

The Transformation of Ottoman Criminal Law in the 19th Century: The Example of Crime of Complicity *

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Abstract

In XIX. century, the Ottoman State has witnessed changes in a number of areas. A review of the content of penal codes legislated during Tanzimat Era in both 1840 and 1851 reveals that the transformation in criminal procedure, judicial system, administrative fields was attempted to be accommodated with penal codes. The aim of this study is to seek answers to the question of how the criminal law of the Ottoman State changed in the period starting with the 1858 Penal Code in the nineteenth century within scope of *ta'zir* (discretionary punishment) and more particularly, crime of murder and complicity as one of special forms of crime. The discussions of the criminal law scholars of the period about the nature of Article 45 regarding complicity in the 1858 Penal Code and their proposed solutions and how they developed new rules due to need in the process and at this point how they benefited from European penal codes, commentaries and their scholars will be attempted to demonstrate. More importantly, it will be witnessed how Ottoman judges used the classical principles in their minds when implementing the article of code. However, when looking from a broad perspective, we will see how the Classical Law School, in which Ottoman State was included through its 1858 Penal Code, and the crime policy of France and the French Penal Code have influenced Ottoman Criminal Law.

Keywords

Islamic Law, Ottoman Criminal Legal History, 1858 Ottoman Penal Code, Ta'zir, Complicity, Crime, Ulama, Qadi

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19. Yüzyıl Osmanlı Ceza Hukukundaki Dönüşüm: Suça İştirâk Örneği

Öz

XIX. yüzyılda Osmanlı Devleti birçok alanda değişimlere tanık olmuştur. Tanzimat ile başlayan süreçte vaz' edilen gerek 1840 tarihli gerekse 1851 tarihli ceza kanunlarının içeriğine bakıldığında, muhakeme, adliye teşkilatı, idârî alanlardaki değişimin ceza kanunları ile yerleştirilmeye çalışıldığı görülür. Bu çalışmanın amacı, 19. Yüzyılda özellikle 1858 Ceza Kanunu ile başlayan süreçte Osmanlı Devleti ceza hukukunun nasıl değiştiği sorusuna tazir suçu ve daha da özeldede katl suçu ve suçun özel işleniş şekillerinden biri olan *suça iştirâk* konusu kapsamında cevap aramaktır. Dönemin ceza hukuku alimlerinin, suça iştirak ilgili 1858 tarihli Ceza Kanununda yer alan 45. maddenin mahiyetine dair tartışmaları ve çözüm arayışları, süreç içerisinde ihtiyaca binaen nasıl yeni kaide geliştirdikleri, bu noktada Avrupa ceza kanunlarından, şerhlerinden, hukukçularından nasıl faydalandıkları gösterilmeye çalışılacaktır. Daha da önemlisi, Osmanlı kadılarının kanun maddesini uygularken zihinlerindeki klasik öğretiyi nasıl kullandıklarına tanık olunacaktır. Ancak büyük resme bakıldığında, Osmanlı'nın 1858 ceza kanunu ile dahil olduğu *Klasik Hukuk Ekolü'nün*, Fransa'nın suç siyasetinin ve Fransa ceza kanununun, Osmanlı ceza hukukunu nasıl etkilediği anlaşılmalı çalışılacaktır.

Anahtar Kelimeler

İslam Hukuku, Osmanlı Ceza Hukuku Tarihi, 1858 Osmanlı Ceza Kanunu, Ta'zir, İştirak, Suç, Ulema, Kadi

INTRODUCTION

*Tanzimat Era*¹, “subsequent to defeats and failures that were persistent for 150 years” as stated in The Gulhane Imperial Edict (*Gülhane Hatt-ı Hümayûnu*), can be defined as a period of reforms in various fields including military, economic, social, cultural, administrative and the judiciary.² The reforms began primarily in military, economic and administrative fields at the end of XVIII. Century. But these reforms were of superficial character due to flaws in the process of adapting of the Ottoman State to modernity and its response to the challenge of change.³ The most salient characteristics of the Ottoman State in the nineteenth century were centralization and

¹ Tanzimat is considered to cover the period until the I. Meşrutiyet (First Constitutional Era), which started in 1876, by some and until the II. Meşrutiyet (Second Constitutional Era), which stated in 1908, by others.

² Its other name is *the Edict of Tanzimat (Tanzimat Fermanı)*. *Düstûr I. Tertip* (İstanbul: Matbaa-i Amire, 1289), 1: 4; See for more information: Reşat Kaynar, *Türkiye’de Hukuk Devleti Kurma Yolundaki Hareketler* (İstanbul: Tan Matbaası, 1960), 1; M. Şükrü Hanioğlu, *A brief history of the late Ottoman Empire* (Princeton : Princeton University Press, 2008), 42-52; Halil İncalcık, “Tanzimat Nedir?”, *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu*, ed. Halil İncalcık - Mehmet Seyitdanlioğlu (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2011), 13-16; Yavuz Abadan, “Tanzimat Fermanı'nın Tahlili”, *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu*, ed. Halil İncalcık - Mehmet Seyitdanlioğlu (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2011), 37-63;

³ M. Şükrü Hanioğlu, *A brief history of the late Ottoman Empire*, 42-47.

modernization.⁴ The reflection of these two concepts in the law has been in the form of legalization.⁵ After the declaration of The Gulhane Imperial Edict, the first statute was legislated in the field of criminal law in 1840. In 1851 the second penal code was legislated⁶. Both legislations had some articles not only about crime and punishment, but also about the new penal proceedings and judicial system. Additionally, there were some articles about the new administrative system and its functions as well.⁷ Both of these two codes were abolished by another code issued in 1858.⁸ All these penal codes were considered legislative steps taken within the domain of *ta'zir* (*discretionary punishment*) in the Sharia.⁹ Though the first article of 1858 Penal Code¹⁰ stated that this code was *ta'zir* based on its content, its scope was expanded in course of time in a way that it brought up laws instead of the Sharia law- inspired laws.

Both the Penal Codes, issued in 1840 and 1851, introduced the new principles about the criminal procedure:

- a) The evidence of *sharia* and *qanun*: The statement of "*şer'an ve kanunen*" (*literally means "under sharia and under the law"*) in the penal codes was used to state the ways of evidence is spotted in this period. These two codes had two evidence systems: *The Sharia evidence* and *the qanun (law) evidence*. Before these codes, it was a general rule that offender was sentenced in case a crime was evidenced by only the testifiers or confess. These codes provided that the crimes evidenced legally were punished.

⁴ M. Şükrü Hanioglu, *A brief history of the late Ottoman Empire*, 3-4, 60-63; Şerif Mardin, *Türk Modernleşmesi: Makaleler: IV* (İstanbul: İletişim Yayınları, 1991), 128-129.

⁵ Hıfzı Veldet Velidedeoğlu, "Kanunlaştırma Hareketleri ve Tanzimat", *Tanzimat-I: Yüzüncü Yıldönümü Münasebetiyle*, (Ankara: Maarif Vekaleti, 1940), 140-145; Mehmet Gayretli, *Tanzimat'tan Cumhuriyet'e Kanunlaştırma Çalışmaları*, (İstanbul: Nizamiye Akademi, 2015), 145-160.

⁶ *The New Code (Kanun-u Cedid)*, a supplementary law was issued in 1851⁶, in order to add new articles to The Imperial Ottoman Penal Code of 1840 (*Ceza Kanunname-i Hümayunu*). Some existing articles were rearranged, some others were completely or partially removed. Certain crimes that were thought to be missed beforehand were formulized and added to the Code. The point attracting the attention about the Penal Code of 1851 contained the articles addressing the common people more than the Penal Code of 1840. In addition, the 1851 New Code of 1851 did not abolish the 1840 Penal Code and both codes were continued to be used at the same time. See for the text of penal codes: Turkish Presidency State Archives of the Republic of Turkey-Department of Ottoman, *Bâb-ı Asâfi, Nizâmât*, 44; *Ceza Kanunname-i Hümayunu*, Süleymaniye Manuscript Library, Esad Efendi, 1877, 1-5.

⁷ This means that this Penal Code issued in 1840 was a multipurposed text that served both as a criminal code and administrative penal code and informed about the judicial organization. See: Carter V. Findley, *Osmanlı İmparatorluğu'nda Bürokratik Reform: Babîli, 1789-1922*, translator: Ercan Ertürk, (İstanbul: Tarih Vakfı Yurt Publications, 2014), 220-224; Ali Akyıldız, *Osmanlı Bürokrasisi ve Modernleşme*, (İstanbul: İletişim, 2004), 31-45; Yavuz Abadan, "*Tanzimat Fermanı'nın Tahlili*", *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu*, ed. Halil İnalçık- Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2011), 52-61.

⁸ *Düstûr I. Tertib*, 1: 537.

⁹ It can be understood from the first article of 1858 Penal Code as follows: "*as the execution of punishment for offenses directly against the state pertains to the state and also it is the obligation of the state to prevent the disturbance of the public order by offenses against an individual, this legal code is responsible for the specification of ta'zir punishment in various degrees, of which legislation and execution belongs to the administrators by the divine law*". See: *Düstûr I. Tertib*, 1: 537.

¹⁰ This penal code, modelling itself on the French Penal Code issued in 1810, underwent a series of changes until its abolishment in 1926.

Thus, the probability of punishment for an offense is increased and this was provided within the limits of the law.

- b) The principle of publicity: The case should be heard as publicly.
- c) The principle of hearing the case repeatedly until the offense becomes definite, if necessary.
- d) The principle of conducting the necessary investigations before hearing the case.

Innovations subsequent to the declaration of Tanzimat Edict in the field of criminal justice system include the establishment of Grand Councils (*Büyük Meclis*) and Small Councils (*Küçük Meclis*) in the periphery and hearing the cases of murders (*qatl*) and theft (*sirkat*) in these councils under the Sharia procedure and submitting decisions of the cases to the center (*Istanbul*) and not implement the punishments before obtaining the approval of the central institutions (e.g., the Supreme Council of Judicial Ordinances (*Meclis-i Vâlâ-yı Ahkâm-ı Adliye*; hereinafter, *the Supreme Council*), the Fatwa Office (*Fetvahane*, a branch working under the *shaykh al-Islam*) and the office of Sultan). The Ottoman State aimed to establish a strong links between the periphery and the center through a hierarchical system providing to be informed of the center about any crime committed in the villages, sanjaks or provinces.¹¹ These were a mixed council, composed of Muslims and non-Muslims, and their main task was to maintain administrative and financial order.¹²

In this period a transformation of the crimes and the punishments was witnessed as well as making the new principles in the criminal procedure and establishing a hierarchy in the judicial system:

- a) In the articles of the penal codes, there was the dualism in the form of crimes committed by commons and state officers: Offenses in many articles are ascribed only to state officers (military class, Ottoman ulama, vizier, etc). At this point there was a crucial parallel in the transition from a system where the sultan holds all the authority to a constitutional monarchy where the judicial and especially legislative powers were transferred to the Supreme Council were taken.¹³ Therefore, it is

¹¹ M. Şükrü Hanioglu stated that the establishment of a new balance between center and periphery was an existential imperative for the Ottoman State in the nineteenth century. See: *A brief history of the late Ottoman Empire*, 40-41; Omri Paz asserted that the Ottoman State tried to accommodate a policy of "interventionist" state by utilizing this new type of criminal justice system. See: Omri Paz, "Documenting Justice: New Recording Practice and the Establishment of an Activist Criminal Court System in the Ottoman Provinces (1840-late 1860s), *Islamic Law and Society* 21, 1/2 (2014): 85; And see: Ebru Yakut Türker, *Alternative Claims on Justice and Law: Rural Arson and Poison Murder in the 19th Century Ottoman Empire* (unpublished PhD dissertation, Boğaziçi University, 2011), 66-87; Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge : Cambridge University, 2006)...; Kent F. Schull, *Prisons in the Late Ottoman Empire: Microcosms of Modernity*, (Edinburgh: Edinburgh University, 2014), 17-18, 22-23.

¹² Only a few studies have been published on the criminal court system between 1840 and 1864. See for example: Rudolph Peters, *Crime and Punishment in Islamic Law : Theory and Practice from the Sixteenth to the Twenty-first Century*, (Cambridge : Cambridge University, 2006), 125-133; Ekrem Buğra Ekinci, *Tanzimat Devri Osmanlı Mahkemeleri* (İstanbul: s.l., 1999); Sedat Bingöl, *Tanzimat Devrinde Osmanlıda Yargı Reformu: Nizamiye Mahkemelerinin Kuruluşu ve İşleyişi 1840-1876* (Eskişehir : Anadolu Üniversitesi Edebiyat Fakültesi, 2004); Omri Paz, *Crime, Criminals and the Ottoman State: Anatolia between the late 1830s and the late 1860s* (unpublished PhD dissertation, Tel Aviv University, 2011); Avi Rubin, *Ottoman Nizamiya Courts: Law and Modernity*, (New York : Palgrave Macmillan, 2011).

¹³ Edouard Philippe Engelhardt, *Tanzimat ve Türkiye*, translator: Ali Reşad, (İstanbul: Kaknüs Publications, 1976), 48-49; Şerif Mardin, *Türk Modernleşmesi*, 127-131; Şerif Mardin, "Tanzimat Fermanı'nın Manâsı: Yeni Bir İzah Denemesi",

not surprising that the first regulations conducted at the beginning of this era were with regards to the criminal code. Issued in 1840, The Imperial Ottoman Penal Code (*Ceza Kanunname-i Humayunu*)¹⁴ contained both judicial and administrative criminal law. Because the new administrative system determined the obligations of officials as well as it set penalties in case these obligations were neglected or exploited.¹⁵

- b) The principle of the equality before law applied to Muslims- non-Muslims and commons- state officials: As being in the example of shepherd and vizier,¹⁶ this effort mainly aimed at putting an end to the inequality between the different segments of the society such as state officers (military class, Ottoman ulema) and members of class of commons. This period brought about a redefinition of the relationship between the ruler and ruled.
- c) Even if the offenses do not have any punishment for sharia (because the offense cannot be proved or the offender is forgiven by the heir of murdered or a peaceful agreement (*sulh*) is made between offender and the heir of murdered), there was a punishment for law. (*the principle of maslaha and huququ'llah*)
- d) The penalties of some crimes were more severe than its penalties in classic doctrine
- e) The principle of legality: the maximum and minimum limits of some penalties defined as ta'zir punishment in the doctrine were defined in these criminal laws.

In addition to elucidate the general characters of the change in criminal law at the first half of the nineteenth century, the aim of this article is to seek an answer to the question of how the penal law of Ottoman State changed at the second half of the century. Many studies have been published on the Ottoman Criminal Law. One of them is *Studies in Old Ottoman Criminal Law* by Uriel Heyd. This study is divided into two chapters and a conclusion in which mainly the development of the Ottoman Criminal Code (*qanunnames and siyasetnames*) from the time of Mehmed II through Bayezid II and Süleyman II, and a privately compiled seventeenth century code, which is the last Ottoman Criminal Code before the Tanzimat period, are studied. Additionally, the definition of the terms of "qanun and urf" (*law and custom*), the role of qadi and governors in the administration of justice, courts system, trial procedures and methods of punishment are also studied.¹⁷ Rudolph Peters with his book titled *Crime and Punishment in Islamic Law*¹⁸ and Mustafa Şentop with his study titled *Tanzimat Dönemi Osmanlı Ceza Hukuku: Kanunlar-Tadiller-Layihalar-Uygulama*¹⁹ and Said Nuri Akgündüz with his book titled *Tanzimat Dönemi Osmanlı Ceza*

Tanzimat: değişim sürecinde Osmanlı İmparatorluğu, ed. Halil İnalçık, Mehmet Seyitdanlıoğlu, (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2011), 91-102; Necdet Hayta – Uğur Ünal, *Osmanlı Devleti'nde Yenileşme Hareketi: (XVII. yüzyıl başlarından yıkılışa kadar)*, (Ankara: Gazi Bookstore, 2003), 120.

¹⁴ See for the text of penal code: *Ceza Kanunname-i Hümayûnu*, 22a-29a.

¹⁵ Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*, edited by Shahrough Akhavi, (New York: Routledge, 2005), 28-40.

¹⁶ *Ceza Kanunname-i Hümayûnu*, 1.

¹⁷ Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Menage, (Oxford: Oxford University, 1973).

¹⁸ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, (Cambridge : Cambridge University, 2006).

¹⁹ Mustafa Şentop, *Tanzimat Dönemi Osmanlı Ceza Hukuku: Kanunlar-Tadiller-Layihalar-Uygulama* [I.ya., t.y.] (İstanbul: Yayıncılık Matbaası, 2004)

*Hukuku Uygulaması*²⁰ and Ruth A. Miller with her study titled *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*²¹ made very significant contributions to the Ottoman Criminal Legal History.

These studies based upon the change of criminal code, justice system and trial procedure, offer the general and theoretical framework. This study will attempt to show how the Ottoman Criminal Law changed by focusing and zooming on only one subject (complicity of murder). Therefore, ta'zir punishment where the change can be better monitored and the crimes committed against the person (*katl*) among the ta'zir punishment were chosen as the study area. In addition, the study provided some important information about the problems encountered in the process, the attempt for the solution of the ulama and the implementation of the law by the qadis while answering the question of how the criminal law has changed in the case of complicity of crime which is one of the special ways of this crime especially in the second half of the nineteenth century. The present study seeks to contribute to a number of studies of the Ottoman Criminal Law by drawing on the primary sources and several documents of Ottoman achieve. Some of these primary sources are;

- *Mebâdi-i Hukuk-ı Ceza* written in 1888 by Nazaret Haçeriyân, an Armenian attorney who taught criminal law at *Mekteb-i Hukuk*.

- *Mufassal Nazariyyat-ı Ceza* written in 1898 by Mehmed Aziz, a criminal law scholar at *Mekteb-i Hukuk* and one of the head adjuncts of the commercial court at the same time.

- *Hukuk-ı Ceza* written by Servet in 1909.²²

1. THE CONCEPT OF "COMPLICITY" AND ITS MEANING BEFORE 1858

Although complicity in crime is a concept used in the classical doctrine, it differs from the expression of complicity in the penal code of 1858 in three aspects: First, the notion of the "complicity" refers to a situation where more than one person jointly commit a crime where all perpetrators are considered equally responsible. For example, if two people intend to kill a person together, this is a complicity and both are penalized with retaliation.²³ The second is that the statement of complicity is used only for the crimes of murder and bodily harm. For example, the statement of complicity is not used for those who commit the crime of theft or other crimes. The third is that in the classical doctrine, the punishment imposed on the offender who aided and abetted the primary offender is different from the punishment stated in the criminal code of 1858. In the classic doctrine,

²⁰ Said Nuri Akgündüz, *Tanzimat Dönemi Osmanlı Ceza Hukuku Uygulaması*, (İstanbul: Rağbet Publications, 2017).

²¹ Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*, edited by Shahrough Akhavi, (New York: Routledge, 2005).

²² These Ottoman Criminal Law books were written for the students of *Mekteb-i Hukuk* in 19th Century. *Mekteb-i Hukuk (The School of Law)* is foundation of today's the Department of Law at Istanbul University and was established in 1880 to raise judges for the Courts of Nizamiya. Dozens of Ottoman Criminal Law books were written at that time by qadis and attorneys who were also served as academics at *Mekteb-i Hukuk*. Over time, the lecture notes of these qadis and attorneys became the first written doctrines of modern criminal law in 19th Century. These books provide systematic information on the theory of 19th century criminal law, illustrate the challenges associated with putting the theory into practice. In addition, since the 1858 Ottoman Criminal Code was incorporated from French Penal Code, these textbooks often derive from western criminal literature, particularly while interpreting the articles of the 1858 Criminal Code.

²³ İbn Abidin, Muhammed Emin b. Ömer b. Abdülazîz ed-Dımaşki, 1252/1836 *Hâşiyetu Reddi'l-Muhtar ale'd-Dürri'l-Muhtar: Şerh-i Tenviri'l-Ebsar* (İstanbul: Kahraman Yayınları, 1984), X., 206-207.

while the punishment given to the offender who helped the primary offender was stated as "severe ta'zir" and the punishment of the primary offender was retaliation for sharia, it was seen in the 1858 penal code that the primary offender and second offender were sentenced to same punishment. In 1889 (h.1306), Nazaret Haçeriyân attracted attention to this issue and criticized Ömer Hilmi Efendi for confusing the statements and meanings of complicity in both classical doctrine and penal code of 1858. Ömer Hilmi Efendi, a leading scholar of the time, stated in his modern legal text entitled *Miyar-ı Adalet* the following expression in retaliation and blood money: "Issue 26: if a person is not complicit in the murder of a man but helps the murderer by holding the arms and legs of the deceased, for example, and facilitate the act of killing, or gives order to the murderer to commit such a crime or encourages him, he will be punished to severe ta'zir (ta'zir-i şedîd)".²⁴ He used the word of *complicity* (*iştirak*) for those who murder a person together and he did not use any term for those who help to someone to kill another one or encourage him or command him in this article. Haçeriyân points out that the difference between these two should be well conceived.²⁵

Another statement used in the classical doctrine connote the concept of the complicity in this period is *madhal* (to be get involved in crime). But, notion of *madhal* was also used to express the acts of those who help to the primary offender. Briefly, in classical doctrine both the statement of *complicity* and the statement of "madhal" are used to state both the primary offender and those who aid the primary offender to murder someone, in other words there is no special definition to state the position of who those help to the primary offender to murder.

In the penal codes issued in 1840 and 1851 after the declaration of Tanzimat Edict, the same approach in relation to the scope of statement of "complicity" in the classical doctrine remained. There are two articles referring to the crimes and punishments related to some aspects of the complicity:

First one is Article 5 of the annex to the 1840 Penal Code, stating if a person intends to kill another person but does not and instead he has someone killed by giving money or deceiving by another way, those who kill and have someone killed shall be sentenced to the same penalty, namely retaliation.²⁶ Secondly, in Article 14 of the 1851 Penal Code, the penalty of the same offense was modified: The person who killed the man is considered as a primary offender and he will be sentenced under Sharia and law. On the other hand, the person who has someone killed will be sentenced from one year to five years in prison, thus his punishment was reduced. Unlike the 1840 Penal Code, the statement of "accomplice" (*fâil-i muin*) was also mentioned in the 1851 Penal Code and his punishment was defined as from one year to three years in prison.²⁷ Compared to the concept of complicity in the 1858 Penal Code, the gist of the complicity and the scope of the concept in the 1840 and 1851 Penal Codes are quite different.

2. THE CONCEPTUAL DEBATES ON COMPLICITY AFTER 1858

Complicity (*iştirâk*) is a statement known in the criminal law of Ottoman classical period (before XIX. Century), yet there was a distinction between the concept in the classical period and the concept expressed in the doctrine of criminal law today in terms of the comprehension and the nature. The concept of complicity used

²⁴ Ömer Hilmi Efendi, *Mi'yâr-ı Adâlet* (İstanbul: Hacı Muharrem Efendi Press, 1301), 9.

²⁵ Nazaret Haçeriyân, *Mebâdi-i Hukuk-ı Ceza* (İstanbul: s.l., 1306), 48.

²⁶ *Ceza Kanunname-i Hümayûnu*, 2.

²⁷ Turkish Presidency State Archives of the Republic of Turkey-Department of Ottoman, *Bâb-ı Asâfi, Nizâmât*, 44.

today, entered into the Turkish criminal literature with The Penal Code of 1858. Article 45 of the aforementioned statute says; "*the principal offender or primary offender (fâil-i müstakil) who directly committed the crime and the accomplice (fâil-i muîn) are punished in the same way in the event that the law doesn't contain further clarification*".²⁸ The article didn't define the concept of complicity and only stated that the punishment given to who those complicit in crime was same as the principal offender in all cases except ones in which the law establishes additional principles. This situation has led to a lack of understanding of the complicity for a long time.

Article 45 was the translation of Article 59 of the French Penal Code of 1810, the source of the Penal Code of 1858. Therefore, the problems regarding the definition of complicity were based on the French Penal Code, because it didn't have the definition of the concept. However, Articles 60, 61 and 62 of the aforementioned statute provided information about the nature of the complicity by clarifying which acts were considered as the complicity. In this respect, the French Penal Code contains more explanatory information about this kind of crime than the Ottoman Penal Code. However, the deficiency of the definition in the Penal Code of 1858 was addressed by Article 209 of The Code of Criminal Procedure²⁹ issued in 1879, but it also couldn't solve the ambiguity of how Article 45 should be understood.

The author of the book titled *Mebadi-i Hukuk-ı Ceza* published in 1889 and the lecturer of criminal law in *Mekteb-i Hukuk*, Nazaret Haçeriyân defined the complicity as; "*sometimes, people can commit together a crime which a person can commit alone, these are the primary offenders (fâil-i müstakil), and some people don't commit to the crime but contribute to the crime by helping, their status is called accomplice (fâil-i muîn)*".³⁰ Although there is more than one act in the complicity, all these criminal acts are divided among the perpetrators/offender and thus all their trials are heard together in a single court and whole crimes committed are seen as a single crime and it is accepted that these crimes are spread among the perpetrators- *the principle of becoming undivided (şuyu)*.³¹

Ten years later in 1316 (h.1899), Mehmed Aziz, one of the lecturers of *Mekteb-i Hukûk*, defined the complicity in his book titled *Mufasssal Nazariyyât-ı Ceza* as; "*Complicity is defined as to unite for an illegal purpose and assist a person who directly commits an act that is forbidden by the law. The person who commits this act directly is called the primary offender, while the person who helps the primary offender is called the accomplice*".³²

In 1908 (h.1326) Servet initiated the most important conceptual debate about the concept of complicity. In his book titled *Hukuk-ı Ceza (Criminal Law)*, he complained about both of the terms "contribution" and "complice" were translated to Turkish as "iştirâk". However, "contribution" refers to an absolute "iştirâk" where there is no agreement or reconciliation among the offenders. However, there was no word corresponding to the term "complice" in Turkish, and he stated that he used the word "iştirâk-ı ferî" (*secondary complicity*) and this term referred to the complicity where a previous agreement took place between the offenders.³³ Servet made an important determination in terms of distinguishing these two from each other, especially because the courts

²⁸ Düstûr I. Tertip, 1: 540.

²⁹ Article 209: That a group of people gather together upon the alliance between them in a way for one to facilitate the commitment of a crime by another or help him in this.

³⁰ Nazeret Haçeriyân, *Mebâdi-i Hukuk-ı Ceza*, 114.

³¹ Dönmezer, Sulhi-Erman, Sahir, *Nazarî ve Tatbikî Ceza Hukuku- Umumî Kısım* (İstanbul: Beta Press, 1966), II, 488-501.

³² Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza* (Dersaadet: s.l., 1306), 60-61.

³³ Servet, *Hukuk-ı Ceza* (Dersaadet: 1326), 202-204.

have great problems about distinguishing complicity (*iştirâk*) and secondary complicity (*iştirâk-i fer'î*) from each other and they hesitate in jurisprudence.

In 1911 (h.1329) in course of changing Article 45 along with several other, the Chamber of Deputies (*Meclis-i Mebusan*) negotiated the conceptual issue Servet drew attention. They realized that the statement of "complice" translated from the French Penal Code as "iştirak/müşerek" should have been translated as "iştirak-i fer'î". After the discussion of the parliament, the statement of "iştirâk" was changed to "iştirâk-i fer'î" in Article 45.³⁴ The lack of definition of the complicity which was one of the deficiencies of the article and caused many problems, continued despite the change made to the text of the article. However, the article clarified more than its previous version, as it explained who the accomplices were and what acts they performed.

3. PRINCIPAL OFFENDER AND ACCOMPLICE

The most important element that differentiates the issue of complicity from other special situations of crime is where there are multiple offenders.³⁵ There are some important subjects that stand out at this point:

- a) Definitions of the principal offender and the accomplice,
- b) Terms for the realization of the state of complicity,
- c) Degree of offense handling of perpetrators (principal offenders and accomplices).

3.1. Who is Principal Offender and Who is Accomplice?

The perpetrators of complicity are defined as those who participate in the performance of an act prohibited by law either directly commit the crime or aid the offender. In the first status, all of those who contribute to the crime is called as the principal offender (*fâil-i müstakil* or *fâil-i asl*), and those who is in the second status is called as the accomplice (*fâil-i muîn* or *fâil-i fer'î* or *zî-medhal*).³⁶

In this century, Ottoman criminal legal scholars complaint about that there wasn't any article defining who principal offender and accomplice were, and referring to the distinction between them.³⁷ Particularly in some cases, it was very difficult to distinguish the two. In Article 209 of The Code of Criminal Procedure of 1879, the acts of the accomplice were partially described, but these statements in the law were not adequate simply because the number of these acts has increased over time and new incidents were encountered. At this point, questions on which acts should be considered as complicity and answers to these questions proliferated and

³⁴ Court Record of The Chamber of Deputies (*Meclis-i Mebusan Zabıt Ceridesi*), I. Period, III. Session, III. Volume, XXXXX. Conclusion, 17 February 1326, 4.

³⁵ Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 61-62; Servet, *Hukuk-ı Ceza*, 202-204.

³⁶ Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 60; Nazaret Haçeriyân, *Mebâdi-i Hukuk-ı Ceza*, 115.

³⁷ Nazarat Haçeriyân, *Mebâdi-i Hukuk-ı Ceza*, 118; Servet, *Hukuk-ı Ceza*, 204-207.

³⁷ Nazaret Haçeriyân, *Mebâdi-i Hukuk-ı Ceza*, 116.

became more detailed in time.³⁸ Therefore, the jurists constantly tried to define the acts of the principal offender and the accomplice. For example; Mehmed Aziz classified their acts as:

According to this, primary offenders are;

- a) Those who conduct an act that is defined as a crime by person or those who take part in the conduct of such an act,
- b) Those who make a person to commit the crime directly through threatening, terrorization, deception, giving money or promises,
- c) Those who promote the crime through printed material..

The accomplices are;

- a) Those who give instructions for the commission of the crime,
- b) Those who supply weapons and devices used in the commission of crime,
- c) Those who contribute to and facilitate the commission of crime, though the crime would still be conducted without their contribution and help.³⁹

Believing that the punishment assigned to the accomplices was not just and needed to be changed, the Ottoman ulema engaged in long and detailed discussions regarding who should be counted as the principal offender and who as the accomplice and which acts should be counted as complicity. Novel cases and situations encountered by ulama led these discussions to stay topical in the course of a long period. These discussions resulted in the adoption of a principle for the distinction between the primary offender and the accomplice: "Among those who were involved in the perpetration of a crime, those without whose acts and contributions the crime would not be possible to be perpetrated are considered to be primary offenders, whereas those without whose acts and contributions the crime would still be possible to be perpetrated are considered to be accomplices".⁴⁰ This principle made it possible to differentiate between two terms. Mehmed Aziz seeking a solution for the same problem in 1316 by using the French sources of the time, came across a rule and recounted it in his book: "The accomplice must know the crime and help with his own consent. If one of these two-term (knowing and intending) is missing, we can't mention the complicity and the accomplice".⁴¹

This raises a question: If both types of offenders would be punished in the same way, why did they try so hard to differentiate between the two terms? Servet is bringing together some of the answers given to this question as follows:⁴²

- a) There are some cases in which the distinction results in significant consequences. For example, the killing of one's father is a unique crime and therefore, its punishment would be a death sentence. However, if a man does not directly kill his father, but makes a secondary contribution to the

³⁸ Some of the acts of complicity requiring punishment are as follows: to keep watch during the realization of the crime to inform about the passers; aiding and abetting to the primary offender; to hide a material used in a murder or qabahat being partially or totally aware of the situation.

³⁹ Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza*, 67-68.

⁴⁰ Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza*, 61-62.

⁴¹ Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza*, 83-85.

⁴² Servet, *Hukuk-ı Ceza*, 225-228.

murderer, he is not sentenced to the same penalty as "murder of father" crime. On the other hand, the higher the number of accomplices of a theft incidence, the more severe the punishment may get.

- b) Both in the murder and qabahat (less serious criminal acts), the reasons that increase the severity of the punishment are concerned with the primary offender.
- c) In all crimes, the primary offenders are necessarily punished. However, in offenses that are considered as misdemeanors, the accomplices are not punished.
- d) In certain cases, determined by the law in effect, primary offenders and accomplices are punished separately and differently.

Because of all these reasons, making a distinction between these terms became of a great importance.

As it was said before, even if the offenders commit multiple crimes, the criminal law system of the period conceived the whole crimes as only one crime and divided the responsibility of these crimes among offenders. Its consequences are in practice as follows:

- a) the principal offender and accomplice have the same penalties
- b) their suits were heard together in the same court. Thus, Articles 209, 418 and 419 of The Code of Criminal Procedure applied to this case.

3.2. Terms of Complicity

Ottoman Ulama debated on whether every secondary act assisting to the principal act could not be considered as the complicity, and decided that there should be some terms that must be included in these secondary acts:

- a) If the principal crime is committed, complicity can be in question.⁴³
- b) Complicity is valid for the crimes committed by "performing" illegal activities. However, Articles 461 and 462 of the Code of Criminal Procedure mentioned some exceptions to which the complicity is valid for the crimes committed by "not performing" acts.⁴⁴
- c) Intent is necessary in complicity. In other words, if a person doesn't have an intent to complicit in a crime, he can't be punished.⁴⁵
- d) The act of complicity should be conducted before or during the commission of the crime. There should be an agreement between the accomplice and principal offender before or during the execution of crime. To complicit in a crime after it was committed was considered as a different crime.⁴⁶

3.3. Some Challenges Regarding the Deficiencies of Definition on the Notion of Complicity

Article 45 of the Penal Code of 1858 and the relevant articles of the Code of Criminal Procedure of 1879 were insufficient to answer many of the problems encountered over time. Therefore, the jurists sometimes strained to solve some challenging issues they faced. This is due to the fact that the French Criminal Law that

⁴³ Nazaret Haçeriyân, 117; Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 65.

⁴⁴ Nazaret Haçeriyân, *Mebâdi-i Hukuk-ı Ceza*, 118; Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 66.

⁴⁵ Servet, *Hukuk-ı Ceza*, 213-215; Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 66.

⁴⁶ Nazaret Haçeriyân, *Mebâdi-i Hukuk-ı Ceza*, 119; Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 60-61, 84.

served as the basis of the Ottoman Penal Code and the Code of Criminal Procedure, had many deficiencies on the complicity. Renowned legal scholar Garraud said that the French Penal Code has many inadequacies about the complicity that leads to misunderstandings. Mehmed Aziz reviewed the latest controversies and debates in the field of criminal law in France and mentioned them in his book. Some of the questions raised in this period are as follows:⁴⁷

- Is it possible to be a complicit in a criminal attempt?⁴⁸
- Should the principal offender be punished in case the accomplice commits another crime by exceeding the illegal act he agreed with the principal offender previously?⁴⁹
- Should an accomplice of the accomplice be punished?⁵⁰
- Do the aggravating circumstances and the extenuating circumstances of the principal offender affect the punishment of the accomplice?⁵¹
- Is it possible to complicit in the negligent crime?⁵²
- If the accomplice regrets for commission of the crime, does his sentence fall?⁵³
- If a general amnesty is declared about the principal offender, will the accomplice be included?⁵⁴

When encountered with new situations, the Ottoman criminal jurists sought solutions from other legal systems, in particular from the legal systems to which they belonged to the same school, and tried to follow up endorsements and views in their doctrine about how the articles were interpreted. In this sense, it should be said that French Criminal Law doctrines are accepted as a source not only in the drafting of the penal code but also in the implementation of penal code, thus the sources of criminal law have begun to change.

3.4. Implementation of Complicity

The determination of the punishment to be given to the principal offender and the accomplice has been the scene of the most heated debates on the subject of complicity. Article 45 of criminal code stated as "*the primary offender (or principal, fail-i mustakil) who directly committed the crime and the accomplice (fail-i muin) are punished in the same way in the event that the law doesn't contain further clarification*" was a general rule and it says that the accomplices were punished as the primary offender in all cases but the ones in which the law establishes additional principles. However, the exceptional cases mentioned by the law were excluded from this general rule. The exceptional cases referred to in Article 45 were as Articles 63, 66/2, 119, 175, 206, 217, 330. The most important of these is Article 175, and it says the person who is the accomplice of murderer should be sentenced hard labour.⁵⁵

⁴⁷ Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 76-77.

⁴⁸ See: Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 62, 86-89.

⁴⁹ See: Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 63, 85-86.

⁵⁰ See: Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 63-65.

⁵¹ See: Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 70-73.

⁵² See: Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 86-87.

⁵³ See: Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 88.

⁵⁴ See: Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 95-96.

⁵⁵ Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 69-70.

Nazaret Haçeriyân, stated that this article would result in unjust consequences if applied especially to serious murders and qabahat.⁵⁶ Therefore, he tried to interpret the article to remove this injustice and he suggested that the meaning of the expression with regards to the punishment of accomplice and the primary offender as the same is they should be punished with the same kind of penalty. For example, if the primary offender was sentenced to hard labour, the accomplice should also be sentenced to hard labour. However, he emphasized that the gravity of reasons and the lightness of reasons may change the duration of the penalty.⁵⁷

Article 45 of the penal code of 1858 was translation of Article 59 of the France Penal Code of 1810 where the sentences of the principal offender and the accomplice were same. In France at that time, there has been a variety of controversy about this article concerning the punishment to be imposed on those who have complicit in. The issue of how to understand the article has been the subject of discussion throughout the process. The reason for those who argue that both the principal offender and the accomplice should be punished in the same way in all respects and interpret the article in this way is that both the principal offender and the accomplice had the same intentions.⁵⁸ But some criminal legal scholars of the period argued that those who gather to commit a crime must have been sentenced in accordance with their influence on the crime. Criticizing the verdict of Article 59, was Garraud stated that even if the principal offender and the accomplice were sentenced in the same way in accordance with Article 59, the main purpose of the legislation was sentenced the principal offender and the accomplice with same kind of punishment, not with same degree of punishment.⁵⁹ However, in practice, this article would continue to be applied.⁶⁰ In countries such as Belgium, Germany, Japan, Denmark and Russia, the accomplice was sentenced less than the principal offender and the only exception in this regard was France.⁶¹

The Ottoman Empire did not follow France in practice, and did not punish both of them with same punishment, even if it was the same kind, as stated by Garraud.⁶² For example; if the principal offender is sentenced to hard labour, the accomplice is also sentenced to hard labour. However, if the jurist sentences the principal offender with ten years and the accomplice with five years transitory hard labour- According to The Penal Code of 1858 the transitory hard labour's maximum limit of sentence was fifteen years and minimum limit of sentence was three years-, this article will adapt to the purpose of the legislative and general rules. It should be noted that the judge has the authority to determine the punishments of the principal offenders and the accomplices. However, the absence of a clause that limits this authority vested in the judge in the law means that there will be no obstacle for the judge to use his authority arbitrarily.⁶³ The fact that this situation contains the possibility of causing injustice to a high rate was another deficiency of Article 45.

In practice, it is seen that the accomplice in almost all of the complicity cases related to the murder was punished in reference to Article 175 which is one of the exceptions to Article 45. For example; examination of the cases of Şeyh bin Mustafa and Cercis bin Ahmed and Muhyuddin bin Ahmed and Ali and Semseddin, locals in

⁵⁶ Nazaret Haçeriyân, *Mebâdi-i Hukuk-ı Ceza*, 48.

⁵⁷ Nazarat Haçaryan, *Mebâdi-i Hukuk-ı Ceza*, 120.

⁵⁸ Servet, *Hukuk-ı Ceza*, 231-233.

⁵⁹ Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza* 69-71.

⁶⁰ Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 89- 91.

⁶¹ Mehmed Aziz, *Mufasssal Nazariyyât-ı Ceza*, 76.

⁶² Servet, *Hukuk-ı Ceza*, 204-207.

⁶³ Servet, *Hukuk-ı Ceza*, 231-233.

Arbil who murdered of Seyyid İzzeddin bin Seyyid Veli, was conducted on 14 February 1324, at the case of the Criminal Division of the Court of First Instance of Kirkuk Sanjak, and based on hearing of witnesses and the statements of murderers and the statement taken before the murdered's death and the official report and medical documentation, the court ruled that Şeyh bin Mustafa killed Seyyid İzzeddin bin Seyyid Veli and others complicit in the murder; and the Court further sentenced Şeyh to fifteen years hard labour in reference to Article 174 as a principal offender and others were sentenced three years hard labour in reference to Article 175 as the accomplices.⁶⁴ As it can be seen, the court sentenced with reference to Article 175 in this case related to the complicity of murder. In light of researches, based on both of Cerîde-i Mehâkim (Journal of Courts) and Presidential Ottoman Archive I have seen that whole case related to the complicity of murder was referred to Article 175 in place of Article 45.

Was this the situation only in cases of murder because the punishment of the murder was considered severe? In cases where the punishment of the crime was lighter was Article 45 applied? A case of theft can be examined to answer this question and to prove that Article 45 was not applied again:

*"In 1895, defendants Behisnili Ahmed, Hüseyin Efendi, Arap Hasan, along with Zeyneb who aided and abetted the defendants, were charged in the Lower Court of Criminal Division due to an act of theft of the money and valuables of Public Defender Ali Rıza Efendi. Eventually Behisnili Ahmed, Hüseyin Efendi and Arap Hasan were sentenced to two years imprisonment in accordance with Article 222 of the Penal Code, and Zeyneb was sentenced to one years of imprisonment according to Article 230. It was decided by the court board that if the money and valuables are still available they will be returned; if not, they would be compensated by the offenders and the court expenses would be collected from the offenders; the case could be appealed."*⁶⁵

According to the record, Article 230 of the Penal Code that was referred for the assignment of Zeyneb's punishment is in fact not an article related to the aiding and abetting. Zeyneb was going to be punished by the same penalty as the primary offenders, but her penalty was reduced because she confessed and informed the officials about the incidence; and verdict was passed according to Article 230. Taking into consideration the case studies, it is clear that Article 45 discussed at length in legal literature was not preferred in Ottoman courts, based on the prevailing belief that it would result in an unjust sentence for accomplices.

At this point, the following question arises: why an article not cited in the cases is discussed so much, or why an article discussed so much is not cited in the cases? The answer is regarding with French criminal policy in the nineteenth century and with how Ottoman legal scholars implemented the criminal code in practice.

As noted before, the 1858 Penal Code was largely inspired by the 1810 French Penal Code. At this period, the question as to what the purpose and source of the punishment was, gained importance in Europe, and as an answer of this question, theories of "social benefits" and "absolute justice" appeared. Later, both of these theories were considered inadequate and a "mixed theory" was created. All these theories were referred to as "classical criminal law school" and then positivist school was established against the approach of this school. The French Penal Code promoted the mixed theory that was within the scope of the classical school. According to one of the ideas of this theory, the punishment to be given to an offender should be in line with the severity of the crime and the harm that was caused on the society. It appeared that being in charge of a committed crime was spread to a large area for protecting and maintenance of public order. This approach to punishment is thought to be

⁶⁴ Cerîde-i Mehâkim (Journals of Courts), 11 Jumada al-ukhra 1290-23 July 1289, Number: 16, 196-198.

⁶⁵ Türkiye Diyanet Foundation Center of Islamic Studies, Kahraman Maraş Qadi Register, 11, 45a.

related to the change in French administration of the time. *Napoleon Bonaparte*, who abolished the republic in 1804 and brought the constitutional monarchy, gave an order for the preparation of a new criminal law. After the French Revolution, a republican regime was proclaimed in 1792; however, the struggle between the social classes made it difficult to continue with the republican administration. After a period of terror and revolts, *Napoleon Bonaparte* came like a savior and justified the proclamation of his kingdom by showing this hard period. Considering the new penal code prepared in this background, it can be understood better why the crime and punishment were wanted to be spread to a large area.

The policy of spreading the crime and punishment to a large area can be seen in all units of the criminal law. As it is explained in this study, the offender and the accomplice would be punished in the same way according to the 1858 Penal Code. This situation can be considered as a result of the policies of the state. However, this issue created lengthy discussions among the Ottoman criminal jurists. Probably because this decision was considered unjust for the accomplice, it can be seen that they avoided to use Article 45 by referring to the other articles included in the law, sometimes with related justifications and sometimes even with unrelated ones.

The Ottoman criminal law, which was included in this criminal law system after The Penal Code of 1858, had to accept the criminal policy and rules of this system and Ottoman law men noticed to accept whole criminal system by adopting the French Penal Code. For example; *Nazaret Haçeriyan* attracted attentions to that point: "*in accordance with the principle that 'The branches and consequences of an action is built on the same basis that it was based on', a lawmaker or jurist should assign crimes and punishments according to the same system and principles that he accepted in criminal law philosophy. In our both criminal law and criminal procedure, French laws were accepted as a model. Therefore, it will be beneficial for the dissection of our criminal law to know which theory and system were accepted and abided by.*"⁶⁶ As it can be understood from this expression, criminal jurists were concerned that the integrity of the criminal law would be spoiled because the explanations and literature of criminal laws belonging to different schools were benefitted at the same time. According to him, if the criminal law is prepared by taking the French Penal Code as a model, this also means to accept the school that the French criminal law belonged to and the criminal system that it had. When a problem arises, the solution should not be looked for in criminal literature of other schools. The same system and school that the French criminal law belonged to should be resorted.

Ottoman law men followed to the doctrines of French Criminal Law about the complicity. However, they are separated from French Criminal Law in implement of law. By utilizing the gap in the statement of Article 45 "*...except that law doesn't contain further clarification*" they legislated some exceptional articles not included in the French Penal Code. The article 175, one of non-covered articles in the French Penal Code, was legislated when drafting the code.

In the bill of the Penal Code, which was submitted to The Chamber of Deputies (*Meclis-i Mebusan*) in 1910, a separate section consisting of four articles related to complicity was prepared based on the Italian Penal Code of that time.⁶⁷ These articles would remedy the deficiencies of Article 45 of The Penal Code and of Article 209 of The Code of Criminal Procedure and the punishment of the accomplice was rearranged to less more than the principal offender's in this new bill.

However, though this bill of the penal code was submitted to the parliament, there is no evidence that it was negotiated in the parliamentary official records, so it was thought that it was cancelled after it was submitted

⁶⁶ Nazaret Haçeriyan, *Mebâdi-i Hukuk-ı Ceza*, 5-6.

⁶⁷ *Ceza Kanunu Layihası* (İstanbul: Matbaa-i Amire, 1325), 65.

to parliament and the former code remained in force, with serious amendments done in 1911. The amendments to Articles 45, 175 and 230 concerning the complicity are crucial.

The Article 45, one of the most controversial articles of the Penal Code was amended in order to eliminate the criticisms made about it in 1329 (1911). The new Article 45 was as follows: ⁶⁸

"If more than one individual commits a murder or a qabahat together, or in a murder or qabahat composed of several acts, more than one individual contributes to the crime by conducting one or more acts with the intent of committing the crime, all of these individuals are called offenders and all of them are punished same as the primary offender.

Those who are the secondary contributors of a murder or qabahat are punished as the following unless the law makes a clear statement:

If the main act requires death penalty or life hard labour, the accomplice should be punished with at least ten years of temporary hard labour

If the main act requires life imprisonment, the accomplice should be punished with at least ten years of imprisonment

If the main act requires exile, the accomplice should be punished with three years of hard labour.

In other cases, the punishment is reduced to between one-third and one-sixth of the punishment specified for the primary offender.

Those who force a person to commit a murder or qabahat by giving gift or money, cheating, using his/her power or exploiting his/her position

Those who knew about a murder or qabahat before they were realized and helped its realization

Those who supply weapons, devices or other means to be used in the commitment of a murder or qabahat

And those who help with the completion of murder or qabahat or facilitate their preparation or realization on purpose

Are considered as the secondary accomplices of the murder or qabahat

Those who provide food, place to sleep, hide and gather to the offenders who commit thuggery or use force or violence against the safety of the state, public order, safety of individuals or properties on purpose being aware of their actions are called as secondary accomplices, as well.

Those who hide an object obtained through theft or theft or used in a murder or qabahat being partially or totally aware of the situation are also called the secondary accomplices of that act."

The Penal Code of 1858 remained in force until the new Turkish Penal Code adopted in 1926. A separate section consisting of four articles related to complicity was incorporated in this new penal code and the articles of this new penal code related to the complicity were the same as the articles of the complicity in the bill of the Criminal Code prepared in 1910.⁶⁹

⁶⁸ *Düstur, II. Tertip* (İstanbul: Matbaa-I Osmaniye, 1329), III, 440-441.

⁶⁹ Mehmed Sami, *Şerhli ve Haşiyeli Ceza Külliyâtı* (İstanbul: Türk Press, 1926), 26-28.

CONCLUSION

Within the 19th century, especially in the second half, the Ottoman Empire witnessed a number of developments and changes in the area of law. But, the character of change and change in criminal law has not been in the same line. The purpose of the criminal laws of 1840 and 1851 is not the same as that of the criminal law of 1858 and the innovations it introduces. This study tried to show the difference of Concept of complicity in classical doctrine from its concept in 1858 Penal Code. The transformation is not only in the concept of "complicity" but also in its implementation and crime policy and source of law. Ottoman criminal jurists encountered with many problems which France faced in that century, because the Ottoman Empire had taken France as a role model while preparing its new penal code. Additionally, it means to accept the policy of spreading the crime and punishment to a large area. In conclusion of this policy, as it is explained in this study, offender and the accomplice would be punished in the same way according to the 1858 Penal Code. However, this issue created long discussions among the Ottoman criminal jurists. Probably because this decision was considered unjust for the accomplice, they avoided to use Article 45 by referring to the other articles included in the law, sometimes with related justifications and sometimes even with unrelated ones. Considering along with the broad powers granted to judges and that many of the judges of that period were also judges of Sharia law, it can be interpreted that they emphasized the doctrines of sharia law behind their minds in practice by interpreting the article and implementing differently from France.

In addition, it attracts attention that the sources which the Ottoman criminal jurist applied to find solutions to the problems, were not sharia sources, but were criminal law literature of various states such as Belgium, Japan, Germany, Denmark and Russia. In this sense, it can be said that the sources of criminal law changed. Moreover, there was a discrepancy between the classical doctrine and the expressions of the 1858 Penal Code; that might be considered as one of the underlying reasons that they could not benefit from the fiqh literature. However, Nazrat Haçeriyân attracted attentions to an important issue at this point: *"In accordance with the principle that 'The branches and consequences of an action is built on the same basis that it was based on', a lawmaker or jurist should assign crimes and punishments according to the same system and principles that he accepted in criminal law philosophy. In our both criminal law and criminal procedure, French laws were accepted as a model. Therefore, it will be beneficial for the dissection of our criminal law to know which theory and system were accepted and abided by."* As it can be understood from this expression, criminal jurists were concerned that the integrity of the criminal law would be spoiled because the explanations and literature of criminal laws belonging to different schools were benefitted at the same time. According to him, if the criminal law is prepared by taking the French Penal Code as a model, this also means to accept the school that the French criminal law belonged to and the criminal system that it had. When a problem arises, the solution should not be looked for in criminal literature of other schools. The same system and school that the French criminal law belonged to should be resorted. These words of Haçeriyân remind the concept of looking for solutions within one madhab.

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