

Reviews

Jörg Fisch: *Cheap Lives and Dear Limbs. The British Transformation of the Bengal Criminal Law 1769-1817.* (Beiträge zur Südasiensforschung 79). Wiesbaden: Franz Steiner Verlag, 1983. vii + 154 pages, DM 32,-.

At a time when Islamic criminal law has made an unexpected reappearance on the Indian subcontinent, and when its compatibility with modern liberal principles has again become an issue in the context of the universalist Human Rights policy pursued by the United Nations, this historical enquiry into an earlier encounter is of particular interest. The question here arises within a general setting very different from today's resurgence of religious fundamentalism, namely in the era of European colonial expansion, with its confident assertion of cultural superiority. Nevertheless this study presents a rather special case in which peculiar constitutional and political conditions inhibited the simple imposition of occidental legal institutions. Instead, a process of gradual adaptation took place. The lasting comparative interest of this process and of the principles involved emerges clearly from this well written study.

The reforms in the Bengal criminal law referred to by the sub-title were not measures introduced by "the British" as colonial Sovereign, but by the *British East India Company* acting, since 1765, as *Diwan* i.e. a vassal of the Moghul emperor. In contrast to the presidency town of Calcutta, where the Company exercised sovereignty under the Crown and where English law had been formally brought into force, in the province (*mufussil*) the Company, in its capacity as *Diwan*, gradually took over the administration of a foreign law of the land, i.e. Islamic criminal law. If the Moghul's suzerainty was but of a nominal character, the Company nevertheless, for pragmatic as well as for legal reasons, tried to avoid open interference with criminal law. Instead it developed a variety of subtle techniques to effect substantial changes while maintaining the facade of existing law.

The study traces in detail, but with perspicuity, the progress of these reforms. At the outset the framework of existing Islamic criminal law is delineated, as well as primary British reactions to it. This sketch brings out, with unusual clarity, the in-built dualisms of the traditional regime: the dualism between strict law (*ḥadd, qiṣaṣ*) and the wide complementary area of discretionary justice (*ta'zir*) within the canonical law (*shari'a*) itself; also the dualism between the canonical system and supplementary "extraordinary" justice in actual administration, which was based on grounds of public exigency (*siyāsat*). By combining the two discretionary powers

of *ta'zir* and *siyāsāt*, the British were able to introduce widely the new definitions of crime and changes in the system of punishments. To effect changes in the more sensitive core area of strict *shari'a* law, ingenious use was made of a procedural peculiarity: the Islamic jurists reporting on the Islamic law applicable in the Company's courts were required to give their *responsa* (*fatwās*) on assumptions suitably modified by legal fictions. Thus while *pro forma* respect was being paid to the Islamic system, it had for practical purposes become almost obsolete by 1817 (the closing date chosen for the period studied, cf. p. 84).

This transformation is an interesting subject even from a purely technical or morphological point of view. But the story has been told more than once, and fresh treatment, especially in the English language, would perhaps not be rewarding, if it were not for the exceptional systematic grasp displayed throughout the presentation. The author's real interest, though, and what the book mainly contributes beyond existing literature, is a fresh evaluation of the policy motives and theoretical ideas involved. The chief target is the myth of the British legal reforms being primarily motivated by humanitarian aims and spirit, "humanity and reason", as the contemporary phrase had it. Most of this impression derives from the abolition of mutilating punishments and, perhaps, some mingled associations of other humanitarian reforms, such as the abolition of *sati*. This, as the study convincingly shows, is a re-interpretation of what originally were reforms designed to make the administration of criminal law, in the first instance, more effective, i.e. more regular and in many cases more severe. The analysis of legislation on this point is supported by material from official enquiries into the effects of reforms, which shows, on the side of administrators, a prevalent concern with the mildness of Islamic law and consequent demands for increased severity. Undoubtedly a strong humanitarian impulse existed in the revulsion toward mutilating punishments. But the overall survey shows that abolition of these cruel punishments was more than offset by a generous extension of capital punishment (hanging) – seemingly without humanitarian qualms. The tacit value preferences underlying this remarkable shift are ironically highlighted in the title of the book.

What is identified as central idea directing the change is the modern occidental concept of legality with its concomitant elements of legal equality and bureaucratic regularity of enforcement. This concept determined the initial choice of the closest equivalent, i.e. canonical written law, as basic legality. As the author rightly notes, canonical law was thereby raised to a position of rigid exclusivity it had never enjoyed before – since modern legality did not admit of the traditional irregular interplay with extraordinary justice. Nor were the new rulers in a position to follow in the footsteps of their predecessors and to use complementary powers under *siyāsāt* in the indigenous style of personal intervention. The nature of their rule as "state" in

the modern sense compelled recourse to legislation as the novel instrument of systematic intervention and change.

In the concluding reflections, an attempt at rational analysis of the reforms is made with such conceptual pairs as: motive power vs. limiting power of a principle, "habit", i.e. ingrained modes of thinking, and "interest", i.e. the Company's interest in ineffective government (The explanation of the latter distinction seems to have been misplaced, occurring on p. 134 though already having been applied on pp. 126, 129, 131.). "Habit" would, for instance, explain why corporal punishment was repugnant to the British only in forms unfamiliar to them, like mutilation, while flogging was resorted to as a matter of course and kept in the statute book throughout British rule (It has survived in Pakistan until today and has lately been supplemented by the re-enactment of "Shari'a" criminal laws and punishments in 1979. The result has been a dualism of flogging British style and flogging Islamic style, according to circumstances.).

The principal motive power identified, not surprisingly, is "reason" in the sense of occidental rationality. This would account for the tendencies to regularize, to eliminate private justice, to close gaps and abolish social privileges and unintelligible "arbitrary" concepts of Islamic doctrine and to streamline punishment to its intended deterrent effect while avoiding "unnecessary" pain (cf. the discussion on the abstract nature of the death penalty and transportation, blowing from the cannons etc. pp. 42 f., 61 f., 131 f.). Only as a secondary or derivative motive does humanity come into play for, as the author takes care to explain, it has no unambiguous rationale of its own. It may mean humanity in relation to the criminal or to the victim, humanity in sparing the life or rather sparing the body. Why it should be more humane to take a person's life than to deprive him of a limb only, cannot be demonstrated on rational grounds. By way of illustration, it may be mentioned here that the very same issue had already been, inconclusively, discussed in most explicit terms in Imperial China during the Tang era (cf. R. Heuser, *Das Rechtskapitel im Jin-Shu*. München 1987).

In general, the author's analysis and reasoning strike this reviewer as both imaginative and convincing, and it is certainly salutary to dismantle the self-complacent myth of the colonial humanitarian mission vs. Eastern barbarity. Nevertheless, I have some lingering doubts as to whether the British administrators' case is adequately stated in historical perspective. Rightly, the author has contrasted the Company's legislation in Bengal with the administrators' background experience of a very sanguinary criminal law in contemporaneous Europe. In England hanging had become the standard punishment for felonies, but was also in use for lesser and sometimes trifling transgressions – a list running into hundreds of capital offenses. The harshness is graphically illustrated by an account of the working of English

criminal law proper in the Presidency towns of British India (p. 93 ff.) which makes the Company criminal law appear, in comparison, mild. It is noted that the formal preservation of Islamic law perhaps played its most consequential role in providing a shield against wholesale introduction of British criminal law and thus giving scope for reforms. The trend of these reforms seems to fall into line with an epochal change occurring in contemporaneous Europe, as recently analysed by M. Foucault (*Surveiller et Punir. La naissance de la prison*. Paris 1975) – a change from sanguinary and conspicuously savage punishments like attacks on the body (cf. the formulation p. 131) towards control by more abstract and measured sanctions. In the temper of the time, the Company's administrators could see themselves as progressive innovators, advancing – between the barbarities of English as well as Islamic law – the enlightened tendencies of the age. "Humanity and reason" may have appeared as essentially the same, a *hen-dia-dyoin*. What is still wanting for a comprehensive assessment is an enquiry into how these reforms were experienced at the receiving end, by the people of Bengal.

A final note of caution in view of actualities: whatever relative justification of corporal punishment might be ironically suggested by the title of this book, the relation no longer exists. Today, where capital punishment is on the retreat generally and has been totally abolished in many civilised countries, punishments of mutilation would have to be justified on their own account, and would have to face the challenge of humanity without extenuating sideglances at alternative barbarities. With this apprehensive gloss we take leave of a thought-provoking book.

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Fred Arnold and Nasra M. Shah (eds.): Asian Labor Migration. Pipeline to the Middle East. (Westview Special Studies in International Migration). Boulder and London: Westview Press, 1986, 265 pages.

This reader collects papers presented at a Conference on Asian Labor Migration to the Middle East which was held at the East-West Center in Honolulu in September 1983. This conference focused on the empirical assessment of the size of the labor flows from Asia (i.e. South Asia, South East Asia and South Korea) to the Middle East, the characteristics of the contract workers and the economic and non-economic consequences of labor migration for the home countries.

Lionel Demery elaborates the weaknesses of the data base of any research on labor migration to the Middle East: poor or missing census data, huge illegal flows and the general absence of information on return flows. Demery's paper presents