İSAM KONUŞMALARI

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İSAM PAPERS

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HOW ISLAMIC WAS OTTOMAN LAW?

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Discussions of Ottoman law necessarily raise the question of the relationship between the sacred and the secular law (*sharīʿa* and *kānūn*), their place within the Ottoman legal system, and the origins of kānūn. The emphasis in these discussions has always been on the secular law, and no one has been more influential in shaping scholarly opinion in this field than Professor Halil İnalcık, above all in his account of the origins of kānūn. This therefore seems a good place to start.

In a series of articles dating from the 1950s and 1960s[1] Professor İnalcık proposed an elegant theory of kānūn as a manifestation of an ancient Turkish tradition of law-making which travelled with the Turks from Central Asia to the Middle East. In this account, each founder of a Turkish state established a law, or *törü*, which bound his successors. In his writings up to the 1970s, Professor İnalcık contrasted this 'Turkish state tradition' of effectively 'constitutional' rule with a 'Persian state tradition' which granted autocratic Iranian rulers unlimited freedom of action. In support of his theory of the 'Turkish state tradition', he cites the early eighth-century Orkhon inscription, where the Turkish ruler Bilge Kagan declares: 'I have estab-

1 Professor İnalcık developed his ideas in 'Osmanlı Hukukuna Giriş', *Siyasal Bilgiler Fakültesi Dergisi*, 13 (1958) pp. 102-126; "*Kutadgu Bilig*'de Türk ve İran Siyaset Nazariyesi ve Gelenekleri", *Reşid Rahmeti Arat İçin*, Ankara: Türk Külütürünü Araştırma Enstitüsü, 1966, pp. 259-71; "Suleiman the Lawgiver and Ottoman law". *Archivum Ottomanicum*, 1 (1969), pp. 105-38. They are summarised in an interview which Professor İnalcık gave to *Türkiye Araştırmaları Literatür Dergisi*, vol.3, no. 5 (2005), pp. 477-88.

lished my törü'.[2] His next piece of evidence is the appearance in the Uighur *Kutadgu Bilig*, dating from the eleventh century, of the term törü as a necessary attribute of a ruler. His third example of Central Asian law-making in the Turkish tradition is the 'Great Yasa' which Chingiz Khan supposedly proclaimed in 1206. The key text which establishes the link between Central Asian törü and Ottoman kānūn is the *kānūnnāme*, or law-book, of Mehmed the Conqueror.[3] Professor İnalcık on more than one occasion refers to this sultan as 'the true founder of the Ottoman Empire' and, as a state-founder, Turkish tradition obliges him to establish a law: hence his kānūnnāme. If, in reality, Osman I rather than Mehmed II deserves the title of 'founder' of the Ottoman 'state', here too Professor İnalcık finds evidence for his theory in two tales of the 'kānūn of Osman Gazi', which appear in the fifteenth-century chronicle of Aşıkpaşazade. The first of these stories tells how Osman established a market-tax on the advice of a man from Germiyan who, obligingly for Professor İnalcık's theory, refers to the practice of levying the tax as '*töre*', a variant of törü. In the second story Osman declares it to be 'kānūn' that sons should inherit their fathers' *timar*s.[4] In this passage, the linkage between a state-founder, töre/törü and kānūn is – or seems to be – clear.

Enticing as Professor İnalcık's theory of the origins of kānūn may be, it is also wrong. In the first place, in the Orkhon inscription Bilge Kagan does not declare: 'I have established *my* törü', but rather '[My ancestors] organised *the* törü',[5] which has a different sense entirely. Second, in the *Kutadgu Bilig* – as is perfectly evident from the text – the term törü is simply a Turkish calque on the Arabic *'adl* /*'adāla*. The author preferred a Turkish over an Arabic term clearly because, at this early stage of the integration of the Uighurs into the

2 Interview in *Türkiye Araştırmaları Literatür Dergisi.*

3 *Kānunnāme-i Āl-i Osmān* (ed. M.Arif), *Tarih-i Osmani Encümeni Mecmuası*, supplement (1330); Abdülkadir Özcan, "Fatih'in Teşkilât Kanunnâmesi ve Nizâm-ı Âlem İçin Kardeş Katli Meselesi", *Tarih Dergisi*, 33 (1980-81), pp. 7-56.

4 Aşıkpaşazade, *Tevārīh-i Āl-i Osmān*, in Çiftçioğlu N.Atsız, *Osmanlı Tarihleri*, İstanbul: Türkiye Yayınevi, 1949, p. 104.

5 Sir Gerard Clauson, *An Etymological Dictionary of Pre-Thirteenth Century Turkish*, Oxford: Clarendon Press, 1972, p. 531.

Islamic world, the author did not expect his readers to be familiar with Arabic terminology. Third, the imagined 'Great Yasa of Chingiz Khan' seems to be a construct of Islamic chroniclers, its literary pedigree going back to a single source, a passage in the *Ta'rīkh-e Jihāngushā* of Juwaynī, which does not in fact describe any such thing.[6] In brief, therefore, the Central Asian 'Turkish state tradition' – Professor İnalcık's source for Ottoman kānūn – never actually existed.

The kānūnnāme 'of Mehmed the Conqueror' and the 'kānūn' of Osman I are equally problematic. In 1967, Konrad Dilger showed conclusively, even if one does not accept all his arguments, that the kānūnnāme 'of Mehmed the Conqueror' is shot through with anachronisms, and that parts of it cannot date from before the late sixteenth century. Subsequently, Klaus Röhrborn demonstrated that the sections of the kānūnnāme dealing with the status of the *defterdār*s must also date from this period, while Richard Repp showed that its reference to '500-akçe *kadı*s' must date from an era later than the reign of Mehmed II.[7] The text contains other glaring anachronisms, notably, perhaps, the reference to the *şeyhülislām* as being 'head (*re'īs*) of the *'ulemā'* and, in the same clause, to the sultan's tutor (*mu'allim*) as being 'commander (*serdār*) of the 'ulemā'. The term şeyhülislām as a designation of the muftī of Istanbul does not seem to have come into normal use until after the time of Ebu's-su'ud (d.1574), nor is it correct to speak of the muftī of Istanbul as 'head' of the 'ulemā before Ebu's-su'ud's period in office. Furthermore, the puzzling designations of the sultan's tutor as 'commander' of the 'ulemā and the şeyhülislām as 'head' seems to be a reference to Sa'deddin (d.1599) who, in the last years of his life, combined the offices of tutor and şeyhülislām. In fact, a fairly cursory examination of the kānūnnāme with its repetitions, errors, and inconsistencies in both contents and phraseology

6 D.O.Morgan, "The 'Great 'yasa' of Chingiz Khan' and Mongol law in the Ilkhanate", *Bulletin of the School of Oriental and African Studies (BSOAS)*, 49 (1986), pp. 163-76.

7 Konrad Dilger, *Untersuchungen zur Geschichte des Osmanischen Hofzeremoniells im 15. und 16. Jahrhundert*, Munich: Trofenik, 1967; Klaus Röhrborn, "Die Emanzipation der Finanzbürokratie im osmanischen Reiche (Ende 16. Jahrhundert)", *Zeitschrift der Deutschen Morgenländischen Gesellschaft*, 122 (1972), pp. 118-39; R.C.Repp, *The Müfti of Istanbul*, Oxford: Ithaca Press, 1986, p. 33.

shows quite clearly that it is a composite work. A compiler has inexpertly combined several texts relating to court ceremonial and related subjects, and ascribed the finished document to Mehmed II. Small sections of the text may indeed date from the period of Mehmed II, but the work as a whole clearly does not. The compiler was, most probably, the *re'īsülküttāb* Koca Hüseyn, since almost the only copy of the text appears in his *Bedā'i' ül-Vekā'i'*, where he states that in 1614 he 'extracted' 'the copy of the kānūnnāme from the kānūnnāme of the Divan'. Note that he says 'extracted' (*ihrac et-*) rather than 'copied' (*istinsah et-*).[8] The probability is, therefore, that the kānūnnāme 'of Mehmed II' is an early seventeenth-century text, compiled from multiple sources, and probably the work of Koca Hüseyn.

This leaves us with the 'kānūn' of Osman I. Here too the evidence for the existence of a 'Turkish state tradition' is less than compelling. It is rather far fetched to see the story of Osman's establishing a market-tax on the advice of the man from Germiyan as evidence of a Turkish state-founder establishing laws to bind his successors. Furthermore, the term *töre* as it appears in the story means simply 'custom'. It is not evidence of Osman following some ancient Turkish tradition. Nor is the passage where Aşıkpaşazade presents Osman as declaring it to be kānūn that sons should inherit their fathers' timars. The fact that the rule that Osman lays down is the precise opposite of the practice in Aşıkpaşazade's own day suggests that the passage is simply intended as a protest against what the author sees as the unfair practices of his own time. He makes his point by comparing contemporary injustice with what he imagines to be the just laws of 'the good old days'.

In sum, therefore, the kānūnnāme of Mehmed II and the kānūn of Osman I are as chimeric as the törü of Turkish state-founders in Central Asia, leaving us with the problem of where the notion of a 'Turkish state tradition' came from and why it has proved to be enduringly popular. The question is easy to answer. In 1925, Mustafa Kemal [Atatürk] opened the new Law School in Istanbul where Sadri Maksudi [Arsal] was to teach a course on 'Turkish Law before Islam'. The opening of the School coincided with the abolition of the sharī'a

8 Facsimile and transliteration in Ahmet Akgündüz, *Osmanlı Kanunnnameleri*, 1, Istanbul: Fey Vakfı, 1990, pp. 317-45.

and Sadri Maksudi's course evidently played an important ideological role in justifying this reform as being a return to an ancient Turkish secular tradition of law-making. One of the texts to which he referred in his lectures was the *Kutadgu Bilig*, in which – like Professor İnalcık – he understood the term törü to refer to ancient Turkish customary law.[9] He also popularised the notion of the 'Turkish state', declaring in a lecture at the congress of the Turkish Historical Society in 1937: 'In the history of humanity no race has shown as great a capacity for founding states as the Turks.' However, if Sadri Maksudi was the pioneer in formulating the 'Turkish state tradition' its greatest exponent before Professor İnalcık was Fuad Köprülü. In his lecture at the same congress in 1937, he presented a tableau of a succession of Turkish states from the Kök-Türks onwards, in each of which the rulers established a *laïque* jurisdiction which, in the Islamic period, took precedence over the religious courts. Like Professor İnalcık, he includes the Great Yasa of Chingiz Khan as a prime example of this tradition, explaining that it was the Turkish element within the Mongol Empire that was the greatest influence in its formation and continued application in successor states. In keeping with the historiography of his day, he also lays great emphasis on the Great Seljuk Empire, showing how its rulers, from the moment Tughrul conquered Baghdad in 1055, 'engaged in free legislative activity' and, like all Turkish rulers, 'showed an inclination towards statism (*devletçilik*)'. The Ottomans, also in keeping with the historiography of the 1930s, receive only a short paragraph in the lecture, but what Köprülu has to say is interesting. After praising the Ottomans for establishing an 'absolutist state', he continues: 'This Turkish Empire, which created a very orderly government machine, represents the first example of an absolutist state in Europe, and was the first instance of such a regime in Europe, representing a stage in the political evolution of modern history … The fact that the mediaeval Turks produced for modern Europe the first specimen of an absolutist regime displays the very clear superiority of the Turks in bringing about the rapid development of public law and political culture.' Köprülü may or may not have believed very much of what he said in his lecture, but his reasons for formulating it in the way he did are clear. Sitting among the audience was Atatürk

9 On Sadri Maksudi, see Adile Ayda, *Sadri Maksudi Arsal*, Ankara: Kültür Bakanlığı, 1991.

himself, whom he addresses in the final paragraph: 'Here is Atatürk, the greatest example of the Turks' genius for establishing states! Here is the new Republic of Turkey which he has created! Before this Great Creator and this Great Work which he has created, I bow with endless love and respect.'[10] The purpose of Köprülü's lecture was in fact no more than to provide, in the presence of its founder, a historical legitimation for the new Turkish Republic. It was the latest of a long succession of 'Turkish states', Atatürk was the latest – and perhaps also the greatest – of a succession of Turkish state founders, and the principles of laicité and statism on which the Republic was founded had been characteristic of Turkish states since time immemorial.

Between them, Sadri Maksudi and Fuad Köprülü formulated the idea of the 'Turkish state tradition' which Professor İnalcık inherited, and it is their ideas that underpin his views on the origins of kānūn. However, while accepting the idea of a succession of 'Turkish states' and of a millennial Turkish tradition of secular law, he made an important modification. Apart from cutting back on Köprülü's more baroque fantasies and re-emphasising the importance of the *Kutadgu Bilig*, which Köprülü had discounted, he presents a different view of the Ottoman Empire. While Köprülü praised the Ottoman Empire as an 'absolutist state', Professor İnalcık reserves the term 'absolutist' for its 'real founder', Mehmed the Conqueror. In İnalcık's account, it is the state founder that establishes the law – be it törü, yasa or kānūn – and it is the founder's law that binds his successors.

Like the 'Turkish state tradition' itself, this is a view without historical justification, but one which closely mirrors contemporary politics. Köprülü's paean of praise to the 'absolutist state' dates from the late 1930s when dictatorship was fashionable. The European dictatorships seemed to many contemporaries to be the most dynamic and successful states of the era, and Köprülü is clearly implying that Mustafa Kemal had pioneered this form of government, much as the Ottomans had pioneered the 'absolutist state'. Professor İnalcık, by contrast, developed his ideas in the 1950s when Turkey was a multi-party state but one still guided by Kemalist principles. Hence,

10 M.Fuad Köprülü, "Orta Zaman Türk Hukukî Müesseseleri: İslam Amme Hukukundan Ayrı Bir Türk Amme Hukuku Yok mudur?', *Belleten*, 2 (1938), pp. 39-72.

in Professor İnalcık's formulation, it is the 'absolutist' founder who establishes the state and its (secular) laws, which his successors are bound to follow. Interesting too is Professor İnalcık's comparison between the quasi-constitutional 'Turkish state tradition', and the 'absolutist' Persian one. The evidence (or lack of it) that he brings to support this idea is hardly convincing. What is more striking is that, in the 1950s and 1960s Turkey's multi-party politics contrasted strongly with the autocratic rule of the Pahlavi Shah of Iran, and the idea of the absolutist 'Persian state tradition' is simply a back projection of contemporary politics into past.

In sum, therefore, Professor İnalcık's view of kānūn as the product of an imagined 'Turkish state tradition' that had travelled with the Turks from Central Asia is without foundation.[11] Equally without foundation is a more recently formulated view that kānūn has its roots in the sharī'a and that the Ottoman Empire was therefore an 'Islamic state', even if an examination of kānūn texts will from time to time reveal that its draftsmen had a familiarity with *fiqh*. For example, the fifteenth-century tariff of strokes and fines that was to be incorporated into the kānūnnāme of Bāyezīd II and its later recensions, in a nod towards the *hadd* penalty for *sariqa,* qualifies the punishments which it prescribes for theft with the conditional clause: 'if [the offender's hand] is not to be cut off'.[12] Similarly, in prescribing penalties for inflicting wounds to the head, the draftsman reveals a familiarity with the classification of head wounds in Hanafī law. Clauses in the kānūnnāmes for sanjaks in the Balkans tend to refer to taxes on pigs rather coyly as *bid'at-i hınzīr*, *bid'at- ḫanāzīr* or *resm-i cānvār*,[13] and to refer to wine as *şıra*,[14] indicating a sense that taxing pigs and wine is

11 For a fuller discussion of Professor İnalcık's theory, see Colin Imber, "'An illiberal descent': Kemalism and Ottoman Law", *Eurasian Studies*, IV.2 (2005 [2007]), pp. 215-43.

12 F.Kraelitz-Greifenhorst, "Kanunname Sultan Mehmeds des Eroberers", *Mitteilungen zur Osmanischen Geschichte*, I (1921-22), p. 2; Uriel Heyd, *Studies in Old Ottoman Criminal Law* (ed. V.L.Ménage), Oxford: Clarendon Press, 1973, p. 73-5.

13 e.g. Ömer Lutfi Barkan, *Kanunlar*, Istanbul: Bahaeddin Matbaası, 1943, p. 238.

14 I owe the observation on şıra to Professor Heath Lowry.

not truly Islamic. However, the rare cases of such 'Islamic' intrusions into kānūn are entirely superficial.

So too is Ebū's-su'ūd's more famous achievement of 'reconciling kānūn with the sharī'a'. This is a reference especially to the 'kānūn of Buda' of 1541[15] and the 'kānūn of Skopje and Salonica' of 1568,[16] in which he laid out the basic rules of peasant tenure on the land, casting his formulation in terms borrowed from Hanafī fiqh. In doing so, the difficulties that he faced were not new. Hanafī jurists from the ninth-century jurist al-Khassāf to Ebū's-su'ūd's Ottoman predecessor Kemālpaşazāde (d. 1535), had wrestled with the problem of how to describe the feudal tenure of land, as it existed in their own times and regions, in terms that harmonised with the theoretical structures of fiqh. Ebū's-su'ūd did the same, although his solution to the problem was different from that of his predecessors. His first difficulty was that, in the Ottoman system, land was not subject to ownership, whereas in fiqh it was. He resolved this conundrum by declaring that in the Ottoman Empire, the land – which in Hanafī theory should have belonged to private individuals – belonged to the Treasury. In the 'kānūn of Skopje and Salonica' he explained that this had come about because, if the land had remained in private ownership, as it should have done according to the rules of *fiqh*, it would, over the decades, have descended to multiple heirs and so been divided into unworkably small parcels. The solution, he stated, was to vest ownership in the Treasury, which in Hanafī doctrine, is the joint property of the Muslim community. He also re-labelled the Ottoman taxes levied on the land with terms which he borrowed from fiqh. The *çift*-tax , an annual rent on the land, became *ḫarāc-i muvazzaf* and the Ottoman tithe – *'öşür* – became *ḫarāc-i mukāsama*, these being the names of taxes which Hanafī law imposes respectively on the soil and on the crops of lands which had remained with their original owners at the time of the Islamic conquest. The Ottoman *tapu*-tax, or entry fee which a peasant paid on taking possession of a piece of land, he described as a rent (*icāre*) or advance rent (*icāre-yi mu'accele*). The tapu-tax does not, however, fully conform to Hanafī rules, since these

15 Barkan, *Kanunlar*, pp. 296-7; plate 55. The ms shown in pl. 55 is an autograph.

16 Barkan, *Kanunlar*, pp. 297-9.

require the term of the rental contract to be defined, while the period of a tapu-contract is open-ended. The best that Ebū's-su'ūd could do to solve this problem was, in some fatwās, to define the tapu-contract as a 'defective rent' (*icāre-yi fāside*).[17]

Ingenious though it is, Ebū's-su'ūd's 'harmonisation' of the kānūn with the sharī'a in the 'kānūn of Buda' and the 'kānūn of Skopje and Salonica' is no more than a legal fiction to create the impression that the Ottoman land-law conformed to Islamic principles. Its purpose was ideological rather than practical. The real and enduring importance of the two documents was that they provided the first clear and practical statement of the basic rules of Ottoman land tenure and it is for this reason, and not for their use of a terminology borrowed from fiqh, that they remained in use as the basic account of Ottoman land law until 1858.

It is clear, then, that even when dressed in an Islamic garb, kānūn does not derive from the sharī'a, any more than it derives from Central Asian Turkish tradition. Recent attempts to ascribe to it an Islamic origin evidently reflect the re-emergence of Islam as a force in modern Turkish politics and a challenge to orthodox Kemalist nationalism. And this brings us back to the original question. If the prevailing views on the origins of kānūn owe more to contemporary political ideologies than to historical reality, what in fact is the origin of kānūn, and what in fact was its relationship to sharī'a in the Ottoman legal system?

In answering these questions, the *Şer'iyye Sicilleri* – the records of the Ottoman kādīs' courts – are a good place to start. Not only do they survive in great profusion, but since Ottoman kādīs acted as both judges settling contested cases, and as notaries registering civil contracts, dividing inheritances, recording the establishment of waqfs and dealing with other mundane matters, the *sicil*s provide a unique insight into the legal life of the Ottoman Empire.[18] What they also show is that Ottoman kādīs conscientiously followed Hanafī rules both in matters of procedure and in the substance of the law which they applied in individual cases. The same respect for Hanafī norms

17 Istanbul University Library, T2088, f. 59v.

18 The *Şer'iyye Sicilleri* now form a popular area of research. However, researchers have tended concentrate on their value as evidence for reconstructing the social, rather than the legal history of the Ottoman Empire.

is also apparent in Ottoman fatwā literature. Between the sixteenth and the eighteenth centuries, the language and content of Ottoman fatwās came increasingly to resemble the language and content of fiqh, while the scholars who collected them into anthologies arranged them under the same chapter headings as occur in works of fiqh, and frequently provided each fatwā with a proof-text from classical Hanafī *furū'*. To this extent, Ottoman law was certainly Islamic. A person or persons who went to a court or sought a fatwā on a private matter would find the case settled according to Hanafī norms.

What then was the role of kānūn? The earliest systematic compilation of kānūn was the law-book – kānūnnāme – appended to the fiscal survey of the sanjak of Hüdavendgār, dated 1487. From this date it became the practice to preface the fiscal survey of each sanjak with a similar law-book, amending it as necessary with each new survey. The first general kānūnnāme, applying to both the European and Anatolian provinces of the Empire dates from c1499.[19] This incorporated material from the kānūnnāme for Hüdavendgār, and formed the basis for the later recensions which were to appear, apparently under the aegis of the *nişancı* Celālzāde, in the reign of Süleymān I (1520-66). The contents of the law-books provide a definition of kānūn. They contain, above all, fiscal rules, listing the taxes, together with their rates and modes of collection, which timar-holders may collect from the tax-payers resident on their timars. In addition, they contain regulations governing peasant tenure on the land, although these are sparse and unsystematic, and other miscellaneous provisions relating to timars. The general kānūnnāmes also show the military obligations of timar-holders and, in addition, contain a criminal code, in essence, a tariff of strokes and fines.[20] The apparently anomalous

19 This was first published by M. Arif, "Kanunname-i Al-i Osman", *Tārīh-i Osmanī Encümeni Mecmuası*, supplement (1911), supplement. For facsimile and transliteration of the Koyunoğlu ms, the earliest known copy of the text, see Ahmed Akgündüz, *Osmanlı Kanunnameleri*, 2, Istanbul: Fey Vakfı, 1990, pp. 39-111.

20 The earliest version of the criminal code appears in a compilation of miscellaneous documents, made after 1488, under the heading: "This is a copy of the imperial kānūn of Sultan Mehmed son of Murad Khan". The archaic language of the code suggests a possible early fifteenth-century date. See F.Kraelitz-Greifenhorst, *Kanunname*, pp. 13-48.

inclusion of penal statutes is in fact consistent with the fiscal and other clauses. The same authorities who collected the taxes and controlled the peasants' access to the land were responsible for apprehending and punishing criminals, and also pocketed the fines. In its origin, therefore, the term kānūn, when not referring to a single statute, refers to a fairly systematic body of law that emerged during the reign of Bāyezīd II (1481-1512) with the function of regulating the timar-system. Its sources were varied – for example, fiscal surveys, customary practice, *berāt*s, sultanic decrees and fatwās. More often than not, it pre-dated Bāyezīd's reign, but its compilation as codified law was the work of this sultan.

Two factors in particular explain the emergence of written kānūn under Bāyezīd II. The thirty-year reign of his predecessor, Mehmed II (1451-81) had been a period of constant warfare, which had not only added territory to the Empire, but also imposed severe fiscal, military and social strains on its resources. Following Mehmed's death, there was a need to incorporate the new territories into the Empire, and to stabilise the Empire's legal and administrative structure. The codification of kānūn seems to have been part of this effort at incorporation and stabilisation. Second, Bāyezīd's declaration that his servants – that is, those who received an income from a timar or other fief, or from the treasury – should be subject to a separate jurisdiction from his ordinary subjects, created a legal distinction between fief- and salary holders – the *'askerī* class – and ordinary tax-payers.[21] This made it necessary to define who belonged to the 'askerī class and what were the mutual rights and obligations of the 'askerī and tax-payers. This is what the kānūnnāmes do.

The immediate origins of kānūn, therefore, lie in the timar-system and the division, *de facto* before the reign of Bāyezīd II and *de jure* thereafter, of the sultan's subjects into the 'askerī and tax-paying classes. The origins of the timar-system itself are pre-Ottoman. A timar was a fief, almost invariably a grant of land, given to a cavalryman in return for military service. The cavalryman did not own the timar and, before 1582, it was non-hereditary and could be revoked in case of failure to appear on campaign. In these essentials it was

21 Théodore Spandouyn Cantacasin, *Petit Traicté de l'Origine des Turcqz* (ed. C.Schefer), Paris : Ernest Leroux, 1896, p. 218.

strikingly similar to the military fief, or *pronoia*, in the late Byzantine Empire, the similarities extending also to basic terminology. The Ottoman term timar has the sense of 'care, attention': the Greek term pronoia means the same thing. The term for a peasant tenement on a timar was çift or less often *boyunduruk*, both terms meaning literally 'yoke'. A tenement on a pronoia was a *zeugarion*, also meaning 'yoke'. A standard Byzantine unit of land measurement was the *stremma*, meaning literally 'twisting'. The standard Ottoman unit of land measurement of forty paces by forty paces was the *dönüm*, with the literal sense of 'turning'.[22] However, not all Ottoman timars conformed precisely to the Byzantine pattern. In central and eastern Anatolia, the most common form of timar was 'two headed' – *iki başlı* – with the revenues shared between the cavalryman and a private owner. The distribution of this type of timar coincided with the territories that had previously belonged to the Seljuks of Rūm, suggesting that this was again a type of fief that the Ottomans had inherited from an earlier regime.[23]

If the basic form of the timar-system itself was an inheritance from the Byzantine and Seljuk Empires and their successor regimes, so too were many of the detailed regulations which in principle governed the system.[24] This is most clearly evident in the many taxes due from peasants to fief-holders whose names betray their pre-Ottoman origins: for example, the *resm-i bojik* ('Christmas-tax' from Slavonic *bož ić*: 'Christmas'), payable at Christmas to timar-holders in Slav-speaking areas on the Danube; or *monapolye* (Greek: *monopolía*), the right of the timar-holder to sell the wine produced on his timar for a specified period each year. Less obvious, but discernable nonetheless, is the pre-Ottoman origin of basic rules governing the tenure of peasants on the land.

22 For the terms *pronoia*, *zeugarion* and *stremma*, with further bibliography, see Alexander Kazhdan (editor-in-chief), *The Oxford Dictionary of Byzantium*, 3, New York and Oxford: Oxford University Press, 1991.

23 Irène Beldiceanu-Steinherr, "Fiscalité et formes de possession de terre arable", *Journal of the Economic and Social History of the Orient,* 19 (1976), pp. 233-322.

24 On this phenomenon, see B. Cvetkova, "L'influence exercée par certaines institutions de Byzance du moyen-âge sur le système féodal ottoman", *Byzantinobulgarica*, I (1952), pp. 237–57.

The first general statement on Ottoman land tenure, as opposed to isolated statutes relating to specific problems, was Ebū's-su'ūd's 'kānūn of Buda' of 1541. Here he states that a peasant occupying a tenement does not own the soil itself. Things which are above the soil, meaning especially vines, trees and buildings, he can own as private property. To gain access to a vacant tenement, he must pay a fee – the tapu-tax – to the fief-holder, but once he is on the land he has tenure for life, provided only that he continues to cultivate the soil and pay all the taxes due. Failure to pay his taxes, or failure to cultivate the land for more than three years would result in his dispossession. At his death, his son (or, in practice, sons) may inherit the tenement without paying the tapu-tax.

It is these basic principles of Ottoman land tenure that allow us to identify the origins of the system. In the fifth century, Roman jurists faced the problem of describing a type of contract which transferred land to be enjoyed in perpetuity by a tenant and his heir or assignee, provided only that he continue to pay rent to the owner. When the jurists were unable to decide whether this was a contract of hire or of sale, the Emperor Zeno established it as an independent contract under the name *emphyteusis* .[25] The terms of the contract conform exactly to the basic condition of peasant tenure in the Ottoman Empire. In the sixth century, the Emperor Justinian was to refine the law by decreeing that the owner of the land could eject the emphyteutical tenant if he failed to pay to pay the rent for more than three years. In Ottoman law, the fief-holder could eject the tenant if he failed to cultivate the land (and hence also to pay the taxes owing) for more than three years.[26] Justinian also decreed that, provided he had the owner's permission, he could sell any improvements he had made to the land.[27] Since it is not possible to sell improvements to the soil itself, the law must have applied to things above the soil, most obviously to trees and buildings. The distinction in Ottoman law between the soil itself, which cannot be held as private property, and things above the soil, which can, seems to have its origin in Justinian's decree. It is

25 Peter Birks and Grant McLeod (intro. and trans), Latin text of Paul Krueger, *Justinian's Institutes*, London: Duckworth, 1987, p. 115.

26 P.Scott A.M., *Corpus Juris Civilis*, Cincinnati: Central Trust Company, 1932, XIII, 135.

27 *Corpus Juris*, XIII, 135-6.

possible, too, that the tapu-tax represents a continuation of Roman practice. From the late fourth century, Roman law required a tenant who obtained land on the imperial domain by emphyteutical right, to provide sureties against the land being abandoned.[28] By Ottoman times, this payment had lost its character as a security, but the principle that occupancy of the land was conditional on the payment of an entry-fee remained in place. Furthermore, the Ottoman law that when a peasant sold his right to occupy a çift, his fief-holder levied a charge, fixed at one-tenth of the price realised, appears to reflect a late Roman practice. Justinian attempted to curb abuses by land-owners by limiting the sum which they could collect when an emphyteutical tenant transferred his land to another party, to one-fiftieth of its price or valuation.[29]

The basic principles, therefore, of Ottoman land tenure derive ultimately from late Roman law. At the same time, much as the basic principles of the Ottoman timar-system derive from late Byzantine and Seljuk practice, most of the taxes due from the peasants to the timar-holders were also pre-Ottoman in origin. Since it is land, taxation and timars that form the primary subject of kānūn, it seems reasonable to suggest that the origins of kānūn are native to the geographical area of the Ottoman Empire. Nor is it not impossible that the term kānūn is itself a native. Since kānūnnāmes are concerned largely with taxation, it is conceivable that the Ottoman word kānūn derives directly from the Greek [*dḍmosios*] *kanōn*, the term for the basic Byzantine land-tax.

Whatever its origins, Ottoman kānūn was not static, but developed according to need and circumstances. Furthermore, although always concerned primarily with land and taxation, during the course of the sixteenth century kānūn came also to have the sense of a regulation or regulations in general. Nonetheless, in both its restricted and general meanings, the term always refers to matters of public law. Private law was the domain of the sharīʿa. It seems reasonable, therefore, to say that in the Ottoman Empire, Islamic law operated largely in the private sphere and secular law in the public, and that, in this respect, the Ottoman Empire was no different from other polities in the pre-modern Islamic world.

28 *Corpus Juris*, III, 224.

29 *Corpus Juris*, XIII, 136.