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A Continuity of Shari'a: Political Authority and Homicide in the Nineteenth Century, written by Brian Wright

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Brian Wright, *A Continuity of Shari'a: Political Authority and Homicide in the Nineteenth Century*

Wright's book can be read at two levels. The first one, at the surface, offers interesting data and draws a relevant comparison, regarding criminal law, between 19th century India, the Ottoman Empire and Egypt. The second one, which touches the deepest dynamic of legal history, proposes a narrative of permanence and change in Islamic law. While the former contributes substantially to our knowledge of the crafting of criminal law and its relation to Islamic jurisprudence in these contexts, the latter, despite insights in the political motivation of some legal historians, requires strong qualification.

The book consists in 6 chapters, complemented with a substantial introduction and a rather brief conclusion. Chapters 3 to 5 compare three criminal codes (Indian, Ottoman and Egyptian) in matters relating to homicide, criminal intent and criminal responsibility. Chapters 1 and 2 set the context, addressing the emergence of state law and the role of new elites in its shaping. In the former one, Wright aptly emphasizes that Ottoman declarations and laws constituted a phenomenon which cannot be reduced to Westernization and secularization (p.25), but corresponded to local actors' belief that there was a need for change. One can wonder, however, whether Wright's choice of words and expressions does not create sometimes confusion, as in the following: "These changes [in *criminal law*] (...) occurred within a context *thoroughly defined by traditional understandings of Islamic law*" (p. 42; my emphasis).¹ Chapter 2 describes the influence of a new type of scholars and institutions, insisting on their role as a "bridge between cultures" (p.46) and in the drafting of the Indian Penal Code of 1860, the Ottoman Penal Code of 1858, and the Egyptian Criminal Code of 1883. In a documented way, the book describes the intertwining of issues of institutional change and translation, convincingly emphasizing the fact that these "elites did not understand what they were doing as outside of the realm and definition of the shari'a" (p.67), putting therefore the question of the people's agency back into frontstage.

Chapters 3 to 5 concentrate on substantial issues. Addressing first the classification of homicide, Wright shows that, in the precolonial systems, there was a tension between "[o]n the one hand, jurists [who] created an increasingly complex system of classification that attempted to avoid the most extreme punishment of execution and favored the payment of blood money (*diya*)" and, "on the other hand, political authorities [which] sought and needed extra leeway in punishment because they felt that harsher penalties fulfilled the law's true objective: to deter potential offenders (*rad'*)" (p.71). One major change in that respect was the concentration of prosecution in the hands of the state (p.72). This is an important statement, which leads in a direction opposite to that promoted by the author, something that often occurs in the book: instead of demonstrating the continuity thesis, he rather documents the deep transformation one. Indeed, when addressing the shift in the role of the state (p.93), Wright goes in great length to explain how 19th century jurists justified such "departure from the Islamic understanding" but fails to acknowledge that these jurists' legitimizing imagination is not evidence of an inner and evident compatibility between classical jurisprudence and modern law but, on the contrary, of a gap that needed to be bridged.

Chapter 4 deals with criminal intent. "[A]lthough the new penal codes of the nineteenth century introduced new methods of establishing intent, the discussion of the weapon continued to dominate the discourse in each jurisdiction and remained the primary way that a specific intent to kill was established and through which the most extreme punishment (execution) was

¹ Just like Muhammad Serag's proposition to understand the *shari'a* as a *nizam qanuni* (p.16), a formulation which puzzlingly conflates many semantic repertoires.

justified” (p.101). Wright is careful to demonstrate that changes and additions to the Hanafi doctrine of the deadly weapon should be explained neither in terms of divergence from Islamic law nor in those of blind adoption of European understandings. At the same time, while emphasizing how much it was a way to accommodate the state’s will “to expand the realm of punishment” (p.107), he seems to minimize the shift toward an attention to the perpetrator’s motives (despite the obvious evolution to which the Egyptian code testifies).² This is the situation of the glass half empty or half full: according to what the author wishes to demonstrate, motives are over or under-emphasized. One way out of this dilemma might have been to acknowledge the processual dimension of the phenomenon, with the new codes throwing the seeds of what became later the ordinary standard: the perpetrator’s psychological attitude.

In the same vein, Chapter 5 addresses the issue of criminal responsibility. It starts by saying that, “[r]ather than directly importing European norms, the codes regularly incorporated elements from Hanafi law and followed local precedent” (p.122). Without going into the details, it should be said that the notion of “precedent” is dubious in both Ottoman and Egyptian law, as their legal systems belonged to the Civil Law family rather than to the Common Law one. It largely explains why the so-called M’Naughten criteria were used in India, while neither in the Ottoman Empire nor in Egypt, which relied on expert advice (p.131). Interestingly, Wright observes that “[l]egal scholars and judges attempted to find solutions that would work within the new legal systems, accord judges a certain amount of leeway when assessing perpetrators’ responsibility, and as a result come as close as possible to achieving the certainty of guilt given the circumstances of each case” (p.148). Once again, such statement allows us to see how a legal revolution (J.L. Halpérin, *Five Legal Revolutions since the 17th Century: An Analysis of a Global Legal History*, Springer, 2014) was in progress, rather than it shows how much remained the same as before.

Introduction, Chapter 6 and conclusion address the second reading level of the book: the general narrative regarding Islamic law, its transformation and continuity. Introduction starts with a somewhat problematic claim: “If Islamic law is indeed a legal system applicable in all times and places, it must be subject to change (p.xiii). Indeed, it raises the delicate question of knowing when something which presented as ubiquitous and a-temporal (“applicable in all times and places”) so significantly changes that it becomes something else. It reminds me Geertz in *Islam Observed* who wondered how momentary evolutions “seemed to have left everything the same but had in fact been revolutions” (C. Geertz, *Islam Observed: Religious Development in Morocco and Indonesia*, University of Chicago Press, 1971, p.47). In *A Continuity of Shari‘a*, we are left with a very puzzling coincidence of a reification of the shari‘a and of an evolutionary conception of it. The main target seems to be Hallaq’s “demolish and replace” thesis, while, according to Wright, nothing substantial happened and everything was in the protraction of former *fiqh* and shari‘a. Actually, both “demolish and replace” and “continuity” theses seem incoherent, and for the same reasons: they ascribe the shari‘a inner properties instead of accounting for the people’s perspectives on it. In other words, both produce an orthodox conception of the shari‘a, as if it were up to scholars to define what the shari‘a is or is not.

What is missing in both Hallaq and his contradictor Wright, is the conscience of the somewhat meaningless nature of the question which is raised: What is the shari‘a? Shari‘a is

² One finds here one of the strangest theses of the book, which is based on a reference to Wood (XXX) but on no further evidence: the Maliki doctrine would have permeated Egyptian law via the influence of the French Ecole d’Alger. When considering the history of this institution and the kind of bricolage invention of “droit musulman algérien” it achieved, I think we should be most cautious in asserting such thesis.

what people refer to as Sharia; there are as many versions of the shari‘a as there are people struggling for its definition. From a scholarly point of view, none is right or wrong: sociolegal scholarship has not the purpose to define the content of any orthodoxy. This holds true with the translation of Sharia as Islamic law. Such a translation implies strong assumptions as to what the three words – Sharia, Islamic, Law – could possibly mean. Of course, conceptual definitions are stipulative, they cannot be assessed in terms of exactitude. However, these definitions can prove more or less heuristic, more or less explicative, more or less descriptive, and more or less coherent. Regarding the word “shari‘a”, it seems rather odd to give it any essential definition, beyond broad glosses such as “God’s path on earth” or “God’s teaching”. Regarding the word “Islamic”, it is quite surprising to consider it as the reference to a well-defined and intangible system of rules, and not as a fuzzy, contextual and perspectival predicate. And regarding the word “law”, it seems strange to use it *as if* it was an a-historical concept, while, as a word as well as a concept, it is obviously situated and overloaded with contemporary meanings.

Wright correctly says that the “end of the shari‘a” argument rests on three points: (1) codification is antithetical to Islamic law and its intrinsic diversity; (2) Islamic law is the domain of jurists while the codes are the domain of the legislator; (3) the new codes are copies of foreign laws and legal systems, and thus alien to authentic Islamic law (p.6-11). However, in his mostly correct critique of this argument, he throws the baby with the bath water: while it is correct to say that it does not make sense to claim that an *essential* Islamic law is *essentially* opposed to an *essential* state law, it does not make sense either to neglect the huge and deep transformation induced by the codification practice (and not its mere episteme); while it is correct to say that it does not make sense to claim that so-called Islamic law is *innerly* jurist-made, it does not make sense either not to account for the dramatic transformation induced by the building of a centralized, bureaucratic, law-making, positivist nation-state; and while it is correct to refute the claim that new codes are copy-and-paste transplants from foreign systems, it does not make sense either not to observe how deeply the whole codification process influenced the practice of law worldwide (and it is factually wrong to assert that the content of the Mixed Codes did not have “a long-standing influence on the Egyptian legal system as a whole” (p.13), unless one discards their direct and documented impact on the Indigenous Codes and Courts from which the independent legal and judicial system was directly derived). In that respect, it seems utterly problematic to claim that “if a shift occurred, it could be detected in the laws produced, explanations given, and judgments issued by the courts” (p.17), whereas the “evidence considered in this book indicates a similarity in all these points before and after implementing the new penal codes” (p.17-18). It implies to totally discard the radical institutional, substantial, procedural, epistemological, and practical changes that occurred, which are empirically documented (see e.g. Khaled Fahmy’s account – *In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt*, University of California Press, 2018 – of the bureaucratization and scientification which happened under the label of *siyasa*), and to stop assessing the dynamic of change at some arbitrary point instead of looking at the whole picture, stretching from the early nineteenth century until the middle of the twentieth. In the latter case, one can see how much the codification technique – but actually positive law as a whole – thoroughly impregnated the whole system, to the point that one cannot think thereof in alternative terms.

While it is Hallaq’s “end of the shari‘a” argument which is targeted initially, it is some contemporary Islamists’ same argument which is tackled in the last chapter of the book. In a way, it clarifies the rationale of the book: salvaging the shari‘a by showing that it stands in no contradiction vis-à-vis modern law and that neither the state nor the codification was per se “a divergence from the shari‘a” (p.169). Again, it seems to me that Wright muddies the water of his argument: the question of knowing whether contemporary legal systems are partly, fully or non-Islamic, conform partly, fully or not at all to the shari‘a stays on the verge of absurdity, at

least in a scholarly perspective, as no meaningful answer can be given. The question is, rather, to describe what people have in mind and actually do when characterizing the law as Islamic. In that respect, the huge production of studies “comparing the fixed, divine law of Islam to positive, manmade law” (p.157) is definitely worth interest, for it allows us to account for the upheaval that occurred in the field of so-called Islamic law, i.e., its current understanding in essentialist terms but along the lines, words, categories, procedures, epistemology and practices of state-sponsored positive law.

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