ADMINISTRATORS AND MAGISTRATES: THE DEVELOPMENT OF A SECULAR JUDICIARY IN EGYPT, 1842-1871[1]

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Introduction

In 1812, the well-known Egyptian chronicler al-Jabartī[2] tells us, a gang of thieves were apprehended in Cairo and brought before the chief qāḍī. They confessed to having committed many thefts, yet the qāḍī could not convict them since, in their confessions, they used not the phrase "we have stolen", but the words "we have taken". Under the sharīʿa, this constitutes ambiguity (*shubha*) which precludes the application of *ḥadd*-punishment. The qāḍī then wrote a report to the *kethüda*[3] (the first lieutenant of the *vālī* and de facto governor of Cairo) and entrusted the matter to him for further disposal. The latter, after some reflection, sentenced them to amputation of their hands on the strength of his authority to impose penalties by way of *taʿzīr* or *siyāsa*.

This little episode illustrates some features of Egyptian criminal law enforcement in the early decades of the nineteenth century. Both the qāḍī and the administration were involved and both applied Islamic law. This was a continuation of the situation pre-

[1] This is the revised text of a paper presented at the 2nd Joseph Schacht Conference on Theory and Practice in Islamic Law, Granada, 16-20 December 1997.

[2] Jabartī (1297 H.) IV, 144.

[3] Since Turkish was the administrative language of Egypt until the 1850s, I will use the Turkish version of administrative terms referring to functionaries and organs existing before 1850. The system of transliteration used is the one proposed by IJMES.

vailing in the seventeenth and eighteenth centuries. During this period, the qāḍī would deal with criminal matters whenever there was a plaintiff and a defendant. If he could not sentence the defendant, or if there was no plaintiff, the civil or military authorities would deal with the matter.[4]

What I intend to discuss in this paper is how this simple system of law enforcement by the executive, complementing the qāḍī's jurisdiction, gradually evolved during the nineteenth century into a much more complex and sophisticated type of justice administered by a fully-fledged judiciary. This judiciary was finally, between 1883 and 1889, replaced by a French type court system. I will limit myself to the common courts and will not pay attention to the commercial tribunals, established in 1845, or the Council of the Qūmisyūn, that functioned between 1861 and 1864 to deal with civil cases between Egyptians and foreigners.[5] After sketching how this judiciary expanded from one single court of justice operating in the political centre into a five-tiered judiciary, I will discuss some essential features and characteristics of the system.

Law enforcement by the administration

Until 1842, when the *Cemʿiyet-i Ḥaḳḳāniye* (see below) was created, the most important of the authorities involved in law enforcement was the *kethüda* and the council presided by him. This council, established in 1805-1806 (1220 H.), was first known as *Dīvān-i Vālī*, and later as *Dīvān-i Hidīvī*.[6] Although its main task was

[4] See Faraḥāt (1993) and El-Nahal (1979).

[5] Zaghlūl (1900), 199-200, 209; appendix 85-90.

[6] The Dīvān-i Hidīvī was located in the Cairo Citadel. (Lane (1966), p. 114) For its power in criminal matters, see Deny (1930), 114. In the decree of 1837 (Rabīʿ I, 1253), creating an administration consisting of six Dīwāns, the existing (*ka-mā fī al-sābiq*) competence of the Dīvān-i Hidīvī was defined as follows: (1) legal affairs of the Capital (*umūr ahkām Maḥrūsat Miṣr*; (2) examination and rendering judgment in cases submitted by petitions from the regions. (Tashkīl al-dawāwīn wa-Qānūn al-Siyāsatnāma, Ch. 1, Art. 1; text in Zaghlūl (1900), app. 4-26). Deny observes that the Divān-i Hidīvī must be distinguished from the Maʿiyet-i Seniye, also known as Şūrā-yi Muʿāvenet, whereas Zaghlūl, erroneously, regards them as identical. (Deny (1930), 92; Zaghlul (1900), 159-160).

administrative, it would also try serious offences. An ordinance of April 1838 defined the jurisdictions of the Dīvān-i Hidīvī and the Police Department (Żābiṭhāne). Simple cases, such as quarrels between spouses or private persons ("Zayd wa-ʿAmr" as the Ordinance expresses it) and arguments in marketplaces were to be dealt with at the police station (located in Muski Street) by an official of the Dīvān-i Hidīvī together with the chief of police or one of his officers. They first had to try to achieve a reconciliation between the parties. Although the decree does not make mention of it, one may assume that petty offenders were punished at the police station, usually by beating. In case the parties did not agree they were sent to the Dīvān-i Hidīvī with the report of the police investigation. If the case had to be examined according to the shariʿa, the parties were sent to the qāḍī. Petty cases could also be summarily dealt in the streets by the *muḥtesib*.[7] Serious cases such as murder, theft, and indecency, were immediately brought to the attention of the Dīvān-i Hidīvī for examination and trial.[8] If capital punishment was at stake, the case would be submitted to Meḥmed ʿAlī himself as is evidenced by the following trial that took place in 1832.

In a street in Cairo a man offered to take care of a donkey while its owner went shopping. However, in stead of waiting for the latter's return, the man absconded with the donkey and sold it outside Cairo. Later he was caught and brought before the *Dīvān-i Hidīvī*. It appeared that he had several previous convictions: twice to a six month term in the Alexandria Dockyards[9] and a number of times to simple detention or corporal punishment. Since evidently these measures had not deterred him from committing new crimes, his case was submitted to the Pasha himself who sentenced him to be hanged "as a punishment (*qiṣāṣ*) for him and a lesson (*ta'dīb*) for others".[10]

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[7] The office of muḥtesib was abolished some time before 1837 and the offenses that he used to deal with were now heard by the Dīvān-i Hidīvī. (Ibid. Ch. 1, Art. 5). For the way the muḥtesib functioned, cf. Lane (1966), 126; Sāmī (1928-1936), II, 262, 542.

[8] Dīvān-i Hidīvī Lāyiḥesi, dated 13 Muḥarram 1254 (8-4-1838), in 18 articles. Turkish and Arabic text in the Egyptian national Archive (Dār al-Wathā'iq al-Qawmiyya, henceforth DWQ), Maḥfaẓat al-Mīhī, doc. 20.

[9] The Alexandria Dockyards (Līmān Iskandariyya) was the main national penitentiary.

[10] *al-Waqā'iʿ al-Miṣriyya*, 1 Shaʿbān, 1247.

Other administrative authorities dealing with criminal matters were the provincial governors, the heads of administrative departments (for offences committed by their personnel)[11] and, finally, all persons with some type of recognised authority over the offenders. The following case, tried in 1831, evidences the authority of the *Shaykh al-Azhar* over religious functionaries.

A woman in Cairo had a pet dog called Samūra, which, she later claimed, could understand both Arabic and Turkish. After she had this dog for three years it died and she wanted to bury it in a cemetery. With two of her neighbours, both Koran reciters (*faqīh*), she took the remains of the dog to a cemetery and buried it. When the guardian inquired what they were doing, they answered him that they were burying a stillbirth. Later the man decided to exhume the contents of the grave, found the dog and informed the authorities. The case was brought before the *Dīvān-i Hidīvī*, which sentenced the woman to be sent to the House of the *Vālī* [where the women's prison was located] to stay there a few days, "since she has a weak mind and a delicate body and will not stand a beating." The guardian was released after having been given a beating, because he knew of this case [and did not inform the authorities right away]. The punishment of the two *faqīh*'s was referred to His Eminence the *Shaykh al-Azhar*."[12]

The beginnings of the judiciary

The creation, in 1842, of *Cemʿiyet-i Ḥaḳḳāniye* marked the first step in the establishment of a secular judiciary. It was a specialised judicial council whose members had no other duties and consisted of a president and six members, two from the civil service, and two each, with the rank of general (*mīrlivā* or *mīrālāy*), from the army and the navy.[13] An important objective of this new council was the enhancement of the legality of penal sentences, after the example

[11] The general rule was laid down in Art. 18 of the Qānūn al-Siyāsatnāma of 1837, dealing with offenses committed by officials. Light offenses are to be tried by the superiors of the offender. Serious offenses are to be tried by a committee, especially set up by the Vālī if the official is high ranking, and otherwise by the council of the offender's Dīvān. If he was not satisfied with the sentence, the offender could appeal to the council of another Dīvān. The offender had to be confronted with the accuser before sentence could be given. All sentences had to be approved by the Vālī.

[12] *al-Waqāʾiʿ al-Miṣriyya*, 26 Jumādā II, 1247.

[13] Zaghlūl (1900), 184.

of Europe. When the *Cemʿiyet-i Ḥaḳḳāniye* was about to be established, Meḥmed ʿAlī was leaving Cairo and had charged his Cabinet with taking care of the final steps. His ministers were then instructed to consult the *Mütercim Bey* (probably Rifʿat al-Ṭahṭāwī, who, at that time was the head of the Translation Bureau) because he knew how these matters were arranged in Europe.[14] The decree itself emphasises that punishments must be imposed according to the existing laws and decrees.[15]

The *Cemʿiyet-i Ḥaḳḳāniye* was to deal with the following matters:[16]
In first instance:

1. cases of manslaughter and theft;
2. offences committed by high officials;
3. disputes between individuals and state authorities (e.g. regarding government purchases, or *iltizām*s);
4. disputes of competence between officials.

In review:

5. penal sentences against officers and civil servants;
6. any sentence (including those of qāḍīs) that is appealed against by the interested party on the ground of injustice, after the Khedive has given his consent.

The sentences of the *Cemʿiyet-i Ḥaḳḳāniye* needed the approval of the *Dīvān-i Hidīvī* (presided by the *kethüdā)* to be effective.[17] The examination of the cases was to take place on the basis of documents.[18] It is doubtful whether one can call the *Cemʿiyet-i Ḥaḳḳāniye* a real court. It had clearly a hybrid character: it was a body that was part of the administrative bureaucracy and had its place in its hierarchy, but on the other hand it was specialised in legal matters, such as the investigation of the legality of sentences, settling administrative disputes and trying high officials in first instance.

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[14] Zaghlūl (1900), 183.

[15] Lā'iḥat Tartīb al-Jamʿiyya al-Ḥaqqāniyya, Ch. 3, Art. 3, 5.

[16] Lā'iḥat Tartīb al-Jamʿiyya al-Ḥaqqāniyya, Ch. 2, Art. 1, 2, 3, 5. The Lā'iḥa does not list the trial of cases of manslaughter and theft and review of judgements given by qadis. This, however, is mentioned in Bayān (1260 H.).

[17] Ibid. Ch. 3, Art. 5.

[18] Zaghlūl (1900), 183; Lā'iḥat tartīb al-Jamʿiyya al-Ḥaqqāniyya, Ch. 2, Art. 5.

After the creation of the *Cemʿiyet-i Ḥaḳḳāniye* legal cases, and especially criminal cases, were to be heard at two or three levels. Serious offences were tried by the *Cemʿiyet-i Ḥaḳḳāniye* acting as a court of first instance. As to other offences, they were first heard by executive authorities (in Cairo by the police, *Żabṭiye*, in the provinces by the provincial government, and for official misconduct by the department of the offender) and then, by way of revision, by the *Cemʿiyet-i Ḥaḳḳāniye*. The final approval for execution would be given by the *Dīvān-i Hidīvī*.

The *Cemʿiyet-i Ḥaḳḳāniye* was operational for seven years. In 1849 it was abolished and its duties were taken over by a new council, the *Majlis al-Aḥkām*.[19] It consisted of a president, eight members, all high ranking officials, with title *pasha* or *bey*, and two *ʿulamāʾ*, a Hanafite and a Shafiʿite one. Later, in 1856, when the *Majlis al-Aḥkām* was re-established after its suppression in the preceding year, it had twenty members, reduced, one year later, to fifteen.[20] Its duties, according to its constitutive decree,[21] were similar to those of the *Cemʿiyet-i Ḥaḳḳāniye*. It would try in first instance serious criminal cases: manslaughter and offences for which the defendant could be sentenced to forced labour (*īmān*) or incarceration (*al-rabṭ bi-l-qalʿa*). Less serious criminal cases were investigated, heard, and sentenced by the provincial authorities (*mudīriyya*) or the departments (*dīwān*).[22] They had to send reports to the *Majlis al-Aḥkām*.[23] Persons who were convicted by the *mudīriyya* could petition the *Majlis al-Aḥkām* for revision of their sentence. This, however, was a risky business, since, if the original sentence was upheld, the punishment would be doubled. There is,

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[19] The Majlis al-Aḥkām was created on 5 Rabīʿ II, 1265 (28-2 1849). It functioned until 1889 with two interruptions, from 16 Dhū al-Ḥijja, 1271 (30-8 1855) until 1 Rabīʿ I, 1273 (30-10 1856) and from 24 Ramaḍān, 1276 (25-4 1860) until somewhere in 1277. (Deny (1930), 123-4; Sāmī (1928-1936), III/1, 347).

[20] Zaghlūl (1900), 196-197

[21] Lāʾiḥat Majlis al-Aḥkām al-ʿĀlī al-Miṣriyya [sic] (5 Rabīʿ II, 1265). Text in Zaghlūl (1900), appendix, 63-66. In 1856 (1 Rabīʿ I, 1273) a new decree governing the activities of the Majlis al-Aḥkām was enacted, which was similar to the first one of 1849. Text in Sāmī (1928-1936), III/1, 194-7.

[22] Art. 23 of the Imperial Penal Code of 1265, enacted nearly simultaneously with the creation of the Majlis al-Aḥkām.

[23] Lāʾiḥat Majlis al-Aḥkām (1265), Art. 4.

however, archival evidence that this harsh rule was not always applied in practice.[24] After the creation of the regional councils in 1852 the *Majlis al-Aḥkām* acted only as a court of revision in criminal matters (with the exception of Cairo, where it continued to act as a court of first instance until 1855). The *Majlis al-Aḥkām* would further examine difficult administrative problems that could not be solved within the departments and disputes regarding the competence of the departments. The decisions of the *Majlis al-Aḥkām* were submitted to the bureau (*Dīvān*) of the *kethüdā* for execution.[25]

The regional councils

The introduction of the Imperial Penal Code (*al-Qānūn al-Sulṭānī*)[26] in 1852-1853 brought new features to the system by creating a lower level of jurisdiction, the provincial councils (*majālis al-aqālīm).* For Cairo, however, the *Majlis al-Aḥkām* continued to be the court of first instance in serious criminal cases until 1855, when the Governorate of Cairo (*Muḥāfaẓat Miṣr* began to administer justice. In 1859 the Council of Cairo was established and took over this task.[27] In spite of the initial problems and the vicissitudes in government policy with regard to these new councils (see Appendix I), they became an important element of the new system. Originally, they were subordinated to the local government. However, as from 1862 they fell directly under the newly established

[24] DWQ, Sīn 1/24 (Maʿiyya Saniyya, Qayd al-khulāṣāt al-wārida min majālis daʿāwī al-aqālīm) Sijill 1 (1268-9), p. 2, 24 Jumādā I, 1268: Two persons, who had been sentenced in the mudīriyya to six months forced labor in al-Qanāṭir al-Khayriyya for having stolen a cow and a calf, complained that their confession has been obtained by torture. The complaint was investigated by the Majlis al-Aḥkām. It appeared that they did not steal the cattle themselves, but had incited others (also convicted) to steal for them. The Majlis al-Aḥkām regarded the sentence of the mudīriyya as justified but did not increase the penalty.

[25] Lāʾiḥat Majlis al-Aḥkām al-ʿĀlī al-Miṣriyya (5 Rabīʿ II, 1265), Art. 2, 3, and 5.

[26] Text in Zaghlūl (1900), appendix, 156-178 and Jallād (1890-1895), II, 90-102.

[27] Sāmī (1928-1936), III/1, 322. However, the Council was suppressed the following year (1860), to be reestablished in 1863.

Department of Justice (*Dīwān al-Ḥaqqāniyya*) in Cairo. Although their numbers varied, and there were intervals during which they were suppressed, they gained importance. By 1871 there were fifteen of them.[28] They were to hear criminal and administrative cases. After the promulgation of the Land Law of 1858, they were to take cognisance also of disputes concerning state land.[29]

The first councils consisted of a president and four or five members, all officers with the rank of major of lieutenant-colonel or middle rank civil servants (*nāẓir qism*, district chief). To these members two *mashāyikh al-balad* were added who would attend the sessions by turns. Coptic shaykhs were also accepted and just like their Muslim colleagues, they had the right to sign or seal the sentences.[30] Finally a Hanafite and a Shafiʿite mufti were attached to each council. The councils convened daily.

The decree does not clearly circumscribe the jurisdiction of these councils.[31] The basic features of the system, as found here as well as in some articles in the Imperial Penal Code, were that criminal cases were first investigated in the offices of legal affairs (*qalam al-daʿāwī)* that were part of the provincial administration (*mudīriyya)*, or in the police departments (*ḍabṭiyya*) of the main cities. Light offences such as quarrels and fights not resulting in serious injuries, petty theft (i.e. theft of objects with a value less than the *niṣāb*, the minimum value for the application of the *ḥadd* punishment), public drunkenness and gambling would be dealt with there. These offences were usually punished with flogging or beating, and, after the abolition of corporal punishment in 1861, by simple detention (*ḥabs*) or detention on bread and water (*ḥabs riyāḍa*).[32] The punishment could be executed immediately, but the *Majlis al-Aḥkām* would be notified of the sentence. In more serious cases, where the defendants could be punished with ban-

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[28] For their varying numbers and locations, see appendix I.

[29] Peters (1994), 77.

[30] Wājibāt maʾmūriyyāt aʿḍāʾ al-majlis, Art. 18. Text in Jallād, II, 104-105.

[31] Decree of 13 Rabīʿ I, 1268; text in Zaghlūl (1900), appendix, 70-75.

[32] For the list of petty offenses that were dealt with at the police level, see Lāyiḥat tabdīl al-ḍarb bi-l-ḥabs, an implementing order of the 1861 decree abolishing corporal punishment. Text in DWQ, Lam 1/20/8, Muḥāfaẓat Miṣr, p. 71, doc. 3, dated 11 Sha'bān 1278 (11-2 1862).

ishment (*nafy*) or imprisonment with or without forced labour (*al-qayd bi-l-zanjīr*), trial would take place before the regional council and the sentence would be executed after approval by the *Dīwān al-Katkhudā*.[33] According to Art. 4 of the Decree of 13 Rabīʿ I, 1268, these sentences were also sent to the *Majlis al-Aḥkām*. The most serious crimes, homicide and offences against the security of the state (*al-saʿy bi-l-fasād*, as defined in Ch. 1, Arts. 5 and 6 of the Imperial Penal Code) were to be heard in first instance by the councils after which the defendants and the records would be sent to the *Majlis al-Aḥkām* for revision.[34]

The following case from 1853 gives an impression of how a criminal investigation was conducted and how the regional councils gave judgement:

On 25 Shawwāl, 1269 (1 August, 1853), during the *mawlid* of Aḥmad al-Badawī, a man was arrested in Ṭanṭā for having stolen a bolt of striped silk during the *mawlid* of the previous year. The owner of the silk, a merchant from Cairo, recognised him because the man was wearing a waistcoat (*ṣideirī*) made of that silk. The accusation was corroborated by other persons. The suspect was from Ṭahṭā in the province of Asyūṭ and Jirjā in Upper Egypt. The *mudīr* of the Gharbiyya province, to which Ṭanṭā belongs, notified the *Dīwān al-Katkhudā* on 3 Dhū al-Qaʿda, 1269, who on 15 Dhū al-Qaʿda requested the *mudīr* of Asyūṭ and Jirjā to investigate whether the suspect had previous convictions and to dispose of the case. The authorities of the district of Ṭahṭā questioned the shaykhs of the suspect's village who testified that he had no previous convictions. On 28 Ṣafar, 1270 the *mudīr* submitted the case to the Regional Council South I (*Majlis Daʿāwī Qism Awwal Qiblī*). The Council examined the case and concluded that the testimonies of the witnesses and the fact that the suspect was wearing a waistcoat made of the stolen silk were sufficient proof of his guilt. However, before the Council could sentence him they needed additional information since the applicable article of the Penal Code lays down that the punishment for theft depends on the value of the stolen good and the capability of the defendant to pay compensation.[35] On 24 Rabīʿ I, 1270 the Council wrote

[33] The text mentions the Dīwān al-Wālī. But this department must be identified with Dīwān al-Katkhudā. See Art. 5 of the Decree of 13 Rabīʿ I, 1268.

[34] Imperial Penal Code Ch. 3, Art. 15.

[35] "If the value of the stolen goods is between 100 and 1.000 piasters, if the thief can compensate the owner of the stolen goods, and if the thief has no previous convictions, then he will be punished with forced labor in the provincial building sites or other public works without wages and only for food (*jirāya*) for

to the *mudīr* of the Gharbiyya Province to inquire about the value of the waistcoat and the suspect's ability to pay compensation. The answer, dated 7 Rabīʿ II, 1270, stated that the value could not be determined since the suspect had disposed of the waistcoat during his imprisonment and that he was a beggar without any properties. Thereupon, on 18 Rabīʿ II, 1270 (18 January, 1854), almost six months after his arrest, the Council decided that the man was to be released. [36]

The case is a good illustration of the bureaucratic handling of criminal affairs. The record does not indicate that the suspect has been questioned by the Council. In fact, it is not even clear where he was imprisoned during his "trial". The case was disposed of on the basis of officially obtained information and the text of the code and at no point during the proceedings before the Council did the suspect have an opportunity to defend himself.

In 1862 a new decree governing the functioning of the councils was promulgated. It is much clearer than the previous one and circumscribes the councils' jurisdiction in detail. Unless otherwise stated in specific laws, the *mudīriyya*s were competent to try

(1) offences that could be punished with up to two months detention,

(2) offences committed by village shaykhs or officials of the *mudīriyya* that could be punished with discharge, and

(3) offences related to the recruiting soldiers for military service.

Flogging had in the meantime been abolished as a penalty (Art. 5 of the Decree). The parties involved were entitled to complain to the regional councils if their cases were not decided in time or if they felt that they had been treated unjustly. This is a new element: previously only the *Majlis al-Aḥkām* acted as an instance of appeal, and not the regional councils. In the absence of contrary statutory provisions, the councils were to take cognisance of

(1) offences that could be punished with more than two months

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a period between two months to one year, dependent on the value of the stolen goods. If the value of the stolen goods cannot be obtained from him, he will be punished in the same manner but for a period of one year and a half at the most, dependent of the value of the stolen goods." Art. 72 of the Penal Code of 1849.

[36] DWQ, Sīn 1/24 (al-Maʿiyya al-Saniyya, Qayd al-khulāṣāt al-wārida min majālis daʿāwi al-aqālīm), sijill 2, 18 Rabīʿ II, 1270, No. 13, pp. 23 and 26.

detention, forced labour (*līmān* or *al-istikhdām fī al-ashghāl al-sufliyya*), and banishment and

(2) offences committed by officials (but not village shaykhs and officials employed by the *mudīriyya*s) that can be punished with discharge or demotion.

The cases were prepared in the *mudīrīyya*s or in the police departments. The councils could also hear commercial cases, which in principle fell under the competence of the commercial courts, provided the parties agreed to submit their dispute to a council. All sentences (*maḍābiṭ*) were sent for revision to the *Majlis al-Aḥkām*. The *Majlis al-Aḥkām* would notify the Khedival Cabinet (*al-Maʿiyya al-Saniyya*) who, after approval, would take care of the execution and give notice to the authorities involved.[37] In 1862, a Police Council (*Majlis al-Ḍabṭiyya*) was established both in Cairo and Alexandria, to prepare cases before being submitted to the Cairo or Alexandria Council.[38]

In 1864 two Appellate Councils (*majlis istiʾnāf*) were established, one for the Northern and one for the Southern region, in order to remedy the backlog of cases for the *Majlis al-Aḥkām*. The council of *ʿulamāʾ* that were operative at the Councils of Cairo and Alexandria, were not attached to the Appellate Councils in order to examine cases with a sharʿī character.[39] A year later the Councils of First Instance of Alexandria and Cairo were transformed into Appellate Councils, whereas the police councils (*majlis ḍabṭiyya*) in these cities were henceforth to serve as Councils of First Instance (*majlis ibtidāʾī baladī*). Sometime before 1870 a second Appellate Council was established in the Southern region.[40] The main task of these Appellate Councils was to review all sen-

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[37] Art. 2-5, 11, Decree of 1 Muḥarram, 1279 [1862] regarding the establishment of regional councils in 13 articles. Text in Sāmī (1928-1936), III/1, 414-7; Zaghlūl (1900), appendix, 94-99.

[38] Zaghlūl (1900), 209; Sāmī (1928-1936), III/2, 475, 501.

[39] DWQ, Sin 7/4/33, Majlis al-Aḥkām, Ṣādir al-Aqālīm al-Qibliyya, doc. 71, pp. 184, 191-192, dated 16-8 1281. This contains the text of the Amr ʿĀlī of 10 Shaʿbān 1281, no. 6 approving a resolution of the Majlis Khuṣūṣī dated 27 Rajab 81, no. 20 concerning the establishment of new appellate councils. Art. 6.

[40] DWQ, Sīn 11/8 (Al-Majlis al-Khuṣūṣī, al-qarārāt wal-lawāʾiḥ al-ṣādira), sijill 8, No. 70, 3 Dhū al-Ḥijja, 1280, pp. 104-105; Sāmī (1928-1936) III/2, 550, 593; Zaghlūl (1900), 209-212.

tences of the Councils of First Instance. After revision the sentences were to be sent to the *Dīwān al-Muʿāwana al-Saniyya* for execution. Only criminal sentences in homicide cases or sentences of more than three years imprisonment were henceforth to be submitted to the *Majlis al-Aḥkām*. If the defendant did not acquiesce in the sentence in first instance, he had to be heard before the decision in appeal. Appeal (*abillū*) could be lodged against the sentences of the Appellate Councils and was to be heard by the *Majlis al-Aḥkām*.[41] It seems that many litigants would try to have unfavourable decisions of the Majlis al-Aḥkām revised by submitting the case ultimately to the Majlis al-Khuṣūṣī, for in February 1869 it was decreed that henceforth such cases would not be examined anymore by the Majlis al-Khuṣūṣī, with the argument that this Council was administrative and not judicial.[42]

Now, this multi-tiered organisation of judicial councils was only one part of the whole system. We have already seen that the legal bureaux of the *mudīriyya*s and police departments carried out essential judicial tasks, including sentencing. From a decree issued in 1865[43] it becomes clear that also other administrative bodies had judicial tasks. This decree circumscribes the jurisdiction of village shaykhs, district chiefs (*nāẓir qism*), police commissioners (*maʾmūr ḍabṭiyya*), provincial governors (*mudīr*, *muḥāfiẓ*) and ministers (*nāẓir dīwān ʿumūmī*, i.e. the heads of the departments of the central government) in civil and criminal cases. All of these had extensive judicial powers. From the preamble it can be inferred

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[41] Khedival Decree (amr ʿālī) of 4 Dhū al-Ḥijja, 1280. DWQ, Sīn/1/19 (Qayd al-awāmir al-karīma al-ṣādira min qalam al-majālis bi-l-Muʿāwana), sijill 1 (1279-1280), No 17, 4 Dhū al-Ḥijja, 1280, p. 22. The decree mentions that al-Majlis al-Khuṣūṣī will issue an order regarding appeal. Text of this order containing eight articles in DWQ, Sin/7/4/33 (Majlis al-Aḥkām, Ṣādir al-Aqālim al-Qibliyya), p. 184 (Amr ʿĀlī of 10 Shaʿbān 1281 approving the order), pp. 191-192 (Text of the order itself dated 27 Rajab 1281), doc. 71, dated 16 Shaʿbān 1281 to Majlis Istiʾnāf Qiblī. See also DWQ, Sīn/1/19 (Qayd al-awāmir al-karīma al-ṣādira min qalam al-majālis bi-l-Muʿāwana), sijill 3, No. 7, 15 Shaʿbān 1281, p. 9.

[42] DWQ, Sin 11/8/13 (Dīwān al-Majlis al-Khuṣūṣī, al-qarārāt wa-l-lawāʾiḥ al-ṣādira), doc. 40, p. 52, dated 12 Dhū al-Qaʿda 1285 (24-2-1869).

[43] Decree of 17 Jumādā II, 1282. Text in DWQ Sin 11/8 (Dīwān al-Majlis al-Khuṣūṣī, al-qarārāt wa-l-awāmir al-ṣādira), sijill 18, No 28, pp. 114-116.

that the decree did not create something new, but rather regulated and better defined the powers these authorities already had. District chiefs and police commissioners in provincial towns (*banādir*) could sentence offenders to up to 5 days detention and try simple civil cases. To avoid overburdening the bureaucracy and, probably, for financial reasons, it was expressly stated that as a rule no records were to be kept of such cases. The legal bureaux of the *mudīriyya*s and of the police departments in Cairo and Alexandria could take cognisance of all civil cases and try offences with a maximum penalty of three months detention, provided the defendant was not a second offender, since that was an aggravating circumstance that might result in an increase of the prescribed penalty. Sentences pronounced by the *mudīriyya*s or the Cairo and Alexandria police departments could be executed by order of the governor (*mudīr, muḥāfiẓ*) or the police commissioners. For more serious offences these legal bureaux would carry out the investigation and submit the results to the council of first instance for sentencing. After revision by the Appellate Council, these sentences were carried out by order of the Ministry of Interior (*Dīwān al-Dākhiliyya*). However, capital sentences, sentences of more than one year imprisonment or banishment, and sentences imposing the punishment of discharge from service could only be executed by order of the Khedive (*amr ʿālī*). Ministers had the power to try all offences committed by their officials for official misconduct. If they pronounced sentences of three months detention or more, these were to be sent to the Appellate Council for revision.[44]

Further expansion of the judiciary

About half a year later, in mid 1871, the lower end of the judicial organisation was reformed to make it conform to the principle

[44] Regulation of al-Majlis al-Khuṣūṣī approved by the Khedive on 8 Shawwāl, 1287 (Sāmī (1928-1936) III/2, p. 883), supplemented by regulation of al-Majlis al-Khuṣūṣī issued on 16 Dhū al-Ḥijja, 1287, approved by the Khedive on 28 Muḥarram, 1288 (Sāmī (1928-1936) III/2, 915-7).

of justice by council, rather than by a single person.[45] Judicial councils were created at the local level (*majlis daʿāwī al-balad*, *majlis daʿāwī al-bandar*, with three members) and at the district level (*majlis daʿāwī al-markaz*, with 5 members)[46] to replace the judicial powers of the village shaykhs and the district chiefs. The village councils could pronounce sentences of one day detention and fines of 25 piaster, the district councils sentences of five days detention and fines of 100 piasters. The village councils would also hear civil cases. If these did not end in settlement, or if the claim exceeded 500 piasters, the initial report and the case was referred to the district councils. Civil claims of 2.500 piasters or more were the competence of the regional councils. All sentences could be enforced immediately by the shaykh of the quarter (*shaykh al-ḥiṣṣa*) where the person lived against whom judgement was given, respectively the district police of his residence. Decisions of the village councils could be appealed against to the district councils, whereas the judgements of the latter, if given in first instance, were subject to appeal to the regional councils. This new decree did not affect the judicial powers of the *mudīriyya*s, which could impose sentences not exceeding fifteen days detention.[47] With some slight modifications regarding the competence of the councils and the possibility of appeal,[48] this new judicial system remained in force until the French inspired judicial reform of 1883.

Conclusions

Within a very brief period of about thirty years, the Egyptian government created a fully developed judiciary, independent from the religious court system. These new councils, however, were not regarded as an encroachment on the sharīʿa. To some extent, Islamic rules continued to play a role in the councils, witness the

[45] Decree of 25 Jumādā II, 1288. Text in Sāmī (1928-1936) III/2, 943-951; Zaghlūl (1900), appendix, 181-206.

[46] The name *qism* for district had been being replaced by *markaz*.

[47] See Supplement to the Decree on the District Councils, of 6 Rabīʿ II, 1290, Art. 1.

[48] See the decree mentioned in the previous note.

fact that *muftī*s were appointed to them and that the higher ones counted important *'ulamā'* among their members. Homicide cases were tried in one session both by a qāḍī and secular council.[49] And the Decree on the Village and District Councils of 1871 laid down that if an action is brought before a district council concerning succession, [the rights to] palm trees, irrigation wheels or landed property, the case will be heard in the council in the presence of the qāḍī of the district.

In the initial stage of the process, two principles played a role. The first principle, introduced by Meḥmed 'Alī, was the notion of conciliar bodies as major building stones of the administration.[50] During his reign many administrative councils were created. Decisions were taken by the majority of the votes after due deliberation. In the beginning, the competence of these councils was not clearly defined. However, gradually the need for specialisation began to be felt. This I consider as the second operating principle in the development of the judiciary. As from the 1830 the idea spread among the ruling elite that maintenance of public order had to be regulated by statute, in the first place in order to curb the unlimited power and the arbitrariness of provincial governors, in the second place, in order to make criminal law enforcement palatable to the public.[51] In the preamble of an order of 1842 given to his cabinet (*Şūrā-yi mu'āvenet*) concerning the establishment of the *Cem'iyet-i Ḥaḳḳāniye* Meḥmed 'Alī argued that:

> if an offender is sentenced to penalties laid down [by law] without the slightest partiality and with justice and equity, then that person will have no objections anymore. It is evident that the impact of penalties laid down [by law] may be enormous. Therefore there is in Europe much attention for and interest in this matter. As a result, when they (the Europeans) impose punishments, they investigate and make clear the offender's fault and the punishment that he deserves to such an extent that the accused does not protest anymore against it and accepts it wholeheartedly.[52]

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[49] Cf. Peters (1994) and Peters (1997).
[50] See Deny (1930), 33, quoting the Regulations of Rabī' II, 1233.
[51] See Peters (1999).
[52] Zaghlūl (1900), 182-183.

Such notions led to the idea that law enforcement was a serious affair for which specialised councils had to be established. However, the next step, that of training jurists to staff these councils was never taken. So much were these councils regarded as belonging to the administration, that membership was part of the normal bureaucratic career. There are indications that these administrators may have had difficulty in functioning as impartial magistrates. Various statutes contain provisions inculcating the members of the councils

> that they must not be inclined to protect only [the interests] of the state (*mīrī*). Rather, they must take into consideration both [the interests] of the state and those of the state servants and the subjects and they must treat the latter with justice. If someone is entitled to something in a case, then his right must be protected. The members [of the council] must always proceed in such a way that they give everybody his due.[53]

As we have seen, the new judiciary evolved from the law enforcement by administrative bodies of the central government (*Katkhudā*, the *Dīvān-i Hidīvī*, or the Khedive himself) or by the regional administration (*mudīr*s) under supervision of these central bodies. The creation of specialised judicial councils such as the *Cemʿiyet-i Ḥaḳḳāniye,* the *Majlis al-Aḥkām*, and the regional councils did not put an end to the involvement of these central authorities. Important decisions were submitted to the central administrative bodies or the Khedive himself. In the course of time, however, increasingly fewer categories of judicial decisions had to be submitted to the central government for approval. Thus the judiciary acquired a greater degree of independence.

In the course of these thirty years the jurisdiction of the secular judiciary was extended. In the beginning the judicial councils dealt almost exclusively with criminal and administrative matters. Gradually, they also took cognisance of civil cases. This was expressly laid down in the 1871 judicial reform decree. For the lower

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[53] Lāyiḥat Majlis al-Aḥkām al-Miṣriyya (5 Rabīʿ II, 1265), Art. 12. Text in Zaghlūl (1900), appendix, 63-66. Similar provisions in: Lāʾiḥat tartīb al-Jamʿiyya al-Ḥaqqāniyya, Ch. 2, Art. 5 (Zaghlūl (1900), appendix, 27-3) and Wājibāt maʾmūriyyat aʿḍāʾ al-majlis (one of the implementing orders of the Imperial Penal Code), Art. 4. Text in Jallād (1890-1895), II, 104-105.

tiers of the judiciaries, this must have been an official confirmation of the practice of informal arbitration at the village level.

During our period, the procedure before the new councils developed from a purely bureaucratic handling of cases to a procedure resembling a trial. The contrast between the procedure before the qāḍī and the way the newly established councils operated is striking. Trial before the qāḍī was in principle a public trial of an accusatory nature: Plaintiff and defendant would fight a legal battle with the qāḍī as a referee. The procedure before the councils was essentially inquisitory. There was no office of public prosecutor and the council would function both as prosecutor and judge, whereas the defendant was not a party in the trial, but rather the object of an investigation. Typically, there was no right to legal counsel. Only in cases of manslaughter was the defendant's presence required since such cases were tried by the council and the qāḍī in one and the same session, and since the rules of sharīʿa procedure require the presence of both plaintiff and defendant.[54] The councils were at liberty to interrogate the defendants, but for most of our period, this was not compulsory. If the members of a council were to question a defendant, they were admonished to interrogate him in a friendly manner and without threats or harassment.[55] It seems that this did not happen very often. The absence in the records of trials of the defendant's statements (except those taken during the preliminary investigation) can be seen as an indication that cases were usually tried on the basis of the reports of the investigation carried out by the authorities that had prepared the case. At some point, towards the end of our period, the rule was introduced that the defendant had to be heard before

[54] Imperial Penal Code, Ch. 1, Art. 3. The required presence during the trial of the next of kin of a victim of manslaughter, of all witnesses and of the defendant caused hardship, especially if the crime was committed in a region far away from the seat of the council. In 1855 this was remedied by a new procedure according to which one council member would travel to the mudīriyya where the case had been investigated. There he would hear the case in the presence of the local qāḍī, the mudīr and his deputy, local 'ulamā' and village shaykhs. The sharīʿa sentence (*iʿlām sharʿī*) pronounced by the qadi and the verdict (*ḥukm siyāsī*) given by the local notables, were to be sent to the council for approval. Decree of 10 Rabīʿ I, 1272, Sāmī (1928-1936) III/1, 145.

[55] Wājibāt ma'mūriyyat aʿḍā' al-majlis, Art. 17. Text in Jallād (1890-1895), II, 104-105.

sentencing.[56] This must be seen as an indication of a shift from a bureaucratic and administrative handling of criminal cases, towards a judicial one.

Another indication is the development of appeal, gradually replacing automatic revision. Initially, nearly all sentences were automatically revised by higher bodies. Revision would take place irrespective of the will of the defendant, which is very much a bureaucratic procedure: an official prepares a draft and submits it to his superior for review and modification, who then, on his turn, passes it to his superior until the concept reaches the bureaucratic level authorised to take the final decision. Gradually, however, one can observe that this automatic revision of judicial decisions is restricted and that appeal becomes conditional upon the will of the defendant.[57]

It is difficult to assess the justness and efficiency of this legal system. It was essentially part of the administration and, as we all know, many things can go wrong during a bureaucratic handling of a case. Bureaucrats are human too. Indeed, there are many indications that he course of justice in the period we have examined did not always flow smoothly. However, if the system operated to some extent with justice and decency, which I think it did, this was due to the institution of petitions. Petitions to the Khedive or higher judicial bodies were an important corrective against failures at a lower level. They were taken seriously and resulted in special investigations after which subjects often would get the rights that had been denied to them.[58]

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[56] This was introduced by a decree of 1287 H. (1871). The defendant in criminal cases and the litigants in civil cases had to be present and be heard before the final judgement was pronounced by the councils of first instance. After the sentence they had to state whether or not they acquiesced in it. If they did not, they had to be heard before the Appellate Council would pronounce its sentence. Regulation of al-Majlis al-Khuṣūṣī approved by the Khedive on 8 Shawwāl, 1287 (Sāmī (1928-1936) III/2, p. 883), supplemented by a regulation of al-Majlis al-Khuṣūṣī issued on 16 Dhū al-Ḥijja, 1287, approved by the Khedive on 28 Muḥarram, 1288 (Sāmī (1928-1936) III/2, p. 915-7).

[57] In the decrees mentioned in the previous footnote, it is stipulated that after the sentence of the Appellate Council, which was a revision of the case independent of the will of the parties, they could lodge appeal with the Majlis al-Aḥkām within eight days.

[58] For a typical case, see Peters (1995).

APPENDIX I

The Regional Councils and Councils of First Instance

	Cities	Delta	Upper Egypt
1852		Tanta	Fishn
		Samannud	Jirja
			Khartum
1854		Tanta	Fishn
			Jirja
			Khartum
1855		Tanta	Jirja
1856		Tanta	Jirja
		Zaqaziq	
1859	Cairo	Tanta	Jirja
	Alexandria	Zaqaziq	
1860: all councils abolished			
1862		Tanta	Asyut
1863	Cairo	Tanta	Asyut
	Alexandria	Zaqaziq	Banu Suwayf
		Mansura	Isna
		Dumyat	
1864	Cairo	Tanta	Asyut
	Alexandria	Zaqaziq	Banu Suwayf
		Mansura	Isna
1870	Cairo	Qalyubiyya	Giza
	Alexandria	Sharqiyya	Banu Suwayf
		Daqhaliyya	Fayum
		Dumyat	Minya
		Buhayra	Asyut
		Gharbiyya	Jirja
		Minufiyya	Qina
			Isna

Sources:
Sāmī (1928-1936), III/1, 97, 133, 204, 322, 341, 403, 410; 3/2, 455-7; Zaghlūl (1900), 194, 198, 200-201, 209-212; appendix, 70-75.

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