CHAPTER 1

Introduction

This book deals with criminal or penal law (I will use both terms indiscriminately), the body of law that regulates the power of the state to inflict punishment, i.e. suffering, on persons in order to enforce compliance with certain rules. Such rules typically protect public interests and values that society regards as crucial, even if the immediate interest that is protected is a private one. A case in point is theft. Many societies make the violation of private property rights a punishable offence, although the interests harmed by such violations are in the first place private ones. However, these societies regard the protection of property as essential for the social order and protect it by stronger remedies than those available under private law. The interests protected by penal sanctions vary from society to society. In some societies sexual acts between consenting adults are of no concern to the authorities, whereas in others the rules regulating sexual contact are regarded as so crucial for the maintenance of social order that violations are severely punished. The same is true, for instance, with regard to the consumption of alcohol and other psychotropic substances. Criminal laws, therefore, give an insight into what a society and its rulers regard as its core values.

Islamic law does not conform to the notion of law as found, for example, in common law or civil law systems. Rather than a uniform and unequivocal formulation of the law it is a scholarly discourse consisting of the opinions of religious scholars, who argue, on the basis of the text of the Koran, the Prophetic *ḥadīth* and the consensus of the first generations of Muslim scholars, what the law should be. Since these scholars interpreted the sources in different ways, we often find various opinions with regard to one legal issue. The jurists and the rulers developed ways to make these differences manageable for those who had to apply the law. The institution of the 'school of jurisprudence' (*madhhab*, plural *madhāhib*), uniting legal scholars around certain legal doctrines, brought greater coherence and consistency, because the adherents of such a school were bound to follow the opinions of the school's founding fathers. Moreover, rulers could instruct

judges to adjudicate only according to opinions of one school. However, even within one law school, there are many controversies on essential legal issues. In order to organise and manage this doctrinal variety, the adherents of specific schools developed hierarchies of authority with regard to the different opinions.

In chapter 2 I will present this legal discourse on crime and punishment, paying attention to the various opinions. The aim of this study, however, goes beyond this: I intend also to show how the actual practice of Islamic criminal law was related to this discourse and how and to what extent this discourse was applied by the courts. This will be the subject of chapter 3. Chapter 4 deals with Islamic criminal law and modernisation. Since the first half of the nineteenth century, the application of Islamic criminal law has seen important changes. In most parts of the Islamic world, it was replaced by Western-type criminal codes. In some countries this happened at once, usually immediately after the establishment of colonial rule. Elsewhere it was a gradual process. It is this gradual process that I will analyse in chapter 4. Finally, chapter 5 is devoted to the importance of Islamic criminal law today, especially to the phenomenon of its return in some countries during the last decades of the twentieth century.

The presentation of the classical doctrine in chapter 2 forms the basis for the other chapters, in which I will examine its actual role in the criminal law systems in various periods and regions. The subject-matter is culled from the classical books of *fiqh* and I have tried to enliven and elucidate the doctrine by including specific and concrete cases from *fatwā* collections. I do not compare the Islamic criminal laws with modern criminal laws. However, in order to facilitate comparison, I have arranged the subject-matter according to what is customary in modern handbooks on criminal law: first I will discuss procedure and the law-enforcement officials; then the general concepts such as criminal liability, complicity and the penalties; and finally the specific offences. This arrangement enables those who are not familiar with Islamic law easily to identify the differences with their own criminal law systems. A completely comparative approach is, in my opinion, not meaningful and not feasible. It is not meaningful because it is not clear with what system of criminal law it must be compared. With a modern European or American system? Or with a pre-modern European system? Neither comparison will be very helpful in understanding the Islamic doctrine, whose early origins date back to the seventh century. Moreover, we are dealing with a fluid and often contradictory body of opinions and not with a uniform, unequivocal doctrine of criminal law. This makes comparison even more complicated.

This book differs from most studies on Islamic criminal law in that it is not limited to presenting the doctrine but also pays attention to how Islamic criminal law 'worked on the ground', i.e. how it was actually used in criminal law enforcement. We cannot assume that this was the same everywhere in the world of Islam during the entire pre-modern period. The levels of implementation of Islamic criminal law and the involvement of the different law-enforcing authorities (such as the *qāḍī*, the ruler and the executive officials) varied from region to region and from dynasty to dynasty. It depended on the form and organisation of the judicial institutions that states established. It is impossible to give a comprehensive picture covering the whole Muslim world from the eighth to the nineteenth centuries. This is a stage of scholarship that we have passed. We no longer try to find 'the Islamic essence' in the history of the institutions of the Muslim world, but rather confine ourselves to the study of specific regions and periods.

Thus, in order to study Islamic criminal law in practice, I have selected one specific state: the Ottoman Empire. There are two reasons for my choice. First, because this system is well documented, thanks to the preservation of the Ottoman Shari'a court records. Of no other Islamic state in the past are we so well informed about its organisation and its legal practice. These records show that the Ottoman Empire, from the sixteenth to the eighteenth centuries, had a stable and fairly well-functioning system of criminal justice. The second reason for my choice is that legal and social historians have already done a great deal of research based on these records. I could use their studies as a starting point for my analysis of the Ottoman system of criminal law and of the role of the doctrine of Islamic criminal law in it. As I have done with my presentation of the classical doctrine, I will illustrate the way Ottoman criminal law worked with cases found in court records and in *fatwā* collections.

By selecting the Ottoman Empire I do not wish to suggest that the Ottoman system is somehow representative of 'the Islamic system of penal law'. The study of Ottoman criminal law is no more than a case study. Studies of other regions and periods that are now available (e.g. on Islamic Spain, see Further reading) show that there was a great diversity and that criminal justice was administered in very different ways. The division of labour and the delimitation of jurisdictions between the Shari'a courts, the ruler and the executive officials varied considerably.

The emergence of Western hegemony in the nineteenth century greatly affected the legal systems in the Islamic world. In most Islamic countries that came under European colonial rule, Shari'a criminal law was immediately substituted by Western-type penal codes. In some other countries,

however, this was a gradual process: there the final abolition of Islamic criminal law took place after a period of reform, during which Islamic criminal law continued to be implemented. Chapter 4 will analyse this period of transition. The processes of reform during this period are of interest because they show us which precisely were the frictions between systems of penal law based on the Shari'a and legal concepts based on Western law. I will use as examples two regions where reforms were introduced by Western colonial powers: India (between 1790 and 1807) and Northern Nigeria (between 1904 and 1960), and two regions where change was initiated by independent governments of centralising and modernising states: the Central Ottoman Empire (between 1839 and 1917) and Egypt (between 1830 and 1883), which at that time was an autonomous Ottoman province with its own legal system. In India and Nigeria, the colonial rulers directly interfered with the substance of Islamic criminal law and tried to mould it into something resembling Western criminal law, before replacing it entirely by a Western-type penal code. In Egypt and the Ottoman Empire the indigenous authorities reformed criminal law, building forth on the Ottoman system of dual jurisdiction in criminal law (i.e. the Shari'a enforced by the *qāḍī*s' courts and *siyāsa* justice administered, at their discretion, by executive officials and the Sultan). Here the locus of reform was *siyāsa* justice: its administration was transferred from the ruler and individual officials to specialised courts and its arbitrariness was restricted by the enactment of penal laws codifying the domain of *siyāsa*. Shari'a criminal law continued to be implemented without substantial changes by the *qāḍī* courts. For the greater part of the nineteenth century the entire legal system, both in Egypt and the Ottoman Empire, remained essentially Islamic. The new courts were not regarded as a challenge to Shari'a justice but rather as a supplement to it. However, here too, Islamic criminal law was abolished in the end.

In the title of chapter 4 I deliberately chose the word 'eclipse' to convey the meaning that Islamic criminal law became invisible, without, however, ceasing to exist. The application of Islamic criminal law came to an end (except for some isolated instances, such as Saudi Arabia). Its doctrine, however, lived on. It is studied by Islamic scholars, discussed and taught to students. Islamist parties and groups, striving for the establishment of an Islamic state, regard its enforcement as their most prominent goal. Islamist regimes that came to power, and other regimes that were already in power but wanted to enhance their legitimacy, introduced Islamic criminal legislation, which became an icon for a regime's Islamicity. In chapter 5 this process is analysed. In this chapter I also pay attention to the question of

whether these new Shari'a penal codes conform to internationally recognised human rights standards.

In conclusion a few technical remarks. Arabic and Ottoman terms and proper names are transliterated with diacritics according to the system used by *The International Journal for Middle Eastern Studies*. The main sources I have used are listed for each chapter or section in the first footnote. For quoting the Koran, I have in most cases used the translation by Mohammed Marmaduke Pickthall,[1] except that I have substituted the word 'Allah' with 'God'. For citing *ḥadīth*, I generally relied on al-'Asqalānī's compendium *Bulūgh al-marām min adillat al-aḥkām*.

[1] Mohammed Marmaduke Pickthall, *The meaning of the glorious Koran: an explanatory translation* (New York: Mentor Books, n.d.).

CHAPTER 2

The classical doctrine

2.1 INTRODUCTION

In this chapter I will discuss and analyse the classical doctrine of criminal law as found in the authoritative works of jurisprudence. I will pay attention to the various schools of jurisprudence (*madhhab*, plural *madhāhib*), including Shiite doctrine, and try to present the authoritative opinions of each school. This may seem somewhat confusing to the reader but it is necessary, first in order to convey how rich and variegated the legal discourse is, and second because I will refer to these opinions in the following chapters. To avoid further confusion, I will refrain from paying attention to the historical development of the doctrine, although I am well aware that the doctrine was not static and immutable. However, this is only recently recognised and there are still many gaps in our knowledge.

In order to make the variety of opinion manageable in practice and to impose some sort of order on it, two devices were used. The first and older one is the institution of the school of jurisprudence. Scholars tracing their doctrine to the same early authority regarded themselves as followers of the same school. Ultimately, there remained four of them in Sunni Islam: the Hanafites, Malikites, Shafi'ites and Hanbalites. These schools had, to some extent, a regional distribution: for instance, North Africa and Islamic Spain adhered to the Malikite school, Central Asia and the territory occupied by the Ottoman Empire was dominated by the Hanafites. In order to create greater legal certainty, rulers could direct the *qāḍī*s they appointed to follow one school. However, within one school there also existed various and contradictory opinions. In the course of time, jurists began to assess these different opinions and assign a hierarchy of authority. Some opinions were regarded as more correct than others. Although there was no complete unanimity about these hierarchies, they helped to make the legal discourse of one school manageable, especially for practitioners.[1]

[1] See Wael Hallaq, *Authority, continuity and change in Islamic law* (Cambridge: Cambridge University Press, 2001).

In the classical textbooks of *fiqh*, criminal law is not regarded as a single, unified branch of the law. It is discussed in three separate chapters:

(1) Provisions regarding offences against persons, i.e. homicide and wounding, subdivided into
   (a) those regarding retaliation (*qiṣāṣ*) and
   (b) those regarding financial compensation (*diya*).
(2) Provisions regarding offences mentioned in the Koran and constituting violations of the claims of God (*ḥuqūq Allāh*), with mandatory fixed punishments (*ḥadd*, plural *ḥudūd*); these offences are:
   (a) theft
   (b) banditry
   (c) unlawful sexual intercourse
   (d) the unfounded accusation of unlawful sexual intercourse (slander)
   (e) drinking alcohol
   (f) apostasy (according to some schools of jurisprudence).
(3) Provisions concerning discretionary punishment of sinful or forbidden behaviour or of acts endangering public order or state security (*taʿzīr* and *siyāsa*).

Categories (1 (a)) and (2) are expounded in the *fiqh* books with great precision and in painstaking detail. They may be regarded as constituting Islamic criminal law in its strict sense, with characteristic features that set it apart from other domains of the law, such as the absence of liability of minor and insane persons, the strict rules of evidence and the large part played by the concept of mistake (*shubha*) as a defence. Category (3) is a residual but comprehensive one under which the authorities are given wide-ranging powers. They may punish those who have committed offences mentioned under (1) and (2) but could not be convicted on procedural grounds (e.g. pardon by the heirs of a victim of manslaughter, or evidence that does not satisfy the strict requirements), and also those who have perpetrated acts that are similar to these offences but do not fall under their strict definitions. Moreover, under this heading the authorities can punish at their discretion all other forms of sinful or socially and politically undesirable behaviour. The punitive powers of the authorities are hardly restricted by law and, as a consequence, the doctrine offers little protection to the accused.

The provisions regarding bloodmoney (*diya*) (category (1 (b)) belong to the field of private law, since they deal not with punishment but with financial liability arising from a specific type of tort (i.e. homicide and wounding). Bloodmoney (*diya*) in cases of homicide or wounding is a financial compensation for damages suffered by the heirs of the victim (in cases of homicide) and for the victim himself (in cases of bodily harm). That

this is no punishment is clear from the fact that in many situations it is not the perpetrator who is liable for the bloodprice, but his 'solidarity group' (*ʿāqila*), usually his agnatic male relatives. Nevertheless, I will discuss the rules on bloodmoney here, since the subject is intimately linked with the criminal law of homicide and bodily harm.

In setting forth the doctrine, I will arrange the material according to what is customary in modern handbooks on criminal law. I will first deal with the law-enforcing agencies and procedure in criminal cases. In section 2.3 some general rules will be discussed regarding criminal responsibility, unlawfulness of the punishable offence and complicity. The various penalties recognised in Islamic criminal law will be the subject-matter of section 2.4. Thereafter, I will expound the doctrine of substantive criminal law, according to the categories found in the classical texts, i.e. homicide and bodily harm (section 2.5), the *ḥadd* offences (section 2.6) and, finally, discretionary punishment (section 2.7).

2.2 ENFORCEMENT AND PROCEDURE

2.2.1 Law-enforcement agencies and procedure[2]

In classical Islamic theory of government the head of state has wide-ranging executive and judicial powers and may pass legislation within the limits set by the Shariʿa. Specialised judicial organs, such as courts staffed by single judges (*qāḍī*s) operate on the basis of delegation by the head of state. The latter, however, retains judicial powers and may adjudicate certain cases himself or entrust other state agencies with hearing and deciding them. Moreover, he may issue instructions to the judicial organs with respect to their jurisdiction.

Classical doctrine recognises, apart from the head of state himself, three law enforcement agencies. The most prominent is the single judge, the *qāḍī*, adjudicating cases on the basis of the *fiqh* doctrine. However, officials in charge of public security, such as governors, military commanders and police officers, also have jurisdiction, especially in criminal cases. But unlike the *qāḍī*, they usually deal with crime according to political expediency rather than on the basis of the legal doctrine. This jurisdiction is called *siyāsa*. The delimitation of the jurisdictions of the *qāḍī* and the executive

[2] This part is mainly based on Christian Müller, *Gerichtspraxis im Stadtstaat Córdoba: Zum Recht der Gesellschaft in einer malikitisch-islamischen Rechtstradition des 5./11. Jahrhunderts* (Leiden: E. J. Brill, 1999) and Emile Tyan, *Histoire de l'organisation judiciaire en pays de l'islam*, 2nd rev. edn. (Leiden: E. J. Brill, 1960), pp. 567–650.

officials varies according to time and place. A final agency is the *muḥtasib* (also called *ṣāḥib al-sūq*, market inspector), an official supervising trade practices, public morals and the observance of religious duties.

The *qāḍī* may award punishment, but only on the strength of a sentence passed after a formal procedure. Trials before the *qāḍī* are adversarial, i.e. they aim at settling a dispute between a plaintiff and a defendant. The plaintiff, i.e. the victim or his heirs, must prove his claim against the suspected perpetrator, acting as the defendant. If the former succeeds, the *qāḍī*, after questioning the latter about whether he can produce evidence in his own defence (*iʿdhār*), will find for the plaintiff. The *qāḍī*'s role is passive, i.e. he does not investigate the facts of the case but only supervises the observance of the rules of procedure and evaluates the evidence produced by the parties. The plaintiff cannot force a defendant to appear in court, and statements must be made voluntarily: the doctrine is almost unanimous that a confession extracted under duress is invalid.

Criminal law enforcement by executive officials, such as police officers and military commanders, is mentioned only occasionally in the law books. These officials had wide, nearly unlimited powers in dealing with crime. The eleventh-century jurist al-Māwardī lists the differences between the way these officials handled suspects and the procedure followed by the *qāḍī*. The most important dissimilarities between the two types of criminal justice are related to evidence. The military commanders and police officials may decide whether or not the charge is probable on the basis of circumstantial evidence and the accused's prior convictions and reputation and inflict punishment if they find that, in their opinion, it is likely that he is guilty. They also may go by the testimonies of non-Muslims and other people who are otherwise not qualified to testify in court. By way of psychological pressure, the law enforcers may impose an exculpatory oath on the accused. Physical pressure is also allowed: during interrogation, the accused may be beaten, but only to urge upon him the need for truthfulness with regard to what he has been accused of, and not in order to force him to confess. If he confesses while being beaten, the beating must be stopped and his confession is effective only if repeated a second time. Other powers possessed by executive officials but not judges are that they may remand the accused into custody during the investigation and that they may send repeat offenders to prison for life if it is expected that the public will be harmed by their crimes.[3] Whereas al-Māwardī regarded the

[3] ʿAlī b. Muḥammad al-Māwardī, *al-Aḥkām al-sulṭaniyya* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1966), pp. 219–21.

enforcement of law and order by executive officials as falling outside the realm of the Shari'a, this began to change during the thirteenth century. Since then many jurists have insisted that law enforcement by executive officials should also be governed by Shari'a norms. However, in order to make it possible for this to be implemented in practice, they had to relax the strict rules of evidence and procedure.[4]

The most important of these executive officials were the chief of police (*ṣāḥib al-shurṭa* or *ṣāḥib al-madīna*) and the market inspector (*muḥtasib* or *ṣāḥib al-sūq*). The jurisdictions of these functionaries varied in place and time, but there were some common elements. The *shurṭa* were originally military elite troops who would protect the rulers and high officials of the state, enforce law and order and crush rebellions and disturbances. As a consequence of this last duty, they would also investigate crime, and try and punish criminals. In many documents dating from various periods we find that the police had the jurisdiction to try *ḥadd* crimes, homicide and offences against public security. They could impose punishment on the ground of public interest. Simple suspicion was sufficient for establishing guilt. An important task with which the police would usually be entrusted was the execution of the *qāḍī*s' decisions.

Another official dealing with crime was, as we have seen, the market inspector. He would check weights, measures and coins, the quality of the commodities sold in the markets and shops, and see to it that no dishonest trade practices were used. Further, he would supervise the public space, checking the state of public roads, traffic and buildings. He also had the power to supervise the functioning of judicial personnel, such as scribes, notaries, legal counsels and magistrates. As a true *censor morum* he would protect public morals, by enforcing dress codes and rules on the mixing of men and women in public, and supervising prostitutes and brothels. Finally, he would enforce the public observance of religious duties, such as fasting during Ramadan and attendance of Friday prayer. His powers were extensive: whenever he saw unlawful actions that fell under his jurisdiction, he could punish the culprit on the spot and impose discretionary punishments such as beating, exposure to public scorn and confiscation of property. However, as he did not have the authority to carry out inquiries or supervise formal litigation, he could only act if the facts of the case were undisputed, such as when the perpetrator had been caught *in flagrante delictu*.

[4] 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, 2 (2002), 168–93.