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THE FRENCH LEGAL SYSTEM AND OTTOMAN CRIMINAL LAW

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SUMMARY[2]

In the period of the 19th century the Ottoman law felt the West influence, which additionally had affected its legal language. The reforms of the Tanzimat also marked the beginning of criminal law codification in the Empire. The Penal Code – adopted in 1858 – was much more modern in form and content, differing significantly from the Acts of 1840 and 1851. Its first article states that it does not override the criminal provisions of Sharia law. This dual nature creates confusion. The replacement of Sharia law entirely by modern European law did not happen suddenly. Changes require time, which is also necessary for the government to adopt the innovative ideas and understandings of the then modern societies. Therefore, on could nor deny the attempts of the Ottoman authorities to modernize the laws and the OPC.

KEY WORDS

Ottoman Criminal Law; Ottoman Empire; Reform; French Penal Code; Modern Legislation

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The Ottoman Empire experienced a series of internal and external crises, including separatist movements, rebellions, fiscal problems, wars, etc. It experienced the influence of the processes in the Western Europe, as well. The desire of the rulers to create a modern secular state stimulated many reforms to change the legal and educational systems, the economy, and the military. As part of this overall restructuring programme the Empire government also made a lot of efforts to create a modern Criminal Justice.[3] The Ottoman legislator did not copy literally modern European secular law, but finally changed the requirements of the Islamic religion and the social, economic, and cultural life of the country.

The beginning of the Tanzimat reforms was set in November 1839 with the proclamation of the Khatt-i-Sherif (Gülhane Hatt-ı Şerif) stipulating to take all the necessary measures to legally guarantee the safety of life, honour, and property of the subjects of the Empire irrespective of their religion. It ensured the equality and inviolability of their property and the rights of inheritance[4]. The Hatt-ı Şerif adopted the Western (particularly the French) ideas for freedom and egality before the law. However, the „Ottoman version" kept some differences in its own form of assurances for the rights of all the subjects.[5] During the Tanzimat the Ottoman law influenced by the West (especially the French legal system) underwent significant changes. The borrowings from the Europe law came, thanks to its reputation for implying the modern legal principles of justice and rule of law,[6] that could modernise and guarantee the future prosperity for the Ottoman law. The Tanzimat reforms also started criminal law codification in the Empire.

The first Penal Code – issued on 3rd of May 1840 – was prepared by the „Supreme Council of Judicial Ordinances" (Meclis-i Vâlâ-yi Ahkâm-i

[3] K. F. Schull. Chapter 2: Ottoman Criminal Justice and the Transformation of Islamic Criminal Law and Punishment in the Age of Modernity, 1839–1922. *K. F. Schull. Prisons in the Late Ottoman Empire, The Age of Modernity.* Edinburgh University Press, pp. 1 – 17, esp. 17, Published online by Cambridge University Press:05 September 2014 [online] https://www.cambridge.org/ core/books/ prisons-in-the-late-ottoman-empire/63FBF42F7405EBFFA5 C02A4EBFF1B136 [access 15.08.2022].

[4] М. Андреев и Ф. Милкова. *История на българската феодална държава и право, 4-то изд.* София, Софи-Р, 1993, с. 315.

[5] R. Kostadinova. Formation of Bulgarian Criminal Law in the Post-Ottoman Liberation Period. *M. Stolleis unter Mitarbeit von G. Bender und Jani Kirov (Hrsg.). Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert.* Fr. am Main, Klostermann, 2015, S. 761.

[6] Д. Рагев. *Обща теория на правото.* София, ЛИК, 1997, с. 148.

Adliye, Meclis)[7]. The influence of the West is clear already in its opening remarks, emphasizing the principle of equality before the law. It classified crimes and penalties in 13 chapters with a total of 41 articles and regulated the principle of equality of the subjects of the Empire before the law and of a fair and impartial trial. But the act of 1840 did not change the traditional forms of punishment. Regardless of the new elements taken from the modern penal codes, there are still remnants of Sharia provisions. At the time of its implementation the local Islamic judges and state officials continued to have a great deal of autonomy in defining, sentencing, and punishing criminals. However, it defined the local councils' jurisdiction of crimes committed within the provincial boundaries.[8] This law stood for an interesting combination of modern and religious law, not codified earlier in the Empire. However, it had several shortcomings.

The Act of 1851 is a peculiar attempt to overcome them. The aim was again to create a modern act like the Western codes. In fact, it resembled the earlier law in form and content, but made certain additions to the range of criminal offences, such as resisting the police, crimes committed under the influence of alcohol, gambling, kidnapping (of girls), fraud and forgery. The penalties included shackling, beating, etc. Due to the contemporary concerns among European criminologists for recidivism, article 13 of chapter 3 of the 1851 Code said, that if the persons threatening the society have corrected themselves after one year of imprisonment with shackles, as proved by the witness of a guarantor, then they should release them. Otherwise, such persons should stay in prison „until it becomes clear that they are corrected".[9]

The 1851 Act innovated significantly the order introducing more specific classification of the offences against property and against the rules of taxation in its Third Chapter. We should assume that the purpose was to support the public order, prevent the corruption of public officials and protect the individual rights, which is in line with the provisions of the French legal system. The Hatt-i-Humayun, proclaimed on 28 February 1856, declared equal rights for citizens of all religions. In the end the government adopted this reformist

[7] O. Paz. Documenting Justice: New Recording Practices and the Establishment of an Activist Criminal Court System in the Ottoman Provinces (1840-late 1860s). *Islamic Law and Society*, 21 (2014), pp. 81 – 113.

[8] Y. Terzibaşoğlu. Ottoman >Legal Revolution< in the Nineteenth-Century Balkans: The Role of Local Councils and Courts in the Making of Property and Criminal Law. *M. Stolleis unter Mitarbeit von G. Bender und Jani Kirov (Hrsg). Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20.* Jahrhundert. Fr. am Main, Klostermann, 2015, SS.128, 130, 131.

[9] Terzibaşoğlu (2015), p. 131.

act because of the political pressure from Britain and France, involved in the Crimean War between the Ottoman Empire and Russia. It expanded the rights of Christians. Thus, the Ottoman society tried to get closer to the principles of the Western societies. But the mean of the reform was to prevent Europe from interfering the internal affairs of the Empire. Overall, between 1839 and 1876 the Ottoman administration made several efforts to keep the promises for equality – some successful, others half-hearted.

As a result, following France as model, the Empire adopted the Penal Code of 1858. It was a reception of the French Code of 1810 (FPC) to some extent. Its form was more modern than the earlier Ottoman law, and its content differed significantly from the Codes of 1840 and 1851, as well. Not by coincidence it transposes provisions of FPC, then it was the model for most of the European countries. However, the very first article states that it does not override the criminal provisions of Sharia law. This dual nature of the law creates much confusion.[10]

Examining the Codes of 1840 and 1851, it is noticeable that they followed the tradition of the Classical period of Ottoman law. The 1858 Act made a significant use of Western laws, particularly FPC, both as a system and as content. The 1840 and 1851 Codes served as the source for the Penal Code of 1858, which in fact revised them. The Bribery and Embezzlement Act of 1855 was also among its sources. Some of its articles have undergone corrections, while thirty of them remained unchanged. But its main supplier is the 1810 FPC. In the literature there are different opinions proposed to define the way of the French influence. According to some authors the 1858 Code is a translation of the FPC with some errors. On the other hand, some still believe that the law is based on the FPC, but with major changes and additions.

A committee of 8 members of the Grand National Assembly of Turkey (chaired by Ahmet Cevdet Pasha) got the assignment to draft the Code. It entered into force by the vote on 9 August 1858. The Act was composed of three sections and 264 articles.[11] Therefore, it is hard to consider it as a simple translation of the FPC. Moreover, some articles on the observance of Islamic law and Ottoman practice were still there. Finally, the findings of George Young who translated the Ottoman Penal Code (OPC) of 1858 into French show the number of articles taken from the FPC: accordingly, OPC cites only

[10] *Ibid.* pp. 128 – 129.

[11] 1858 Osmanlı Ceza Kanunnamesi (1858 Ottoman Penal Code) [online] https://yusiflishahriyar.blogspot.com/2017/05/1858-osmanl-ceza-kanunnamesi.html?zx = 23d0f3df0dbf3e98 [access 15.08.2022].

126 of FPC articles, and thus proving that most of its content came from various sources.[12] Therefore, the transposition is not literal, and is consistent with the relicts of the feudal law.

Like in the French Code the OPC included a section on the protection of the individual rights. This is the biggest difference between the new law and its predecessors. It divided the crimes against persons into three categories: „(1) crimes committed against life and individual security, (2) crimes against honour and dignity and (3) crimes against citizens' property". All these provisions are in line with the rulings of the French legal system.

The principle of the 1858 OPC about the „legality of crimes" proves the influence of the Roman legal system: it reaffirmed that only a legal act should decide which are the crimes. Therefore, the scholars accepted the OPC of the 19th century as reception in general of the achievements of Western criminal law, particularly the French one.[13]

The opinions of its researchers are also controversial. Some of them assume that it significantly approximates modern European legislation. Such is the opinion of F. Shabanov,[14] N. Gaydarov, who defines the OPC as „a relatively modern law".[15] According to D. Tokushev, although it embodies the legal principles of the Tanzimat, it is not remarkably close to the contemporary legislation of the time. Ottoman law was to strengthen the feudal-despotic regime in the empire.[16] The influence of the Islamic religion on the secular law is clear, making possible the criminal liability not only for acts sanctioned by the OPC but also for these, sanctioned only by the Muslim religious law.[17] Article 1 of the OPC is also significant in this regard, because it shows the legal mind of the legislator. A complete replacement of Sharia norms, implemented for centuries, with the modern European secular principles is impossible to happen all at once. These changes require time and innovative ideas.

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[12] *Ibid.*

[13] *Ibid.*

[14] Ф. Ш. Шабанов. *Государственный строй и правовая система Турции в период Танзимата.* Баку, АН АзССР, 1967, с. 172.

[15] Н. Гайдаров. Процесът срещу Васил Левски и революционната организация. *Исторически преглед*, 3 (1973), с. 60.

[16] Д. Токушев. *Създаване на новобългарското наказателно право (1877 – 1896).* София, Сиби, 2019, с. 26.

[17] Д. Токушев. Възникване на българското буржоазно наказателно право в периода на Временното руско управление (1877 – 1879). *ГСУ – ЮФ*, 72, 2 (1979), с. 266.

However, it cannot deny the attempts of the Ottoman authorities to modernise the law and OPC particularly. Like the FPC its content consists of three sections and adopts the tripartite division of criminal acts: crimes, delicts, and contraventions. Crimes are acts of the highest degree of public danger, as they affect the State, the Government, State agents, religion, etc.[18] The OPC definition of a crime is extremely incomplete. As provided in the law, it is an act punishable by death, imprisonment for life or temporary confinement, together with dishonourable exposure to the public, imprisonment in a fortress, banishment for life, deprivation of rank, office, and civil rights for life (Art. 3). Delicts, on the other hand, are cases requiring some correctional penalties: more than one-week imprisonment, temporary exile, removal from public service and a fine (Art. 4). The contraventions (misdemeanours) are cases where the penalty is imprisonment from twenty-four hours to one-week and a fine not exceeding one hundred groschen (Art. 5). Again, it tries to transpose and create a new criminal justice system. **The penalties** in the 1858 law are basic and supplementary. The basic punishment is that which is proper to the crime. The individual punishment should protect the public interest and prevent the offence from being committed again. The added penalties are these which the judge must impose add-on to the main one.

The OPC penalties' system is the following: deprivation of life, life or temporary hard labour, life, or temporary exile in the remote parts of the Empire, confinement in a fortress, public exposure (dishonour), deprivation of rank, degree, office and civil rights, imprisonment and fine. The imprisonment may replace the fine if the criminal lacking the money cannot pay. There was an attempt to bring the system of penalties into line with modern European legislation by borrowing texts from the FPC. For example, the Art. 18 of the OPC: „If a woman sentenced to death penalty, declares that she is pregnant, and her pregnancy is verified, her punishment shall be carried out after childbirth".

The usual punishment in the Empire was imprisonment, either temporary or permanent, served in penitentiaries, citadels, dungeons, and government buildings. It existed from the earliest days of the Empire and kept its application even after the adoption of OPC, while the exile sentence has a limited application. Widespread was also the fine.

The OPC as the French Code adopted the principle of the personal criminal responsibility of the individual over a certain age (who is not insane). However, the act did not define it explicitly. Minors and the mentally ill are exempt from criminal liability. The Code regulates for „imperfect (adolescent, i.e.,

[18] Kostadinova (2015), p. 762.

who has approached the age of majority)", lighter penalties. A novel approach in line with the social modernisation is the decision to exempt the persons, forced to commit a criminal act. It was not possible applying criminal reprisals against corpses or animals.[19]

According to Art. 43 there should be no distinction in imposing penalties on persons regardless of their sex. However, the legislator grants a humane treatment in the execution of certain punishments: „some allowance for the female sex."

The issue of guilt is evolving in a more modern aspect. However, it also has no rules about inevitable defence, extreme necessity, mitigating and aggravating circumstances and the regulation of complicity, attempt, recidivism, etc. are incomplete.

The first impression about the regime of attempted offence is that there is no provision in the general part to differentiate between attempt and completed offence, or that it shows the extent of the punishment for attempt. Nonetheless, OPC overcame the deficiency by the special provisions for the individual criminal acts setting out individual punishment for attempt in certain offences. Considering that OPC has no general regulation of the attempt, it is reasonable to assume that attempt in Bulgarian kingdom after the Liberation was punishable only in cases for which the law explicitly provided. So, OPC on this issue is quite modern and even meets the requirements of the science of criminal law.[20] Article 180 and its supplement states that the attempted murder not completed for reasons beyond the control of the offender is punishable by a lighter penalty than completed murder. According to Art. 174, attempted premeditated murder is punishable by 15 years imprisonment in chains; in Art. 170, for premeditated murder the guilty person is punished by death, and Art. 180 and its supplement provides for attempted murder a temporary imprisonment from 3 to 15 years in chains. As in the European laws, Art. 180 also allows the court to decide the extent of punishment according to the circumstances from the minimum to the maximum. The 1860 supplement to Art. 198 of the OPC also stipulates a penalty of imprisonment for not less than three months for attempted „forcible adultery". As the punishment prescribed was much lighter as opposed to the completed offence.

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[19] И. С. Власов и А. Б. Сахаров, и А. М Яковлев. *Уголовное право зарубежных государств.* Москва, Изд. УДН, 1971, с. 192.

[20] В. Маринов. Върху опитването за престъпление. *Юридическо списание*, 4 (1889), с. 5.

The OPC does not explicitly say that attempted crime is punishable, hence it should consider it not punishable except when explicitly mentioned. According to Supplement I to Art. 230 of the OPC of 1860, „whoever attempts to commit theft but is prevented from doing so by obstacles beyond his control, shall be sentenced to the punishment for theft according to the degree of the deed he attempted to do". This supplies a kind of general rule for the criminality of attempted theft.

As shown, the general provisions lack a definition of attempt which could clarify what types of attempt the PC recognizes. But it could infer from articles 180, 198, 230, etc. that it recognizes only the completed attempt as it deals with the offence of murder, dishonouring, theft, etc., which are not committed due to circumstances beyond the control of the offender. Although the OPC does not differentiate the two forms of attempt: completed or uncompleted, it supports a much lighter penalty for the uncompleted as opposed to a completed offence. Furthermore, it allows the court to decide the punishment according to the criminal intent and the nature of the crime. To impose a fair punishment on the offender for the attempted crime, it is important to find whether there was a crime completed. Resolving this issue is important to the construction of a modern criminal law.

The statutory defence has also found a place in the OPC. Here, as it is in the case of attempt, there is no regulation in the general provisions of the law. Only the Special Part addressed this in Chapter II, Division I on murder, wounding and striking (Art. 186 and 187). Even here Code gave no definition of the concept of legal defence.[21]

Much of the European countries' legislation defines only the concept of statutory defence and says that any act committed in a state of statutory defence is not imputable and does not lead to criminal liability. Neither the German, the Hungarian nor the Dutch criminal codes make any distinction as to the position or title of the attacker, whether official or not. In contrast, the reasoning of the Russian Draft Criminal Law was explicit that a statutory defence against the unlawful acts of officials was possible.[22]

[21] В. Маринов. Законната отбрана в теорията и положителните законодателства. *Юридическо списание*, 3 (1890), с. 91.

[22] *Ibid.*, pp. 108 – 109.

The Criminal Code makes no systematic division of criminal acts and there are no grounds to exclude prosecution and execution of punishment. In relation to the latter, we should note that it does not give the criminal statute of limitations.[23]

As FPC OPC has three sections. The first: „On crimes and delicts causing general damage and, on the penalties, imposed to them". It regulates crimes against the State and has 16 chapters. The second – „On crimes and delicts committed against an individual, and on the penalties imposed to them" – regulates crimes against the individual and consists of 12 chapters. The last Section – „On the punishments inflicted on those who violate the prescribed measures of public health, and who do not comply with the police regulations at all" – is short and not divided into chapters.

As shown, the new law incorporates provisions from the FPC, some are Sharia-compliant, and it borrowed some from the earlier two laws. For example, forgery of documents came from 1858 Act, as in this of 1840 and 1851, while the crime of adultery is absent from the 1840 and 1851 Acts. Its provisions came from the French source. Although the two older Acts chapter 3 of the 1858 tackled the bribery in the OPC there is as a translation of the 1810 FPC. To modernize the legislation, it included some FPC texts – Section IV „On the unlawful confinement and detention of persons, for stealing children and minors and for kidnapping girls". A new regime regulated the residential immunity. According to Art. 105 public servants should suffer prison from six months to three years for forcible entering the home of any person, except from the powers granted by military laws and police statutes. In line with modern legislation was the provision of Art. 103 of the 1858 PC incriminating torturing the accused person to make him plead guilty. The courts should have imposed a temporary confinement in a fortress and life deprivation from rank and office, as under the Art. 103, for any public servant torturing the accused to extract a confession, and if the tortured dies, the punishment was „as if he had killed or wounded"[24].

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[23] Д. Минков. Развитие и характер на законодателството в България. *60 години Българско правосъдие 1878-1941: Юбилеен сборник.* София, Придворна печ., 1941, с. 52 – 53; Н. Долапчиев. Развой на българското наказателно право след Освобождението на България до днес. *60 години Българско правосъдие 1878 – 1941: Юбилеен сборник.* София, Придворна печ., 1941, с. 63.

[24] Хр. Арнаудов (прев. и изд.). Императорскый наказателенъ законъ. *Хр. Арнаудов (прев. и изд.). Пълно събрание на държавнытъ законы, уставы, наставленія и высокы заповѣди на Османската империя. Т. 4.* София, Ковачевъ, 1886, с. 99.

There was also a new provision for the offence of defamation, which is known and settled in Sharia law. The third chapter of the 1840 PC also included defamation. Similar offence is to find in the 1851 Act. But in both acts the regulation was not complete enough. Art. 213 of the new act made a comprehensive regulation of the crime of defamation.

In the Ottoman Empire the criminal enactments of the Tanzimat period and the 1858 PC give no special provisions on the crime of infanticide. The reason for this is that both the Islamic Law and the 1810 FPC lack explicit provisions on infanticide. Articles 192 and 193 of the Act refer only to abortion.

In the 1858 PC, which replicates the provisions of the 1810 FPC, there was more detailed regulation of the crime of riot, as well. Correspondingly, the offence of inciting and joining a riot.

Overall, the influence of the French legal system on the law of the Ottoman Empire is undeniable. However, the translations of the laws made are not literal. The changes in the provisions show attempts to adapt French law to the demands of social and economic life in the Ottoman Empire.

An analysis of the criminal offences in the special provisions shows lack of comprehensive regulation. There was an attempt to create a modern law, but the influence of religious law remains. The law keeps the possibility of seeking criminal liability not only for acts provided for in the PC but also for those sanctioned by Sharia law. Another serious shortcoming of the law again is that it kept the blood vengeance and talion in crimes against the person (murder and bodily injury) and in cases of adultery. The severity of some of the penalties in the PC depend on the considerable religious-law impact.[25]

In the liberated Bulgarian lands, the Russian authorities (during the temporary Russian rule) have sanctioned the OPC enforcement, removing its religious character along with amending the system of penalties. The application continued even after the end of the temporarily Russian rule up until 1896 as a kind of reception of the FPC. On the other hand, there were several outstanding issues before the Bulgarian statesmen, as well as the lack of sufficient number of jurists. One cannot deny the desire of the legislators to create a modern European law that meets the needs of Bulgarian society.

[25] Токушев (2019), p. 28.

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