THE CONCEPT OF *TA'ZIR* (DISCRETIONARY PUNISHMENT) IN THEORY AND IN PRACTICE

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Introduction

This article is based on the *sijills* of the law court of Bakhchisaray. The original registers are located in the Saint Petersburg library in Russia. In Ukraine, the library of Crimean Tatars holds a copy of these registers, where I obtained my copies. The cases to be examined in this article date from 1609 to 1675.

I chose the registers of the Bakchisaray court as a subject of study due to the fact that it was the highest court of the state as cases from the different parts of the Khanate were taken to it. Furthermore, examination of this registers my give us a clue about the relationship between the local and the central court and the hierarchy between them.

Analysis of the documents may show us how *ta'zir* was viewed by the judicial authorities and the way in which offenders were sentenced. Since our aim here is not the study of juristic doctrines, the reader should not expect all the details discussed in *fiqh* books.

It is worth mentioning at the outset that the court was headed by a single qadi who had two primary assistants, namely a clerk and a Muhzır (summoner). Furthermore, he had *shuhud al-hal* who witnessed the proceedings of the court and ensured its fairness and justice. The presence of *shuhud al-hal* in each case indicates that no procedure of the court took place without their attendance. In other words, the qadi did not see the cases without the presence of several witnesses. Our examination of different registers suggests that there were several men who regularly attended the court as *shuhud al-hal*. In some cases,

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several more joined them when a case involved a man from their own community or they interested in the case for some special reasons.[1]

Legal Doctrines:

Although jurists examined *hudud*[2] and *jinaya* (homicide and bodily wounding) crimes in minute details, they did not do so in *ta'zir*. To put it differently, *ta'zir* was not systematically and fully developed by Muslim scholars. It seems that they deliberately ignored it. This gave the administrative authorities a wide range of powers in legislation. For instance, Ottoman Sultans used this opportunity to enact laws known as *qanuns*. Some such as Togan, Köprülü, and Barkan view these *qanuns* as secular laws contravening the *shari'a* (*fiqh*).[3] Some others however see them as additions to *shari'a* without infringing its basic principles. To be precise, Schacht, İnalcik, Akgündüz, Karaman and Gerber share the view that, in terms of *fiqh*, these laws can be classified as *ta'zir*, and that they are not in conflict with *shari'a*.[4]

My examination of the Ottoman criminal code (*qanun*) indicates that it deals with almost all spheres of criminal law giving lip service to the *shari'a*. To give an example, the aforesaid code elaborately defines the outcome of a *zina* (un-marital sexual intercourse) crime paying lip service to *shari'a*. The *qanun* asks the man who violated this provision of the code to pay fine according to his/her economic conditions. Although it says almost nothing about the *rajm* of the criminal, it enumerates in minute detail the amount of the fine which is to be paid by each class of the society. It says: 'If a person commits *zina* and this is proved against him, if the fornicator is married and is rich, possessing one thousand *akçe* or more, a fine of 300 *akçe* shall be collected provided he does not suffer the [death] penalty (*rajm*); if he is in average circumstances, his

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1 R. C. Jennings, "Kadi, Court, and Legal Procedure in 17th Century Ottoman Kayseri", *Studia Islamica* IIL (1978); Cigdem, R. *The Register of the Law-Court of Istanbul 1612-1613: A Legal Analysis*, (Unpublished PhD Thesis, The University of Manchester, 2001), pp. 84-60.

2 *This* refers to five fixed punishments: *zina* (fornication), its counterpart, *qadfh* (false accusation of *zina*), *shurb al-khamr* (wine drinking), *sariqa* (theft), and *qat' al-tariq* (highway robbery). Al-Marghinani, Burhan al-Din, *Al-Hidaya*, (Egypt: Matba'a Mustafa al-Halabi, 1971), vol. 2, pp. 96-135.

3 Togan, A. Z. V. *Umumi Türk Tarihine Giriş*, (Istanbul: İsmail Akgün Matbaasi, 1946), pp. 271, 277, 375; Köprülü M. F. "Fıkıh", *Islam Ansiklopedisi*, vol. 4; Barkan, Ö. L. "Kanunname", *Islam Ansiklopedisi*, vol. 6.

4 İnalcik, H. "Mahkeme", *Islam Ansiklopedisi*, vol. 7; Akgündüz, A. *Osmanli Kanunnameleri ve Hukuki Tahlilleri*, (Istanbul: Fey Vakfi. 1990), vol. 1, pp. 41-135; Karaman, H. *Mukayeseli Islam Hukuku*, (Istanbul: Nesil Yayinlari, 1996), vol. 1, pp. 218, 201, 221. For more discussion on this issue, see Schacht, J. *An Introduction to Islamic Law*, (Oxford: The Clarendon Press, 1964), p. 91; Gerber, H. *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*, (Albany: State University of New York Press, 1994), p. 35.

property amounting to six hundred *akçe,* a fine of 200 *akçe* shall be collected; if he is poor, his property amounting to four hundred *akçe,* a fine of 100 *akçe* shall be collected; and if he is [in even] worse [circumstances], a fine of 50 or 40 *akçe* shall be collected.'[5] The wording and the structure of this article of the code clearly indicates that a person who committed *zina* crime will receive fine rather than *rajm*. The *qanun* does no more than mention the *rajm*.

I would now like to go over juristic view of *ta'zir*, beginning with its definition. An eminent *Hanafi* scholar, Kasani (d.587/1191) defines *ta'zir* as a "crime which has no specified punishment in *shari'a*. It is a crime either against the right of God such as abandoning the prayer and fasting, or against the right of an individual such as harming a Muslim with a word or deed."[6] Maliki jurist Khurashi (d.1101/1690) in his commentary on *Mukhtasar al-Khalil* (d.776/1374) gives its definition as a "punishment [for a crime] which has no [specified retribution]. It differs according to people and their words and deeds [*al-'uquba allati laysa fiyha shay'un ma'lumun bal yakhtalifu bi ikhtilaf al-nas wa aqwalihim wa af'alihim*]".[7] It is defined by Nawawi (d.676/1277), who is a well known and respected *Shafi* jurist, as a "[punishment awarded] for crimes which have neither *hadd* nor *kaffara* (expiation) [*yu'azzaru fi kulli ma'siyatin la hadda lahu wa la kaffarata*]".[8] Hanbali jurist Ibn Qudama (d.620/1223) defines *ta'zir* as a "legal punishment for a crime which has no *hadd* [*al-'uquba al-mashru'a 'ala jinayatin la hadda lahu*]".[9]

A qadi is entitled to sentence any criminal, regardless of his sex, social status (free or slaves) or religious affiliation, to *ta'zir* at his discretion.[10] It can appear in various degrees and forms. It can be a warning, summoning to the court, exposing to scorn, expulsion,[11] corporal punishment,[12] imprisonment[13] or

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5 Heyd, U. *Studies in old Ottoman Criminal Law*, (Oxford: The Clarendon Press, 1973), p. 95.

6 Kasani, Abu Bakr b. Mas'ud, *Bada'i al-Sina'i*, (Beirut: Dar al-Kutub al-Arab 1982), vol. 7, p. 63.

7 Muhammad al-Khurashi, *[Sharh] al-Khurashi 'ala Mukhtasar Saydi al-Khalil*, (Beirut: Dar al-Sadr, 1900), vol. 8, p. 110.

8 Al-Nawawi, Yahya b. Sharaf, *Minhaj*, in the margins of *Mughni al-Muhtaj*, (Egypt: Matba'a Mutafa al-Halabi, 1958), vol. 4, p. 191.

9 Ibn Qudama, Abdullah b. Ahmed, *al-Mughni*, ed. Abdul Fattah Muhammad al-Halwa & Abdullah b. Abdul Muhsi al-Turki, (Cairo: Matba'a al-Hijri, 1990), vol. 12, p. 523.

10 Kasani, *Bada'i*, vol. 7, pp. 3-4.

11 Marghinani, *Hidaya*, vol. 2, p. 99; Al-Khatibi, *Mughni al-Muhtaj*, vol. 4, p. 192; Shams al-Din al-Maqdisi, Abu Abdullah Muhammad, *Kitab al-Furu'*, (Beirut: 'Alim al-Kutub, 1958), vol. 6, p. 110.

12 Ibn Humam, *Fath al-Qadir*, vol. 5, p. 350; Al-Khatibi, Muhammad al-Sharbibi, *Mughni al-Muhtaj ila Ma'rifat Ma'ani al-Alfadh al-Minhaj*, (Egypt: Matba'a Mustafa al-Halabi, 1958), vol. 4, p. 192.

death (*siyasa*).[14] For instance, according to jurists, the *ta'zir* of a scholar is to inform him of what he has done. If it was an administrative authority, he has to be summoned to the court, and admonished and exposed to scorn. In their view, the *ta'zir* of a middle class man or woman is to summon him/her to the court and to give him/her an imprisonment. The worst goes for the lower class who is to suffer corporal punishment and imprisonment.[15]

Here raises the question of whether or not there is a limit for the corporal punishment. In the view of Abu Yusuf (d.182/798), its highest limit is seventy five stripes. Whereas Abu Hanifa (d.150/767) and his disciple, Muhammad al-Shaibani (d.189/805) have the opinion that thirty nine lashes are the maximum.[16] Shafi (d.204/820), however, maintains that it should be less than forty for a free person and less than twenty for a slave.[17] Ahmed b. Hanbal (d. 241/855), the founder of the Hanbali school of law, limits *ta'zir* to ten strokes.[18] Imam Malik (d.179/795), does not set any maximum limit for *ta'zir*, leaving it to the discretion of the qadi.[19]

It is worth mentioning here that *ta'zir*, as reported by Ibn Humam (d.861/1456)[20] from Abu Yusuf, can be a fine. All other scholars mentioned above oppose to this particular option.[21] In Ottoman criminal code, most crimes result in fine. This is justified with the view of Abu Yusuf. In other words, taking the view of Abu Yusuf, Ottoman authorities gave priority to fine as a main remedy. It is very clear that their policy was to extract money from the criminals. This could have been the result of economic difficulties facing the state at that time. I will leave this to its experts.

The most important feature of *ta'zir* is that the offender can be forgiven and so does not receive any punishment. Ibn Humam justifies this principle with the following *hadith*: "A man came to the Prophet and said 'I met a woman and

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13 Ibn Humam, *Fath al-Qadir*, vol. 5, p. 353; Khalil, *Mukhtasar*, p. 332; Nawawi, *Minhaj*, vol. 4, p. 193; Ibn Qudama, *Mughni*, vol. 12, p. 526.

14 Marghinani, *Hidaya*, vol. 2, pp. 102, 134; Abdurrahman b. Muhammad, *Macmu'a al-Fatawa Shaykh al-Islam Ibn Taymiyya*, (Cairo: Al-Faruq al-Hadisa, 1857), vol. 35, p. 405. For a legal and historical study of *siyasa* punishments in the Ottoman Empire, see Mumcu, A. *Osmanli Devletinde Siyaseten Katl*, (Ankara: Ajans-Türk Matbaasi, 1963).

15 Ibn Humam, Kamal al-Din, *Fath al-Qadir*, (Egypt: Matba'a Mustafa al-Halabi, 1970), vol. 5, p. 345.

16 Marghinani, *Hidaya*, vol. 2, p. 117.

17 Nawawi, *Minhaj*, vol. 4, p. 193.

18 Ibn Qudama, *Mughni*, vol. 12, p. 524.

19 Khalil b. Ishaq, *Mukhtasar al-Khalil*, (Cairo: Matba'a Mashhad al-Husayni, 1900.), p. 332; Al-Khurashi, *[Sharh] al-Khurashi*, vol. 8, p. 110.

20 Ibn Humam, *Fath al-Qadir*, vol. 5, p. 345.

21 Ibid. vol. 5, p. 345; Ibn Qudama, *Mughni*, vol. 12, p. 526.

touched her but I did not have sexual intercourse with her,' the Prophet asked him 'Do you pray with us?' to which he replied 'Yes,' the Prophet, then, recited the Quranic verse: 'Virtues clean vices".[22]

There is no liability for death caused while implementing *ta'zir* unless it was intentionally caused.[23] However, according to *Shafi* scholars, the person who caused the death is liable to *diya* (blood-money).[24] They see it as a result of intent.

These are the basic points of Muslim jurists. The regulations of *qanuns* are very different. Along with imprisonment and monetary fines, we see pounding to death in mortars, bowstringing, burning, confiscation of offenders' property, castration, bastinado, banishment, penal servitude on the galleys, and so on as forms of *ta'zir* in *qanuns*.[25] This indicates that *qanuns* went beyond the limits set out by the jurists. The regulations of the *qanuns* perhaps were the requirement of the penal system of the time.

Lastly, the fatwas of Shaikh al-Islam Abu's-suud (d.982/1574) indicate that long imprisonment and corporal punishment (strokes) were the two common way of *ta'zir* punishment in the Ottoman Empire.[26]

The court cases

Our document contains 4 cases. One is about the *ta'zir* of a witness who retracted his evidence. The second and the third are about the imprisonment of debtors who avoided the payment of their debts. The last deals with a case in which a man was scared to death and was physically attacked. Let us now see the cases in close scrutiny.

Case 1:

15/?/4[27] The case is as follows:

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22 Ibn Humam, *Fath al-Qadir*, vol. 5, p. 346. See also Al-Qarafi, Shihab al-Din, *Al-Furuq*, (Beirut: Dar al-Ma'rifa, 1924), vol. 4, p. 181; Nawawi, *Minhaj*, vol. 4, p. 193; Ibn Qudama, *Mughni*, vol. 12, pp. 526-7; Al-Maqdisi, *Furu'*,vol. 6, pp. 114-5.

23 Marghinani, *Hidaya*, vol. 2, p. 117; Khurashi, *[Sharh] al-Khurashi*, vol. 8, p. 110; Ibn Qudama, *Mughni*, vol. 12, pp. 527-8.

24 Khatibi, *Mughni al-Muhtaj*, vol. 4, p. 191.

25 Heyd, *Criminal law*, pp. 263, 264, 265, 271, 273, 303, 304; See also Tekin, Y. *Şeriyye Sicilleri Işığında Osmanlı Devletinde Suç ve Cezaları* 1179/1765, (Unpublished MA Thesis, The Institute of Social Sciences, The University of Marmara 1995).

26 Düzdağ, M. E. *Şeyhulislam Ebussuud Efendi Fetvalari Işiğinda 16. Asir Türk Hayati*, (Istanbul: Enderun Kitabevi, 1972), pp. 47, 141.

27 This identifies the case as register 15, page? and entry 4. The question mark means that it is illegible.

From Bordas?, Rıdvan b. (son of) Devin cun brought a lawsuit against a *dhimmi* (non-Muslim residing in Muslim territory) called Tibruz v. (child of) Tort in the court:

"The dark ox which is in the possession of the said Tibruz was my own property. A person called Kurban *gazi* (1), from Akkerman (Belgorad-dnestrovski), claimed [that the ox had belonged to him (*mustahaqq*)]. In the presence of the qadi of Göz[leve?] (Yevpatoriya), he [Kurban (1)] took [the ox] from my possession, with the testimony of [two] witnesses called Şah Timur Aydal and Kurban *gazi* (2). Now, one of the witnesses called Şah Timur [Aydal] retracts his evidence. He [Şah Timur Aydal] should be interrogated according to *shari'a*."

When evidence about the ox being his own property in the first place was sought from him [Rıdvan], the persons called Sefer *gazi* and Kad testified that the ox had been [Rıdvan's] own property.

When they bore legal witness, their testimony was found acceptable.

In the court, Şah Timur [Aydal] retracted his evidence that the ox had belonged to Kurban *gazi* (1) who had claimed that it had been his own property.

It is recorded that [since he retracted his evidence] after the judgment [of the qadi of Gözleve] and after [Kurban *gazi* (1)] had taken possession of [the said ox], *ta'zir* and reparation are required. [The last judgement is based] on the rule that if one of the witnesses retracts his evidence, he is responsible for the half [of the value of the good.]

[The case was probably recorded sometime in *Rabi' al-Awwal* 1086 (5.1675), the date of the previous entry. R. C.]

Shuhud al-hal: Abdulkerim efendi (title for *madrasa* educated people)[28] b. Arslan efendi, Mehmet efendi, [and] Kırimi b. Ismail.

The case involved three men, namely Rıdvan, Kurban, and Tibruz. The function of the former two is clear, one being the plaintiff and the other being the *mustahaqq* (the original owner of the animal). Tibruz was standing in the dock of defendants as he was the present holder of the disputed animal. It is very likely that he purchased the beast from the *mustahaqq* namely Kurban.

The case makes it clear that the plaintiff lost his ox upon a false testimony. It was a man called Şah Timur Aydal who had borne false testimony costing the plaintiff his animal. The plaintiff was able to establish in the court that the beast had belonged to himself and that he had lost it upon false evidence. The bearer of false testimony corroborated his statement bringing the outcome to his favour.

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[28] Bayerle, G. *Pashas, Begs, and Efendis: A Historical Dictionary of Titles and Terms in the Ottoman Empire*, (Istanbul: The Isis Press, 1997), p. 44.

Since Şah Timur Aydal withdrew his former statement, the court sentenced him to *ta'zir* punishment and ordered him to pay compensation to Kurban. He was condemned to *ta'zir*, because his former statement was false, meaning that he had lied. Here, the court clearly followed the view of Abu Yusuf and Muhammad al-Shaibani who hold that giving false evidence in court merits *ta'zir*.[29] Yet, the form of *ta'zir* was not clarified. It is very likely that he was condemned to certain strokes, meaning that he was sentenced to corporal punishment.

For the latter, the court quoted the *Hanafi* rule that "if one of the witnesses retracts his evidence, he is responsible for the half of the value [of the good]".[30] The court gave a reason for his decision with a quotation. This is actually very rare in practice. Çiçek, who studied the conditions of *dhimmis* in the Cyprus court, notes that in some cases the court quoted Hidaya of Burhan al-Din al-Marghinani (d.593/1197), as a basis for his judgments.[31] My examination of the registers indicates that although the qadi did not give a reason for his judgements, he circumspectly issued his judgements following the Hanafi legal principles.

It is worth noting that the court underlined that retraction of evidence took place in the court, since otherwise it merits nothing.[32] It also noted that the ox had been taken into possession by the first claimant as otherwise no reparation is required.[33] These indicate that the court was very much circumspect in his decisions. In other words, before issuing his judgment, the qadi considered each point of the case.

The entry reveals nothing about the *dhimmi* against whom the case was brought. If he was the customer of the first claimant, as we have presumed, he would have had recourse to him[34] as he lost the title to the animal as a result of the trial. Actually, Tibruz was the real loser as the animal was stripped of his hands. It is very likely that he was a farmer and needed the ox for ploughing. He spent time to get a new ox. Now, it is all over, he needs to look for a new ox or else has to persuade the new owner namely Rıdvan to hand it over to him as he needs it and has to try a new bargain with him.

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29 Ahmed b. Hanbal and Shafi share this view. Marghinani, *Hidaya*, vol. 3, p. 132; Khatibi, *Mughni al-Muhtaj*, vol. 4, p. 191; Al-Makdisi, *Al-Furu'*, vol. 6, p. 104.

30 Marghinani, *Hidaya*, vol. 3, p. 133; Düzdağ, *Ebussuud*, pp. 135-6.

31 K. Çiçek, *Zimmis (Non-Muslims) of Cyprus in the Sharia Court: 1110/39 A:H. /1698-1726 A.D.* (Unpublished PhD Thesis, The University of Birmingham 1992), Section 'Preface'.

32 Marghinani, *Hidaya*, vol. 3, p. 132.

33 Ibrahim Al-Halabi, *Multaqa*, (Istanbul: Güryay Matbaasi, 1981), p. 307.

34 Marghinani, *Hidaya*, vol. 3, pp. 67-9.

It is not clear whether the claimant (*mustahiqq*) Kurban *gazi* (1) and the witness Kurban *gazi* (2) are the same person. He (2) might have been a close relative of Kurban *gazi* (1) bearing the same name as it is legally not allowed for a claimant to be the witness for his own case.[35]

On the question of what the motives of the false witness were, it is very likely his main motive was to get money. In other words, he was bribed for doing so. There might have been some other motives that we do not know. It is also possible that he made a mistake about the facts of the case. When he realised that he has mistaken in his statement, he retracted it taking upon himself the responsibility of his mistake. It seems to me that he was paid by the second claimant, otherwise why should he withdraw his evidence and receive *ta'zir* punishment. It might have not been easy for Rıdvan to persuade him to take back his testimony. Whatever the reason and the motives might have been, the case evidently shows that people bore false testimony. More research is required in order to be able to estimate how often it occurred and how widespread it was.

The case raises the question of why they did not take the case to the qadi of Gözleve as he heard the case in the first instance. It is highly likely that since the second claimant was not satisfied with his former decision, he wanted the case to be heard in a different court. He chose the Bakchisaray court, as it was situated in the capital of the Khanate and its decision carried heavier weight. Furthermore, it seems that society viewed it as an appellate court.

Lastly, I would like to note that both Muslims and *dhimmis* are identified by their fathers' name. While the documents identify a Muslim with a reference to his father with the word 'bin (son) of', 'veledi (child) of' was the word for the father of a *dhimmi*. This could indicate that although *dhimmis* were not segregated in the society as they had next-door Muslim neighbours, they were done so by the bureaucracy.

Case 2:

15/27/4 The case is as follows:

From the residents of Ferahkerman (Perekop), Mehmet b Hamza [illegible] brought a case in the court against a person called Musa b. Hüseyin, from the residents of Gözleve:

"The said Musa owes me seventeen lion coins (*esedî guruş*).[36] It needs to be paid. I request that he should be interrogated and that justice should be established."

After interrogation, the aforesaid Musa voluntarily admitted [that] he owes him lion [coins].

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35 Düzdağ, *Ebussud*, p. 135.

36 Coins of Holland. Sertoğlu, M. *Resimli Osmanli Tarihi Ansiklopedisi*, (Istanbul Matbaasi, 1958), p. 118.

[The case was probably recorded sometime in *Rabi' al-Awwal* 1086 (5.1675), since one of the entries mentions this date. R. C.]

Shuhud al-hal: Hasan efendi, Abdurrahman *çelebi* (a literate or a tradesman),[37] Hacı from Salacık, Ahmet efendi, *Muhzır* (an employee of the court, in charge of bringing criminals to the court),[38] [and] Mustafa b. Abdullah, broker (dellal).

The continuation of the same case:

15/27/5, The said debtor, Musa avoids paying his debts.

He has been imprisoned at the request of Mehmet *beşe* (Janissary).[39]

Shuhud al-hal aforementioned.

Here, we see a man imprisoned for his debts. In detail, a certain Mehmet filed a complaint against a man named Musa, accusing him of not paying his debt of 17 lion coins. After interrogation, the defendant admitted that he had been in debt to the plaintiff. It is to be noted that the court recorded that his confession was a voluntary one. Otherwise, it establishes nothing.

This was a *hüccet* document recording the statement of the plaintiff and the defendant. The second document however was an *ilam* containing the decision of the qadi. As recorded in the entry, the court sentenced the defendant to imprisonment at the plaintiff's request. Legally, the ruling of the court was the requirement of Hanafi law. In particular, it was the view of Abu Hanifa who holds that if a debtor who has properties does not pay off his debts, he, at the request of the creditors, be imprisoned until he does so.[40] He however does not entitle the judicial authorities to sell the debtors' properties in order to discharge his debts. Whereas his disciples Abu Yusuf and Muhammad hold the opposite view. They maintain that if a debtor avoids selling his goods to discharge his debts, judicial authorities can sell his properties and divide them among his creditors.[41]

The judgment of the court does not make it clear for how long he was imprisoned. It is very likely that it was until he paid off his debt. The imprisonment of the debtors was a way of making them pay off his debts. This

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37 İbid. p. 65; Bayerle, *Pashas*, p. 30; Zilfi, M. C. "We do not get along: Women and Hul Divorce in the 18th Century" in *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era*, ed. Zilfi, M. C. (Leiden: E. J. Brill, 1997), pp. 280, 294.

38 Heyd, *Criminal Law*, pp. 236, 271; Jenninngs, "Kadi", p. 151; Bayindir, A. *Islam Muhakeme Hukuku: Osmanlı Devri Uygulaması*, (Istanbul: İslami İlimler Araştirma Vakfi, 1986), p. 81.

39 Cigdem, *The Register of the Law-Court of Istanbul*, p. 46.

40 Marghinani, *Hidaya*, vol. 3, p. 285.

41 Ibid. vol. 3, p. 285; Halabi, *Multaqa*, p. 387.

makes sense if the debtor had enough property to discharge his debts. Otherwise, there is no point in jailing the debtor.[42]

On the question of why the court did not issue his judgment when the plaintiff filed his complaint, this is perhaps because he wanted to give them a chance to have a compromise. When they could not reach a deal, and the plaintiff insisted on his imprisonment, the court issued his judgment.

The entry does not reveal what the reason for the debt was and this was not the business of the court. However, the wording of the document suggests that it was for borrowing. There is also possibility that it was the result of a trade. The plaintiff might have sold something for seventeen lion coins but could not get his money. The presence of a tradesman and a broker in the court suggests this possibility.

The presence of a Muhzır among *shuhud al-hal* indicates that the defendant did not voluntarily come to the court. Rather he was brought by the executive authorities. To put it differently, the defendant did not have the intention of coming to the court to face the charges. This in turn suggests that the plaintiff attempted to get his money back outside the court, but he failed. The court became his last resort to recover his money.

Since the plaintiff was a Janissary we see several dignitaries in the court. They came to the court to witness the case and to ensure the fairness of the court and to give their backing to him.

Case 3:

15/27/10 The case is as follows:

Hasan b. Arslan stated in the court in the presence of Abdurrahman b. Osman:

"[Abdurrahman] owes me seventy *akçe* (silver coin)".

The defendant, Abdurrahman admitted that he owes him seventy *akçe*.

He avoids its payment.

He has been imprisoned at the request of the plaintiff.

[The case was probably recorded sometime in *Rabi' al-Awwal* 1086 (5.1675), since one of the entries mentions this date. R. C.]

Shuhud al-hal: *Seyyid* (title borne by the descendants of the Prophet Muhammad),[43] Fettah b. Mustafa, [and] Mehmet efendi b. Ismail.

As in the case above, we see here a certain Abdurrahman being sent to jail because of his debts. As recorded in the entry, the defendant corroborated

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42 Marghinani, *Hidaya*, vol. 3, pp. 104, 286; Halabi, *Multaqa*, pp. 287-8.

43 Bayerle, *Pashas*, p. 136.

the statement of the plaintiff that he had been in debt to him. Since he did not pay off his debt, he was jailed. Although the document does not make it clear to whom the statement 'he avoids its payment' belong, it is quite likely that it was the plaintiff's statement. It was this statement that brought about the imprisonment of the defendant.

This case is very similar to the one examined above except that here the statement of the sides and the decision of the qadi were recorded in the same entry. This suggests that the court did no give them a chance for compromise. Rather it issued his judgment after hearing the case. On the question of why they were not given an opportunity to resolve the matter mutually, it is perhaps because the qadi was aware of the fact that he was not going to discharge his debt should he give him a chance. This in turn suggests that in some cases the qadi relied on his personal knowledge.

These two cases indicate that the judge gave the sides of a case a chance to resolve the matter mutually when he saw that it is going to bring the issue to a satisfactory conclusion, whereas he did not give this opportunity where it would not work. These further show that people did not hesitate to demand the imprisonment of the man who delayed his payment. This raises the question of whether or not it effected the social relation, and how will they see each other when he released from the prison. Although there is no answer to these questions, it is likely that society viewed such demand as normal, and people were aware of the fact that they may go to prison if they failed in their payment. This does not however mean that it will not effect the relations between the debtor and the creditor. Of course, it will be effected, but it can be kept in minimum.

The presence of a Seyyid and an efendi in the court suggests that either the plaintiff or the defendant was an important man. Or else, they were his neighbours, friends or they had some sorts of relation. It is also possible that they were regular attendants of the court as *shuhud al-hal*.

Case 4:

1/?/7 The case is as follows:

Hacı Hüseyin stated in the presence of Mehmet b. Tat Ali:

"The said Mehmet threatened me with a knife (*biçak çikarub*) and tore my beard. He ruined my world? (*dünyanin sarsani? eyledi*).

When the said Mehmet was questioned face to face, he accepted [Hüseyin's accusation].

This happened in the second decade of *Rabi' al-Awwal* 1018 (6.1609).

This is the last entry to be examined in this study. In this document, we see a certain Hüseyin accusing his counter believer named Mehmet of threatening him with a knife and physically attacking him. The defendant's answer to the accusation was positive. This must have brought about a

conviction and a punishment. Neither of which was recorded. To speculate over what might have happened to the defendant, it is highly likely that he was condemned to *ta'zir* punishment, perhaps to several strokes, for his intimation of the plaintiff, as there is no other punishment available in *fiqh* and to *diya* or fine for his physical assault (tearing beard). In the view of Hanafi jurists, "if a person shaves or tears another person's beard and it does not come out again, the criminal is held liable to *diya*".[44] Whereas according to the Ottoman criminal code, 'if a person unlawfully beats [another person] or tears his beard, [the qadi] shall chastise [him], and from a rich person 20 *akçe*, from a poor person 10 *akçe* shall be collected as a fine'.[45]

On the question of why the plaintiff was intimidated and physically attacked, it is possible that it was the result of a dispute over a serious mater which is undisclosed. Otherwise, why should he assault him? The defendant could not be a mentally sick person as otherwise the court could not have questioned him.

Lastly, no *shuhud al-hal* were mentioned at the bottom of the case. It is possible that the scribe forgot attaching their name to his own copy. It is however very likely that he attached the names of *shuhud al-hal* to the copy handed over to the plaintiff. In this, we cannot be hundred percent sure, as we do not have that copy.

Conclusion

As has been seen, *ta'zir* is a concept which is not well defined and developed by the jurists, giving secular authorities a great scope to regulate criminal sphere of the law. My examination of *qanuns* indicates that criminal law was regulated by secular law paying lip service to *shari'a*. This does not however mean that by doing so they infringed its principles.

Although *ta'zir* can emerge in different forms and degrees, in our document and in the fatwas of Muftis, it appears in the form of corporal punishment and imprisonment.

Although it is very rare, we see the court giving a reason for his judgments quoting Hanafi text books. My examination of the judicial documents further indicates that the qadi was very much circumspect in his decisions considering each point of the case before issuing his judgment. Moreover, we see the court giving the sides of a case a chance to resolve the matter mutually where it will work.

The documents are limited strictly to the legal point. The reason behind the cases did not interest the court as its task was to solve to disputes but not to find out why it broke out. For this reason, they do not provide much about the

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44 Marghinani, *Hidaya*, vol. 4, p. 180; Halabi, *Multaqa*, p. 467.

45 Heyd, *Criminal law*, p. 104.

circumstances in which crimes were committed and they do not disclose the reasons behind the cases and the crimes. They say almost nothing about the social and pyschological implications of the crimes. However, as indicated in this study, it is certain that people bore false witness causing injustice and leading to the loss of legal entitlements. This study further indicates that the criminals did not voluntary come to the court, rather they were brought to the court by the executive authorities.

Appendix

According to my survey of the registers, the following served in Crimea in 1018/1609:

Director of Finance: Has *agha* b. Gayzor?

Director of Finance: Hüseyin efendi b. Abdi (previously)

Deputy of the Director of Finance: Hüseyin efendi

Head of the Treasury: Said *agha* b. Muslih

Glory of the most eminent and peers:[46] 'Iş Mehmet *agha* b. Karagöz

Paragon among the peers: Sefer *gazi* bey b. Derviş (za'amet[47] holder?)

Dergahi 'âli Müteferrikasi:[48] Ibrahim *agha* b. Mehmet efendi

Inspector of Caffa: Mevlana Musa

Mufti[49] of Crimea: Mehmet efendi

The judge of the Sultan:[50] Mehmet efendi

Military Judge: Abdullah efendi

Military Judge (dismissed): Davut efendi

The judge of Crimea and Rabat: Hasan efendi b. Mahmut

Judges: 1- Abdulaziz efendi (judge of Gözleve) 2-Abdulaziz efendi b. Shaykh Hisamuddin, (judge of Korlu?) 3-Abdurrahman efendi b. Allah kulu (judge of Yorulca?) 4- Dede efendi (judge of Küçük Karasu-Nijniygorsk) 4-Hasan efendi b. Mehmet (judge of Kerşin) 6- Ibrahim efendi (judge in Kirman) 7- Mahmut efendi (judge of Kagi?) 8- Mehmet efendi (judge of Karkayim?) 9-Mehmet efendi (judge of Korkir) 10- Musa efendi b. Eyüp *çelebi* (judge of Caffa) 11-Mutahhar efendi (judge of Yorulca?)

Mudarris (Professor): 1-Ebulkasim 2- Abdulaziz efendi b. Sihamüddin 3-Halil efendi (in the madrasa of Salacik)[51] 4-Halit efendi b. Hacbi 4-Mehmet efendi (in the madrasa of Olakli)

Scribe: 1-Dede *çelebi* 2- Mevlüt efendi

Katib al-Huruf (The undersigned): 1-Hasan 2- Hizir 3- Hizir *çelebi*

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46 His job was not specified.

47 A military fief with an annual income of between 20.000 and 100.000 *akçe*. He was expected to perform military and administrative duties. Sertoğlu, *Osmanli Tarihi*, p. 349; Bayerle *Pashas*, p. 163.

48 Member of the elite mounted personal escort of Khan.

49 Jurist who is competent to issue a fatwa. Ibid. p. 115.

50 This probably refers to a post in the Divan (council) of the Khan.

51 This madrasa is now converted to a hospital for mentally handicapped people.

Va'iz (Preacher in a mosque): Mehmet efendi

Imam: 1-Hacı Eman b. Musa 2-Mustafa *halife*[52]

Müezzin: Mustafa (in the mosque of [Sahibi giray I] Khan)

Shaykh (Head of a mystic order): 1-Shaykh Hasan b. Shaykh Ali (the following title accompanies his name: Paragon among the followers of spiritual path, may his virtue increase) 2- Islam efendi b. Said? (in the dervish lodge of Aziz)

Muhzır: 1-Fahri 2-Mahmut 3- Mensur 4-Perviz b. Abdullah

Racil:[53] 1-Faik (*beşe*) 2-Mustafa b. Hüseyin

In 1020/1611:

Director of Finance: Mehmet efendi

Judges: 1-Abdurrahman efendi (judge in Karasu-Nijniygorsk) 2-Ibrahim efendi (judge in Akmescit/Simferopol) 3-Kasim efendi (previous judge of Bakhchisaray)

Va'iz: 1- Ahmet b. Habib 2-Mehmet *çelebi* b. Abdulkadir

Hatib (Preacher): Abdulgani b. Abdullah [in the mosque of Devlet Giray Khan I (1551-77)]

Mullah: Can b. Abdullah

Mütevelli (Administrator of a *waqf*): Musa b. Mehmet (of the *waqf* of Sahibi Giray)

Muhzır: Recep *sufi*

Çavuş:[54] Ibrahim

In 1021/1612:

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52 A rank in a *sufi* order or a junior clerk of the treasury. Bayerle, *Pashas*, p. 74

53 Jennings translates '*racil*' as 'soldier' without further definition. It, however, seems to me that it is the synonym of *beşe*, since in many documents from the Istanbul law-court, *racil* and *beşe* were used interchangeably. Jennings, "The Society and Economy of Maçuka in the Ottoman Judicial Registers of Trabzon, 1560-1640" in *Continuity and Change in Late Byzantine and Early Ottoman Society*, ed. Bryer, A. &Lowry, H. (Birmingham: University of Birmingham, 1986), p. 137; Cigdem, *The register of the law court of Istanbul*, Section 'Glossary'.

54 "A military grade of soldier of diverse duties". Bayerle, *Pashas*, p. 29.

Judges: 1-Abdurrahman efendi al-Kirimi (judge in Yorulca?) 2- Dede efendi (judge in Bakhchisaray)

Mufti: Hasan efendi

Katib al-Huruf: 1-Hizir 2-Mevlüt

Imam: 1-Murtaza *halife* b. Musa *halife* 2- Mustafa

Muhzır: 1-Mahmut b. Abdullah 2-Perviz b. Abdullah

In 1077/1667:

Pasha:[55] Ali

The judge of Bakhchisaray: Abdurrahman [illegible]

Deputy Judge: 1-Hasan efendi 2-Vasif efendi

Scribe: Hasan efendi

Muharrir (scribe of the land and tax registers?):[56] Mehmet efendi

Va'iz of the mosque of Kuba: Abdullah efendi

Müezzin: Kirim *gazi*

Muhtesib:[57] 1-Ali *agha* 2-Mehmet Ali

Commander of a Castle: Salih

Subaşi:[58] Mehmet *çelebi*

Muhzır: Mehmet *gazi*

Veterinary Surgeon: Salih *halife* Ali

In 1082/1671:

Khan (The ruler of Crimea): Selim Giray b. Bahadir Giray

The judge of Bakhchisaray: Ahmet b. Recep

Professor: Hizir efendi

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55 Title for the highest military and bureaucratic dignitaries. Cigdem, *The Register of the Law-Court of Istanbul*, Section 'Glossary'.

56 Sertoğlu, *Osmanli Tarihi*, p. 214.

57 Market inspector who was responsible for checking prices in the markets to ensure that they conform with the official price (*narh*). Ibid. p. 112.

58 According to Pakalin, Sertoğlu and Bayerle, *subaşi* executed several functions including that of night guard and police. Pakalın, Z. M. *Osmanli Tarih Deyimleri ve Terimleri Sözlüğü*, (Istanbul: Maarif Basimevi 1954), vol. 3, pp. 259-61; Sertoğlu, *Osmanlı Tarihi*, p. 298; Bayerle, *Pashas*, p. 238.

Mullah: 1-Abdulfettah b. Mustafa 2-Arslan
Imam: 1-Gayretli Ali 2-Kutlu Ali
Muhtesib: Nasif b. Abdullah
In 1085/1674:
Khan: Selim Giray b. Bahadir Giray
The judge of Bakhchisaray: Mustafa b. Hacı Mehmet (in August)
Shaykh: Abdullah efendi b. Musa efendi
Muhtesib: Ebu Bekir *halife*
Muhzır : Ahmet efendi
Broker: Mustafa b. Abdullah

In 1086/1675:

Professor: Mustafa efendi (in the madrasa of Salacik)
Scribe: Abdulkerim efendi (previously)
The undersigned: Ahmet efendi
Muhtesib: 1-Ebu Bekir *çelebi* 2-Sefer *halife*
Muhzır: 1- Ahmet efendi 2-Bayram b. Ali 3-Bayram Ali b. Zülgaffar

In 1087/1676:

Khan: Selim Giray
Defter al-Sultan (Director of Finance?): Mustafa *agha*
Pride of notables: Ali *agha* [Maliye? Sultan, (Director of Finance?)] 2-Ilyas *agha*
Pride of the peers: 1-Ahmet bey 2- Kasim *agha*
Serasker? *Qadi* (Commander-in-chief of a military campaign):[59]Abdulhamit
Agha of Nogay (Governor?): Mehmet
Military Judge: *Seyyid* Abdurrahman efendi
Judge of Bakhchisaray: 1-Ibrahim efendi 2-Ahmet efendi (previous)
Judge of Man Kefe (Caffa?): Kabil efendi
Professor: 1-Ahmet efendi (in the madrasa of Kubat) 2- Hizir efendi

[59] Bayerle, *Pashas*, p. 135.

Scribe: 1- Hasan efendi 2- Abdurrahman efendi (in Çorak göz) 3-Mehmet

The undersigned: Mustafa bey

Mullah: 1- Ahmet 2- Bekir 3-Ibrahim b. Hacı Mehmet 4-Abdurrahman (in the village of Çorak) 5-Abdurrahman (from the village of Kırmacı) 6-Gazenfer 6- Kara Ali [b.] Mehmet 7-Selim b. Ramazan (father and son)

Mütevelli: Ibrahim

Shaykh: 1- Ali efendi (from the village of Ediyrat) 2-Süleyman efendi 3-Yahya efendi b. Süleyman

Keeper of a tomb: Ibrahim

Door Keeper: Hasan

Balci Başi (Head of the honey makers?): Ali *agha*

Kethüda:[60] 1-Çorak 2-Muzaffer

Kethüda of *Koçkar* (ram): Hacı Giray Sultan[61]

Chief or commander:[62] Ali efendi

Muhzır 1- Abdul Baki 2-Karabas 3- Kat 4- Kurt 5-Murat *gazi*

Topçu (Artilleryman): Bekir Mullah

The following served as Khans according to Spuler in the periods given above:[63]

Selamet Giray I, son of Devlet Giray I (1608-1610)

Canbek Giray, grandson of Devlet Giray I (1610-1623)

Canbek Giray, grandson of Devlet Giray I (1610-1623)

Adil Giray, from the collateral line of Çoban Giray (1666-1671) or Mehmet Giray IV, 2. time, Brother of Bahadir Giray and son of Selamet giray? (1654-1666)

Adil Giray, from the collateral line of Çoban Giray (1666-1671) or Selim Giray I, son of Bahadir Giray I (1671-1678)[64]

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60 *Kethüda* is defined as the chief or representative of a craft guild. Huart, C. L. "Kahya", *Islam Ansiklopedisi*, vol. 6. For the concept of legal person in Muslim societies, see Cohen, A. "Communal Legal Entities in a Muslim Setting Theory and Practice: The Jewish Community in Sixteenth-Century Jerusalem", *Islamic Law and Society* 3 (February 1996), pp. 75-89.

61 He was the ruler of Crimea between 1683-1684. It is interesting to find him holding the post of a *Kethüda* in 1676.

62 *New Redhouse Turkish-English Dictionary*, (Istanbul: Redhouse Yayinevi, 1994).

63 Spuler, B. "Kirim", *EI*^{2}, vol. 5.

64 Our document establishes as a fact that Selim Giray was the ruler.

Selim Giray I, son of Bahadir Giray I (1671-1678)

Selim Giray I, son of Bahadir Giray I (1671-1678)