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Library of Congress Cataloging-in-Publication Data

Judi Upton-Ward, *New Millennium Perspectives in the Humanities*

ISBN 0-9724918-0-5

Printed by Global Humanities Press
Published by Fatih University, Istanbul and
Brigham Young Unviersity, Provo, Utah
Distributed by Global Scholarly Publications
220 Madison Avenue
New York, New York 10016
Phone: (212) 679-6410 Fax: (212) 679-6424
E-mail: books@gsp-online.org
www.gsp-online.org

Cover by Foad Faridzadeh

New Millennium Perspectives in the Humanities

Contents

List of Illustrations i
List of Contributors iii
Editor's Preface v
Introduction vii

Part I The Philosophical Approach

1 Coming Home and Quietly Resting: A Study in Comparative Philosophy
Douglas W. Shrader 3

2 Enlightenment Philosophy in Republican Turkey
Ernest Wolf-Gazo 18

3 Advice about How to Do Philosophy in the Twenty-first Century
Stephen Voss 26

4 What Glaucon Said: The Significance of '*Απολλον*' at *Republic*, 509
G.S. Bowe 40

5 Evolution: The Epitome of the Emerging Contemporaneous Global Civilization
Şaban Teoman Duralı 51

6 Towards an Open Science: Learning from the Ottoman Humanities
Recep Şentürk 55

Part II The Social Approach

7 Civil Society in Western Europe and the Ottoman Empire: A Comparative Perspective
Ömer Çaha 77

8 A Sociology of the History of Law and Legitimation in Ottoman Society
Yasin Aktay 91

9 John Dewey's Philosophy of Education and Turkish Educational Reform 101
Hadi Adanalı

Part III The Literary Approach

10 The Philosophy of Non-resistance to Violence in Medieval Russia 121
Tatyana I. Grenkov

11 Evil in Alan Ayckbourn's Drama 135
Wisam Mansour

12 The Future of African Literatures in African Languages 141
Mohamed Bakari

13 Recreating the Plautine Twins: Shakespeare's *Comedy of Errors* 153
Metin Boşnak

14 Yunus Emre: A Turkish Humanist Contemporary of Dante 171
Ricardo H.S. Elía

Part IV The Historical Approach

15 European Travellers to Ottoman Lands 179
Mustafa Bilge

16 Anglo-Ottoman Relations Before the *Tanzimat* 202
Turgut Subaşı

17 Some Observations on the Offices of Judge (*Qāẓī*) and Army Judge (*Qāẓī-'Asker*) in Later Safavid Iran and the Ottoman Empire 231
Muhammad Ismail Marcinkowski

18 The *Millet* System in the Ottoman Empire 245
Ebubekir Ceylan

8

A Sociology of the History of Law and Legitimation in Ottoman Society

Yasin Aktay

Any discussion of an aspect of Ottoman society is closely related with the problems of history, both with history as a science and history as a way of expressing an identity. Indeed, these two dimensions of history cannot be separated from each other, and it may be said that they are all that makes the domain of history problematical in terms of the possibility of carrying out scientific activity. The problem of the possibility of scientific activity in history, as is well known, has recently been one of the major issues determining the quest for new directions in the humanities. Apart from the difficulties in producing objective knowledge even in non-historical areas, both in the humanities and the natural sciences, the possibility or the impossibility of such activity arises from many features of the nature of history itself. Now, it is a widely held opinion that history or historical knowledge is not there waiting 'to be explored' or uncovered, but is something to be 'constructed', inscribed and reinscribed by way of invention. The exploration of knowledge about a historical episode takes place in accordance with rhetorical procedures rather than so-called scientific ones.

As for those rhetorical procedures, they are always under pressure from some historical tendencies which determine the scientific interest and direction as well as the object of the scientific activity. Of course, the rhetorical procedures are also, by their very definition, of an aesthetic nature. In aesthetic activities the arbitrariness, rather than the certainties, is determinant. This means that historiographical activity is subject to the arbitrariness of the historian, who is also completely a historical product determined by his(story). Literally speaking, history is the historian's story; it is his story, a story in which the role of the historian is ambiguous even in terms of whether he is its author or an actor in the global imagination of another 'his'

story. In the case of the historiography of Ottoman society, we have initially to cope with the plurality of stories attached to that society. Indeed, the reasons for this plurality are well worth discussing because an examination of the proliferation of sources for Ottoman history can show us the special functions of Ottoman historiographies. Those functions are related to popular problems of the present rather than the problem of shedding light on the past. In fact, the study of Ottoman society in any case has to be interlinked with the current problem of studying present-day society. That is why Michel Foucault observed history as something permanently re-inscribed.[1]

Here I shall try to examine the manifestation of this dimension of history in the case of historical discussions about the system of law and legitimation in Ottoman society. But in passing I should add that the increasing problematization of history as a scientific activity has much to do with the development of new approaches to history, namely hermeneutical or post-structuralist, and deconstructionist approaches. The common tendency in all these approaches emerged in their precedence of the reader of history over the historical facts or subjects. The idea underlying this precedence is that it is historians who primarily inscribe history and not the historical actor; and the process of inscription is totally arbitrary. This precedence of the historian over the fact is parallel with the postmodernist declaration of the death of the author and the precedence of the reader over the intention of the author.[2] Here the historical fact is to be treated as a text, and then subjected to a textual interpretation. It is assumed that history is not a linguistic representation of the past, nor is it an objective knowledge of the past. Of course, there are some traces of the past at our disposal, but those traces by themselves are lacking of any language: it is the historian who speaks instead of them. The historian always creates a new his(s)tory by imposing total narratives

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1 M. Foucault, 'Nietzsche, Genealogy and History', in D.F. Bouchard, ed., *Language, Counter-Memory, Practice: Selected Essays and Interviews with Michel Foucault*, tr. D.F. Bouchard and S. Simon (Ithaca, NY: Cornell University Press, 1977), pp.68–86.

2 E.D. Hirsch, Jr., *The Aims of Interpretation* (Chicago: University of Chicago Press, 1976).

on the past. For example, Foucault drew attention to the role of the totalistic conceptions of history. He argued that historical facts are particulars without being subject to any total project of any ultimate power or direction. Every fact has the right to exist for its own sake, while total projects, such as Marxist historical and materialist dialectic, Hegel's stories of the *Gheist* which manifests itself through totalitarian states, and so on, destroy this right (to exist for its own sake) by articulating it to large-scale and total projects of history. Any particular fact, then, becomes only a small moment or step taken in the long course of the historical process. Foucault suggested that all these totalities do not really exist, but are in the mind of the historian. They are merely the mental constructions of the historian which are imposed on reality and then become conceived as reality itself.[3] Thus, clarification of the past has never been the matter of the past but the matter of the present; the matter of the interpreter who looks for a narrative to legitimate a way of 'ex-istence'. Having considered that 'ex-istence' etymologically always represents a step towards the future, as Heidegger warned us, then history is a matter of the future, not of the past. Every quest for historical knowledge is part of outlining the future. Therefore, the historical studies and discussions on the legal and legitimation system in Ottoman society, which are the central object of this study, have to be read in terms of their expectations of the law and legitimation system in the society of the future.

After emphasizing these common-sense dimensions of history, which are now to be treated as parameters of a sociology of history,[4] we can come to some remarks on the discussion of the legal system in Ottoman society. As a matter of fact, studies on the Ottoman legal system are generally undertaken in the context of arguments concerning civil society, the development of an autonomous rational legal system, modernization, and the comparative sociology of civilization. As is well known, all these arguments are also elements of the sociology of law as outlined by Max Weber. In Weber's study

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3 A. Munslow, *Deconstructing History* (London: Routledge, 1997).

4 Y. Aktay, 'Yarınlar İçin Osmanlı Tarihi: Osmanlı'da Hukuk ve Meşruiyet Üzerine bir Tarih Sosyolojisi', *Yeni Türkiye*, 33 (May-June 2000), 388–405.

of civilizations, his sociology of law took a central place, but it is not clear which one he studied for the sake of the other. It seems that his interest in the sociology of law served in accomplishing his sociology of civilization project. By that I mean that Weber's comparisons of Eastern and European civilizations have been found to be weakened by various shortcomings of Orientalism. His emphasis on the existence of civil society or the development of an autonomous legal system was determined by a clear Orientalist and essentialist interest because it arose from his famous question, 'Why did capitalism not arise outside Europe?' This question was followed by a series of comparisons between Eastern and European societies, and the answer appeared as the invention of a series of absences in Eastern society which was already realized in Europe. Eastern societies came to be characterized by the absence of civil society; by the absence of the development of an autonomous and rational law; by the absence of classes, of cities, and so on. Even the conceptualizations of capitalism took place under the shadow of this comparative outlook. The non-development of capitalism was explained by Weber as resulting from the absence of all these institutions in Ottoman society. He argued that 'it was the patrimonial nature of Muslim political institutions which precluded the emergence of capitalist pre-conditions, namely rational law, a free labour market, autonomous cities, a money economy and a bourgeois class.'[5] Weber's sociology of the dynamics of capitalism was thus worked out through producing a negative vision of the West. Like all such negative visual productions his conception of the West relied on some reductionist and stereotyping techniques. For example, he produced a stereotypical figure such as the '*qadi*-justice' to characterize the Ottoman-Islamic legal system. The '*qadi*-justice' represents precisely the negative mirror-image of the rational-objective European legal system. It is characterized by the arbitrary and subjective, inestimable *fatwa*, or decision of the *qadi*. On the other hand, the *qadi* is drawn as an absolute subject of the Sultan who is over the whole legitimation system, while he is also bound with the sacred law. In this context the

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5 B.S. Turner, *Weber and Islam: A Critical Approach* (London: Routledge and Kegan Paul, 1974), p.2.

sacred law (that is, the *sharī'a*) is better understood as the product of the speculative labours of the *faqih*, the legal specialists who eventually formed four great law schools. Thus Weber termed the sacred law in this context as a 'specifically jurists' law'. Once the details of the law had been elaborated by the jurists, the s*harī'a* was held to be fixed and perfect, and law-making was at an end.

My objective here is not to give a detailed consideration of Weber's thesis; there are many elaborations of his studies on law. My aim, within the narrow limits of this paper, is to indicate the importance of his approach in the constitution of the Ottoman history of law. The total perspective he provided to that history has constituted a historical conception about the law in that society. Properly understood, his sociology of law is in one sense a complementary part of his Protestant ethic thesis. In this way it has been almost universally accepted that there is a causal relationship between mental worlds of meaning and economic development. By its very nature, this relationship has always been burdened with heavy essentialist implications that attached to the West the positive mental abilities enabling capitalism, while upon the East negative mental elements precluding the development of the preconditions of capitalism.

It should be noted, however, that this Weberian relationship has never been considered an unproblematic one. Some objections have been made to this thesis asserting that, in fact, neither Protestantism has been so determinant in the development of capitalism nor has its absence in, or its difference with, Islam precluded the development of the Islamic world. In fact, generally, like any sociological correlation constructed between ways of thinking and developmental trends, this correlation is also problematic and, of course, fictive. The famous anthropologist and, indeed, radical Eurocentrist scholar, Ernest Gellner, provoked our imagination by a fictive example to illustrate the problematic dimension of this conventional correlation. He invited us to imagine what would have happened had the Muslims won Poitiers or the Ottomans won in Vienna and gone on to conquer and Islamize Europe:

> We should all be admiring Ibn Weber's *The Kharejite* [or Ash'arite] *Ethic and the Spirit of Capitalism* which would conclusively demonstrate how the modern rational spirit and its expression in business and bureaucratic organisation could only have arisen in

> consequence of the sixteenth-century neo-Kharejite puritanism in northern Europe. In particular, the work would demonstrate how modern economic and organisational rationality could never have arisen had Europe stayed Christian, given the inveterate proclivity of that faith to a baroque, manipulative, patronage-ridden, quasi-animistic and disorderly vision of the world. A faith so given to seeing the cosmic order as bribable by pious works and donations could never have taught its adherents to rely on faith alone and to produce and accumulate in an orderly, systematic, and unwavering manner. Would they not always have blown their profits in purchasing tickets to eternal bliss, rather than going on to accumulate more and more?
>
> A Muslim Europe would also have saved Hegel from the need to indulge in most painfully tortuous argument in order to explain how an earlier faith, Christianity, nevertheless is more final and absolute than a chronologically later one, namely Islam. Had Islam, the later and by some plausible criteria purer faith, prevailed, no such problem would have arisen for a Muslim Hegel.[6]

Through this imagined scenario, Gellner suggested that, in any case, capitalism had to be present, without depending on any mental condition, and, in fact, what Weber had done was merely to give a retrospective reading of the history of capitalism. What concerns us here is the paradigmatic and retrospective effect of this correlation in reading the Ottoman history of law. Actually, most of the historical data about Ottoman law have been collected or filtered through the selective interest of this assumption. Even Muslim historians have elaborated on the negative aspect of Ottoman law in adapting to the course of development. I think most of the criticisms of contemporary modernist Muslims of Ash'arite or Shāfi'ī methodology has been deeply influenced by this Weberian assumption. However, their accusation that Islamic law is logocentrist, and the characterization of Islamic law as lacking autonomy and objectivity has given rise to serious difficulties in that a logocentrist conception of the text is more inclined to be objective, by its very nature.[7]

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6 E. Gellner, *Muslim Society* (Cambridge: Cambridge University Press, 1981), p.7.

7 Y. Aktay, 'Aklın Sosyolojik Soykütüğü: Soy Akıldan, Tarihsel ve Toplumsal Akla Doğru', *Toplum ve Bilim*, 82 (1999), 114–40.

Whereas the Weberian thesis of Protestantism, which included implications on the role of the law, has been a dominant paradigm in reading the history of Ottoman development, there have been counter-paradigms which emphasized the reductionist aspect of this thesis. In this context the arguments followed at least two paths. The first tried to show that most features, institutions or stereotypes that were attached to European societies by Weber, were, in fact, not so widespread and dominant in European societies. The second was laid down as a logical requisite to the first. That is, all these features, institutions or human figures (stereotypes) could also be found in Eastern societies. That is a way to deconstruct a special and characteristically essentialist reading of the history of law and legitimation. Following this way, for example, Suraiya Faroqhi has tried to show that '... the separation of the roads of the East and the West occurred at quite a late period and in this rupture coincidence played a crucial role, contrary to widespread opinion. Furthermore, both socio-economic formations involve important social and cultural contradictions.'[8] As a matter of fact, many examples of the historical processes of stagnation and backwardness, which have been conventionally referred to as the essential characteristics of the Ottoman Empire since the sixteenth century, can very often be found even in the developmental period of European societies.

For example, in Weber's treatment of the relationship between law and development 'a gapless system of law' is considered as a precondition for development. Such a system, however, has been considered by many modernization theorists as precluding development because of its logocentrist constraining effects. On the other hand, as Turner demonstrated, in various European regions the capitalist development occurred in spite of the existing legal system, which was considered very inappropriate to development. Turner stated that:

> ... adjudication by honoratories is inclined to be essentially empirical, and its procedure is complicated and expensive. It may thus well stand in the way of the interests of the bourgeois classes and it may indeed be said that England achieved

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8 S. Faroqhi, 'Osmanlı Tarihini Ararken', *Defter*, 20 (1993), 62.

> capitalistic supremacy among the nations not because but rather in spite of its judicial system.[9]

Ottoman history, thus usually becomes subject to today's paradigms of history which serve to construct the future. Another example in determining this history in a similar way and orientation is the range of conception of Ottoman society between centralism and decentralism or between civil society and political society. But in this case, the motivation is not at all an Orientalist motivation, but an apologist or Ottomanist orientation. As we know, at least until the early 1950s, Turkish-authored Ottoman history theses drew a picture of Ottoman society as highly centralist and political. In the detailed studies of this history, all historical data collected from the deep layers of the past were employed to elaborate such a centralist and gapless political society on all its social, political, cultural and economic levels. After the 1950s, another tendency began to manipulate the same historical data to show that the Ottoman social structure was, in fact, strongly characterized by a civil society, decentralized institutions and even a secular organization of the state over the ethnically and religiously plural society. While the literature on legal systems and civil society has tended to characterize Eastern societies with the series of 'absences', attempts to demonstrate the civil societal elements in Ottoman society were apologist by their very nature. However, the same apologism was available also in the former thesis which tried to describe Ottoman society as a political and centralist social structure. They were all subject to the conjuncturally dominant paradigms of the day. For example, the former thesis was in circulation when centralist and political societies were quite popular in the world. We should remember that even the famous Turkish political ideal that appeared at that time as 'reaching the level of civilization' (proposed by Mustafa Kemal, the founder of the Turkish Republic) had in mind the level of centralist societies like Germany, Italy, Russia and France. At that time centralist and statist values were widespread and an apologist interest of knowledge in Ottoman history had to seek or interpret the data in accordance with these values.

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9 B.S. Turner, *Orientalism, Postmodernism and Globalism* (London/New York: Routledge, 1994), p.120.

In the 1950s, Turkish scholars suddenly came to realize that Ottoman society had indeed been a civil pluralist society. They suddenly remembered that Ottoman society had always tolerated non-Muslims and given them considerable autonomy. This was even to create connotations for later models for the secular state. In fact, this realization was nothing but a result of the promotion of liberal values and the new hegemony of the democratic pluralist political system. Under such a system, the values should go in parallel, and an apologist interest of knowledge should be determined in that way.

In conclusion, Ottoman society does not seem to be there waiting to be invented, but it is there to be constructed, deconstructed and reconstructed, because, by the very nature of historical knowledge, it is always in the service of the historians' 'ex-istential' situations or future projects. Turner has tried to show that

> the debate about oriental despotism took place in the context of uncertainty about enlightened despotism and monarchy in Europe. The orientalist discourse on the absence of the civil society in Islam was a reflection of basic political anxieties about the state of political freedom in the West. In this sense, the problem of orientalism was not the Orient but the Occident. These problems and anxieties were consequently transferred onto the Orient which became, not a representation of the East, but a caricature of the West.[10]

Similarly, images of Ottoman society regarding the legal and legitimation system represent not the real problems of Ottoman society but our anxieties about future political and cultural freedoms. We are free to choose a historical vision of Ottoman society, just as we are free to make choices about how we would shape our future.

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[10] Ibid., p.34.

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