ULUM

Dini Tetkikler Dergisi
Journal of Religious Inquiries
مجلة الدراسات الدينية

علوم

www.dergipark.org.tr/ulum

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

Kübra Nugay ** Abdullah Kahraman ***

Abstract

In the XIX. century, Ottoman State has witnessed changes in many areas. Looking at the content of both the dated 1840 and the dated 1851 Penal Codes legislated in Tanzimat Era, it has seen 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 seeking 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 it's 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.

---

* This article is extracted from my doctorate dissertation entitled *"The Transformation of Ottoman Criminal Law in the 19th Century"*, (PhD Dissertation, Marmara University, Istanbul, Turkey, already ongoing).

** PhD Student, Marmara University, Institute of Social Sciences, İstanbul, TURKEY
Doktora Öğrencisi, Marmara Üniversitesi, Sosyal Bilimler Enstitüsü
kubra.nugay@marmara.edu.tr ORCID 0000-0002-0773-0335

*** Professor, Marma University, Faculty of Theology, Department of Islamic Law, Istanbul, Turkey
Prof. Dr., Marmara Üniversitesi, İlahiyat Fakültesi, İslam Hukuku Anabilim Dalı
a.kahraman69@hotmail.com

Article Types: Research Article
Received: 11 June April 2019
Accepted: 26 August 2019
Cite as: Kübra Nugay - Abdullah Kahraman, "The Transformation of Ottoman Criminal Law in the 19th Century: The Example of Crime of Complicity", *ULUM* 2/1 (2019): 103-120. https://doi.org/10.5281/zenodo.3377498

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 özelde 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 kanunun, Osmanlı ceza hukukunu nasıl etkilediği anlaşılmaya çalışılacaktır.

Anahtar Kelimeler

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

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 Hümâyûnu)*, can be defined as a period of reforms in various fields including military, economic, social, cultural, administrative and judicial.[2] The reforms began primarily in military, economic and administrative fields at the end of XVIII. Century and they were superficial. The main reason that these reforms had this character was regarding 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 modernization.[4] The reflection of these two concepts to the law has been in the form of

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 İnalcık, "Tanzimat Nedir?", *Tanzimat:* Değişim *Sürecinde Osmanlı İmparatorluğu*, ed. Halil İnalcık - Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Publications, 2011), 13-16; Yavuz Abadan, "Tanzimat Fermanı'nın Tahlili", *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu*, ed. Halil İnalcık - Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Publications, 2011), 37-63;

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

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

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 legislated[6]. Both two of them 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, its functions and about different subjects.[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 Code[10] 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, developed the new principles about the criminal procedure:

a) The evidence of *sharia and qanun*: The statement of *"şer'an ve kanunen"* in the penal codes was used to state the ways of evidence in this period. These two codes had two evidence system: *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 confessus. These codes provided that the crimes evidenced legally were punished. 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 have been 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.

---

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 1851[6], in order to add new articles to The Imperial Ottoman Penal Code of 1840 *(Ceza Kanunname-i Hümâyunu)*. 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 Hümâyûnu*, 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: Babıâli, 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 İnalcık- Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Publications, 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.

In the period after the declaration of Tanzimat Edict what those were innovated in the field of criminal justice system were establishment of Grand Councils *(Büyük Meclis)* and Small Councils *(Küçük Meclis)* in the periphery and hearing the cases of murders (katl) and robbery (sirkat) in these councils by 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 intitutions (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 tight junctions 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 councils 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 hold 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 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]

---

[11] M. Şükrü Hanioğlu 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", *Tanzimat*: *değişim sürecinde Osmanlı İmparatorluğu*, ed. Halil İnalcık, Mehmet Seyitdanlıoğlu, (İstanbul: Türkiye İş Bankası Kültür Publications, 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 Hümâyûnu*, 22a-29a.

was comprising 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 for each muslims- nonmuslims and commons- state officials: As being in the example of shepherd and vizier,[16] this effort mainly aimed at putting an end for the inequality between the different segments of the society such as state officers (military class, Ottoman ulema) and the commonality. 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.

Along with to mention the general characters of the change of 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* written 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", 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 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 information. This study will attempt to show how the Ottoman Criminal Law changed by focusing

---

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 Hümâyûnu*, 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* [l.yya., t.y.] (İstanbul : Yaylacık Matbaası, 2004)

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).

and zooming on only one subject (complicity of murder). Therefore, ta'zir punisment which 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. Especially when considered together with the functions imposed on the criminal law in the second quarter of the nineteenth century 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, also substantial 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 is provided.

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 Haçeriyan*, 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 at three points: Firstly, the meaning of the statement of the "complicity" is that more than one person commit a crime together, in which case whole the perpetrators directly complicit in the offence, thus their guilts are at the same degree. 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 wounding. For example, the statement of complicity is not used for those who commit the crime of robbery or other crimes. The third is that in the classical doctrine, the punishment imposed on the offender who helped the primary offender is different from the punishment stated in the criminal code of 1858. In the classic doctrine, 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 1306, Nazaret Haçeriyan attracted attention to this issue and criticized *Ömer Hilmi Efendi* due to confuse the statements and meanings of complicity in both classic doctrine and penal code of 1858. Ömer Hilmi Efendi, one of the ulama of the time, stated in his modern legal text entitled *Miyar-ı Adalet* the following expression in

[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.

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. Haçeriyan points out that the difference between these two should be well conceived.[25]

Another statement used in the classical doctrine to express the same meaning of the complicity of the period is *madhal* (to be get involved in crime). But, the statement of madhal was also used to express the acts of those who help to the primary offender. Briefly, in classic doctrine both the statement of *complicity* and the statement of "madhal" are used to state both the primary offender and who those help the primary offender to murder someone, namely 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 mind relevant to the scope of statement of "complicity" in the classic doctrine proceeded. 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 of the 1840 Penal Code that if a person intends to kill another person bot not to kill in person and he have someone killed by giving money or deceiving by another way, who those kill and have someone killed will be sentenced to the same penalty, namely retaliation.[26] Secondarily, in Article 14 of the 1851 Penal, the penalty of the same offense was changed: The person who killed the man is considered as a primary offender and he will be sentenced for sharia and law. On the other hand, the person who have 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 with the concept of complicity in the1858 Penal Code, the mind 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) was a statement known in the criminal law of Ottoman classical period (before XIX. Century), yet there was a distinction between the concept in the classic 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 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

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

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

[26] *Ceza Kanunname-i Hümâyûnu*, 2.

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

[28] Düstûr I. Tertip, 1: 540.

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 gave information about the nature of the complicity by mentioning 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 tried to remove with Article 209 of The Code of Criminal Procedure[29] issued in 1879, but it also couldn't solve the ambiguity of how Article 45 should be understood.

The writer of the book titled *Mebadi-i Hukuk-ı Ceza* published in 1889 and the lecturer of criminal law in *Mekteb-i Hukuk*, Nazaret Haçeriyan 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 (1899), Mehmed Aziz, one of the lecturers of Mekteb-i Hukûk, defined the complicity in his book titled *Mufassal 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 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 fer'î" *(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 have great problems about distinguishing complicity *(iştirâk)* and secondary complicity *(iştirâk-i fer'î)* from each other and they hesitate in jurisprudence.

In 1329 (1911) 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

[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 Haçariyan, *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, *Mufassal Nazariyyât-ı Ceza* (Dersaadet: s.l., 1306), 60-61.

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

the discussion of the parliament, the statement of "iştirâk" was changed as "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 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 that there are offenders more than one.[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 performing of an act prohibited by law either directly commit the crime or help to those who directly commit. 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),* or 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 law men complaint about that there wasn't any article defining who was principal offender and accomplice 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 began to not to be adequate. Because the number of these acts has increased over time and new events were encountered. At this point, questions on which acts should be considered as complicity and answers to these questions proliferated and 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 sorted 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 threating, terrorization, cheating, giving money or promises,

---

[34] Court Record of The Chamber of Deputies (*Meclis-i Mebusan Zabıt Ceridesi*), I. Period, III. Session, III. Volume, XXXXX. Conclusion, 17 February1326, 4.

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

[36] Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza,* 60; Nazaret Haçeriyan, *Mebâdi-i Hukuk-ı Ceza,* 115.

[36] Nazarat Haçaryan, *Mebâdi-i Hukuk-ı Ceza,* 118; Servet, *Hukuk-ı Ceza*, 204-207.

[37] Nazaret Haçeriyan, *Mebâdi-i Hukuk-ı Ceza*, 116.

[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.

c) Those who reinforce the crime through printed matter.

The accomplices are;

a) Those who give instructions for the realization of the crime,
b) Those who supply weapons and devices used in the commitment of crime,
c) Those who contribute to and facilitate the realization 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 changed, the ulama of Ottoman 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. In consequence of the discussions advanced 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 can raise 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 exist some cases in which the distinction results in significant consequences. For example, the killing of one's father is a special 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 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 faults, 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.

[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.

As it was said before, even if the offenders commit more than one crime, the criminal law system of the period conceived the whole crimes as only one crime and adopted to spread of these crimes among offenders. Its consequences are in practice as:

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 referred to this subject.

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 "doing" 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 doing" activities need to be done.[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 committing of the crime. There should be an agreement between 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 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 which was the source of the Ottoman Penal Code and the Code of Criminal Procedure, had many deficiencies on the complicity. The famous lawman Garraud said that the French Penal Code has many inadequacies about the complicity that leads to misunderstandings. Mehmed Aziz followed the latest controversies and debates in the field of criminal law in France and mentioned them in his book. Some of the questions sought in this period are as follows:[47]

- Is it possible the complicity in 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]

---

43 Nazaret Haçeriyan, 117; Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza,* 65.

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

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

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

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

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

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

- 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 commit 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 preparation of the penal code but also in the implement of penal code, thus the sources of criminal law have begun to change.

3.4. Implement 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 of 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]

Nazaret Haçeriyan, 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 and 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

[50] See: Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza*, 63-65.

[51] See: Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza*, 70-73.

[52] See: Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza*, 86-87.

[53] See: Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza*, 88.

[54] See: Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza*, 95-96.

[55] Mehmed Aziz, *Mufassal Nazariyyât-ı Ceza*, 69-70.

[56] Nazaret Haçeriyan, *Mebâdi-i Hukuk-ı Ceza*, 48.

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

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 law men of the period argued that those who gather to commit a crime must have been sentenced in accordance with their influence on the crime. One of them complained 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 of Article 59, the main purpose of the legislative was to be 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 with hard labour, the accomplice is also sentenced with 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. At this point what those draws attention is 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 given to 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 the 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 of Article 45. For example; examination of the cases of Şeyh bin Mustafa and Cercis bin Ahmed and Muhyuddin bin Ahmed and Ali and Semseddin who were from Arabian community in Arbil and murderers of Seyyid İzzeddin bin Seyyid Veli, was conducted on 14 February 1324, in the case of the Criminal Division of the Court of First Instance of Kirkuk Sanjak and in consequence of hearing of witnesses and the statements of murderers and the statement taken before the murdered's death and the official report and doctor's report the court ruled that Şeyh bin Mustafa killed Seyyid İzzeddin bin Seyyid Veli and others complicit in the murder and Şeyh was sentenced 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 Achieve I have seen that whole case related to the complicity of murder was referred to Article 175 in place of Article 45.

58 Servet, *Hukuk-ı Ceza*, 231-233.

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

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

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

62 Servet, *Hukuk-ı Ceza*, 204-207.

63 Servet, *Hukuk-ı Ceza*, 231-233.

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

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 judgment 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.

In 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 law men implemented the criminal code in practice.

It was stated before that the 1858 Penal Code was prepared with inspiration from the 1810 French Penal Code. At this period, the question 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 as "*classical criminal law school*" and then positivist school was established against the approach of this school. The French Penal Code defended 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 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 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, republic 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 that 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 long discussions among the Ottoman criminal jurists. Probably because this decision was

[65] Turkiye Diyanet Foundation Center of Islamic Studies, *Kahraman Maraş Qadi Register*, 11, 45a.

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.*" 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 preparing 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 by the Italian Penal Code of that time.[66] 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 to parliament and the old code was continued with serious amendments realized 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: [67]

"*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:

---

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

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

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 robbery 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 stood until the new Turkish Penal Code adopted in 1926. A separate section consisting of four articles related to complicity was prepared 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.[68]

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 classic doctrine from its concept in 1858 Penal Code. the transformation is not only in the concept of "complicity" but also in its implement 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

[68] Mehmed Sami, *Şerhli ve Haşiyeli Ceza Külliyâti* (İstanbul: Türk Press, 1926), 26-28.

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 classic 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 Haçeriyan 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 Haçeriyan remind the concept of looking for solutions within one madhab.

REFERENCES

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

Ceza Kanunname-i Hümâyûnu. Esad Efendi.1877. Süleymaniye Manuscript Library.

Kahraman Maraş Qadi Register. 11. Turkiye Diyanet Foundation Center of Islamic Studies.

Abadan, Yavuz. "Tanzimat Fermanı'nın Tahlili". *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu*, editors: Halil İnalcık - Mehmet Seyitdanlıoğlu. 37-63. İstanbul: Türkiye İş Bankası Kültür Publications, 2011.

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

Akyıldız, Ali. *Osmanlı Bürokrasisi ve Modernleşme.* İstanbul: İletişim, 2015.

Bingöl, Sedat. *Tanzimat Devrinde Osmanlıda Yargı Reformu: Nizamiye Mahkemelerinin Kuruluşu ve İşleyişi 1840-1876.* Eskişehir: Anadolu Üniversitesi Edebiyat Fakültesi, 2004.

Cerîde-i Mehâkim. Dersaadet: s.l., 1290.

Dönmezer, Sulhi - Erman, Sahir. *Nazarî ve Tatbikî Ceza Hukuku- Umumî Kısım.* İstanbul: Beta Press, 1966.

Düstûr I. Tertip. İstanbul: Matbaa-i Amire, 1289.

Düstûr II. Tertip. İstanbul: Matbaa-i Amire, 1289.

Ekinci, Ekrem Buğra. *Tanzimat Devri Osmanlı Mahkemeleri*, İstanbul: s.l., 1999.

Engelhardt, Edouard Philippe. *Tanzimat ve Türkiye.* translator: Ali Reşad. İstanbul: Kaknüs Publications, 1976.

Gayretli, Mehmet. *Tanzimat'tan Cumhuriyet'e Kanunlaştırma Çalışmaları.* İstanbul: Nizamiye Akademi, 2015.

Hanioğlu, M. Şükrü. *A brief history of the late Ottoman Empire.* Princeton: Princeton University Press, 2008.

Hayta, Necdet - Ünal, Uğur. *Osmanlı Devleti'nde Yenileşme Hareketi: (XVII. Yüzyıl Başlarından Yıkılışa Kadar).* Ankara: Gazi Bookstore, 2003.

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

İnalcık, Halil. "Tanzimat Nedir?". *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu*, editors: Halil İnalcık- Mehmet Seyitdanlıoğlu. 13-35. İstanbul: Türkiye İş Bankası Kültür Publications, 2011.

Kaynar, Reşat. *Türkiye'de Hukuk Devleti Kurma Yolundaki Hareketler*. İstanbul: Tan Press, 1960.

Mardin, Şerif. Türk Modernleşmesi: Makaleler: IV. İstanbul: İletişim Yayınları, 1991.

Mehmed Aziz. *Mufassal Nazariyyât-ı Ceza*. Dersaadet: s.l., 1899.

Mehmed Sami. *Şerhli ve Haşiyeli Ceza Külliyâtı.* İstanbul: Türk Press, 1926.

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

Nazaret Haçeriyan. *Mebâdi-i Hukuk-ı Ceza.* İstanbul: s.l., 1306.

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

Paz, Omri. *Crime, Criminals and the Ottoman State: Anatolia between the late 1830s and the Late 1860s*. Unpublished PhD dissertation, Tel Aviv University, 2011.

Paz, Omri. "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): 81-131.

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

Rubin, Avi. *Ottoman Nizamiya Courts: Law and Modernity*. New York: Palgrave Macmillan, 2011.

Servet. *Hukuk-ı Ceza*, Dersaadet: s.l., 1326.

Türker, Ebru Yakut. *Alternative Claims on Justice and Law: Rural Arson and Poison Murder in the 19th Century Ottoman Empire.* Unpublished PhD dissertation, Boğaziçi University, 2011.

Velidedeoğlu, Hıfzı Veldet. "Kanunlaştırma Hareketleri ve Tanzimat". *Tanzimat-I: Yüzüncü Yıldönümü Münasebetiyle*. 139-209. Ankara: Maarif Vekaleti, 1940.