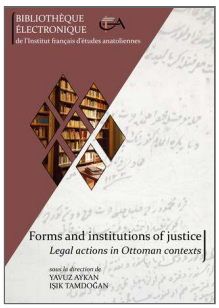

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Legal actions in Ottoman contexts

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From the Hanafi *Doxa* to the *Mecelle*

The Mufti of Amid and genealogies of the Ottoman jurisprudential tradition

Yavuz Aykan

My special thanks are due to Şükrü Özen who called my attention to Ibn 'Abidin's text and to Boğaç Ergene and Megan MacDonald for their keen eyes. I would also like to thank to the staff of the Käte Hamburger Center for Advanced Study, Law as Culture Program in Bonn who provided me a pleasant atmosphere to develop the main ideas of this article.

Introduction

Since the 1970s the scholarship tackling Ottoman legal institutions has long placed the figure of the *qadi* at the center of its narrative. It is partially due to the nature of the available primary sources (*kadı sicilleri*) that the scholarship privileged the role of the judge in the process of dispute resolution. The relative invisibility of the other actors in Ottoman court records—such as provincial muftis (*kenar müftileri*)—led to the constitution of a historiographical *topos* where the role of the Ottoman judge remained central. This picture is perhaps most crystallized in the historiography of the so-called 'classical period' of the empire's lifespan.[1]

Recent studies on the Ottoman legal-doctrinal tradition have offered perspectives that can be useful for changing this dominant paradigm. Rudolph Peters has argued that under the supervision of the state, Ottoman Hanafi jurists developed a body of uniform legal doctrine that could be applied in legal disputes in the courts. While this process, according to Peters, served to constitute an unequivocal body of law, it also limited the *qadi*'s discretion in legal procedures.[2] Because of his preoccupation with other dimensions of the issue, Peters does not elaborate on the ways in which this development might be observed in legal procedures.

More recently, Guy Burak has pushed the debate further.[3] Building his case against the Mamluk legal tradition, Burak has argued that from the 16th-century onwards, the Ottoman learned hierarchy favored a specific vein of Hanafi tradition. By doing so, he has

called attention to the constitution of what he calls a '*rûmî*' branch of Hanafism. Hence, according to Burak, a body of text identified in *tabaqat* works as the "books of high repute" attests to the constitution of a uniform Ottoman canon that emerged throughout the early modern period.

In this article I will attempt to reveal the complexity of the historical process through which the Ottoman Hanafi doctrine has evolved. I will do so by placing the Ottoman provincial muftis (*kenar müftüleri*) and the historicity of the Hanafi legal doctrine at the center of my narrative. I will try to answer three different, yet interrelated questions: Was the judgment of the Ottoman *qadi* governed by Islamic jurisprudence (*fiqh*)? What was the role of the provincial muftis and their fatwas in litigation processes? Finally, what can the collaboration between the *qadi* and the mufti in legal procedures tell us about the crystallization of a Hanafi *doxa*[4] in the early modern period, as the precursor of the 19th-century codification era?

This article pursues the circulation of a legal dissent (*ikhtilaf*) with regard to the rules governing evidentiary law in Hanafi jurisprudential tradition.[5] By drawing on a divorce case that was brought before the judge of the Ottoman city of Amid in the 18th-century, the article traces the genealogies of a debate among the Hanafi jurists on the legal capacity of the person judged to be in a state of madness. There had existed a long-standing dissent (*ikhtilaf*) among the Hanafi jurists on this particular question. In the 17th-century the Ottoman chief mufti Çatalcalı Ali Efendi (d. 1692) favored a specific opinion as the binding one. By focusing on the history of this legal dissent and on the traffic between medieval jurisprudential traditions of the wider Islamic *oikoumene* and the Ottoman world, I will show that Çatalcalı Ali Efendi's opinion even infiltrated the 19th-century codification of the *Mecelle*.

A Divorce Case on Trial

On July 7, 1739, a woman named Hamide, a resident of the İçkale quarter in the city of Amid sent her proxy (*vekil*) al-hajj Mahmud son of Mullah Ömer to the legal court of the city, in order to end her marriage with her husband, Seyyid Kemaleddin.[6] As the judge questioned the parties it turned out that Kemaleddin had already divorced Hamide during a quarrel with Hamide's brother, Seyyid Sunullah. He uttered the divorce formula three times, "*go to your brother's house, I divorced you*"[7], which should be considered according to the declarations of the proxy Mahmud as an irrevocable divorce (*talak-ı selâse* or *talâk-ı bâ'in*). Such a clear and unequivocal (*sarih*) statement of the divorce formula does not require the court's intervention, for the dissolution of marriage is legally effective after such an utterance by the husband, and the marriage is definitively over.[8]

The fact that Hamide brought her case before the judge reveals that her husband was refusing the consequences of his words. Hence, Kemaleddin wished to continue his marriage in spite of the fact that he pronounced the divorce formula. The declarations of the proxy Mahmud are as follows:

> Two days before the present trial, Seyyid Kemaleddin, while he was the husband of aforementioned lady Hamide, had quarrel with the brother of Hamide named Seyyid Sunullah. During the dispute, Kemaleddin uttered at once, three times "go to your brother's house, I divorced you", applying the irrevocable divorce (*talâk-ı selâse*). The abovementioned Hamide even declared, in the presence of Muslims and

> by citing them as witnesses that she was definitely divorced by abovementioned Kemaleddin. At present, I ask on behalf of aforementioned lady Hamide that what is necessary shall be applied according to the Sharia and according to the noble sense of the fatwas that she has in her hand.

Talâk refers to the normal case of divorce in the Islamic legal tradition. The married man is the only party in a marriage who has the right to pronounce *talâk* to his wife. He does not have any legal obligation to give a reason for the *talâk* in question.[9] A *talâk* may be legally revocable (*rec'i*) or irrevocable (*selâse* or *bâ'in*). The revocable *talâk* is aimed at allowing the spouses to reconcile since it does not end the conjugal relationship immediately. It can be revoked during the waiting period (*iddet*) of women, consisting of three menstruation periods of the wife. In the case that the woman no longer menstruates, this period is fixed at three months. The purpose is to determine whether or not the woman is pregnant, and if so, the identity of the father of the child. It also gives the spouses the opportunity to reconcile before the definitive *talâk*. It is during this waiting period that the man has the right to withdraw the uttered *talâk*. If the man lets this time elapse the marriage ends definitively.[10]

In the case of an irrevocable *talâk*, a marriage is dissolved immediately. The free man should pronounce the divorce formula three times in order for the divorce to be irrevocable (*bâ'in*). For example: If a man says to his wife: "You are divorced", the woman is divorced once. If the husband says again, "you are divorced", the woman is divorced again. However, it is the third utterance of the *talâk* formula that puts an end to the marriage definitely. Expressions that lead to the irrevocable *talâk* must be unequivocal (*sarih*). Legally, each unequivocal formula uttered by the man is considered to be annexed (*mülhak*) to one another. It is by this accumulation that the third formula uttered by the husband is considered to be the strongest one and so engenders the definitive divorce. If one who announces the divorce uses ambiguous or equivocal expressions (*kinaya*), the couple must apply to a legal expert in order to clarify the situation. A new marriage contract between former spouses can be concluded after an irrevocable *talâk* only if the woman consummates another marriage with a different man and then gets repudiated by him.

In the case of Hamide and Kemaleddin, after the declaration of the proxy the judge questioned Kemaleddin. Kemaleddin accepted the fact that Hamide was his wife but declared for his defense:

> I uttered [those words] in a state of madness and epilepsy (*masru' iken*)[11]

Kemaleddin's declaration before the judge was not advantageous for Hamide. According to Islamic jurisprudence, a divorce pronounced by a husband in a state of delirium or temporary madness is not valid. This jurisprudential principal is closely connected to the conception of legal faculty/legal capacity in law. In this context only a free (*hurr*), mentally healthy ('*aql*) Muslim of a certain age (*balig*) possesses full legal capacity. Only under this condition is he/she fully responsible (*mukallaf*) vis-à-vis the law.[12] As the utterance of the divorce formula was closely related to the man's 'intention', he had to be in full possession of his mental and physical health. As such, it is obvious that with his declaration before the judge, Kemaleddin aimed at saving the marriage he already jeopardized.

According to Islamic jurisprudence, in a court proceeding, only the plaintiff is entitled to support his/her claims by witnesses in a case where the defense would deny the charge. If the plaintiff is not able to gather the necessary witnesses to prove his accusation, the

judge asks the defense to take an oath for his denial. However, in our case, the fact that Kemaleddin advances another claim before the judge puts Kemaleddin into a position equal to that of the plaintiff. In other words, by advancing a different story before the judge, he takes the position wherein he is expected to prove his argument; that is, his state of madness during the utterance of the divorce formula. This position is very advantageous because it allows the individual to present the strongest case before the judge, which is the testimony (*bayyina*).[13]

However, after registering Kemaleddin's declaration and the refutation of the proxy who claims that "*Kemaleddin was not affected by the mentioned condition*", the court scribe offers the following highly formulaic sentence:

> [since] the proof for sanity [of the person] takes precedence over that of [his] madness, the production of evidence to support his refutation was requested from the aforementioned proxy.[14]

Although we would expect that Kemaleddin had to have the right of taking the position of proving his madness before the judge, it is obvious that this sentence registered by the scribe in the court record rendered this principal legally null. Why such a particularity? Or why, according to the court, would the proof supporting Kemaleddin's sanity during the repudiation take precedence over the proof supporting his epilepsy or madness? As I will discuss below, this point is an important detail and offers a window into the history of the development of Hanafi jurisprudence with regard to evidentiary law. By keeping this detail in mind, let us turn back to the case in hand.

Upon the judge's request, Hamide brought four men who testify to the effectiveness of Kemaleddin's repudiation and to offer witness testimony regarding Kemaleddin's full legal capacity during the utterance of the divorce formula. Their testimony in the court is registered as follows:

> Indeed two days before the present court hearing [the] above mentioned Kemaleddin divorced his aforementioned wife, Hamide daughter of *al-hajj* Mustafa when he was sane and in full possession of his [mental] health. He uttered the divorce formula at once, three times by saying "go to your brother's house, I divorced you". He admitted this in our presence. We testify on this matter and we even take oath.

After the witnesses' oral testimony, the proxy Mahmud submitted three fatwas to the court, formulated by the city's Hanafi mufti. By formulating the fatwas, the mufti aimed at aligning the case at hand to certain authoritative texts considered to be the "most respected books of *fiqh*".[15] The jurisprudential texts that are consulted by the mufti and adduced to each fatwa in order to support his legal opinion encompass a vast geography and a long history, connecting the far corners of Hanafi jurisprudential tradition to the Ottoman Empire. These texts are not only important for understanding the destiny of Hamide and Kemaleddin's marriage. More importantly, they provide the historian with a unique lens to relocate Ottoman Hanafism to a larger interpretive tradition.

Three fatwas and the "most respected books of *fiqh*" (*kütüb mu'teberât-ı fıqhiyye*)

A fatwa is a legal opinion formulated by a jurisconsult (*mufti*), as a response to the legal questions of individuals (*mustafti*).[16] In the court of the city of Amid, the use of fatwas by individuals shows that, in complex legal cases, the fatwa had the role of guiding the

actors of the legal dispute—including the judge—towards a final verdict in favor of the one who brings the fatwa to the court. In this sense, fatwas were simple abstractions of real legal disputes. In a fatwa, individuals were identified with pseudonyms such as Zeyd and Amr. The questions addressed to the mufti referred to real problems that were to be discussed before the judge during a court hearing. The legal problems were supposed to be formulated in order to allow yes or no answers.[17] The first fatwa formulated by the Hanafi mufti of Amid and adduced to the case reads :

> If Zeyd says three times to his wife Hind "I divorced you, I divorced you, I divorced you"; and in this condition given that an unequivocal [statement] is annexed to [other*] unequivocal* [ones], could the aforementioned Hind be considered triply divorced according to the Sharia? The correct answer is yes, as it is clearly stated in Qadikhan, one of the most authoritative books of *fiqh*: If a man says to [his] woman you are divorced, you are divorced, you are divorced [then] she is divorced triply.[18]

The fatwa includes a quotation from the book entitled *al-Fatawa al-Khaniyya* which is abbreviated by the mufti as Qadikhan. The author of this book is the late 12th-century Transoxanian Hanafi jurist *Qadikhan Fakhr al-Din al-Hasan b. Mansur al-Farghani* (d. 1196).[19] The fatwa clearly underlines the rules governing the irrevocable divorce (*talâk-ı bâ'in* or *talâk-ı selâse*). It remainds the basic principal that the divorce formula uttered by the husband should be unequivocal and pronounced at once, three times.

Was the formula uttered by Kemaleddin as clear as the fatwa mentioned above? The answer is no. That's why the mufti, after having formulated this first fatwa, issued a second one in order to give the court a legal reason as to why the statement uttered by Kemaleddin had to be considered as an irrevocable divorce. The second fatwa reads:

> If Zeyd, in a moment of passion, says to his wife Hind: "I divorced you, go to your brother's house", and since [according to the law] by saying "I divorced you", one revocable divorce and by saying "go to your brother's house" one irrevocable divorce takes effect, and given that in this case the irrevocable [divorce] is annexed into the unequivocal [one], could aforementioned Hind be divorced only by two *talâks*? The correct answer is yes, as it is clearly stated in Multaqa, one of the most respected books of *fiqh*: an irrevocable divorce is annexed into an unequivocal [one] [20].

This fatwa, legitimized by Hanafi jurist Ibrahim al-Halabi's (d. 1549) famous book *Multaqa al-Abhur*, is important for its content as well as for the ways in which it reveals the historicity of Hanafi jurisprudence. In order for an irrevocable divorce to take place, the husband had to pronounce the divorce formula three times in an unequivocal manner. By saying only one time "I divorced you", the divorce could be revoked by the husband during the wife's waiting period. The same goes for the pronouncement of the second divorce formula during this period. However, what is striking in this fatwa is that it contains the expression "*go to your brother's house*" which is considered, according to the fatwa, as an irrevocable divorce. The fatwa also highlights that "*an irrevocable divorce is annexed to the unequivocal one*". In order to comprehend this point, let me offer a parenthetical commentary in order to peer into the details of this specific point in Hanafi legal tradition.

In the 8th century, the teaching of Abu Hanifa in Iraq, the founder of the Hanafi school of law had already spread to Central Asia. The Islam of Transoxania had developed its own distinct Hanafi interpretation.[21] The city of Balkh in today's Afghanistan became the first major center of Hanafism in Asia. As an intellectual group, the jurists of Balkh formed a tradition of eastern Hanafism as a distinct identity.[22] One of the particularities of this tradition was their interpretation of the rules governing divorce in the Hanafi legal

tradition. By working almost like cultural anthropologists, jurists of the region articulated a new doctrine concerning equivocal and unequivocal divorce formulas. They argued that certain expressions that could be considered as equivocal for Iraqi society could be unequivocal for another culture.[23] In this process, they cited a number of examples in order to show that it is indeed the intention of the man that should be the decisive factor in the establishment of the validity of a divorce. If in one culture, an expression like "*get out of this house*" clearly reflects the will and the intention of the man for divorce, then it should be considered as "unequivocal" and should be annexed to an "irrevocable" divorce. As such, in the second fatwa integrated into Hamide's case, the citation in Arabic "*an irrevocable divorce is annexed into an unequivocal* [one]" refers to this specific interpretation of divorce and suggests that in 18th-century Ottoman Amid, the expression "*go to your brother's house*" clearly shows Kemaleddin's intention of divorcing Hamide. By citing this opinion from Ibrahim al-Halabi's *Multaqa al-Abhur*, the Hanafi mufti of Amid called attention to Kemaleddin's real intention during his utterance of the divorce formula.

The final fatwa submitted to the court by the proxy Mahmud refers to Kemaleddin's argument regarding his state of madness during divorce. Undoubtedly, this was the strongest card in Kemaleddin's hand during the judicial contest. However, the last fatwa aims at rendering this argument legally null. The fatwa reads:

> If Zeyd, at one time losing and at another time regaining his conscious divorces his wife Hind and [later on] says that "I divorced her in a state of madness" and pro duces the necessary proof [in front of the court] and the aforementioned Hind also produces proof showing that he [Zeyd] was rational and if in this case there exists a dissent (*ikhtilaf*) among the Hanafi jurists as to the validity of both proofs, could the judge of the case make a decision [in favor of the one] who brings the proof of discernment? The correct answer is yes, as it is clearly stated in *Qunya*, one of the most respected books of *fiqh*: the proof for sanity takes precedence over the proof of madness[24].

The authoritative text abbreviated in the fatwa as *Kitâb-ı Qunya* is Najm al-Din al-Zahidi al-Ghazmini's (d.1260) *Qunyat al-munya li-tatmim al-Ghunya*.[25] The fatwa describes Kemaleddin's mental state as someone who is not in a permanent state of madness. This suggests that the crux of the matter was the instability/ambiguity of Kemaleddin's general mental state (be it epileptic or mad).[26] Since both parties (i.e. Kemaleddin and the *proxy* Mahmud) brought opposing proofs on the mental state of Kemaleddin during his utterance of the *talâk* formula, the fatwa underlines that in such a case there exists a dissent (*ikhtilaf*) in the Hanafi legal tradition on the validity of both proofs. The fatwa also underlines that, according to *al-Qunya*, the proof arguing for Kemaleddin's full possession of his legal capacity takes precedence over the opposing proof. The fatwa makes clear that in this case the *qadi* has the authority to pronounce his judgment in favor of Hamide. In other words, despite the existing dissent in the Hanafi tradition, it is clear that the judge preferred the validity of this proof as the binding opinion in conformity with the sentence quoted from *al-Qunya*.

This fatwa brings us back to the question that I raised at the beginning of this article: Why did Kemaleddin lose his right to offer his own testimony during the court procedure in order to prove his madness? The answer to this question lies in the history of the legal dissent that existed on this particular subject in Hanafi tradition and in Ottoman jurists' preference of a specific vein of its interpretation.

The *Mecelle* in the Making

This legal debate dates back to the legal opinion of Abu Yusuf Ya'qub (d. 798), one of the disciples of Abu Hanifa (d. 767), the founder of the Hanafi school of law.[27] It is discussed in Ibn 'Abidin's (d. 1836) *Radd al-Muhtar 'ala ad-Durr al-Mukhtar*.[28] According to Ibn 'Abidin, Abu Yusuf discusses the issue in case of a sales transaction: One person sells his house to another person. Subsequently two witnesses declare that he sold the house in a state of madness. Two other witnesses challenge this proof by arguing that the vendor was indeed sane during the transaction. According to Abu Yusuf, the proof supporting that the person in question was in full possession of his legal capacity—*sui juris*— takes precedence during a court hearing.

Ibn 'Abidin quotes two other texts that represent a departure from this classical Hanafi tradition. The first text quoted by Ibn 'Abidin is abbreviated as *al-Ashbah*.[29] The subject of discussion is an inheritor whose legal capacity is ambiguous. In this case the one who claims that the heir was ill during the sharing of the succession—and consequently the sharing should legally be invalid—his/her eye-witnessing takes precedence over the opposing testimony. According to *al-Ashbah*, the same principal applies for cases of divorce and manumission.[30] Unlike Abu Yusuf's position, according to *al-Ashbah*, in case of a conflicting eye-witnessing of a contracting agent's legal capacity, the proof claiming the illness (or madness) of the person takes precedence.

Ibn 'Abidin also cites *Jami' al-Fatawi*, and this too represents a departure from Abu Yusuf.[31] This time, the case in question is a person who suffers from dementia (*'atah*). The proof supporting the person's suffering from dementia during a transaction takes precedence according to *Jami' al-Fatawi*.

Ibn 'Abidin continues:

> In the *Qunya* the proof for sanity takes precedence over the proof for dementia or madness in case of a sale.[32]

Ibn 'Abidin makes it clear that in his *al-Qunya*, al-Ghazmini discusses dementia and madness at the same time in spite of the fact that in the last fatwa adduced to Hamide and Kemaleddin's court case, only the question of madness was underlined in the sentence cited from *al-Qunya* by the mufti. It is also striking to see that according to Ibn 'Abidin, al-Ghazmini discusses the issue in case of a sales transaction. The mufti of Amid seems to have made an analogy between a sales contract and a divorce case—both of which, logically, require full legal capacity. By doing so, the mufti bound the case at hand to the opinion articulated in *al-Qunya* in the case of a sales transaction.

Ibn 'Abidin argues that in his al-Qunya, al-Ghazmini followed the tradition of Abu Yusuf on this particular point. He also adds that the mufti of Rum (*mufti al-Rum*) Çatalcalı Ali Efendi (d. 1692) has followed this path.[33] As I am going to discuss in what follows, the chief Ottoman mufti Çatalcalı Ali Efendi did indeed end the dissent, at least for the Ottoman doctrinal tradition, by favoring the opinion of Abu Yusuf as the binding one.[34]

In his *Fetâvâ-yı Ali Efendi*, the chief jurist devoted an entire chapter to the question of proof (*bayyina*). Entitled "On the preference of proof" (*fi tercih'ül beyyinat*), he discusses different legal issues that have created dissent in the Hanafi legal tradition with regard to the rules governing the question of proof. The chapter contains 53 fatwas penned on this topic with the aim of underlining certain points over which there was no unity of opinion

in Hanafi tradition. The fatwas include, but are not limited to: Conflicting accounts of eye-witnessing regarding the testament of a person on his/her deathbed (*maraz-ı mevt*); the validity of the testimony from a person suffering from dementia (*ateh*); and the weight of the proof provided by the person asserting that he/she concluded an amicable settlement (*sulh*) under duress (*ikrah*), etc...[35] Çatalcalı Ali's legal opinion on the issue of madness and proof reads as follows:

> Query: If in a [legal] dispute the proof of madness and that of sanity is [simultaneously] provided [by the conflicting parties] which proof should [legally] be relied upon?
> Answer: [In such a case] the proof of sanity takes precedence.[36]

It is striking to see that the chief mufti does not give any specific context in order to formulate his fatwa. Çatalcalı Ali's authoritative tone suggests that by abstracting the question, his aim was to universalize this legal rule in order to apply it to any legal dispute (be it a sales contract or divorce). What is more, for the Ottoman doctrinal tradition he seems to have once and for all put a lid on the long-standing dissent. This is the reason for which, more than a quarter century later when Hamide sued her husband Kemaleddin, the scribe of the court of Amid announced from the very beginning of the court record that "*the proof of sanity* [of the person] *takes precedence over that of* [his] *madness*" which, in turn, led the judge to give the right to bring testimony to the proxy Mahmud, rather than Kemaleddin, who had taken a position akin to that of a plaintiff during the court hearing. Hence, in his endeavor to constitute uniform rules governing evidentiary law, Çatalcalı Ali eliminated the intra-*madhhab* dissents on this particular subject so as to make it conform to the Ottoman Hanafi *doxa*.

This legal opinion's adventure is not limited to Çatalcalı Ali's intervention. This principal passed into the constitution of the *Mecelle* as well in the 19th-century. When we take a close look at the articles of the text, it is mentioned in Article 1767 of the code where the rules governing economic transactions are discussed. As was the case with al-Ghazmini's opinion, the question of dementia (*ateh* in Ottoman), together with madness, is also addressed in the code. The article runs as follows:

> Article 1767: According to the agreement of the [most] enlightened [jurists] the proof for sanity, in other words the proof supporting the sanity of the agent [during a transaction] predominates over the proof of the loss of rationality or dementia.[37]

The author of the annotation of the *Mecelle* cites three sources: The *Radd al-Muhtar* of Ibn 'Abidin, the fatwa of Çatalcalı Ali, and finally, a text titled *Tekmile* whose author I could not identify. Abu Yusuf and al-Ghazmini are absent among the sources cited for drafting the *Mecelle* for a simple historical reason: Their integration into Ottoman authoritative texts such as *Radd al-Muhtar* or *Fetâvâ-yı Ali Efendi* seems to have rendered the original sources forgotten for the drafters of the code. This is perhaps one of the many indicators that attest to the crystallization of an Ottoman Hanafi *doxa* before the *Mecelle*.

Conclusion:

The historical adventure of the legal dissent on the legal capacity of the madman has important implications for the aims of the present volume as well as for mapping the historicity of Ottoman legal structures that stretch back to previous legal universes. This was made apparent in the deployment of a specific Hanafi legal doctrine (in the form of fatwas) that aimed at resolving the knotty points of Hamide and Kemaleddin's legal

dispute. This operation was made possible by the provincial muftis' (*kenar müftileri*) involvement in the process of dispute resolution. Hence, the mufti had the vital role of creating a dialogue between the dispute in question and the legal doctrine articulated by the "author-jurists[38]" such as al-Ghazmini, Qadikhan, or Ibrahim al-Halabi. Such a picture has the potential of recasting the historiographical *topos* that has long placed the figure of the judge and his discretionary power at the center of its narratives.

The long-standing historical dissent over the question of proof of discernment and Çatalcalı Ali's intervention into this process powerfully attests to Ottoman jurists' efforts to eliminate nodes of dissent (*ikhtilaf*) in the Hanafi legal tradition. This process was an important part of the constitution of an Ottoman Hanafi *doxa* in the early modern period. As such, the historical route that also led to the codification of the *Mecelle* was much more complex than the schematic description presupposed by straightforward linear accounts. In other words, the emergence of the *Mecelle* in the 19th-century demarcates a critical historical encounter between modern codification as a 'form' and the constitution of the Ottoman Hanafi *doxa*, as the historical and the doctrinal grounds of this code.[39]

It remains commonplace to write about this history as the offshoot of a modernizing logic that would somehow over determine the 19th-century political and historical landscapes. However, despite having been left to oblivion, the infiltration of the opinion of Abu Yusuf via al-Ghazmini in the *Mecelle* has a message for historians grappling with the puzzling questions of the 19th-century: Beyond the grand narratives of modernization, the historicity and the operations of the *fiqh* invite us to re-think this Hanafi tenor diffused in the modernization of the Ottoman/Turkish legal system that should be further addressed in future studies.

NOTES

1. See Ronald C. Jennings, (1979). "Kadi, Court and Legal Procedure in 17th Century Ottoman Kayseri," *Studia Islamica* 50, pp. 133-172. DOI: 10.2307/1595357; Haim Gerber (1994). *State, Society and Law in Islam: Ottoman Law in Comparative Perspective*, Albany, State University of New York Press; Leslie Peirce (2003). *Morality Tales: Law and Gender in the Ottoman Court of Aintab*, Berkeley, University of California Press.

2. Rudolph Peters, (2005). "What does it mean to be an official madhhab? Hanafism and the Ottoman Empire", in Peri Bearman, Rudolph Peters and Frank E. Vogel (eds.), *The Islamic School of Law: Evolution, Devolution, and Progress*, Cambridge, MA, Harvard University Press, pp. 147-159. URL: http://hdl.handle.net/11245/1.326741. See particularly p. 148.

3. Guy Burak (2014). *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire*, Cambridge, Cambridge University Press.

4. Here, by the term *doxa* I refer to a set of fundamental beliefs that do not need to assert themselves in the form of an explicit and self-conscious dogma. See Pierre Bourdieu, (1997). *Méditations Pascaliennes*, Paris, Seuil, p. 30. On the Ottoman Hanafi *doxa* that crystallized in the 18th -century, see Yavuz Aykan (2016). *Rendre la justice à Amid : procédures, acteurs et doctrines dans le contexte ottoman du XVIIIe siècle*, Leiden, Brill, pp. 162–226.

5. For a discussion of the question of legal dissent in Hanafi legal tradition, see Baber Johansen, (2013). "Dissent and Uncertainty in the Process of Legal Norm Construction in Muslim Sunni Law," in Michael Cook, Najam Haider, Intisar Rabb, and Asma Sayeed (eds.), *Law and Tradition in Classical Islamic Thought*, New York, Palgrave Macmillan, pp. 127-144. DOI: 10.1057/9781137078957_7.

6. The record of the case can be found among Diyarbakır Şeriye Sicilleri. DS 360/90b [27 *rebiyü'l-evvel* 1152].

7. *Karındaşının menziline git, seni boşadım.*

8. Judith Tucker, (1998). *In the House of the Law: Gender and Islamic Law in Ottoman Syria and* Palestine, Berkeley, University of California Press, pp. 79-81.

9. *Ibid.*, p. 80.

10. *Ibid.*, p. 80.

11. *Cünûnum hâlinde, masru' iken söylemişimdir.*

12. Michael W. Dolls, (1992). *Majnūn: The Madman in Medieval Islamic Society*, Oxford, Oxford University Press. According to Baber Johansen this feature is one of the criterion that demarcates the field of law and theology in the Islamic tradition. See Baber Johansen, (2013). "The Changing Limits of Contingency in the History of Muslim Law," lecture delivered at The Nehemia Levtzion Center for Islamic Studies, the Hebrew University of Jerusalem, p. 10. URL: http://www.hum.huji.ac.il/upload/_FILE_1370347773.pdf.

13. In their recent work Metin Coşgel and Boğaç Ergene have shown that in the Ottoman courts taking the position of the plaintiff in a legal procedure was central for winning a case. See Metin Coşgel and Boğaç Ergene, (2016). *The Economics of Ottoman Justice: Settlement and Trial in the Sharia Courts*, Cambridge, Cambridge University Press, pp. 252-262. For this particular rule in Hanafi legal tradition see Baber Johansen, (1990). "Le jugement comme preuve : preuve juridique et vérité religieuse dans le Droit islamique hanéfite," *Studia Islamica* 72, pp. 5–17. DOI: 10.2307/1595773.

14. *Beyyine-i cünûndan beyyine-i akıl evlâ olmağla vekil-i mezburdan def'ine beyyine taleb olundukda...*

15. In the documents of nomination of the Hanafi provincial muftis issued by the *şeyhü'l-İslâm* it is clearly stated that the formers had to consult this body of text while formulating their legal opinions. See Yavuz Aykan, *Rendre la justice à Amid*, pp. 162-226. By drawing on *tabaqat* texts, Guy Burak has made the same observation. Burak attributes this development to the existence of what he calls "canon consciousness" of the Ottoman learned hierarchy. See Guy Burak, *The Second Formation of Islamic Law.* Particularly in the 4th part of the book.

16. Muhammad Khalid Masud, Brinkley Messick and David Powers, (1996). *Islamic Legal Interpretation: Muftis and their Fatwas*, Cambridge MA, Harvard University Press.

17. Ronald C. Jennings, "Kadi, Court and Legal Procedure," p. 139.

18. *Zeyd zevcesi Hind'e seni boşadım, seni boşadım, seni boşadım üç defa dese, sarih sarihe mülhak olmağla Hind-i mezbûre üç talâk ile şer'an mutallaka olur mu? Cevâb-ı bâ sevâbında olur deyü Kütüb mu'teberât-ı fıkhiyye'den Kadıhan'da:* ***rajul qal li-imra'at inti taliq inti taliq inti taliq: mutallaq thalathan.***

19. For the biography of Qadikhan see H. W. Juynboll, and Y. Linant De Bellefonds, (1990). "*Kadi Khan,*" *The Encyclopaedia of Islam*, vol. 3, Leiden, p. 377. 2nd edition.

20. *Zeyd zevcesi Hind'e, hin-i gazâbında, seni boşadım, çık git karındaşın evine dese, boşadım demekle bir talâk-ı rici', çık git karındaşın evine dimekle bir talâk-ı ba'in ile mutallaka olub, ba'in sarihe mülhak olmak ile iki talâk ile şer'an mutallaka olur mu? Cevâb-ı bâ sevâbında olur deyü Kütüb mu'teberât-ı fıkhiyye'den* ***Multaqa****'da:* ***wa- 'al bayin mulhaq al-sarih.***

21. Shahab Ahmed, (2000). "Mapping the World of a Scholar in Sixth/Twelfth-Century Bukhāra: Regional Tradition in Medieval Islamic Scholarship as Reflected in a Bibliography," *Journal of the American Oriental Society* 120:1, p. 41. DOI: 10.2307/604883.

22. Eyyüb Said Kaya, (2005). "Continuity and Change in Islamic Law: The Concept of *Madhhab* and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century" in Peri Bearman, Rudolph Peters, Frank E. Vogel (eds.), *The Islamic School of Law: Evolution, Devolution, and Progress*, Cambridge MA, Harvard University Press, pp. 26–40. See also Nurit Tsafrir, (1998). "The Beginnings of the Ḥanafī School in Iṣfahān," *Islamic Law and Society* 5:1, pp. 1-21. URL: http://www.jstor.org/stable/3399350.

23. *Ibid*. p. 33.

24. ***Yajunn taratan wa-yufiq taratan*** *olan Zeyd zevcesi Hind'i tatlik eyledikde cünûnum halinde tatlik eyledim deyü ikame-i beyyine eyledikde hangisinin beyyinesi evlâ olmağda ihtilâf-ı fukaha olmağla kadı'ül-vakit akılın beyyinesi evlâ olduğuna hükm idicek, hükmü şer'an nâfız olur mu? Cevâb-ı bâ sevâbında olur kütüb fıkhiyye-i mu'teberatdan* ***Kitâb-ı Qunya'de: bayyinat al-ifaqah awla min bayyinat al-junun.***

25. Al-Zahidi al-Ghazmini was an important jurist of Karamanoğulları principality in Anatolia. For the life of al-Zahidi see şükrü Özen, (2013). "Zâhidî," *Türkiye Diyânet Vakfı İslam Ansiklopedisi*, v. 44, pp. 81-85. URL: http://www.islamansiklopedisi.info/dia/pdf/c44/c440058.pdf.

26. This state of mind is discussed in the Ottoman fatwa compilations with the following term: *mecnun-i gayr-i mutbik*. Vardit Rispler-Chaim, (2007). *Disability in Islamic Law*, Dordrecht, Springer, p. 65, argues that in Islamic societies junun does not necessarily refer to a medical condition. However, in our case it is clear that this was a medical condition that made it impossible for the person to make legal judgments.

27. Salim Öğüt, (1997). "Ebu Yûsûf," *Türkiye Diyânet Vakfı İslam Ansiklopedisi*, v. 10, pp. 260-265, Istanbul, 1997. URL: http://www.islamansiklopedisi.info/dia/pdf/c10/c100255.pdf.

28. See Ibn 'Abidin, (1307 AH). *Radd al-Muhtar 'ala ad-Durr al-Mukhtar*, Cairo, v. 7, p. 180. See the chapter entitled "On the proof of madness" (*Min bayyinat al-junun*).

29. This book probably refers to Mamluk jurist Zayn al-Din b. Nujaym's *al-Ashbah wa'l-naza'ir ala maddhab Abu Hanifa al-Nu'man*. For the importance of this book in the Ottoman Hanafi tradition see Guy Burak, *The Second Formation*, pp. 135-139.

30. Ibn 'Abidin, *Radd al-Muhtar*, p. 180.

31. I could not identify the author of this text.

32. *fi al-Qunya bayyinat al-ifaqah awla min bayyinat al-'atah aw al-junun fi al-bay'.*

33. In the vocabulary of the early modern period, instead of referring to an ethnic identity, the word Rum denotes a cultural geography covering roughly Anatolia and a part of Balkans. See Cemal Kafadar, (2007). "A Rome of One's Own: Reflections on Cultural Geography and Identity in the Lands of Rum," *Muqarnas* 24, pp. 7-25. DOI: 10.1163/ej.9789004163201.i-310.5.

34. For the fatwa compilation of Çatalcalı Ali Efendi see Cengiz Kallek, (1999). "Fetâvâ-yı Ali Efendi," *Türkiye Diyânet Vakfı İslam Ansiklopedisi*, v. 12, p. 438. URL: http://www.islamansiklopedisi.info/dia/pdf/c12/c120259.pdf.

35. See Çatalcalı Ali Efendi, (2014). *Açıklamalı Osmanlı Fetvâları. Fetâvâ-yı Ali Efendi*, annotated by H. Necâti Demirtaş, v. 1, Istanbul, Kubbealtı Neşriyatı, pp. 640-657.

36. *Bir maddede cünûn beyyinesi ile akıl beyyinesi cem' olsa kangısının beyyinesi evlâdır ? El-Cevâb : Akıl beyyinesi evlâdır.* See *Açıklamalı Osmanlı Fetvâları*. p. 641.

37. 1767. Madde : *Akıl beyyinesi diğer bir ta'bîrle mutasarrıfın âkıl olduğuna dâir olan beyyine –kavl-i müstâbihe göre – cünûn veya ateh beyyinesi üzerine tercih olunur (Redd-i Muhtâr ve Tekmile ve Ali Efendi)* . See Ali Haydar Efendi, (2000). *Dürerü'l-Hukkâm şerh-i Mecelleti'l-Ahkâm*, volume 4, Istanbul, pp. 377. See also Ömer Nasuhî Bilmen, (1952). *Hukuku İslamiyye ve İstılahatı Fıkhiyye Kamusu*, v. 6, Istanbul, p. 410.

38. Wael B. Hallaq, (2001). "The Author-Jurist and Legal Change in Traditional Islamic Law," *Recht van de Islam* 18, pp. 31-75. URL: http://www.verenigingrimo.nl/wp/wp-content/uploads/recht18_hallaq.pdf.

39. My argument differs from those of some recent studies on the *Mecelle*. This vein of scholarship treats the doctrinal basis of the *Mecelle* as being "faithful" to the Hanafi tradition. For

a recent example see Samy Ayoub, (2015). "The *Mecelle*, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and the Twentieth Centuries," *Journal of the Ottoman and Turkish Studies Association* 2:1, pp. 121-146. URL: https://muse.jhu.edu/chapter/1749803. The faithfulness/unfaithfulness binary has the risk of denying the complex history of the development of what I term the Ottoman Hanafi *doxa* that was inherent to Islamic legal tradition. For the global development of codification which I call in this article a 'form' see Avi Rubin, (2016). "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification," *Journal of the Economic and Social History of the Orient* 59:5, pp. 828-856. DOI: 10.1163/15685209-12341415.

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