THE CRIMINAL NORM IN DIFFERENT LEGAL SYSTEMS – COMPARATIVE PERSPECTIVE

Alexandru Vladimir OLĂNESCU*

Abstract

This paper aims to analyze the structure and evolution of the criminal norm in the context of various existing legal systems at the global level, showing both the similarities and the differences between these systems. Thus, in the context of increasingly prominent globalization and unification of legal systems, there is some reticence registered within states in relation with the "modernization" and uniformity of the criminal norm.

Therefore, a comparative presentation of criminal norms in certain representative legal systems, namely China for the Asian legal system, the United States of America for the North American legal system, Lebanon for the Islamic law system, and Italy for the European law system, is desirable.

Also, the paper shall highlight the historical evolution of criminal norms as well as their development according to the existing cultural valences in each region.

Moreover, this paper provides an overview of the development of criminal law in different legal systems and underlines the social and cultural factors as well as the space and time matters that customize the legislation of each state subject to analysis.

Keywords: *criminal norm, legal systems, development, globalization, state*

1. Introduction

"*Il faut éclairer l'histoire par les lois et les lois par l'histoire*"[1] – "*We must highlight history by laws and laws by history*" said Montesquieu, which clearly shows that legal and historical subject matters are closely interrelated.

The drafting of the law is conceived only in the light of the past: the legal norm is always created based on empirical observations attesting an abnormality that should be corrected. The reason why we resort to the link between the two subjects is simple: events and facts with historical impact have influenced the evolution of the **Criminal Law** envisaged as a whole.

History is not a monolithic notion, in the sense that it refers to two main ideas that we have to underline.

Defined by Petit Larousse on the one hand as "the relation of past facts and events related to life of mankind, of a society, of one person" and, on the other hand, as "the study and science of past events, of evolution," history designates both the sequence of past events, and the discourse originated therefrom, i.e. the relation of these facts. Etymologically, the very notion of history refers to narrative, the Greek verb "*historein*" means "to *attempt to know"*, "*to say*".

Paul Ricoeur places of interest the distinction in German between the future of mankind and the discourse related to this becoming: "*The history we write, the retrospective history (die Historie) is made possible by the History that was made* (die Geschichte)"[2].

History and criminal law meet in force, essentially as follows: if criminal law, through its deterrent effect, has a preventive role, it also aims at sanctioning the hypothetical behaviour of a thing of the past. There is no problem of advance punishment, repression can only focus on a crime committed. At first glance, Criminal Law seems rather to have to know history in the sense of the German Geschichte, i.e. of the events from the past. In this respect, time is considered of the essence: **Criminal Law** does not intend to return forever to the past, and the passage of time generally hinders sanction. But, in some cases, the criminal law is working backwards, taking into account the facts whose oldness would have suggested they would escape the sanction of criminal law. Different mechanisms may, however, be taken into consideration: one may believe that when one created the statute of limitation for a public action, a crime should be considered history. The more serious a crime, the more stringent the need to enter the domain of the past and, therefore, of the unpunished. It is also possible to refer to more specific provisions[3].

But history is above all the discourse regarding sequence of events; history is the story of past events.

Originally, the story aims to revive the memory of the past, as Herodotus begins his "Historia" with the following words: "*Herodotus of Halicarnasus presents here the results of his investigation so that time does not destroy the memory of people's actions and the*

* PhD Candidate, Faculty of Law, "*Nicolae Titulescu*" University of Bucharest (e-mail: alexandru.olanescu@cliza.ro);

[1] Montesquieu, *De l'esprit des lois*, 1748;

[2] P. RICOEUR, *Histoire et vérité*, Seuil, 1955;

[3] Article 35, Law of 29 July 1881;

great explorations made by the Greeks or the Barbarians do not fall into oblivion".

The work of Herodotus, called "*the father of history*" by Cicero[4] has essentially a memorial vocation. It is a matter of history to guarantee the sustainability of past events. In this sense, history was seen by positivists as science [5], such as mathematics and physics. Henri Irénée Marrou[6] said, with reference to history, that it is "*the knowledge of the human past*", and that "*history is the relationship, the conjuncture established by the initiative of the historian between two planes of mankind, the past lived by the ancient people, and the present moment in which we witness developing the effort to recover this past for the benefit of the future*[7]. "*History is therefore extremely subjective, because it depends on the manner in which each historian retains the past to extract a certain truth therefrom*". For Serge Carfantan, history is *"a representation that links the values of today's people to the past lived by the ancient people and their values*"[8].

As time goes by, history is rewritten, reinterpretation is enriched and becomes more refined; the story never ends. In this regard, Criminal Law can be brought forward in several respects in the sense that it is not limited to the assimilation of the past facts but it also knows the discourse resulting from these facts by framing the subjective history.

History therefore refers to two realities: the sequence of facts transmitted in se, but also the discourse - especially historical - corresponding to this chronology.

Consequently, we need to see in what context Criminal Law can be brought to the cognisance of history as it has just been defined [9], because many of the sanctions provided in the Criminal Law are based on the very relation between events and historical facts, especially when we refer to the Muslim space.

The story must find a balance between, on the one hand, the need for fighting against forgetting the past and, on the other hand, using this past as a precedent that allows man to progress. Man must feed on the past, learn from it, but must not be paralysed by it. Many punishments provided by the Criminal Law, in many parts of the world, have remained at an original stage without evolving in line with the time to which we relate.

As regards Criminal Law, it is about knowing the past and assimilating it: history hinders the passage of time, prevents the memory of the past from disappearing. In order to fight against oblivion, the historian presents a narrative of events in order to pursue and maintain consistency. Jean Favier believes that "History, first of all, is a narrative, and then an analysis, a reconstruction of the past, and finally an attempt to understand the past.[10]

Thus, history necessarily implies a certain subjectivity. Even if in principle it does not have the role of making important assessments of the past, it can engage and influence perceptions of past events /facts. (we refer to history as science). As a rule, historians enjoy great freedom in their activity of research and reconstitution, which explains why they oppose any dogma, taboo or order [11].

According to Madeleine Rebérioux, historians can be considered "*revisionists not by ideological will, but by profession*".[12]

Criminal Law it is not as fluid as the historical discourse; there is indeed a principle of legal certainty that requires some stability in the legislative system, especially with regard to the repressive device that affects individual freedoms. If history is essentially an evolutionist science, Criminal Law tends to solidly define its object and therefore to be perennial. However, within these developments we witness the fact that Criminal Law has not ceased to intervene in the elaboration of a historical truth; repressive law treats history as a discourse about the past.

Criminal law has no choice but to know the past, it is in its nature to deal with past facts. Some of these facts have a special dimension allowing them to be described as "*historical*" because of their age or the impact they have had on mankind.

Criminal Law must "*digest*" the past, know history in the "*event*" dimension; it is its duty to assimilate facts related to history.

The first actor who has the possibility to retain facts of a historical nature is the legislator, who, through the creation of incriminations and the definition of their regime, can influence history or be influenced by it. Certain mechanisms make it possible to note that history, through the special crime it has generated, requires an adequate criminal response, even if the passage of time is generally a factor of impunity; it is essentially the creation of retroactive incriminations. Other mechanisms allow, on the contrary, to anticipate the potential difficulties, deciding that in the future certain facts can never be resumed in history, and that their objective gravity requires they are given an adequate response at all times: these are the imprescriptible crimes.

As for the timely implementation of laws, the legislator has the opportunity to understand facts that, hypothetically, belong to past or even to history. In principle, material criminal law is intended to apply

[4] Cicéron, De Legibus, I, 1;
[5] S. Carfentan, Philosophie et spiritualité, 2002 (http://serfecar.perso.neuf.fr/).
[6] Henri Irénée Marrou, De la connaissance historique, Paris, Le Seuil, 1954;
[7] Ibidem;
[8] S. Carfentan, Philosophie et spiritualité préc.;
[9] E. Cobast, Petites leçons de culture générale, coll. Major, PUF, 2007, 6th edition;
[10] J. Favier, speech of 15 April 2008 before the information mission about memorial issues;
[11] Information Report by B. Accoyer in the name of the information mission on the memorial issues, 18 Nov. 2008;
[12] B. Accoyer, the Information Report above;

only to future situations, a new law can only apply to the acts committed after its entry into force. The past seems, on the contrary, to be granted a certain immunity because, according to the principle of legality, it does not seem possible to punish a person for facts that have not been incriminated. The principle stated in Article 8 of the Convention on the Rights of Man and Citizen of 1789, "The right to respect for private and family life", has been and is interpreted in relation to various contextual elements.

Criminal Law is used by lawmakers to sanction behaviours that require a response according to the gravity of the act.

If we proceed to a comparative analysis of the criminal legislation in different cultural-religious backgrounds, namely the United States, China, Italy and the Middle East (the Muslim space), we find specific peculiarities, some of them extracted from historical facts, others remained unaltered and unchanged since they were stated.

2. Muslim Criminal Law

The Muslim criminal legislation is based on Sharia law, the tradition.

Sharia, *charâ'a* or *sharî'a* (in Arabic: الشريعة) represents, in Islam, the tradition preserved by Prophet Mohammed, a set of doctrinal, social, cultural and relational rules received through revelation. The term used in Arabic in the religious context means "*a way to obey [God's] law*".

In the West, reference is made to "*Sharia*", meaning the Islamic term, which is an approximate translation, since it only partially covers the true meaning of the word (this term is also used instead of the Islamic law). Sharia codifies both public and Muslim life aspects, as well as social interactions. Muslims consider this set of rules to be the emanation of God's will (Shar). The level, intensity and extent of Sharia's normative power vary considerably in historical and geographical terms [13].

In the world, some of these rules are considered incompatible with human rights, particularly as regards freedom of expression, freedom of belief, sexual freedom and women's freedom.

The link to the past we mentioned earlier, analysing the relationship between history and Criminal Law, referred precisely to this aspect, namely that historic events / facts serve for the capacity of rebuilding the coherence and chronology of past events; it is correct to accept the past and look toward it, but to adapt it in order to understand the present.

Sharia, little applied during colonisation, when European law was often imposed (in Lebanon legislation is still predominantly French), is back in some Muslim majority states (for example, Sudan has reintroduced amputation for theft).

Many countries have promulgated Islamic criminal law codes including Afghanistan (Criminal Code 1976), Brunei (CC 2014), Iran (CC 1991, reformed in 1996 and 2013), Kuwait (1960, 1970), Libya (1953, 2002), the Maldives (1961, 2014), Oman (1974), Pakistan (1860, as amended by the Hudood Ordinances in 1979), Qatar (1971, 2004), Sudan (2003), the United Arab Emirates (1987), Yemen (1994) and several provinces in Malaysia (Kelantan in 1993), Nigeria (about ten provinces) and Indonesia Aceh, 2014)

Although the Muslim law is in no way limited to criminal law, it is often the most known because of the severity of certain punishments.

2.1. Categories of crimes

Sharia distinguishes several categories of crimes and related sentences:

Crimes falling within "God's law" and divided into two categories:

Crime that may give rise to revenge, according to the equivalent of the law of reprisals (qisas); hudud, which are "fixed phrases" defined by the Qur'an; less serious or offenses unknown in the Qur'an that fall within tazir [14].

Due to the severity of the prescribed condemnations (hudud), Muslim jurists often had the tendency, except the Zahirite school (present in the 9th and 10th centuries in Iraq, then in the 11th century in Spain), to apply a criterion of doubt, shubha, to the deed, which allows the "modelling" of the sentence or even its non-application (by casting doubt on the person responsible for the crime or on the legal framing of the punished deed[15].

Thus, the application of Sharia was, in fact, more flexible than what written texts 16 seemed to grant. The criminal codes promulgated in the twentieth century, however, disregard this canon, shubha, the legislator resorting most often to the earliest written sources of the Muslim law, contrary to medieval legal practice17 - with the notable exception of the 2013 reform of the Iranian Criminal Code, which incorporates this canon (Articles 120 and 121)[18].

However, this canon is sometimes invoked by judges and / or lawyers (for example, in 2002, in Nigeria, to defend Amina Lawal, the lawyer invoked this canon, as well as the case of Ma'iz illustrated in the

[13] Intisar A. Rabb, *Reasonable doubt in Islamic Law*, *Yale Journal of International Law*, vol.40-41, 2015, pp.40-94 (p.48-49, note 30);

[14] Ali Kazemi-Rached, *L'Islam et la réparation du préjudice moral*, Genève, Droz, 1990, abstract published in *Revue internationale de droit comparé*, 1991, n° 3, pp. 733-735;

[15] Elias Saba, Le bénéfice du doute en droit musulman, La Vie des idées, 7 March 2016 (ISSN 2105-3030);

[16] Intisar A. Rabb, Reasonable doubt in Islamic Law, in Yale Journal of International Law, vol.40-41, 2015, pp.50, note 35;

[17] Intisar A. Rabb, Reasonable doubt in Islamic Law, in Yale Journal of International Law, vol.40-41, 2015, pp.50, note 36;

[18] R. Peters, Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century, Cambridge Univ. Press, 2006, pp.67-68;

Qur'an for to annul the death penalty as a result of the adultery committed by her[19].

Finally, there is a fourth category of punishment, which falls under the competence of the leader and does not aim to punish a person for what that person has done, but to preserve the general interest and / or to protect society against persons committing a crime that poses a threat against public order (fitna)[20].

This category of punishments is in the form of certain sentences, siyasa, and often consisted either in life imprisonment or in permanent exiles or in capital punishments - under the Ottoman Empire, siyasa had become synonymous with capital punishment[21]. These punishments are justified on the basis of a historic fact that would have occurred under Caliph Omar (634-644), who exiled a certain Nasr b. Hajjaj because he was too handsome, threatening thus all the women in the city by tempting them through his beauty , though he was not doing anything condemnable[22].

2.1.1. Talion (qisas) and compensation (diya)

Qisas may be applied to murders and intentional injuries [23]. It may be replaced by diyya, financial compensation or "blood money", according to the recommendations of the Qur'an [24]. Therefore, there is "a desire to replace private revenge (when accepted or acceptable) by compensating victims" [25], the doctrine specifies the conditions for such compensation (possibly even in the case of homicide[26]). The amount of compensation, which can never be strictly equivalent to the damages produced, varies according to gender and religion [27].

These provisions were detailed in the Ajarif Charter (1405) used by the Berbers of the Anti-Atlas[28]. For example, to the burden, *al'hamal*, *diya* was attached [29]. Thus, in accordance with the traditions of Bedouins in Egypt, besides *diya*, the tribe whose member has caused injury must also ensure the birth of a male child in the opposite group / tribe to compensate for the loss of a person [30].

The murderer had to lend his wife, sister or daughter to one of the victim's relatives so that she could give birth to a son and restore the balance of tribal powers [31]. This provision has disappeared from the most recent Anti-Atlas documents (at least from the 16th century); it was replaced by the exile of the murderer, a measure that remained in force until the imposition of French laws on the Anti-Atlas tribes in 1934 [32].

Some contemporary authors (Ali Kazemi-Rached [33]) saw in *diya* a possibility to theorise moral prejudices[34].

2.1.2. Hudud

Hudud (literally meaning "*limits*") include the crimes and sanctions defined by the Qur'an that cannot be challenged by judges; these offenses are considered to be committed against God Himself. Islamists are the ones who defend most the introduction to the positive law of this type of punishment[35] (and, in people's conception, what is often understood by the "*restoration of Sharia*").

There are seven such punishments [36]:

- sex outside marriage, called zina الزنا
- false imputation of this crime, called القذف بالزنا
- wine drinking, called شرب الخمر
- theft, called السرقة
- banditism, called الحرابة
- apostasy / abandonment of Islam, called الردة
- rebellion, called العصيان

2.1.3. Ta'zir

The penalties and crimes from the *ta'zīr* category (التعزيرات: the corrections) are discretionary judgements (established by public authorities and ruled by judges) which, by definition, vary according to circumstances. They are not fixed either in time or space. These penalties vary depending on the judge's assessment of the seriousness of the crime and the criminal provisions[37]. Sanctions range from sermon or verbal exhortation to death penalty for violation of

[19]Intisar A. Rabb, Reasonable doubt in Islamic Law, Yale Journal of International Law, vol.40-41, 2015, pp.50, note 36;
[20] Intisar A. Rabb, Reasonable doubt' in Islamic Law, in Yale Journal of International Law, vol.40-41, 2015, pp.50, note 36;
[21] R. Peters, Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century, Cambridge University Press, 2006, pp.67-68 ;
[22] Meunié, Jacques, Le prix du sang chez les Berbères de l'Anti-Atlas, 1960, No. 1, pp. 323-326 ;
[23] Ali Kazemi-Rached, L'Islam et la réparation du préjudice moral, Genève, Droz, 1990;
[24] Ibidem;
[25] Ibidem;
[26] Ibidem;
[27] Ibidem;
[28] Meunié, Jacques, Le prix du sang chez les Berbères de l'Anti-Atlas, 1960, n° 1, pp. 323-326;
[29] Ibidem;
[30] Ibidem;
[31] Ibidem;
[32]Ibidem;
[33] Ali Kazemi-Rached, L'Islam et la réparation du préjudice moral, Genève, Droz, 1990;
[34] Ibidem;
[35] Ali Kazemi-Rached, *L'Islam et la réparation du préjudice moral* » Genève, Droz, 1990;
[36] Jacques El Hakim, *Les droits fondamentaux en droit pénal islamique*, *in Les droits fondamentaux: inventaire et théorie générale*, Université Saint-Joseph, Beyrouth, November 2003;
[37] Mohammed Salam Madkoar, in cadrul *The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia. Proceedings of the Symposium held in Riyadh.* (9-13 octobre 1976) Riyad, Arabia Sauditã, simpozion organizat de United Nations Social Defense Research Institute ;

divine or individual rights that threaten social peace or the security of individuals [38].

Apart from whipping, no corporal punishment can be given under *ta'zīr*[39] [with the exception of the Malachites - Muslim Sunnis following madhhab (a legal-religious school founded in Medina in 796 AD by Mālik ibn Anas) where amputation of the right hand is practiced in case of forgery of documents][40].

In practice, because of *shubha* (doubt), often expressed, about hudud crimes, the ta'zīr's sentences were, by far, the most common[41]. Lawyers have often tried to impose limits on *kadis'* discretion[42].

Thus, according to jurisprudents, the maximum number of blows varies between 10 (for some Shafists and Hunbalites[43] – Sunni Muslims belonging to certain juridical-religious schools founded by Abdullah Muhammad ibn Idrīs as-Shāfi'ī and Muhammad ibn Hanbal) and 39 (according to Abu Hanifa, 699-767 [44]) or 79 (Abu Yusuf, 731-798)[45].

2.1.4. Qissas

The Qissas category (القصاص) is autonomous in relation to the two previous ones and would, according to Jacques El Hakim, be in line with a survival of private revenge shifted into retaliation. This category is used for murder or bodily injury. In these cases, the victim or his or her legal heirs may choose to enforce reprisals or to receive damages (called "diya" for murder and "arche" for bodily injury)[46]. Exercising reprisals or collecting the allowance does not exclude a correction (ta'zīr) that would be made by public authorities in the case of a voluntary offense[47].

2.2. Sanctions

The Qur'an defines the punishment applicable to each "had", and Sunnah (Sunnis) adopted rules for other crimes whose punishment was not foreseen in the Qur'an. Qur'an punishments are usually performed in public, but with the covering of the body parts that do not need to be displayed publicly.[48]

2.2.1. Whipping

The punishment by whipping is stipulated for non-marital sex, false accusation, alcohol consumption and other offenses from the correction category.

Jurists offer different sanctions according to the Madhhabs (legal-religious schools). According to a hadith reported by Abû Burda al-Ansari [49], Prophet Mohammed forbids the exceeding of 10 blows when the punishment to be applied is not defined in the Qur'an or in Sunnah.

The Qur'an provides 100 whips for sex outside of marriage. The Malachites, however, allow over 100 blows, while other schools present this number as a limit that cannot be overcome [50]. There are 80 strikes stipulated for false testimony [51] and 40-80 strikes for alcohol drinking [52]. The number of whips varies between 10 and 100.[53]

2.2.2. Amputation and crucifixion (in case of armed robbery)

Based on Sura 5, paragraph 33 of the Qur'an [54], jurists indicate four fixed sentences for armed robbery (or banditism): capital punishment, crucifixion, transverse amputation (one hand and the opposite leg), or exile[55].

Shiism believes that the state (represented by the ruler or judge) may establish one of these sanctions in accordance with their own will.

The Malachite School sets fixed penalties according to the gravity of the offense: exile if there was intention, but the theft was not carried out, amputation if it was theft; crucifixion or capital punishment if, in addition, there was a homicide.

Other schools affirm a strict correspondence between sentences and the nature of armed robbery (the judge cannot exceed the maximum punishment etablished)[56]. Thus, if the theft was not completed, exile

---

[38] Jacques El Hakim, *Les droits fondamentaux en droit pénal islamique in Les droits fondamentaux: inventaire et théorie générale*, Centrul de Studii Arabe, Université Saint-Joseph, Beyrouth, November 2003;

[39] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.66 ;

[40] *Ibidem*;

[41] *Ibidem*;

[42] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.67 ;

[43] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.67 ;

[44] *Ibidem*;

[45] Hadith, Buhâri, Muslim, abû Dâvûd, Tirmidhî, Nasâî si Ibnu Mâja, in chapter «*Hudûd*» ;

[46] Jacques El Hakim, *Les droits fondamentaux en droit pénal islamique* in *Les droits fondamentaux : inventaire et théorie générale*, Université Saint-Joseph, Beyrouth, November 2003;

[47] Jâmi'ul Ahkâm'il Qur'ân, Qurtubî ; (Qur'an. XXIV, : 4-5) ;

[48] Jacques El Hakim, «*Les droits fondamentaux en droit pénal islamique*» *in Les droits fondamentaux : inventaire et théorie générale*, Centrul de Studii Arabe, Université Saint-Joseph, Beyrouth, November 2003 ;

[49] «*Nobody can be punished by more than 10 whips except hudûd !*», Hadith, Buhâri, Muslim, Abû Dâvûd, Tirmidhî, Nasâî and Ibnu Mâja;

[50] Abdel-Kader Odé, *Le Droit pénal islamique comparé au droit positif*, 3rd edition, Cairo, 1964, no. 585;

[51] Jâmi'ul Ahkâm'il Qur'ân, Qurtubî ; Cor. XXIV;

[52] Abdel-Kader Odé, *Le Droit pénal islamique comparé au droit positif*, 3rd edition, Cairo, 1964, no. 585;

[53] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.58<

[54] *Ibidem*;

[55] Ibidem;

[56]Ibidem;

may be replaced by imprisonment until the perpetrator's repentance is detected; cross-amputation if there is a theft of a good with a minimum value (nisab) or, according to some Chafeists and Malachites, if there was rape or sexual assault; death penalty when a man died (not theft) and ultimately crucifixion for armed robbery having led to death.

Hanafi, however, believes that in the latter case, the head of the state may impose the simple amputation of both hands rather than the death penalty associated with the crucifixion [57]. Ultimately, these strict punishments do not apply if the victim is close to the perpetrator.

According to certain jurists who dissociate crucifixion from capital punishment, the tortured (the crucified) can receive food and drinks and must be executed by the end of the third day.

This sentence may also be imposed as a result of a crime in the ta'zir category, without being followed by execution.[58]

2.2.2. Death penalty

Death penalty is stipulated for apostasy [59] (which corresponds to an abandonment of Muslim religion), rebellion, insurrection, murder or sometimes adultery [60].

2.2.3. Sanctions for the correction of the offender

The sanctions for correction are left to the judge's discretion. Therefore, he may choose the most appropriate way to apply the penalty depending on the circumstances, the severity of the offense and the personality of the perpetrator. The judge may choose imprisonment, fines or moral sanctions. Moral punishments are warnings (ظعولا), reprimand (خيبوتلا), threat (with punishment) (ديدهتلا) or the perpetrator's public exposure. As these punishments are not defined in the Qur'an and Sunnah, judges have the right to apply more lenient sanctions.[61]

2.2.4. Specific sanctions

Sexuality outside marriage is considered *zinā* and strictly condemned (hudud).

The term "*zinā*" can cover both adultery and simple prostitution or acts homosexuality. Penalties range from exile for one year, from 50 to 100 whips, to even stoning.[62] The criteria for proving the crime are, however, very strict (for the most serious sentences, four separate witnesses and four depositions), leading to the enforcement of these sentences very rarely encountered before the 20th century; also the false witness (*qadhf*) is severely punished (jurists rely on Surah 24, 4, which prescribes 80 whips)[63]. A monetary compensation (equivalent to the dowry that would have been paid) is often accepted.

2.2.5. Adultery

Adultery in Islam for women involves having sex with someone other than the husband[64].

For men, adultery is to have sex with someone other than the wife.

The penalty is exile for one year. Under strict conditions, whipping (from 50 to 100 blows) may be applied, followed by a one-year interdiction. The Qur'an (Surah 24: 2) only refers to whipping [65], hadith-based stoning. For the last two sentences to be executed, it takes four witnesses who must be able to testify that sexual penetration has taken place and, according to most legal-religious schools. The punishment does not apply to the person who refuses the act [66].

According to the Chafite School, if the perpetrator who testified to the deed tries to escape during stoning, he must be allowed to flee Mâiz [67] on the basis of hadith.

2.2.6. Fornication

Fornication in Islam refers to the fact that there are sexual relations between two unmarried persons of opposite sex, the penalty being public flagging if four witnesses can testify that sexual penetration has occurred, and the deed has been admitted four times [68]. In the latter case, the penalty is not applied to the second person if the latter denies the act [69].

2.2.7. Homosexual relations

Men who have homosexual relationships (sodomy) are punished or even executed. Women are not executed (because there is no sexual penetration) but must be morally punished. There are significant differences regarding the penalties to be applied to people who have had a homosexual relationship. They range from a hundred whip blows [70] to the throwing from the highest bridge in the city. This latter punishment is included in law books, but jurists claim that there is no known case of applying this form of punishment.

---

[57] Ibidem;
[58] http://islamqa.info/fr/ref/41682;
[59] Ibidem;
[60] Abdel Kader Odé, *Le droit pénal islamique comparé au droit positif*, 3rd edition, Cairo, 1964 ;
[61] *Jâmi'us-Sahîh* al Bukhârî Hadith no. 57 ;
[62] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.61 ;
[63] Ibidem;
[64] Kitab al hudud, no. 4198 in *Sahih Muslim ;*
[65] Kitab al hudud, no. 4198 in *Sahih Muslim*;
[66] Kitab al hudud, nr 4209 in *Sahih Muslim ;*
[67] *Büyük Şâfîi Fıkhı*. Dr. Mustafa el-Hin, Dr. Mustafa el-Buğa, Ali eş-Şerbeci. Hudûd, *La peine pour la relation extra-conjugale — Comment appliquer la peine ?;*
[68] Jâmi'ul Ahkâm'il Qur'ân, Qurtubî; Cor. XXIV;
[69] Kitab al hudud, nr. 4209 in *Sahih Muslim ;*
[70] Büyük Şâfii Fıkhı. Dr. Mustafa el-Hin, Dr. Mustafa el-Buğa, Ali eş-Şerbeci, p.162 ;

2.2.8. The apostate

The apostate, the one who renounces Muslim belief, is punished by death in all jurisprudence schools. However, according to the *Hanefit* ritual, women who give up Muslim religion is not executed, but is imprisoned until she regains her Islamic religion[71].

2.2.9. Blasphemy

Any blasphemy is punished. There is no canon about this, unless it is about a pregnant woman, where the punishment is not the death sentence, but the guilty person is punished by 100 blows.

2.2.10. Piracy

Piracy must be punished by amputation of the hand. To be considered theft, it needs to meet strict conditions[72]: the theft has been committed in secret (as opposed to object theft), it targets a low-value mobile asset (*nisab*) - the Hanafite school does not, in fact, retain the theft crime if its object is a food product [73]; the stolen object does not belong in part to the "*thief*" (a soldier who appropriates his pre-war warrant prey before being divided will not be considered a thief);

Aisha, Prophet Mohammed's wife, would have said that the Prophet would have explained that the theft of any object less than 1/4 dinars in value should not be punished[74]. Also, if someone steals from a close relative, the sentence is not enforced.

Punishments according to Malachite and Chafeite rituals: at the first theft, the right hand is cut off, at the second the left leg, at the third the left hand, and finally the right leg [75]. If, despite these facts, the perpetrator is still able to steal and does steal, that perpetrator must be executed.

The punishment according to the Hanafite and Hanbalite rituals: the right hand is cut for the first theft, and if there is a second theft, the left foot is cut off.

2.2.11. Alcohol

It is forbidden for a Muslim to drink, transport, sell, produce or serve alcohol. According to rituals, this condemnation comes from an extension of the ban on consuming wine (present in the Qur'an). Anyone who drinks, transports, sells, produces or serves alcohol is punished by 80 whips. The whipping for this crime is not based on a verse or hadith but was introduced at the request of Mohammed's successors. In principle, whiplash counts cannot exceed 10 unless it is based on a recommendation from Prophet Mohammed, a situation where 100 blows can be applied.

All the offenses and punishments presented seem very strange, if not even barbarian, for the time and the age in which we live, but they have strong historical roots granting them justification and validity in the context of the socio-cultural space in which they apply.

3. Particularities of Criminal Law in the U.S.A.

The United States has by far the highest incarceration rate in the world. According to a Pew Centre study conducted in 2009, one in one hundred American adults is imprisoned and one in forty-five is released. For a European observer, one can identify the hardness of the American criminal system.

For example, for a first conviction, for a minor deed, the defendant sometimes receives a brief period of detention or conditional release. But the magnitude of the sanctions increases considerably if the defendant in indicted in one or more criminal cases, whether on serious facts or not.

For crimes such as drug sale worth $ 15 (10 Euros), they are frequently charged with five to ten years in prison for re-offending. The major problem is that little money is spent on rehabilitating detainees. Many times, their prolonged incarceration is described as long-term "storage". However, we know that a prolonged period of imprisonment prevents reintegration and risks to destabilize detainees or even to make them become more dangerous.

For crimes classified as violent or potentially violent, sentences are the most ruthless. More burglaries can lead to more than a dozen years of imprisonment. Life sentence is regularly imposed in murder cases, regardless of attenuating circumstances, such as the young age of the accused or his or her mental disorder.

The persons convicted for sexual crimes, similar to those for which they accused Dominique Strauss-Kahn, may be closed for decades. They must then register with the sex offenders register, a blacklist that can be accessed by the general public.

With regard to the death penalty, a court ruling made it inapplicable in New York State, despite the opposition of the Republicans.[76]

The difference is, however, that in a country that promotes human rights and equality of opportunity, wealthy people usually escape draconian sentences because of their social status and the provision of good and costly lawyers that not anyone can afford . Harsh punishments are applied to the needy, especially to Blacks and Latinos, but also to many white people in disadvantaged environments, the so-called "profound America" [77].

The large budget allocated for mass incarceration could be used to develop crime prevention programs to improve public schools. Criminal cases are overwhelmingly resolved through agreements between the prosecutor and the accused, in order to obtain a

[71] Şeyh Abdurrahmân El-Cezîrî, Dört Mezhebin Fıkıh Kitabı ; Kitâb'ul Fiqh alâ al Mazhâhib'ul arba'a ; vol. VII, p. 125-130 ;

[72] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge University Press, 2006, p.56 ;

[73] Tafsir d'al qortobi du verset 5:38;

[74] Şeyh Abdurrahmân El-Cezîrî, Dört Mezhebin Fıkıh Kitabı ; Kitâb'ul Fiqh alâ al Mazhâhib'ul arba'a ; vol. VII, p. 158-159 ;

[75] *Ibidem*;

[76] Amnesty International Report, 2017;

[77] Ibidem;

more lenient sentence, especially because the recognition of guilt in front of a jury leads to a greater punishment than if it were "unofficially" punished. Given the severity of the sentences, few defendants take the risk of going to trial.

It is true that serious crimes deserve severe sentences to discourage crime and protect society. In addition, the death penalty - a fundamental violation of human rights - is being enforced in many states, and we may say it is a peculiarity of the American system. Politicians, prosecutors and judges do not pay too much attention to the socio-political and human consequences of such a repressive system [78]. Lawyers claiming that the application of overly long sentences dehumanizes justice are rarely taken seriously.

Political leaders pay little attention to studies showing how their policies are counterproductive and costly. Some Americans, especially the progressive and intellectual, oppose this criminal system, though they do not realize it is a repressive system incomparable with any other democracy.

Delinquency and criminality are social problems that can be easily resolved, but there seems to be little political will in the United States, just like in France to solve such problems [79].

An interesting case is that of Dominique Strauss-Kahn who managed to regain his freedom in return for a $ 1 million deposit. The payment of a $ 1 million deposit for DSK made it possible to ensure that the accused, although free in his moves, will appear at all the hearings he was summoned to. If he does not comply with this obligation to present himself every time he is summoned, he loses the total amount of the deposit. On the other hand, if he respects the agreement imposed by the bail, the deposit is automatically returned to him, regardless of whether he is found guilty or not. In the case of Strauss-Kahn, this obligation also involved a $ 5 million deposit that the defendant has to pay to the court if he does not comply with all the conditions regarding home arrest, bracelet wearing, his apartment monitoring by a guard at his expense [80], etc.

The eighth amendment to the Constitution of the United States declares that "no excessively high bail will be required, neither excessive fines will be imposed, nor unrestrained and brutal punishment will be enforced." The amount of the deposit is fixed by a judge at the first hearing. The magistrate takes into account the nature and circumstances of the case, the accusation brought, the social and family environment, family resources, personality, and criminal record.

In the case of Strauss-Kahn, he himself offered a one-million-dollar deposit. The question is: is this a frequent practice? According to Jean-Eric Branaa, lecturer at University Paris 2, American law specialist, "... this is almost the rule for two reasons: the first is of an economic nature because US prisons are full, the second is based on the presumption of innocence - it will always be preferable to leave an innocent person go free rather than in prison Very rarely have defendants the amounts requested in cash in a short time This is why they can demand bail guarantees called " bonds". The defendant must provide bonds in a guarantee deposit, such as 40% of the cash value of the bail or a property at least equal to the total amount owed. In exchange the guarantor, the issuer of the bonds, submits to the court a contract by which he agrees to pay the guarantee if the defendant does not appear at the hearings. These contracts are largely funded by insurance companies capable of providing the available capital.

A peculiarity in the US criminal law is also the introduction of cultural elements into the trial. The introduction of cultural elements can be done: before the trial, when deciding whether or not the person should be prosecuted; during the trial, in order to eliminate an element of criminal prosecution, to support an established defence, such as consent or provocation, to mitigate the sentence. This type of defence is accessed, among other things, by immigrants charged with serious violence against a woman. An example is the 1984 case of Kong Pheng Moua, who lived in the United States for six years, married Xiong, a woman of the same cultural background she had forced to sexual acts. Xiong then complained to the police and accused him of abduction and rape. In his defence, Moua claimed that they had followed a traditional marriage practice, "*marriage of capture"* meaning that even if marriage was made by free consent, the woman had to resist to show her virtue to the man. Moua explained that he did not realize that Xiong's resistance was real. The old idea that a woman, saying "no" to a man, actually does not really believe in refusal is still widely accepted in many cultures. Men who are accused of rape frequently invoke the cultural element, but this must also be supported by evidence. They seek to perpetuate the cultural practices that keep their women in a subordinate position.

The court rejected the allegations of rape and kidnapping and retained only the sequestration: Moua was sentenced to 120 days in prison and fined to pay $ 1,000 - State v. Moua, summary of file no. 315972-0.

Feminist organisations objected to this judgment and filed a complaint with the State Judiciary Conduct Commission requesting an investigation[81]. Mr. Yen, Prosecutor Brooklyn Holzman said: "*There must be one standard of justice, and it should not depend on the origin of the accused person's culture. It cannot be admitted that the existence of barbarous customs in different parts of the world excuse the criminal behaviour in the US"*.

[78] Amnesty International Report, 2017;
[79] Ibidem;
[80] LeFigaro.fr;
[81] A. D. Renteln, The Cultural Defense, op. cit., p. 480;

What is noteworthy is that by invoking certain cultural, traditional, even barbaric practices, a more favourable sentence can be obtained in the circumstances in which the deed can even be murder. An American who kills his wife or boyfriend can successfully use a culture-based defence that can result in a more favourable indictment and a more lenient punishment.

This type of defence is not called "cultural", but it is based on deep-rooted cultural assumptions about what is or is not a reasonable behaviour of two individuals.

The resort to the cultural argument may allow an immigrant who has murdered his wife (Dong Lu Chen, People v. Chen, no 87-7774, Supreme Court, New York County)[82] "*in the heat of passion*" to get an easier conviction compared to an American for the same deed.

More and more US law no longer treats women as the property of their spouses, and doctrine is no longer worded in terms of "honour": we speak of "passion" or "extreme emotional suffering." But the law did not cease to show indulgence to the deceived husband, who may even kill his wife, since he defends himself by invoking the fact that he was provoked.

The vast majority of US jurisdictions now accept broader definitions of the term provocation: judges are much more attentive when it comes to ruling a homicide verdict and consider a wider range of provocative behaviours

It should be noted that about half of American jurisdictions continue to try in terms of "*provocation*" and "*passionate fir*e" and that nearly twenty states have abandoned these categories only to replace their terminology with "*extremely emotional"* (Cynthia Lee, MPC 1962). In addition, the argument of the provocation is not obviously neutral from the point of view of gender, both in its formulas and in its impact. Thus, it is said that the current formulations refer to the male model of a sudden and temporary loss of self-control, in the context of a unique confrontation, limited in time, between two men of more or less equal power.

About 9% of murder cases committed in the United States are committed between partners, that is, as defined by the Department of Justice, between spouses or lovers, past or present. Men represent more than 90% of those arrested for murder (all categories), and nearly three-quarters of the victims of homicide are women.[83] It seems that men have more chances than women to invoke the argument of provocation: according to some authors, "it is difficult to find situations where a woman has benefited from an easier sentence based on this argument after killing her husband or her fiancée " [84]

Victoria Nourse, after fifteen years of jurisprudence involving the categories of "passion fire" and "extreme emotional distress", also shows that the courts have extended the doctrine of provocation to include not only the adultery of the wife, but also the "infidelity of a fiancée dancing with another person, of an ex-girlfriend who dates someone else, of a former wife who started a new relationship a few months after the final divorce trial" [85]. The American courts believe that the victim of this "*betrayal*" the man, deserves a much higher degree of compassion and indulgence before the law than that for a woman.

In the light of the above, one can argue that „*defence through culture*" could have the effect of protecting patriarchal practices among minorities and that, even beside this first factor, some more commonly established means of defense in the criminal trial support these practices?

Brian Barry claims: "*If it is justified to allow people to respect their norms / cultural traditions, they cannot be barred from the proper exercise of justice, it must be understood that the latter cannot admit the acquittal of those who violate the law, only by using the cultural reason*"[86].

It is essential that, in order to offer equal treatment to minority members, one acknowledges the "*defence through culture*", but this does not imply that those who invoke it are right. One of the roles played by cultural elements in criminal trials is to illustrate the accused's mood by highlighting his origin cultural context which constitutes the context of his actions. But this cultural framework can very well reflect the patriarchal norms, which will be strengthened by the successes achieved in the courts through the defence established on the basis of cultural arguments. The use of these arguments by immigrants, not only in the US but also in the EU, will have the same effect as their use by members of the majority: to favour male violence against women.

All in all, the issue raised by some cases of "*defence through culture*" refers not only to the norms and practices of minority cultures, but also to those of majority cultures in Western societies. The problem will not be solved by merely rejecting or accepting the defence through culture in its entirety - what is necessary is the re-evaluation of the norms and doctrines of the majority culture. This problem of intercultural resonance and mutual reinforcement of norms between majority and minority cultures is not limited to the problem under scrutiny but is found in many other contexts - beyond the Criminal Law.

[82] Dick Polman, *When is Cultural Difference a Legal Defense ?*;
[83] John Kaplan, Robert Weisberg, Guyora Binder, *Criminal Law*;
[84] *Ibidem*;
[85] Dixon v. State (Ark, 1980);
[86] Brian Barry, *Culture and Equality*, 2001;

4. Particularities of criminal law in Italy

The first criminal code of United Italy was the 1839 Criminal Code of the Kingdom of Sardinia, which was subsequently replaced by the 1859 Criminal Code, extended to the rest of the peninsula after Italy's unification. However, from 1861 to 1889, two separate criminal codes coexisted because Tuscany continued to use its own code (which provided for the abolition of the death penalty in 1859 after it had been reintroduced in 1853). The normative unification took place through the Zanardelli Code, which bears the name of the Minister of Justice, Giuseppe Zanardelli, promulgated on June 30th, 1889 and come into force on January 1st of the following year.

The criminal code currently in force in Italy is the result of a five-year legal process since the promulgation of the law of December 4th 1925, with which the government was delegated to amend the then-valid criminal code (the so-called Zanardelli code) , until October 19th 1930, the day when the new Italian criminal code, technically executed under Manzini, was promulgated, and the Regio Decree of October 19th 1930, no. 1398, published in the Official Gazette of October 26th 1930, no. 251 came into force on July 1st 1931. The Royal Decree of Promulgation contains the signatures of the King of Italy Vittorio Emanuele the Third, the Head of the Government Benito Mussolini and the Minister of Justice Alfredo Rocco; this is why the Criminal Code is called the Rocco Code[87].

Although it has been amended over the years, following the Constitutional Court's judgments, the 1930 code is still in force. Numerous sectoral reforms are often uncoordinated. Numerous study committees have drafted reports and pleaded for the approval a new criminal code, and several political parties criticized the Rocco Code[88]; furthermore, the academic world and legal practitioners have repeatedly expressed their views on the achievement of a modern criminal code that fully respects constitutional principles.

The Code was largely modernized and cleansed by the most authoritarian provisions of fascist origin, which, after the founding of the Republic, proved to be in conflict with the Constitution. This has happened both through partial reforms and by decisions of illegality ruled by the Constitutional Court. However, some important changes have already been made: for example, all death sentences have been abolished.

An organic reform of the criminal code has never been launched. After the fall of fascism, the doctrine of criminal law (Pannain, Delogu, Leone) considered impossible the restoration of the 19th century Zanardelli Code and even opposed a zero-based reform, claiming that the rigorous technical system of the Rocco Code was necessary to immunize it , in the basic aspects. In the following decades, many reforms have taken place, but they have been partial and disconnected from one another without having a unique model. All this led to the loss of the logical consistency and logic of the criminal code.

Decades after the entry into force of the Constitution, the need for a more modern code, inspired not only by constitutional principles, but also by international conventions and the theme of new rights, has been widely felt and the projects have been presented and institutional reforms (commissions of Ministries Pagliaro and Grosso, from 1988 and 2001). The new Code of Criminal Procedure promulgated in 1988 entered into force on October 24th 1989.

A peculiarity of the Italian Criminal Code refers to crimes relating to mafia associations and groups, Art. 416 bis of the Criminal Code and Article 41-bis.

The law in question aims to protect public order, threatened by the use of intimidating force and the subsequent condition of subjugation and conspiracy of the silence that arises from it.

The offense in question is a permanent offense that is consumed when a partnership is actually created that is likely to disrupt public order or when the organisational structure assumes the hazard characteristics.

The Mafia method is outlined on the active side for associates to use the intimidating force arising from the mafia association and, on the passive side, for the situation of subjugation and silence that this intimidating force causes in the community to induce unwanted behaviours, even through the use of real threats or violence.

It is sufficient for the association to enjoy a certain fame of violence, the potential for oppression, to develop a real, concrete and stable power in the community through intimidation. The user of the intimidating force must, however, "use" or at least allow the passive subject to understand that he is a member of the association.

It is important to stress that the danger to public order is given by the very existence of the mafia association, regardless of the purposes it pursues. The association may also have legitimate activities.

The concept of "belonging" to a mafia association, which is relevant to the implementation of preventive measures, includes behaviours that, although it cannot be attributed as "participative", are incorporated into action, with associative purposes, excluding situations of mere contiguity or association to the criminal group.[89]

Article 41-bis refers to a legislative provision of the Italian Republic provided for by the Italian penitentiary system. It is part of the Gozzini Law approved on October 10th 1986 and published in the Official Gazette on October 16th 1986.

The provision was introduced by the Gozzini Law, which amended the Law no. 354 of July 26th 1975, (concerning the Italian penitentiary system) and

[87] *Gazzetta Ufficiale del Regno d'Italia* No.251 of 26 Oct.1930, first part;
[88] Critiche al Codice Rocco, Corriere.it, 19 June 2001;
[89] Criminal invalidation, United Section, sentence no. 111 of 4 January 2018;

originally referred only to situations of revolt or other serious emergencies in Italian prisons.

Following the Capaci massacre of May 23rd 1992, when Giovanni Falcone, his wife and his entire escort lost their lives, one introduced by decree-law no. 306, dated June 8th 1992, (the so-called Martelli-Scotti anti-mafia decree), converted into Law no. 356 of August 7, 1992, a second paragraph of the article, which allowed the Minister of Justice to suspend for serious reasons of public order and public security the treatment rules in the penitentiary for detainees belonging to the criminal organisation of the Mafia. While discussing the extension of the law, Leoluca Bagarella, in a teleconference during a trial in Trapani, reads a statement against article 41-bis, accusing politicians of failing to honour their promises (referring to Totò Riina).

A letter signed by 31 Mafia heads is made public, with some warnings to their lawyers who, after becoming MPs, have forgotten them. Then, an escort is attributed to some of these attorneys, including to Dell'Utri.

In 1995, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CP) visited the Italian prisons to verify the conditions of detention of persons subject to the regime under Article 41a. In the opinion of the delegation, this particular case of the detention regime was the most difficult of all those taken into account during the inspection. The delegation saw the restrictions as extreme and defined them as inhuman and degrading. Detainees have been deprived of all activity programs and have been found essentially detached from the outside world. The prolonged duration of the restrictions has caused harmful effects that have led to changes in social and mental faculties, often irreversible.

The norm was temporary: its effectiveness was limited to a period of three years after the entry into force of the conversion law. Its effectiveness was extended for the first time until December 31st 1999, the second time until December 31st 2000 and the third time until December 31st 2002. Ten years after the Capaci massacre of May 24th 2002, the Council of Ministers proposed a bill to amend Articles 4-bis and 41-bis which was subsequently approved by the Parliament as Law no. 279 of December 23rd 2002 (the amendment of Articles 4-bis and 41-bis of Law No 354 of July 26th 1975 on prison treatment), abrogating the transitional provision that sanctioned the temporary nature of this discipline and stipulating that the ministerial provision may not be less than one year and may not exceed two years and that subsequent extensions may only have one year each; the heavy prison regime has been extended to those convicted of terrorism and subversion.

The Article 41-bis regime applied for very long periods, even to persons who have not been finally convicted, it is considered by some jurists to be unconstitutional, but so far Constitutional Court rulings (with reference to Article 27 of the Constitution of the Italian Republic) and of the European Court of Human Rights (under the European Convention for the Protection of Human Rights and Fundamental Freedoms) confirmed the legitimacy of the provision.

An American judge refused to extradite Mafia head Rosario Gambino in 2007 because, in his opinion, Article 41a would be similar to torture. In 2013, the Constitutional Court declared illegitimate the limitations regarding the talks with the defence attorney.

The regime is applied to prisoners individually and seeks to prevent their communication with outside criminal organisations, the contacts between members of the same criminal organisation in prison and the contacts between members of different criminal organisations, as well as avoiding offenses and guaranteeing public security and order even outside prisons.

5. Particularities of the Chinese Criminal Law

The constitutive elements of the crimes under Chinese law are the same as in French law.

We consider the requirement of a legal element, a material element and an intentional element. The intentional element is of great importance in Chinese criminal law because it determines the classification of crimes.

In China, the notion of public order covers both public orders, as it is conceived by most Western countries, and the protection of socialist ideology.

Public order in the traditional sense of the term is protected in China by incriminating several categories of offenses, including crimes against citizens' personal and democratic rights, crimes against public security, material damage, public order offenses. Certain acts that represent the responsibility of civil liability in EU countries are sanctioned because of the importance given to them in the Chinese tradition.

No provision of the Code penalizes political offenses or crimes of opinion. But the protection of socialist ideology is ensured by the criminalisation of acts affecting the security of the state, repression is promptly made for all actions aimed at overthrowing the socialist system and those related to violations of sovereignty, territorial integrity and security of the People's Republic of China. Articles 102 through 113 of the Criminal Code list are not limited to those acts that include: incitement to desertion, espionage, and incitement of the masses to rebellion. The Chinese Criminal Code punishes various acts that harm the socialist economic order. These include financial fraud, tax and customs fraud, smuggling and infringement of intellectual and industrial property rights.

Certain perfectly legal economic activities in most modern legal systems may be considered to prejudice the socialist economic order. In 1988, a television import contract between a French company

in the field and a subsidiary of the Chinese Aviation Ministry was considered a huge fraud affecting the economy. The commercial agent employed by the French company, who received a commission and received a substantial deposit on behalf of his employer, was jailed for smuggling and misappropriation.

He was in a position to receive the death penalty because, being of Chinese nationality, he could not benefit from the preferential treatment of expatriates. The Chinese authorities involved in signing the contract were fired and arrested for smuggling. Criminal liability and the sanctions imposed depend on the personality of the offender and on the seriousness of the deeds.

In China, the age for criminal liability is 16 years. But juveniles under the age of 14 are punished for certain offenses considered to be seriously detrimental to public order, such as intentional homicide, serious injury, drug trafficking, rape etc. The sanctions applied are lower than those prescribed by the law. Like in most legal systems, mental patients who are not aware of the scope of their actions are declared irresponsible.

Similarly, force majeure and self-defence are exonerated from liability.

In any case, Article 3 of the Criminal Code stipulates that unintentional offenses are punished only in the cases provided by the law.

Most unintentional offenses are punished, but sanctions are much more lenient. For example, in case of intentional murder, the punishment is death, life imprisonment or imprisonment for at least 10 years. If mitigating circumstances are used, the penalty ranges from 10 years to 3 years of imprisonment (Article 232 of the Criminal Code). On the other hand, when homicide is involuntary, the penalty ranges from 3 to 7 years of imprisonment. If there are mitigating circumstances, the punishment ranges between 3 years and 6 months of imprisonment (Section 233 and 45 of the Criminal Code). For any offense, the accused may benefit from attenuating circumstances, the main cause of the reduction or even the exemption of punishment in minor offenses being voluntary surrender.

The Chinese Criminal Code provides for five main sanctions and three accessory punishments.

The main sanctions are: (i) release for three to two years of a penalty without imprisonment obligating the convicted person to report on his activities and obtain authorisation for all trips; (ii) detention from one month to six months in a detention facility where the sentenced person is engaged in a remunerated activity; (iii) imprisonment from 6 months to 15 years; (iv) life imprisonment; (v) death penalty that has been enforced since 1982 for economic crimes. People's courts may, in an ancillary manner, rule either a fine or the deprivation from political rights for a period of one to five years, or total or partial confiscation of property.

The judicial system is divided by Article 3 of the Code of Criminal Procedure between the public security bodies responsible for the preparatory investigation and the preventive detention, the People's Prosecutor’s Office that approves the arrest, verifies legality and executes the public action.

The public security body intending to make an arrest must obtain the authorisation of the Tribunal or of the Prosecutor's Office. In case of refusal, it may request a review. It is also the only power at its disposal when the prosecutor's office refuses to initiate criminal proceedings after a preliminary investigation. In case of emergency, the public security body may detain the persons caught or suspected of serious crimes without being authorised to do so. In this case, it must inform the Prosecutor's Office within three days and, if the latter does not authorise the arrest, within three days, the detained person must be released immediately.

Detention during the preliminary investigation may not exceed two months. If the investigation cannot be completed after this period, the Prosecutor's Office may grant an additional period of one month.

This was the case with the aforementioned import contract.

The commercial agent was detained for 12 months without the People's Court having been notified with any charges. A first indictment for misappropriation of funds was handed over to the tribunal after four months of detention. The court rejected it for lack of evidence, a new indictment was filed after three months. Despite the rejection of the second indictment, only a release of "medical guarantee" was obtained 5 months later. This release was made possible by the prisoner's acquisition of French citizenship as a spouse of a French citizen.

The right to defence is supported by the Code of Criminal Procedure; in addition, the law of 2001 and 2008 on the exercise of the profession of lawyer has reaffirmed and strengthened the rights of lawyers in criminal proceedings to ensure their defence for the client.

The criminal proceedings are accusatory, the debate being between the accused, the prosecutor and possibly the civil party. The usual methods of evidence are recognised. Magnetic records, which are very common in China, have probative force even when they were made without the knowledge of the interlocutor.

The presumption of innocence is not recognised by the Code of Criminal Procedure. The defendant's lawyer has the capacity to provide evidence to recognise the defendant’s innocence. In practice, the defendants' lawyers are often appointed by the Tribunal. Their mission is to encourage their "client" to admit the facts in order to facilitate the manifestation of truth and to benefit from the judges’ lenience.

In any case, when the judges deliberate, they have the obligation to communicate the decision to the parties within five days. On the other hand, when the decision is postponed to a subsequent hearing, the copies of the judgment must be sent to the parties immediately. The appeal period applies only after the date of receipt of the ruling.

Despite the relative independence of judges from the prosecutor's office, experience has shown that, as far as economic crimes are concerned, it is difficult for the accused to establish good faith.

Over the last decade, there has been an important debate on crimes against state security, Criminal Law, capital punishment and rights of the defendant in criminal proceedings, which have had all the positive consequences in criminal law. Therefore, it is important to note that the Chinese Criminal Law has considerably evolved and has made much progress; one can only hope that it will meet both the requirements of China's social evolution as well as those of the international context.

The brief presentation of the peculiarities comprised in the Criminal Law of four different legal systems reveals major discrepancies in addressing and treating the same type of crime, the fact that what is allowed in a legal system is severely or even worse sanctioned in another.

References

- N. Popa, Teoria generala a dreptului - curs universitar, C.H. Beck, Bucharest, 2014;
- N. Popa, Teoria generala a dreptului - caiet de seminar, C.H. Beck, Bucharest, 2011;
- Montesquieu, De l'esprit des lois, 1748;
- P. Ricoeru, Histoire et vérité, Seuil, 1955.;
- Loi sur la liberté de la presse, 29 juil. 1881;
- Cicéron, De Legibus, Penguin Classics, 2004;
- S. Carfentan, Philosophie et spiritualité, 2002;
- H. I. Marrou, De la connaissance historique, Paris, Le Seuil, 1954;
- E. Cobast, Petites leçons de culture générale, coll. Major, PUF, 2007, 6th edition;.
- J. Favier, discurs in fata Misiunii de Informare pe Problemele Memorandului, 15 April 2008;
- B. Accoyer, Information Report before the Information Mission on Memoranda Issues, 18 November 2008;
- Intisar A. Rabb, Reasonable doubt' in Islamic Law, Yale Journal of International Law, vol.40-41, 2015;
- Ali Kazemi-Rached, L'Islam et la réparation du préjudice moral », Genève, Droz, 1990, in Revue internationale de droit comparé, 1991, No. 3;
- Elias Saba, Le bénéfice du doute en droit musulman,, La Vie des idées, 7 March 2016 (ISSN 2105-3030);
- R. Peters, Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century, Cambridge University Press, 2006;
- Meunié, Jacques, Le prix du sang chez les Berbères de l'Anti-Atlas, 1960, No. 1;
- Jacques El Hakim, « Les droits fondamentaux en droit pénal islamique » in Les droits fondamentaux, inventaire et théorie générale, Université Saint-Joseph, Beyrouth, noiembrie 2003 ;
- Mohammed Salam Madkoar, in cadrul The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia. Proceedings of the Symposium held in Riyadh. (9-13 octobre 1976) Riyad, Arabia Saudită, simpozion organizat de United Nations Social Defense Research Institute;
- Hadith, Buhâri, Muslim, abû Dâvûd, Tirmidhî, Nasâî si Ibnu Mâja, in capitolul « Hudûd » ;
- Jâmi'ul Ahkâm'il Qur'ân, Qurtubî ; (Cor. XXIV, : 4-5) ;
- Abdel-Kader Odé, Le Droit pénal islamique comparé au droit positif, 3rd edition, Cairo, 1964;
- http://islamqa.info/fr/ref/41682;
- Kitab al hudud, nr. 4198 in Sahih Muslim;
- Kitab al hudud, nr 4209 in Sahih Muslim;
- Büyük Şâfii Fıkhı. Dr. Mustafa el-Hin, Dr. Mustafa el-Buğa, Ali eş-Şerbeci. Hudûd, La peine pour la relation extra-conjugale — Comment appliquer la peine ?;
- Jâmi'ul Ahkâm'il Qur'ân, Qurtubî ; Cor. XXIV;
- Şeyh Abdurrahmân El-Cezîrî, Dört Mezhebin Fıkıh Kitabı ; Kitâb'ul Fiqh alâ al Mazhâhib'ul arba'a ; vol. VII, p. 125-130 ;
- Tafsir d'al qortobi du verset 5:38;
- Raport Amnesty International, 2017;
- LeFigaro.fr
- A. D. Renteln, The Cultural Defense, op. cit., p. 480..
- Dick Polman, " When is Cultural Difference a Legal Defense ?";
- John Kaplan, Robert Weisberg, Guyora Binder, Criminal Law, Aspen Publishers, 2008;
- The Supreme Court, 2005, Term, Harv. L. Rev. 322, Dixon v. Stat;
- Brian Barry, Culture and Equality, 2001;
- Gazzetta Ufficiale del Regno d'Italia No.251 of October 26,1930, first part;
- Critiche al Codice Rocco, Corriere.it, 19 iunie 2001.