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Beyond the Sharia and Codified Law Dichotomy: From the Late Ḥanafi Tradition to Mecelle

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preguntarse: ¿realmente su apoyo a esta causa se explica por (o guarda una relación tan directa con) su giro hacia el pensamiento católico, o más bien simplemente el jurista y personajes afines como Doris Stevens se aprovechaban, en momentos puntuales, del barniz »intelectual« o incluso práctico que suponían las remisiones a los Suárez, Vitoria, e incluso la propia Isabel la Católica, a la hora de construir y promocionar sus argumentos?

El expresivo telegrama de Scott a Salvador de Madariaga que cita Amorosa (»I URGE YOUR SUPPORT … ALICE PAUL'S RESOLUTION … WE HOPE SPANISH LEADERSHIP HUMAN RELATIONSHIPS IN ACCORDANCE VITORIA'S PROGRESSIVE LAW NATIONS«, 297) da la medida del carácter instrumental de este tipo de argumentación, que, no olvidemos, tenía lugar al mismo tiempo que debates que – como el de la nacionalidad de las mujeres casadas con extranjeros – enfrentaban a naciones que se veían a sí mismas como modernas y/o individualistas frente a otras que se autopercibían como tradicionales o »familiaristas«. No en vano, en foros como la Conferencia de La Haya de 1930, el recurso al catolicismo era utilizado de forma muy acusada como argumento por parte de estas últimas. Visto así, en la operación de Scott, además de ante un ejemplo más de intento de autojustificación disciplinar, nos encontramos también ante una operación paralela mucho más práctica aún, como era el intento de atraer al paradigma mesiánico estadounidense a naciones consideradas como tradicionales, fundamentalmente las hispánicas y/o las católicas.

Las consideraciones finales no son una mera síntesis de la investigación. Por un lado, constituyen una reflexión sobre el rol del iusinternacionalista como agente, como actor político, pero también como actor capaz de ofrecer una revisión histórica crítica de su propia disciplina. Por otro lado, presentan, con el ejemplo de la utilidad del *ius communicandi* de Vitoria para el programa de libre comercio que promovía el Carnegie Endowment, el problema que supone la conversión de determinados conceptos o principios en »verdades morales incuestionables«, que se vincula con una reflexión muy sugerente acerca de la pérdida de contenido de determinados lenguajes – como el de los derechos humanos – en la actualidad.

En síntesis, nos encontramos ante una obra que va más allá de su propio objeto de estudio. No solo expone de manera solvente quién era James Brown Scott y qué hizo con Francisco de Vitoria, sino que también ofrece un esforzado repaso por la consolidación de la disciplina en Estados Unidos y su vinculación con asuntos políticos de gran interés, además de reflexión sobre el papel performativo que juegan los propios juristas internacionalistas.

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Beyond the Sharia and Codified Law Dichotomy: From the Late Ḥanafi Tradition to Mecelle*

The interaction between the ruler and Islamic law was an intricate one. The Ḥanafi school of law was one of the legal schools in Islamic law, and it was the school adopted in the Ottoman Empire. Samy Ayoub, in his book *Law, Empire, and the Sultan*, investigates the transformation of Ḥanafi jurisprudence and its interaction with state authority starting from the 16th century. Islamic juris-

* Samy A. Ayoub, Law, Empire, and the Sultan: Ottoman Imperial Authority and Late Ḥanafi Jurisprudence, New York: Oxford University Press 2020, XVII + 194 p., ISBN 978-0-1900-9292-4

prudence and legal discourse were not fixed or frozen in time. Samy Ayoub illustrates how late Ḥanafi jurisprudence was in flux and how the interaction between legal scholars and the state shaped the legal opinions of the school between the 16th and 19th centuries. He poses a few main questions in this context: How to »explain the late Ḥanafi jurists' departure from the established norms of their school and their adoption of a new set of doctrines? What are the tools they used to justify such changes? In what ways did Ḥanafi jurists incorporate Ottoman edicts and orders? And how should we evaluate the codification of Ḥanafi legal doctrines in the late nineteenth century?« (4) One of the main arguments of the book is that »late Ḥanafi jurists formulated a set of juristic tools and devices to change, alter or perpetuate early Ḥanafi opinions, even those that originated with Abū Ḥanīfa (d. 150/767), the eponym of the school« (4). He portrays a continuation together with change in Ḥanafi legal thinking, a legal process that considered the necessities and social realities of the time (153). Throughout the book he illustrates the various tools (necessity, customary practice, change of time, widespread communal necessity and others) that late Ḥanafi scholars used to »justify fundamental changes in key Ḥanafi doctrines« (4).

The book brilliantly illustrates the transformation of the relationship between Ḥanafi legal scholars and the state as well as the rulers' influence on the law and the legal discourse. It sheds light on the fact that the alleged dichotomy between men made Sultanic law and Sharia law is not functional. Rather than being a unilateral process of imposition by the Sultan, this was a mutual process between the sultan as a lawgiver and Ḥanafi legal scholars (6–7). Continuity and change in the Ḥanafi legal tradition as well as the codification of Ḥanafi law into Mecelle during the late Ottoman Empire period during the late 19th century are major points of the book.

In the first chapter, the author focuses on the late Ḥanafi jurist Ibn Nujaym (d. 1562–1563), who »was the first Ḥanafi jurist to incorporate the legal scholarship of Ottoman Shaykh al-Islām and Anatolian jurists into his legal commentary« (31). Ayoub argues that Ibn Nujaym played an essential role in shaping Ḥanafi legal discourse in the 17th to 19th century and his works constituted a basis for the Ḥanafi works after him (31–32). The chapter deals with case studies on late Ḥanafi legal reasoning and on sultanic authority. An important argument of the chapter is that late Ḥanafi scholars constituted a continuation of the early Ḥanafi school and they shaped the school according to the new circumstances of the time (47). Moreover, he argues, late Ḥanafi scholars not only considered early Ḥanafi tradition as a valid departure point, they also considered the »milieu« surrounding the opinions of the early Ḥanafi scholars (47). The chapter also elaborates the power of the sultanic authority vis-à-vis Sharia. He portrays this relationship as non-linear: »Late Ḥanafi jurists rejected, accepted, and expanded policies and decisions made by the Ottoman sultan« (62).

The second chapter examines the interaction between increasing sultanic authority on legal matters and the inclusion of sultanic orders in the legal thinking of Ḥanafi jurists in the 17th and 18th centuries. The author challenges the strict separation of Islamic legal scholarship from the state (65–66). The chapter argues that the late Ḥanafi legal commentaries, treatises and *fatāwās*, included the sultanic edicts and orders in the 17th and 18th centuries for the first time (66). He illustrates this point with particular attention to the works of the four jurists, namely Ḥasan b. ʿAmmār al-Shurunbulālī, (d. 1659), ʿAbd al-Raḥmān b. Muḥammad b. Sulaymān Shaykh-Zāda (d. 1667), ʿAlāʾ al-Dīn al-Ḥaṣkafī (d. 1667) and Ḥāmid b. ʿAlī al-ʿImādī (d. 1757) (66). For example, sultanic orders forcing judges to employ certain opinion among various opinions on certain problems within the same school was unique to Ottoman empire and late Ḥanafi jurisprudence (81). The pre-Ottoman Ḥanafi literature had no reference to sultanic orders or edicts (85), whereas the late Ḥanafi discourse incorporated these (93). However, this did not mean that late Ḥanafi scholarship rubberstamped sultanic orders. Instead, they »variously rejected, accepted, and expanded certain policies and decisions by the sultan« and even criticized abusive and corrupt practices (154). Thus, the author points to a conscious interplay between sultanic power and scholars, and he invites us to revisit the alleged »dichotomy between Islamic law and political authority in light of late Ḥanafism« (93).

The third chapter deals with scholar Ibn ʿĀbidīn (d. 1836) and the way he dealt with »departure from earlier authorities' opinions« (95) within the Ḥanafi legal school. The chapter illustrates how Ibn ʿĀbidīn legitimized new opinions and departed

from »the school's authentic narrations« with reference to necessities of the time and the local customs but also by invoking the authority of Abū Ḥanīfa by stating »Were [he] here, he would say the same [on this issue]« (96). He also illustrates how Ibn ʿĀbidīn dealt with embracing the sultanic authority (118) and points to the citations made to Ottoman empire affiliated jurists as well as to Abū al-Suʿūd Efendī, Ottoman Shaykh al-Islām, and to the sultanic orders in his works (119–120).

Finally, the fourth chapter concerns the Mecelle of the Ottomans in the 19th century. The chapter deals with the Mecelle, which is a crystallized and codified version of the late Ḥanafi jurisprudence (117). A major argument of the chapter is that the Mecelle was a sign of »continuity and evolution within the Ḥanafi school, not a radical break from the premodern legal tradition« (132). Even though there were some departures from the early or late Ḥanafi opinions in the Mecelle, they were still justified with the techniques of the Ḥanafi tradition (130). The chapter argues that although the Mecelle pays attention to new social and legal norms of the late 19th century, it still is a »faithful synthesis of late Ḥanafi jurisprudence« (130). On the point of Mecelle, the book states »In short, the Mecelle, at its core, is a Muslim response to modernity and its legal order, argued and justified from within the tradition« (151). Ayoub's contribution to our understanding of the Mecelle and its intellectual baggage is significant and thought provoking. It is also correct that »the Mecelle should be understood as a continuation and transformation of Ḥanafi legal thought« (150). He provides the socio-economic and political context that Mecelle appeared (131–136). Yet, a more nuanced elaboration of the socio-legal context of the empire starting from the early 19th century is necessary to grasp the true meaning of such continuation and transformation.

A striking feature of Ayoub's book is his skilled and convincing use of the primary sources of Ḥanafi scholars. Moreover, his work is in perfect synergy with the growing literature on the formation of late Ḥanafi school and its crystallization into Mecelle, especially the recent contributions from Guy Burak on the Ḥanafi school, Yavuz Aykan on Mecelle, and the works of Wael B. Hallaq on Islamic law. Therefore, it is a valuable contribution to an on-going discovery process of the Ḥanafi juristic discourse in flux. Although the book does not explicitly aim at dealing with the conceptual subjects of the legal history such as codification, legal change, legal transplants, reform and modernity in depth, it does provide a fertile ground for discussing such concepts. These concepts are usually developed and explained with western examples. The material in the book is very rich and valuable for understanding the legal change from a non-western perspective. Such material invites us to think beyond the Ottoman legal history or Islamic law. Therefore, the book opens new questioning opportunities not only for Islamic law and Ottoman law but also the general development and nature of the law throughout the history. Therefore, Ayoub's book is an extremely precious contribution to the literature. ■

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Kennst du das Land, wo die Mangos blühn?*

Chintan Chandrachud, der als Rechtsanwalt in einer Londoner Kanzlei arbeitet, veröffentlichte 2017 eine Untersuchung zum *judicial review* in Großbritannien und Indien nach Verabschiedung des Human Rights Act (HRA) im UK 1997 (*Balanced Constitutionalism: Courts and Legislatures in India and the United Kingdom*). Sein neues Werk, *The Cases that India Forgot*, bietet eine populäre

* Chintan Chandrachud, The Cases that India Forgot, New Delhi: Juggernaut 2019, XIII + 229 S., ISBN 978-9353450823