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A comprehensive treatment of Islamic criminal law

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A few years ago, Cambridge University Press started a series *Themes in Islamic law*. The purpose of this series was to »publish state-of-the-art titles on the history of Islamic law, its application and its place in the modern world«. The first book published in this series was *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press 2004)[1] by Wael B. Hallaq, who is also the series' editor. The book under review is the second in this series. It is written by Rudolph Peters, a professor of Amsterdam University and an established name in the field of history of Islamic law.

The book is divided into six chapters. The first chapter is an introduction, whereby the author has outlined the subject and the method of his study. The second chapter deals with the classical Islamic doctrine on crime and punishment. In this chapter the author has given a systematic and clear exposition of the doctrine of the Islamic criminal law as developed by the four major Sunni schools of jurisprudence and dominant Shi'a interpretation. The exposition has been given on the basis of relevant books of *fiqh* and collections of *fatawa*. By doing this the author was able not only to give a scholarly treatment of crimes and punishment but also to illustrate it with *responsa* of Muslim scholars. The author's method of exposition of classical Muslim doctrine of criminal law follows the method of treatment of criminal law in contemporary Western textbooks. Thus, the author has first dealt with enforcement and procedure, after that with general principles of substantive criminal law, then penalties, and, finally, specific crimes such as homicide, bodily harm, *hadd* punishments or offences with fixed mandatory punishments and discretionary punishments (*taz'ir* and *siyasa*).

The third chapter deals with the implementation of Islamic criminal law in the pre-modern period. The case chosen for closer study is that of the Ottoman Empire. This state was selected, as the author explains, for two main reasons: (1) the Ottoman system is well documented and (2) legal historians have already done a number of studies of records of the Ottoman courts which makes easier the task of analysis of implementation of Islamic criminal law in this state. The legal system of the Ottoman Empire was based on *Shari'a*, as interpreted by the Hanafi school of jurisprudence, and state legislation (*Qanun*). The enforcement of criminal law in this state was the responsibility of both the *qadi* and the executive officials. The author has examined this system and its functioning. He has also discussed courts procedure, sentencing as well as substantive law applied by the courts. With regard to the question to which extent the *Shari'a* was applied in the Ottoman state, the author came to a conclusion that the classical Hanafi doctrine was applied in full. Apart from that, the executive officials charged with maintaining law and order were required to ask the *qadi*'s approval in many situations. In general, the influence of Islamic criminal law in the Ottoman state was not limited to courtrooms – »the *qadis* conferred Islamic legality on the whole system of criminal law enforcement« (188).

The fourth chapter deals with what the author has described as »the eclipse of Islamic criminal law« or the time when Islamic criminal law »became invisible, without however ceasing

* Rudolph Peters, Crime and Punishment in Islamic law: Theory and Practice from the Sixteenth to the Twenty-first Century, Cambridge: Cambridge University Press 2005, XI, 219 p., ISBN 0-521-79670-9

1 Reviewed in Rg 8 (2006) 177 by Nicholas H. D. Foster.

to exist« (4). That happened as a result of the modernization and westernization of the Muslim world. Modernization came either as a consequence of colonization or as an endowment of the political elite of some Muslim countries. In both cases, a recently modernized, centralized and bureaucratized state needed a new legal system as an instrument of social control. Thus, the Muslim world during the nineteenth century saw the change in the areas of criminal law. These changes were of three kinds: (1) complete abolition of Islamic criminal law; (2) reform of Islamic criminal law and (3) reform of *siyasa* justice. In this chapter the author focuses on the latter two kinds of change. He has taken the British India and North Nigeria as examples for the reform of Islamic criminal law and the Ottoman Empire and Egypt for the reform of *siyasa* justice. Reform in India and North Nigeria ended up with the creation of criminal law which was Islamic only by name. Reform in the Ottoman state and Egypt ended up with the codification of area of *siyasa* justice. In some countries, like Saudi Arabia, which managed to avoid any Western impact, Islamic criminal law continued to be applied. Even though Islamic criminal law was almost removed from legal practice, it continued to be studied, taught and discussed. This continued life of Islamic criminal law will acquire new meaning when Islamist parties and groups formulate a claim for the establishment of an Islamic state and the implementation of Islamic criminal law during the twentieth century.

In the fifth chapter the author has discussed the role of Islamic criminal law today. Saudi Arabia was taken as a country exemplifying uninterrupted application of Islamic criminal law. Several other countries such as Libya, Pakistan, Iran, Sudan and Northern Nigeria were chosen to illustrate the tendency of reintroduction of Islamic criminal law within basically western-styled legal systems. For each country the author has outlined the political circumstances in which Islamic criminal law was introduced, the content of relevant laws and their eventual deviations from classical doctrine. Namely, reintroduction of Islamic criminal law was achieved through the means of state legislation – a process which was not only limited to the area of discretionary punishments but also included fixed punishments and retaliation. During this process of codification, modern Muslim states departed from the classical doctrine in order to make criminal law a more efficient instrument in their hands. On the other hand, Muslim states which embarked on the policy of reintroduction of Islamic criminal law are signatories to international human rights conventions. These conventions ban »cruel, degrading, or inhuman punishment«, proclaim the principle *nulla poena sine lege*, equality before law, freedom of religion and freedom of expression, as well as the basic right of children not to be subject to the death penalty, life imprisonment and cruel, degrading or inhuman punishment. Reintroduction of Islamic criminal law has brought these countries in conflict with accepted international obligations.

The author does not subscribe to the view that the *Sharía* is not compatible with human rights. He is of opinion that the *Shari'a* is open for development and rather that the question of remedy of state legislation in Muslim countries which opted for reintroduction of Islamic criminal law should be considered. A possible remedy would be: (1) »to stimulate debates among Muslims on the interpretation of religious sources with the aim of providing great legitimacy for human rights norms«; (2) to explore the significance of a position developed by some Muslim

groups »for suspending the law of *hadd* until there is an Islamic society based on social justice …« (184). The author's opinion is that these strategies are in long run significant for human rights enforcement in Muslim countries where Islamic criminal law is introduced. Finally, in the sixth chapter the author has highlighted major themes of each chapter and connected them in a comprehensive conclusion.

In terms of the structure and content, this book represents the most comprehensive treatment of the topic so far. The classical doctrine of Islamic criminal law is systematically presented. The practical aspect – its application from the sixteenth to the twenty-first century – is covered by choosing representative historical models and cases. The documentary basis of the book consists of relevant sources and literature in the field. With its concept and elaboration, this book transcends abstractness of dogmatic treatment of Islamic criminal law, on one hand, and mere dwelling on historical forms of application of Islamic criminal law, on the other hand. It shows to the readers a dynamic picture of Islamic criminal law: relations between revealed law and juristic doctrine, fixed definitions of crimes and punishments and the area of discretion, sacred law and political power, law and society. With this book, an important gap in the literature on Islamic criminal law has been filled.

Fikret Karčić

Irrwege und Lichtblicke*

Wissenschaftliche Literatur über Serbien zählt im Westen zur Mangelware. Auf dem Büchermarkt überwogen bis vor kurzem geschichtliche Abrisse von Journalisten und dilettierenden Historikern.[1] Montenegro ist ein noch seltenerer Gegenstand wissenschaftlicher Geschichtsschreibung. Daher weckt ein Sammelband zur Gesellschafts-, Kultur-, Politik- und Staatsgeschichte, der von einem wissenschaftlichen Institut und ausgewiesenen Kennern der serbischen Geschichte herausgegeben wurde, hohe Erwartungen. Der Ländersonderband des Österreichischen Ost- und Südosteuropa-Instituts ist nämlich breit angelegt und umfasst die Gebiete: Raum und Bevölkerung, Geschichte, Sprache und Literatur, Kultur, Politik, Gesellschaft, Wirtschaft, Recht. Diese Erwartungen erfüllt der Band leider nur partiell, so dass man von extrem schwankender Qualität der Beiträge sprechen muss. Ich möchte daher – anders als sonst üblich – mit Einwänden beginnen, um die Besprechung in lichteren Tönen zu beschließen.

Im Vorwort schreibt Walter Lukan: »… zum Zeitpunkt des Verfassens dieses Vorwortes … war [Montenegro] bereits ein auch international anerkannter unabhängiger Staat«. Dass nun die »beiden Länder … in der Zeit der Konzeption und des Entstehens des Sammelbandes noch« in einer Union verbunden waren, ist an sich kein ausreichender Grund dafür, die Konzeption selbst der zu erwartenden Entwicklung nicht antizipierend anzupassen. Diese konzeptionelle Unzulänglichkeit wirkt sich sowohl auf die Struktur des Bandes als auch auf einzelne Beiträge aus, so dass einige serbische Mitwirkende nicht nur eine fortdauernde Kontinuität der

* Walter Lukan, Ljubinka Trgovčević, Dragan Vukčević (Hg.), Serbien und Montenegro. Raum und Bevölkerung – Geschichte – Sprache und Literatur – Kultur – Politik – Gesellschaft – Wirtschaft – Recht, Münster: LIT Verlag 2007, 880 S., ISBN 3-8258-9539-4

1 Friedrich Jäger, Bosniaken, Kroaten, Serben. Ein Leitfaden ihrer Geschichte, Frankfurt a. M. u. a. 2001; Tim Judah, The Serbs. History, Myth and the Destruction of Yugoslavia, New Haven, London 1997; Wolfgang Libal, Die Serben. Blüte, Wahn und Katastrophe, München, Wien 1996; seit kurzem aber liegt ein Standardwerk zur serbischen Geschichte des Berliner Historikers Holm Sundhaussen vor: Geschichte Serbiens: 19.–21. Jahrhundert, Wien u. a. 2007.