CHAPTER FOUR

UPHOLDING THE INTEGRITY OF SHARĪʿA VIS À VIS QANŪN

There is ample evidence that qanūn and sharīʿa certainly complemented one another (thanks in large part to the efforts of Abu al-Suʿūd to reconcile the two) and that jurists, judges, and legal officials across the Empire played an integral role in applying qanūn in various realms of law. However, the evolution of the qanūn-sharīʿa relationship, particularly after the sixteenth century, has also been characterized by instances of tension, with Islamic legal officials either directly or indirectly challenging the jurisdiction of qanūn. Seventeenth- and eighteenth-century jurists in Syria, for example, while playing an integral role in upholding Ottoman qanūn, were also adamant about protecting the integrity of sharīʿa law in matters pertaining to land tenure. This was significant considering that land tenure law (along with criminal law) was largely under the jurisdiction of qanūn. Jurists upheld sharīʿa and ensured their jurisdiction over matters pertaining to land tenure by one of two ways: directly challenging state encroachments on peasant rights, or clearly delineating laws regarding usufruct and access to waqf lands. This chapter examines three specific areas in which jurists invoked sharīʿa law to either question, confront, or expand upon state law. These three areas include: peasant mobility, women’s usufruct rights, and jurisdiction over waqf properties.

Qanūn/Sharīʿa Debate

Among scholars, there is no broad based consensus on how the legal system developed between the seventeenth and nineteenth centuries. According to Uriel Heyd in his study on criminal justice in the Ottoman empire, qanūn came to be disregarded by qāḍīs after the sixteenth century.1 Rather than being replaced by sharīʿa, however, Heyd concludes that the system came to be characterized by a “renewed tyranny of executive

1 Richard Repp agrees, arguing, however, that it came to be replaced increasingly by sharīʿa. See, “Qānūn and Sharīʿa in the Ottoman Context,” in Islamic Law: Social and Historical Contexts, ed. A. Al-Azmeh (London: Routledge, 1988), 124–45.
holding the integrity of sharīʿa vis à vis qanūn.”

Basing his conclusion on European travel books, he argues that qāḍīs became more corrupt, wielding a sort of whimsical, arbitrary and often cruel type of justice based on suspicion if need be. Unlike Heyd, Haim Gerber emphasizes that in seventeenth-century Bursa, qanūn was in full force in matters of criminal law and land law, trumping to a large extent the force of sharīʿa law. Thus, for example, along the lines of qanūn (and not sharīʿa) “most of the criminal cases were decided without due regard for proof of the specific charge for which the suspect was brought to court, but rather, according to the view of public opinion.” Gerber does point out, however, how certain elements of sharīʿa law came to be incorporated into the qanūn on matters of criminal law.

In her research on the Iraqi provinces of Basra and Mosul between the seventeenth and nineteenth centuries, Dina Rizk Khoury argues that jurists and scholars of the early modern period offered dissenting interpretations on elements of administrative law based on the sharīʿa. They did this, however, without challenging the overall legitimacy of the Ottoman legal and political order. Thus, in the case of Basra, the state incorporated various elements of sharīʿa into qanūn in the arena of land tenure, given that the former (in its laws of ownership of property) was more accommodating to provincial realities. According to Khoury, however, the appeal to sharīʿa increased from the last decade of the eighteenth century (under the influence of Wahhabism) as reformers challenged the more fluid qanūn-sharīʿa system that existed prior to that and emphasized a more distinct split between state law and religious law.

Although he does not specifically take up the issue of the qanūn-sharīʿa dynamic as exemplified in the law after the sixteenth century, Bogaç Ergene does point out, in support of Khoury’s argument, that judges in the Empire sometimes used religious discourse to challenge the political authority of the state between the sixteenth and eighteenth centuries.

In his work on Ottoman Syria, Rafeq maintains that Syrian ʿulamāʾ, beginning as early as the sixteenth century, challenged certain tenets

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