codes.

The new codes of the 19th century made important changes and additions to the Ḥanafī doctrine of the deadly weapon. Firstly, the codes expanded the definition of what could be considered a weapon by selecting minority opinions from within the Ḥanafī School. For example, choking or beating a victim to death, which would not fall within the standard Ḥanafī definition of a weapon and result in the crime being treated as intentional (*ʿamd*), would now be considered as a use of deadly force. Secondly, the Ottoman and Egyptian codes selected and developed the concept of premeditation from the Mālikī School, or the idea of a perpetrator lying in wait for his victim or planning to commit the crime, as sufficient evidence to establish murderous intent and subject the perpetrator to execution. These changes were made, as will be discussed in the chapter, within the larger context of the tension between the Islamic legal tendency to reduce the application of the harshest punishment in cases of doubt and the state which sought to expand the realm of punishment. This tension and the ultimate triumph of the state, just as described in the previous chapters, was present throughout Islamic and Ḥanafī legal history and the changes to the law were justified largely within the terms of Islamic law and were not seen as a divergence nor an adoption of European understandings.

From a general Islamic point of view, intent is critical to evaluating an individual's actions, based on a ḥadīth of the Prophet which states, "Actions are defined by intentions, and to every person what he intends."[1] As a result, every act of worship (*ʿibāda*) and worldly transaction (*muʿāmala*) in Islamic law includes a discussion of the intent required to render that act valid. In

[1] This ḥadīth is considered one of the most reliable within the Islamic canon, as it contains the strongest chain of narrators connecting it to the Prophet. See al-Bukhārī, *Al-Jāmiʿ al-Musnad al-Ṣaḥīḥ*, 1:2, no. 1.

the realm of criminal law jurists, focused on a perpetrator's external actions to determine intent. Paul Powers notes, in his study on intent, how this contrasts with the approach to intent in other areas of the law:

> Rather than give legal weight to intentions per se, as they theoretically do to some extent in ritual, contract, and family law, jurists consistently rely on indirect, objective evidence when assessing subjective states in penal situations. Further, jurists recognize limitations in their ability to know and evaluate human intentions, and some explicitly acknowledge that, because of this, they can achieve no more than a provisional form of justice.[2]

In cases of homicide and personal injury (*qiṣāṣ*), intent was to be established according to the presence or absence of a deadly weapon. Homicides that were conducted with the use of a deadly weapon fell within the Ḥanafī category of intentional murder (*ʿamd*) and necessitated execution, while the use of all other types of weapons fell into the category of semi-intentional (*shibh ʿamd*). According to ʿAbd al-Ḥayy:

> Things in the category of a weapon are a condition [for intentional murder] because murder is by definition an intentional act done by the heart and therefore cannot be definitively established. The use of a deadly weapon takes the place of intent in order to facilitate [its establishment], in the same way that travel is used in [establishing] hardship [for the shortening of prayer].[3]

The question of what constituted a deadly weapon, therefore, formed the core of Islamic scholarly debates well into the 19th century. Interestingly, the presence of a deadly weapon is also important for the common law, establishing a connection to the perpetrator's state of mind. Beginning with

[2] Paul Powers. *Intent in Islamic Law: Motive and meaning in Medieval Sunnī Fiqh* (Leiden: Brill, 2006), 170.
[3] ʿAlī ibn Abī Bakr al-Marghīnānī. *Al-Hidāya Sharḥ Bidāyat al-Mubtadi,* ed. ʿAbd al-Ḥayy Luknāwī (Karachi: Idārat al-Qur'ān wa al-ʿUlum al-Islāmiyya, 1996), 8:3.

cases involving the British clergy in the 16th century, this slowly came to be known as the "deadly weapon doctrine," which:

> …is thus a vehicle from deadliness of instrumentality to state of mind. It constitutes a specific (perhaps the original) application of what has come to be a generally accepted principle: that one is 'presumed' to intend the natural and probable consequences of his acts.[4]

In the common law, just as in the definition provided by ʿAbd al-Ḥayy, the presence of a deadly weapon links the external actions of an individual to their internal intent, located in "the mind" in common law and in "the heart" in the Islamic law.

Deadly Weapons: The Ḥanafī Approach

In the work of the student of Abū Ḥanīfa, Muḥammad al-Shaybānī (d. 749/50), the term used to describe items used in the commission of a crime is a general word for weapon (*silāḥ*). Although not specified or elaborated by al-Shaybānī, at the time the Arabic term *silāḥ* typically referred to a weapon of war, such as a sword or a spear.[5] This becomes clear in al-Shaybānī's definition of semi-intentional murder as one that is carried out with non-conventional weapons such as "a switch, a rock, or a hardened piece of mud."[6] Through the slightly later work of al-Ṭaḥāwī (d. 321/935), two general opinions are presented and attributed to the first generations of the school. The school's founder, Abū Ḥanīfa, reportedly stated that the weapon must be one capable of wounding (*jarḥ*). His two main students, Abū Yūsuf (d. 798) and al- Shaybānī, were

[4] Walter Oberer. "The Deadly Weapon Doctrine: Common Law Origin," *Harvard Law Review* 75, no. 8 (Jun 1962), 1573.
[5] Muḥammad b. Mukarram b. Manẓūr. *Lisān al-ʿArab* (Beirut: Dār Ṣādir, 1993), 2060.
[6] Cited in ʿAbd al-Ghanī al-Ghanīmī al-Maydānī. *Al-Lubāb fi Sharḥ al-Kitāb* (Beirut: al-Maktaba al-ʿIlmiyya, ND), 3:141-2

reported to have disagreed, believing that "All [weapons] which kill, whether they wound (*yajraḥ*) or do not, if they are intentionally applied to take a life then the murder is intentional (*ʿamd*) and requires execution by the sword."[7] Al-Ṭaḥāwī takes the report of Abū Ḥanīfa's students as his basis for discussion and builds upon the idea to include the use of non-deadly weapons that causes death, such as "a strike with a switch or a club, or with a slap of the hand."[8] Although these weapons would not have fallen under the theoretical concept of *jarḥ,* their repeated use reaches that effect and therefore falls under the supposed opinion of Abū Yūsuf and al-Shaybānī.

By the time of al-Qudūrī (d. 428/1036) this difference between the school's founders had been modified further, with new details added. According to al-Qudūrī, intentional murder occurs with "a weapon (*silāḥ*), or that which is similar to a weapon (*ma ujriya majra al-silāḥ*)." The second type is defined as an item that "separates body parts (*tafrīq al-ajzāʾ*)," such as weapons made of wood smelted with iron (*muḥaddad min al-khashab*), rocks (*ḥajar*), or fire (*nār*). According to this definition, Abū Ḥanīfa would place every act committed with anything outside of these two types of weapons under semi-intentional murder. Abū Yūsuf and al-Shaybānī, on the other hand, are now reported to have said, "If he strikes [someone] with a great rock, or a large piece of wood, then it is intentional. Semi intentional is if he intends to strike with *what does not generally kill* (*mā lā yaqtul ghālib*^{an})."[9]

Al-Qudūrī's contribution to the definition of a deadly weapon indicates two important developments. The first is the modification of the definition of wounding (*jarḥ*) to include only those weapons that physically separate body parts. The second, which further modifies the definition of *jarḥ*, is the addition of the idea of weapons that generally kill (*mā yaqtul ghālib*^{an}).

[7] al-Ṭaḥāwī. *Mukhtaṣar*, 234.
[8] Ibid.
[9] al-Maydānī, *Al-Lubāb,* 3:141-2.

Although unknown to the Ḥanafī School in its formative period, this is the primary definition of a deadly weapon described in the early Shāfi'ī School, which has now been adopted by the Ḥanafī tradition and attributed to Abū Yūsuf and al- Shaybānī.[10] The importance of these two contributions is that they have now created general types beyond the specific examples of rocks, slaps, and switches provided by the early scholars and opened the door for additional types of weapons to be considered and placed in their respective type.

Roughly a century later, al-Kāsānī (d. 587/1191) will further develop the concept of the deadly weapon, this time focusing on the material from in which the weapon is constructed. A murder weapon is made "of iron (*ḥadīd*) with a point and [has the ability to] stab (*ṭaʿn*) like a sword, knife, spear, awl, needle and what is similar to that." The point of consideration for the weapon therefore is "iron itself, whether it wounds (*jaraḥa*) or not." In this definition, al-Kāsānī abandons modifications made by al-Qudūrī and focuses his discussion on al-Ṭaḥāwī's understanding of *jarh.* He places the material from in which the weapon was fashioned as the primary point of consideration and, as a result, he would include other items that are made from iron but not normally considered weapons in the category of intentional murder such as "[iron] bars, scales, the backs of axes, metallic rocks, and things like these."[11] He also creates an analogy to other metals including weapons made from copper, brass, lead, gold, and silver, "and their ruling is that of iron."[12]

This shift in focus to the material is one of the most important changes in the Ḥanafī School's understanding of a deadly weapon, even later attempts to integrate both the concept of

[10] This opinion is first found in the work of al-Shāfiʿī, see Muḥammad b. Idrīs al-Shāfiʿī. *Al-Umm* (Beirut: Dār al-Maʿrifa, ND), 7:329-30.
[11] The term for metallic rocks (*al-marū*) refers to a "white, shiny rock used to make fire," and is named for a mountain in Mecca. It is unlikely that this stone contained any amount of iron, however al-Kāsānī probably understood the rock as being either metallic or containing iron ore because of its physical qualities. See Muḥammad b. Yaʿqūb al-Fīrūzābādī. *al-Qāmūs al-Muḥīṭ* (Beirut: Muʾassasat al-Risāla, 2005), 1334.
[12] al-Kāsānī, *Badāʾiʿ,* 10:233-4.

jarḥ with the weapon's material continued to prioritize the material as the determining factor. The *Fatāwā Tātārkhāniyya,* for example, dismisses the idea of weapons that generally kill and states that the "consideration in this section [of the law] is to metal."[13] If the weapon was made of another item other than metal, then the *tafrīq al-ajzāʾ* rule applies; however, if the weapon is made from metal then no additional consideration is necessary. The same opinion is found in the *Fatāwā Anqarawiyya* and the work of Ibn ʿĀbidīn (d. 1252/1836).[14] The only slight deviation from this opinion is in the *Fatāwā ʿĀlamgīriyya,* which attempts to return to the rule of *tafrīq al-ajzāʾ* in all cases, although the collection dismisses the minority opinion of weapons that generally kill.[15]

Another attempt to augment the material approach in the classical period came from the incorporation of an additional element from the Shāfiʿī School. On this idea, first introduced by the Persian scholar Muḥammad b. Aḥmad al-Sarakhsī (d. 490/1096), if a person were stabbed by a small weapon, such as a pin, and died as a result, it would not be considered intentional murder. However, if that stabbing occurred in a vulnerable area of the body likely to cause death (*maqtal*), then it would be considered intentional.[16] This idea was largely ignored by contemporary Ḥanafī scholars and is not found in the discussions of al-Kāsānī. However, this opinion is mentioned in the *Tātārkhāniyya* and the *ʿĀlamgīriyya* as well as the work of Ibn ʿĀbidīn.[17] After a brief mention, each of these texts claims that the discussion of an attack on a vulnerable area of the body becomes irrelevant in the face of the rules regarding material, as pins would automatically be considered as deadly weapons regardless of where they were used because they are made from metal. This point

[13] al-Andarpatī. *Al-Fatāwa al-Tātārkhāniyya,* 19:5.
[14] al-Anqarawī,. *Al-Fatāwa al-Anqarawiyya*, 1:164-5; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 10:157.
[15] *al-Fatāwa al-ʿĀlamgīriyya*, 6:3.
[16] Muḥammad b. Aḥmad al-Sarakhsī. *Al-Mabsūṭ* (Beirut: Dār al-Maʿrifa, ND), 27:87-90.
[17] al-Andarpatī. *Al-Fatāwa al-Tātārkhāniyya*, 19:5; *al-Fatāwa al-ʿĀlamgīriyya*, 6:5; Ibn ʿĀbidīn, *Radd al-Muḥtār,* 10:156.

proves that, even when attempting to introduce non-Ḥanafī approaches to a deadly weapon to move away from the description of the material, the standard approach of the school held firm.

Thus, although the initial periods of development of the Ḥanafī School attempted to widen the definition of a deadly weapon to include general categories of "separating body parts (*tafrīq al-ajzāʾ*)" and to incorporate understandings from the Shāfiʿī school, such as weapons that "generally kill (*yaqtul ghālib*^{an})," by the end of the 12th century the school became firmly grounded in the idea of judging a deadly weapon by the material from which it was crafted.

The development of the material standard on which a weapon is categorized reflects an instance of the "doubt canon" as discussed by Intisar Rabb. According to Rabb, when searching for the intent of an individual, judges were concerned about reaching a particular level of certainty in their rulings. By only examining the internal indicators of the motive to kill, the judge could never reach a level of certainty that allowed him to apply the strictest punishment. Judges, therefore, "could never reach evidentiary *certainty* about guilt."[18] The presence of a weapon that does not fall into the defined category of metal objects allowed judges to forego the most extreme punishment of the law and instead opt for more lenient punishments, such as the payment of blood money or a discretionary punishment, because they could not establish absolute certainty of the perpetrator's intent.

There is one point within Ḥanafī law in which the concept of a deadly weapon runs into trouble: cases in which no weapon was present, exemplified in the juristic discourse on strangulation. In this case, the overwhelming majority of scholars agreed that a person who choked someone to death would not be subject to the death penalty but could be executed through discretionary punishment if it was a repeat offense or the man was in the habit of choking his

[18] Rabb, *Doubt,* 121.

opponents. The *Fatāwā Tātārkhāniyya* and *Fatāwā Anqarawiyya* present a slight alternative. Citing the opinions Abū Yūsuf and al- Shaybānī, if a person continued to choke another to the extent that "a person would most likely die (*mā yamūt al-insān minhu ghālib*^{an})" then it is intentional, "because he meant (*qaṣada*) to kill him." If the perpetrator choked a person for a moment, then stopped, and the victim died later as a result, the question that must be asked is whether that amount of choking fits the definition of killing generally (*ghālib*^{an}). Here we see a return of the Shāfiʿī principle introduced earlier regarding a weapon, now applied to strangulation. Like the previous applications, however, this opinion is rarely cited and is found only in the *Fatāwā Tātārkhāniyya* and the *Fatāwā Anqarawiyya*, meaning that it never took hold within the Ḥanafī School. The same difference of opinion is found in cases of drowning or throwing a person off a cliff or building.[19]

As the juristic tendency to use doubt and limit the types of weapons considered deadly came into conflict with the desire of states in the 19th century to expand the realm of punishment, states would look to dismiss this understanding of the deadly weapon altogether and attempt to redirect judges towards viewing the perpetrator's motive. This tension, the method through which the weapon was discussed, and how it continued to establish intent in the jurisdictions studied in this dissertation, will be covered in the rest of this chapter.

Deadly Weapon vs. Motive in British India

In British India, colonial officers quickly took note of the Ḥanafī approach to the weapon and sought to amend it, seeing it as a barrier to the application of punishment. Lord Hastings suggested, "If the intention of murder be clearly proved, no distinction should be made with respect

[19] al-Andarpatī. *Al-Fatāwa al-Tātārkhāniyya*, 19:16; al-Anqarawī, *Al-Fatāwa al-Anqarawiyya*, 1:179.

to the weapon by which the crime was perpetrated."[20] This method of establishing intent, for the British, resulted in the passing of much lighter sentences and the dismissal of cases altogether. "Since the present Raja's ascension," remarked the colonial official Jonathan Duncan when referring to the ruler of Bengal, "he has not ventured, nor will of himself venture, to punish with Death, the most notorious offenders…"[21] In 1790 Lord Cornwallis issued regulations ordering that crimes were to be judged by their motive and not the weapon used because, in his view, the Islamic provision of barring capital punishment was "of barbarous construction and contrary to the first principles of civil society by which the state acquires an interest in every member."[22]

Appeals judges regularly cited this regulation, emphasizing the importance of distinguishing their understanding of the law from that of Islamic law. For example, in one case adjudicated in Bengal in 1853, three individuals were charged with the murder of one Button Mooshur. There were no eyewitnesses to the case and, as a result, the fatwa of the law officer classified the charge as "culpable homicide" and ordered the payment of blood money (*diyyut*). The sessions judge appears to have agreed with this classification and passed prison sentences of five years for two of the defendants, and seven years for the third. Although there seemed to be no conflict between the understanding of the law officer and the sessions judge with regards to the culpability of the prisoners, the Nizamut Adawlut judge, J.R. Colvin, took serious issue with the initial law reports created by the Muslim officers that classified the crime as culpable homicide. He stated that the British have "…set aside the distinctions of the Mahomedan law schools as to the particular instrument by which the death is caused" and ultimately confirmed the sentence of the sessions judge and the ruling of the Mufti.[23]

[20] Cited in Singha, *Despotism,* 52-3.
[21] Ibid, 51.
[22] Ibid.
[23] *Government v. Hulkara Singh* (1853) NA Ben 2 Behar 544.

However, the place of a deadly weapon in the establishment of intent did not go away so easily, and the precise nature of the weapon used continued to act as one of the primary ways through which intent was established. In a case from Bengal in 1853, a man (Nokory Bagdee) was charged with the murder of Roopchand, the younger brother of the prosecutor Gorachand Singh. The perpetrator had purchased food from Gorachand's sister, refused to pay, and run off. When Roopchand confronted him, he stabbed and murdered him. The sessions judge convicted him of willful murder and asked for the death penalty, while the Mufti disagreed and found him "guilty of culpable homicide, and declares him liable to discretionary punishment by *deyut.*" Upon appeal, one of the Nizamut Adawlut judges (H.T. Raikes) pointed out the medical report, which stated that death was caused by "a penetrating wound between the fourth and fifth rib on the left side of the chest, extending deeply into the lungs. It was 1.5 inches in length and 7 inches in depth." "The deadly weapon used by the prisoner," in the opinion of Raikes, "the part struck, and the wound inflicted, seven inches and a half in depth, evince a determination to take life, which makes the prisoner's crime willful murder, and he is therefore liable to suffer death." The other judges disagreed, however, and cited the circumstances of the case (a death caused in the midst of an altercation) to sentence the perpetrator to the mitigated punishment of life in prison. Although the judges eventually sided with the Mufti for lighter punishment and not the sessions judge who ruled for execution, the presence of a deadly weapon—that is, one capable of stabbing, just as in the definition of the Ḥanafī School—gave them grounds to convict for willful murder, even though the circumstances ultimately led them to a mitigated punishment.[24]

In another case from the Northwestern Provinces in 1854, a woman (Mussumat Mohuree) was charged with the willful murder of her husband (Chootkaie). A Mufti was either not present

[24] *Government v. Nokory Bagdee* (1853) NA Ben 2 Hooghly 987.

during the proceedings or his opinion was not recorded. The session's judge ruled for capital punishment, based largely on the prisoner's confession. The appeals judges differed and eventually convicted her of willful murder but only sentenced her to life in prison. The entire basis for this lighter punishment rested upon the nature of the weapon used, a large rock, "in consequence of which blow he died, without her designing to kill him." In this case, even when a Mufti was not present and the regulations regarding the treatment of the deadly weapon in Islamic law were not to be considered, it was still the material nature of the weapon and *not the perpetrator's motive* that determined the prisoner's level of guilt and dictated the punishment.[25]

In the Indian Penal Code of 1860 (IPC), the framers and explainers of the code brought the discussion of the deadly weapon back to prominence and replaced the regulations that had been in place since the end of the 18th century. In explaining the Code, the section on culpable homicide notes:

> The existence of a particular evil motive such as hatred, avarice, jealousy, etc., is not necessary. It is no part of the definition of Culpable Homicide that the act which causes death should be a malicious act. Malice is not made a necessary ingredient. Whatever may be the motive which incites the action, and whether or not any motive whatsoever be discoverable, the question for investigation is this: did the accused person intend to cause death, or a bodily injury likely to end in death; or did he know that death was a probable result of his act?[26]

The explanation continues, "…How can the existence of the requisite intention or knowledge be proved, seeing that these are *internal* and *invisible* acts of the mind? They can be ascertained only

[25] *Government v. Mussumat Mohuree* (1854) NA Nwp 1 Saugor 468.
[26] Morgan and Macpherson, *Indian*, 230.

from *external* and *visible* acts."[27] One of the main external indicators of such intention is the presence of a deadly weapon. An example of this application would be in cases of provocation in which a person was insulted or encouraged to attack by the actions of another. Typically, the presence of provocation would be considered as a mitigating factor for punishment. However,

> If a person strikes another with a deadly weapon, or assaults him with blows causing great bodily pain or bloodshed, or if he in a serious personal conflict assails him, having a great superiority of personal strength or skill, the provocation would seem sufficiently grave to extenuate.[28]

Thus, the IPC, in promoting the definition of intent established through the act committed, remained close to the opinion of the Ḥanafī School which takes as its primary consideration the nature of the weapon used. While the regulations passed by colonial officers in the 18th century sought to move away from using the weapon as the main way to establish intent, cases of homicide throughout the first half of the 19th century with or without the opinion of a Mufti regularly rested on the nature of the weapon used in the attack. With the introduction of the new code, the regulations regarding motive were sidelined and the *external act* that caused death was placed at the core of the definition of homicide, the defining aspect of that act judged through the use of a weapon. This this was also in line with the changing understanding of the common law of the time, with the Offenses Against the Person Act of 1861 explicitly rejected the idea of premeditation and motive and considering only the external act, stating,

> …it shall not be necessary to set forth the Manner in which or the Means by which the Death of the Deceased was caused, but it shall be sufficient in any indictment for Murder to charge that the Defendant did feloniously, willfully, and of his Malice aforethought kill

[27] Ibid, 231, emphasis added.
[28] Ibid, 244.

and murder the Deceased; and it shall be sufficient in any Indictment for Manslaughter to charge that the Defendant did feloniously kill and slay the Deceased.[29]

The problem faced with the OAPA, however, was how to sufficiently judge an external act as having the requisite intent. In the IPC local understandings, which were influenced by Ḥanafī law, dictated that it was the presence of a weapon that would must adequately fulfill this requirement. Examples of this can be found in cases brought to the Indian appellate courts following the code's implementation.

In a case brought to the High Court of Allahabad in 1874, a police officer had gone to the home of his superior and struck him over the head with "a heavy bamboo club." Although the victim did not die from the attack, the officer was convicted of attempted murder and sentenced by the lower court to seven years in prison. Upon appeal, the attorney for the officer argued that his client had no intention to cause the death of his superior and meant only to fight with him to cause injury. "Had his intent been murderous," he argued, "he might have armed himself with a weapon more certain of lethal effect than a club." The appeals judge, Justice Turner, agreed and stated:

> The weapon with which he attacked him is described by the witnesses in the Magistrate's Court as a heavy bamboo *lathee* or stick: it was produced in Court, and if the Judge had considered the description of it incorrect, it must be presumed he would have stated so in his judgment. Moreover, from the tenor of his judgment, it is evident the Judge regarded the weapon as such as could produce death, and the committing officer to whom also the weapon was produced, describes it as a *heavy bamboo club.* Looking at the appellant's act,

[29] Offences Against the Persons Act 1861, c. 1 §6.

and *the nature of the weapon* with which it was perpetrated, I come to the conclusion that he intended and attempted at the least to inflict grievous hurt.

The judge then dismissed the initial ruling of the lower judge and rather sentenced the officer to 3.5 years in prison for the crime of "attempting voluntarily to cause grievous hurt," following Sections 325 and 511 of the IPC.[30] Had this case been one of homicide, the use of a club according to the Ḥanafī School would have automatically categorized the crime as semi-intentional (*shibh ʿamd*). In this case, however, the judge extended the deadly weapon rule to personal injury and established that the use of a bamboo club did not constitute a deadly weapon and so the judge lessened the sentence.

Outside of British jurisdiction the issue of the weapon used remained controversial. In the late 1880s in Muslim-ruled Hyderabad, a government employee named Jay Singh shot his brother-in-law Behna Singh, who died of his injuries the following day. Jay Singh was brought to court and charged with murder, and the question immediately arose if the weapon used—a gun whose bullets were made of lead—could fall under the category of a deadly weapon. The opinion of the city's most prominent scholar of the time, Mufti Luṭfullāh, was sought and he ruled that the homicide was to be treated as semi-intentional and that the death penalty could not be applied. He cited as his justification the condition of "separating body parts (*tafrīq al-ajzāʾ*)" stating that a bullet creates only a minor wound and cannot cut off limbs like a sword.

This ruling presented a unique problem. Typically, and as was seen in the first section of this chapter, *tafrīq al-ajzāʾ* was meant to *extend* the definition of a deadly weapon and move beyond its material nature; however, Mufti Luṭfullāh used the same logic to *limit* the definition in an attempt to create doubt and remove the possibility of applying the death penalty. This threw the

[30] *Queen v. Girdharee Singh* (1873) NA Nwp Allahabad 26.

city-state's judiciary into disarray and debate that was only resolved through an official announcement from the government's High Judicial Council (*Majlis-e ʿĀliya-e ʿAdālat*) declaring once and for all that deaths that occur from guns and bullets are to be officially classified as intentional murder (*ʿamd*), overruling Mufti Luṭfullāh.

In their opinion, the council's members each took turns challenging the approach of Mufti Luṭfullāh, particularly the criteria of *tafrīq al-ajzāʾ*. The main question posed was: what was more important to the definition of the deadly weapon: its material or its ability to wound (*jarḥ*)?

The head of the council, Mawlavi Khudā Baksh Khān, supported the latter by pointing out the case of fire, considered as intentional *(ʿamd*) even though it does necessarily separate body parts (*tafrīq al-ajzāʾ*). If fire is therefore still considered a deadly weapon, then surely bullets fired by a gun could fall into the same category. Another member, Mawlawi Sayed Afẓal Ḥusayn, analyzed three other opinions Mufti Luṭfullāh had given on the same issue, hinting that he had begun to shift his position following the events of 1857 to accept bullets as deadly by using the opinions of al-Ṭaḥāwī (and expanding the definition of *jarḥ* through *tafrīq al-ajzāʾ*), and that this most recent opinion must stand. Finally, the report cited other fatwa collections, namely the *Anqarawiyya*, to state that the presence of metal is not a requirement, and that bullets fired from a gun should count. Finally, the report cited nine other legal scholars working in the Hyderabad courts who ruled bullets as deadly and argues that, as this is the common practice within the courts, it can override the opinion of an individual scholar regardless of his rank.[31]

Through this ruling, the expanded definition of a deadly weapon has become the standard in both British and Muslim jurisdictions within the Indian Subcontinent, following the understanding of the IPC and the Ḥanafī School. Considerations of motive, therefore, which

[31] "Qatl az Bandaqa Raṣāṣiyya," *Decisions of the Majlis-e ʿĀliyya-e ʿAdālat* 91 (Hyderabad: Maṭbaʿ-e Muqannin-e Dakkan, 1887).

dominated colonial discussions of law during the late 18th through the first half of the 19th centuries, was now sidelined and local understandings dominated.

Weapons & Premeditation in the Ottoman and Egyptian Codes

During the first half of the 19th century, the Ottoman and Egyptian criminal systems widened the definition of the deadly weapon and added the additional element of premeditation. However, later in the century the Ottoman and Egyptian approaches would diverge, with the former continuing to affirm the place of the weapon and the latter choosing to incorporate the concept of premeditation. In Egypt in 1858, the appellate court (*Majlis al-Aḥkām*) ruled that bamboo sticks (*nabbūt*) were to be considered as deadly weapons and henceforth instructed judges to take the wider Ḥanafī definition of a deadly weapon.[32] This ruling was mentioned in a number of instances in the courts, and it appears that the wider definition of the weapon was respected. For example, in one case from 1860, a man was charged with the murder of another by striking him with a wooden stick. In his ruling, the Mufti cited the definition of the weapon given by the two students of Abū Ḥanīfa, that is, to consider weapons that kill generally (*bi mā yaqtul ghālib*^{an}).[33]

However, the courts also took into consideration the presence of motive, or wider discussions of the perpetrator's intent. For example, in one case from 1860 a man named al-Shaykh Muḥammad al-Ḥabīshī was charged with the murder of another, one ʿAlī Ḥijāzī. The two had been on opposite sides of the courtroom on another matter and, while inside the courtroom, Muḥammad had beaten ʿAlī with a switch. After leaving the court, Muḥammad kicked ʿAlī four times, and he died from his injuries eight days later. During the court proceedings, Muḥammad argued that he

[32] Cited in Khaled Fahmy, "The Police and the People in Nineteenth-Century Egypt," *Die Welt des Islams* 39, no. 3 (November 1999), 355.
[33] *Family of Muḥammad Gharīf v. Aḥmad b. al-Ḥājj al-Daqsabī* (1860) FM 6 Danqla 47.

had only meant "to scare him" and that he had no intention of killing him. The court and Mufti agreed, ruling that he should only be required to pay blood money in compensation for his death.[34]

In another case from the Ottoman Empire in 1880, a woman (Sofia) was walking down the street with three of her daughters and was attacked by a group of men armed with a knife. Sofia and one of her daughters (Tuti) were injured in the attack, and Sofia died of her injuries the following day. Upon investigation and interviews with witnesses from the neighborhood, two men (Amīn Rafīq and Ḥasan) are arrested and charged with the murder. They categorically denied the charges and after further investigation and interrogation, including an autopsy of the victims, it was determined that Amin was the primary actor and that Ḥasan was merely an accomplice. Amin was sentenced to 15 years of hard labor for wrongful homicide, while Hasan was sentenced to five years for participating in the crime.[35]

In both of these cases, if the court had only viewed the nature of the weapon, the punishment would have been much harsher, perhaps necessitating the death penalty. The first was carried out with extreme bodily force, taken as a deadly weapon under the minority opinion within the Ḥanafī school, while the second was carried out with a knife made of metal, a deadly weapon under the majority opinion. However, the court chose to look at the motive and the other circumstances of the case, finding that the first happened as a result of an immediate court disagreement and the second as a street fight, and decided to lessen the punishment to that of wrongful homicide (*khaṭaʾ*).

Explanations of the Ottoman Penal Code detail two criteria for the establishment of intentional murder. "The first is that the death must be proceeded by a purpose (*qaṣd*), intent (*niyya*), and conception (*taṣawwur*). The second is that the instrument (*al-āla*) or the means (*al-*

[34] *Family of ʿAlī Ḥijāzī v. al-Shaykh Muḥammad al-Ḥabīshī* (1860) FM 6 Baltim 58.
[35] *State v. Amin Rafiq & Hasan* (1880) CM 31 Sarokhan 2.

wasīṭa) used be valid [to produce] death." The most important of these is the "investigation of the instrument used in the killing [and asking] whether it is amongst that which is valid for killing or not."[36] With regards to the nature of the weapon the explanation continues:

> Intentional murder must include that the instrument used for its commission [be] a weapon (*silāḥ*) or what is like it (*ma yajri majrāhu*) like a piece of metal that obtains as an effect [of its use] the general taking of life (*zuhūq al-nafs ghālib*^{an}), or it – meaning intentional murder – is done by drowning in water or burning with fire or strangulation in its different types.[37]

This reflects a direct application of the concept of a deadly weapon as described within the Ḥanafī School. Taken to its widest extent, the Ottoman Code not only includes the material definition of weapon as metal that dominated later Ḥanafī discussions but also expands to include minority opinions regarding all types of strangulation and cases that would be considered as semi-intentional, such as drowning, within this larger idea of a deadly weapon.

Focusing exclusively on the weapon with this definition could create a problem for judges, as what would happen when a person picked up a sword or another deadly weapon that just happened to be lying around in the midst of a fight and used it in an attack? The circumstances of the homicide would render it not intentional; however, following the letter of the Ḥanafī School and looking at the weapon alone would require a ruling of intentional murder. The Ottoman and Egyptian codes solve this problem by the introduction of the concept of premeditation. According to the explanation:

> Preceding intentional murder includes conceptualization [of the crime] in the mind of the killer and his resolution [to carry it out] in his heart…It is a legal condition for murder to

[36] Rifʿat, *Kulliyyāt*, 177.
[37] Rifʿat, *Kulliyyāt*, 178.

> be considered intentional that he previously visualized [the crime], determined to commit the act, and realized with certainty the concept of destroying (*itlāf*) the person he intends to murder. He has prepared and made ready the instruments of death and its tools, then approached him, removed his soul and took away his life. For example, if a person not prone to rage or in a fit of anger purposefully desires to kill, or lied in wait or him to pass and with purpose took him unknowingly…actions of this type are considered intentional murder.[38]

Premeditation also covers instances in which there was no weapon used, such as in a case where a person "…stalks the one he wants to kill without a weapon, taking the advantage of an opportunity throw him into a pit that he would not have normally fallen into, or [waiting for him to] sit on the edge of a river, coming behind him and pushing him in."[39]

The Egyptian code focuses much more exclusively on the concept of premeditation and, as was mentioned briefly in the previous chapter, uses premeditation as the defining element between the highest degree of murder, necessitating execution, and other categories. In its explanation, the code explicitly disregards the presence of a weapon:

> There is no difference between the types of intentional murder whether the killing occurred with a sharp weapon such as a sword, knife, or dagger, or if it was [done] with a firearm such as a pistol or a shotgun, or whether [the weapon] was neither sharp nor a firearm such as killing with a club or a rock, or even if it was carried out with no weapon at all, such as a person throwing another in an ocean or river intending to drown them.[40]

[38] Rifʿat, *Kulliyyāt*, 177.
[39] Ibid.
[40] Muḥammad Yāsīn. *Sharḥ Qānūn al-ʻUqūbāt* (Cairo: Maṭbaʿat al-Ṣādiq, 1886), 221-222.

Therefore, to establish premeditation according to the Egyptian code, one or both of the following two elements had to be present:

1. The murderer designed to kill before committing the act (*al-iṣrār*),[41] and/or
2. The murderer lied in wait for the victim (*al-taraṣṣud*)[42]

For the first, evidence must be presented that the murderer planned to commit his act prior to its commission, typically in the form of statements made to others regarding the intent to murder. These statements could have been made at any time, be it months or even minutes, before the commission of the crime. For the second, evidence must be provided that the murderer had waited around and prepared for the act, taking at least some period of time to wait and consider the homicide before acting, even if that was only for a few minutes. The murderer could have been waiting on the same path that their victim took home or picked a place that they knew would be quiet enough and out of the sight of onlookers and witnesses. Either of these elements, according to the code, could be proven with the presence of either a confession from the defendant or the presence of two witnesses—an interesting connection to the standard practice in *fiqh*.[43]

Thus, the Egyptian code took the most significant step away from using the presence of a deadly weapon as the main method of establishing intent and instead focused on the concept of premeditation. Unlike the Ottoman code, which continued to hold to the importance of the weapon, the Egyptian code denies altogether the relevance of the weapon used and instead instructs courts to focus on the circumstances around the crime, particularly the aspect of premeditation.

However, this does not mean that the discussion of the weapon disappeared entirely, and there is still evidence that the question of the weapon continued to factor in the rulings of the courts

[41] Yāsīn, *Sharḥ,* 225.
[42] Ibid, 226.
[43] Ibid.

and the Mufti. In one case from 1888, for example, a man named Sayyid ʿAbd al-Mutaʿāl was charged with the murder of his former wife, Zanūba bint Muḥammad. He had confessed to the murder to other family members, stating that he had choked her to death. The question arose amongst the court and the Mufti as to whether this constituted intentional or semi-intentional murder since the categorization of choking, as was mentioned previously in this chapter, was a point of contention within the Ḥanafī School. The judge ruled that they shall continue to follow the standard Egyptian practice and consider choking as sufficient for intentional murder, and so the defendant was sentenced to death.[44] Although the Egyptian Penal Code had been in place for roughly five years, the question of the weapon remained important in the courts in establishing intent, and the previous government rulings regarding the definition of the weapon within the Ḥanafī School continued to remain influential.

The concept of premeditation as developed in the Egyptian and Ottoman codes was largely new to Islamic legal theory and can be explained in a number of ways. Firstly, an earlier concept of premeditation did exist within the Mālikī School. Understood as an aggravated category of homicide known as *al-qatl ghīla*, this entailed the perpetrator "…either murdering secretively (*khifya*^{tan}) or tricking the victim (*khid'a*^{tan}), luring him to a location and killing him [there] in order to take his property. [This even applies] if the murder took place in public, in a situation where [the victim] could not call for help."[45] The Mālikī school, as discussed in the previous chapter, was used by the Egyptians in the development of the legal system to justify changes made with the influence of the French, arguing that the French understandings of the law were in line with Mālikī understandings and therefore in line with Islamic law.

[44] *Family of Zanūba bint Muḥammad v. Sayyid ʿAbd al-Mutaʿāl* (1888) FB Fayum 318.
[45] Muḥammad ʿArafa al-Dusūqī. *Ḥāshiyyat al-Dusūqī ʿala al-Sharḥ al-Kabīr* (Cairo: Dār Iḥyā' al-Kutub al-ʿArabiyya, ND) 4:238.

A second and more important point for the integration of premeditation into the Ottoman and Egyptian codes is that it reflects the outcome of the tension between the Islamic legal desire to avoid punishment and the state's desire to expand its application. That tension is most clearly expressed in the explanation of the Ottoman Penal Code:

> It is true that a group of theorists in the field of criminal punishment believe that it is necessary to limit the punishment of a murderer to what he might benefit from, [seeking to] reform him without exterminating him as retaliation for intentionally destroying the creation of God, in that he has killed a person unjustly and without right. However, it is necessary to enact this [punishment] as when a murderer receives [retaliation] it closes the door of wrongdoing and prevents its expansion, disposes of enmity and annihilates the remnants of distrust and friction from the hearts of people.[46]

As seen the previous chapter, the desires of the state to expand the realm of punishment were justified as complying with the ultimate purpose of retaliation (*qiṣāṣ*) as established in the Qur'ān, preventing blood feuds and revenge killings. That expansion of the role of the state needed to be checked, however, in order to ensure that only the most deserving criminals would receive the extreme punishment of execution. For the specific case of premeditated murder, the existence of premeditation can be found in the explanation of the Egyptian penal code:

> The premeditated murderer (*al-qātil bi iṣrār aw taraṣṣud*) is the greater sinner and the more extreme violator of the law than one who kills in the state of passion because of the circumstances. The state of passion places a person in a state of partial insanity as opposed to premeditated murder, as a person in this state is neither passionate nor deficient in reason.[47]

[46] Rif'at, *Kulliyyāt*, 178.
[47] Yāsīn, *Sharḥ*, 226.

The presence of premeditation helped to establish the perpetrator's state of mind and, as discussed in the explanation of the Ottoman code above, indicates that the perpetrator has "conceptualized" the crime and has the "resolution in his heart" to carry it out. It therefore can be understood as a contemporary adaptation of the doubt canon, allowing jurists to reach a higher level of certainty by removing the doubt that the perpetrator had not fully intended his actions and should not be subject to execution, ensuring that only those who had planned out their actions were given the most extreme punishment. In the specific case of the Ottoman code, the concept of premeditation acts in concert with the expanded concept of the weapon. Given that the Ottoman code now considers weapon on its widest definition, the requirement of premeditation for the strongest punishment serves as a new check against punishing those who had no previous intent to kill their victim with execution.

Although the Ottoman and Egyptian penal codes embodied the new demands of the state to expand the role of punishment for homicide, this was tempered by the introduction of premeditation. Just as the previous system had balanced the political authority's power to enact punishment (*siyasa* and *ta'zir*) by subjecting it to strict rules and developing the doubt canon, the new codes in the Ottoman Empire and Egypt attempted to do the same. The codes balanced an expanded definition of the weapon (in the case of the Ottomans) or a removal of the means altogether (in the case of the Egyptians) by adding in the new requirement of premeditation, which would ensure that only those who had acted in a way that showed they fully intended the results of their crime would receive the most extreme punishment.

Conclusions

Through an analysis of the deadly weapon doctrine and the establishment of intent this chapter has shown that, although the new codes brought with them a number of significant theoretical shifts, they were still based on understandings found in the Ḥanafī School. For the British in India, the shift in intent came full circle from a focus on the weapon to an understanding of motive and eventually returning to the external nature of the act committed where the weapon was critical in establishing intent. In the first half of the century, new regulations were put in place to remove consideration of the weapon as described in the Ḥanafī School, but as time progressed the weapon continued to figure prominently in the rulings of British judges, with or without the help of a Mufti. With the introduction of the IPC in 1860, the weapon returned, acting as the most accurate and demonstrative link between the external act committed and the internal will of a perpetrator. Using the presence of a deadly weapon and defining the external nature of the act committed, the code was in direct opposition to the Offenses Against the Persons Act 1861 which required that only the internal motive be used to establish intent. Writing in the second half of the century, the Ḥanafī scholar and jurist ʿAbd al-Ḥayy felt the same way and believed that the presence of a deadly weapon was the best indicator of what action a person desired to commit in his heart. The same approach was taken in the Ottoman code, with the nature of the weapon used being the "most important investigation" required by the judge to pass a sentence of murder.

What did change from the traditional Ḥanafī approach to establishing intent was the definition of the weapon itself. From the classical period onwards, the Ḥanafī School became embroiled in discussing the material from which the weapon was produced. Driven by the doubt canon to mitigate as much as possible the situations in which the death penalty could be passed up to inflict less severe punishments, the school's jurists severely limited the understanding of the weapon to only those made from metal, making only limited exceptions such as in the case of fire.

The 19th century, with the state's increasing desire to deter more murderers, saw a divergence from the majority opinion of the school toward a wider definition of the weapon to expand the realm of capital punishment. When looking for a way to expand the definition of the weapon, the new codes did not have to search far, as the Ḥanafī School already contained minority opinions attributed to the two main students of the school's founder: Abū Yūsuf and al- Shaybānī. The British in India made the first move to direct judges towards the minority opinion and the Egyptians soon followed, with the Ottomans being the last to incorporate this expanded definition in their penal code of 1858.

The Ottomans and the Egyptians, influenced by French understandings, made the greatest shift in the code with the new element of premeditation to help regulate their acceptance of new forms of deadly weapons, with the Egyptians going the furthest in downplaying the role of the weapon used. The concept of premeditation in the Ottoman and Egyptian codes, although not present in Ḥanafī legal discussions, worked as a new form of the doubt canon, served as a check on the new expanded concept of the weapon and acted to limit the most extreme punishment to instances in which the perpetrator planned out the attack, ensuring the establishment of intent.

The previous two chapters were concerned with establishing the composite elements of the crime of homicide: the categorization and characteristics of the act committed, and the intent required for the relevant category to be applied. However, there remain areas in which an individual's degree of criminal responsibility is altered and therefore is considered not responsible for the acts committed, even if the main elements of the crime were established. This is particularly important in the case where the perpetrator committed the act as a child, is considered insane, or with the participation of others. The final chapter of this dissertation will examine the concept of

criminal responsibility in cases of homicide within Ḥanafī Law and the approaches of the new penal codes.

Chapter 5: Criminal Responsibility

In order for a crime to be categorized as murder (Chapter Three) and the intent to be fully established (Chapter Four) and punishment carried out, the perpetrator of the act must have full legal capacity, that is, the ability to be held responsible for his actions. In Islamic works of jurisprudence (*fiqh*), full criminal responsibility fell upon individuals who were sane (*ʿāqil*) and an adult (*bāligh*) at the time of the crime's commission. As a result, children and the mentally insane were not to be considered to be fully responsible for their crimes. In the Ḥanafī tradition, these rules were first established by the school's founders and find their first full iteration in the work of al-Ṭaḥāwī:

> If a child who has not reached puberty or an insane person in a state of insanity attacks a man and kills him then the blood money is upon his (the perpetrator's) family, as there is no [consideration of] intentional killing (*ʿamd*) for them. Similar are all injuries committed by [them] for hands, eyes, or what is similar to them, as the blood money is upon his family.[1]

This status of full responsibility is referred to as *taklīf*, meaning assignment from God, and applies not only to criminal law but also to acts of worship (*ʿibādāt*) such as prayer, fasting, pilgrimage, and payment of charity. *Taklīf* is often constructed in Islamic thought as a burden, one that carries a reward for fulfillment and punishment otherwise. There are numerous times in the law of worship when that burden is lifted. When sick or traveling, Muslims are exempted from fully performing their prayers, and women while menstruating are exempted from praying on time and from fasting.[2] In the realm of criminal law, children and the mentally insane, legally believed to be unaware of the actions that they are committing, are also exempted from the burden of punishment.

[1] al-Ṭaḥāwī, *Mukhtaṣar*, 229.
[2] See for example Qur'an, 2:185-6 and 4:101-2.

There are two other general elements of *taklīf* within Islamic law that should be mentioned: the gradual development of *taklīf* over time and the difference between spiritual and worldly responsibility for actions. In the particular case of children, *taklīf* is a burden that is developed gradually as a person matures. While still in the womb, children obtain their first subject of legal capacity in that they are held responsible for paying the mandatory charity to be paid by every Muslim at the end of Ramadan fasting (*zakāt al-ʿīd*). Although the responsibility for paying this amount is temporarily placed upon the child's parent or guardian, if he becomes an adult and realizes that it was not paid then the burden moves to him. At around the age of seven, the next step of *taklīf* appears, known as the age of discernment (*sin al-tamyīz*). Children at this age are now believed to have a basic understanding of what is right and wrong and can, for example, carry out basic commercial contracts and act as temporary agents. In family law, the Shāfiʿī school holds that a child who has reached the age of discernment can choose which parent they feel would act as a better custodian and choose to live with either their father or mother in a custody dispute. A child finally becomes a full adult and *taklīf* is completed once they have undergone the natural process of puberty, that is, becoming physically capable of bearing children and, as a result, carrying the full responsibility of taking care of others and, thus, bearing the consequences of crimes committed. The precise point at which this occurs is debated within works of *fiqh*, and its relationship to criminal responsibility will be discussed later in this chapter.

There are also other instances outside of the category of *taklīf* in which criminal responsibility is modified. For example, if there were more than one participant in the crime, the punishment would be shared by those involved and, potentially, responsibility would be divided amongst the participants according to the relative degree of severity in their participation.

An exploration of criminal responsibility, although a relatively minor point in the new codes, is critical to understanding how the codes of the 19th century were developed and on what sources they relied. Rather than directly importing European norms, the codes regularly incorporated elements from Ḥanafī law and chose to follow local precedent. In the case of juvenile offenders, for example, in the common law children as young as twelve were subject to the harshest punishment of execution well into the 19th century, while in Indian courts this was typically not the case. The Indian Penal Code fixed the age of adulthood at 12 but gave significant leeway to judges to ascertain the mental state of the perpetrator. If the perpetrator was determined to have fully comprehended the consequences of their actions, the judge could issue a stronger punishment. This reflects a development in the law that balanced a desire, expressed in both Ḥanafī and European traditions, to determine a fixed age of responsibility with the willingness to see each case in its own circumstances. Alternatively, in the explanation of the Egyptian code, al-Bustānī holds that the definition of a child is in conformity with European traditions that find their source in Roman law. While this was true, the content of the law was still a direct adaptation of Ḥanafī understandings, even more so than the mixed approach adopted in British India.

The realm of criminal responsibility was also where Islamic and European definitions came to grapple with their own systemic problems. This will be most clearly seen in the definition of insanity. Both European and Ḥanafī law had struggled to develop a comprehensive legal definition of insanity. Through court practice, the common law eventually created a set of rules known as the M'Naughten rules in 1843, while Muslim jurists placed the responsibility of defining insanity on the shoulders of medical experts. These problems continued to show up in the new codes, with the IPC sticking more closely to M'Naughten and the Ottoman and Egyptian codes continuing to seek out the recommendation of psychiatrists.

Comparing the definitions of criminal responsibility between Ḥanafī law and the new codes offers a nuanced view of what happened with the implementation of the new codes. In dealing with complex problems such as defining a child, insanity, and shared criminal responsibility, the framers of the codes chose solutions that were in line with both changing European and Islamic understandings, converging their understandings to create new solutions that would suit contemporary circumstances. In the case of shared criminal responsibility, for example, the Ḥanafī requirement of cooperation between perpetrators remained the standard rule in judging responsibility in the Indian Penal Code, while allowing room for judges to evaluate the act of each participant on its own merits. The Ottoman and Egyptian codes on the other hand chose to institute the French view of equal punishment for all perpetrators as the basis of the law but, in practice, judges often chose to follow the Ḥanafī (and general Islamic view) of dividing punishment according to the degree of participation.

This chapter compares the understandings between Ḥanafī law and the new penal codes of the 19th century regarding criminal responsibility. The chapter begins by looking at juvenile offenders and insanity, and then moves to the idea of shared responsibility and special circumstances discussed within Islamic legal texts. Each section presents an overview of the general Ḥanafī and common law understandings, and then explores how those ideas were applied in pre-IPC British India. The sections then present the definitions established in the IPC and how they were implemented in the courts and close by examining the approaches of the Ottoman and Egyptian codes.

Juvenile Offenders

As mentioned in the introduction, for all the Sunni schools of Islamic law, children were not to be held criminally responsible for their acts—with a child being defined as an individual that has not exhibited the physical signs of puberty. Typically, those signs were considered as the first ejaculation for a man and the first menstruation for a woman. These signs could manifest at different ages according to local conditions, and jurists set both minimum ages, or a point at which a claim of adulthood could not be made, and maximum ages, or a point at which the absence of puberty could not be claimed to argue against legal responsibility. According to Ibn ʿĀbidīn, that minimum age was 12 for boys and 9 for girls. Additionally, a boy or girl could be assumed to have reached puberty if they have reached the age of 15 regardless of whether they have exhibited the physical signs or not, what Ibn ʿĀbidīn referred to as "puberty by age (*al-bulūgh bi al-sinn*)."[3] Across the other schools, only the Malikis differed from this definition, placing the maximum age at 18.[4] In cases of homicide, the acts of children were always to be considered as wrongful (*khata'*), and the punishment would always be mitigated to the payment of blood money to be paid by the child's guardian to the family of the victim.

In common law, on the other hand, until the middle of the 19th century there was no specific age at which a person was determined to be responsible for a crime and children were regularly subjected to the harshest punishments. In one particular case from 1829, a boy named T. King was convicted of being part of a gang of thieves and confessed to what the local press described as "several murders and robberies." He was publicly hanged at the age of 12 and the media remarked, "We hope the dreadful example of this wretched youth may produce a lasting warning to the world at large."[5] The method of dealing with children would change with the passing of the Juvenile

[3] Ibn ʿĀbidīn, *Radd al-Muḥtār,* 1:308.
[4] Peters, *Crime and Punishment*, 21.
[5] "Execution of a 12 year old boy." British Library, Learning Timelines: Sources from History, Accessed July 25, 2018, http://www.bl.uk/learning/timeline/item102910.html.

Offenders Act of 1847, which declared that children under the age of 14—and eventually raised to 16 in 1850—were to be tried before two magistrates in a special court separate from adults. Slightly later, in 1854, the Youthful Offenders Act established the creation of special reform schools, children under the age of 16 convicted of crimes were sent to these schools for varying periods of time in an attempt to reform them. However, children were still regularly sent to adult prisons until the early part of the 20th century when the practice was significantly reduced.

British India

During the first half of the 19th century in British India, children were sometimes tried for homicide, however they typically received reduced sentences in light of their age. For example, in one case from Bareilly in 1853 two individuals, Roopun and Khooshalee, were charged with the willful murder of a five-year-old child in an attempt to steal his silver jewelry. According to their confession in the presence of witnesses, the session's judge sentenced them both to execution. However, the Nizamut Adawlut judges took note of the age of the second perpetrator (Khooshalee), which had been stated at 16, and reduced his sentence to life in prison and confirmed the death sentence for Roopun.[6]

In another case from Bengal in 1853, a 10-year-old child, Mathur Bewa, was charged with the murder of her much older husband Shaik Ameen. According to her confession, her husband had ordered her to prepare some tobacco and she refused, at which time he beat her twice with a bamboo stick. In revenge, she took a knife from the home and murdered her husband in his sleep, stabbing him in the head and severing one of his fingers. Based on her confession, the magistrate and lower judge convicted her of willful murder and suggested a sentence of life in prison. The

[6] *Sumadhan v. Roopun* (1853) NA Nwp 1 Bareilly 311.

appeals judges debated over the punishment, with particular attention to her age, and cited three additional cases in which boys aged nine and 12 were either sentenced to life in prison or released. They quoted repeatedly the precedent in English law, where "between the age of seven and fourteen years an infant shall be deemed *prima facie* to be *doli incapax,* yet so that the presumption weakens as the prisoner's age approaches puberty," and also remarked that the women of her region were "still lower in the scale of civilization, and a child, under the circumstances in which the prisoner stands, must be dealt with accordingly." As a result, the appeals judges agreed that the most appropriate sentence would be ten years imprisonment.[7]

In both cases, the lower sessions judge believed that the defendant deserved a much harsher punishment than what was applied by the review. In their analysis, the Nizamut Adawlat judges considered English law, which stated that children below seven years could automatically be considered as a child; however, such consideration dissipated as the defendant reached fourteen or when the law considered puberty to occur. They also considered the local custom, referred to as the "civilization" of a cultural group. This ultimately resulted in almost all defendants under the age of fourteen being considered as children, an idea that was not far off from the Ḥanafī designation of puberty by age (*al-bulūgh bi al-sinn*), placed at fifteen, and in the greatest consideration taken at the attainment of natural puberty, as in Islamic law.

The Indian Penal Code

According to Section 82 of the Indian Penal Code, children under the age of seven were not to be held responsible for their actions. Section 83 outlined that between the ages of seven and twelve, a child was to be assessed by the judge as to whether they had "attained sufficient maturity

[7] *Shaik Monee on the part of Government v. Mathur Bewa* (1853) NA Ben 2 Assam 57.

of understanding to judge of the nature and consequences of his conduct on that occasion," with children beyond the age of 12 to de considered as adults unless the judge determined that they were incapable of understanding their actions.[8]

This defines the child to be much younger than that found in common law, and the upper end of 12 is lower than the precedent cited in cases from the first half of the 19th century. Rather, the definition is much closer to the Islamic understanding of the age of discernment, discussed earlier, which held that children beyond the age of seven could understand the consequences of their actions. The code eliminated the Ḥanafī description of puberty by age (*al-bulūgh bi al-sinn*), placed at 15, and gave significantly more discretion to the judge than both Islamic and common law typically allowed. The focus for the IPC was therefore much more closely connected to the observance of a child's state of mind—discussed in Islamic thought as the presence of reason (*ʿaql*)—rather than their achievement of puberty.

The definition of a child in the IPC represents a point where shared legal concerns were brought together. On the one hand, both the Ḥanafī School and the common law desired to establish fixed ages for assuming adulthood. On the other, both systems continued to claim that the assessment of the perpetrator's awareness of their acts and their consequences was more important. By setting fixed ages and allowing for judicial discretion, the IPC satisfied the requirements of the Ḥanafī School and the common law, allowing for each case to be judged individually.

Ottoman and Egyptian Codes

The Ottoman Code follows exactly the rules of the Hanafi School, creating three successive categories of criminal responsibility where an individual becomes gradually more responsible for

[8] Morgan and Macpherson, *Indian*, 59.

their actions. According to Sections 985-6, a child is considered an adult once they have expressed the physical signs of puberty that are defined as the first ejaculation for a man and menstruation for a woman. The first point when a child could express these signs is 12 for a man and nine for a woman; however, if the physical signs cannot be ascertained all children are to be assumed as having reached puberty by the age of 15. Prior to puberty, if a child can *discern (yumayyiz)* between right and wrong or understand, for example, that buying and selling means the absolute transfer of ownership from one person to another, then that child should be classified as an *adolescent (murāhiq).*[9]

According to Section 40 of the Ottoman Code, each of these categories requires different degrees of punishment. Those who are older than 15 or can be proven to have exhibited the signs of puberty will be subject to the fullest extent of responsibility for their crimes. On the other end, children who have not reached puberty nor can understand the gravity of their actions are to be released to their parents or placed in prison until are determined to have been reformed. For those in the third category, or who have reached the age of discernment but are not yet adults—the *adolescent (murāhiq)*—if the normal punishment for an adult were to be death or life imprisonment, the adolescent would be subject to a prison sentence of 5-10 years, and in any other type of crime where the punishment for an adult were less than a life sentence, the adolescent would be subject to anywhere between a fourth or a third of the standard sentence.[10]

The Egyptian code establishes in Section 57 the lowest point for which a person may be held responsible for their actions at seven years. The explanation of the code written by Amīn al-Bustānī, states that in its determination of seven to be the age of responsibility, the Egyptians "followed the path of the English legislators which also complies with Roman law." The

[9] Rif'at, *Kulliyyāt,* 48-9.
[10] Rif'at, *Kulliyyāt,* 47.

explanation continues by stating this is because below seven years, "he is still an immature child, not able to differentiate between what is good and evil, nor to *discern* (*yumayyiz*) between what is preferred and what is abhorrent."[11] The emphasis on discernment is important to note here, as it is exactly the way jurists within the Ḥanafī School chose to explain the same point. Al-Bustānī also cites Austrian and German law, which set entirely different ages of 10 and 14 years respectively, and states that, despite their differences, they are all following the understandings of Roman law. The remainder of Section 57 and Section 58 place the upper limit:

> Section 57: If the age of the accused is more than seven years but has not yet reached 15 years then the judgment upon is based upon the principles established in the following section:
>
> Section 58: If it is proven that the accused acted without *discernment* then there will be absolutely no punishment issued upon him. Rather, it is upon the court to order his release to his family, or to those who would take care of him from those honorable and respectable people, or to the occupation of agriculture or manufacturing or education, whether public or private, until he reaches the age of 10 years.[12]

Sections 59 and 60 then limit the punishments of children below the age of 15, stating that if the punishment would normally be execution, life imprisonment, or exile, then the court could sentence the child to prison for 5-10 years, and either a fourth or third of the normal punishment if the code normally required a temporary prison sentence.[13]

Although the Egyptian Penal code and its explanation cite English, Austrian, and German law, all the while confirming their connection to Roman law, the actual content of the law mirrors

[11] al-Bustānī. *Sharḥ,* 1:175.
[12] al-Bustānī. *Sharḥ,* 1:176.
[13] al-Bustānī. *Sharḥ,* 1:178-180.

exactly the understanding of Islamic law, more specifically the Ḥanafī opinions as expressed by Ibn ʿĀbidīn. Children under the age of seven are considered to be absolutely not responsible for their actions because of their failure to *discern* the nature of their acts, the same concept in Islamic law as the age of discernment (*sinn al-tamīz*) mentioned in the introduction of this chapter, and the upper range of responsibility at 15, where a person is automatically considered to be an adult, is precisely where Ibn ʿĀbidīn placed his "puberty by age (*al-bulūgh bi al-sinn*)."

The Egyptian code adds a final point, indicating that reform of a child could take place by forcing them to work in either manufacturing or agriculture. This is not a surprising development as most of the major public works projects conducted in the 19th century—the most prominent example of which being the Suez Canal—were carried out through a sweeping system of forced labor (corvée).[14] Such projects did not exist at the same scale in the wider Ottoman Empire and, as such, the creators of the Ottoman Penal Code didn't include such a provision, instead, sticking to the option found in the French Code of imprisonment under supervision.

In the Ottoman and Egyptian codes' definition of a child represents yet another example of the convergence of multiple forces in the formation of law. In both codes the Islamic definition of puberty and classification of childhood is maintained, although expressed more explicitly in the Ottoman code. This is slightly different from that of the French Penal code, the source of Ottoman and Egyptian inspiration. In its Sections 66 and 67 of the French code, the same three categories of child-adolescent-adult are defined but no reference is made to puberty and the age of adulthood is set at 16.[15] The French code punishes adolescents with 10-20 years imprisonment if the typical punishment was life, or between a third and a half of the normal sentence in other situations. This is slightly harsher than the Ottoman and Egyptian codes, both of which limit the punishment to 5-

[14] See Fahmy, *All the Pasha's Men.*
[15] *The Penal Code of France, Translated into English* (London: H. Butterworth, 1819), 14-15.

10 years for normal life sentences and between a fourth and a half of the normal punishment for other cases.

With the Egyptian code's addition of forced labor, the law reflects the needs of the growing state. As argued in previous chapters, the needs of the state took prominence in the 19th century, and reformers called on the state to take a larger role to protect society and fulfill the greater purpose of the law: the implementation of justice. Section 58 of the code did just that, placing the responsibility of the lives of children who committed criminal acts squarely on the shoulders of the state. It was their reform into productive members of society and not their exoneration from punishment that would further the course of justice and the Muslim creators of the law, like Muḥammad Qadrī Bāshā, worked to meet those needs.

Insanity

In common law, the development of the legal definition of insanity took its first form with the writings of Sir Matthew Hale (d. 1676). Hale divided insanity into two categories: partial and total. Individuals who were totally insane were "destitute of the use of reason," and could not ever be held responsible for their criminal acts. Those who were partially insane, "such as a person laboring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years," could be found guilty of a felony such as murder or treason.[16] In the 18th and 19th centuries, a number of important cases appeared that would further this understanding. In *R v. Arnold* (1724) the defendant murdered a man, Lord Onslow, under the belief that he was the cause of all the country's problems. In the judge's remarks to the jury, he instructed the members to determine whether the man was "totally deprived of his understanding and memory, and doth

[16] Homer D. Crotty. "History of Insanity as a Defence to Crime in English Criminal Law," *California Law Review* 12, no. 2 (Jan 1924): 105-123.

not know what he is doing; no more than an infant, than a brute, or a wild beast."[17] Arnold was convicted by the jury and sentenced to death, however the Crown reduced his sentence to life in prison. Later in the case of *R v. Hadfield* (1800), the defendant believed that he could bring about the Second Coming of Christ through being executed, and therefore attempted to assassinate King George III. In his defense, Thomas Erskine challenged the definition of "total deprivation" established with Arnold, and argued that in this case, "reason is not driven from her seat, but distraction sits down upon it with her, holds her, trembling upon it and frightens her from her propriety." Hadfield's plea of insanity was accepted, and according to the newly adopted Criminal Lunatics Act of 1800 was placed in an insane asylum for the rest of his life.[18]

The next advancement in the definition of insanity, and the rule that continues to govern most common law jurisdictions today with only limited changes, came in the case of M'Naughten (1843). Charged with the murder of a government official, Edward Drummond, thinking that he was Prime Minister Robert Peel, the defense in the case successfully proved that M'Naughten was insane and as a result he was found not guilty. British Parliament members called forth a number of judges to discuss the case and, as a result, issued a set of rules that created the standard legal definition of insanity. In order to be considered legally insane, a person must:

1. Labor under a defect of reason, and
2. That the crime was caused by a disease of the mind, so that either
3. He did not know the nature and quality of his acts, or that he did not know what he was doing was wrong.[19]

[17] Crotty, "History," 114; *R. v. Arnold* (1724) 16 How St. Tr. 765.
[18] *R v. Hadfield* (1800) 27 How St. Tr. 765.
[19] *M'Naughten's Case* (1843) All ER Rep 229.

In the works of Islamic jurisprudence, there was never an established legal definition for insanity.[20] Linguistically, the word for an insane person in Arabic (*majnūn*) referred to someone who was lacking in the full capacity of reason (*ʿaql*), which was defined as the "knowledge of necessary perceptions, either by the senses or the soul."[21] Therefore, a person who was incapable of discerning the physical world around them or right from wrong in terms of action would be considered insane, similar to the level of a child who had not reached the age of discernment. Islamic law did believe that insanity could be either a permanent affliction placed upon the individual by God (*muṭbaq*), or a temporary illness that could be treated medically (*ghayr muṭbaq*) and could come and go during different times of a person's life.

Regardless of the insanity's permanence, individuals who were determined to be insane at the time of committing a criminal act were not fully responsible for their actions. In the specific case of homicide, for example, an insane person would not be subject to execution but would be responsible for paying blood money (*diyya*) to the victim's family as compensation for the crime. Ḥanafī law also passed the same ruling of forbidding execution when a criminal had gone insane after the commission of a crime and thereby mitigated the punishment to the payment of blood money.

In comparing the common law and Islamic approaches to insanity, there are a number of shared themes. Both definitions tie insanity to a loss of reason and the inability of a person to comprehend the world around them and the consequences of their actions. They also recognize temporal differences in insanity and believe that it could either be a temporary affliction or a permanent fixture of an individual. Additionally, both the common law and Islamic approaches to

[20] See for example Michael Dols. *Majnūn: The Madman in Medieval Islamic Society* (Oxford: Clarendon Press, 1992), 434 & 439.
[21] Safar Aḥmad al-Ḥamdānī. "al-Junūn wa Anwāʿuhu fī al-Manẓūr al-Islāmī," Shabakat al-Ulūka, Last updated June 18, 2012.

insanity accept the idea that every human being is born with basic reason. This idea is often understood as an invention of modernity and the Enlightenment. According to the 20th century German philosopher Ernst Cassirer, for example, "The eighteenth century is imbued with a belief in the unity and immutability of reason. Reason is the same for all thinking subjects, all nations, all epochs, and all cultures."[22] However, Muslim jurists spoke of reason in similar terms and saw insanity (*junūn*) as an affliction that came from an external source. The word *junūn* comes from the Arabic root j-n-n, which means "to cover (*satara*),"[23] indicating that a person's natural state of sanity (*ʿaql*) was covered or removed by virtue of an external affliction. This distinction is important because the legal presumption in courts would be that an individual is sane and insanity would have to be proven, rather than the opposite.

Where the Islamic and common law understandings of insanity differ, however, is in their connection to medical science. Islamic law, and the Ottoman and Egyptian penal codes, relied heavily on medical experts to determine whether a person was insane or not. However, the common law system worked to develop rules that resulted in the creation of a definition of insanity that was separate from the medical definition.

British India

In the first half of the 19th century in India, insanity was used as a defense to mitigate punishment. In one case from Bengal in 1853, a man (Kunhai Chung) was charged with the murder of Ramsoonder, the wounding of Ramsoonder's sun, and setting the house of their neighbor on fire. According to the case summary:

[22] Earnst Cassirer. *The Philosophy of the Enlightenment* (Princeton: Princeton University Press, 1951), 7.
[23] Ibn Manzūr. Lisān al-ʿArab (Saudi Arabia: Ministry for Islamic Affairs, Endowment, Daʿwa and Guidance, ND), 16:244.

> It appears that the prisoner went out of his mind five or six days prior to the commission of the act now laid to his charge. His madness showed itself by his wandering frequently into the jungles and there concealing himself, and from his never speaking to any one who addressed him.

The Mufti issued a *fatwa* barring punishment, as the crime was committed while the perpetrator was insane. The British judge agreed, acquitting him of all charges. The Nizamut Adawlut concurred but ordered that the prisoner be kept in custody until the court was satisfied that he was no longer a danger to others.[24]

The investigation of whether a person was insane or not was frequently a challenge for the courts and involved seeking the opinions of medical specialists as well as of multiple judges. In another case from Bengal in 1853, a man named Abool Hossein was charged with the murder of his wife, Murrium, by striking her multiple times with a pole while she was asleep in their home in 1851. In front of the magistrate the defendant fully confessed to the crime, but claimed insanity, saying:

> I did kill my wife with this weapon. I don't know the date but it was in Cheyt. I and my wife were asleep in the house with the door facing the north. I was going out early in the morning, when my wife Murrium said to me you must not leave your house. Hearing this I became like a mad man, and with this weapon, which was below a *machan* in the same room, I gave my wife several blows and killed her. I then ran out and was going towards Attaullah, chowkeedar's house, when Buddon Seel seized me. For 8 or 10 days before this, my heart was in a very unsettled state, and I committed the deed when I was out of my

[24] *Government v. Kunhai Chung* (1853) NA Ben 2 Backergunge 835.

> mind. It was 11 days before the murder, that my wife told me I must not go outside my house.

An interrogation by the magistrate is also recorded, during which the defendant claimed that a man from a different caste, Maun Sheekdar, wished to forcibly marry his wife, and when he learned of his plot it caused him to become insane. When a medical officer was brought in to observe the defendant, he deposed on two occasions that he believed the defendant was faking insanity. The magistrate felt it unwise to proceed, and placed Abool Hossein in a mental hospital for treatment. When he was discharged from the hospital, he was brought before the session's judge for a further trial and final ruling. Multiple witnesses from the community were brought in to attest to his insanity, and they claimed that he at times he "abused people and chased them, and at others he would do dirty tricks." At this point, Abool Hossein changed his confession and claimed:

> I did not kill my wife. I never had a wife, my mother and father died when I was very young, where was I to get the money to marry a wife? Whose wife Murrium was I can't say, I know not who she was or who murdered her. I have come here having been told by the people to do so.

This complete turnaround in the defendant's statements shocked the court and requested that the physician of the insane asylum, one Dr. William Abbot Green, be brought in and asked about the defendant's state of mind when he was brought into the asylum and after his treatment. Dr. Green stated that he believed the defendant upon admission to be "quite insane," and that his insanity was due to his suffering "from cholera and dysentery in November 1851" and that he was a regular "gunjah" (marijuana) smoker. However, following a few months treatment in the hospital he calmed down, and after two full years of observation was considered cured and released.

The court agreed with Dr. Green's observation and ordered that the defendant be acquitted. The Nizamut Adawlut, although criticizing the process of the investigation, eventually concurred, stating: "Believing that when the prisoner killed his wife, he was in a state of mind which rendered him incapable of knowing that what he was doing an act forbidden by law, and for which he cannot therefore be held responsible, I acquit him of the murder."[25]

The circumstances of this case reveal a number of important elements regarding how the British in India viewed instances of insanity. Although the M'Naughten rules had been in place in England for over a decade and defined legal insanity as separate from the medical definition, the courts relied on the expertise of two health officials – the medical officer of the court and Dr. Green from the insane asylum – to ascertain the defendant's mental status. His insanity was also determined to be temporary and curable, the result of diseases and his repeated drug use which impaired his reason a few days before and during the commission of the crime. Finally, although the defendant had become more obviously insane during his second interrogation when he denied even having a wife, the important point to determine was whether he was insane *when* he committed the crime, not *after.*

Although the opinion of a Mufti was not sought, and a British judge and local jury made the conviction, the outcome of the case would have been largely the same had the case been subject to the understandings of Ḥanafī law, with only one important additional consideration. The loss of reason as a result of intentional intoxication—the defendant's continued voluntary use of marijuana—would not be considered, according to the Ḥanafī School, as a legitimate excuse for the crime. This would have caused a Muslim judge to pause; however, the presence of other illnesses and the fact that the defendant clearly and of his own admission committed the crime

[25] *Government v. Abool Hossein* (1853) NA Ben 2 Backergunge 258.

when he was not in his proper state of mind would have confirmed the presence of insanity and rendered him innocent, although he would have been required to pay blood money to the victim's family.

The Indian Penal Code

Section 84 of the IPC states "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law." In the explanation of this section the M'Naughten rules are cited and the term "unsoundness of mind" is considered to include "whether the want of capacity is temporary or permanent, natural or supervening, whether it arises from disease or exists from the time of birth…Thus an idiot who is a person without understanding from his birth, a lunatic who has intervals of reason, and a person who is mad or delirious, are all persons of 'unsound mind.'"[26]

Following the application of the code, in 1864 a barber named Tota from a village near the city of Aligarh was charged with the murder of his daughter. According to the testimony of witnesses, the defendant appeared to be of unsound mind because he had stopped working for the last two years and "goes about in a careless way with head uncovered." One day, he felt that death was better than life, took his 5-year-old daughter in his arms and jumped in a well near the outskirts of his village. Once in the water he got scared and shouted for help. Other villagers pulled him out and brought him home but Tota made no mention of his daughter to his rescuers. When it became clear that she was missing from the home, he confessed that she had been in the well with him and she was later found dead from drowning. The jury found him innocent by reason of insanity but

[26] Morgan and Macpherson, *Indian,* 60-61.

the session's judge disagreed, believing that if he was of sound enough mind to call for help, he should have known the fate of his daughter, and that he showed no signs of insanity when he was brought in front of the court. The judge therefore called for a verdict of guilty and sentenced him to life in prison.

The Nizamut Adawlut judges were starkly divided in the case with two (W. Roberts and D. Simson) believing that he was not insane, with Roberts commenting:

> I do not think that he was in a state of unconsciousness as to his act, or of the nature of his acts, but rather that he is of a morbid temperament; that at the time of the act, owing to his family having left him, he was worked up to a state of excitement. He seems to have been in the same state at the time of committing the act, as he now is, which certainly does not show an aberration of mind amounting to insanity as defined in Section 393, Criminal Procedure Code.

Two other judges (J.H. Batten and W. Edwards) believed that there was no evidence presented as to the defendant's insanity, with Batten remarking:

> The medical evidence in this case amounts to *nil.* The Sessions Judge uses this remarkable expression in his judgment: 'The main evidence, however, of insanity is the act itself with which the prisoner is charged.' The Judge then, after declaring his inability to give a 'certain opinion' as to the insanity of the prisoner, goes on to say 'granting that he was then insane, it cannot be allowed that he was insane when drawn out of the well.' If he was sane enough to have saved, or to have 'attempted to save, his daughter.' I entirely fail to see the force of this reasoning; after years of insanity, did one plunge into a well *cure* him?...If the prisoner had any spite against the child, and if he had threatened to make away with her, or if he had told his neighbors that he could no longer support his daughter, then his

> allowing her to stay in the well from which he was himself rescued, might, perhaps, be considered a deliberate act; but there is nothing of the kind in evidence.

A final judge (A. Ross) issued the deciding opinion for acquittal, stating:

> Medical evidence there is none, pro or con, as to the prisoner's state of mind when he committed the act. There is a considerable weight of general evidence as to the accused having been for a long time past of weak mind, and it is difficult to say whether he had at the time of committing the act such soundness of mind as to render him 'capable of knowing the nature of the act charged, or that he was doing what was wrong or contrary to law.' His conduct subsequent to his rescue, I think, on the whole, rather favors the conclusion that he had not. I observe, too, that suicide or attempt to commit suicide is generally taken to afford presumption of insanity. Under these circumstances, I would give the prisoner the benefit of the doubt, and acquit him on the ground of insanity.[27]

The wording and the subsequent application of the IPC in cases of homicide have created a mixture between the understanding of common law and that of local custom, in this case Islamic law. In contrast to the case presented before the application of the IPC, the M'Naughten rules have now been established as the primary test for insanity and all individuals are assumed to be sane, whereas insanity must be proven in order to receive acquittal. Insanity is connected to the ability of a person to know that their actions are wrong or illegal at the time they were done. In addition, the act committed cannot be considered as proof of insanity no matter how odd or irrational it might seem, as clarified by the opinion of J.H. Batten. Rather, it is the defendant's state of mind before and during the commission of the act that must be judged.

[27] *Government v. Tota* (1864) NA Nwp 1 Aligarh 211.

The primary difference between Islamic law and the IPC with respect to the definition of insanity is that, in the latter, the state of insanity is not absolute and individuals under some perceived delusion could be held responsible for their actions. In the explanation of the IPC, an example of this is given wherein a person's "delusion was, that the deceased had inflicted some injury on him or had caused the death of his relations, etc., and he killed him in revenge for such supposed injury."[28] Such an individual would be considered insane and therefore not responsible for his actions under the Islamic perspective, whereas, under the IPC such a defendant would be held liable for punishment at the discretion of the judge.

Ottoman and Egyptian Codes

For the Egyptian code, the concept of insanity is discussed under the excuse of idiocy (*ʿuth*), and is explained in Article 63, "The person accused of a felony or misdemeanor is excused from the punishment passed upon him by law if it is proven that he was an idiot during the time of its commission." The explanation then goes on to explain that the general category of idiocy includes "all elements which infect reason," including "insanity (*junūn*), confusion (*balah*), and all of the other mental disorders." Similar to the discussion of juvenile offenders, the Egyptian code describes idiocy exactly as provided in the Ḥanafī School, that is, being either permanent (*muṭbaq*) or temporary (*ghayr muṭbaq*) and either a fault placed by God (*khuluqī*) or as the result of an event (*ḥādith*).[29]

The same approach is presented in the Ottoman Penal Code, with Section 41 stating "If it is established that a criminal committed a crime in the state of insanity (*junūn*) he is pardoned from

[28] Morgan and Macpherson, *Indian*, 62.
[29] al-Bustānī. *Sharḥ*, 1:185-6.

the legally proscribed punishment."[30] Later in the explanation of this section a person is to be considered as insane dependent upon the testimony or certification of a medical expert. This is justified as the common practice in Istanbul, where a Ministry of Health certified doctor issues reports as to whether an individual was insane at the time of their commission of a crime. The code states that similar steps should be taken outside of the capital and that the advice of a reputable local medical professional should be sought out.[31]

Additionally, the Ottoman Code also makes a point to emphasize that a removal of reason carried out voluntarily, such as by way of drinking alcohol or taking drugs, does not constitute a valid excuse of insanity and will not mitigate criminal responsibility.[32] This is the same as in al-Bustānī's explanation, as mentioned in the case from British India above.

Thus, the legal changes that took place within the new codes reflected the problems faced by each system and the difficulty faced by the code's creators and judges in the definition of insanity. In the Ḥanafī School, which never established a legal definition of insanity, doctors were relied upon to determine the perpetrator's state of mind during the commission of the crime. This created a significant degree of uncertainty, meaning that each case had to be judged individually. For the common law, even though the M'Naughten rules had been established in the 1840s and created a strict definition of insanity, it was still unclear exactly when a person could be acquitted based on the defense of insanity. The IPC and its subsequent application in Indian courts therefore created a balance, using the M'Naughten rules as a test but continuing to rely on specialist testimony as in the Ḥanafī School. The Ottoman and Egyptian codes made no change to the

[30] Rifʿat, *Kulliyyāt,* 53.
[31] Rifʿat, *Kulliyyāt,* 55.
[32] Ibid.

definition of insanity at all, continuing to rely upon the expertise of doctors as had been done in the past.

Shared Criminal Responsibility

In cases of homicide, Islamic legal theorists attempted to seek out the person who was directly responsible for the death and subject only that person to execution, while other accomplices were set to pay a division of punitive blood money (*al-arsh*). In an example that was often cited by traditional scholars and first found in the work of al-Ṭaḥāwī, "If a man assaulted another and sliced open his stomach, bringing out his insides, then [another] man came and struck his throat with a sword intentionally, then the killer who must face execution is the one who struck the throat and not the other."[33] This rule has led observers such as Rudolph Peters to state:

> Islamic criminal law is based on the principle of individual responsibility. Persons are punished for their own acts. Collective punishment is not allowed, although there are exceptional cases of collective liability, such as in the Hanafite *qasāma* doctrine, where the inhabitants of a house or village can be held liable for the financial consequences of a homicide with an unknown perpetrator, committed in the house or village.[34]

An example of this type of individual responsibility can be found in the cases of the first half of the 19th century in Egypt. In one particular case from 1861 two brothers (Aḥmad and ʿUmar al-Dawwa) were charged with the murder of a man named ʿAlī walad Ḥāmid. One of the defendants, ʿUmar, had entered the home in which the victim was sleeping and cursed him, accusing him of adultery. The victim woke up and chased ʿUmar outside where he was ambushed and beaten in the head by the two brothers with bamboo clubs—he died a few days later from his injuries.

[33] al-Ṭaḥāwī, *Mukhtaṣar*, 234.
[34] Peters, *Crime and Punishment,* 20.

Although both defendants were convicted and had clearly cooperated in the crime, the Mufti in his *fatwa* ruled that in this case only one of the defendants could be held wholly responsible for the death. He came to this conclusion because the witness statements did not clearly specify the defendants' cooperation and "had each beating been taken independently, it [should have] led to death. It is likely that death occurred from only one of the beatings."[35]

However, in *fiqh* works as well as most *fatwa* collections from the Ḥanafī School, legal scholars did accept the concept of shared criminal responsibility, known popularly as the idea of "killing a group for the [right of] one (*qatl al-jamāʿa bi al-wāḥid*)," based on a case adjudicated by the second Caliph 'Umar. According to the *al-Fatāwā al-Tātārkhāniyya*:

> If a group killed one person then the [entire] group is to be killed, based on the consensus (*ijmāʿ*) of the Prophet's Companions, and it is related that seven killed one in the city of Ṣanʿāʾ. ʿUmar executed them all and stated 'If all the people of Ṣanʿāʾ had come together (*tamālaʾ*) [in the crime], then I would have executed them all.'"[36]

Elsewhere in the same collection, the theoretical case is presented, where:

> If a man injures another gravely (*jirāḥa muthakhkhana*) from which it is not expected that he will live, and another injures him as well then the murderer is the one who made grave injury. This is if the two injuries are subsequent [to one another], but if they were in cooperation [with one another] (*muʿāwin*) then they are both the murderers. This is also the case if one injured multiple times and the other only once, then they are both the murderers.[37]

[35] *Family of 'Ali walad Hamid v. Ahmad & 'Umar al-Dawwa* (1861) FM 6 Kurdafan 103.
[36] al-Andarpatī. *Al-Fatāwa al-Tātārkhāniyya*, 19:26.
[37] Ibid, 19:19.

The two terms used in these rules, and which establish the conditions for joint criminal responsibility in Islamic Law, are a coming together (*tamālu*ʾ) and cooperation (*taʿāwun*). If one of these two conditions are met, then the punishment of execution could be shared between all of those involved. The same opinions are mentioned in *al-Fatāwā al-ʿĀlamgīriyya* and the *Fatāwā Anqarawiyya.*[38] The *Anqarawiyya* also mentions, citing al-Kāsānī, that if multiple individuals participate in the commission of a crime but only one carries out the actual homicide, then the other participants should be judged independently and punishment given out according to their actions.[39] Thus, although Islamic law attempted to seek out the main person responsible for the crime and apply the most extreme punishment only upon the individual who actually took the life of the victim, if multiple persons either came together or cooperated in the commission of the crime then they could all be held responsible, either being executed as a group or having their crimes judged independently according to the respective severity of each act leading up to the actual crime.

In another case from Egypt in 1862, a group of three villagers were charged with the murder of a man named Aḥmad Farghalī. A fight was occurring between a larger group of villagers when the victim joined in an attempt to stop the fight and was beaten by the three defendants. He died a few days later. Two of the defendants confessed, and there was no evidence presented against the third. The two who confessed were convicted by the court of wrongful homicide, as there was no intent to kill, and the court ruled that they each were responsible for paying the full blood money (*diyya*). The Mufti, in his ruling, stated that this punishment was inappropriate and believed that the blood money should have been divided into equal thirds among all those involved in the death,

[38] *al-Fatāwa al-ʿĀlamgīriyya*, 6:5; al-Anqarawī, *Al-Fatāwa al-Anqarawiyya,* 1:165.
[39] al-Anqarawī, *Al-Fatāwa al-Anqarawiyya,* 1:165.

as the strikes occurred "subsequently (*ʿalā al-taʿāqub*)" and that they all had participated in the killing.[40]

In common law, those who were present during the commission of a crime were known as an "accomplice" or a "principal in the second degree." According to William Blackstone (d. 1780) in his *Commentaries on the Laws of England,* principals of the second degree were persons who were "present, aiding, and abetting the fact to be done."[41] They did not have to directly participate in the commission of the crime and could, for example, be standing guard and protecting the individual who is committing the actual crime. Typically, accomplices were subject to the same punishment as the principal perpetrator.

Those who aided in the commission of the crime but who were not actually present were known as "accessories," defined by Blackstone as "he who is not the chief actor in the offense, nor present at its performance, but is someway concerned therein, either before or after the fact committed." He then defines two types of accessories: those *before-the-fact*, who "being absent at the time of the crime committed, does yet procure, counsel, or command another to commit a crime," and those *after-the-fact*, who "knowing a felony to have been committed, receives, relieves, comforts, or assists the felon."[42] Blackstone did not provide a specific punishment for accessories, however the Accessories and Abettors Act of 1861 stated that accessories before-the-fact "my be indicted, tried, convicted, and punished in all respects as if he were a principal Felon," while accessories after-the-fact were subject to a punishment of up to two years in prison, with or without hard labor.[43]

[40] *Family of Aḥmad Farghalī v. Farḥāt Jawda* (1862) FM 6 Girga 127.
[41] William Blackstone. *Commentaries on the Laws of England* (Philadelphia: J.B. Lippincott & Co., 1908), 2:33.
[42] Ibid, 2:36.
[43] Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94.

Common law would have to wait until close to the end of the 19th and then well into the 20th century for new cases to establish the precedent. The next major advancement in the understanding of shared criminal responsibility would come from the United States in 1893 with *State v. Tally* where a judge named John Tally in Alabama was removed from office for aiding and abetting in the murder of R.C. Ross. A family known as the Skeltons was chasing down the defendant in revenge for his relationship with their sister and the wife of the judge, and his relatives had sent him a telegram warning him that the family was on their way to kill him. Judge Tally sent telegrams of his own to the town where Ross was taking refuge, ordering the telegram employee to not let Ross get away and to say nothing regarding any warnings that had been received earlier. As a result, the Skeltons killed Ross. Initially Judge Tally was acquitted of the charge of murder, but upon appeal he was found guilty of the murder because although he did not have absolute knowledge of the murderous intentions of the Skeltons when they set out, his subsequent actions and the telegrams that he sent meant that he was "constructively present" at the time of the murder and therefore shared the same guilt as those who committed the murder.[44]

Thus, the conception of both common law and Islamic law held that as long as there was a form of cooperation between the parties to a crime they could in principle share in the guilt and punishment. In the 19th century this meant that regardless of the jurisdiction, shared criminal responsibility could constitute either the same punishment issued to all the parties involved or a lesser punishment for each participant depending upon the degree of their involvement.

British India

[44] *State v. Tally* (1893) 102 Alabama 25.

In Bareilly in 1853, three men (Chait Ram, Purma, and Doolee) were charged with the willful murder of a seventeen-year-old boy named Gunga. His body was found in a field close to where he and the defendants worked during the day, and "there was a string round the neck, and marks of fingers on the throat." He had also been wearing silver arm rings and gold earrings, which were missing. Upon investigation, the jewelry was found in a shed belonging to Chait Ram, and when asked the defendants began accusing one another of killing Gunga.

At the police station, each defendant produced a confession that was confirmed by witnesses. Doolee stated that, "Chait Ram and Purma got on the breast of the deceased, and were beating him. After the beating Chait Ram gave him the rings, enjoining silence." Purma stated that, "Doolee compressed the neck of the deceased, and took off his earrings. Chait Ram held hands of the deceased and took off his arm rings; then Doolee and Chait Ram took up and carried away the body; he followed." Chait Ram stated, "That he went to see his field. Dolee and Purma were with him; perceived a man cutting the crop; Purma seized his legs, he caught hold of his neck; cried out thief. Purma then compressed the throat of the man and he died immediately; he and the two others took up the body and cast it in the field of Bhowane. Purma took off the ornaments and gave them to Doolee; said after that Doolee killed deceased from spite."

In court, each defendant pleaded not guilty and claimed that they were tortured to confess by the police. Two of the three members of the jury convicted all prisoners, while the third had reservations against Chait Ram and acquitted him. The lower judge sided with the majority of the jury and requested death sentences for all three defendants. The Nizamut Adawlut judges (S.S. Brown and H.B. Harington) looked at the confessions and believed that the defendants knew what they were doing in providing contradictory stories and in their confessions "charged each other with being the principals and endeavored to present themselves as merely aiding and abetting."

Ultimately, the court found fault with the confession of Chait Ram and believed his claim of torture and decided to acquit him. The other two, Purma and Doolee, were found guilty and sentenced to death.[45] In this case, each of the two defendants cooperated in the murder and committed the crime together. As a result, they were both subject to capital punishment, a ruling that would have been the same had it been conducted in an Islamic setting.

In another case from Bengal in 1854, five defendants were charged with the murder of Nundlal Singh that occurred as the result of a large fight between two groups, the cause of which is not mentioned in the records. In his *fatwa*, the Mufti convicts the five men "guilty of affray with severe wounding" and the sessions judge agreed, sentencing each of the prisoners to four years in prison and ordering that they pay a fine of 50 Rupees each. Three of the defendants appealed their sentence, and the Nizamut Adawlut rejected their appeal based on the presence of eyewitnesses who readily identified all those involved. In this case no one person could be identified as the killer, and all those involved in the fight were sentenced to lighter punishments. Had this crime been tried in an Islamic setting, the same outcome would have been reached and each defendant would have been required to pay a portion of the blood money (*diyya*) and been subject to discretionary punishment (*taʿzīr*) that could have included imprisonment.

The Indian Penal Code

Sections 34-38 of the IPC define the participation of multiple parties in a crime

Section 34: When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act were done by him alone

[45] *Untram v. Chait Ram* (1853) NA Nwp 3 Pillbheet 750.

> Section 35: Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons, who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention
>
> Section 36: Wherever the causing of a certain effect, or an attempt to cause that effect by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.
>
> Section 37: When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly, or jointly with any other person, commits that offence.
>
> Section 38: Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.[46]

The language of Section 37 in defining "cooperation" is the most pertinent for the current discussion. It is the same term used in Islamic discussions (*ta'awun*) which stipulate that as long as two individuals are proven to have worked together in the commission of a crime, then they can both be held fully for the crime as if they had worked alone. Additionally, Section 38 opens the door for other participants in the crime to be charged with smaller offences.

In 1865 three individuals named Benee, Pirtheepal, and Bunsee were charged with the murder of two victims named Sheobhuruth and Sewuk. This was a very strange case, reportedly

[46] Morgan and Macpherson, *Indian,* 25-28.

occurring because a village of fishermen had received letters from the Muslim holy cities of Mecca and Medina, "calling upon them to break up their ornaments, burn their nets, abstain from eating fish and drinking wine, and to become Bhuguts." After the letters had been circulated amongst the villagers for a few days all of the residents came together and held a carnival to celebrate their new religious importance. During the celebrations, the victims were accused of being demons from a former world and it was believed that they would eat the other villagers. As a result, they were tied to a tree and beaten to death by the defendants. Witnesses and medical evidence proved to the initial judge and assessors that the three defendants were guilty, as they had both tied up the victims and caused their final fatal wounds. The sessions judge believed "it is quite clear that these three *co-operated* in murdering the two." However, the judge determined that the third defendant, Bunsee, should not be held completely responsible for the murder as Benee threatened him with death if he refused to assist him in the murder. He sentenced Benee and Pirtheepal to execution by hanging and Bunsee to life in prison. Eleven other defendants were also brought to trial for the lesser charge of abatement, as they had taken part in the carnival and did not do anything to prevent or stop the crime that was taking place in front of them. In review, the Nizamut Adawlut confirmed the death sentences but believed that the other eleven defendants:

> Were no more than spectators on the occasion and seem to have been taken by surprise by the ultimate acts of extreme violence of the three men above named, and therefore they can be held to have been *merely passively* consenting to the murder committed, but not to have been guilty of abatement thereof.

As a result, he acquitted the eleven offenders of abatement and ordered their immediate release.[47]

[47] *Government v. Benee* (1865) NA Nwp 1 Benares 114.

This case highlights every aspect of shared criminal responsibility discussed in the IPC and shows how the court viewed both the concept of participants to the crime as well as abatement. For the two defendants who were sentenced to death, they "*co-operated"* in committing the act, working together to tie the victims to the tree and cause their death. The third defendant, who had his sentence reduced to only life in prison, had an excuse because he felt compelled to participate in the murder because of a threat to his life. This is not enough to completely mitigate his responsibility, as IPC Section 94 limits the use of such an excuse regarding situations of bodily harm or homicide. For the rest, the simple fact that they were present during the time of the crime was not sufficient to hold them criminally liable as their actions were "*merely passive"* and, in order to be considered as abetting the murder, they needed to *actively* assist the murderers through either providing aid to them in some manner or willingly refusing to come to the aid of those being murdered. This was not proven in the case and so the defendants were released upon review.

The understanding of shared criminal responsibility developed under the IPC, therefore, closely follows the understanding of Islamic law requiring that for punishment to be issued, each participant had to be actively either "cooperating" with each other (understood as accomplices in common law) or had "come together" (understood as abetment) in order to carry out the murder.

Ottoman and Egyptian Codes

With regard to participants in the same crime (*al-ishtirāk fī al-jarīma*), the Egyptian code states in Article 64 that, "All those who participate with another in the act of a felony or a misdemeanor are to be punished in the same manner as the principal actor, as long as there is not a contradictory text to that in the law."[48]

[48] al-Bustānī. *Sharḥ*, 206.

In his explanation of the code, al-Bustānī mentions that this is one of the hardest areas of criminal law and that legal scholars around the world differed in their approach to shared criminal responsibility. "If a group commits a singular crime as participants," he said, "it comes immediately to the mind that they are not at the same level of participation, and that there must be major differences between them."[49] However,

> Is there a definition for judges of limited power, as stated by one of the great jurists, that sets and confirms these multiple degrees and shades of participation so that he may subsequently enforce a punishment based upon it? Are there also definitions for the power of the judiciary that it may rely upon and specific texts that it may reference? With this in mind, it is not shocking [to observe] what the Egyptian legislator has decided upon, following the French legislation, in placing an absolute rule of judgment, equal in its pillars, [that] encompasses the doers of the crime and the participants in it with a single punishment…"[50]

The Ottoman Code speaks of the same difficulty in determining shared responsibility, and only provides a single reference in Section 45: "The shared perpetrators of a crime are to be punished as if they were acting alone, unless specifically mentioned in the [relevant] section."[51] Rashād Bek, an explainer of the code, gave the example of a number of individuals who gather around a person and begin stabbing him with knives until he dies. If each stab could be determined through medical reports to have independently caused the death of the victim, then they should be treated equally. The Ottoman Code in Rashād's opinion does not provide any significant detail regarding this point, but he believes that the example he gave would fit within the section. Khalīl Rifʿat, another

[49] al-Bustānī. *Sharḥ*, 203.
[50] al-Bustānī. *Sharḥ,* 204-5.
[51] Rifʿat, *Kulliyyāt,* 60.

explainer of the code, mentions that this is one of the most difficult areas of the law because it is taken directly from the French Penal Code's Section 59, and significant work was left to Ottoman jurists and legal experts to expand on this area of the law. In particular, Rifʿat calls out the code for not fully encompassing the different levels of participation in a single act.

> The law, in its sections regarding punishment of criminals, did not specify differing degrees of participation…it is not a requirement that [a judge] rule upon each defendant with a single degree [of punishment], rather it is permissible to aggravate or mitigate the ruling taking into consideration what aggravating and mitigating circumstances appear for each individual at trial.[52]

To see how these differing degrees of participation would work in practice, in one case from Salonia in 1880, six defendants are accused of attacking and killing a trader and injuring a number of his employees following Friday prayers. Upon investigation, it is determined that only three defendants (Mustafa, Dilli Isma'il, and Hasan b. Husayn Efendi) are responsible for the crime and the other three defendants were released. Mustafa is later identified as the primary actor but dies in prison from injuries sustained in the fight. The remaining two individuals are sentenced to 15 and five years of hard labor respectively.[53] In this case the Ottoman judges held all three defendants responsible for a single homicide and punished them according to their degree of participation in the crime. Thus, although the Ottoman Code only allowed for the same punishment amongst accomplices, in both the explanation of the code and in practice significant discretion was left to judges to alter the severity of punishment depending upon each party's degree of participation.

The confusion found within the Ottoman and Egyptian codes shows another area where European influence conflicted with the existing legal discourse. In this area of the law, the French

[52] Ibid.
[53] *State v. Mustafa* (1880) CM 33 Salonia 4.

understanding was directly applied into the Ottoman and Egyptian context. Jurists in both jurisdictions realized this problem and worked to make room for differing degrees of participation, eventually creating a legal definition largely removed from the limited ruling found in the code. The IPC's understanding of shared criminal responsibility was much closer to the classical Ḥanafī understanding, with the code incorporating the concept of cooperation found in earlier *fiqh* discourse. Although the sources used for this dissertation do not present a motive for these changes, it is important to note that, despite the complexity of determining the punishment deserved for those who participated in a crime together, the Ḥanafī School, the IPC and the Ottoman and Egyptian codes came to the same conclusion in practice, that is, measuring out the responsibility of each defendant according to their level of participation.

Conclusion

As observed in the explanation of the Egyptian Penal Code of 1883 regarding shared responsibility, defining a person's degree of criminal responsibility represented one of the most complicated areas of criminal law. At what point in time does a child truly understand the consequences of their actions? Where is the line between sanity and insanity? Can an insane person, who has clearly lost their connection to the world around them, still be held responsible for a crime as egregious as taking the life of another? And finally, can an individual that participates with another fully understand and share the murderous intent of the principal perpetrator(s) to the degree that they should face the same fate?

Islamic and Western legal theorists developed different and complex answers to these questions. For Muslim jurists the answer was to be found in the religious concept of *taklīf* that governed responsibility for acts of worship and worldly affairs alike. Those who were able to bear

the burden of managing their daily prayer requirements and able to comprehend the message that God had given humanity, were therefore deemed capable of being held responsible for their acts in this world. For Western theorists the focus was on the state of mind. If a person could be found to be of sound mind when they committed a crime and aware of the consequences of their actions, they could be held criminally responsible.

Although these two approaches found their explanations in different sources and carved very different paths in their legal development, they came to similar conclusions that were reflected in the new penal codes of the 19th century and especially when applied in the courts. The line between a child and an adult could no longer be left entirely to a subjective understanding of puberty that could differ widely from one person to another, and efforts were made to identify specific points in time in which all children would be considered in courts as adults. The IPC left the most room for judicial discretion and allowed for each case to be judged on its merits. Insanity was also more clearly defined. The IPC again placed more discretion to the judge, while the Ottoman and Egyptian codes chose to rely more upon the evidence of medical experts. Finally, a general rule was established that those who actively cooperate with one another in the commission of a crime or homicide could in principle to be punished equally. However, this was modified by the courts and expanded beyond the codes, particularly in the Egyptian and Ottoman jurisdictions, allowing for a balanced application of the law to punish accomplices according to the degree of their participation in the crime.

The question of criminal responsibility was by no means solved with the introduction of new penal codes and subsequent laws, case precedents, as well as developments in medical science in both the Muslim world and the West continue to provide new answers to these questions and move the discussion in different directions. In the case of insanity for example the United

Kingdom, which instituted the M'Naughten Rules, continued to have significant difficulty reconciling those rules with medical definitions of insanity. As a result, individuals that would be confirmed as insane by a psychiatrist could still face significant punishment as, according to the Rules, they needed merely to comprehend their act, that it was wrong, or that it was contrary to the law. The gap between the legal and the medical approaches eventually caused Parliament to issue the Criminal Procedure (Insanity and Unfitness to Plead) Act of 1991, requiring the "written evidence of two or more registered medical practitioners at least one of whom is duly approved" for a jury to return a verdict of acquittal on ground of insanity.[54]

In India the situation has been quite different, with no statutory statutory changes at all made to Section 84 of the IPC since its implementation, despite the the Law Commission of India's recommendation that it be revisited.[55] The practice of the courts has echoed this and, although the testimony of psychiatrists is often accepted as evidence, the courts have consistently confirmed that the test for insanity is legal and not medical. Even those who have been certified insane by medical professionals could be subject to criminal liability if they showed some other evidence of culpability, for example hiding the murder weapon.[56]

During the implementation of the new penal codes in the 19th century, the answers posed to the complex questions of defining criminal responsibility represented a coming together of Islamic and Western legal approaches in an attempt by legal scholars and judges to find solutions that could work within the new legal systems, accord perpetrators a certain amount of leeway when

[54] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, c. 25 § 1(1). See also Estella Baker. "Human Rights, M'Naughten and the 1991 Act," *Criminal Law Review* (Feb. 1994): 84-92.
[55] Suresh Bada Math, et al. "Insanity Defense: Past, present, and future," *Indian Journal of Psychological Medicine* 37, no. 4 (Oct-Dec 2015): 381-7.
[56] See for example *Jai Lal v. Delhi Administration* (1969) AIR SC 15; *Sudhakaran v. State of Kerala* (2010) 10 SCC 582; *Surendra Mishra v. State of Jharkhand* (2011) 11 SCC 495.

assessing their responsibility and, as a result, achieve the closest result of certainty of culpability possible given the circumstances of each case.

Conclusion: A Bridge Between Systems

The purpose of this dissertation was to explore the question of the "end of the *Sharīʿa*" in the criminal law of homicide following the introduction of penal codes in the Egyptian, Ottoman and Indian contexts. According to the dominant narrative within the secondary literature of Islamic legal historiography, these codes represented a replacement of Islamic Law with that of Europe. By observing the work of local actors and comparing the composite elements of the crime of homicide: the act (*actus reus*), intent (*mens rea*) and definition of criminal responsibility as it appeared in the Ḥanafī School and the new codes, this dissertation has shown that the penal codes were not a divergence from the *Sharīʿa*. Rather, the codes represented a development in the law where Islamic legal norms converged with European influence and changing local circumstances. In each of these jurisdictions, the *Sharīʿa* and its rulings remained the law of the land but were now shaped by the concerns of a growing centralized state.

Chapter One initiated this argument by exploring the political and legal environment of the 19th century. During this period, Muslim scholars in each jurisdiction called for the political authorities to expand upon the existing Islamic concept of political authority (*siyāsa*) to create new laws that would bring justice to a system that had been thrown out of balance. In pre-IPC India where non-Muslim colonial officers were in control of the legal system, Muslim actors working with the British in their courts such as Sirāj al-Dīn ʿAlī Khān praised the "jurisprudence (*fiqh*)" of British officials such as Henry Korbick and John Herbert Harrington, and suggested that *siyāsa* be used in every instance where the traditional categories of retaliation (*qiṣāṣ*) and discretionary punishment (*taʿzīr*) failed to deter criminals or exact necessary punishment.

For Muslim political writers in the Ottoman Empire and Egypt, the problems of their society lay in a failure of justice. In their view, instances of crime such as homicide were on the

rise and the legal system that had served them for centuries had become corrupt and was no longer able to serve their needs. For people like ʿAbd Allāh b. Ḥasan Barakat Zāda, who was educated in the Ottoman system and worked in Egypt as a head judge, the solution to these problems was a return to a balanced understanding and application of *siyāsa* that would allow the Ottoman Sultan to reign in corrupt officials and bring justice to the Empire, all the while remaining loyal to the principles and goals of Islamic law. Much like Ibn Qayyim al-Jawziyya who had made similar arguments centuries prior, the true *Sharīʿa* was wherever justice could be found.

Chapter Two focused on the new cadre of legal elites and institutions who would take up the task of creating this balance. In India the Delhi College supplemented the traditional Nizamiyya curriculum with a focus on the natural sciences and English, helping to push forward an upsurge in Urdu writing and creating scholars such as Nazeer Ahmed who would later translate the new Indian Penal Code and strengthen its connection to local Indian—and Islamic—legal custom. Meanwhile in Egypt, an evolving translation movement backed by the Khedival government grew around the personage of Rifāʿa al-Ṭahṭāwī, one of the century's most prominent reformers. His School of Translators (*Madrassat al-Mutarjimīn*), formed the basis for new law schools that would transform the way Egyptian law was understood and applied. One of the graduates of this school, Muḥammad Qadrī Bāshā, was assigned by the Khedives Ismāʿīl and Tawfīq to create the codes that would govern the country's Native Courts. His understanding of the law struck a balance between European and Islamic influences, most clearly embodied in his theoretical work on criminal law.

The greatest change introduced by the new codes was the shift from understanding homicide as a crime against the victim and their family in the Islamic category of retaliation (*qiṣāṣ*) to one against society that was both prosecuted and punished by the state. Chapter Three of this

dissertation looked at this issue of classification and argued that the development of the theory of homicide was built on a conflict of interests between the needs of the state and the hesitation to punish within the Islamic system, described by Intisar Rabb as the "doubt canon." The shift to full state control of the prosecution of homicide was completed during the 19th century, and the families of the victim were left with only limited options to request the payment of blood money (*diyya*) or financial compensation through the civil courts.

The framers of the codes did not ignore the importance of the shift to state dominance nor its implications on the wider criminal system. As the chapter highlighted, explanations of both the Ottoman and Egyptian codes spoke in detail about their justifications for this shift, with Amīn al-Bustānī's work on the Egyptian code being the most clearly articulate. In each of these explanations, the role of Islamic law was confirmed and both legal scholars and judges alike believed that the state taking full control in the prosecution of murderers was the only way to achieve Islam's goal of justice and prevent the rise of chaos and personal blood feuds.

The penal codes of the 19th century also selected simplified definition of homicide and expanded the realm in which murderers could be subject to execution. It is in the classification of homicide where this dissertation encountered the first inclusion of what one might call external influence, with the Ottoman and Egyptian codes following the understandings of the French Code of 1791 in some areas. Still, these adaptations from the French system should not be considered as radical departures from the Islamic tradition, and jurists such as Makhlūf al-Minyāwī in Egypt produced works to show how these changes were compatible with the Mālikī School of Islamic Law.

Chapter Four then moved to the establishment of intent, critical to understanding the new expanded categorization of homicide. From the outset of its historical development, the Ḥanafī

School focused on the presence of a deadly weapon. Although there were differing approaches between the school's founder Abū Ḥanīfa and his two students, Abū Yūsuf and Muḥammad al-Shaybānī, later scholars—in an attempt to reduce the scope of intentional murder—focused on the material from which the weapon was made and considered only weapons made from metal to qualify as deadly. As the state began to enact more influence the 19th century, the scope of homicide was expanded once again. This resulted in either a slow (in the case of India) or immediate (in the case of Egypt) implementation of the minority opinion of the Ḥanafī School that considered all weapons that created an injury (*jarḥ*) as deadly, opening the door for other methods of killing not always accepted within majority Ḥanafī discourse, such as strangulation, to be included as intentional murder.

The new penal codes also introduced alternative methods for determining intent. In British India colonial officers ordered courts to focus on the perpetrator's motive, while in the Ottoman Empire and Egypt the focus turned to premeditation to show that a person had planned out—and therefore fully intended—the result of his actions. Despite the implementation of these new approaches, the presence of a deadly weapon remained the primary way to establish intent. Court practice in each of these jurisdictions showed that the question of what constitutes a deadly weapon and its connection to intent continued to be debated.

The final chapter of this dissertation focused on the concept of criminal responsibility, an extension of the Islamic religious concept of *taklīf*. Beginning with the treatment of juvenile offenders, the penal codes of the 19th century moved away from the variable of puberty that differed from person to person and chose fixed ages within a gradually evolving scale of enhanced responsibility. Ḥanafī law had already done the same centuries earlier, and in the 19th century scholars such as Ibn ʿĀbidīn relied primarily upon the idea of puberty by age (*al-bulūgh bi al-sinn*)

to hold all those over the age of 15 responsible for their crimes. In the particular case of British India, common law had allowed for children as young as 12 to be hanged publicly for murder. When applied to the Indian courts in the first half of the century judges stuck to the concept of puberty but believed that the presumption of limited responsibility "weakens as the prisoner's age approaches puberty." By the end of the century, codes in each of the three present jurisdictions as well as within Europe had adopted a fixed age (12 in the IPC and 15 in Ottoman and Egyptian codes). However, in the particular case of India, judges continued to hold the ultimate power of discretion and could acquit older defendants who were determined to have only the capacity of a child.

When it came to the question of insanity, the Islamic system had never developed a comprehensive or detailed definition of insanity and left significant discretion to the judge and medical experts, similar to the situation in Europe. During the 19th century a number of cases within the common law system—coupled with evolving understandings of mental health—ushered in changes in the legal definition of insanity with the British M'Naughten Rules that were eventually brought to colonies in India. In the Ottoman Empire and Egypt, however, common law understandings were not used and the broader Islamic definition of insanity remained dominant as judges continued to rely on the presence of medical evidence. In application, the question of insanity continued to prove to be one of the more complicated areas of homicide cases and, as demonstrated in the case of *Government v. Tota* (1864), despite the existence of more precise definitions, judges were divided as to how insanity was to be established and used as a defense to mitigate punishment for homicide.

Lastly, when discussing the responsibility of multiple participants in the same crime, Islamic law had developed two criteria of cooperation (*taʿāwun*) and coming together (*tamāluʾ*).

Once these criteria were established, the case was left to the judge to either punish all accomplices equally—which could reach execution—or to distribute the punishment to each offender according to their degree of involvement. During the 19th century, both Islamic and Western legal systems preferred holding all the participants of a crime equally responsible, and this standard became the established law as represented in the new penal codes. However, in practice, Ottoman and Egyptian courts regularly modified this approach, preferring instead to punish accomplices for homicide according to their degree of participation.

Colonialism and Local Actors

As outlined in the introduction, the current historiography of Islamic Law rests upon three points in arguing that the penal codes of the 19th century represented a divergence from Islamic law: the antithetical process of codification, the sidelining of traditionally-trained scholars, and the content of the laws coming from Europe. Given that more recent scholarship has brought the first two points into question, this dissertation cast doubt specifically on the third point, arguing that with regard to the construction of the penal codes, those who participated in their creation, the political and legal environments in which they were created, and the actual content of the laws themselves, the new penal codes of the 19th century maintained the objects of Islamic law at the forefront. This is also evident during the process of colonization in each of the three jurisdictions covered. Whether colonization was direct and long-standing (India), short-lived (Egypt) or functioning only as cultural influence until the 20th century (Ottoman Empire), the result was still recognizably *Islamic*. This is not to argue that there was no change in the legal system, nor that there was no importation of ideas from Europe. However, as those ideas were brought into the jurisdictions covered by this dissertation they were analyzed, processed, and thought out by legal

scholars and worked into the creation of new legal systems that maintained their connection to the past.

The criminal codes of the 19th century were made possible by the work of local actors. Whether through the work of jurists such as ʿAbd al-Ḥayy of India, or legal specialists trained in Western systems like Amīn Ifrām al-Bustānī and Muḥammad Qadrī Bāshā of Egypt, a new generation of scholars took up the reigns of Islamic legal discourse and engaged in debates and discussions with both European and Islamic understandings, synthesizing these legal systems to create the resulting legal thought that was embodied in the codes. Often, this work occurred outside the halls of institutions such as al-Azhar in Cairo, which was mired in administrative and pedagogical difficulties, and was made possible through institutions, teachers, and graduates who straddled multiple realms of thought. This does not mean that traditional scholars sat on the sidelines, as other works have already shown how the presence of traditional voices worked to temper debates in Egypt and India.[1] However, particularly in terms of the law, by the end of the 19th century the discourse had been moved out of traditional centers of learning and into new law schools and courthouses, where the majority of *fiqh* scholars held only marginal sway. Despite reforms that occurred in places like al-Azhar in the beginning of the 20th century at the hands of Muḥammad ʿAbdū, a gap formed between traditional Islamic legal education, on the one hand, and the jurists working in the National Courts, on the other. This rift continued to grow throughout the century and remains painfully obvious to this day.

The importance of focusing on local actors and their impact on the development of the law helps observers understand the complexities facing Muslim societies during this period. Most of the academic work that has been produced on the colonial period to this point and cited throughout

[1] See for example Gesink, *Islamic Reform*; Zaman, *Ulama,* 1-2.

this dissertation has looked at the changes in the law from the viewpoint and perspective of the colonizer. Whether it is Hallaq's "demolish and replace" or Radika Singha's "despotism of law,"[2] the colonizer is the one doing the work as the colonized sits silently, only allowed to take over following independence. Most recently, Rumee Ahmad described the colonial experience of Islamic law in the following terms: "Colonial powers figured that it would be simple enough to develop a criminal code based in colonial law, which they did through a mash-up of the Law of England, the Napoleonic Code and, oddly enough, the Louisiana Civil Code of 1825. They then set about developing a separate civil code that would be wholly based on local religious laws." Following independence, Ahmad continues:

> During the mid-1900s, after mass agitation and even more atrocities, colonial powers began gradually withdrawing from the colonies. They left behind nation-states with new borders and little capacity for governance. These nation-states were forced to quickly create governing bodies, institutions, and legal codes or risk devolving into anarchy. They threw together constitutions—usually modeled on existing European constitutions—that would serve as founding documents for their new countries.[3]

This understanding is inaccurate—particularly when the work of numerous Muslim scholars during the 19th century is considered—and does not reflect the complexities of the colonial experience nor the role that Islamic law played in this important period. In the first half of the 19th century in India, for example, traditional scholars worked *with* British officers to help expand *siyāsa* and *taʿzīr* to enforce punishment, and Muftis in the courts regularly sided *with* British judges

[2] See for example Hallaq, "Can the Shari'ah be Restored?" and Radika Singha. *A Despotism of Law.*
[3] Rumee Ahmed. *Sharia Compliant: A User's Guide to Hacking Islamic Law* (Stanford: Stanford University Press, 2018), 14-15. Although Ahmed's work is not specifically related to the history of Islamic law in the colonial period his description is representative of the field. See for example Scott Kugle, "Framed, Blamed, and Renamed;" Rudolph Peters, *Crime and Punishment*; and Wael Hallaq, "Can the Shari'ah be Restored?"

to provide rulings that helped punish murderers even when traditional understandings of Islamic *fiqh* would not. In Egypt and the Ottoman Empire, when the legislature undertook the major step of formally transforming homicide from a crime against the individual to one against society and the state, they had the backing of scholars that worked out—with great intellectual effort—the way the new criminal system should work while keeping Islamic understandings in mind.

Changing Tides and Islamism

Although this dissertation sought to highlight the role of local actors and challenge the idea of the "end of the *Sharīʿa*," it is important to note that this is not the current perception of the law by Muslims in the jurisdictions at hand. The environment of converging legal systems and the important work done by these scholars becomes overshadowed in the 20th century by new anti-colonial and postcolonial movements that took a new view of Islamic identity based upon a recasting of legal history. Cemil Aydin, for example, has tracked this identity development through the creation of what he calls the "Muslim World." Separate from the classical concept of the *Umma* which was always present in Islamic theological and political texts, Aydin argues that during the late 19th and early 20th centuries Muslim reformers reshaped their societies towards a singular global identity as a response to imperial racialization. On par in tolerance, reason, and enlightenment with their European counterparts, the Muslim world was now to be seen as an equal "civilization."[4] One of the cornerstones of this civilization was Islam's unique legal system, the *Sharīʿa*, which provided the rule of law and all of the rights and responsibilities of the West.

Already mentioned by Amīn al-Bustānī in his explanation of the Egyptian Penal Code, members of the Egyptian parliament and religious scholars begun by the 1880s to express

[4] Cemil Aydin. *The Idea of the Muslim World: A global intellectual history* (Cambridge: Harvard University Press, 2017), 229-30.

opposition to the new codes as "foreign" and opposed to the *Sharīʿa*. Scholars during this period, forming the background to what would eventually be called Islamism, rallied around the identity of the *Sharīʿa* as an independent, unchanging, God-given legal system—sometimes referred to as Divine Law (*qānūn ilāhī*)—that was diametrically opposed to the changing, man-made law created partially by the introduction of the new codes of the 19th century—referred to as Positive Law (*qānūn waḍʿī*).

Leonard Wood, in his work on the reception of European law in Egypt, finds the earliest manifestation of these opposing legal systems in an article from the first year of the widely popular Islamist magazine *al-Manār* in 1898.[5] In this article, the reformer Rashīd Riḍā begins by lamenting that Muslim societies had "become wretched after prosperity, become enslaved after freedom, and debased after being uplifted." Muslim rulers, he argues, had:

> Abandoned Your Divine Sharīʿa and sought to replace it with positive laws (*al-qawānīn al-waḍʿiyya*) and legislated that the greatest leader be granted sacred powers to abrogate what was legislated, make permissible what was forbidden, make forbidden what was permissible, and pardon those who would be punished.[6]

In the following decades, this sentiment would develop into an entire field of comparative legal theory, and dozens of works appeared in the first half of the 20th century showing how the contemporary legal system was in complete opposition to the true intention of God's law and the Sharīʿa. In criminal law, the most important of these works is that of the judge ʿAbd al-Qādir ʿAwda (1906-1954) entitled *Islamic Criminal Law, in Comparison with Positive Law (al-Tashrīʿ al-Jināʾī al-Islāmī Muqārin*^{an} *bi al-Qānūn al-Waḍʿī)*. First published in the 1930s, ʿAwda wrote

[5] Wood, *Islamic Legal Revival,* 58.
[6] Rashīd Riḍā, "Rabbanā innā aṭaʾnā sādatanā wa-kubarāʾanā fa-aḍallūnā al-sabīlā," *al-Manār* 1 (1898), 606.

the work to "declare the merits of *Sharīʿa*, their supremacy over positive law, its precedence in establishing all of the principles of humanity, as well as over the scientific and sociological theories that the world neither came to know nor scholars were guided to until recently."[7] In the remainder of the book, ʿAwda highlights how each of the proscribed criminal punishments of Islam (*ḥudūd*) were established to protect both the sanctity of society and individuals alike. One example given early in the text is the punishment for public drunkenness (*shurb al-khamr*), whose evils Western societies had only recently come to realize and passed prohibition laws like those in the United States.[8]

Although most of these comparative works sought to point out the stark differences between Islamic and Western Law and extol the virtues and supremacy of the *Sharīʿa*, there were others who continued to believe in the ideas of the 19th century and continued to develop a pathway that combined Western and Islamic approaches well into the 20th century. This is most clearly seen in the development of civil law, where scholars of the Khedival Law School, such as ʿAbd al-Razzāq al-Sanhūrī and Shafīq Shiḥāta, synthesized the French and Egyptian systems of contract.[9] Al-Sanhūrī's primary work of legislation, the Egyptian Civil Code of 1948, is considered the greatest development in Islamic civil law after the Ottoman *Mecelle* of 1869 and still forms the basis for civil law in numerous Arab countries to this day.[10]

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[7] ʾAbd al-Qādir ʾAwda. *al-Tashrīʿ al-Jināʾī al-Islāmī Muqārinan bi al-Qānūn al-Waḍʿī* (Cairo: Dār al-ḥadīth, 2009), 3.

[8] The United States most famously banned the manufacture, transportation, and sale of alcoholic beverages with the passing of the 18th Amendment to the Constitution in 1920, however the amendment was repealed in 1933 with the ratification of the 21st Amendment. The U.S. was not the first or the only state to enact such laws, and Christian revival movements across Europe and North America worked throughout the first decades of the 20th century to pass similar laws which were either modified or abolished entirely by the second half of the century.

[9] See for example ʿAbd al-Razzāq al-Sanhūrī. *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī* (Cairo: Maʿhad al-Buḥūth wa al-Dirāsāt al-ʿArabīyah, 1967-8)

[10] Nabil Saleh. "Civil Codes of Arab Countries: The Sanhuri codes," *Arab Law Quarterly* 8, no. 2 (1993): 161-167.

In criminal law a graduate from the newly-established religious faculty of Cairo University, Dār al-ʿUlūm, and a judge within the *Sharīʿa* court, Riḍwān Shāfiʿī al-Mutʿāfī, published in 1930 a work entitled *Common Crimes in the Law and the Sharīʿa (al-Jināyāt al-Mushtarika fī al-Qānūn wa al-Sharīʿa)*. In this work, al-Mutʿāfī describes the categories of punishment within the Islamic system—*qiṣāṣ, ḥudūd*, and *taʿzīr*—and argues that they each have a corresponding element within the contemporary Egyptian legal system:

> We find a clear similarity between the spirit of modern legislation and the spirit of Islamic Law in general. We [also] find that the rules of the Sharīʿa are spoken by the explainers of the Penal Code, and that the articles of the Egyptian Penal Code and their explanation in both public and private matters, as well as in some of the laws of the European nations, [contain] what might almost be a transfer of meaning of the statements of [classical] Muslim jurists. We also observe that, although some of the explainers [of the Penal Code] rely on the statements of Jaro, Jarson, Dalwaz, etc., we [also] find [these statements] in some of the books of the four schools [of Sunni jurisprudence].[11]

As a result of the reform movements of the 20th century and the new attachment to the *Sharīʿa* as a cornerstone of a global Muslim identity, the changes made to the law during the colonial period—including the penal codes discussed in this dissertation—are recast as merely importations of European laws and as one of the greatest defeats of global Muslims at the hands of the colonizers. Academic scholarship in both Western and Muslim circles alike have taken this thesis as a given, creating a gap in Islamic legal historiography in the shape of the colonial period where Islamic law is unnaturally removed from its pre-colonial roots and replaced with European Positive Law.

[11] Riḍwān Shāfiʿī al-Mutʿāfī. *al-Jināyāt al-Mushtarika fī al-Qānūn wa al-Sharīʿa* (Cairo: al-Maṭbaʿa al-Salafiyya, 1930), 3.

The work of this dissertation, in concert with other emerging views of the colonial period, attempts to nuance to this discussion. By including the work and views of local actors and viewing in detail how the penal codes of the 19th century were formed and applied in the case of homicide, the dissertation argues that the colonial period should be seen as a bridge between systems. Although the influence of colonial powers on the law colonialism introduced unprecedented changes in India, Egypt, and the Ottoman Empire, it did not destroy and replace existing legal dynamics. Much like the impact of Greek philosophy on the formative and classical periods of Islamic thought, the colonial period ushered in new legal ideas that were debated, theorized, integrated—and yes, sometimes rejected—by Muslim scholars. Unlike the situation with Greek philosophy, however, the power dynamics between Muslims and those working outside the tradition were different, and it is this difference that remains the main point of contention in discussions between academics (and laypersons) on the influence and effect of colonization on Islamic law. In the view of this dissertation local actors developed, explained, and implemented the codes in full awareness of those power difference and the content of the codes clearly exhibits that awareness. Power dynamics are important to consider but should not be taken as the primary—and surely not the only—way to approach the colonial period.

Defining the *Sharīʿa*

In addition to being a work of legal history that focuses on the complex changes of the colonial period, this dissertation draws conclusions that are also relevant for a wider discussion in Islamic law regarding the definition of the *Sharīʿa*. For some, the *Sharīʿa* is an "idealized" form of the law that is never actually attainable in the real world. According to Carl Ernst, "the complex

of Islamic Law as an ideal, usually known as the Sharīʿa."[12] Elaborating on that point, Rumee Ahmad claimed:

> From a religious perspective, sharia describes a utopia in which everything is right and good…sharia's power is precisely that it never *is* something but always *will be* something. It is an idea that is always just coming into being. Whenever someone makes a claim about what the sharia *is,* that claim is inherently suspect, because claims about what the sharia *is* automatically lose the power of something that *will be.*[13]

For others such as Islamists in the 20th century and Western obervers such as Joseph Schacht and Noel Coulson, the term *Sharīʿa* is limited to the realm of jurisprudence (*fiqh*), and what constituted Islamic Law was only that discussed within the traditional texts of *fiqh.*[14] The majority of the Islamic legal paradigm, in their view, was either not applicable due to its inpracticality or actively dismissed by political rulers who sought out more pragmatic applications of the law.

For Wael Hallaq, on the other hand, the *Sharīʿa* was very much a reality on the ground, albeit one much different from that described by Shacht and Coulson. The *Sharīʿa* of Hallaq represented a "complex set of social, economic, cultural, and moral relations that permeated the epistemic structures of the social and political orders."[15] Guided by the learned *faqīh* whose goals were to "provide[d] an intellectual superstructure that positioned the law within the larger tradition that conceptually defined Islam, thereby constituting a theoretical link between metaphysics and theology on the one hand, and the social and physical world on the other" and secondly "the infusion of legal norms within a given social and moral order, an infusion where the method of

[12] Carl Ernst. *Following Muhammad: Rethinking Islam in the contemporary world* (Chapel Hill: University of North Carolina Press, 2003), 104.
[13] Ahmad, *Sharia,* 18-19.
[14] See for example Amr Shalaqany. "Islamic Legal Histories," *Berkeley Journal of Middle Eastern & Islamic Law* 1, no. 1 (2008): 2-82.
[15] Wael Hallaq. "What is Shari'a?" *Yearbook of Islamic and Middle Eastern Law Online* 12, no. 1 (2005): 151-180.

realization was not imposition but rather mediation."[16] This process was mediated by a socially-engaged and moral judge (*qāḍī*) who helped, along with other non-judicial social forces, to develop the system from the bottom up, without the force of the modern state's powers of coercion. As a result, the *Sharīʿa* was far more than a legal system as understood in mid-19th and 20th century terms.

None of these approaches provides a sufficient definition. On one hand, the definition of the *Sharīʿa* as an unattainable ideal ignores the fact that, for almost fourteen centuries, Muslim scholars and laypersons alike believed that they were living in societies governed by the *Sharīʿa*. Ibn Qayyim, with his famous quote on justice, called out rulers who he believed had strayed too far from the *Sharīʿa*, indicating that the *Sharīʿa* was well within reach and could be lost if leaders were not careful. Political writers in the 19th century, such as ʿAbd Allāh ibn Ḥasan Barakat Zāda mentioned in Chapter One, held the same view and called for a reasonable and balanced application of *siyāsa* in order to help the Ottoman Empire reach the very attainable goal of applying the *Sharīʿa*.

Alternatively, the limitation of the *Sharīʿa* to discussions of the *fuqahā',* and the belief that Islamic law is reducible to the rules found in the voluminous manuals of jurisprudence, ignore the numerous other institutions and players in the world of Islamic law, the least of which being the state. Ibn Qayyim was fighting against similar understandings from his time as well, criticizing religious scholars who limited areas of the law, such as rules of evidence to only confession and witnesses, and claiming that trough their absolute attachment to *fiqh*, they ignored the purpose of the *Sharīʿa* which was to establish justice. In the 19th and 20th century this struggle continued, as the new generation of legal scholars mentioned in Chapter Two moved beyond the rules of their

[16] Ibid, 160.

respective schools to create penal codes that would both establish justice and remain faithful to their Islamic legal heritage.

Finally, the vision of Hallaq, although much closer to an accurate understanding of the *Sharīʿa* though its recognition of forces that existed in the creation of the law beyond that of the jurist, is problematic because of its focus on a reified and idealized vision of the *Sharīʿa* juxtaposed to an equally demonized picture of Western legal systems.[17] For example, his description of the European legal system of the 19th and 20th centuries as having a "repugnance to religion, especially when seen to be intertwined with law," would seem rather shocking to historians such as Harold Berman, who dedicated much of his life to affirming the moral – and indeed religious – foundations to Western law.[18]

In the view of this dissertation, the *Sharīʿa* should be given a more concrete and contoured definition than that of Hallaq. It is a place of intersection where the rules created by the *fuqahā'*, the interests of the state and local custom, and the application within the courts come together. Returning to its original definition in Arabic, that is, a "path" in the desert that leads to a water source, the water here being salvation and Paradise. Paradise is not attainable in this world, but the path to it is. The *Sharīʿa* is also a legal system, not unlike its counterparts in civil and common law. With its borders defined by the Qur'ān and Sunna, the *Sharīʿa* is a field where jurisprudence, state power, Muslim practice and application of the law in courts, and influence from external systems and actors interact—which is exactly what occurred during the colonial period. *Fiqh,* coming from the Arabic root to "understand," is a snapshot of the interactions at play in the interpretation of a particular historical period, school of thought, and independent scholar. Critical

[17] This has been clearly articulated by Anver Emon. See Emon, Anver. "Codification and Islamic Law: The ideology behind a tragic narrative," *Middle East Law and Governance* 8, no. 2-3 (November 2016): 275-309.
[18] See for example Harold Berman. *The Interaction of Law and Religion* (Nashville: Abingdon Press, 1974); Harold Berman. *Law and Revolution* (Cambridge: Harvard University Press, 1983).

to this expanded definition of the *Sharīʿa* as a legal system is the integration of work by others such as Khaled Fahmy who, in his description of the implementation of forensic medicine into the legal system, argued that we should view "*siyāsa* and *qānūn*, not only *qaḍā'* and *fiqh*, as central to our understanding of Islamic law."[19]

External influence and change are alien neither to the *Sharīʿa* nor to other legal systems. To take the example of codification, the common law systems of England and the United States saw projects of criminal codification during the 19th and early 20th centuries, while the staunchly codified French system of civil law in the same period experimented with the introduction of juries and greater judicial discretion.[20] No scholars have claimed that the use of juries in the French system constituted the "end of civil law" nor is the project of the Field Codes in the United States held as "destroying and replacing" common law. In the unique case of Canada, for example, both the common and civil law systems exist side-by-side, with criminal matters governed by a Criminal Code first enacted in 1892 and largely influenced by English common law theorists and British attempts to codify their criminal law and procedure in the 1870s.[21]

In the specific case of the *Sharīʿa* in the 19th century and beyond, the primary problem is that of colonial influence. The changes listed above in the common and civil law systems were viewed as locally produced, while the changes in the *Sharīʿa* are seen as the result of a foreign colonial project. However, as demonstrated in this dissertation, when the role of local actors is considered together with an analysis of the laws in both content and application, the picture begins to change. Some of the shifts within the law instituted by the new codes can find their origins

[19] Khaled Fahmy, *In Quest of Justice*, 27.
[20] See for example James M. Donovan. *Juries and the Transformation of Criminal Justice in France in the Nineteenth & Twentieth Centuries* (Chapel Hill: University of North Carolina Press, 2010); Stephen C. Thaman. "The Model Penal Code and the Dilemma of Criminal Law Codification in the United States" in *Codification in International Perspective,* ed. Wen-Yeu Wang (New York: Springer, 2014): 165-183.
[21] Desmond Haldane Brown. *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989).

before the introduction of colonial influence, and concepts such as transferring the prosecution of homicide away from the victim's family and into the hands of the state had already seen its introduction through either the Indian *rāẓīnāma*, or the Egyptian view that the ruler and judge could be constructed as the "father" or primary descendant of a victim and take the place of the family.

Questions for Future Research

Much remains to be examined regarding the changes to Islamic Law in the colonial period. One area that would further the thesis of legal convergence during the colonial period would be to examine conceptions of the law that found their way back from colonized areas to the colonizing states. Because of the assumption of the power dynamics of the period as well as the assumed supremacy and development of European law in the 19th century, this idea is seen as a lost cause; however, scholars such as John Makdisi have already shown that classical Ḥanafī law largely influenced the common law theory of contracts.[22] In British India, for example, many colonial officers traveled to the Subcontinent with little to no legal experience yet worked as judges in the Indian system. Following their retirement, they returned to England and found work as jurists, legal scholars, and university professors, their knowledge shaped largely by their time in India and the encounter with Islamic law.

Another realm for research should be the production of a comprehensive survey of the role of the state in the development of Islamic law. Looking beyond the legal category of *siyāsa* as constructed by the *fuqahāʾ,* scholars should re-evaluate how the state helped to form rulings from the very formation of Islamic Law. The beginnings of such a project have already been undertaken

[22] John A. Makdisi, "The Islamic Origins of the Common Law," *North Carolina Law Review* 77 (June 1999): 1635-1739.

in the Ottoman Period, and the works of Guy Burak and Samy Ayoub should be noted as important steps forward in the field. If, as observers, we can construct a more complete picture of how the state impacted the construction of the law before the introduction of colonialism, then the changes that took place in the 19th century can be seen as a continuation of, and not a divergence from, Islamic legal history.

Finally, future research should look beyond the codes analyzed for this dissertation. In every jurisdiction studied, except for India, the penal codes were by no means the last changes made to criminal law. Even in the Indian case, the IPC was modified numerous times throughout the 20th century through legislation and the courts. Additionally, following the Partition of India in 1948, the newly created states of Pakistan and Bangladesh have supplemented this code with new elements such as the Pakistani Hudud, Qisas and Diyat Ordinances enacted in 1979 following the military coup of General Zia-ul-Haq. These new laws should be analyzed in the same way as the codes here, considering the role of local actors and changing intellectual circumstances (such as Islamism) that influenced the content of these new ordinances. In the instance of Pakistan, if the IPC—incorporated as the Pakistan Penal Code (PPC) at Partition—was largely in line with Ḥanafī understandings and not a divergence from Islamic Law, what purpose did the new ordinances serve? Perhaps they represented a new interpretation of, and a more clear divergence from, Islamic Law than that of the IPC created by the British, one that was, in effect, served not as the re-application of the Sharīʿa but rather as an adoption of the post-colonial phenomenon of Islamism.

Bibliography

ʿAbd al-Ḥayy, Muḥammad. *Khulāṣat al-Fatāwā.* Lucknow: Munshī Nawal Kishūr, ND.

_____. *Majmūʿ-e Fatāwā.* Lucknow: Yūsufī Press, 1911.

Abu-Lughod, Ibrahim. *Arab Rediscovery of Europe: A Study in Cultural Encounters.* Princeton: Princeton University Press, 1963.

Abu-Manneh, Butrus. "The Islamic Roots of the Gülhane Rescript," *Die Welt des Islams* 34, no. 2 (1994): 173-203.

Agrama, Hussein Ali. *Questioning Secularism: Islam, sovereignty, and the rule of law in modern Egypt*. Chicago: University of Chicago Press, 2012.

Ahmad, Rumee. *Sharia Compliant: A User's Guide to Hacking Islamic Law.* Stanford: Stanford University Press, 2018.

Allouche, Adel, "The Establishment of Four Chief Judgeships in Fāṭimid Egypt," *Journal of the American Oriental Society* 105, no. 2 (April-June 1985): 317-20.

al-Andarpatī, ʿĀlim ibn al-ʿAlāʾ. *Al-Fatāwā al-Tātārkhāniyya.* Deoband: Maktabat Zakariyyā, 2010.

Anderson, J.N.D. "Law Reform in the Middle East," *International Affairs* 32, no. 1 (Jan 1956): 43-51, 45.

Anjum, Ovamir. *Politics, Law, and Community in Islamic Thought: the Taymiyyan movement.* New York: Cambridge University Press, 2012.

al-Anqarawī, Muḥammad b. Ḥusayn. *Al-Fatāwā al-Anqarawiyya.* Bulaq: Unknown, 1865.

Asad, Talal. *Formations of the Secular: Christianity, Islam, Modernity.* Stanford: Stanford University Press, 2003.

ʿAṭiyya, Muḥammad Labīb. "Taṭawwur Qānūn al-ʿUqūbāt fī Miṣr min ʿAhd Inshāʾ al-Maḥākim

al-Ahliyya" in *Al-Kitāb al-Dhahabī li al-Maḥākim al-Ahliyya.* Bulaq: al-Matba'a al-Amiriyya, 1933.

ʾAwda, ʾAbd al-Qādir. *al-Tashrīʿ al-Jināʾī al-Islāmī Muqārin*^{an} *bi al-Qānūn al-Waḍʿī.* Cairo: Dār al-Ḥadīth, 2009.

Aydin, Cemil. *The Idea of the Muslim World: A global intellectual history.* Cambridge: Harvard University Press, 2017.

Ayoub, Samy. "The Sultan Says: State Authority in the Late Hanafi Tradition." *Islamic Law and Society* 23, no. 3 (July 2016): 239-278.

Azam, Hina. *Sexual Violation in Islamic Law: Substance, evidence, and procedure.* New York: Cambridge University Press, 2015.

Baer, Gabriel. "The Transition from Traditional to Western Criminal law in Turkey and Egypt." *Studia Islamica* 45 (1977): 139-58.

Baker, Estella. "Human Rights, M'Naughten and the 1991 Act," *Criminal Law Review* (Feb. 1994): 84-92.

Baldwin, James. *Islamic Law and Empire in Ottoman Cairo.* Edinburgh: Edinburgh University Press, 2017.

Barakat Zāda, ʿAbd Allāh b. Ḥasan. *al-Siyāsa al-Sharʿiyya fī Ḥuqūq al-Rāʿi wa Saʿādat al-Raʿiyya.* Cairo: Maṭbaʿa al-Taraqqī, 1900.

Beccaria, Cesare. *On Crimes and Punishments*, translated and edited by Georg Koopmann. New York: Routledge, 2009.

Berkes, Niyazi. *The Development of Secularism in Turkey.* Montreal: McGill University Press, 1964.

Berman, Harold. *The Interaction of Law and Religion.* Nashville: Abingdon Press, 1974.

_____. *Law and Revolution*. Cambridge: Harvard University Press, 1983.

Blackstone, William. *Commentaries on the Laws of England.* Philadelphia: J.B. Lippincott & Co., 1908.

Brown, Desmond Haldane. *The Genesis of the Canadian Criminal Code of 1892.* Toronto: University of Toronto Press, 1989.

al-Bukhārī, Muḥammad b. Ismāʿīl. *Al-Jāmiʿ al-Musnad al-Ṣaḥīḥ.* Liechtenstein: Thesaurus Islamicus, 2000.

Burak, Guy. *The Second Formation of Islamic Law: the Ḥanafī School in the Early Modern Ottoman Empire.* New York: Cambridge University Press, 2015.

al-Bustānī, Amīn Ifrām. *Sharḥ Qānūn al-ʿUqūbāt al-Miṣrī.* Cairo: Maṭbaʿat al-Maḥrūsa, 1894.

Cassirer, Earnst. *The Philosophy of the Enlightenment*. Princeton: Princeton University Press, 1951.

Cohn, Bernard. *Colonialism and Its Forms of Knowledge.* Princeton: Princeton University Press, 1996.

Cole, Juan. *Colonialism and Revolution in the Middle East: Social and cultural origins of Egypt's Urabi movement.* Princeton: Princeton University Press, 2001.

Crotty, Homer D. "History of Insanity as a Defence to Crime in English Criminal Law," *California Law Review* 12, no. 2 (Jan 1924): 105-123.

Dahlawī, Shāh Walī Allāh. *The Conclusive Argument from God,* translated by Marcia Hermansen. Leiden: Brill, 1996.

Dalrymple, William. "Transculturation, Assimilation, and its Limits: The rise and fall of the

Delhi White Mughals, 1805-57," in *The Delhi College: Traditional Elites, the Colonial State, and Education before 1857,* ed. Margrit Pernau, 60-101. Delhi: Oxford University Press, 2006.

al-Dārquṭnī, ʿAlī ibn ʿUmar. *Sunan al-Dārquṭnī.* Cairo: Dār al-Maḥāsin, 1966.

Davison, R.H. "Tanẓīmāt," *Encyclopaedia of Islam, Second Edition*, edited by P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs.

Dols, Michael. *Majnūn: The Madman in Medieval Islamic Society.* Oxford: Clarendon Press, 1992.

Donovan, James M. *Juries and the Transformation of Criminal Justice in France in the Nineteenth & Twentieth Centuries.* Chapel Hill: University of North Carolina Press, 2010.

Düstur. Istanbul: Maṭbaʿa-e ʿĀmire, 1873.

al-Dusūqī, Muḥammad ʿArafa. *Ḥāshiyyat al-Dusūqī ʿala al-Sharḥ al-Kabīr.* Cairo: Dār Iḥyā' al-Kutub al-ʿArabiyya, ND.

Elgawhary, Tarek. "Restructuring Islamic Law: The opinions of the ʿUlamāʾ towards codification of personal status law in Egypt." PhD diss., Princeton University, 2014.

Emon, Anver. "Codification and Islamic Law: The ideology behind a tragic narrative," *Middle East Law and Governance* 8, no. 2-3 (November 2016): 275-309.

Ernst, Carl. *Following Muhammad: Rethinking Islam in the contemporary world.* Chapel Hill: University of North Carolina Press, 2003.

"Execution of a 12 year old boy." British Library, Learning Timelines: Sources from History, Accessed July 25, 2018, http://www.bl.uk/learning/timeline/item102910.html.

Fadel, Mohammed. "The Social Logic of Taqlīd and the Rise of the Mukhtaṣar," *Islamic Law*

and Society 3, no. 2 (January 1996): 193-233.

Fahmy, Khaled. "The Anatomy of Justice: Forensic Medicine and Criminal Law in Nineteenth-Century Egypt." *Islamic Law and Society* 6, no. 2 (1999): 224-271.

_____. "The Police and the People in Nineteenth-Century Egypt," *Die Welt des Islams* 39, no. 3 (November 1999): 340-77.

_____. *All the Pasha's Men: Mehmed Ali, his army and the making of modern Egypt.* Cairo: American University in Cairo Press, 2002.

_____. "Rudolph Peters and the History of Modern Egyptian Law" in *Legal Documents as Sources for the History of Muslim Societies: Studies in Honour of Rudolph Peters,* edited by Maaike van Berkel. Leiden: Brill, 2017.

_____. *In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt.* Oakland: University of California Press, 2018.

Farooq, Mohammad Omar and Nedal El-Ghattis. "In Search of the Shari'ah," *Arab Law Quarterly* 32, no. 4 (2018): 315-354.

al-Fatāwā al-ʿĀlamgīriyya. Bulāq: al-Maṭbaʿa al-Amīriyya, 1892.

al-Fīrūzābādī, Muḥammad b. Yaʿqūb. *al-Qāmūs al-Muḥīṭ.* Beirut: Muʾassasat al-Risāla, 2005.

Friedmann, Yohanan. "Islamic Thought in Relation to the Indian Context" in *India's Islamic Traditions, 711-1750,* edited by Richard Eaton, 50-63. New Delhi: Oxford University Press, 2003.

Gasper, Michael. *The Power of Representation: Publics, peasants, and Islam in Egypt.* Stanford: Stanford University Press, 2009.

Gesink, Indira Falk. *Islamic Reform and Conservatism: Al-Azhar and the Evolution of Modern Sunni Islam.* London: I.B. Tauris, 2009.

Guenther, Alan. “Hanafi Fiqh in Mughal India: The Fatawa-i Alamgiri,” in *India’s Islamic Traditions, 711-1750*, edited by Richard Eaton, 209-34. New Delhi: Oxford University Press 2003.

Hallaq, Wael. “From Fatwas to Furu’: Growth and change in Islamic substantive law,” *Islamic Law and Society* 1, no. 1 (1994): 29-65.

_____. *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh.* New York: Cambridge University Press, 1997.

_____. “Can the Shari’a Be Restored?” in *Islamic Law and the Challenges of Modernity,* edited by Yvonne Haddad and Barbara Stowasser, 21-53. Walnut Creek: Altamira Press, 2004.

_____. “What is Shari’a?” *Yearbook of Islamic and Middle Eastern Law Online* 12, no. 1 (2005): 151-180.

_____. *An Introduction to Islamic Law.* New York: Cambridge University Press, 2009.

_____. *Sharīʿa; Theory, Practice, Transformations.* New York: Cambridge University Press, 2009.

_____. *The Impossible State: Islam, politics, and modernity’s moral predicament.* New York: Columbia University Press, 2013.

al-Ḥamdānī, Safar Aḥmad. “al-Junūn wa Anwāʿuhu fī al-Manẓūr al-Islāmī,” Shabakat al-Ulūka, Last updated June 18, 2012.

Hasan, Mushirul. “Maulawi Zaka Ullah: Sharif Culture and Colonial Rule,” in *The Delhi College: Traditional Elites, the Colonial State, and Education before 1857,* edited by Margrit Pernau. Delhi: Oxford University Press, 2006: 261-298.

Ḥaydar, Hāfiẓ Muḥammad ʿAlī. *Tadhkira-e Mashāhīr-e Kākūrī.* Lucknow: Aṣaḥ al-Maṭābiʿ,

1927.

Hefner, Robert. *Schooling Islam: The Culture and Politics of Modern Muslim Education* Princeton: Princeton University Press, 2010.

Heinzelmann, Tobias. "The Ruler's Monologue: The Rhetoric of the Ottoman Penal Code of 1858." *Die Welt Des Islams* 54 (2014): 292-321.

Heyd, Uriel. *Studies in Old Ottoman Criminal Law.* Oxford: Clarendon Press, 1973.

Hoyle, Mark. *Mixed Courts of Egypt.* London: Graham & Trotman, 1991.

Ḥusayn, ʿAbd Allāh ʿAlī. *al-Muqāranāt al-Tashrīʿiyya bayn al-Qawānīn al-Waḍʿiyya al-Madaniyya wa al-Tashrīʿ al-Islāmī.* Cairo: Dār al-Salām, 2001.

al-Ḥusaynī, Aḥmad al-Barzanjī. *Al-Naṣīḥa al-ʿĀmma li Mulūk al-Islām wa al-ʿĀmma.* Damascus: Unknown, 1890.

Hussin, Iza. *The Politics of Islamic Law: Local elites, colonial authority, and the making of the Muslim state.* Chicago: University of Chicago Press, 2016.

Ibn ʿĀbidīn, Muḥammad Amīn. *Radd al-Muḥtār ʿala al-Durr al-Mukhtār.* Riyadh: Dār ʿĀlim al-Kutub, 2003.

Ibn ʿĀshūr, Muḥammad al-Ṭāhir. *Tafsīr al-Taḥrīr wa al-Tanwīr.* Tūnis: al-Dār al-Tūnisiyya li al-Nashr, 1984.

Ibn Abī Shayba, ʿAbd Allāh ibn Muḥammad. *Al-Muṣannaf.* Beirut: Dār al-Tāj, 1989.

Ibn Duqmāq, Ibrāhīm b. Muḥammad. *Description de l'Égypte.* Cairo: Maṭbaʿat al-Bulāq, 1893.

Ibrahim, Ahmed Fekry. "The Codification Episteme in Islamic Juristic Discourse between Inertia and Change," *Islamic Law and Society* 22, no. 3 (May 2015): 157-220.

_____. *Pragmatism in Islamic Law: A social and intellectual history.* Syracuse: Syracuse University Press, 2015.

_____. "Customary Practices as Exigencies in Islamic Law," *Oriens* 46 (2018): 222-61.

Ibrāhīm, Muḥammad. "Athar Madrassat al-Ḥuqūq al-Khīdawiyya fī Taṭwīr al-Dirāsāt al-Fiqhiyya." MA Thesis, Cairo University, 2015.

İnalcık, Halil. *Osmanlı'da Devlet, Hukuk ve Adalet*. Istanbul: Kronik Yayıncılık, 2016.

Iskārū, Tawfīq. "Muḥammad Qadrī Bāshā," *al-Muqtaṭaf* (March 1916): 253-63.

al-Jabartī, ʿAbd al-Raḥmān ibn Ḥasan. *Maẓhar al-Taqdīs bi Zawāl Dawlat al-Fransīs.* Cairo: Dār al-Kutub al-Miṣriyya, 1998.

al-Jawziyya, Muḥammad ibn Qayyim. *al-Ṭuruq al-Ḥukmiyya fī al-Siyāssa al-Sharʿiyya.* Beirut: Maktabat al-Muʾayyad, 1989.

Johansen, Baber. "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim al-Jaqziyya (d. 1351) on Proof," *Islamic Law and Society* 9, no. 2 (2002): 168-193.

Kamali, Muhammad Hashim. "Sharīʿah and Civil Law: Towards a Methodology of Harmonization," *Islamic Law and Society* 14, no. 3 (2007): 391-420.

al-Kāsānī, Abū Bakr ibn Masʿūd. *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*. Beirut: Dār al-Kutub al-ʿIlmiyya, 2003.

al-Kawākibī, ʿAbd al-Raḥmān. *Ṭabāʾiʿ al-Istibdād wa Maṣāriʿ al-Istiʿbād.* Cairo: Muʾassasat al-Hindāwī, 2011.

al-Khāmis, Muḥammad Bayram. *Mulāḥiẓāt Siyāsiyya ʿan al-Tanẓīmāt al-Lāzima li al-Dawla al-ʿUliya.* Unknown, 1880.

Khān, Najm al-Dīn ʿAlī. *Kitāb-e Jināyāt*. Ms. 3829, Khuda Baksh Library, Patna.

Khān, Salāmat ʿAlī. *Al-Ikhtiyār.* Ms. 2060, Khuda Baksh Library, Patna.

_____. *Islāmī Qānūn-e Faujdārī: Tarjuma-e Kitāb al-Ikhtiyār.* Azamgarh: Maṭbaʿ-e

Maʿārif, ND.

Khān, Sirāj al-Dīn ʿAlī. *Jāmiʿ al-Taʿzīrāt min Kutub al-Thiqāt.* Maṭbaʿ ʿAyn al-ʿAyān, 1820.

King, Christopher. *One Language Two Scripts.* Delhi: Oxford University Press, 1999.

Koch, Ebba. "The Madrasa of Ghaziu'd-Din Khan at Delhi," in *The Delhi College: Traditional Elites, the Colonial State, and Education before 1857,* edited by Margrit Pernau. Delhi: Oxford University Press, 2006.

Kugle, Scott. "Framed, Blamed, and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (May 2001): 257-313.

Lāl, Bābū Kunj Bihārī and Munshī Muḥammad Naẓīr. *Sharḥ Majmūʿ-e Qawānīn-e Taʿzīrāt-e Hind.* Fatehpur: Maṭbaʿ Nasīm-e Hind, 1885.

Lange, Christian. *Justice, Punishment, and the Medieval Muslim Imagination.* New York: Cambridge University Press, 2008.

Macaulay, Thomas Babington. "Minute on Education," in *Selections from Educational Records, Part I (1781-1839)*, edited by H. Sharp. Delhi: National Archives of India, 1965.

al-Mahdī, Muḥammad al-ʿAbbāsī. *Al-Fatāwā al-Mahdiyya fī al-Waqāʾiʿ al-Miṣriyya.* Cairo: al-Maṭbaʿa al-Miṣriyya, 1883.

Mahdī, Muḥammad. *Tadhkira Shams al-ʿUlamāʾ Ḥāfiẓ Naẓīr Aḥmad Marḥūm.* UP, ND.

Makdisi, John A. "The Islamic Origins of the Common Law," *North Carolina Law Review* 77 (June 1999): 1635-1739.

Ibn Manẓūr, Muḥammad b. Mukarram. *Lisān al-ʿArab.* Beirut: Dār Ṣādir, 1993.

al-Marghīnānī, ʿAlī ibn Abī Bakr. *Al-Hidāya Sharḥ Bidāyat al-Mubtadi,* commentary by ʿAbd al-Ḥayy Luknāwī. Karachi: Idārat al-Qur'ān wa al-ʿUlūm al-Islāmiyya, 1996.

_____. *The Hedaya, or Guide: A commentary of the Mussulman laws*, translated by

Charles Hamilton. London: T. Bensley, 1791.

Math, Suresh Bada, et al. "Insanity Defense: Past, present, and future," *Indian Journal of Psychological Medicine* 37, no. 4 (Oct-Dec 2015): 381-7.

al-Maydānī, ʿAbd al-Ghanī al-Ghanīmī. *Al-Lubāb fi Sharḥ al-Kitāb.* Beirut: al-Maktaba al-ʿIlmiyya, ND.

Meshal, Reem. *Sharia and the Making of the Modern Egyptian: Islamic law and custom in the courts of Ottoman Cairo.* Cairo: American University in Cairo Press, 2014.

Metcalf, Barbara. *Islamic Revival in British India: Deoband, 1860-1900*. Princeton: Princeton University Press, 1982.

Minault, Gail. "The Perils of Cultural Mediation: Master Ram Chandra and Academic Journalism at Delhi College" in *The Delhi College: Traditional Elites, the Colonial State, and Education before 1857,* edited by Margrit Pernau. Delhi: Oxford University Press, 2006.

al-Minyāwī, Muḥammad Ḥasanayn ibn Muḥammad Makhlūf. *Taṭbīq al-Qānūn al-Faransāwī al-Madanī wa al-Jināʾī ʿala Madhhab al-Imām Mālik.* Cairo: Dār al-Salām, 1999.

Mitchell, Timothy. *Colonising Egypt.* Berkeley: University of California Press, 1988.

Morgan, Walter and Arthur George Macpherson. *The Indian Penal Code With Notes.* Calcutta: G.C. Hay & Co., 1863.

Mubārak, ʿAlī. *Al-Khiṭaṭ al-Jadīda li Miṣr al-Qāhira wa Muduniha wa Bilādiha al-Qadīma wa al-Shahīra*. Bulāq: al-Maṭbaʿa al-Amīriyya, 1887.

_____. *Ḥayātī.* Cairo: Maktaba al-Ādāb, 1989.

Mudhakkirāt Nubār Bāshā, translated by *Jārū Rūbayr Ṭabaqiyyān.* Cairo: Dār al-Shurūq, 2009.

Muḥammad, Muṣṭafa (Bek). "al-Ijrām fī Miṣr," in *al-Kitāb al-Dhahabī li al-Maḥākim al-*

Ahliyya. Bulāq: al-Maṭbaʿa al-ʾAmīriyya, 1938.

Mumcu, Ahmet. *Osmanlı Devletinde Siyaseten Katl.* Ankara: Ajans-Türk Matbaası, 1963.

Mūsa, Nīfīn Muḥammad. *Mukhtārāt min Wathāʾiq al-Iftāʾ al-Miṣrī fī al-Qarn al-Tāsʿ ʿAshr.* Cairo: Dār al-Kutub wa al-Wathāʾiq al-Qawmiyya, 2013.

al-Mutʿāfī, Riḍwān Shāfiʿī. *al-Jināyāt al-Mushtarika fī al-Qānūn wa al-Sharīʿa.* Cairo: al-Maṭbaʿa al-Salafiyya, 1930.

al-Nīsābūrī, Muslim b. al-Ḥajjāj. *Ṣaḥīḥ Muslim.* Liechtenstein: Thesaurus Islamicus, 2000.

Nuʿmānī, Shiblī. *Safarnāma-e Rūm wa Miṣr wa Shām*. Delhi: Qawmī Press, 1901.

Oberer, Walter. "The Deadly Weapon Doctrine: Common Law Origin," *Harvard Law Review* 75, no. 8 (Jun 1962): 1565-1576.

The Penal Code of France, Translated into English. London: H. Butterworth, 1819.

Peters, Rudolph. "'For His Correction and as a Deterrent Example for Others:' Meḥmed ʿAlī's first criminal legislation (1829-30)," *Islamic Law and Society* 6, no. 2, The Legal History of Ottoman Egypt (1999): 164-92.

_____. "From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified." *Mediterranean Politics* 7, no. 3 (2002): 82-95.

_____. *Crime and Punishment in Islamic Law.* New York: Cambridge University Press, 2009.

Powell, Avril. *Scottish Orientalists and India: the Muir Brothers, Religion, Education, and Empire.* Rochester, NY: Boydell Press, 2010.

Powers, Paul. *Intent in Islamic Law: Motive and meaning in Medieval Sunnī Fiqh.* Leiden: Brill, 2006.

Qadrī, Muḥammad (Bāshā). *Taṭbīq mā wūjida fī al-qānūn al-madanī – al-faransī – muwāfiq*^{an} *li*

madhhab Abī Ḥanīfa. Mss. 48119 Dār al-Kutub, Cairo.

_____. *Murshid al-Ḥayrān ila Maʿrifat Ahwāl al-Insān fī al-Muʿāmalāt al-Sharʿiyya ʿala Madhhab al-Imām al-Aʿẓam Abī Ḥan īfa al-Nuʿm ān,* edited by Muḥammad Aḥmad Sirāj. Cairo: Dār al-Salām, 2011.

"Qatl az Bandaqa Raṣāṣiyya," *Decisions of the Majlis-e ʿĀliyya-e ʿAdālat* 91. Hyderabad: Maṭbaʿ-e Muqannin-e Dakkan, 1887.

Rabb, Intisar. *Doubt in Islamic Law: A history of legal maxims, interpretation, and Islamic criminal law.* New York: Cambridge University Press, 2015.

Riḍā, Rashīd. "Rabbanā innā aṭaʾnā sādatanā wa-kubarāʾanā fa-aḍallūnā al-sabīlā," *al-Manār* 1 (1898): 606-10

Rifʿat, Khalīl. *Kulliyyāt Sharḥ al-Jazāʾ.* Beirut: al-Maṭbaʿa al-ʿUmūmiyya, 1886.

Robinson, Francis. *The ʻUlama of Farangi Mahall and Islamic Culture in South Asia.* London: C. Hurst, 2001.

Rohe, Mathias. *Islamic Law in Past and Present.* Leiden: Brill, 2015.

Rubin, Avi. "Ottoman Judicial Change in the Age of Modernity: A Reappraisal." *History Compass* 7, no. 1 (2009): 119-140

_____. *Ottoman Nizamiye Courts: Law and Modernity.* New York: Palgrave Macmillan, 2011.

_____. "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification," *Journal of the Economic and Social History of the Orient* 59, no 5 (2016): 828-56.

_____. "Was There a Rule of Law in the Late Ottoman Empire?" *British Journal of*

Middle Eastern Studies (2017), Published October 18, 2017, http://dx.doi.org/10.1080/13530194.2017.1383883.

"Ṣalāḥiyyat al-Sharīʿa li Kull Zamān wa Makān," al-Jazīra Online, Last modified April 4, 2004, http://www.aljazeera.net/programs/religionandlife/2004/6/3/صلاحية-الشريعة-لكل-زمان-ومكان.

Saleh, Nabil. "Civil Codes of Arab Countries: The Sanhuri codes," *Arab Law Quarterly* 8, no. 2 (1993): 161-167.

Sālim, Laṭīfa Muḥammad. *Al-Niẓām al-Qaḍāʾī al-Miṣrī al-Ḥadīth.* Cairo: Dār al-Shurūq, 2010.

al-Sanhūrī, ʿAbd al-Razzāq. *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī.* Cairo: Maʿhad al-Buḥūth wa al-Dirāsāt al-ʿArabiyya, 1967-8.

al-Sarakhsī, Muḥammad b. Aḥmad. *Al-Mabsūṭ.* Beirut: Dār al-Maʿrifa, ND.

Schacht, Joseph. *An Introduction to Islamic Law.* Oxford: Oxford University Press, 1982.

Schneider, Irene. "Imprisonment in Pre-Classical and Classical Islamic Law," *Islamic Law and Society* 2, no. 2 (1995): 157-173.

al-Shāfiʿī, Muḥammad b. Idrīs. *Al-Umm.* Beirut: Dār al-Maʿrifa, ND.

Shalaqany, Amr. "Islamic Legal Histories," *Berkeley Journal of Middle Eastern & Islamic Law* 1, no. 1 (2008): 2-82.

al-Shayyāl, Jamāl al-Dīn. *Tārīkh al-Tarjuma wa al-Ḥaraka al-Thiqāfiyya fī ʿAsr Muḥammad ʿAlī.* Cairo: Dār al-Fikr al-ʿArabī, 1951.

_____. *Rifāʿa Rāfiʿ al-Ṭahṭāwī.* Cairo: Dār al-Maʿārif, 1958.

Skuy, David. "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century," *Modern Asian Studies* 32, no. 3 (1998): 513-557.

Siddiqui, Sohaira. "Navigating Colonial Power: Challenging Precedents and the Limitation of

Local Elites," *Islamic Law and Society* 25, no. 4 (2018): 1-41.

Singha, Radhika. *A Despotism of Law: Crime and justice in early Colonial India.* Delhi: Oxford University Press, 1998

Stilt, Kristen. "'Islam is the Solution:' Constitutional Visions of the Egyptian Muslim Brotherhood," *Texas International Law Journal* 46 (2010): 73-108.

_____. *Islamic Law in Action: Authority, discretion, and everyday experiences in Mamluk Egypt.* Oxford: Oxford University Press, 2012.

Surridge, Lisa. "On the Offenses Against the Person Act, 1828," *BRANCH: Britain, Representation and Nineteenth-Century History*, edited by Dino Franco Felluga, Last modified January 2013, http://www.branchcollective.org/?ps_articles=lisa-surridge-on-the-offenses-against-the-person-act-1828.

al-Suyūṭī, Jalāl al-Dīn. *Jamʿ al-Jawāmiʿ*. Cairo: Dār al-Saʿāda li al-Ṭabāʿa, 2005.

al-Ṭabarī, Muḥammad b. Jarīr. *Jāmiʿ al-Bayān ʿan Taʾwīl Āy al-Qurʾān* Beirut: Muʾassasat al-Risāla, 1994.

Tageldin, Shaden. *Disarming Words: Empire and the seductions of translation in Egypt.* Berkeley: University of California Press, 2011.

al-Ṭaḥāwī, Aḥmad b. Muḥammad. *Mukhtaṣar al-Ṭaḥāwī.* Hyderabad: Lajnat Ihyāʾ al-Maʿārif al-Nuʿmāniyya, ND.

al-Tanīmī, Sirāj al-Dīn ʿAlī b. ʿUthmān. *Al-Fatāwā al-Sirājiyya.* Beirut: Dār al-Kutub al-ʿIlmiyya, 2011.

Taylor, John. "Holding Egypt: Tracing the Reception of the Description de l'Égypte in Nineteenth-Century Great Britain." *Journal of the History of Collections* 19, no. 1 (2007): 152-3.

Thaman, Stephen C. “The Model Penal Code and the Dilemma of Criminal Law Codification in the United States,” in *Codification in International Perspective,* edited by Wen-Yeu Wang (New York: Springer, 2014): 165-183.

Trevelyan, George Otto. *Life and Letters of Lord Macaulay.* Project Gutenberg EBook #2647, published November 12, 2009.

Van der Veer, Peter. *Imperial Encounters: Religion and Modernity in India and Britain.* Princeton: Princeton University Press, 2001.

Wood, Leonard. *Islamic Legal Revival: Reception of European law and transformations in Islamic legal thought in Egypt, 1875-1952.* Oxford: Oxford University Press, 2016.

Yāsīn, Muḥammad. *Sharḥ Qānūn al-ʿUqūbāt.* Cairo: Maṭbaʿat al-Ṣādiq, 1886.

Zaghlūl, Aḥmad Fatḥī. *al-Muḥāmā.* Cairo: Dār al-Kutub wa al-Wathā’iq al-Qawmiyya, 2015.

Zaman, Muhammad Qasim. *The Ulama in Contemporary Islam: Custodians of Change.* Princeton: Princeton University Press, 2002.

_____. *Ashraf ‘Ali Thanawi: Islam in Modern South Asia*. Oxford: Oneworld, 2007.

Zarinebaf, Fariba. *Crime and Punishment in Istanbul: 1700-1800.* Berkeley: University of California Press, 2010.

Ẓuhūr al-Dīn, Abū Saʿīd. *Ḥīrat al-Fuqahāʾ wa Ḥujjat al-Quḍāʾ.* Ms. 2669, Khuda Baksh Library, Patna.