Epilogue: Society as text: the infernal cycle of credit and debt

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1. Our approach has opted for a micro-analysis of texts. By giving priority to text as such—any text for that matter, no matter what its institutional origins might have been—a descriptive analysis of social relations is achieved through the notion of society-as-text. Such a cinematographic and psychoanalytic approach deliberately selects from the massive amount of available texts the ones that will receive that privileged close scrutiny. A process of juxtaposition, montage, and collage of texts therefore follows, one that would give us a descriptive analysis of the social through its own languages and grammars. The notion of society-as-text therefore pushes us towards representations of the social through different angles, analytical tools, prisms, temporalities and styles, and lights and shadows.

2. The scope of this study has been to rethink social and economic relations within a textual anthropology, prior to rooting the socio-economic into a legal nexus of relations involving contractual settlements, property rights, and the transaction costs allocated to bargain for, negotiate, and secure (mostly status) contracts. Anthropology proves crucial in describing pre-modern systems in terms of its kin groups, formal and informal networks of violence and vengeance, and the institutions that monopolize violence and act in lieu of a weakly implemented state power. The socio-economic history of the Ottoman Empire mostly assumes the existence of commodities in terms of their cost of production and market price, thus following the lead of neoclassical economics and European socio-economic history, both of which looked upon price (and its related indicators such as wages, inflation, and profit), population growth, unemployment, and production at large, as essential economic indicators. Shortcomings become more obvious, however, when attempting an explication of even some of the most visible “economic” choices. Why was the empire plagued by a common pool of state-owned property, one whose production cycles were inefficient at best? And what role did the parallel waqf system play within that massive land ownership by the state? Why did Ḥanafism operate within a dozen or so contractual formulas, and why were more settlements-cum-litigations patched through the practices of the courts to the already long lists of contracts?
For a long time Ottoman historiography has conceptualized the socio-economic history of the empire in terms of a dominating class of a'yān-multazims, which by the seventeenth century had already replaced in its functions the old sipahi-timariot class, and both of which (the old and the new) have been extracting a surplus-rent from the corvée labor of the peasantry. One could push the analysis further and claim a quasi-class struggle between the a'yān-multazims and their peasantry, with the possibility of the state and its bureaucracy acting as a third intermediary power which enforced all the laws and the regulations (even though it did not have the full and exclusive monopoly of power), and with at least part of the bureaucracy also accessing the peasantry’s surplus. But even though the existence of the a’yān-multazims class, and its modus operandi with the peasantry, have been well documented on few occasions, an analysis that broad fails when it comes to articulating law with economics, describing the modalities of domination between those “classes” or groups, or explicating the complexities of the Ottoman legal system in terms of its well known broad division between the qānūn and the sharī‘a, and the various (mostly) Ḥanafī contractual modes. But probably the biggest drawback of that classical model is its failure to account of the contractual settlements that routinely occurred within the dominating groups, and the dominated ones as well. Moreover, by placing domination that broadly—at the level of the a’yān-multazims, which in turn is guaranteed by the state—a difficulty arises when we attempt to understand what it was exactly that held such groups together, and more importantly, why there was that incessant need to lock quasi-private property rights in the hands of the state, and grant them in the form of ittizām to loyal individuals and families.

While attempting to bypass the impasses of all class formulations, this study has followed a different approach at three levels. (1) A micro-analysis of texts, whatever their nature and origin, which pushes towards a narrative construction that looks for details within texts, so that the “bigger picture” is first perceived in terms of its smaller elements, which, at first sight, might be imperceptible. (2) Such a micro-narrative approach makes possible the construction of discursive formations on law and economics (and hence on society and politics too) from the point of view of the social agents themselves (“in their own words”) rather than solely from the orderly material of the historian. And (3) the combination of law and economics looks at property rights mainly in terms of the contractual settlements that made them possible, and hence asks for the transaction costs to enforce a particular settlement. Chapter 3 on contracts addresses that final issue and its relevance to judicial decision making.

Beginning with the general assumption that contracts function as a mechanism to transfer and secure property rights between social agents, and that the enforcement of property rights is a costly operation in which the benefits of acquiring property have to outweigh the costs, the contractual settlements common among Ḥanafis, as well as those worked through the courts by means of procedural fictions, in addition to those imposed through sultanic ordinances and the like, have all been analyzed on the basis of the property rights they engendered. There are several benefits to such an operation, some of which were dealt with already, while others might need additional research. (1) The activities of the sharī‘a courts and the regional councils are primarily perceived in terms of a general discourse that works out and favors particular contractual settlements, which in turn engender specific property rights. (2) Because of the necessary ties with contract, property rights do not have to be limited to the acquisition or possession of land only, but also in conjunction to incorporeal property (e.g., dayn and manfa‘a in Ḥanafī
practice) and intangible property (anything that enables one to obtain from others an income—i.e., property—in the process of buying and selling, borrowing and lending, hiring and hiring out, renting and leasing, in any of the transactions where mal is exchanged). (3) There are transaction costs associated with the acquisition and preservation of private property, and the social actors have to weigh all kinds of costs and benefits, which in the final analysis pushes them towards particular contractual settlements such as the ones we typically encounter in the sharī’a courts, or those that are enforced through the regional councils.

All three methodological assumptions combined provide a better explanation as to the well known division of the Ottoman legal system between qānūn and sharī’a, on the one hand, and the proliferation of specific contractual settlements that we find in Ḥanafī practice and to which the Ottoman period paid its dues, on the other; and finally, to explicate the existence of a common pool of publicly owned land known as mīrī in the Ottoman land-tenure system, whose “usefulness” or “efficiency” (or lack thereof) has always been assumed but never satisfactorily addressed in terms of its cost effectiveness relative to the other two predominant property forms, milk and waqf. In fact, a common pool of property like the mīrī points to difficulties in creating a competitive system of private property. Such difficulties could be anything from the securing of adequate water resources, to the legal and physical protection of the property (fencing and guarding from trespassing Bedouins and nomads, etc.), and more important, the disadvantages of dividing properties owned in common—or commonly administered—by clans, villages, and peasants, and allotting them to individuals. The assumption here is that all such operations would have turned unprofitable had the system as a whole opted for privately owned properties. But, on the other hand, a common-pool system like the mīrī generated enormous losses too due to its uncompetitive nature and the overexploitation of the land resources. Moreover, and considering the political nature of the iltizām-mīrī system (in the way it allocated tax-farming units to inefficient and corrupted multazims), the system as a whole must have generated a great deal of loss, whose burden must have been assumed by the community as a whole in terms of lower production rates, higher taxation, and lower rents (more about this later). The assumption here is, of course, that the other alternatives, namely, a fair collection of taxes by state officials based on income and production, and a competitive system of landownership where land is freely exchanged as a commodity, would have been costly to implement as such, so that their implementation costs would have been far greater than their benefits. It is as if Ottoman societies had opted for the most affordable solution, one that favors communal ownership, the division of resources among clan members, a massive state ownership of lands and their distribution for purposes of usufruct to specifically appointed individuals and families (even though the iltizām system assumes an auction to the highest bidder), and one that avoids difficulties in keeping private properties safe and secure.

A similar perspective could also help in understanding the need for multiple contracts. In fact, rather than opt for “free” contractual settlements—so that the contracting parties would decide on their own, and prior to any legal arbitration, the modalities of their transaction—Ḥanafī classifies transactions in terms of different contractual settlements whose enforcement varies greatly from one formula to another. Additional contractual settlements were created through court practice as the needs grew, not to mention contractual regulations and the like imposed by sultanic ordinances and the regional councils. An open contractual form would have implied higher transaction costs,
which at their most basic level would have included the costs of negotiating, monitoring, and enforcing contractual agreements, all of which assume, in turn, high information costs (the information that is needed to assess the other party’s liability history, the various forces on the market, and the likelihood of detriment, etc.). Such risks, however, were minimized through a legal system that allowed only specific kinds of clearly categorized and labeled transactions. In fact, even a casual look at some of the Ḥanafī contractual forms undeniably points to the desire to minimize risk at all levels, either by considerably reducing the duration of the transaction (which in many instances was assumed to be nearly simultaneous), or by forbidding the exchange of commodities whose existence proved either uncertain or nonexistent at the moment of the settlement. Thus, excessive gain in the form of ribā creates a high risk situation for both creditor and debtor and has thus been forbidden. All those regulations notwithstanding, individuals and families that were able to accumulate enough surplus so as to afford such risks of lending and borrowing at high rates were able to circumvent the Ḥanafī type of settlements. Moreover, since any contractual settlement encounters the obvious difficulty of knowing whether the promisee will perform and whether his promise is legally binding (assuming of course that the terms of the agreement were equally accepted on both sides)—what American common law labels as a “consideration” of the original offer—customary practices play a crucial role in determining a valid (linguistic) framework for all kinds of agreements. In short, even though contractual variety might end up creating a rigid system of exchange, one that subjected all parties to numerous constraints, it at least attempted to protect them from risk, uncertainty, and high transaction and information costs. Moreover, such constraints were bypassed at several levels: either in the legal work of judges and jurists, or in the judicial decision making of the courts, hence the sheer size of the legal texts which tended to grow out of proportion while finding ways to bypass the rigid precepts of tradition.

The divisions and hierarchies within the Ottoman legal system, mainly in terms of a conglomeration between sultanic legislation and Ḥanafī practice, turns out to be a cost saving device. In fact, the shari’a court system was no more than a “private” and “communal” system of adjudication towards which the state manifested very few scruples beyond a limited desire to control the appointment of judges (even though our data points, at least for the first half of the nineteenth century, to a quasi-autonomous process within the a’yān-‘ulamā’ group to control access to judgeship appointments from within), so that the evolution of that system, especially to anything related to contract and property, was left within the insurmountable bounds of taqlīd, to the point that much of the venerable Ottoman land tenure issues and their legal formulation (based on shari’a law) was left outside the scope of the fiqh manuals (see Chapter 4). As a matter of fact, interfering in the practices of the courts did not represent any real advantage to the state authorities, or the local bureaucracies for that matter, considering that the system was designed to minimize cost by working out all kinds of contractual settlements, all of which attempted to reduce risk to its bare minimum. Property rights were crafted accordingly, meaning that the appropriate legal device was found whenever the irrevocable nature of a private property was at stake. Thus, when by the second half of the nineteenth century, and in particular with the promulgation of the 1858 Land Code, the social and material conditions became more favorable for the commercialization of private property, the shari’a courts lost the most crucial part of their business.
In contrast to the “private” adjudication of the courts, the institutions of the qānūn were more concerned with transactions between individuals and groups outside narrow family circles, quite often involving the state or a quasi-state agent as an alternative party. In such cases the transaction costs could prove high (primarily because negotiations between poorly connected parties might prove inefficient), thus precluding any efficient bargaining, while leaving the final arbitration to quasi-official institutions like the regional councils. The more tortured adjudication of those councils only reflects the difficulties of placing non-related parties at the same bargaining table. By contrast, the adjudication of the sharīʿa courts shows much more elaborated pre-contractual (ex ante) settlements. Those were typically either constrained within the same family or clan, or else were kept within a network of families with extensive marriage alliances. Thus, in order to minimize transaction costs, which were very different from and marginal to production costs, clans were either constrained to their endogamous practices (e.g., the Shihābs), or nurtured inter-familial alliances through well thought out marital strategies (e.g., by marrying into families situated lower within the hierarchy, or by absorbing new comers to the region, in particular merchant groups and the nouveaux riches). The sharīʿa documents of both Damascus and Beirut were replete with contractual settlements, worked out through elaborate procedural fictions, which translate the ambitions of such groups in securing property transactions between generational networks.

The control over the circulation of commodities and their access was a de facto control over contractual settlements and rights, primarily, though not exclusively, property rights. Why should such a control prove necessary? Not only were the resources limited, but more important, their access was even more limited. Access to such resources had to go through the usual political networks dominated by kin, so that the latter acted as protective shells that pushed all transaction costs high enough to make them exorbitant for anyone outside the network. In fact, there was a cost embedded in access, so that when costs were high, access was protected, if not monopolized by a group. In effect, whenever transaction costs for a particular contractual settlement became unusually high, access was then severely limited. Contractual settlements through procedural fictions became the norm whenever access to particular goods, services, or rights (in particular property rights) were so exorbitantly limited that a new generation of urban capitalists pushed towards more flexibility. There might not be enough incentives to push for greater benefits whenever the costs were perceived to be greater than the benefits.

To summarize, contractual settlements are the most crucial element in any society to secure specific property rights. However, only a combination of legal and economic concepts could bring contract and property together. (1) Contracts have been mostly studied as tools of exchange regardless of the property rights they could engender. (2) Contractual settlements have often been limited to what the law manuals would permit, thus totally obscuring the role played by procedural fictions in extending the scope of traditional contracts. (3) Contracts have been mostly perceived in terms of the value of the exchanged commodities, but regrettably not enough in terms of their transaction (marginal) costs, namely, the costs of negotiating, monitoring, and enforcing contractual agreements. Those prove even more crucial for the types of societies under consideration in that they explain all the “protective” legal framework of contracts, expressed in the great variety of contractual settlements, all of which tend to minimize risk and excessive loss, not to mention the protectiveness of groups through their exclusivist policies and privileges accorded to their own networks. Which brings us to our final point, (4) a study
of contractual settlements and their correlative property rights necessarily leads to political formations, not only in terms of discourse and ideology, but also in terms of the power relations they institute based on the property rights they aim at protecting.

The existence of the state, and the entailing discourses and ideologies, political networks, and local (regional) bureaucracies, whether strong or weak, partial or total, centralized or decentralized, should be looked upon in terms of the property rights that they attempt to enforce, and hence, indirectly, of the contractual settlements that make the latter possible. Thus, a strong centralized state, in the European and North American tradition, by enforcing unified contractual regulations, minimizes the transaction costs to the contracting parties. That could be achieved in several ways, but primarily a “unified” norm implies that other much “weaker” norms based on custom, region, and kin, have been outlawed in favor of a more coherent and rationalized normative values. But a society would only go that way—a transformation that in Europe took several centuries—when the material conditions that make the acquisition and preservation of private property have become affordable. Thus, technical innovations such as irrigation projects and the expansion of the railway networks, in conjunction with the rationalization of the judicial decision-making process, all help and contribute in the fostering of private property and laissez-faire economics at lower costs. In short, the existence of a strong centralized state, which only happens in conjunction with a formalization of all norms at a national level, helps in the minimization of transaction costs, relative to the gains from bargaining, so that inefficient assignments of rights will be overcome through the bargaining process.

The case of the Ottoman state turns out quite different. First, the centralization and decentralization dichotomy cannot be used without conceptual ravage. In fact, there was no period in Ottoman history, except perhaps for the Tanziyemat, where the imperial state had attempted to create and impose a coherent set of normative rules. The reverse was rather true: all Ottoman history consisted in keeping all kinds of social groups (tawā’if, millets, za’āmāt, a’yān and ‘ulama’, etc.) within their own normative rules, while some higher norms had to be imposed solely on a regional/territorial basis for fiscal purposes. The integration of Ottoman societies thus took place first and foremost at the communal level, and was kept there for the most part without much state intervention. This is not much of a philosophical and political decision as much as one related to cost alternatives. The imposition of a single set of normative values, enforced and implemented by the imperial state, would have turned into a costly enterprise, and all the material conditions notwithstanding, was not worth implementing unless there were clear benefits that would outweigh all costs.

The aim of this book was to view adjudication and judicial decision making as totalities, whose effect would appear tout ensemble only in conjunction with the set of topoi and idioms which the Ḥanafī scholars had formulated throughout the history of their school. The issue that concerned us the most was the epistemic grounds upon which knowledge in such societies rested. That issue is important not only in regards to how the Ḥanafīs formulated their own views of the school, society, language, and law, but more important, the way such notions endlessly reverberated through all kinds of practices that formed the core of judicial decision making, such as witnessing, constructing evidence, procedures, and fact finding (or lack thereof). The foundations of knowledge (‘ilm, ma’rifā) thus help us understand some core activities that even go far beyond the judicial as such,
such as the religious, political, and economic, all of which are non-dissociable from one another.

The judiciary system analyzed in this book was also the last of its genre—fin de siècle—and by the second era of reforms much of it failed to survive. The epistemic grounds of knowledge becomes an even more crucial issue with the “reception” of modern western European codes and their implementation—sometimes side-by-side with the old practices—within the judiciary. When codes change, the old ones become obsolete, and for this very reason, Ḥanafism and the Majalla and its general rules, are all past history, save for some limited personal status matters. But the implementation of new codes, however, is not necessarily an indication that the old epistemic notions have become de facto obsolete. Indeed, such notions are the hardest to change and ought to be looked upon on a longue durée basis as a bottom layer over which other layers come and go. The modern Middle Eastern systems would then be looked upon in conjunction with the Ottoman practices, which in spite of the fact that their procedures and opinions are no longer in force, still survive beneath the common surface of events.

NOTES

1. For a brief evaluation of the law and economics schools in the United States, see the “bibliographical essay” below.