Ottoman *Nizamiye* Courts

Law and Modernity

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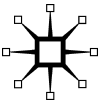

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For Ronit, Mai, Ella, and Adam

"[W]hatever law's primum mobile *may be, law could not operate without a means of going from its generalities to the particularities of individual cases. For however grand and majestic is the law in general,* law must also be in the small."

—Anthony G. Amsterdam and Jerome Bruner,
Minding the Law

"Our system is not one of justice, but of law. Justice is the goal, but it is always elusive, blind, and never certain."

—Edna Buchanan, *The Corpse Had a Familiar Face*

Contents

List of Illustrations ix

Acknowledgments xi

Introduction 1

1 The *Nizamiye* Court System: An Overview 19

2 The Ottoman Judicial Mall: A Legally Pluralistic Perspective 55

3 The Age of Procedure 83

4 The Age of Accountability: Judges on Trial 113

5 The Age of Centralization: The Public Prosecution 133

Concluding Remarks 153

Notes 159

Bibliography 191

Index 205

Illustrations

I.1 Sample of a title page—*Ceride-i Mehakim* 10
I.2 Sample of the "informal section" in the *Ceride-i Mehakim* 11
3.1 A statistical chart—*Ceride-i Mehakim* 94
4.1 Two pages from the verbatim report of Ali Eşref Efendi's trial—*Ceride-i Mehakim* 123

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Personal histories, like all histories, are subject to the whims of chance and coincidence. When I came to Harvard for my doctoral studies, I was fascinated by the Ottoman nineteenth century, but I had little interest in Ottoman law. During one of my endless rovings through the Ottoman stacks in the superb Weidner library, a voluminous book of a nineteenth-century-style binding caught my attention. I picked it out and thumbed through the pages. The language of the dense script was painfully challenging. There was a lot in it I could not make sense of, but I could tell it was an extremely meticulous legal text dealing with real trials and real people in the late nineteenth century. I noticed that there were additional volumes of the same series on the shelf. I picked all of them and sat down on the floor to get a better idea of what it was. Three hours later I got up, my legs stiff but my spirit high, rushing to the catalogs to find out more about this fascinating source. Following several weeks of explorations, I was amazed to discover that there was very little research on the *Nizamiye* courts, and actually none on this specific source: the *Ceride-i Mehakim* (Journal of the Courts). My journey to the world of Ottoman law had started.

This project would never have happened without the initial encouragement and intellectual support of Roger Owen, my advisor at Harvard, who kept asking me to try imagining myself stepping into a *Nizamiye* court. At last, I am finding myself more capable of doing so. I was also privileged to benefit from the scholarship and guidance of Cemal Kafadar, and his contagious love for all things Ottoman. My years at Harvard were precious for many reasons, the most important of which is the wonderful people whom I was fortunate to learn from and befriend. Special thanks are due to Afsaneh Najmabadi, Hakan Karateke, and Bill Granara for their friendship. I also thank Şükrü İlicak and Nurullah Şenol for their assistance and hospitality in Istanbul.

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Introduction

Americans seem to value their courts. In recent decades, the term *litigious society* has been widely used in public discourses to signify the increasing tendency of ordinary Americans to take their disputes, petty or otherwise, to court. Leaving aside the normative question of how beneficial this tendency is on the societal level, it clearly indicates that people imagine the civil court as a highly accessible institution providing support in times of trouble. At the same time, the presumed accessibility of the contemporary American civil court, even before actually using its services, is interpreted by people as an opportunity to advance their interests in daily interactions. In a society where the court of law is conceived as highly accessible, everyday exchanges between the dentist and his/her patient, the mechanic and her/his client, the employee and her/his boss, and even between couples bear the potential of a civil suit. Raising the threat of civil legal action can be implied or explicit, but in itself it is always an exercise of power that may change any given situation. In a litigious society, such a threat can be expressed in very subtle ways, because the potential of a lawsuit is constantly "in the air." The accessibility of the courts is likely to have a considerable bearing on the ways in which people go about their daily businesses. A recent study points to the costs of litigation as the reason why Americans spend three times more on litigation than the Britons. In the British and the Continental legal systems, the losing party in a civil suit has to pay a significant part of the adversary's legal fees, unlike the American legal system, where the legal fees are not determined by the judicial outcome.[1] This difference renders litigation in the former case a much more risky business. Clearly, Europeans think twice before they take up judicial arms. In other words, they imagine judicial action in a different way than Americans. How did the Ottomans imagine their courts?

In the nineteenth century, the judicial system of the Ottoman Empire underwent substantial refashioning through codification and the establishment of a new court system—the *Nizamiye* (regular) courts. Largely inspired by French law, these new courts were designed to address criminal cases as well as civil and commercial

disputes, thus signifying the end of the centuries-old dominance of the *Şeriat* courts. How did ordinary Ottomans imagine their courts, following the judicial reforms of the nineteenth century? I chose to pose this question at the outset of this study on the Ottoman judicial reform in order to emphasize the nature of its contribution to the growing historical literature on the passage of the Middle East to modernity. This study is a sociolegal exploration of the Ottoman *Nizamiye* court system during the late nineteenth century. The *Nizamiye* courts strike historians of the Middle East as a landmark in the passage of Ottoman societies to modernity. The *Nizamiye* court system appears in the scholarship on the late Ottoman Empire as an emblematic expression of a wide-ranging process of westernization and secularization. However, most of the existing literature on Ottoman legal change in the nineteenth century focuses on the normative aspects of law, while daily interactions *inside* the courtrooms have hardly received attention.

The *Nizamiye* court system makes an effective case study of Ottoman modernity. The fact that its administrative structure and legal sources followed French law to a considerable degree, thus being a case of *legal borrowing*, provides an opportunity to address questions that are at the core of the scholarly debate on the history of modernity in the Middle East. Nevertheless, the answer to the question of how Ottoman modernity should be defined and approached is not as unproblematic as it used to be.

APPROACHING OTTOMAN MODERNITY

Broadly defined, two generations of scholars may be identified in the development of the historiography on the Ottoman *long nineteenth century*. Until the 1970s, scholars tended to perceive social and ideological changes that took place in the Ottoman Middle East during the nineteenth century through the lens of *westernization*, or, in its alternative phrasing, *the impact-of-the-West*. The early works in English portray major diplomatic, political, and military events, usually in narrative style, emphasizing the project of administrative reorganization of the empire, which is known as the *tanzimat*. Though these studies made solid contributions to our knowledge of administrative and institutional changes, some of their basic assumptions have been proven a reflection of colonial cultural truisms rather than actual realities. These studies attributed the reorganization of Ottoman state institutions almost exclusively to European pressure. By emphasizing the military and economic weakness of the *sick man*

of Europe and by drawing on the *decline thesis*, they tended to reduce Ottoman agency to the sheer business of political survival in the context of a crumbling polity.[2]

The histories that were produced in the Middle Eastern and Balkan states that succeeded the Ottoman Empire in the twentieth century were deeply committed to their projects of nation building; as such, they had their own unique characteristics and emphases, which were quite different from Euro-American scholarship. This was also true for the early decades of Turkish historiography, which on the whole advanced a negative image of the Ottoman past, thereby inventing its own notion of national purity. Nevertheless, unlike Balkan, Arab, and Israeli scholars, who adopted with ease the image of the Ottomans as an alien, oppressive, and degenerate "Turkish yoke," the early Turkish historians had a more ambivalent attitude to their Ottoman past.[3] Albeit the differences between these various genres, they all shared the notion that the Ottoman Empire was lacking real agency in the nineteenth century; it was lagging behind *the West* and was responding to change, rather than initiating it. The perception of a homogeneous West, and its representation as an exclusive benchmark for evaluating the failures of the Ottoman state, was yet another convention shared by these historiographic traditions.

Both Turkish and English-language scholarship of the first generation represented the period of Abdülhamid II (ruled 1876–1909) as a setback with regard to a certain type of liberalism that was associated with the *tanzimat*. Clearly, the overall negative image of Abdülhamid in this early historiography was nurtured by the anti-Hamidian discourse that had been evident in the European press of the late nineteenth century on the one hand, and by the Turkish anti-Hamidian discourse that had been advanced by the regime of the Young Turks, and the entire generation that sympathized with their cause on the other. Whereas more favorable accounts of Abdülhamid II appeared in Turkey during the 1950s, his image as a religious reactionary remained mostly unchallenged in English-language literature until the 1970s.[4]

Since the 1970s, this master narrative of the Ottoman nineteenth century has been challenged both in the English and Turkish literature, with increasing success, by scholars that can roughly be identified as belonging to another, younger generation. The increasing accessibility of the Ottoman archives in Turkey, the growing appeal and prestige of social history, and the new methods of historical research that it advanced yielded a paradigmatic shift in the study of the nineteenth century.[5] The contribution of Edward Said's *Orientalism* to this shift

cannot be overstated. Said was not the first to criticize the foundations of the Orientalist paradigm; he had been preceded by a few social historians who questioned the validity of the Orientalist conventions on the basis of empirical research.[6] Nevertheless, the impact of Said's critique on the study of both Western and non-Western societies was proven spectacular, to my mind primarily due to the interpretive possibilities opened through the analysis of Orientalism as a *discourse* that was aimed at preserving the specific power relations that materialized in the colonial context.[7] More than thirty years of accumulated research in the fields of social, economic, and cultural history have brought to the fore the complexities of the nineteenth century, thus refuting the earlier notion of a passive Ottoman society that lacked agency. The movement of reform is seen now as a continuum—*the long nineteenth century*—that started around 1800 and ended practically with the demise of the empire. It is during the Hamidian period that major administrative and legal innovations that had been ushered in by the *tanzimat* reformers came to fruition.[8]

The image of modernity as a gift bestowed by *the West* on *the East*, best represented by the event of Napoleon's landing in Egypt (1798), can no longer be accepted as historically valid. Many processes of social change that are associated with the passage of the Ottoman Middle East to modernity, which had been assumed to be an outcome of the encounter between Ottoman and European societies, were actually underway before the nineteenth century. Increasing social mobility, decentralization of political power, movements toward market economy, and other similar developments came to be perceived as stemming from internal social and economic dynamics that had been in progress prior to the nineteenth century. Some of these changes were embedded in a growing interaction with foreign societies (not only Europeans) through trade, war, and intercommunal relations within the Ottoman domains, while others were exclusively indigenous in nature.[9] Again invoking the image of Napoleon in Alexandria, modernity is no longer imagined naively as a "gift" entrusted to the (irresponsible) hands of the Eastern rulers.[10]

The world-system perspective, which emerged in the early 1980s as an alternative to the modernization theories of the 1950s and the 1960s, had some impact on area studies, the Middle East included. In its application to the Ottoman case, this theory maintained that the Empire was incorporated in the capitalist economic system as a peripheral economy, in a process that started in the sixteenth or seventeenth centuries and peaked in the nineteenth. To some extent, this theory may be seen as a reproduction of the tendency to represent

the Ottoman Empire as a recipient rather than a facilitator of change, thus depriving it of true agency. However, studies that apply the world-system perspective often emphasize both the oppressive and the revitalizing effects that the process of peripheralization had on Ottoman social change, and therefore, have little in common with the *impact-of-the-West* paradigm.[11]

A major contribution of the world-system perspective to the historiography of modernity is its emphasis on the global nature of modernity. Even though it describes the capitalist world system in deterministic terms, leaving no room for the emergence of alternative economic structures, once the East-West dependency crystallized, it nevertheless effectively describes modernity as an inherently global phenomenon. In recent years, alternative approaches to modernity have called attention to the fact that it is global by definition, while emphasizing its plurality. This trend finds expression in the increasingly frequent use of the plural form *modernities*. The concept of *multiple modernities* has been used extensively in recent years as an alternative to a homogenous, ahistoric modernity; yet, one might question the extent to which it offers a radical divergence from the *impact-of-the-West* paradigm. In a sense, the notion of *multiple modernities* reinforces the association of modernity with a homogenous West; nonetheless, in contrast with the *impact-of-the-West* paradigm and the modernization theories, the alternative of *multiple modernities* legitimizes the existence of various translations of Western modernity worldwide. In other words, whereas the modernization theory expects the non-Western world to embrace some ideal called "Western modernity" as is, the advocates of *multiple modernities* conceive the indigenization of Western modernity and the resulting variety as a normal social development and a morally legitimate phenomenon. S. N. Eisenstadt, who coined the term *multiple modernities*, does not doubt the notion that modernity ("the civilization of modernity," in his formulation) developed first in the West and then spread to the rest of the world:

> The appropriation by non-Western societies of specific themes and institutional patterns of the original Western modern civilization societies entailed the continuous selection, reinterpretation, and reformulation of these imported ideas. These brought about continual innovation, with new cultural and political programs emerging, exhibiting novel ideologies and institutional patterns. The patterns and institutional programs that unfolded in these societies were characterized particularly by a tension between conceptions of themselves as part of the modern world and ambivalent attitudes toward modernity in general and toward the West in particular.[12]

Presently, the most radical deviation from the *impact-of-the-West* paradigm is offered by scholars who argue that the automatic association of modernity with the West is a fiction that has been constructed by the social sciences during the twentieth century. Dipesh Chakrabarty challenges the dominant academic paradigm that perceives non-Western histories as variations (incomplete to be sure) of "the history of Europe." According to Chakrabarty, this scheme has been invented and then reenforced by the historicist approach of the social sciences. He proposes the alternative concept of "translational histories" that is intended to draw out the dialogic essence of modernity as a global process in which Europeans and non-Europeans were equal partners, thus neutralizing the hierarchy that is structured by the association of the West with modernity.[13] Criticizing the comparative approaches that became a characteristic of the social sciences after World War II, Harry Harootunian, a prominent historian of Japan, voiced a similar call for unthinking the conventional narration of modernity:

> While area studies were explicitly implemented after World War II to encourage and even foster the development of new comparative perspectives across disciplines and between different culture regions, they were diverted from this vocation by the desire to supply information crucial to the interests of the national security state and then, later, to those of private businesses. Instead of envisaging genuinely interdisciplinary agendas capable of integrating different disciplines, area studies often settled for the regime of a simple multi-disciplinarism as a sign of comparative method that masqueraded coverage for the work of comparison, with language acquisition for method, and the totality of the nation-state for theory. Too often, area studies became captive of a particular kind of social science that promoted a form of cultural holism, which was made to stand in for a broader region, even though its true focus was the nation.[14]

According to Harootunian, *comparison* came to be an intellectual mechanism for constituting and reaffirming the hierarchy of political power through classification in accordance with criteria derived from Euro-American history. These criteria formed the basis on which non-Western countries were ranked in accordance with their assumed distance from the West. The so-called comparisons that were based on these criteria were embedded in an evolutionary trajectory in which certain societies were placed at its apex, whereas others were positioned in lower evolutionary phases.[15] As a way out of this tautology, which perpetuates non-Western modernities as more or less

accurate replicas of the "true" modernity of *the West*, Harootunian suggests to base the study of modernity on an exploration of *the experience of modernity* in everyday life, while associating modernity with a world time set by the emergence of capitalism and the kind of daily routines that it imposed.[16] What lies at the core of modernity as a global phenomenon, therefore, is the constant sensation of transition to the new, which is revealed in everyday routines. At the same time, unevenness is an essential feature of modernity, fully exhibited in everyday experiences.

The *Nizamiye* court system was one manifestation of the global modernity that was experienced in many uneven ways across the world in the nineteenth century. It was an institution that was based on a selective legal borrowing from France; yet comparing it to the French legal system would again fall into the trap of employing an artificially homogenous *West* as a benchmark for grading the rest, and it will not be helpful for the task of understanding Ottoman modernity in its own terms. The Ottoman reformers never meant to replicate the French judicial system in their own domains; rather, they consciously developed their own version of modern law, which combined French and Islamic legal texts on the level of positive law, and amalgamated borrowed and local practices. Keeping in mind Harootunian's emphasis of the fact that modernity is uneven by definition, there is no doubt that in the late nineteenth century, everyday judicial manifestations of modernity took various forms in France as much as they were uneven in the Ottoman Empire. Yet again, there was a series of judicial conventions and practices that signified modernity, which was shared by contemporary French, Japanese, Ottomans, Englishmen, and many others. New ideas and practices that came to be associated with modernity emerged roughly *at the same time* in many parts of the world in the course of the nineteenth century. This shared discourse of modernity (discourse used here as a complex of ideas and practices), quite nebulous and lacking coherence to be sure, gave modernity its unique quality as a global phenomenon.[17]

The *Nizamiye* courtroom was a locus where new concepts of justice were exhibited, reconstituted, and negotiated through everyday routines that had been established by a process of legislation. As such, the *Nizamiye* court provides an opportunity to probe into the experience of modernity in everyday life.[18] As shown in chapter one, the harbingers of the *Nizamiye* courts, the mixed courts of commerce that were established in the 1840s, were created as a means of accommodating the legal needs stemming from the growing interactions between Ottoman and non-Ottoman merchants, in a context of an expanding

contract-based capitalist activity. The impact of capitalism in the Ottoman lands was not limited to merchants, however. The intersection of capitalism and modernity was manifest in the civil domain of the law in general, where issues such as debt, guarantees, rent, ownership, and credit were negotiated and contested on a daily basis, involving private individuals, companies, and state agencies. Capitalism expressed itself through the sort of cases that were addressed in the civil courts, but also through the actual performance of justice. The proceduralization of judicial proceedings entailed a growing need for legal advocacy, and the judicial fees that sustained the courts were high. Justice became an expensive business. As a result, civil justice became more relevant to the middle and upper classes, and less accessible to the lower strata. Similar effects of capitalism were evident across the world.[19] Lumping these changes together under the rubric of *westernization* makes little analytical sense. In this study, which is the first attempt to analyze the *Nizamiye* courts as a case of Ottoman modernity through a sociolegal perspective, I hope to redirect the discussion on the judicial reform from the self-explanatory narrative of westernization to the path of everyday history.

APPROACHING THE COURTS

Turkish scholarship has produced a rich crop of studies on what is known as "the legislation movement of the *tanzimat*," while emphasizing state legislation rather than implementation.[20] A few studies recently published in Turkish shed light on the administration and the working of the *Nizamiye* courts in various stages of their evolution. These studies make extensive use of Ottoman archival material and provide indispensable information about the bureaucratic development of the *Nizamiye* court system, its organization, and operation.[21] Written from functionalist and descriptive approaches, these recent contributions neither address questions of meaning nor do they tackle broad social aspects related to the *Nizamiye* courts. Ruth Miller's *Legislating Authority* employs a more analytical methodology to the subject of judicial reforms. Limiting her discussion to the criminal domain of the law, Miller traces changes in the attitude of the state to crime, beginning with the Ottoman judicial reforms, through the early Republican period. She focuses on the normative aspects of the law, while treating the law "as it was understood apart from its social context."[22]

While putting forward illuminating insights on the legislation relevant to the *Nizamiye* court system as well as on its administrative

and technical aspects, the studies mentioned offer much less information on questions related to the actual performance of the courts (*law in action*) and the daily interactions inside the courts. None of these studies investigate litigation. This lacuna seems to have resulted from the fact that actual protocols of *Nizamiye* court hearings from the late nineteenth century are hardly available to historians.[23] The implication of this unfortunate absence may be demonstrated by comparing it to the richness of the *sicil*, the *Şeriat* court records that documented centuries of Ottoman judicial activities and social interactions in general. These "real time" summaries of legal proceedings in *Şeriat* courts are perhaps the most important source for the social and economic history of the Ottoman Empire. One can only imagine how poor our knowledge of the Ottoman societies would be without the *sicil*.[24] No such corpus from the *Nizamiye* courts is available, although the practice of recording a detailed protocol of the court proceedings (*zabt*), which was required by procedural law, became common in the 1870s in both *Nizamiye* and *Şeriat* courts.[25] The lack of a *Nizamiye sicil*, as it were, must be one of the major reasons for the scarcity of information on the daily interactions inside these courts. The present study is aimed at filling some of the historiographical void by an extensive use of what I think is the best available source for this purpose, the *Ceride-i Mehakim*, in addition to Ottoman and British archival sources.

In 1873, the Ottoman Ministry of Justice launched an official periodical titled *Ceride-i Mehakim* (Journal of the Courts) with the objective of assisting the *Nizamiye* court community, including judges, clerks, prosecutors and attorneys in conducting their daily tasks. The journal, published on a weekly basis, contains around fifteen pages with civil and criminal case reports that summarize proceedings from courts of first instance and courts of appeal from across the empire, and the subsequent decisions issued by the Court of Cassation in the capital.[26] The issues are typically divided into two sections; the first, titled *Formal Section* (*kısm-i resmi*), contains routine notifications, circulars, new regulations, and announcements of new nominations (see figure I.1). The second, titled *Informal Section* (*kısm-i gayr-ı resmi*) contains case reports, statistical charts, articles authored by court officials, and occasionally full protocols of criminal proceedings (see figure I.2). The *ceride* was an essential resource for implementing the project of judicial reform. It facilitated orderly communication between the Ministry of Justice and the courts and created a sense of uniformity and coherence of practice in the judicial system. The journal gave rise to an imagined professional community composed

جريدهٔ محاكم

١٢٩٠

جمعه ايرتسى

نومرو	رجب	سنه	كانون اول	سنه	صحيفه
٩٠٦	٢١	١٣١٤	١٤	١٣١٢	١٢٨١٣

(اشبو غزته بهر هفته جمعه ايرتسى كونلرى چيقار . سنه‌لكى درسعادت ايچون مجيديه يكرمى غروش)
(حسابيله التمش غروشدر . طشره‌لر ايچون اون بش غروش پوسته اجرتى ضم اولنور . بهر)
(نسخه‌سى يئه مجيديه يكرمى غروش اولمق اوزره يوزپاره يه هربرده صاتيلور . درج اولنه‌جق)
(اعلاناتك هربرندن بر مجيديه اخذ اولنور . سنه لكنه مشترى اولمق استيانلر عدليه نظارتى)
(دائره‌سنده كائن جريدهٔ محاكم اداره‌سنه مراجعت ايتملدير)

قسم رسمى

(فى ١٢ رجب سنه ٣١٤ وفى ٥ كانون اول)
(سنه ٣١٢ تاريخيله بالجمله ولايات استيناف)
(محكمه‌سى مدعىٔ عموميلرينه ومدعىٔ عمومى)
(بولنميان محللرمدعىٔ عمومى معاونلرينه يازيلان)
(تحريرات عموميه صورتيدر)

دوائر رسميه‌يه ويريله‌جك كفالت سندلرينك

مقاولات محررلرينك غيرى مجالس اداره
ويانجارت اوطه‌سى طرفندن ويا اصناف لونجه‌لرى
كبى كفلانك منسوب اولدقلرى مواقعدن دخى
جواز تصديق كفالت نظامنامه‌سنك ايكنجى
ماده‌سنك صراحت احكامندن بولنمغله برابر
مستفىٔ عرض و بيان اولديغى اوزره مجالس
وموافع مذكوره‌دن وقوعه كلان اشبو معامله‌ٔ
تصديقيه كفيلك ذات وهويت ودرجهٔ اعتبار
وثروتى بيان واخباردن عبارت اولەرق لدى الاـ
يجاب سندات مذكورەنك احتجاجه صالح وثائق

Figure I.1 Sample of a title page—*Ceride-i Mehakim.*

of the growing professional class of judges, prosecutors, and lawyers. The hundreds of court officials throughout the empire did not know each other, yet the journal served as a professional beacon that created a sense of a distinguished community and a shared cause. The

قسم غیر رسمی

قوصوه استیناف محکمه‌سنده ٢٥ نیسان سنه ٣١١ تاریخی وبش عددی ایله وبریلان اعلامك تمیزینی استدعا ایدن متروبچه قصبه‌سنك غازی عیسی بك محله‌سنده مقیم حاجی علی اغا ایله مدعی علیهم محله‌ٔ مزبوره ده ساکن حاجی آدم وبرادرلری یوسف وحسن اغالردن مزبورحاجی آدم اغانك وکیلی قواص اوغلی فوأد افندی بالورود دیکرلری مرقومان یوسف وحسن اغالر کلمامش اولدقلری کبی جواب لایحه‌سی دخی ویرمدکلرندن مومی‌الیهانك ایضاحات شفاهیه‌لری استماع قلندقدن صکره تدقیقات تمیزیه اجراسنه ابتدار اولندی .

اعلام مذکورك خلاصهٔ مألی مومی الیه حاجی علی اغانك خزینهٔ جلیله‌یه مدیون بولندیغی اوتوز بربیك طقوز یوز یکرمی برغروشك تأمین استیفاسی ضمننده باطاپو متصرف اولدیغی اون سکز قطعه‌ده اوچیوز طقوز دونم ترلاسی جانب محکمه‌دن عجز اولنه‌رق بالمزایده مرقومان حاجی آدم ویوسف وحسن اغالره فروخت ایدلدکله مزبورون اراضیٔ مزبوره دن ماعدا اون قطعه چایر ایله یکیجه وسکز قطعه ترلایی ومذکور اراضی درونده بولنان طقوز باب چفتجی خانه‌لریله حرمن و بورت یرلرینی فضولی اولهرق ضبطه قیام ووضع ید ایتمکده اولدقلرندن بالکشف مداخله‌لرینك منعیله بروجه محرر ضبط ایلدکلری اراضینك اوچیوز یدی وسکز سنه‌لری حاصلاتی اولان سنوی ایکیشر بیك غروشدن درت بیك وخانه‌لرك ایجاری بولنان ایکی بیك غروشله اون بشبیك قیه ذخیره‌نك تحصیلی متروبچه بدایت محکمه‌سنه بالمراجعه طلب ودعوی ایتمسنه قارشو مدعی علیهم مرقومان اونبر قطعه طاپو سندی ابراز ایله ترلاایله مشتملاتی وحدود داخلنده بولنان خانه‌لر حدود اعتباریله جانب اجرادن مزایده اولنه‌رق کندولرینه احاله اولندیغی وادعا اولنان چفتجی خانه‌لری وترلا وبورت یرلری ایله سائره‌نك فراغ ایدیلان محله حدودی داخلنده بولندیغی واراضی قانوننامه‌سنك قرق یدنجی ماده‌سنك فقرهٔ اخیره‌سی حکمنجه دونمه اعتبار اولنیوب حدوده اعتبار اولنه‌جغنی بالمدافعه سرد واتیان ایتمش ایسه‌لرده محکمه‌جه سبق ایدن کشف ومحاکمه وتدقیقات نتیجه‌سنده مدعی علیهلره فراغ اولنان اوچیوز طقوزدونمده اون سکز

Figure I.2 Sample of the "informal section" in the *Ceride-i Mehakim*.

publication and distribution of the *ceride* were funded by subscription fees. The Ministry of Justice attributed great importance to a timely distribution and delivery of the *ceride* to the courts. The provincial public prosecutors were in charge of supervising the proper distribution of the journal and the collection of subscription fees. They were held accountable for any irregularity in this regard.[27] The Ministry of Justice expected the judicial personnel to subscribe: since 1886, fees were deducted from the salaries of those judicial officials who had failed to pay their subscription fees.[28] The *ceride* was also sent, free of charge, to the Law School and other institutions of higher education, including the School for Civil Servants (*Mülkiye*), the Medical School, the Imperial School, and the School of Literature (*medrese-yi edebiye*).[29]

To my mind, at present, the *Ceride-i Mehakim* (and its subsequent versions) is the best nonprescriptive source on the *Nizamiye* courts, providing the kind of information about litigation and legal practice that is absent from the *law in the books*. The very few Turkish studies that use this source tend to treat it as a "transparent" repository of historical data, whereas its strength, as a historical source, lies also in the fact that it is a discursive field that reveals the ideological agendas of the judicial elite.[30]

Unlike the *sicil* of the *Şeriat* courts, the *ceride* is an edited text. Treating this fact as an added value of the source is a methodological move that requires a brief explanation, given the centrality of the archive in Ottoman studies. The expansion of research on the nineteenth-century Ottoman Empire owes to the improved working procedures at the Turkish state archives, mainly the Ottoman section of the Prime Minister Archive in Istanbul. Containing millions of documents produced by one of the world's most bureaucratic empires, it is one of the largest state archives worldwide. Being an impetus for the development of Ottoman studies on the whole, the accessibility and size of the Ottoman archive also helped to cultivate a Rankian approach to the sources. In recent years, several scholars have called attention to the problem of archival fetishism in Ottoman studies.[31] The tendency of Ottomanists to grade their source material in line with its assumed capacity to capture historical reality has advanced a glorifying attitude to the archive while belittling nonarchival sources. This tendency is especially noticeable in the study of the nineteenth century for which cataloged archival materials are abundant. The fetish of the handwritten script is especially noticeable in the relative neglect of printed sources: newspapers, published books, and official journals. As far as the social history of the nineteenth century is

concerned, these texts are simply seen as sources of lower quality for the purpose of historical analysis. Since the late 1980s, however, the positivistic approach to state archives as neutral repositories of data has systematically been criticized by historians, anthropologists, and archivists. This critique has yet to make an impact on Ottoman studies, and, it is hoped, the Ottoman state archive will become a subject of research in its own right.[32]

As a printed and edited text that was aimed to be circulated among the *Nizamiye* court community, the *Ceride-i Mehakim* was a showcase that promoted the vision of the judicial elite, in particular its belief in the possibility of rational law-making revolving around elaborate procedure. Justice came to be equated with adherence to a complex system of procedure. This message was conveyed by the editorial decision to include only cases that reached the Court of Cassation, even though judicial decision-making in the *Nizamiye* court system was not based on judicial precedents. The form of presentation was yet another means of projecting an image of regularity: while the thousands of case reports that are included in the *ceride* differ in length, their structure is identical across the board. A typical report of a civil or commercial case includes three parts. The first part provides details about the place and type of the court that issued the original decision, the date of the decision, and the names and domiciles of the litigants. If a state authority was a party (for instance, a local municipality, a state bank), the title of this authority was specified as well. The typical report also indicates whether or not the plaintiff responded to the appellate petition. The second part of the case report, which is usually the longest one, depicts the circumstances of the dispute, the arguments raised in the original trial in the lower court, and its decision. The concluding part of the report specifies the findings of the investigation conducted by the Court of Cassation and the resulting ruling, which would either quash or affirm the lower court's decision. Typically, the first and last parts of the case reports manifest a highly formulaic language, thus creating an image of rationality and coherence.[33] This form of presentation of the experiences in the courts might lead the historian to attribute to the judicial proceedings some ideal neatness that was never really there, while forgetting that legal texts effectively conceal the chaotic aspects of court experiences.[34] How should the historian avoid the risk of reading this claim for orderliness as a manifestation of "real" experiences?

In a response to the tendency of postcolonial scholars to read the archive *against* the grain, Ann Stoler has suggested reading the colonial archives "*along* their grain." Rather than contending oneself with

saying that the archive is not an innocent space, or that it reflects a specific structure of power and that the task at hand is to excavate what is underneath, Stoler calls for a reconstruction of the archival logics:

> If a notion of colonial ethnography starts from the premise that archival production is itself both a process and a powerful technology of rule, then we need not only to brush *against* the archive's received categories. We need to read for its regularities, for its logic of recall, for its densities and distributions, for its consistencies of misinformation, omission, and mistake—*along* the archival grain.[35]

In the present study I treat the *ceride* as a *kind of* archive that allows reading along and against the grain, being a source for both discourse and praxis. The *ceride* serves well the purpose of reconstructing daily praxis, because it advanced a certain agenda regarding the proper administration of justice, while it was not written for the gaze of historians or foreigners; rather, it was a working tool for the use of judicial officials. As such, it is imbued with reports about irregularities and warnings addressed to court personnel. No attempt to coat the performances of the courts with bright colors is evident in the *ceride*. It is hoped that my reading of the *Ceride*, together with other sources used in this study, archival and nonarchival, prescriptive and nonprescriptive, would allow a reasonable imagination of the *Nizamiye* courts.

OUTLINE OF THE BOOK AND ARGUMENTS

This book is arranged thematically, and each chapter advances specific arguments concerning a certain aspect of the *Nizamiye* court system. Specific court cases are presented in order to demonstrate specific arguments. At the same time, through detailed presentation of these cases, I hope to provide a glimpse into the *Nizamiye* experience, as it were. Lawrence Friedman identifies two distinct approaches to the study of litigation: one is focused on disputes as a social phenomenon, in which litigation is but a phase in an ongoing conflict; the other is primarily interested in courts as institutions.[36] The present study is closer in its objectives to the latter approach. The first chapter is an overview that sets the historical grounds for the subsequent discussion. In this chapter I describe the administrative evolution of the *Nizamiye* court system, which was embedded in the grand project of Ottoman reforms, and reached a high point during the Hamidian era (1876–1909). Ottoman legal change has been represented in

scholarship mainly through the prism of "westernization that went wrong," while the very concept of westernization has been often treated as self-explanatory. Oversimplifying social and economic processes that are otherwise contradictory and unstable by attributing to them a superficial linearity and homogeneity is a common feature of narratives about "Ottoman Westernization." The organizational evolution of the *Nizamiye* courts and their final consolidation in the late 1870s offers an effective test-case for problematizing the concept of westernization exactly because these new courts had been presented in scholarship as an undisputed hallmark of westernization. Similarly, historians presented the *Nizamiye* court system as a signifier of an imperfect, incomplete "imitation" of French law. Drawing on theoretical writings on the phenomenon of legal borrowing, I position Ottoman judicial reform in a global context. I demonstrate how the Ottoman project of judicial change was a typical case of legal borrowing that was highly selective, hence yielding a hybrid judicial legal system that consciously preserved indigenous, Islamic-Ottoman legal elements. In the first chapter, I sketch out the structure of the *Nizamiye* courts, and also address the contested themes of the courts' performance, integrity, and independence.

The nineteenth century is often imagined along the logic of competition between secular/modern and Islamic/traditional trends, also conceived as a conflict between the westernizing *alafranca* and the conservative *alaturka*. Historians have used the concept of *duality* to describe an alleged clash between what *they* perceived as secular and religious legal systems, yet the Ottoman reformers themselves never thought of the *Nizamiye* court system as *secular*. In the second chapter I advance an alternative interpretation of Ottoman sociolegal change. I argue that from the outset of the *tanzimat* until the demise of the Ottoman state, the *Nizamiye* and the *Şeriat* courts were entwined components of a single judicial system, converging in some aspects and departing in others. Adopting the interpretive prism of legal pluralism, I maintain that in spite of a formal division of labor between the several judicial forums that emerged through the century, the authorities allowed a certain space for "forum shopping," thus revealing a flexible attitude to this practice. The Ottoman version of legal pluralism provided court users with new opportunities for judicial maneuvering.

Legal formalism was one of the salient markers of legal change in Western Europe and North America during the nineteenth century, and it was also evident in the Ottoman Empire. The passage of the Ottoman state to modernity was experienced, inter alia, by a modified

perception of justice, discussed in the third chapter. The previous understanding of justice in terms of the ruler's commitment to the well-being of his subjects gave way to a different conception thereof. Justice came to be increasingly associated with "procedural correctness," as the central judicial administration advanced an ideology of legal formalism, experienced in the court system as an accelerated "proceduralization" of judicial praxis. The reformers saw in legal formalism an expression of the civilized, rational world that they aspired to be part of; at the same time, it served state centralization, which was the underlying principle of the nineteenth century's reforms. In the third chapter I demonstrate the manifestations of legal formalism in judicial discourse and daily practices, and I also discuss the opportunities and drawbacks it brought about, from the perspective of court users.

In the nineteenth century, the issue of official indiscipline occupied much of the attention of the reformers, who associated officials' discipline with administrative efficiency and with regularity. In the fourth chapter I discuss the issue of accountability among the judicial personnel. In the late nineteenth century, the category of "official misconduct" included a wide range of practices that the central judicial administration deemed intolerable, from trivial violations of procedure and negligence, to acceptance of bribe. This emphasis of indiscipline stands in contrast with popular representations in the post-Ottoman era, which depicted corruption and arbitrariness as almost an institutionalized practice, tolerated and even encouraged by the state.

Public prosecution was one of the more significant novelties in the Ottoman judicial sphere. In the fifth chapter I explore this institution, arguing that it was the most important vehicle in the promotion of centralization in the *Nizamiye* court system. The office of public prosecution is often thought of in association with the criminal domain of the law. However, in the late Ottoman Empire, public prosecutors played a considerable role in certain civil trials, and they were assigned the role of "guardians of justice" through their wide-ranging supervisory duties. The public prosecutor, more than any other official, formed an embodiment of the centralizing state in the court scene.

* * *

In June 1881, the famous statesman and reformer Midhat Paşa, who had won the sympathy of Europe for his liberalism and charisma,

was trialed in the Yildiz palace on the charge of complicity in the murder of the deposed sultan Abdülaziz, Abdülhamid II's predecessor. The trial of the alleged conspires, which was conducted in a tent erected in the Yildiz palace especially for this purpose, was performed as a *Nizamiye* trial, in accordance with the criminal procedure that had been introduced a couple of years earlier. The so-called Yildiz trial lasted three days, resulting with the indictment of Midhat Paşa, who was consequently sentenced to death. Following pressures by the British government, the sentence was converted to banishment to Taif, where Midhat died three years later, in dubious circumstances. The trial was subject to harsh criticism in the British press and Parliament, which described it as a mockery trial.[37] A thorough study of the trial documents brought the eminent Turkish historian İsmail Hakki Uzunçarşılı to a similar conclusion.[38] If this was indeed the case, how should one analyze the contradiction between Abdülhamid's apparent commitment to the judicial reforms and his personal involvement in the abuse of the law for the sake of attaining political objectives? The episode of the Yildiz trial raises questions as to the complex connections between political trials, authoritarianism, and the judicial system in the Hamidian period. Nevertheless, deserving an elaborate discussion in its own right, the issue of abuses of justice in political contexts remains outside the scope of the present study. When Abdülhamid II ascended to the throne, the process of judicial reform approached its final consolidation. Throughout his long reign, Abdülhamid did not attempt interfering with the evolution of the judicial system, or rendering it part of a dictatorial apparatus. The emergence of professional judicial training (both formal and informal), specialized discourse, and fully functional mechanisms of judicial review provided for a certain legal autonomy that rendered the system immune, to a considerable degree, to the whims of the ruler, authoritarian as he may have been.

Chapter 1

The *Nizamiye* Court System: An Overview

A Typical Legal Amalgam

Laws and legal systems have been circulating around the globe since antiquity. Reception of foreign law and legal structures is a typical feature of legal change across regions and periods. The legal orders born out of the often lengthy processes of legal borrowing are amalgams of various legal sources.[1] The reception of Roman law in Western Continental Europe was a saga that lasted some seven hundred years, beginning in the eleventh century and resulting in the marginalization of European customary law in favor of Roman law. Likewise, premodern Ottoman sultanic law (*kanun*) contained a good deal of pre-Ottoman legal concepts and even technical terminology that preserved non-Turkish terms.[2] Legal borrowing during the long nineteenth century was different, however. It bore the marks of all those elements of the passage to modernity that are recognized almost instinctively, first and foremost the rapidity of change. Indeed, the pace of legal change was unprecedented in many parts of the globe. Movement of legal structures, laws, and cultures was embedded in globalization, colonialism, and changing class relations on the local and the global levels. During the century, French Napoleonic law was received in Latin America, East Asia, Africa, and the Middle East. Labeling this remarkable success of French law as *westernization* would be too simple and misleading, because it tends to overlook the fact that all processes of legal borrowing result in hybrid legal regimes, which altogether manifest an extraordinary variety of legal systems.

Legal transplantation has been debated extensively for forty years now. Some scholars, mostly anthropologists, resist the weight attributed to legal borrowing in processes of legal change. They maintain that since law always exhibits local culture, and since law and society are inseparable, a legal system cannot simply be transferred from one society to another that is significantly different.[3] Alan Watson, a leading theorist of legal transplantation, tackles this issue with regard to the evolution of Western law. He agrees that in the early stage of the development of a distinctive European law, the legal order derived from the societal; but once legal situations came to be determined by universal standards, the law became "to some extent autonomous, and exist[ed] and operate[d] within its own sphere."[4] The transition from adjudication based on societal considerations to adjudication dominated by legal standards signified the transition from customary law to statute law in medieval Europe. This change, in turn, yielded a *certain* space of legal autonomy that made legal borrowing across different societies quite possible.

Watson's ideas about legal borrowing have been intensely deliberated. The debate has taken various directions, but it seems to me that the underlying questions concern the interrelations between law and society, namely, the extent to which law reflects social factors, the degree of autonomy that law has vis-à-vis local culture, and the extent of the cultural distance between legal experts and their societies. Answering these and similar questions is not necessarily any easier today than it was three hundred years ago, when Montesquieu wrote that law was not autonomous from society, and therefore it could not be transferred to dissimilar societies.[5] Research of the last decades is sufficiently rich to allow the following statements: first, legal change across the globe is imbued with legal borrowing. In fact, there is no significant legal change without legal transplantation. Second, the hybrid outcomes of legal borrowing around the globe share many commonalities. Third, the twin processes of legal change and legal borrowing are more dynamic than previously assumed, to the extent that the conventional classifications of *legal traditions* fail to capture the variety and complexity of legal systems.[6]

Positioning the consolidation of the *Nizamiye* court system within the conceptual context of legal borrowing provides an alternative to the approach, quite common in the historiography of the modern Middle East, which assumes an inherent incongruity between local/Islamic law and borrowed Western/French law, an approach that presents legal amalgamation as some sort of anomaly. I will discuss this approach in more detail in chapter two. On the whole, one of the arguments advanced

in this study is that the Ottoman legal change of the nineteenth century was a *typical* case of legal borrowing. It was typical in terms of the unique hybrid legal order that it produced, by the commonalities it shared with other legal systems of its time, and by its dynamism.

In his textbook on the *Nizamiye* procedural law from the late nineteenth century, the Ottoman jurist and member of the Court of Cassation Ali Şehbaz Efendi develops a dialectic discussion on the decision of his government to adopt large parts of the French legal codes. His discussion is a vivid demonstration of the fact that even the most technical aspect of the law, namely, judicial procedure, is a dynamic site of meaning, intertextuality, and cultural translation, as demonstrated in the following discussion.

Writing in the 1890s, Ali Şehbaz Efendi explained that Victor Hugo's *Le Misérables*, which was translated to Ottoman Turkish, was an example of the essential moral and cultural differences between the "Europeans" and the "easterners." He saw in the miseries suffered by the novel's protagonist, Jean Valjean, a reflection of European moral "harshness" (*şiddet*). For Ali Şehbaz Efendi, harshness was a key character of the European culture that had intensified over time and is likely to further intensify. He did not like the founding principles of European culture, being, in his mind, mercilessness and class-based alienation. While "among us, that is, easterners, there was much tendency towards mercy and compassion," there was nothing of the sort among the Europeans. In fact, the author portrayed the easterners as a reverse mirror image of the Europeans, from a moral point of view. Ali Şehbaz Efendi depicted several social situations (demonstrated in *Le Misérables*) intended to illustrate this difference. For one, upper-class Europeans did not care for their poor because they were considered inferior. The social solidarity among the easterners, on the other hand, cut across social divisions. According to the author, no easterner could conceive a situation in which a poor standing at his doorstep will be denied food and compassion.[7]

Alluding to the question of whether or not European laws should be adopted, Ali Şehbaz Efendi argued against the position of those who claimed that the moral differences between the two cultures rendered legal principles or procedures originating from Europe inapplicable in the Ottoman Empire. He took this major cultural difference as an undisputable given. It was the legal implications of this difference that were dubious though. His own stance was that while European firmness and tenacity (*metanet*) was excessive, Eastern mercy and compassion were no less exaggerated. He went on to argue that there was no point in discussing which of these two moral options should be chosen,

being not a matter of logic but of cultural nature and essence. At first glance, this essentialism hardly agrees with Şehbaz Efendi's endorsement of a procedural law that was borrowed from a Western society.

Les Misérables was a convenient point of reference for Ali Şehbaz Efendi's dialectical discussion of legal borrowing. Set in the Parisian class-based society of the Revolutionary period, the novel tells the story of Jean Valjean, who had been sentenced to nineteen years in prison for stealing a loaf of bread. After his release, the protagonist commits a minor crime for which he is hunted by a certain police inspector. Yet, under a new identity he manages to become a successful businessman and even a mayor. The subsequent tragic events bear out the protagonist's inability to escape from his own criminal past.[8] Moving from the cultural to the legal, Ali Şehbaz Efendi discusses the issue of criminal past and legal rights. He gives the legal principle of "restoring revoked rights" (*iade-i hukuk-ı memnua*) as an example. This *Nizami* principle stipulates that the rights of a convict who had committed serious crimes and was sentenced to grave penalties, such as penal servitude, will be restored in full after the convict's release or amnesty.[9] According to Ali Şehbaz Efendi, the absence of this principle in Ottoman law prior to the adoption of the new procedure was explained by the fact that in Ottoman society, "people do not look at the face of a person who has completed a term of penal servitude thus causing him [constant] discomfort."[10] In other words, there was no point in restoring convicts' revoked rights in the Ottoman cultural context, because the morals of Ottoman society had its own way. In the final analysis, however, Ali Şehbaz Efendi does not accept this view. By resorting to a detailed legalistic and a rather technical discussion, he demonstrates the legal necessity of the principle of "restoring revoked rights." The bottom line in Ali Şehbaz Efendi's discussion is that the need for this legal principle derived not from the conditions unique to the Ottoman society, but from the internal logic of the *Nizami* legal framework.[11] This view reflected the emerging conceptualization of the law as an autonomous space in society, dominated by professional legal practitioners. This image of modern law as a closed discursive field allowed Şehbaz Efendi to live comfortably with the contradiction between the assumed difference implied by reified East and West, and the proven feasibility of legal borrowing.

Judicial Experimentation: 1838–1864

The *tanzimat* reforms were launched on November 3, 1839, with a public reading of the Imperial Edict of Gülhane. Several features of

this event signaled to the world how important the Ottoman sovereign deemed it to be. The audience watched Mustafa Reşit Paşa, the foreign minister and the mastermind of the reform movement, reading the decree in the presence of Sultan Abdülmecit, surrounded by the highest echelons of the Ottoman elite. Next to them stood foreign diplomats and dignitaries. By contrast, the foundation of the *Nizamiye* courts was not marked by any ceremonies or festive declarations, though it was a remarkable point in the history of the Ottoman Empire as it put an end to the centuries-long dominance of the *Şeriat* courts. The nineteenth-century judicial reforms were embedded in the logic of the *tanzimat*; unlike the *tanzimat*, however, the judicial reforms in themselves were neither a *project*, nor a neatly designed program. Rather, they were heuristic in nature. As any other case of legal borrowing, the emergence of the *Nizamiye* court system was a matter of evolution, the outcome of which was determined by the necessities on the ground and pragmatic considerations. Codification and experimentation with new judicial bodies were the most salient features of the judicial change that preceded the formal establishment of the new courts in 1864 and their final consolidation in 1879.

The earliest innovations that marked the beginning of a new judicial era were determined by two factors that on the whole signified the passage of the Ottoman state to modernity: the first is the fully conscious effort made by the political elite in Istanbul to reinforce its control over the provinces, following nearly two centuries of administrative and political decentralization. The incorporation of the Ottoman Empire to the world economic system was the second key factor, which required new judicial accommodations.

The "auspicious event" (*vaka-yı hayriye*) of 1826, namely, the destruction of the Janissaries by Mahmut II, was not only a practical prerequisite for refashioning the state. It had a metaphoric value in the minds of the Ottomans as it symbolized the return of the political power to the reigns of the Sultan, following years of political and administrative devolution of power. Though the "auspicious event" cleared the ground for the *tanzimat*, state centralization was not achieved through epic military events, but through the painstaking work of bureaucrats. After centuries of imperial ruling and accumulated experience in administration of a multicultural empire, the Ottoman reformers knew by instinct that a viable centralization was contingent on the performance of the bureaucracy and the unconditional commitment of state officials to the project of centralization. To this, we should also add the fact that new conceptions of the civil service were emerging around the globe in chorus, when complex

bureaucracies were associated with rational statecraft and professionalization.[12] It is for this reason then that the legal and judicial limelight of the 1840s and the 1850s was directed at the officials. The earliest codified law was the *Criminal Code* of 1840, which amalgamated provisions derived from both contemporary European codes and *Şer'i* principles. As Ruth Miller has shown, this code mainly aimed at policing the officials, a rationale that was also upheld in the later, more elaborate versions of this law.[13] In line with this rationale, the first innovations in the field of adjudication were embedded in the effort to maintain discipline among the official rank-and-file.

The establishment of the Supreme Council of Judicial Ordinances (*Meclis-i Vâlâ-yı Ahkâm-ı Adliye*) by Sultan Mahmut II (1838) may be considered the beginning of the process that eventually led to the emergence of the *Nizamiye* courts. It was the earliest attempt to form a high court that had the potential to challenge the judicial monopoly of the *Şeriat* courts. The Supreme Council was primarily in charge of legislation in certain, limited fields, but it also served as a high court for cases that originated from such legal bodies as the governors' *divan*s in the provinces and other qualified judicial organs.[14]

The 1840s and the 1850s were characterized by uncertainty with regard to the general course of the judicial reforms, but clearly the most vigorous experimentation with judicial reform concerned criminal law.[15] The provincial conciliar bodies that were created with the *tanzimat* were given judicial authorities in certain criminal matters, namely, crimes punishable by penal servitude (*kürek*). However, regulations concerning the division of labor between these councils and the *Şeriat* courts, and also regarding the manning of the councils, were not quite consistent. For instance, the councils could be headed by notables who had official appointments, by the local *kadı* (*Şer'i* judge), or by professional administrators sent from the center. A sort of appellate procedure was laid down by subjecting decisions of the district (*sancak*) councils to review by the provincial council. Nevertheless, the extent to which these regulations were implemented is not at all clear.

The capital had its own judicial arrangements that were constantly refashioned during the 1840s and 1850s. During this period, several types of criminal courts were established and then abolished: the Gendarmerie Council (*zaptiye meclisi*), the High-Council of the Gendarmerie (*divan-i zaptiye*), and Council of Investigations (*meclis-i tahkik*), all of which applied the new criminal codes. The panel of this tribunal consisted of a president (*reis*), a member of the *ulema* (the learned class), five Muslim members (*âza*), in addition to four

representatives of the non-Muslim communities, the Greek-Orthodox, the Armenian, the Jewish, and the Catholic communities.[16] The inclusion of non-Muslims in the administration of justice exhibited the Ottoman commitment to the modern principle of equality before the law, a principle that was stated in the Imperial Decree of 1839. Scholars often refer to the Ottoman application of legal equality as yet another indication of *westernization*; but as a matter of fact, it was a revolutionary concept in Western legal systems as well.[17] Over the years, the composition of the court panels underwent changes, yet the basic concept remained the same: the court consisted of several judges, both Muslim and non-Muslim members from the local community, and was presided over by a professional judge appointed by the imperial center. This concept was entirely different from the *Şeriat* courts, which consisted of a single judge, the *kadı*, who was obviously always a Muslim.

The earliest experimentation in the noncriminal fields of the law was apparent in the commercial domain, and the reason for this is quite straightforward: the incorporation of the Ottoman Empire in the capitalist world system. Through free trade treaties that the Ottoman government signed with Russia (1829, Treaty of Adrianople), the United States (1830), and the United Kingdom (1838, Treaty of Balta Liman), the Ottomans removed formal restrictions on the activity of foreign traders. In his seminal work on the incorporation of the Middle East into the capitalist world economy during the nineteenth and the early twentieth centuries, Roger Owen makes the argument that demand from European markets was the major impetus behind both economic growth in the Ottoman Empire during the *long nineteenth century* and the peripheralization of the Ottoman economy.[18] Whereas this process resulted in growing economic and political dependency of the Ottoman state vis-à-vis the European powers, it also had a revitalizing impact on many Ottoman cities and on everyday life in general. During the second half of the century, urban commercial centers such as Izmir, Istanbul, Beirut, Aleppo, Haifa, Alexandria, and many others became more cosmopolitan, more multicultural than ever.[19] The growing interaction between local and foreign traders gave raise to complex business situations that had to be legally accommodated. The use of credit and purchase-in-advance in the mercantile communities expanded to an unprecedented scope, and foreign merchants had a hard time coping with violations of credit-based contracts and the nonpayment of debts by Ottoman subjects. The European consuls made a great effort persuading the Ottoman government to establish commercial courts

that would provide a standard means of settling commercial disputes between Ottoman and foreign traders. This effort was accompanied by diplomatic pressure to conduct business in accordance with British or French commercial law.[20]

In 1847, the first organ of what would soon become the *mixed courts* was established in Istanbul to address lawsuits between traders, be they Ottoman or foreigners. However, the absence of legal tools defining the operation of the tribunal was apparent, and a more serious legislative and administrative project was advanced in designing the commercial court, still defined as *council* (*meclis*). Within less than a decade, commercial tribunals were established in urban centers of considerable commercial activity, such as Izmir, Edirne, Selanik, Beirut, Cairo, Damascus, and Aleppo. These tribunals consisted of representatives of the Ottoman and European mercantile communities, assisted by translators, and they settled disputes between Ottoman and foreign merchants, and disputes among Ottoman merchants. In the latter case, the attendance of the European representatives was not required. The process of legal transplantation in the commercial domain was accomplished with the adoption of the French codes of land and maritime commerce in 1850, and the procedural code for the commercial courts in 1861.[21] Additional commercial tribunals were established in the process, and their administration was further rationalized.

The adoption of the commercial codes was quite significant as far as the process of legal borrowing in general was concerned. In the minds of the reformers and the legal community, it was recognized as a precedent that made a massive transplantation of civil law into the Ottoman legal system a viable option. It also set French law as the preferable model to be followed, rather than the British law. The Ottoman inclination toward the former was guided by practical reasons. The availability of a homogenous *code* divided into numbered articles promised a relatively smooth process of transplantation, in addition to the fact that commercial justice in England was unsatisfactory at the time, causing the British mercantile community to push for a comprehensive reform of the British commercial law.[22]

During the nineteenth century, the international community in the Ottoman domains was growing, as well as the number of the Ottomans who enjoyed ex-territorial legal rights. Civil and criminal conflicts between Ottomans and non-Ottomans, and among Ottomans who enjoyed foreign protection, presented a challenge to the Ottoman government that had to find legal solutions within the limiting context of the capitulations. The capitulations, or "privileges"

(*imtiyazat*), as the Ottomans called them, were originally concessions granted to foreigners by the Sultan in the framework of agreements with foreign states. The Treaty of Küçük Kaynarca, which concluded the Russo-Ottoman war of 1768–1774, rendered the capitulations a means for the Russians, and subsequently to other powers, to enjoy wide ex-territorial rights in Ottoman domains, thereby systematically undermining Ottoman sovereignty.[23] Since the mid-eighteenth century, a growing number of Ottoman individuals, including Ottoman employees of foreign consulates and embassies, dragomans, merchants, moneychangers, and people of other trades, enjoyed the desirable official status of foreign protégés, which exempted them from Ottoman jurisdiction in some legal and commercial matters. The commercial privileges associated with this position, such as reduced tariffs and tax exemptions, motivated a dynamic market of patents that guaranteed the status of protégé. In spite of recurring protests by the Ottoman government, European consuls and ambassadors sold patents of various categories to non-Muslim artisans, shopkeepers, and moneychangers, on the grounds that they were facilitators of business between Ottomans and foreigners. These patents soon became commodities that were bought and sold among non-Muslim Ottoman subjects, regardless of the capitulations' original *raison d'être*.[24] Feroz Ahmad argues that until the first decade of the nineteenth century, the Ottomans still thought of the capitulations in terms of reciprocal rights, which benefited them as much as the foreigners. But with the rising number of individuals enjoying ex-territorial privileges in Ottoman domains, the growing European political and diplomatic influence, and the wholesale abuse of these privileges by foreign subjects, it became clear to the Ottoman authorities that the capitulations were detrimental to Ottoman sovereignty. In the second half of the nineteenth century Ottoman frustration over the abuse of the capitulations was unequivocal.[25] Being the ultimate signifier of sovereignty, the legal system seemed to be ripe for drastic refashioning.

The Emergence and Consolidation of the *Nizamiye* Courts: 1864–1879

The modern principle of separation of administrative and judicial powers was one of the features that distinguished the *Nizamiye* law from the preceding concept of justice. Nevertheless, it was the centralizing reforms in the provincial administration that formed the immediate context to the emergence of the new judicial system. A vision of state centralization and rationalization resulted in what was

probably the most ambitious piece of legislation during the *tanzimat* period, namely, the provincial laws of 1864 and 1871, known as the *Vilâyet* Laws.[26] Signifying a transition from the phase of administrative experimentation to the phase of a generalized system of administration, this legislation redefined the imperial administration of the provinces. The laws established new administrative units arranged in a hierarchical structure and run by salaried bureaucrats appointed by the central administration. The provinces, termed now *vilâyet*s, instead of *eyelet*s, were headed by the provincial governor (*vali*). They were divided into provincial districts (*sancak*s or *liva*s), headed by the district governor (*mutasarrıf*). The latter units were subdivided into counties (*kaza*s), directed by the *kaymakam*. The counties were subdivided into townships (*nahiye*s), headed by the *müdür*s, and villages (*karye*s), headed by the headmen (*muhtar*s). Administrative significance was attributed to the provincial capitals, which were responsible for the lower administrative units in their jurisdictions. The provincial laws introduced the new concept of municipality into the Ottoman bureaucratic language. Despite some deviations from the rule, necessitated from special circumstances, the new administrative system was designed to guarantee the homogenization of administrative practice across the imperial domains.[27]

The judicial part of the provincial laws was a solid demonstration of legal borrowing from the French, forming a defining moment in the emergence of the *Nizamiye* court system as a whole. The provincial laws delineated a clearer judicial hierarchy and division of labor between the various judicial bodies. Three judicial organs were to operate in the province: the *Şeriat* court, the criminal tribunal, and the commercial court. The titles of these bodies showed continuity in the evolution of the courts: while the *Şeriat* courts, being a well-developed institution, were defined as *mahkeme* (court of law), the non-*Şer'i* judicial organs were still defined as *meclisler* (councils). On the whole, the latter were part of the administrative council system, which was the backbone of the new provincial administration. The founding feature of the councils was the combination of appointed office-holders and representatives from the local community, chaired by senior officials. The members of the councils were appointed by nominating councils (*meclis-i tefrik*). Rather than an expression of some liberal ideas of representation, the participation of the local representatives in the councils reinforced the underlying principle of state centralization, as the nominating councils consisted exclusively of state officials. The lower criminal tribunal was termed Council of Judicial Appeals and Crimes (*meclis-i temyiz-i Hukuk ve Cinayet*).

The provincial tribunal of appeal, entitled High Council of Appeal (*Divan-ı Temyiz*), served as a second instance and was composed of three Muslims and three non-Muslim members. It was presided over by the judicial inspector (*müfettiş*), who was appointed by the *Şeyhülislam*.[28] At this stage, the entire judicial system, including the commercial and criminal courts, was still subordinate to the office of the *Şeyhülislam*. The *Şer'i* judges, now termed *naib*s, were members in both the judicial and administrative councils.[29]

Legal transplantation typically begins with legislated texts that introduce borrowed concepts, but the positive law in itself is not necessarily an indication of the actual success of the transplantation. This was clearly the case with the judicial reforms that were introduced through the provincial laws. The concept of separation between the judicial and the administrative powers, which emanated from the French doctrine of separation of powers, was stated in the Ottoman provincial laws. However, as demonstrated in a recent study of Ottoman Vidin, the new councils were dynamic sites of social and political interactions at the local level, involving the imperial government, members of the local elite, and the wider population. Local notables served in both judicial and administrative councils at the same time, while identifying the new opportunities for exercise of power that were embodied in the new councils.[30] The tension between ideals and realities with regard to the concept of separation of powers persisted in later years, as I shall show later.

Whereas the administrative mechanisms established by the provincial laws remained valid until the demise of the Empire, the judicial part of these laws formed merely a stepping stone for more elaborate legislation, which reached a high point in 1879. The numerous regulations, laws, and imperial decrees issued between the years 1864 and 1879 reveal the extraordinary intensity that characterized the refashioning of the Ottoman judicial system. This dynamic effort of legislation and reorganization of the *Nizamiye* judicial system is a bewildering matter for the historian who wishes to put some order in what might otherwise look like a cacophony of administrative units, changing terminology, and constantly changing procedures. To this, one should add the fact that the imperial capital had its own judicial arrangements, which resembled, but were not identical to, the provincial ones. Additional complexity resulted from the existence of autonomous or semiautonomous provinces, which had their own judicio-administrative peculiarities, such as the Hijaz, Yemen, Mount Lebanon, Egypt, Crete, and Bosnia. Yet the single most important event in the evolution of the *Nizamiye* courts during the 1860s

and the early 1870s was the legislation of the *civil code*, the *Mecelle* (Mecelle-i Ahkâm-ı Adliye).

The brilliant reformer and jurist Ahmet Cevdet Paşa (1822–1895), who started his career as a *kadı*, was the figure most identified with the creation of the *Nizamiye* courts in the early 1860s. His educational background and worldview reflected a sociocultural environment, partially pervaded by new ideas about religion that were not configured along the European religious/secular divide; and Cevdet Paşa himself never thought in the binary terms of religious/secular.[31] In the years 1868–1876, Cevdet Paşa led the project of compiling a new civil code, known as the *Mecelle-i Ahkâm-ı Adliye*, which came to be a pillar of the civil domain in the *Nizamiye* court system and was used in the *Şeriat* courts as well. The legislation of the *Mecelle* was preceded by a debate among high officials over the question of whether or not to translate the French *code civil* and to apply it in the Ottoman courts. In the final analysis, the idea of adopting the French *code civil* was a consequence of the incorporation of the Ottoman market into the world economy. In his memoirs, Cevdet Paşa wrote that the expansion of trade between Ottomans and Europeans and the ensuing rise in the number of the latter in the Empire's territory posed a judicial challenge, especially since the Europeans complained about their disadvantaged position in the *Şeriat* courts.[32] Backed by the French ambassador and other members of the diplomatic community, the minister of commerce Kabuli Paşa led the group that supported the translation and adoption of the French *code civil*, and he even started to translate it to Turkish. Eventually, the group that preferred a civil code derived from Islamic law gained the upper hand over those who supported the adoption of the French code, and Cevdet was appointed to head the committee to draft the first Ottoman civil code.[33]

The *Mecelle*, enacted between 1869 and 1876, included sixteen books addressing the issues of sales, debts, ownership, lawsuits, evidence, and judicial procedure, to name but a few.[34] It was Islamic Hanafi law adjusted to meet actualities. At the same time, the code echoed principles derived from French law in terms of substance and structure. Scholars differ as to the actual nature of the *Mecelle*. According to Joseph Schacht, "The experimentation of the *Medjelle* was undertaken under the influence of European ideas, and it is, strictly speaking, not an Islamic but a secular code."[35] Majid Khadduri and Herbert Liebensky, on the other hand, argue that the *Mecelle* is not a code in the European sense, but rather a "nonconclusive digest of existing rules of Islamic law."[36] It seems to me that both positions

are guided by an "either-or" impulse, having two supposedly dichotomous and homogenous categories in mind, the *Şeriat* and European codes, or religious and secular, respectively. These options do not take into account the possibility that a full-fledged civil code could be a hybrid legal artifact, containing both Islamic and European features. In fact, the *Mecelle* meant more than merely a new organization of Hanafi law into numbered articles. What made it a "real" civil code, comparing to the old *kanunname*s (digests of sultanic law), was its mode of application as a legal standard in force in *Nizamiye* and *Şeriat* courts throughout the empire, whereas previously, the judge addressing civil and criminal matters in the *Şeriat* court had a considerable leeway in choosing the sources relevant to this or that case.[37] In retrospective, the *Mecelle* was proven a remarkable Ottoman achievement, as it survived in the legal systems of most of the nation states that succeeded the Ottoman Empire into the 1980s. The single non-Muslim state in the Middle East, Israel, was among the last ones to abolish the *Mecelle* in 1984.[38]

The first Ottoman constitution (Kanun-ı Esası, 1876) included a section on the courts that can be seen as a synopsis of the principles that were deemed to be the pillars of the reformed court system.[39] Though this law was abolished in 1878, mainly due to its inherent liberal implications, its stress on the rule of law remained unchallenged in the years that followed. In the judicial sense, this law was never truly abolished. Each of the ten clauses that dealt with the courts (clauses 81–91) was an embodiment of the rule of law: judges were not to be removed from office unless subject to criminal charges; trials were to be public with the exception of special situations prescribed by law; courts were not allowed to dismiss cases that belonged to their jurisdiction, including cases that involved lawsuit between individuals and the state; the courts were totally independent, and interference with their decisions was prohibited; the courts (both *Şeriat* and *Nizamiye*) were to be the only legitimate judicial bodies; judges were not allowed to hold nonjudicial offices; public prosecutors were to be appointed. The Constitution prepared the ground for subsequent legislation, stipulating that a particular law would lay down the structure of the new court system and the related specificities.[40]

THE STRUCTURE OF THE COURT SYSTEM AFTER 1879

The creation of the *Mecelle* and its legislative aftermath illustrates the contingent nature of legal borrowing and the unexpected twists and

turns it might take. The selective transplantation of French legal concepts, evident in the council system and the codification of criminal and commercial law in the 1850s and the 1860s, was followed by the reenforcement of *Şer'i* law in the form of the *Mecelle*. Yet the latter did not signal standstill as far as legal transplantation was concerned. In 1877 the government sent a senior jurist Vahan Efendi to study the various judicial procedures employed in Europe and propose the one most suitable for the Ottoman legal system.[41] Merely three years after the publication of the last part of the *Mecelle*, legal transplantation was rigorously resumed with the introduction of two procedural codes and a reform law. The *Code of Civil Procedure*, the *Code of Criminal Procedure*, and the *Law of the Nizamiye Judicial Organization*, all published in 1879.[42] These laws rendered the *Nizamiye* courts more similar than ever to their French equivalent, although the Ottoman legislature did not intend to turn its courts into a replica of the French legal system, and the hybrid nature of the Ottoman legal borrowing was maintained.

The three laws were a milestone in the evolution of the *Nizamiye* courts not only because they improved the daily routine in the courts and made them more efficient, but also because they signified, and at the same time enforced, a new formalistic legal culture, which I shall discuss in depth in chapter three. The *Code of Civil Procedure*, containing 297 clauses, was prepared by the same committee that had drawn up the *Mecelle*. It was a hybrid text that exhibited a good deal of *Şer'i* principles. The 487-clause *Code of Criminal Procedure*, however, was not hybrid, in the sense that it did not resort to any *Şer'i* principles of criminal procedure. At the same time, the transplantation was clearly selective, and French concepts that were not in line with the autocratic, centralizing motivations of the Hamidian state were not adopted. This was the case with the jury system, which existed in the French legal system. In what follows I portray a schematic picture of the structure of the *Nizamiye* courts, the way it was laid down by the procedural codes and the *Law of the Nizamiye Judicial Organization*.[43]

General Structure

The court system as a whole consisted of three judicial levels: the courts of first instance (*bidayet*), the courts of appeal (*istinaf*), and the Court of Cassation in Istanbul (*Mahkeme-i Temyiz*). The law divided each court into civil (*hukuk*) and criminal (*ceza*) sections. The *Law of the Nizamiye Judicial Organization* recognized the councils of elders

in the villages and the townships as peace tribunals, authorized to try minor offenses that required monetary punishment, and settle minor civil disputes upon the consent of the parties involved. In actuality, however, the *Nizamiye* community never recognized the councils of elders as courts of law. Arguably, these councils did not function as regular peace courts, and the agreements they facilitated could not be brought before the courts.[44] During the period of the Young Turks, the *Law of the Peace Judges* (1913) was an attempt at instituting full-fledged peace courts run by professional judges, but it is not clear to what extent it was implemented.[45]

The judicial personnel in the *Nizamiye* courts consisted of individuals trained in the *İlmiye* educational institutions, namely, *medrese*s, alongside graduates of the *Nizamiye* Law School (established 1878), the School for *Şer'i* judges (established 1855), in addition to other educational institutions that were founded in the course of the *tanzimat* venture. This composition did not change until the period of the Young Turks.[46]

The division between the imperial capital, "the abode of felicity," and the provinces had always been a fundamental notion in Ottoman political imagination. The capital was not only the administrative nerve center of the empire, but in its capacity as the city where the sultans, "the shadow of God on earth," resided, it assumed a sense of elitism and cultural superiority. This elitism, signified by the division between the center (Dersaadet) and the provinces (*taşra*), was reflected in institutionalized markers of prestige, namely, the establishment of first-class and second-class judges. This distinction, in itself, was merely a continuation of an earlier practice, yet it had new implications, given the overall transformation of the judicial system. The judges of the second class (*mertebe-yi saniye*), which were deemed to be more prestigious and were better paid, consisted of the court presidents, members, and prosecutors of the imperial capital, and their appointments were sanctioned by an imperial decree. The judiciary of the first class (*mertebe-yi ulá*) consisted (with few exceptions) of the provincial judiciary, who were appointed by provincial committees. The staff that was not involved in adjudication, namely, notaries, clerks, bailiffs, and execution officers, belonged to the first class. To qualify for inclusion in the second class, judges had to be either outstanding graduates of the Law School, or individuals of considerable court experience, not necessarily as judges. They could be former clerks in the courts of the capitals or in the Ministry of Justice, head clerks or execution officers in the provincial courts of appeals, and similar positions.

The Courts of First Instance

The hierarchical structure of the courts and their jurisdictions followed the pattern that had been prescribed by the provincial laws. The courts of first instance, which were the backbone of the system, were of three types, in line with the status of the administrative unit in question: the county (*kaza*), the provincial district (*liva*), and the provincial centers (*vilâyet*). In each of these units there was a court of first instance that saw cases in accordance with its hierarchical status. Hence, the county courts of first instance addressed civil cases of lower sums and criminal offenses of lower severity, whereas the courts of first instance at the provincial centers addressed cases of the highest sums and highest criminal severity. To what extent the separation between criminal and civil sections was maintained in the county courts of first instance is not entirely clear. It appears that in most places the same panel addressed both civil and criminal cases.[47] In counties that lacked courts of commerce, the courts of first instance addressed commercial disputes as well. In the late 1880s, there were forty-seven specialized courts of commerce in the empire.[48] Each of these courts consisted of a president and four members (two permanent, and two ex-officio). The capital had its own unique arrangement: the First Court of Commerce (*Birinci Mahkeme-yi Ticaret*) addressed disputes between Ottoman and foreign merchants; each day was dedicated to merchants of a specific nationality.[49] The Second Court of Commerce (*İkinci Mahkeme-yi Ticaret*) addressed disputes between Ottoman merchants. The Court of Maritime Commerce (*Ticaret-i Bahriye Mahkemesi*) formed another judicial forum.

The composition of the court panels reflected their level in the judicial hierarchy. The panel of the county courts consisted of a president (*reis*) and two members, one of which was in charge of the scribal duties (*başkâtip*), while the president and the other member performed pretrial investigations. In courts that maintained the division between the criminal and the civil sections, which was the standard in the provincial district courts and the courts of first instance at the provincial centers, each section had its own panel, consisting of a president and two members. The panels were assisted by additional clerks, assistants, and bailiffs as needed. In most county courts, and in the civil sections of the higher courts of first instance, the president of the *Nizamiye* court was the local *Şer'i* judge, namely, the *naib* who sat in the *Şeriat* court. In courts of first instance that maintained the division between the civil and the criminal sections, the president was an employee of the Ministry of Justice.[50]

In 1879 the *Provisory Law concerning the Execution of Civil Court Decision* (*İlâmat-ı Hukukiyenin Suret-i İcrasına Dair Kanun-ı Muvakkat*) rationalized an important aspect of the execution of court decisions.[51] According to this law, the presidents of the civil sections were responsible for the execution of court decisions, with the assistance of execution officials. The gendarmerie was instructed to assist the courts in executing their decisions.[52]

The Courts of Appeal

Courts of appeal (*istinaf*) operated in the provincial centers, namely, in the counties defined as the centers of the provinces. In these courts, the division to civil and criminal sections was sustained in several provinces, while in others the same panel saw both criminal and civil cases.[53] In the former case, each section consisted of a president and four members, two of whom were appointed officials and the other two were ex-officio, selected by nomination committees from among the local notables. The president at the civil section was a *naib,* and the president of the criminal section was an official appointed by the Ministry of Justice. As prescribed by the *Code of Civil Procedure*, litigants could appeal decisions of the lower civil courts in civil disputes that involved the minimum amount of 5,000 *kuruş*, or which pertained to properties of a similar value. The right to appeal within sixty-one days from the issuance of the contested ruling rested with both the defendant and the plaintiff in the original case, and with other related parties, such as heirs, guardians, directors of commercial companies, and representatives of administrative units. The appellate petitions had to follow the formal guidelines and be submitted directly to the courts.

In addition to judicial review of rulings that emanated from the lower courts in their jurisdiction, the criminal sections of the appellate courts also served as first-instance courts for severe crimes (*cinayet*) that occurred in their respective provincial district, upon the recommendation of an investigatory body called Indictment Committee (*heyet-i ittihamiye*) and the public prosecutor. In such cases, an appeal could be brought to the Court of Cassation.

The Court of Cassation

The high court underwent several modifications since its establishment in 1861, then part of the highest legislative body, the Supreme Council of Judicial Ordinances (*Meclis-i Vâlâ-yı Ahkâm-ı Adliye*),

and until the reforms of 1879, when it was named after its French equivalent, the Court of Cassation (*Mahkeme-i Temyiz*).[54] The duty of the Court of Cassation, which was located at the Ministry of Justice, was limited to deciding on the legality of the judicial decision under review in response to appellate petitions. It could quash (*nakz* in Ottoman, from the French *casser*) judicial decisions on both substantive and procedural grounds, but it never revised the actual ruling of the lower court. Once a civil, commercial, or criminal court decision was quashed, the case had to be readdressed by the same court that had originally heard it, or, pending the agreement of both parties, the case was sent to another court of the same instance. If the decision was quashed due to a breach in procedure and if the judicial circumstances would allow it, the lower court could correct only the specific fault identified by the Court of Cassation. Otherwise, the case had to be retried. If a case that had been quashed in the Court of Cassation and returned to the lower court for revision was readdressed in its entirety, it would be quashed again by the Court of Cassation.[55]

Members of the Court of Cassations, appointed by a committee of senior judicial officials, had to be at least forty years old and of considerable experience in the judicial system. The president of the high court could be appointed only from among the members of the same court, or from among the presidents of the appellate courts. Once appointed to the Court of Cassation, members and presidents were not to be removed from office without their consent. Originally, this court was divided into criminal and civil sections, each consisting of six members and a president. In 1887, an additional department, the Petition Department (*istida dairesi*), was founded, which decided on the basis of documents, without conducting hearings. The Petition Department addressed appeals on civil rulings as well as criminal court decisions that pertained to crimes of low and medium severity (*kabahat* and *cünha*, respectively). The foundation of this department was a manifestation of the formalistic legal culture that characterized the *Nizamiye* court system, which I shall discuss in chapter three.

The Ministry of Justice

The administrative ancestor of the Ministry of Justice was established by Mahmut II in 1836, then defined Ministry of Trials (*Nezaret-i Deavi*), as part of the introduction of a modern administration that was based on specializing ministries. The justice

ministry was modified in tandem with the general progression of the judicial reforms, and in 1870, when it was renamed Ministry of Justice (*Nezaret-i Adliye*), it assumed its role as the administrative headquarters of the *Nizamiye* court system and the facilitator of judicial reform until the demise of the Ottoman state. Ministerial positions during the nineteenth century were subject to dynamic, sometimes too dynamic, rotation, when ministers served in their positions no longer than a year. This was also the case with the Ministry of Justice. During the three years that preceded the 1879 reforms, this position was manned no less than eight times, no tenure lasting more than a year.[56] Among all the ministers of justice in this period, only Cevdet Paşa was a legal expert, and it appears that he was most influential in shaping the *Nizamiye* institution in its early stages. The hectic change of positions while judicial reforms were underway suggests that these ministers, with the exception of Cevdet Paşa, did not have a significant impact on the general progression of the reforms. Serving merely several months in office, they certainly could not possess the sort of specialized knowledge that was required for getting involved with the legal nuts and bolts. It seems, therefore, that the judicial change in question was undertaken by the senior officials at the ministry, rather than the ministers in charge.

Exceptional in this regard was the case of Said Paşa, who was the minister of justice from December 1878 until October 1879, when he was appointed Grand Vizier and replaced in office by Cevdet Paşa. The consecutive terms of Said and Cevdet, two of the brightest statesmen of the Hamidian era, formed an energetic momentum, as both were personally involved with the final consolidation of the *Nizamiye* court system, through the reforms of 1879. In 1886, following the appointment of Said to the Grand Vizierate, Cevdet Paşa returned to lead the justice system for the last time for an exceptionally long term, which lasted until 1890. During this period he did much to rationalize the appointment procedures and the working of the courts in general. Cevdet's term marked a change in the pattern of rotation, as the terms in office became longer. His successor Hüseyin Rıza Paşa served five years in office, and the last minister of justice during the Hamidian era, Abdurrahman Nureddin Paşa, served thirteen years in office, from 1895 until 1908.

So far I have sketched out the evolution of the *Nizamiye* court system, and its resulting structure. The rest of the chapter will be dedicated to examining the major challenges that confronted the designers and practitioners of the *Nizamiye* law.

ASPIRATIONS AND REALITIES: LAW IN ACTION AFTER 1879

Independence of the Courts

The principle of the separation between the judicial and the administrative authorities was stated in the provincial laws and in the Constitution (1876), but it was not really applied until 1879. This principle was put into judicial practice through article 20 of the *Law of the Nizamiye Judicial Organization* and article 3 of the *Code of Civil Procedure*. In addition, several significant administrative measures were taken. For instance, administrative officials (*mülkiye*) were no longer allowed to accept petitions that pertained to judicial matters. The earlier procedure of submitting rulings of the Court of Cassation to the Grand Vizierate for ratification was abolished. By the same token, the practice of sending protocols from criminal trials to the Ministry of Gendarmerie was also brought to an end. The involvement of the Secretariat of Foreign Affairs (*Hariciye Kitabeti*) in disputes that involved foreign subjects stopped.[57]

Of all the challenges related to a judicial transformation of this scope, grave as they may have been, putting the principle of judicial independence into practice was probably the most difficult task that the Ministry of Justice faced. In order to appreciate how radical this idea was in the minds of Ottoman officials, one needs to recall the centrality that the institution of the *kadı* had in the Ottoman administration for centuries. The official responsibilities of the prereform Ottoman *kadı* included both judicial and administrative duties. In the course of the centuries, the *kadıs* throughout the empire assumed an increasing number of administrative duties, to the extent that they became the most important, indeed busy, figures in the local administration. Their daily administrative tasks included a remarkably wide range of duties: they regulated and inspected the markets, they supervised the proper administration of the pious endowments (*vakıf*s), they ensured the proper distribution of inheritances and the preparation of wills, they supervised the administration of the *timar*s, they appointed the religious service providers such as the local prayer leader (*imam*) and the mosque preacher (*hatip*), they were authorized to manumit slaves, and they were in charge of the proper registration and administration of all sorts of contracts, from business to marriage, in addition to other official tasks that emanated from local circumstances.[58] This is not to say that there was no division of labor between the judiciary (*ehl-i şer'*) and the administrative authorities (*ehl-i örf*) prior to the nineteenth century—there certainly

was. However, it had little in common with the modern doctrine of separation of powers, which was supposed to secure the independence of courts. The provincial laws removed most of the administrative tasks from the *kadi*s and reassigned them to the local administrators, but they did not establish clear mechanisms to realize the ideal of the independence of the courts. The Ministry of Justice endorsed the separation of powers as an ideal that also called for the independence of the courts; yet it took time until the principle took root in the provincial administration, and even in the government. In the meantime, intervention of provincial governors (*vali*s) in judicial decisions was a common practice.

The separation of powers was encountered with antagonistic reactions as soon as this principle was set in motion. In October 1879, Sir Austen Henry Layard, the British ambassador in Istanbul, sent a worried report about the reforms to the Marquis of Salisbury, the British foreign secretary. Layard wrote that during his recent journey in the provinces he heard "the gravest complaints" against the new reform. "These complaints, which come from the Turkish authorities and others whom I saw, were fully borne out by the information that I received from Consular Agents of England and countries."[59] Layard specified several problems, such as incompetence of the individuals appointed as judicial inspectors and public prosecutors, and the reduction of the salaries of judges as a means of funding the costs of the reforms, in addition to favoritism and other ill practices. He dedicates a paragraph to complaining about the separation of the administrative and judicial powers:

> The removal of the tribunals from all control on the part of the Valis, their so-called independence, though good in principle, has been decided upon too soon. When a class of learned, intelligent, and honest judges has been formed, it will be quite right to make the tribunals independent; such a class does not, unfortunately, at present exists. The present judges are for the most part notoriously ignorant and corrupt. To place them beyond the control of the Valis [. . .] is to give full play to corruption and injustice. The Valis, when appealed for redress, reply that they are forbidden to interfere with the Tribunals, and neither redress not justice is to be obtained.[60]

Ambassador Layard raised the same concerns during an audience with the sultan, who seemed surprised to hear about these grievances. During that audience, the ambassador expressed full confidence in the provincial governors, whom he described as "capable and honest men, anxious for the improvement of the province in their charge,

and for the welfare of their inhabitants, and enjoyed the confidence of the populations, Christian as well as Mussulman."[61]

This idyllic description of the governors, contrasted with the general incompetence that the ambassador repeatedly attributed to the judicial officials in many consular reports during the early 1880s, should not be taken at face value.[62] At that very early phase of the reforms, British diplomats could receive information about new courts only from provincial governors and other senior Ottoman administrators, who were concerned about the apparent implications of the courts' independence on their political power. The separation between the judicial and administrative powers, a radical innovation in the history of the Ottoman Empire, led to power struggles at the level of the provincial administration, as demonstrated in the following account, given by the British consul at Sivas:

> For instance, a notorious robber is arrested and imprisoned by the Vali; if no plaintiff appears within a certain time the law directs that the man should be released. In the case the Mufettish [judicial inspector] or Mudaioumum (Public Prosecutor) sends a written order for the release of the prisoner to the officer of the Zaptiehs [gendarmerie]; the officer takes the order to the Vali, who directs him to pay no attention to it; a quarrel then ensues between Judicial and Administrative.[63]

Following the free trade treaties of the 1820s and the 1830s, foreign consuls increased their activities in the Ottoman provinces and were expanding their power, often exercising influence with senior officials on the one hand, and encountering resistance from local officials of the lower level on the other.[64] The British consuls realized that the removal of the governors' power from the judicial sphere would eliminate an important channel of exercising foreign influence in local affairs. Vice-Consul Gatheral wrote in October 1881 that "the work of a Consul become much more difficult, because the influence he was formerly able to exert through the Vali was to a great extent lost."[65] British consular reports reveal that members of the consular corps were meeting with governors regularly, cultivating relationships with them in their efforts to promote the interests of the British government in the various provinces. Hence, there appeared to be a sort of ad-hoc collaboration between some governors and the consuls, in an effort to work against or around the independence of the courts. In December 1879, the governor of Konya told Vice-Consul Stewart that "these courts and inspectors may be necessary in highly-civilized communities, but expensive and unnecessary luxuries here;

that the cases are generally simple, and do not require a very scientific procedure."[66]

The pressure to compromise the principle of the courts' independence was substantial and, at times, successful. In November 1880, the Ottoman government ordered the courts in the province of Trabzon to refrain from releasing violators of the public orders who had been arrested by the administrative authorities, without the governor's consent.[67] Various sporadic attempts of the government to contravene the law and to interfere with judicial proceedings were evident in other cases, especially in politically sensitive circumstances. Thus, for example, the central government restored the provincial governors' authority in the eastern Anatolian provinces in 1888 to interfere in the working of the courts as a means of handling the growing tensions between Armenians and Kurds in these regions.[68] In Mount Lebanon, governors were particularly reluctant to give up their control over the judiciary, exhibited in their involvement with appointments, dismissals, and interventions in judicial proceedings. The Hamidian regime tended to close its eyes to this local deviation from the doctrine of the courts' independence. Not before 1912, however, and following frequent grievances, the government warned the provincial governor of Mount Lebanon against intervening with the judicial matters. This move was proven effective, as "the principle of the independence of the judges from administrative control became reasonably established in Mount Lebanon."[69]

British views about the judicial reforms were guided by their political and economic interests in the provinces, and they, therefore, adhered to a double standard with regard to the separation of powers. In 1881, the British consul at Sivas Sir Charles Wilson protested in his report against the influence of Governor Hakkı Paşa on the courts of Sivas (central Anatolia), which defeated "the primary object of the new Regulations." He argued that the payment of the judges' salaries in that province depended on the signatures of the governor or the provincial treasurer (*defterdar*), as a means of rendering the judicial staff totally submissive to the former. He mentioned a case in which the salary of the judge at the criminal court of appeal was withheld because "he showed a certain independence during the trial of the Armenian rioters."[70]

The objections of the provincial governors and the consuls to the reforms were usually guided by interests. Yet sheer ignorance on the part of the consuls regarding legal matters in general and the nature of the new Ottoman courts in particular, in addition to the usual patronizing attitude toward the easterners, further contributed to the

grim depictions of the new courts. The following view, written by Vice-Consul Stewart in his reports on the courts of Konya, in central Anatolia, may be indicative:

> The Cadi is said to be honest, but, like most of his class, fanatical. He is President of the Civil Appeal Court, as well as the Sheri [Şeriat court]. He openly deplores having to judge according the civil law. He looks with hatred and contempt on any other law but Sheri and Mefelle [should be Mecelle], and decides, whenever possible, according to them. A very necessary reform is to deprive this class of officials of appointments in the common law courts. It is impossible to expect such officials from their religious training to be anything else but fanatical.[71]

This depiction was nonsensical. The vice-consul, who portrayed the judge as a religious fanatic who did everything in his capacity to avoid the civil law and apply the *Mecelle* instead, missed the fact that the *Mecelle* was actually the civil law. Equally nonsensical was the usage of "common law courts" in the context of a judicial system that was modeled after the Continental law. A similar demonstration of ignorance concerning Ottoman law was apparent in the absurd report of Ferdinand Bennet, the vice-consul of Anatolia, on the civil section of the *Nizamiye* court in the Anatolian *sancak* of Kayseri:

> This court is subdivided, religious cases in which Moslems only are concerned being dealt with, if the litigants desire, by the Judge alone (assisted by the Mufti, if necessary), according to the law of the Koran Scheri. Cases in which Christians only are concerned, or a Christian and a Mahommedan, or Mahommedans only, if they desire it, are brought before the Judge and members of the Court, and are decided according to civil law and the Mejeb [should be *Mecelle*]. This Mejeb is a compilation from the Koran, commenced long ago and being constantly added to; it is an attempt to reconcile the inconsistencies and contradictions of the Koran, I believe, arranged so as not to clash with existing civil laws and to present the Koran in a practical and acceptable form to the people; but the Turks have never got over their aversion to the laws of man, and would hail with rapture the total abolition of this side of the Bidaet Hukuku.[72]

Resistance of local administrators to the independence of the courts was apparent throughout the 1880s and the 1890s, and it encountered recurring attempts of the central judicial administration to enforce the separation of powers. In June 1885, the ministry informed its officials that the military chief of staff (*makam-ı âli-yi serasker*)

had received several reports according to which administrative officials ordered, verbally and in writing, police officers to postpone the execution of arrest warrants issued by judicial officials. This intervention was considered pressing enough a matter to be handled at the Council of State. The latter issued a decision prohibiting any such intervention from administrative officials, thus reinforcing the principle of separation of powers.[73]

The Council's decision was implemented only to a limited extent though. Thirteen years later, in 1898, the ministry wrote to its employees that although it had time and again reiterated the principle of the courts' independence in all legal matters, "several administrative officials intervened in judicial matters, hence violating the authority of judicial officials." The ministry explained that substantive and procedural laws were designed, above all, to secure the separation of powers.[74] The last part of the circular, the bottom line really, provides a glimpse at the local political dynamics. The ministry complained that according to recent reports, people of influence had been appointed as court members. It explained that membership in the *Nizamiye* courts was not akin to membership in the municipal councils. The ex-officio court member was required to fill in for the professional president of the court or the public prosecutor in their absence, and therefore should possess the appropriate qualifications. The ministry blamed mainly the nominating committees that did not act "neutrally."[75] Hence, as far as the ministry was concerned, the intervention of administrative officials in judicial affairs and the intervention of people of influence in appointments with the intention to promote private interests were part of the same problem, namely, the vulnerability of the principle of the courts' independence. The ministry's clarification that "membership in the *Nizamiye* court was not akin to membership in the municipal councils" reflects a paradox that the ministry faced on the issue of appointments. The municipal councils were composed of ex-officio and elected members. Membership in the municipal councils was often a prerogative of certain families, and given the fact that council members were not paid a fixed salary, they obviously were members of the elite.[76] Members of the *Nizamiye* courts were elected as well. Clearly, power-holders at the local level identified in the *Nizamiye* courts of first instance opportunities similar to those evident in the councils. But while the center seems to have accepted the influence of local notables in the councils as a given, regardless of its efforts to assimilate local power bases into the state apparatus, such practice clearly could not be tolerated in the judicial sphere because it seriously undermined the principles of the courts'

independence and separation of powers. At the same time, there was not much the ministry could do, given the existing method of selecting court members.

Financing the Courts: The Price of Justice

One could hardly imagine a poorer timing for the launching of the judicial reforms in 1879, when the Ottoman state experienced one of its worst financial crises ever. Since the mid-1850s, the Ottoman government was accumulating debts as a result of massive borrowing, starting with the sale of long-term bonds in the European financial markets as a means of financing the Crimean War. The dramatic rise in exports, the availability of international capital, and the increase in direct foreign investment created an ambiance of economic prosperity during the first half of the 1860s. European lenders took advantage of the Ottoman demand for cash, thus imposing stifling interest rates that were as high as 10–12 percent. In the late 1860s, it became evident that the accumulated debts had reached a dangerous point, the overall amount of debts being larger than the total state revenues, in addition to the unexpected shortage in European capital following the depression of 1873. Rather than proclaiming bankruptcy, the government declared a moratorium on the payment of debts in 1875–1876 and demonstrated willingness to work out a financial formula that would allow it to meet the claims of its creditors. The financial deterioration throughout the 1870s resulted in the foundation of the Public Debt Administration, an organization controlled by European officials, which guaranteed the payment of debts and the availability of foreign capital under more reasonable terms.[77] The government in general and Said Paşa in particular were eager enough to get the new project of judicial reform underway in spite of its heavy costs.

The introduction of new salaried positions, such as judicial inspectors and public prosecutors, together with the establishment of an appellate mechanism, the expansion of the court system and the rationalization of its daily working procedures, was a costly business that put a considerable burden on the provincial treasuries.[78] The latter paid the salaries, and the amounts differed from one province to another. In Adana (southern Anatolia), for instance, the monthly wage of the president at the civil section of court of first instance was 3,000 *kuruş*, among the highest salaries in the provincial administration. The total amount required for covering the wages of the presidents, the court members, and the scribal staff in both the civil and

the criminal sections of the Adana court of first instance exceeded 8,000 *kuruş* per month. An additional amount of 13,000 *kuruş* was required for the salaries of the staff of the provincial court of appeal, and 6,000 *kuruş* for salaries in the court of commerce. The judicial inspector earned 7,500 *kuruş* per month. The public prosecutor earned 3,000 *kuruş*, and his deputy was paid 1,800 *kuruş* a month.[79] In poorer provinces wages could be significantly lower: 1,000 *kuruş* for a president at the court of first instance, and 70 *kuruş* for each member of the court.[80] The poor budgetary situation throughout the empire rendered these expenses very difficult to meet, resulting in the haphazard payment of salaries during the transitional phase. In 1879, the prominent reformer and statesman Midhat Paşa, then the provincial governor of Syria, was frustrated enough to order his subgovernors to avoid executing the judicial reforms in the criminal sections of the courts. Midhat Paşa, who was furious at the Grand Vizier Said Paşa, explained to the British ambassador Layard that he took this drastic measure in protest against the fact that judges earned "miserable salaries, were irregularly paid and sometimes not at all," a situation that called for corruption, as Midhat Paşa warned.[81] The temptation faced by the judicial staff to take bribes in order to make the ends meet was immense. Indeed, the British consular reports as well as Ottoman correspondence indicate that judicial corruption was a widespread phenomenon in this period, although it is impossible to determine its scope in accurate terms. Corruption and the responses of the central judicial administration to this problem will be discussed in chapter four.

It seems that toward the late 1880s, after completing the transitional phase, the financial situation of the court system stabilized, as it became almost self-sufficient and more efficient, as a result of an elaborate system of court fees that had to be specified in the court decisions, since 1879.[82] Each and every action that involved the courts had its price tag. For instance, every document seen by the court cost the court user a registration fee of 5 *kuruş*. In order to initiate the judicial process in civil cases, the plaintiff had to pay the court a fee equal to 25 percent of the disputed sum specified in the petition. If such a sum was not specified, the plaintiff was summoned to court in order to determine the fee, and only then the judicial action could proceed. Issuance of a decision at the court of first instance cost from 10 *kuruş* for lawsuits of up to 500 *kuruş*, to a fee of 100 *kuruş* for lawsuits pertaining to an amount of 3,000–5,000 *kuruş*. Every additional 1,000 *kuruş* of value cost an additional fee of 20 *kuruş*. Each page of a summons-list entailed a fee of 5 *kuruş* in the court of first

instance, 10 in the courts of appeal, and 20 *kuruş* in the Court of Cassation. Every notification had a price tag of 10 *kuruş* plus extra charges pending the distance of the addressee from the court. A litigant who submitted a Protest against the Decision (*itiraz'al'ülhüküm*) took the risk of having to pay another 25 percent in case of rejection. A petition to the court of appeal could cost the appellant 100 *kuruş* in case of rejection. Litigants who appealed to the Court of Cassation had to take the risk of paying a fixed fee of 200 *kuruş*, if the court found his appeal unjustified, yet if the court accepted his petition and sent it as a result back to the lower court for revision, the appellant had to bear the cost of a second trial. If a litigant thought that there was a reason for submitting a request for disqualification of one of the judges, and his request was denied, he had to pay the court 50 *kuruş*. Execution of court decisions required the payment of additional fees.[83]

Convicts had to bear the expenses of their trials, which were prescribed in the court decisions, in proportion with the severity of the crime. Offense convicts (*kabahat*) were charged a fee of 20 *kuruş,* and felony convicts (*cinayet*) were charged 100 *kuruş*. A person who had been convicted for a crime of medium severity (*cünha*) or a felony, and wanted to appeal to the court of appeal, was charged a fee of 100 *kuruş*. Failure to pay these expenses resulted in the seizure of the convicts' properties and their sale by auction to cover the judicial dues. The revenues provided by the judicial fees were used to pay the salaries of the judicial staff, in addition to other expenses, such as payment to expert witnesses.[84]

This extensive system of fees, which were handled by the courts through coffers that existed in each of the courts, sustained their daily operation and reduced the temptation to take bribes. An elaborate procedure of registration and report that was regularly checked by the provincial public prosecutors allowed a good deal of transparency.[85] However, it presented some serious problems as well. The handling of large sums of money required procedures regarding the nitty-gritty issues that concerned the collection of fees and fines, the transfer of money between administrative units, reimbursements, and the strict supervision of these actions through registration and report practices, in addition to disciplinary measures for the enforcement of such practices. The establishment of this complex financial system that sustained the courts across the empire was an impressive achievement of the Ministry of Justice. Yet its complexity and scope called for irregularities as well. Inadequate registration of fees and fines in court decisions was a common problem that impeded revenues, also causing

problems with the execution of the rulings. Problems occurred in the handling of bail in criminal matters and guarantees in civil matters, as well as in the management of the properties and money of convicts. The ministry constantly tried hard to improve the relevant procedures.[86]

The high price of justice was another, more serious problem generated by the burdensome fees. A vast body of critical legal scholarship that addresses social inequality in modern judicial systems has been accumulated since the 1970s. To put it simply, this critique aims at demonstrating that legal liberalism has worked best for those with economic and political power by allowing them to dominate, and even oppress, those less fortunate, thus creating unprecedented gaps between the wealthy and the poor. "The rule of law" is thus presented as a myth.[87] The issue of the accessibility of modern courts to the poor is addressed in numerous studies that examine various judicial contexts. These studies demonstrate that people of limited means cannot fully benefit from modern legal regimes.[88] This feature of the modern court was also evident in the *Nizamiye* courts, especially after their final consolidation, when the cost of the *Nizamiye* justice rendered it less relevant to the lower classes.[89] Yet, the increasing costs of justice in the nineteenth and the twentieth centuries should not be interpreted nostalgically as a sharp deviation from an otherwise egalitarian epoch. In his study on the courts of Çankırı and Kastamonu during the seventeenth and the eighteenth centuries, Boğaç Ergene shows that the poorer inhabitants of this region preferred to avoid the courts due to high court fees. He further argues that the amounts charged for judicial services increased significantly over a period of sixty years.[90] This change of the early-modern court may indicate a beginning of the alienation of the underprivileged classes from the modern courts. Then again, more research on the costs of Ottoman justice in the preceding periods is required in order to make a definite argument.

The Performance and Integrity of the Courts

How effective were the *Nizamiye* courts? Any normative assessment of the overall performances of these courts cannot be but sketchy. The concept of *judicial effectiveness* is theoretically fluid to begin with. Evaluations of the efficiency of court systems that are based on comparisons between ideals and actual practice would most likely yield grim conclusions about the effectiveness of modern legal systems across the board. This is evident in numerous studies produced

by the school of Critical Legal Studies, which seriously question the ability of the modern legal systems to live up to their glorified ideals of rationality, objectivity, and efficiency.[91] In order to be meaningful, a historical (as opposed to ahistorical) analysis of judicial effectiveness will have to be comparative in nature, based on an examination of data produced by judicial systems that operate within a defined period of time, an ambitious task that will require a collaborative project involving historians working on different regions of the world. Such a project is yet to be accomplished. An additional difficulty in the study of judicial effectiveness during the nineteenth century (and increasingly during earlier periods) emanates from the complexities that were typical of imperial states. The limited technological means that were available to the administrations of these states in their effort to impose a uniformity of practice across their vast territories should be taken into account. Hence, rather than "grading" the performances of the *Nizamiye* court system, the purpose of the present discussion is to propose a general idea about the judicial effectiveness of the *Nizamiye* courts by relating to factors such as the management of the caseload, the overall integrity of the courts, and the implementation of policies. As some of the themes related to judicial effectiveness will be elaborated in the following chapters, the purpose at this point is to advance an eagle-eye view that is significantly different from the by and large negative common wisdom about the *Nizamiye* courts.

The first comprehensive account of the caseload in the *Nizamiye* courts appeared in the statistical yearbook of 1897.[92] During that year, the *Nizamiye* courts of all instances across the empire (twenty-two provinces and the capital) addressed 195,122 cases in total, with the following distribution: the criminal sections addressed 162,182 cases from all categories. The civil sections addressed 25,572 cases that included financial issues related to tax-farming, ownership, rent, loans, guarantees, pawns, escrows, donations, credits, deeds, and other civil matters. The courts of commerce addressed 7,368 cases.[93] The statistical charts divided into various categories are extremely rich in information. The availability of statistical information of this magnitude is in itself an indication of administrative efficiency and sophistication, as they are contingent on meticulous registration and report. The statistical yearbook, however, does not provide information that allows determining the average duration of court cases. An assessment can nonetheless be inferred from information provided in the case reports and the statistical charts that were published in the *Ceride-i Mehakim*.

The thousands of case reports published in the *Ceride-i Mehakim* summarize the details of cases decided by the Court of Cassation. Each report records the date of the decision issued by the lower court that was subject to appeal at the Court of Cassation, and the date of the latter's decision. A statistical analysis of the dates provided will indicate a surprising efficiency of the Court of Cassation. By way of illustration, a survey of 130 case reports from various years that were published successively in the *Ceride* between August 25, 1900, and December 15, 1900 (this span was chosen at random), indicates an average of roughly nine months from the date of issuance of the original ruling until the decision by the Court of Cassation.[94] In 32.5 percent of these cases, the high court decided within six months or less, while 58 percent required twelve months or less until decided at the high court. Only 6.3 percent of the cases included in this survey required more than twenty-four months to be resolved at the high court. Though these numbers are fairly typical, they refer merely to the Court of Cassation, which was efficient by any standard. The information provided in the case reports does not allow a similar analysis of the average time that had elapsed since the initiation of cases at the lower courts until their completion in those courts.

At least some idea about the performances of specific courts can be inferred, however, from statistical charts published in the *Ceride*. The editors included statistical data produced by particular courts over several consecutive years. It is difficult to tell why these specific courts were chosen for this purpose. Was their performance in any way exceptional? Was it a matter of random sampling? Given the practical purposes of this official journal and the fact that it is imbued with references to irregularities, there is no reason to assume that these statistical data were manipulated in some way as a means of creating an idealized picture, which was clearly not an objective of the *Ceride*. In the fiscal year 1303 (1887–1888), the court of first instance at Menteşe (province of Aydın) decided 485 criminal cases of *cünha* and *kabahat* categories. A total of 470 cases were received in the same year, and merely 15 originated from the previous year. From the 64 *cinayet*-type (severe crimes) cases decided in 1313, 10 originated from the previous year, and only 5 were postponed to the following year.[95] In the year 1312 (1896/1897), the Denizli criminal court of first instance in the Western province of Aydın decided 876 criminal cases of various categories. The court started the following year (1313) with 79 cases originating from previous years.[96] During that year, the court decided 828 cases and had to postpone 55 to the subsequent year.[97] In 1302, the court of first instance in the county

of Tavas (also in Aydın) received 86 new civil cases in addition to 40 that originated from the previous year. From this total of 126 cases, 39 were decided in 1302, 55 were closed without decision because the litigants did not follow up, and in 32 cases the decision was postponed to the following year.[98] In 1314, it decided 783 cases, but the caseload seems to have grown considerably as the court started the year 1315 with 229 cases that originated from previous years.[99] Natan Brun, who examined the details of some twelve reports on *Nizamiye* proceedings in late nineteenth and early twentieth centuries, which were written by Zionist settlers, reaches a similar conclusion concerning the overall satisfactory efficiency of the *Nizamiye* courts. These accounts are especially indicative, given the stereotypes that dominated Zionist representations of the Ottoman administration in Palestine.[100] Hence, it appears that efficiency was not limited to the high court.

The British consuls were on the whole hostile to the reforms of 1879. The fact that they harshly discredited the *Nizamiye* courts immediately after the introduction of the new judicial structure without giving it a chance says something about the consuls' preconceived opinions regarding the Ottoman administration in particular and the "easterners" in general, rather than on the actual performance of the courts. In fact, the consular reports—negative as they were—indicate a high level of Ottoman governability, in spite of the objective difficulties. Had implementation been weak, there would hardly have been a reason for local administrators and viceconsuls in the provinces to oppose the separation of powers with such passion. The apprehensive consular reports that arrived from many parts of the empire during 1879 and 1880, bitterly complaining about the incompetence of the courts, leave no doubt as to the rapid execution of the new laws and regulation and the government's determination to refashion the judicial system empire-wide. Exceptional was a report on Sivas submitted to British ambassador Layard in May 1880, only a few months after the introduction of the 1879 judicial reforms. This report gave a positive impression of the overall functioning of the courts: "The new system has only come into effect a few months, but has been more easily adopted than might have been supposed." Some difficulties notwithstanding, the local court system is described as "on the whole good."[101] Compared to other consular reports, this description is atypical in its approving tone, which may be attributed to the fact that it was based on the account of an Englishman who knew the Ottoman administrative system better than any other British observer at the

time. Valentine Baker (1827–1887), an ex-major in the British army, had been expelled from the military after serving a year in prison for assaulting a woman. During the Russo-Ottoman war, he joined the Ottoman gendarmerie and was given the title *Paşa*. After the war, he was assigned a post in the Ottoman administration of the eastern provinces of Anatolia, and in 1882 he left for Egypt to command the gendarmerie. It appears from the consular correspondence that throughout the years he spent in the Ottoman domains, Baker Paşa maintained semiformal connections with British diplomats that included the submission of general accounts on the situation in the provinces with which he was familiar. His unique position and empathy toward the Ottomans rendered his accounts more balanced and certainly free of the conventional prejudices that characterized the consular reports.

When analyzing sociolegal change in a nineteenth-century imperial state of political, ethnic, and even geographic complexities such as the Ottoman Empire, the simultaneous introduction of new work procedures, habits, and legal culture across the vast territory may not be taken for granted. Therefore, examining the implementation of the judicial reforms in regions that were considered culturally and geographically "remote" from the imperial center allows assessment of the overall effectiveness of the judicial reforms. One could point to the case of Yemen as an example of a striking failure in the history of the *Nizamiye* courts. Following their reconquest of southwest Arabia in the early 1870s, the Ottomans created the new province of Yemen and tried to integrate it into the general administrative system. The official policy of adapting imperial administrative practices to local customs, however, resulted in an administrative system that differed considerably from other provinces. As part of this "adaptation" and in response to local pressures, the *Nizamiye* courts in Yemen were abolished altogether during the 1880s, and the comprehensive jurisdiction of the *Şeriat* courts was restored. Yet, rather than interpreting the abolition of the *Nizamiye* courts in Yemen as a failure to execute a governmental program, Thomas Kühn insightfully explains this move as a confirmation of Ottoman colonial attitudes toward the indigenous population, conceived as savages incapable of benefiting from a civilized judicial administration.[102] As Kühn noted, the judiciary that replaced the *Nizamiye* courts in Yemen was not a reproduction of the pre-*Nizamiye* judicial order, but rather a refashioned judicial regime including features of the reformed law. The *Şeriat* courts in Yemen applied the *Mecelle* and probably other elements of Ottoman judicial modernity.

Yet, the state of affairs in Yemen was atypical. The relatively rapid implementation of the new judicial procedures in the peripheral regions of the empire was nothing but impressive. Haim Gerber comes to a similar conclusion concerning the administration of *Nizamiye* justice in Ottoman Palestine. Gerber studied protocols produced by the criminal section of the *Nizamiye* court of first instance in the port city of Jaffa. A close analysis of these records (from 1887) brought him to the conclusion that the Jaffa court strictly adhered to the procedural law and did its job with integrity and fairness, revealing an awareness of legal subtleties. In support of this view, Gerber also mentions an account of the daily life in Jerusalem at the turn of the century, written by David Yellin (1864–1941). Yellin was born in Jerusalem to a distinguished family in the city. He was involved in the development of modern Hebrew, and during the Mandate period in Palestine he gained a reputation as a scholar of literature and history. In his memoir, Yellin describes in detail three murder trials that were conducted at the Jerusalem criminal court of first instance. Yellin was interested in these specific trials because they addressed the murder of a person from the Jewish settlement of Petach Tikva. Yellin's account, as well as his personal view, leaves no doubt as to the professional and fair court proceedings.[103]

A similar impression concerning the integrity of the courts in other peripheral regions emerges from the scores of case reports published in the *Ceride,* and yet more clearly from case reports that include full trial protocols, as illustrated by the following case, which was deliberated in 1888 at the *Nizamiye* court of first instance on the island of İmroz (today's Gökçeada). This island, located at the northern Aegean Sea, was undoubtedly a peripheral spot, with a small population of mainly Greek Orthodox Christians. In the trial, a twenty-four-year-old man called Astarati was accused of seducing a girl named Kali to have repeated sexual intercourse with him, as a result of which she got pregnant. Astarati refused to marry Kali and he was even accused of trying to get hold of a drug that would cause an abortion. The village headman (*muhtar*) initiated his arrest; following an investigation, a bill of indictment was prepared, charging Astarati with the violation of article 200 of the *Criminal Code.* This article stipulates that a man who seduces a virgin under the promise of marriage and deflowers her will face a penalty of a week to six months of imprisonment. In addition to the criminal charges, Astarati faced a civil lawsuit brought by Kali, demanding a compensation of 100 *lira*s. The court needed three sessions for hearing witnesses provided by the prosecutor and the defense. Astarati tried to present Kali as a promiscuous woman

who had supposedly been engaged in sexual relations with many men. Her promiscuity being public knowledge, according to his line of defense, made it impossible to determine the father; thus, both criminal culpability and civil responsibility could not be established. Typical to cases of sexual transgression, this was a complicated case, as there were no eye witnesses to the purported intercourse, and the court had to contend with indirect testimonies, many of which were based on hearsays. The pedantic conduct of the court president Mihalaki Kacharonas Efendi is apparent throughout the protocol. He ran the trial in strict adherence to the procedural rules concerning the adjuration and hearing of witnesses and the recording of the protocols. The local gendarmerie officer, who served as an assistant public prosecutor, was well acquainted with criminal procedure, and displayed the kind of self-confidence and authority typical of professional public prosecutors (see chapter five). For instance, in the first hearing he demanded that the president of the court order a closed-door trial while quoting the relevant legal clauses. The court's attention to the written depositions that had been taken from the witnesses prior to the trial led it to conclude that the witnesses testifying on behalf of Astarati had coordinated their versions, and that their testimony was, therefore, deceptive. The court sentenced Astarati to two months' imprisonment and determined indemnities and child support.[104]

Conclusion

Since its formal foundation in 1864, it took the *Nizamiye* court system some two decades until it became reasonably stable and fully functional in most of the imperial domains. An effective legal transplantation of positive law is contingent on a competent administrative machinery. The objective circumstances in which the *Nizamiye* court system evolved were unfavorable—chronic financial deficits in the state's treasury, resistance of local officials to the radical change in the distribution of power that was implied by the separation of powers, distrust on the part of the consular corps, and even trivial, yet important, issues such as the limited space available for housing the new judicial units. Given these difficulties, the consolidation of the Ottoman *Nizamiye* courts during the Hamidian era may be regarded as a successful case of legal transplantation.

The impetus stemming from the personal commitment of Cevdet Paşa and Said Paşa during the formative phases was undoubtedly a major reason for this achievement. Both were men of legal vision, both invested much energy in designing the nitty-gritty details on

which the effectiveness of the reform depended.[105] The attention of the Hamidian state to the issue of official discipline proved to be an effective means for implementing the reform legislation. As I shall show in chapter four, the judiciary knew that they were constantly exposed to the gaze of the central judicial administration. In this respect, the ultra-centralistic practices that were imposed by Abdülhamid II and his senior officials, eventually turning the Empire into a sort of police state, were advantageous for the purpose of realizing the judicial reforms in spite of the challenging circumstances. Nonetheless, judicial effectiveness cannot be achieved by disciplinary means only. During the second half of the nineteenth century the Ottoman bureaucracy was moving toward professionalization, through new administrative practices and through the new sort of professionalized training that was available in the new schools. At the same time, Ottoman officialdom still maintained its adaptability during this transformative phase, a feature that had been a source of strength throughout the centuries of ruling a multifarious empire.[106] In our times, distinguished by professional attitudes that are based on ultraspecific knowledge, it may be difficult to imagine a lawyer that would be "an expert" in criminal, civil, and commercial fields. The ability of the single judge to effectively implement laws from various legal fields (with the assistance of the other court members) in his courtroom was made possible by the initial decision to base the *Nizamiye* court system on codified law, whether based on Hanafi law, as was the case of the *Mecelle* and the *Land Law*, or on French law, as was the case of the *Criminal Code* and the procedural codes. The user-friendly structure of this legal genre, together with the formalistic legal culture advanced by the Ministry of Justice, smoothed the progress of legal change. This is not to say that the Ottoman courts were faultless and that the ideals set by the reformers were fully realized. Judicial proceedings were too expensive, irregularities and delays prevailed, and corruption, though fiercely fought, was not eradicated.

Chapter 2

The Ottoman Judicial Mall: A Legally Pluralistic Perspective

[T]his clear-cut dichotomy between "secular courts" and "religious" was a startling and radical development.

—Anderson and Coulson,
"Islamic Law in Contemporary Cultural Change"

In this chapter I take issue with what may be phrased as the "duality narrative" in the historiography of Ottoman law, and suggest legal pluralism as an alternative framework for describing and analyzing sociolegal experiences in the course of Ottoman passage to modernity. When producing explanations, historians should care for the fact that lots of individuals who experienced Ottoman legal change as litigants, state employees, and lawyers did not perceive their legal realities in terms of a dichotomy: secularity or religiosity. The two key arguments that will be advanced in this chapter are basically the following: First, from the outset of the *tanzimat* until the demise of the Ottoman state, the *Nizamiye* and the *Şeriat* courts were neither antithetical nor competing "legal systems," as historians have often presented them, but rather two entwined components of a single judicial system converging in some aspects and departing in others. Second, the Ottoman judicial sphere of the period may be analyzed and better understood through the prism of legal pluralism. It is similarly argued that the term *secularization*, which is widely used to describe the overall process of legal change in the nineteenth century, is a misnomer, as far as understanding of daily judicial experiences from a

sociolegal perspective is concerned. Relocating our attention from an alleged *long-durée* process of secularization to particular sites of legal plurality, however, carries a better chance for a more nuanced and historical description of large-scale legal change.

THE DUALITY/SECULARIZATION NARRATIVE

The notion of *duality*, which reverberates throughout the scholarship on the *tanzimat* period, refers to an institutional structure that reflected a century-long competition between modernist and traditionalist forces. By "duality," historians have referred to an assumed divide between religious and secular spaces, evident in the realms of education, cultural production, politics, and law.[1] The changing legal sphere of the period seems to have lent itself to narration along the lines of duality embedded in a widening split between the religious and the secular. Before illustrating what may be a historiographical state of mind rather than historical realities, it should be stressed that the notion of legal duality has a historiographical lineage that precedes the political and cultural tempests of the *tanzimat* and that is centered around the *Kanun/Şeriat* divide.

In theory, the *kanun* was a body of state legislation aimed at providing legal solutions for matters not covered by the *Şeriat*. It crystallized with the Law Book of Bursa in 1487 and through additional law books (*kanunname*) that were enacted in the sixteenth century. These collections were actually enactments of written versions of customary and sultanic law, legitimized by the Islamic principle of *siyasa shar'iyya*, namely, the *Şer'i* recognition in the necessity of state legislation on specific issues not covered by the *Şeriat*, mostly in matters of criminal law, land tenure, and taxation. In other words, the *kanun* was a normative mechanism used for filling *Şer'i* gaps.[2] However, assessing the overall structure of Ottoman law since the introduction of the first *kanunname* through the prism of a *kanun/Şeriat* division is misleading, because the distinction between the two was a matter of doctrine rather than of praxis. Revisionist studies have shown that *kanun* cannot be reduced to merely a mechanism intended for "filling the gaps," nor was the *kanun* a "secular" law. *Kanun* formulations often replicated *Şer'i* legal principles, while integrating them with new legal concepts. This is not surprising, given the fact that the *kanun* was the making of the *ulema*.[3] The indivisibility of these two sources of Ottoman law was also evident in its mode of application in the courts.[4] Hence, in the final analysis, the Ottoman legal system after the sixteenth century and prior to the *tanzimat* was not a dual

one, neither at the level of positive law, nor at the level of judicial practice.

The notion of legal duality turns out to be ubiquitous in the scholarship on the *long nineteenth century*, especially in the context of legal reform. In this particular historiography, duality assumes the pejorative meaning of incongruity between secular and religious legal cosmologies. The following quote epitomizes the common wisdom concerning the duality of the reforming Ottoman law:

> The Gülhane decree of 1839 had promised new laws to implement its egalitarian promises. The effort to produce them would launch the Ottomans into uncharted territory where *incompatible legal systems, Islamic on the one hand, and secular, on the other, would coexist and compete*, generating confusion and conflict until the issue could eventually be resolved in favor of one or the other. If egalitarian Ottomanism formed one theme of the *tanzimat*, legal dualism and a rapid expansion of secular legislation at the expense of the şeriat formed another.[5]

This and similar views about the general nature of Ottoman legal change are based on two basic assumptions: that a secular legal *system* existed alongside a religious one; and that these two were ill-assorted and competing. Inherent to this view is the idea of a progressing secularization of the law. The absence of the term "secular" from Ottoman judicial jargon should ring an alarm bell as to the ability of the secularization narrative to capture the complex sociolegal experiences of the period. What historians referred to as "religious" and "secular" courts appear in the Ottoman documents as *Şer'i* and *Nizamiye* courts, respectively.[6] As far as terminology is concerned, the distinction between secular and religious legal spheres is a later invention, of the post-Ottoman period. What, then, is the meaning of "secular" in the Ottoman legal context? In what sense was the "secular" competing with the "religious"?

Answering these questions on the basis of the existing historiography is not as simple as might be expected. In most historiographical accounts of "secularization" in the context of legal change, the term *secular* is taken for granted; its meaning is rarely subject for a serious discussion, not to mention critique. A salient exception is Berkes's brief explanation of his understanding of the notion, even if set in terms of a deterministic concept of secularization. Berkes's point of departure is European history, specifically the well-known historical process of separating church from state. He points to the difference between the Protestant meaning of secularism, pertaining to "the

temporal world," and the Catholic one (*laïcité*), which emphasizes the distinction of the laity from the clergy. Hence, secularization in this context "meant the transformation of persons, offices, properties, institutions, or matters of ecclesiastical or spiritual character to a lay, or worldly, position."[7] In "non-Christian" societies, according to Berkes, secularism has a different meaning, whereby the basic conflict is not between state and church as was the case in the Christian world, but rather, between "the forces of tradition" that were committed to the sacred law and "the forces of change."[8]

Berkes's understanding of the secular in the late Ottoman context was actually an application of the modernization theory, which dominated the sociology of his days, with its essentializing perceptions of a dichotomy between tradition and modernity. Tradition in this construction was perceived as change-resistant, religious, and irrational, whereas modernity simply stood for the opposite.[9] Berkes takes this dichotomy as a given rather than as something that needs to be substantiated. More than four decades after the publication of Berkes's influential work and following an impressive expansion of scholarship on premodern histories, Ottoman and others, this essentialist conceptualization of "tradition" appears naïve. Nevertheless, using the notion of "secular" in the sense of a separation between state institutions and religious institutions is not really *the* problem, when trying to make sense of Ottoman legal change. The conceptual difficulty lies with the preassumed competition and incompatibility of the religious and the secular in the Ottoman case. While the meaning of secularization may appear more or less intelligible in some of the intellectual discourses of the period, its meaning in the legal sphere remains obscure.

This critique is not a suggestion for getting rid of the term "secular" when dealing with Ottoman sociolegal modernity simply because this term did not exist in the Ottoman professional legal jargon, although this absence should certainly be accounted for in any analysis of modern Ottoman law. Talal Asad's discussion of the "Reconfigurations of Law and Ethics in Colonial Egypt" during the late nineteenth and early twentieth centuries suggests that it *is* possible to think historically on legal change through the notion of the secular, by employing a sophisticated analysis that neither takes secularity for granted nor seeks out for an easy definition on the other. Asad demonstrates that new legal configurations of the *Shari'a*, and not alienation or marginalization thereof, were part and parcel of the Egyptian formation of modern secularism through a complex and historically contingent "arrangement" that was meant

to secure governance before anything else.[10] Ottoman legal change took a path that was different from that of colonial Egypt, yet Asad's reading of Egyptian legal reform is highly relevant to explorations of Ottoman sociolegal change, not only because similar transplantation of positive law was evident in the Ottoman Empire, and not merely for the fact that the Egyptians and the Ottomans had been minded to each others' experimentations with statecraft before the British occupation of Egypt. Asad's reading offers an effective case against the reduction of legal change to a simple struggle between secularity and religion.

The study of Ottoman education along the secular/religious divide seems to produce the same kind of simplifications that are evident in the study of the sociolegal sphere addressed in the present study. Benjamin Fortna demonstrates what is actually gained by writing against the grain of the secularization narrative in terms of both historical reconstruction and conceptualization. Fortna demonstrates that the daily routines of the new state schools, their syllabi, structure, and staff fall short of their assumed role as "agents of seemingly inevitable process of secularization."[11]

As it is often the case with metanarratives, the secularization narrative tends to emphasize those events or processes that are supposed to demonstrate the mega-change that can always be presented in a single word, while it simultaneously marginalizes or simply pays no heed to phenomena that suggest otherwise. By the same token, metanarratives tend to debar individual social experiences of ordinary people and present ideas of intellectual and bureaucratic elites as the sole impetus for social change. This is exactly the case with the secularization narrative, which offers little for understanding how state legislation, codification, and bureaucratic changes affected the ways people went about their daily businesses in and outside the courts of law. The perspective of legal pluralism seems to provide a suitable means for probing into these daily experiences. To paraphrase Michel de Certeau, it allows the historian to represent both officials and litigants as *users* who constantly negotiate institutional strategies through everyday tactics and moments of "making do."[12]

The Paradigm of Legal Pluralism

Legal pluralism has been a dominant paradigm in sociolegal studies during the last two decades. As such, it has attracted the attention of a good number of methodological discussions and debates, trying to

define the concept,[13] redefine and sharpen it,[14] or doubt some of its worth.[15] Broadly defined, a situation of legal pluralism exists wherever there is more than one body of law observed by the population.[16] But this definition alone illustrates the main problem with the concept: it lacks theoretical refinement.

Students of sociolegal studies agree that all legal contexts are fundamentally pluralistic.[17] This generalizing nature of the concept should be understood against the background of its own history. Legal pluralism emerged as an alternative to the hegemonic approach of "legal centralism," which paid little attention to law outside the state, and that understood state law as a monist entity. John Griffiths, one of the leading theorists of legal pluralism, describes legal centralism as a scholarly myth that should be replaced by legal pluralism being the "normal situation in human society."[18] Exploring the variety of conceptualizations of legal pluralism is beyond the scope of this study. It will suffice to lay out several key features of the concept that are relevant to the present discussion:

Legal pluralism and legal borrowing: Legal pluralism is largely a consequence of legal borrowing, or in Barry Hooker's words, it is a result of "the transfer of whole legal systems across cultural boundaries."[19] Many studies of legal pluralism, if not the majority, focus on colonial, neocolonial, and postcolonial contexts. Yet, movement of laws and legal cultures across state boundaries has not been a phenomenon limited to colonial contexts, and it was rather common in Europe as well. This is also suggested by the Ottoman case.

Legal pluralism and the state: My discussion of legal pluralism in the Ottoman judicial sphere will be limited to what is commonly understood as the state domain, while leaving aside the question of legal pluralism beyond the state. One should keep in mind, however, that the distinction between the state legal system and other competing or overlapping legal formations might be problematic. The interrelation between legal pluralism as an analytical framework with the notion of the state is a theoretical problem in legal studies that needs to be addressed in brief. As noted earlier, the concept of legal pluralism emerged in opposition to legal centralism, thus inspiring researchers, mostly anthropologists, to study legal systems operating primarily outside state law. The theorizing of legal pluralism is imbued with disagreements concerning the actual meaning of law. If one accepts that state institutions are not the exclusive source of legal practices, one needs to characterize "the law" in social contexts outside the state, which seems to be a rather challenging endeavor given

the uncertainty of the meaning of law not emanating from the state. To add to this conceptual challenge, the explanatory strength of the concept of legal pluralism is questionable, if one assumes that all legal contexts are fundamentally pluralistic.

A partial solution to the obscurity of the concept is offered by the distinction between "weak" and "strong" legal pluralisms, which sets the ground for a possible typology.[20] This distinction is based on evaluations of the interrelations between nonstate legal bodies and the state, defined in terms of dependency, coexistence, autonomy, and so on. However fruitful this path has been for the development of the concept of legal pluralism, its value when studying social realities remains limited. At the basis of the scholarly preoccupation with law outside the state lies a reifying and objectifying notion of the state, as if there is a bona fide boundary between state and society. As a matter of fact, the very nature of situations characterized by legal pluralism goes against notions of a reified state, or society. As argued by Brian Tamanaha, deconstruction of categories (such as the state) followed by empirical investigations would reveal that "certain manifestation of what is called state law might lack the features of the category derived from state law, and that certain phenomena not called state law possesses the core features of the state law category and so forth."[21]

To summarize this point, arguably, the general tendency is to focus on legal situations outside what is usually considered as "the state" when studying legal pluralism. However, situations that can be analyzed with the conceptual toolkit provided by legal pluralism exist in formal legal systems just as well. The Ottoman judicial sphere of the nineteenth century is a case in point.

The litigants' point of view and forum shopping: Few theorists have pointed to the need of employing litigants' point of view as the major perspective for studying legal pluralism.[22] Settings that fit the category of legal pluralism offer litigants various degrees of "forum shopping," which refers to a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict" under the condition that there is a choice.[23] This common practice, which cut across geographic boundaries, was employed by scholars as a means of neutralizing some of the theoretical obstacles in the study of legal pluralism. Relating to the strong/weak distinction, Ido Shahar, for instance, suggests that strong legal pluralism exists whenever a litigant can engage in forum shopping, while weak legal pluralism exists when specific tribunals are assigned to specific categories of the population, in which case the litigants can appeal to only one of the tribunals.[24] This typology

is only partially helpful because it takes the state's desire for and illusion of judicio-bureaucratic neatness as the only point of reference. Yet litigants have their ways of working through the system. Some would comply while others would take advantage of legal loopholes or bureaucratic obscurities, which are surely present in the most rational legal systems. Hence, formal approaches to forum shopping may not necessarily reflect the actual extent and nature of legal pluralism. In any case, it is clear that the practice of forum shopping, however approached, is a key aspect of legal pluralism.

The concept of legal pluralism has been developed mainly by anthropologists. Employing it for the purpose of historical reconstruction and analysis raises an additional challenge, especially when attempting to shed light on litigants' tactics and considerations: reconstruction of legal pluralism in early-modern and premodern contexts is circumscribed by the nature of the sources typically used by historians, and by the fact that the lion's share of the source material was produced by state agencies. Hence, the sophistication of the anthropologists' debate over the proper way of approaching legal pluralism is geared to a sort of detailed information about everyday human praxis that historians rarely possess, or can merely speculate about.

The following exploration is substantially *informed* by the concept of legal pluralism rather than committed to any discernible approach to "the proper way" of studying legal pluralism, given the nature of the sources available for this study. To what extent were litigants involved with the practice of forum shopping in a rapidly changing judicial system? To what extent did the Ottoman judicial authorities tolerate forum shopping in the context of centralizing state policies? Did the new *Nizamiye* courts expand or reduce opportunities for forum shopping? How does Ottoman legal pluralism complicate the simple binary of religious/secular legal spaces? In what follows, an attempt to answer these and similar questions will be made, as part of a broader effort to abandon the secularization narrative in favor of an alternative, more flexible framework for describing Ottoman sociolegal change.

The Perspective of the Litigants: Shopping in the Judicial Mall

The rationalizing reforms of 1879 marked the zenith of a gradual process of codification that had commenced with the introduction of the first criminal code more than three decades earlier. Five years

after the completion of the *Mecelle*, the civil code that was based on the Hanafi legal tradition, the Ottoman legislature published civil and criminal procedural codes. These hundreds of legal articles, which formed a consistent body of positive law, presented a modernist judicio-administrative vision of legal rationality. They were supposed to indicate consistency, professionalization, and predictability.[25] Hence, the *kanunname*s of the earlier Ottoman times, which were ad-hoc compilations of laws, usually valid with regard to a specific geographical region, gave way in the nineteenth century to a codex that was designed to be in effect across the board, independent of the person of the ruler.[26]

The reformed procedure prescribed a sound division of labor between various judicial forums. According to the *Code of Civil Procedure*, *Şeriat* courts were not allowed to address cases that belonged to the jurisdiction of the *Nizamiye* court and vice versa, and *Nizamiye* courts could not address lawsuits that belonged to the jurisdiction of the court of commerce and vice versa.[27] The *Nizamiye* courts were competent to try all civil and criminal matters, whereas the jurisdiction of the *Şeriat* courts covered matters of personal status (marriage, divorce, inheritance) and pious endowments (*vakıf*).[28] In principle, legal pluralism could be only antithetical to this new construction, emphasizing a neat division of labor as an expression of the reformers' commitment to state centralization through comprehensive regulation. The everyday realities in the courts, however, suggested otherwise.

Forum Shopping I: *Nizamiye* and *Şeriat* Courts

According to Iris Agmon, who studied the *Şeriat* courts of Haifa and Jaffa of the late nineteenth century, many cases that belonged in theory to the *Nizamiye* jurisdiction were actually deliberated at the *Şeriat* courts, and "judges and court clerks left it to the litigants to choose where to take their legal problems."[29] This observation contains two elements that are important for the present discussion: first, it suggests that the rationalizing reforms did not bring an end to the practice of forum shopping known from earlier periods; and second that the lower-level judicial personnel considered forum shopping a legitimate practice. This does not mean that the laws that established the division of labor between the *Nizamiye* and the *Şeriat* courts remained a dead letter. The civil *Nizamiye* courts did not address cases of personal status as such, as they belonged to the *Şer'i* jurisdiction, and the *Şeriat* courts did not try criminal cases, which exclusively

belonged to the *Nizamiye* jurisdiction. Forum shopping was commonly practiced, but it was restricted to "grey" areas, in which the boundaries between the civil and the *Şer'i* domains tended to blur. Cases involving pious endowments, for instance, provided such an opportunity for forum shopping, as demonstrated by the following cases.

In 1898, a group of people brought a suit at the Hayrabolu court of first instance in the province of Edirne (Eastern Thrace) against the Ministry of Pious Endowments. The suing group included Hadice Hanım, Akile Hanım, the cultivator Ali Bey, his sister Basime Hanım, and his daughter Mezide Hanım. They pleaded that the ministry intended to sell by auction a piece of land at the market square in the village of Hayrabolu, while ignoring the fact that they possessed property there, which included an inn (*han*) and a grocery shop. They asked it to prevent the auction. The Hayrabolu court was convinced by the title deeds (*tapu*) and *Şer'i* deeds (*hüccet*) produced by Hadice Hanım and her partners, and decided to prevent the auction, in accordance with the relevant articles of the *Mecelle* and the *Code of Civil Procedure*.[30]

In his appeal to the Court of Cassation in the capital, Manulaki Efendi, the attorney of the ministry, argued that the *Nizamiye* court at Hayrabolu was supposed to refer the case to the *Şeriat* court in order to determine whether the landed property in question was a *vakıf* or private property, and that the *Nizamiye* court had no authority on the matter. Four years later, the Court of Cassation ruled in favor of the ministry. It ordered to refer the case to the *Şeriat* court on the grounds that the *Nizamiye* court was not authorized to address this lawsuit. The decision was based on the procedural article that required the high court to quash a decision issued by an unauthorized court.[31] Nowhere in the case report is it specified why the *Nizamiye* court was not authorized to address the dispute, but the reason was obvious: according to the division of labor between the *Nizamiye* and the *Şeriat* courts, the latter were in charge of addressing disputes related to *vakıf* property.

The owners may or may not have been aware of the *Şer'i* jurisdiction over *vakıf*-related disputes to be sure. Having clear-cut proof of ownership at their disposal in the form of title deeds, there was no possible reason for the *Şeriat* court to rule against them, had they brought their case to this court. Why did they bring their suit at the *Nizamiye* court then? Why did the attorney of the ministry insist on having the *Şeriat* court address the case, if it was clear that no court, *Şeriat* or *Nizamiye*, would deny their ownership in the first

place? There is no way to provide definitive answers; they may lie with complicated local circumstances at Hayrabolu, perhaps linked to the reality of a local social network or the business relations between the owners. In any case, it is clear that the local *Nizamiye* court did not reject the case and that the litigants felt that they could give it a try at the *Nizamiye* court for unknown reasons.

Zeliha Hanım from the central Anatolian province of Sivas occupied a house endowed as *vakıf* in the town of Zara (also known as Koçgiri).[32] Two individuals called Yorgaki Ağa and Kapril Ağa established a coffeehouse and a store on the private way that led to the house. Zeliha, who could not but see this as a trespassing, turned to the *Nizamiye* civil court in Koçgiri, which decided on December 1888 to have the coffeehouse and the store demolished, on the basis of testimonies and the relevant *vakfiye* (deed of trust of *vakıf*). The report mentions an additional intervention of the court in an unspecified subsequent period, following another encroachment by the two ağas, which led to a court decision that ordered the demolition of a third structure. In response, the trespassers Yorgaki and Kapril petitioned the Court of Cassation, arguing that the Koçgiri court had not summoned the official who was in charge of inspecting *vakıf* accountancy, as required by law, hence the illegality of the decision. Zeliha Hanım argued in response that there was no such requirement, since neither her ownership nor the nature of the *vakıf* was in question. On July 1892, the Court of Cassation quashed the Koçgiri court decision and sent it to the local *Şeriat* court on the grounds that the case belonged to the jurisdiction of the *Şeriat* court, since it involved *vakıf*.[33]

It is impossible to tell why Zeliha Hanım preferred the *Nizamiye* court over the *Şeriat* court in the first place. Her (or her attorney's) familiarity with the law regarding the division of labor can be assumed given the sort of specific procedural argument she presented at the cassation stage. More important for the purposes of the present discussion is the fact that the appellants did not raise the straightforward argument that the case belonged to the *Şeriat* court by law as it involved a *vakıf*. This move suggests that both litigants and lower courts did not question the legitimacy of taking disputes involving *vakıf* to the *Nizamiye* courts. In other words, regardless of the clear division of labor prescribed by the positive law, the everyday judicial norm facilitated forum shopping in matters of *vakıf*. This impression is further supported by another dispute originating from the civil court of Canik (1894), which belonged to the northeastern Anatolian province of Trabzon, between a tenant of a *vakıf* land and the trustee

of that *vakıf*. In the course of the deliberations both litigants avoided raising the argument that the case actually belonged to the *Şeriat* court. What is more striking, however, is the ruling of the Court of Cassation two years later, which upheld the decision of the lower *Nizamiye* court on the *vakıf* matter, arguing that this decision conformed with "law and procedure."[34]

Diffusion of cases between civil *Nizamiye* and *Şeriat* courts was apparent also in disputes related to inheritance and divorce, although the *Şer'i* nature of such cases was beyond obscurity as far as the positive law was concerned. Saada Ağa and Emra Ağa from a village in the Cuma county demanded that the widow Hanifa Kadın, from the same village, transfer to them a rather large field of twenty-three *dünüm* and a vineyard of one and a half *dünüm*, which were part of her husband's bequest.[35] Hanifa turned to the Cuma *Nizamiye* court asking it to prevent Saada and Emra's intervention. The court dismissed their claim to the land, but ordered Hanifa to pay them 500 *kuruş* from her *nikâh* (marriage portion paid by the bridegroom to the bride). The report does not specify the grounds for their initial demands, but a clue is provided in the description of the subsequent proceedings. The two gentlemen, who had not come to the deliberations in the court, submitted an objection petition in which they argued that upon the death of Hanifa's husband, his brothers provided them with a document pledging them her *nikâh* and share of the inheritance. The circumstances of this claim are completely obscure in the report. Possibly, the deceased husband had owed the two gentlemen a considerable debt that had to be paid, and his brothers were trying to cut a deal with the creditors, while violating the widow's rights. The court dismissed their claim on the grounds that they had not produced the document.

Disappointed with the Cuma court decision, the men appealed to the Court of Cassation. They employed procedural arguments, none of which referred to the matter of jurisdiction. In the summer of 1893, the Court of Cassation quashed the lower court's decision on the grounds that the case belonged to the jurisdiction of the *Şeriat* court. For some reason that cannot be inferred from the report, neither of the litigants brought up the supposedly "winning" argument of jurisdiction in the course of their judicial scuffle either in the first instance or in the last. By the same token, the lower court did not refer the case to the *Şeriat* court, as required by the law.[36] Plausibly, the editorial decision to include these cases in the journal exhibited an attempt to promote a stricter application of the division of labor between the *Nizamiye* and the *Şeriat* courts, even though

the ministry's attitude to this matter was ambivalent. Although diffusion of civil cases between the *Şeriat* and *Nizamiye* forums seemed to have been a widespread practice, litigants did not give up jurisdiction-oriented arguments altogether, and sometimes did play this card, usually at the appellate phase.[37]

Litigants, who knew a thing or two about the complexity of the judicial maze, or were represented by skilled attorneys, sometimes tried their luck in another legal forum although their case had already been decided upon, even though the law forbade this move. One Hacı Mustafa from the county of Sandıklı (in the Aegean region) claimed possession of one portion of a four *dünüm* of arable land that was held by someone called Nebi Çavuş and his brothers.[38] Nebi Çavuş turned to the *Nizamiye* court asking it to prevent any intervention by Mustafa. Mustafa presented to the court a document that was supposed to prove his claim, and at the same time argued that addressing the case at the *Nizamiye* court was illegal, because the *Şeriat* court had already decided the matter. The report does not say why the case was first seen in the *Şeriat* court, but it is clear that Nebi Çavuş felt that the *Nizamiye* court would better serve his interest.[39] The Sandıklı court decided in December 1886 in favor of Nebi Çavuş, arguing that the document presented by Mustafa was irrelevant to the land in question and that the title deeds proved the tenure of Nebi Çavuş and his brothers. The court ignored Mustafa's claim about its lack of competence on this matter, which was exactly the argument raised by Mustafa, when appealing to the Court of Cassation. In its decision from November 1888, the Court of Cassation accepted Mustafa's argument, and quashed the Sandıklı court decision on the grounds that it failed to investigate whether or not a *Şeriat* court decision had already been issued, and whether or not it had been registered in the *sicil*. The Court of Cassation based its decision on article 1837 of the *Mecelle*.[40]

It is clear that a good deal of diffusion was apparent between the two judicial forums, the *Şer'i* and the *Nizami*, thus opening the door for forum shopping in civil matters. Sometimes, playing the *Nizami/Şer'i* cards looked more like pure and simple fraud, rather than forum shopping. In 1898, the president of the civil court of first instance in Istanbul sent a memorandum to the Ministry of Justice, where he complained that "some people" who had been forced by the civil *Nizamiye* courts to pay their debts had managed to obtain from the *Şeriat* courts legal deeds (*hüccet*s) stating that they had given away all their money and property as presents, as a means of avoiding payment of their debts. The memorandum called to prevent *Şer'i* judges

from issuing such deeds that had not been substantiated.[41] Such ruses demonstrate the new opportunities offered by the expansion of the Ottoman judicial labyrinth. As far as daily praxis was concerned, legal pluralism was also apparent in other judicial bodies that emerged with the *tanzimat*, as will be shown in the following section.

Forum Shopping II: Courts of Commerce and *Nizamiye* Courts

The courts of commerce were born out of the need to accommodate conflicts between Ottoman subjects and non-Ottomans, hence known as "mixed" (*muhtelit*) courts, but soon they were transformed into standard courts regardless of the litigants' nationality. Similar to the civil and criminal *Nizamiye* courts, the 1879 reforms marked the high point of a gradual institutional development that had taken place in the preceding years.

The courts of commerce formed a distinct judicial forum, working with distinctive legal sources, mainly (but not exclusively) the *Code of Commerce*, the *Code of Maritime Commerce*, and the *Code of Commercial Procedure*. This court was also distinctive by its ex-officio personnel, which was composed of local merchants who sat on the bench together with the official court members (*áza*) and the president.[42] Following the reforms of 1879, the courts of commerce became an integral part of the *Nizamiye* court system. Previously subordinate to the Ministry of Commerce, they now reported to the Ministry of Justice. In localities that lacked courts of commerce, the *Nizamiye* courts of first instance operated as ad hoc courts of commerce in accordance with the instructions of the ministry, and their decisions were subject to the standard *Nizamiye* appellate procedure. In theory, the ad hoc commercial capacity of the civil *Nizamiye* courts did not mean a compromise of the division of labor between the various courts, because when sitting as a court of commerce, the *Nizamiye* court was required to work with the standard legal sources of the commercial law and make adjustments in the composition of the ex-officio judges.[43]

Theoretically, the administrative division of labor between the courts of commerce and the *Nizamiye* courts was less obscure compared to the division of labor between the *Nizamiye* and *Şeriat* court in the civil situations mentioned earlier, given the principle that all disputes related to commercial transactions had to be seen by the courts of commerce. As demonstrated by the following examples, litigants nevertheless contrived ways to reach their judicial objectives by resorting to arguments based on jurisdiction.

The merchant Erzumanoğlu Ağıp Ağa, who was based in the market of Gerede (in the Kastamonu province, the Black Sea region), brought a suit at the Gerede *Nizamiye* court of first instance against another merchant named Hüseyin Efendi. The plaintiff Ağıp demanded Hüseyin pay him back a debt of 85 *lira*s, which was recorded in a bill. Hüseyin argued in response that he had already paid the principal sum and the interest through a third person, one Ohanes. Ohanes was not available to testify, so Hüseyin asked the court to have the plaintiff take an oath. Ağıp refused to take an oath, but upheld his claim. The Gerede court rejected Ağıp's version, and he consequently appealed to the appellate court in Bolu, at the center of the district. In March 1894, the appellate court overturned the lower court decision (the reasons are not specified in the report), ordering Hüseyin to pay Ağıp 3,700 *kuruş*. Now it was Hüseyin who took the initiative, challenging the Bolu appellate court decision at the Court of Cassation. A jurisdiction-oriented argument was raised for the first time, when Hüseyin maintained in his petition that since both litigants were merchants, and given the fact that the debt in question was related to business, the case had to be addressed initially by the court of commerce, rather than the regular civil court. Four months after the decision of the Bolu appellate court, the Court of Cassation accepted Hüseyin's argument and quashed the appellate court's decision, explaining that the appellate court was not supposed to try the case, as it belonged to the court of commerce.[44]

Why did Ağıp not take his case to the court of commerce in the first place? Why did Hüseyin have to go through two judicial instances before raising the jurisdiction argument for his defense? Perhaps his success at the court of first instance on the basis of a substantive argument gave him no reason for trying a procedural argument at the appellate court. Perhaps he was better advised as he moved along. The point to consider, as far as legal pluralism is concerned, is the fact that the appellate court did not automatically return the case to the court of commerce, to which the case belonged, and that the issue of jurisdiction was absent from the two judicial instances that had preceded the last resort. In this specific case, the plaintiff brought his suit at the civil *Nizamiye* court, but there are cases in which plaintiffs initiated their legal motions in the court of commerce although they belonged to the civil *Nizamiye* court, and the procedural argument of jurisdiction was raised only during the cassation phase.[45] It seems, then, that legal pluralism at the lower judicial instances allowed litigants some space to maneuver through the exercise of forum shopping.

Although the division of labor between the commercial and *Nizamiye* courts was somewhat more clear-cut compared to the *Nizamiye-Şeriat* courts, "grey areas" generated by the complexities of daily lives were apparent as well, as demonstrated by the following case. A horse dealer called Veli Ağa from Tophane neighborhood in Istanbul brought a suit at the court of commerce against another horse dealer, Mevlüt, from the same neighborhood. Veli demanded that Mevlüt pay a debt in the amount of 1,350 *kuruş*, being the price of horses that Veli had sold to Mevlüt. In this case, Mevlüt raised a jurisdictional argument at the very beginning of the proceedings, arguing in defense that the case belonged to the *Nizamiye* court, because the debt did not derive from a business transaction but rather from his capacity as a salaried employee of Veli. The court of commerce did not accept this argument, writing in its decision from December 1899 that the debt in question referred to horses that Veli sold to Mevlüt. It thus ordered Mevlüt to pay his debt to Veli. Apparently, Mevlüt worked for Veli as a salaried horse driver (*surucu*), but also bought from him some horses, probably in order to develop his own business. Mevlüt did not give up and appealed to the Court of Cassation, employing the same argument of jurisdiction. In his petition, he wrote that he was not a member of the merchants' class (*sınıf*), and that the debt had nothing to do with a commercial transaction. Three months after the issuance of the contested decision, the Court of Cassation accepted Mevlüt's version and quashed the decision of the court of commerce.[46]

Forum Shopping III: *Nizamiye* Courts and Administrative Councils

In addition to specialized judicial forums such as the *Şeriat*, *Nizamiye*, and the commercial courts, there were state authorities in the second half of the nineteenth century that exercised limited judicial powers, such as the municipal departments, which were authorized to have the local police imprison people for violating municipal orders, or failing to pay fines inflicted by the municipality.[47]

The administrative councils (*meclis-i idare*), introduced by the *tanzimat*, lost much of their judicial powers in favor of the *Nizamiye* courts under the *Provincial Law* (1864). According to Gerber, "complete agreement existed here between the regulations and administrative practice." Working on the Jerusalem region, Gerber found that when individuals mistakenly petitioned the administrative council of Jerusalem, it transferred these cases to the *Nizamiye* court.[48] The

court records do not reveal whether turning to the council rather than the *Nizamiye* court was really a matter of "mistake"; it could also be a case of forum shopping.

The provincial administrative councils were the judicial forums designated to try officials. To be sure, charges against officials had to be pertinent to their official duties.[49] Such cases included conflicts between subjects and officials, conflicts derived from tax obligations and tax farms, and other disputes between individuals and the government.[50] The administrative councils were not left outside the Ottoman judicial mall, as demonstrated by the following case. The Imperial Treasury brought a suit at the *Nizamiye* court against two tithe collectors from the county of Şiran in the Black Sea region, Hasan Bey and Hüseyin Efendi, who failed to pay taxes in the amount of 1,200 *kuruş* for the tithes collected in 1877–1878. In February 1891, the Şiran court of first instance ordered the two gentlemen to pay this debt. One of them, Hüseyin Efendi, appealed to the Court of Cassation, where he argued that this sort of lawsuits against officials belonged to the jurisdiction of the administrative council. The Court of Cassation accepted his appeal, quashed the lower court decision, and returned the case to the local administrative council.[51] As far as the positive law was concerned, the decision of the Court of Cassation was pretty predictable, as there could be no possible reason for initiating this motion in the *Nizamiye* court. Why, then, did the local branch of the Imperial Treasury choose to bring its suit at the *Nizamiye* court? Attributing to the Treasury's agents sheer ignorance about the jurisdictional division is not plausible given the fact that claiming taxes in the courts was their bread and butter assignment. We do not know the specific consideration behind the preference for the *Nizamiye* court in this case; it is nevertheless indicative of forum shopping. In addition, disputes between individuals and state authorities where addressed in the *Nizamiye* courts by the hundreds during the late nineteenth and early twentieth centuries, suggesting a significant space of forum shopping involving the *Nizamiye* courts and the administrative councils.

The cases presented here illustrate that the "rationalizing" judicial reforms did not stifle legal pluralism. On the contrary, the emergence of new judicial bodies brought with it new instances of overlapping and new opportunities for forum shopping. Thus far the litigants' perspective was highlighted. Did legal pluralism present a challenge to the Ottoman judicial authorities? Was it tolerated? The following chapter will highlight the perspective of the legislature and the central judicial administration.

THE PERSPECTIVE OF THE AUTHORITIES

In 1891, the Ministry of Justice authorized the public prosecutor at the province of Hüdavendiğar to prosecute Veli Efendi, the president of the *Nizamiye* court of first instance in Yenişehir, who was also the judge (*naib*) of the local *Şeriat* court. The charges against Veli Efendi included abuse of office (*suistimal*), insults and illegal actions against litigants, and seeing cases that legally belonged to the *Şeriat* court in the *Nizamiye* court.[52] Prosecution and punishment of judges due to illegal conduct was a common practice, but judges were very rarely prosecuted for the reason that they had failed to follow the formal division of labor between the *Nizami* and *Şer'i* judicial forums. This complaint was included in the case against Veli only because there were additional, more serious charges. Had it been the only charge, probably it would not result in a prosecution. An ambivalent and sometimes vague attitude of the legislature to the division of labor between the *Nizamiye* and the *Şer'i* judicial forums in itself was a salient indication of legal pluralism in this period. From the reforms of 1879 until the eve of the Great War, two approaches characterized the judicial policies toward legal pluralism: for one, recurring affirmation of the formal division of labor and attempts to reinforce it; second, acknowledgment of the *Şer'i* and *Nizami* forums as complementary, rather than competing judicial spaces. Did the legislature conceive situations of legal pluralism as a necessary evil?

An ambivalent approach toward legal pluralism was apparent already before the 1879 reforms. In the early 1870s, the civil section at the Court of Cassation reported to the Council of State that litigants who won their cases at the *Şeriat* courts, often followed up at the *Nizamiye* and commercial courts with demands for damages and interest. The Court of Cassation asked for guidance regarding legal motions, which involved both judicial forums. In its decision, the Council of State stated that the court that had issued the initial decision should be the one to address the secondary issue of damages as well.[53] The Council of State neither criticized nor prevented in any way the liberty of litigants to choose between the *Şer'i* and the *Nizami* domains. It took this liberty for granted. Although the Court of Cassation had complained about the vagueness of the law, the Council of State reinforced the judicial ambiguity in its decision.

The 1879 reform was supposed to solve much of this ambiguity, but later decrees and regulations indicate that legal pluralism endured. Attempts to put the division of labor between the *Nizamiye* and *Şeriat* courts into effect took the form of imperial decrees and regulations

issued in 1887, 1909, and 1914 under the following indicative titles: *An Imperial Decree concerning the Separation of the duties of the Şeriat courts from the Nizamiye Courts*, *An Imperial Decree Prohibiting the Şeriat Courts from Addressing Civil Cases that are Subject to Nizami Proceedings*, and the *Law concerning the Separation of Duties*. These laws reiterated the standard division of labor between the two judicial forums, but at the same time, they legitimized forum shopping by allowing litigants to take their civil cases to the *Şeriat* courts under the consent of both parties. Legal pluralism did not mean bureaucratic chaos, as the legislature made it clear that a case that was decided by a certain forum could not be retried in another, and that in case of disagreement between the parties, the lawsuit would be addressed in accordance with the formal division of labor.[54] While an ideological competition between "secular" and "religious" cosmologies was certainly not an issue in the daily lives of Ottoman law, the legislature had to deal with specific complex situations born out of the interrelations between the *Şeriat* and the *Nizamiye* courts.

Dead Bankrupt Merchants, Foreign Creditors: A Jurisdictional Conflict

According to an imperial decree from 1869, if a debtor whose liability had been decided in a *Nizamiye* court died before paying his debt and his inheritance was registered in the *Şeriat* court, the creditors had the right of receiving their dues from the inheritance.[55] Though defining a clear division of labor in such situations, this rule failed to address the more complicated issue of bankruptcy. In June 1900, thirty-one years later, the Ministry of Justice informed the courts about an imperial decree prohibiting the *Şeriat* courts from intervening in disputes involving legacies of deceased debtors who had gone bankrupt. The circular issued by the ministry made it clear that when a bankrupt person died, settling his debts at the *Nizamiye* court was the highest judicial priority, and not before the civil aspects are solved, the *Şer'i* procedure of registering the inheritance with the legitimate heirs could proceed at the *Şeriat* court.[56] This instruction, which appeared as a brief, standard circular, reads like a straightforward statement about the proper sequence of judicial motions to be taken in cases of due debts claimed from the inheritance of deceased individuals who had gone bankrupt. However, the circular is mute on the power struggle that formed its context, and it does not mention an important actor that played a key role in this power struggle: the foreign consulates. Exploring at some length the discussions that had

led to the issuance of this circular is worthwhile, for they reveal something of the Ottoman legislature's approach to legal pluralism.

The imperial decree in question was based on a report of a special ministerial committee at the *Tanzimat* Department in the Council of State, issued three years earlier, on October 1897.[57] According to this report, when a bankrupt person died after the *Nizamiye* court had decided against him and before the execution of this court decision, the claimants were forced to turn to the *Şeriat* court that had registered the inheritance and to substantiate their claim, now at the *Şeriat* court. In other words, judicial proceedings that had already reached a conclusion in the *Nizamiye* court had to be reopened at the *Şeriat* courts, when bankrupt debtors died, due to the exclusive competence of the *Şeriat* court in the field of inheritance. The report maintained that Ottoman and foreign claimants had complained that the *Şeriat* court rulings on their matters did not relate to the issues of interest and trial expenses, thus forced them to spend years in the *Nizamiye* courts trying to obtain a decision that would allow them to receive the interest and trial expenses.

The ministerial committee advised that in case of conflict between the *Nizamiye* and *Şeriat* courts concerning the inheritance of a bankrupt deceased, the initial motion following the death of the bankrupt person had to take place at the *Nizamiye* court or the court of commerce. Since debts were to be paid before the *Şer'i* distribution of the inheritance among the heirs, the committee advised that the *Şeriat* courts may not intervene with inheritance of bankrupt individuals, and that the bankruptcy procedure will take place at the designated court. Once the *Nizamiye* court issued its ruling, the *Şeriat* court had to respect and enforce it. For the purposes of the present discussion, the point to emphasize is that the *Şeriat* courts did not always respect *Nizamiye* court rulings when deciding on inheritances of bankrupt debtors, although the letter of the law made it clear that partition of inheritance at the *Şeriat* court could not take place before the satisfaction of the deceased individual's debts.[58]

The report was published in the *Düstur*, the official compilation of regulations and laws, as a means of rationalizing the imperial decree that attributed priority to the *Nizamiye* courts in this specific legal issue. Justification of an imperial decree in this way was not a common routine in the *Düstur*. Why was it important to *explain* this specific decree rather than simply publish it as is, the way it appeared in the *Ceride*? The Ottoman archive provides some clues.

In February 1883, the German Embassy sent a messenger to the Ministry of Foreign Affairs, carrying a brief, but rather assertive

message. According to the Ottoman translation of the message, the embassy complained that three years earlier it had demanded from the Ottoman government to make a decision regarding claims of two German subjects against the inheritance of an Ottoman trader. The embassy was referring to a former ruling issued by the Izmir court of commerce, which ordered to pay the German businessmen, who owned a factory in Germany, the debts owed to them from the inheritance of a deceased Ottoman trader, one Celebian Efendi. The claim of the German merchants, being part of the liquidation process, was addressed at the court of commerce in accordance with Ottoman law.[59] At the same time, the local *Şeriat* court issued its own different decision, which prevented the execution of the *Nizamiye* ruling. The embassy protested that the Ottoman government had not responded to their earlier complaint, thus causing serious damage to the German subjects. It urged the government to decide promptly "in order to put an end to this situation."[60] Additional pressure to resolve similar conflicts came from the Italian embassy, which protested that one of its subjects, a certain Samun Moreno, brought a suit in the Selanik court of commerce against an Ottoman subject called Yakup Beyzade Ali Bey, with the demand of satisfying a debt. The court ruled against the Ottoman debtor, but the execution of the decision was brought to a standstill, following the bankrupt debtor's death and subsequent proceeding at the *Şeriat* court, which involved the partition of his inheritance. The Ministry of Foreign Affairs indicated that similar cases occurred in other places. The diplomatic protest initiated a comprehensive debate that lasted a decade.

Most revealing is a report that was prepared by the office of the Grand Vizierate, on the basis of which the ministerial committee made its decision. The report of the Grand Vizierate was not published in the *Düstur* and remained in the archive. This document reported the reaction of the *Meşihat* (the Ministry of the *Şeyhülislam*), which was crystal clear: changing any aspect in the existing situation was unacceptable. Whereas the matter in question was one of inheritance in general, the *Meşihat* chose to stress a very specific aspect thereof. It argued that disputes involving minor orphans (*yetim*) and incompetent (*kasır*) heirs, or registration of their inheritances, should take place initially at the *Şeriat* courts. The *Meşihat*'s objection to any attempt to undermine its authority is not unexpected. It is remarkable, nevertheless, that the *Meşihat* raised the potential involvement of minor orphans and incompetents as the main argument against the threat of undermining its judicial competence in this type of civil cases.

The response of the *Meşihat* should be understood in terms of the refashioned role of the *Şeriat* courts at the late nineteenth century, and the related legal culture. According to Iris Agmon, the *Şeriat* court—already before the reforms—assumed the role of guardian of social equilibrium, "whose duty was to recognize situations of extreme distress among people who sought remedy at court."[61] Supervision of orphans' legal rights was an important duty of the *Şeriat* court, which was transformed into a family court following the creation of the *Nizamiye* judicial system. Litigants perceived the *Şeriat* court as the preferred judicial forum as far as social justice was concerned. As Agmon further demonstrates, the *Şeriat* courts maintained an open-door attitude, which was geared toward arbitration rather than adjudication.[62] By no means do I imply that the *Şeriat* court remained user-friendly because it was a "traditional" forum untouched by the sweeping reforms of the nineteenth century. On the contrary, it was a reforming institution as much as the *Nizamiye* court was, yet it did maintain its arbitrative role, reinforced by the lack of such function in the *Nizamiye* court, with its elaborate procedure.

In its response, the office of the Grand Vizierate argued that the fundamental principle in such cases required that payments of debts from inheritances of bankrupt merchants precede the division of the inheritance among the heirs. Having laid down this principle, it argued that the rights of orphans and incompetents were already secured in the *Code of Commerce*, which designated the *Şeriat* court as the competent forum for this matter.[63] But this answer alone did not really solve the conflict, as revealed by the subsequent detailed depiction of the legal actions to be taken, when incompetent heirs of a bankrupt person were involved.[64] The bottom line in the government's opinion revealed that this one principle was not open for debate in as much as it was an unquestionable tenet among the *Meşihat* officials—that the *Şeriat* court was the exclusive forum to handle rights of orphans.

Eventually, the entire discussion resulted in the imperial decree mentioned earlier. It took the Council of State fourteen years to reach a decision, in the course of which other embassies raised similar complaints, and investigations were conducted by senior officials. The main problem, as presented in the official correspondence, was recurring "disagreements" (*ihtilâfât*) between the *Nizamiye* and the *Şeriat* courts. Yet, more than three decades after the establishment of the *Nizamiye* courts, conflicts with the *Şeriat* courts did not form a problem pressing enough to require a definitive decision by the Council of State, which seemed to have been quite hesitant to do so, if we observe the time that had elapsed between the date that the German

Embassy had raised the issue for the first time (1880) and when it was resolved (1897).

Interpreting this episode as a clash between "secular" and "religious" judicial systems is perhaps tempting, especially when having the duality narrative in mind, but it would be misleading. The imperial decree in question referred to a very specific situation, and it derived from the obstinate pressure of the embassies and not from Ottoman judicial staff. The embassies' perception of the division of labor between the *Şeriat* and the *Nizamiye* courts was not very different from modern scholarship, which represented Ottoman legal sphere in terms of competing legal traditions. As far as the consulates were concerned, the interest of the *Şeriat* courts in the liquidation of inheritances was an annoyance causing delays that further damaged the financial interests of their subjects. For the Ottoman judicial authorities, it was a matter of priority of rights.

For the government, the debate was a matter of both Ottoman judicial sovereignty and priority of rights. At the same time, it could not ignore the protests that were raised by the embassies, nor could it simply reject their demands. In the final analysis, the decision of the council was a submission to the demands of the embassies, as it did prohibit the intervention of the *Şeriat* courts before completing the liquidation process at the *Nizamiye* courts. However, all in all it was a pretty marginal submission given the fact that the overall judicial equilibrium between the *Şeriat* and the *Nizamiye* courts remained intact.

This specific episode was one marginal affair within the continuous struggle of the Ottoman governments against European encroachment, best manifested by the capitulatory agreements, which eroded Ottoman sovereignty throughout the long nineteenth century.[65] Interestingly, when criticizing sourly the judicial capitulations that allowed foreign subjects ex-territorial rights, the Ottoman jurist Ali Şehbaz Efendi raised the *Şer'i* flag vis-à-vis foreign encroachment. He argued that the idea of judicial capitulation was not in line with the *Şeriat*, and that it was a requirement the state had to live with in order to survive.[66] Ali Şehbaz Efendi was no foreigner to the *Nizamiye* institution. Having acquired some of his legal education in Europe, he served as a law school professor and wrote three books on *Nizamiye* procedure.[67] Yet, when passing judgment on the capitulations, it was the *Şeriat* that served him as a counterargument. Both Şehbaz Efendi and the legislature understood the *Şeriat* as a key component in the judicial sphere, regardless of the distinctions between the various judicial organs that made up Ottoman law. At the same

time, they understood it as a symbol of Ottoman sovereignty. This reaction reflected the general defensive mood vis-à-vis the Western encroachment in the late nineteenth century and the related resorting to Islamic motifs.[68]

THE DOUBLE ROLE OF THE *NAIB* RECONSIDERED

The notion of judicial "duality" assumes a divergence between two judicial *systems* or legal traditions, one is religious and the other is secularizing, or secular. Two structural features of the Ottoman judicial sphere do not fit with this model: for one, the coexistence of positive law that derived from the *Şeriat* with a positive law that originated from the Napoleonic codex; and second, the composition of the professional manpower that staffed the *Nizamiye* ranks.

The reformed judicial system was a hybrid resulting from legal borrowing. The *Şeriat*-made codes, mainly the *Mecelle* and the *Land Law*, were applied in the civil *Nizamiye* courts together with procedural codes that had been adopted and adapted from the Napoleonic codex (since 1879). In the courts of commerce, substantive law included both the borrowed *Code of Commerce*, and the *Mecelle*. It is true, however, that legal borrowing was more extensive in the legal sources applied by the criminal sections of the *Nizamiye* courts, whereas the substantive code (the *Criminal Code*) was an adaptation of its French equivalent. But then again, positive law was only one indication of syncretism.

Until 1908, most of the judges who presided the *Nizamiye* courts of first instance—or the civil sections thereof, to the extent that a distinction between criminal and civil sections was maintained—were *naib*s (*Şer'i* judges from the ranks of the *ulema*), employed by the Ministry of the *Şeyhülislam*. As demonstrated in the Ottoman yearbooks (*salname*s), these were the same individuals who served as *kadı*s in the local *Şeriat* courts. The rationalizing reforms of 1879 did not change the dual role of the *naib*s, who applied *Şer'i* legal sources in the *Şeriat* courts, and *Nizami* laws in the *Nizamiye* courts.[69] Historians have attributed the dual role policy to the inability of the state to realize a complete separation of the *Şeriat* and *Nizamiye* systems, and to the related shortage of a sufficient number of trained *Nizami* manpower to staff the new courts.[70] A circular sent by the Ministry of Justice to the provincial courts of appeal in September 1890 suggests, however, that by that point in time, the number of certified candidates for *Nizami* positions exceeded the number of vacant positions. This

situation led the ministry to instruct the nominating committees to avoid approving candidates before positions were made available.[71] The excess of *Nizami* personnel did not change the dual role policy.

Flux of manpower was apparent also in the criminal sections at all levels. During the formative years of the *Nizamiye* courts, namely, the 1860s and 1870s, functionaries of both *Şer'i* and civil backgrounds populated the criminal sections of these courts.[72] The homogeneity of the judicial sphere was maintained, and was best apparent in the Law School (est. 1878), the single most important institution for shaping the *Nizamiye* legal culture. The syllabi exhibited a combination of classical Islamic jurisprudence and borrowed law, and did not present a distinctively "secular" outlook.[73] The solid presence of the *ulema* in the *Nizamiye* courts supports the conclusions offered by Mahmoud Yazbak based on his study of the Nabulsi *ulema* in 1864–1914. According to Yazbak, the administrative reforms did not weaken the *ulema*, who maintained their influential position.[74] Hence, the consistent policy that allowed the *naib*s to serve in both the *Şer'i* and the *Nizami* judicial forums for several decades should not be interpreted intuitively as an irregularity. Rather, it was a typical outcome of legal borrowing, being a fluid mixture of the local and the borrowed, the new and the old.[75]

Continuity in the Period of the Young Turks

In the course of the long nineteenth century, forces of reform and reaction were set in particular political constellations, often involving charismatic and ambitious statesmen. The judicial coherence of the Hamidian era had its roots in the earlier indivisibility of the *kanun* and *Şeriat*, yet it also reflected the collaboration between Abdülhamid II and prominent *ulema*, such as the *Şeyhülislam* Ahmet Esat Efendi (1813–1889) and his successor Cemaleddin Efendi (1848–1919), as well as the prominent reformer and *ulema* scholar Cevdet Paşa.[76] Imperial politics had always been dynamic, all the more so when shaken by a political revolution, which was the case with the Young Turk Revolution of 1908. Perhaps changing power relations between the leading *ulema* and other segments of the elite was the reason that after 1908 the *naib*s were losing their grip on the civil sections of the *Nizamiye* courts.[77] The centuries-old prominence of the *ulema* in the state machinery and politics was gradually coming to an end during the era of the Young Turks.[78] However, legislation concerning the administration of the law after 1908 demonstrates that even though

the political power of the *ulema* was overall decreasing, the boundaries between the *Nizamiye* and the *Şeriat* judicial forums at the institutional level remained fluid, still a far cry from the duality model.

This is evident in two important laws published in 1917. The first law, signed by the minister of justice, the *Şeyhülislam* and the grand vizier, subjected the *Şeriat* courts, previously subordinated to the *Meşihat*, to the Ministry of Justice. The law maintained that appeals against *Şeriat* court decisions were to be addressed in a new department (*Şer'iye*) at the Court of Cassation. This law rendered the minister of justice the exclusive authority in cases of conflicts between existing laws and the new one.[79] No doubt, this law was a major blow on the power of the *Meşihat*, as it expropriated its most important administrative assets. Nevertheless, it may not be interpreted as an elimination or even reduction of the actual importance of the *Şeriat* courts in the judicial sphere as a whole, nor can it be taken as a sign of a dramatic modification in the balance between the two forums. The subjection of *Şeriat* court decisions to the discretion of a *Şer'i* department in the Court of Cassation meant a continuation of the hybridity that was the judicial sphere, while not compromising the prescribed division of labor between *Nizamiye* and *Şeriat* courts.

Also indicative is *The Law of the Şeriat Court Procedure*, published in 1917, only few years before the collapse of the Ottoman state. Niyazi Berkes finds this law as yet another manifestation of the secularization trend, which supposedly had started with the *tanzimat*, and increased after the Young Turk Revolution, but he does not clarify in what sense exactly it is an evidence of secularization. He is right, however, to present it as "another step towards the unification of the judicial procedure."[80] Some clauses in the *Şer'i* procedural law allude to the *Nizamiye Code of Civil Procedure*. For instance, article 14 stipulates that investigations concerning issues of jurisdiction will be conducted in accordance with the *Nizamiye Code of Civil procedure*.[81] In fact, this law formalized the integrative nature of the Ottoman judicial system. Nowhere in this law is there a formulation that implies a competition between two judicial systems, and nowhere is there a hint of or an attack over the authority of the *Şeriat* courts vis-à-vis the *Nizamiye* courts. It seems that as far as the legislature was concerned, "proceduralization" continued to be the guiding principle of the reform in both the *Nizamiye* and *Şeriat* courts. The distinction between *Şer'i* and *Nizami* domains was evident by the fact that the legislature found it imperative to devote a distinctive procedural law to the *Şeriat* courts, rather than simply apply the *Civil Code of Procedure* to the *Şeriat* courts.

Conclusion

Unfortunately, the sources do not reveal explicitly why litigants preferred one judicial forum over the other. However, they provide sufficient evidence to support the argument that forum shopping was a common practice in the judicial sphere. If we are to take full advantage of the "shopping" metaphor, we may conclude that the Ottoman judicial mall included the *Nizamiye*, *Şeriat*, commercial, and possibly consular courts, as well as the administrative councils. As far as the perspective of the litigants is concerned, the emergence of the *Nizamiye* courts did not reduce legal pluralism. On the contrary, it actually contributed to a further expansion thereof by offering litigants new opportunities, new tactics. Specific "grey zones" allowed an effective resort to jurisdictional arguments in appellate proceedings, whether by raising such arguments at the outset or in the final phase of the judicial battles, or by ignoring jurisdictional restrictions altogether. At the lower instances, forum shopping was not a matter of argumentation; it was a matter of daily practice.

The reactions of the legislature and the central judicial administration toward legal pluralism may be described as ambiguous or ambivalent. Yet perhaps *flexible* or *pragmatic* would be a better word choice, having in mind the well-known Ottoman pragmatic attitude in statecraft. Similar to other legal regimes of the period, the Ottoman reformers rationalized the judicial system through codification and proceduralization of the law. The Ottoman well-known tendency to keep administrative requirements in tandem with reality "in the field" was also at play. Hence, while reaffirming the very general judicial division of labor, both the legislature and the administrators of justice allowed a certain, not insignificant, space for legal pluralism, which endured until the demise of the Ottoman Empire. If there was a need for imposing rigid distinctions that would obstruct this flexible approach, it may have originated from foreign pressure, and even then, it did not motivate an overall attempt to unravel the ties between the *Şer'i* and the *Nizami* spheres at the level of daily praxis. The duality model that assumes a competition between "secular" and "religious" legal "systems" does not and cannot give expression to the Ottoman judicial hybridity.

Chapter 3

The Age of Procedure

Until the nineteenth century, "justice" (*adalet*) was conceived primarily in terms of protective relations between the sultan and his subjects.[1] In the most general sense, justice was founded on an unwritten pact between the sultan and his "flock" (*reaya*), according to which the sultan was committed to protect the tax-paying population from abuse by state officials. Various administrative mechanisms and customary practices provided ordinary people with direct access to the central administration. Eradication of abuse by state officials was a major preoccupation in the Justice Decrees (*adaletnames*) that were issued by the state through the centuries.[2] The mechanism of "complaint" (*şikâyet*) allowed peasants, nomads, and city dwellers alike to address the sultan in person or in writing, directly or through the provincial governors; thousands of these petitions were recorded in the Registers of Complaints (*Şikâyet Defterleri*).[3] The passage of Ottoman law to modernity in the nineteenth century did not result in a complete disappearance of this centuries-old pact between the ruler and his subjects. However, justice increasingly came to be defined in terms of procedural standards and universality of judicial practice.

Nizam was a key word in the Ottoman reform discourse throughout the long nineteenth century. According to Şerif Mardin, the term was used for the first time in the eighteenth century, in a proposal for reform that was drafted by a European officer.[4] The Redhouse Ottoman-English lexicon (1890) translates *nizam* as order, regularity, law, system, and method. Similarly, an Ottoman dictionary from 1899 describes the adjective *nizami* as well-organized (*tertipli*), set in order (*müretebb)*, regular, and orderly (*muntazam*). The term *nizam* also pertains to state law and order (*kanun ve nizama müteallik,*

nizamât-ı devlete mutabık).[5] In the late nineteenth century, the term *nizami* stood for both "legal" and "regular." In the reformers' modernist consciousness, order and regularity came to form the hallmark of modern administration and law. The difference between "lawful" and "unlawful" became contingent on consistent procedural correctness. The legality of every judicial practice was evaluated, before anything else, in terms of its agreement with a particular standard set by the Ministry of Justice. The central administration habitually monitored the observance of the legal standards by the various judicial units. The standard was communicated through sample-forms, and it also took the form of judicial reviews, namely, through evaluations of lower court decisions, checking their conformity with procedural codes.

In this chapter, I argue that the passage of Ottoman law to modernity was signified by its transition to a mode of legal formalism, experienced in the court system as an accelerated "proceduralization" of judicial praxis. Proceduralization was manifest not only as an unprecedentedly expansive body of legal procedure, but it was also apparent as a distinct legal culture that rendered procedure the focal point of jurisprudence.[6] This development resulted from and was energized by several sociolegal and political processes. For one, legal formalism served the Ottoman project of administrative centralization that characterized statecraft during the nineteenth century. The desire of legal formalists to reduce the human factor in adjudication to a minimum, and thereby subject law to an absolute model of objective reasoning, however vaguely conceived, coincided with the reigning political model of state centralization. In this scheme, there was no room for competing judicial "logics," as much as there could only be a single legitimate power base, identified with a reified state.

The Ottoman project of legal borrowing corresponded to the growing appeal of legal formalism in nineteenth-century Western Europe and North America, where it accommodated various economic and political transformations.[7] Observing European legal systems, Weber defined these processes as "professionalization" and "systematization" that were supposed to yield full or partial legal rationality embedded in statutory codification. For Weber, legal rationality meant, in the final analysis, the application of law in accordance with general rules. Hence, in order to qualify as "rational," legal systems had to apply the rules unvaryingly to all judicial cases, to the extent that court decisions would be predictable. By the same token, systematization in Weber's theory stands for the integration of rules in an internally consistent system.[8] Weber's legal theory is noteworthy

not for its explanatory strength, which has been criticized extensively due to its ambiguity, determinism, Orientalist agenda, and empirical weaknesses.[9] It is emblematic, however, of the zeitgeist of his epoch, specifically, the confidence of nineteenth-century intellectual elites in the power of reason and science to restructure, indeed improve nature and society. Nineteenth-century legal formalists believed that adjudication could be subject to the same methods of classification and experimentation that were used in the natural sciences.[10]

As I hope to demonstrate in the present chapter, in the Ottoman Empire, *Nizamiye* courts formed the most important judicial forum in which legal formalism was advanced and practiced through an unprecedented emphasis on legal procedure and standardization. However, the impact of legal formalism was felt also in *Şeriat* courts, although on a smaller scale. It is important to stress that proceduralization of law was apparent in both actual trials and judicial administration. Both aspects were inseparable.

Theoretical Framework: Proceduralization as Simplification

Catastrophic events in the first half of the twentieth century gave way in the second half to a large wave of grim theorizing of what used to be called *progress* in the late nineteenth century. Such is the theory of James C. Scott concerning the transformation of statecraft since the late nineteenth century. Borrowing the term *high modernism* from David Harvey, Scott employs it in *Seeing Like a State* to describe the unconditional faith of West European and North American societies in scientific and technical progress following the industrialization boom. In his words:

> At its center was a supreme self-confidence about continued linear progress, the development of scientific and technical knowledge, the expansion of production, the rational design of social order, the growing satisfaction of human needs, and, not least, an increasing control over nature (including human nature) commensurate with scientific understanding of natural laws. High modernism is thus a particularly sweeping vision of how the benefits of technical and scientific progress might be applied-usually through the state-in every field of human activity.[11]

In an attempt to explain the recurring failure of twentieth-century large-scale schemes to improve the human condition, Scott offers a

critical perception of the processes identified by Weber some half a century earlier as *rationalization*. He argues that a colossal effort to simplify state-related practice and render social realities legible was a distinctive feature of the modern state. High-modernist faith in its ability to hitch science and modern knowledge to projects of social engineering sustained the enthusiastic attempts of modern states to simplify praxis in the fields of administration, economic planning, urban planning, agriculture, and the law. Simplification and legibility were achieved by standardization, while doing away with the locally based practice and knowledge that had characterized the premodern state. According to Scott, the naïve faith in the capacity of generic formulas to replace the diversity of local practice and knowledge (which he calls *metis* paraphrasing the ancient Greeks) was responsible for "practical failure, social disillusionment, or most likely both."[12]

In an analysis of the changing administrative and legal praxis of the late nineteenth-century Ottoman state, Huri İslamoğlu endorses the notion of simplification offered by Scott. However, critical of his tendency to assume a sharp divide between a reified state and society, İslamoğlu suggests a blurring of the distinction between state and society.[13] Rather than seeing *the state* as the abode of a singular intent, and *society* as the domain of politics and negotiations between multiple actors, as implied by the accustomed state/society convention, she portrays individual administrative practices (registration, legal procedures, cadastral mapping, etc.) as manifestations of power fields, in which various actors "negotiate the terms of their existence." İslamoğlu distinguishes the modern state by its commitment to a generalization of practice, as opposed to the administrative practices of the premodern state, which were committed to and consciously determined by local social particularities. Unlike Scott's pessimistic emphasis on tragic consequences of "well-intended schemes to improve the human condition," İslamoğlu reaches the conclusion that in the Ottoman case, modernity did not fail; by the end of the nineteenth century a new hegemonic order was in place and the ability of the central administration to tax increased considerably.[14]

In what follows, I demonstrate some of the practices by which simplifications were realized in the reforming judicial sphere. The Ottoman central administration understood legal procedure as the key means for achieving simplification of judicial practice in the courts, calling it not simplification but regularity, or *nizam*. I advance an interpretive path that differs from both Scott and İslamoğlu, in that I am less interested here in the issue of successes or failures of the Ottoman passage to

modernity; I focus on understanding the impact of proceduralization-as-simplification on daily experience in the courts.

The Modernist Judicial System: Standardization

In a *Ceride* essay from 1888, Mehmet Şukri, the head clerk (*başkatib*) of the court of commerce in Van, complains about irregularities in the style of court decisions (*ilam*):

> Sometimes court decisions contain legal deficiencies or unnecessary redundancies, and clerks (*kâtip*s) who move from one court to another shape numerous models concerning the practice of this procedure. Therefore, court decisions are subject to appeals in second (*istinaf*) and third (*temyiz*) instances because various clerks in various courts use their pens differently. Quashing [by the Court of Cassation] causes delays by having cases re-addressed in the courts of first instance. Obviously, no court would wish to address the same case for the second time.[15]

In another essay from the same year, al-Sayyid Ahmad Fahmi bin-Aref, the recording clerk (*zabt kâtibi*) in the civil section of the court of first instance in Kırkkilise in the province of Edirne, criticized clerks who inscribed protocols (*zabt*) of criminal trials, for their usage of vague expressions such as "nothing in the defense of the attorney was found legally acceptable" or "until now, no contradiction has been found between the testimonies heard in court and those made during the pre-trial interrogation (*istintak*)." He then demonstrates the appropriate standard formula, when no contradiction is evident between the statements given by litigants and witnesses at the trial, and their earlier, pretrial depositions:

> no contradiction and change was apparent between the oral testimony in court and the statement dated . . . which was recorded on page . . . of the *istintak* documents concerning such and such act, conducted in this or that way in such and such place, committed by the accused so and so, and witnessed by so and so.[16]

These didactic texts exhibit the sort of bureaucratic ideology that was typical of the *Nizamiye* judicial culture. There was no room in this ideology for more than a single model to be followed in every judicial practice, be it the phrasing of a court decision, recording of protocols, the preparation of appellate petitions or of statistical

charts. The very act of codification was the most salient manifestation of this judicio-bureaucratic state of mind. Throughout the nineteenth century, the Ottoman legislature produced hundreds of numbered legal clauses in numerous fields: civil, criminal, commercial, procedural, and administrative. They were arranged as volumes divided into coherent chapters, exhibiting legibility and efficiency.[17] The *Nizamiye* courts were required to indicate in their decisions the number of the specific *madde*, or clause, that formed the basis for their decisions. The reformers' desire to codify almost every sphere of human activity followed the French legal positivism of the time, which aspired to minimize, if not dispose of doctrinal interpretation, custom and judicial discretion in favor of the statute.[18] This was the ultimate justice envisioned by Weber, when describing the (ideal-type) Continental legal system as a machine to which the pleadings and the fees are inserted and which then produces the judgment together with the reasons mechanically derived from the code.[19]

A translation of this vision of legal positivism into Ottoman-Islamic terms is apparent in a textbook on the *Nizamiye* procedure. Drawing on Islamic terms, the jurist Ali Şehbaz Efendi demonstrates the conceptual change brought about by the introduction of codification. He argues, in a nutshell, that until the creation of the *Nizamiye* courts, the discretion of the judge was inspired by the practice of *ijtihad* (jurists' original interpretation of religio-legal texts), whereas under the new judicial order, the legal clause (*madde*) became the exclusive source of adjudication. He then advises judges to adhere to the codified clause and avoid *ijtihad*.[20] The term *madde*, or article, was widely used in the *Nizamiye* discourse. It possessed three interrelated meanings: the law in general, a specific codified clause, or criminal charges in the criminal domain. *Madde* was not only a translation of the French *article*, or legal clause in a codified law. Rather, it was a signifier of the *Nizamiye* positivist schema as a whole. The Ottoman-Turkish language of the nineteenth century included a healthy number of foreign words. Yet, rather than borrowing the actual French term for legal article, the reformers chose to borrow from the Arabic, which was part of their immediate linguistic reservoir. *Madda* (مَادَّة) in Arabic has many meanings, all of which are various expressions of concrete reality: matter, substance, stuff, component, constituent, chemical element. The Arabic word *madda* also stands for disciplined forms of knowledge: academic discipline, school subject, field of study, subject matter. Hence, when Şehbaz Efendi contrasts the *madde* with *ijtihad*, he actually reinforces the binary oppositions of norm/interpretation and objective/subjective, which

certainly belong to the repertoire of the positivist-scientific mind of the nineteenth century. For a *Nizamiye* jurist like Şehbaz himself, and in line with the *Nizamiye* formalist mentality, the codified law formed the foundation of law as a discipline, as an objective science.

The last decades of the nineteenth century witnessed a systematic endeavor on the part of the senior administrators of the *Nizamiye* courts to subject reality to the realm of standard formulas through codification, regulation, and routine enforcement thereof. Standardization was a matter of both contents and form, and it was rendered visible through the concept of numbered articles and subdivisions. The procedural section in the *Mecelle* was the earliest comprehensive formulation of judicial procedure in the form of numbered articles, chapters, and subchapters. Yet, it were really the procedural codes of 1879, highly inspired by their French equivalents, that reflected the ambitious aspiration of the Continental legal tradition to regularize every aspect of the judicial practice.

Documentation was the most important medium for realizing the ideal of simplification through standardization. The principle rule, according to which every judicio-administrative action in the courts had to leave behind a documentary trace, was not written down as such, but was evident through a series of detailed procedural clauses. To ensure unity of practice across the board, the central judicial administration made sure to distribute a sample document to the various judicial units for every new practice of registration. Standardization of official forms was apparent in all spheres of Ottoman administration during the second half of the nineteenth century, enabled by the increasing accessibility of print technology.[21]

Registration, classification of documents, and routine report procedures were major measures for rendering the daily working of the courts legible to the gaze of the central judicial administration. Indicative is the fact that orders regarding registration and classification of documents are given at the outset of the *Code of Civil Procedure*. It instructs every court to keep separate registers for petitions, adjournments, legal actions, and documents submitted by the litigants, court decisions and fees received by the court, all to be arranged in a numeric order. The Ministry of Justice did not tolerate any deviation from the standard methods of registration and report. In a circular from July 1879, the ministry pointed to the fact that courts ignored the instruction to date protocols of trials in accordance with both the Muslim (*Arabi*) and civil (*Rumi*) calendars, and instead used only one of them, thus causing problems in the calculation of imprisonment terms and the determination of appellate

procedures.[22] The court clerks of all instances were required to send copies of these registers to the Ministry of Justice (and the Ministry of Police in criminal trials) once in three months. Court clerks were held personally accountable. Failure to follow the standard procedure of registration, or failure to send the copies of the registers on time, cost the clerks a fine as high as four *lira*s for every error.[23] In a circular to the provincial courts from December 1881, the Ministry of Justice complained that some criminal courts did not adhere to the sample forms when preparing the registers. Clerks, so it was reported, wrote down the names of convicts, but epithets (*şöhret*), names of fathers, and dates were erroneously omitted. The circular reminded the clerks of the relevant four-*lira* fine.[24]

The difficulty of lower courts to live up to these expectations of punctilious conduct are evident in a circular sent two years later, in which the ministry complained that most of the criminal courts of first and second instance had failed to send the registers, whereas some of them had sent registers that did not conform strictly with the sample forms.[25] Almost twenty years later, in 1898, the ministry again reprimanded the civil sections of the courts, arguing that most of them failed to follow the registration procedures specified in the *Code of Civil Procedure*.[26] Legibility through meticulous document-keeping dictated also the communication of the court with its users. The *Code of Civil Procedure* instructed the court to accept only petitions written on wood-made paper that had the dates, names, epithets, occupations, and addresses of the litigants, properly signed. Needless to say, every correspondence with the court had to be registered.[27]

In the official correspondence between the central judicial administration and the courts, facilitation of appellate procedure and prevention of delays were the most common justifications for the requirement to uphold the standard formulas. Indeed, universal and adequate recording procedures were crucial to both the process of appeal, and to the daily supervision of the courts' performance. In a mammoth judicial organization such as the *Nizamiye* one, the proper functioning of the higher judicial instances depended on the "reliability" of the documents, at times being the only point of reference for the judges, the public prosecutors, and the attorneys who addressed cases in the courts of appeal.[28] Rendering the proceeding legible in the eyes of potential appellate review was the logic that guided the recording clerk from Kırkkilise, mentioned earlier, in his advice to his fellow clerks. It is important, he writes, that the recording clerk, who is not acquainted with the minute details of the

(pretrial) investigation documents, will write down "everything that goes on in the trial, whether necessary or not." The clerk reassured his colleagues that errors were "natural," and that they were to be revealed in the appellate proceeding in any case.[29]

Yet adherence to standard scribal and report conventions was not only a matter of administrative efficiency; it was also a discursive characteristic typical of the *Nizamiye* judicial culture evident in its showcase, the *Ceride-i Mehakim*. The case reports in the *Ceride* are extremely formulaic in style, revealing nothing on the process of interpretation that led to the ruling of the court. In civil cases the reports typically adhere to the following template:

1. General introduction of the litigants involved including names, titles, and places of residence. Specification of the number of the original court decision and of the issuing court.
2. Summary of the disputed court decision.
3. Summary of the appellant's petition, namely, the reasons on the basis of which the appellant wishes to have the lower court decision's quashed.
4. Summary of the defendant's response, which often includes a formulaic phrase, such as "the court decision in question is lawful."
5. Summary of the opinion of the public prosecutor in cases that require his input.
6. Ruling of the Court of Cassation, indication of the relevant articles of the relevant laws, and the subsequent orders of the court regarding the procedure to be followed.

Neither is the personal voice of the judge presented in these reports (in both civil and criminal matters), nor are possible debates among the court panel traceable. The process of adjudication is projected as a matter of a mechanical *application*, rather than *interpretation* of the statutes. Unlike the discursive style typical of the common-law tradition, the *Nizamiye* discourse never subjects the legal source itself to criticism for possible ambiguity or inadequacy; the legal clause appears as a definite, undisputed juridical artifact. The formalistic discursive style exhibited in the *Ceride*'s case reports is very similar to the one characterizing the rulings of the French *Cour de Cassation*, which never deviates from the standard grammatical and stylistic template.[30]

Statistics formed another powerful means for attaining legibility. During the nineteenth century, statistics became the dominant method for rendering society comprehensible to the gaze of state

administrations all over the world, turning into a customary identifying mark of "civilized" societies.[31] In modern statecraft, pedantic collection of statistical data serves what Anthony Giddens recognized as the *reflexivity* of modern social life, referring to the obsessive examination and reform of social practices in the light of a constant inflow of information about those practices.[32] Systematic collection of data from the population was not an unknown practice in the history of premodern Ottoman statecraft. Yet in the nineteenth century, in the Ottoman Empire and elsewhere, official data collection turned into a scientific endeavor, called statistics (*istatistik*), which served new objectives. Statistical practices were applied in unprecedented scope and rigor. Statistics served the Ottomans in realizing their modernist projects roughly at the same time that it served other states, with similar highly developed bureaucratic traditions. The Ottomans did not lag behind in detecting the potential contribution of statistical manipulation and official data to the enterprise of state centralization. In the last quarter of the nineteenth century, statistical offices were established throughout the empire, aimed at collecting data on many spheres of life and then providing the statistical data to the various ministries.[33]

Since the early 1880s, the various *Nizamiye* judicial departments were required to send statistical reports in accordance with detailed instructions and standard samples. As in the case of the report routines, it took the courts a good number of years to get accustomed to the new habit of data-collection along conventional patterns.[34] Nevertheless, statistical charts that were published in the official yearbooks (*salname*s) and the *Ceride* imply that by the end of the century, such habits had successfully been established. What was included in these charts? Statistics collected from the *Nizamiye* courts take up a significant portion in the first statistical yearbook of the Ottoman Empire (1897). The plentiful tables provide an incredible wealth of information, classified in categories that never before had been deemed important in the eyes of Ottoman bureaucrats. The decision as to what details deserved to be included in what categories of classification was not always contingent on immediate practical needs. Sometime data seem to have been pedantically gathered for the mere sake of collection. The following is just a partial list of tables (each table contains data specific to the various provinces and a summary representing the entire population):

- The sex and numbers of individuals convicted of felony (*cinayet*), crimes (*cünha*), and offenses (*kabahat*).
- The sort and amount of crimes tried by the courts.

- Distribution of individuals convicted of felonies and medium crimes, in terms of religious and national communities.
- Distribution of individuals convicted of felonies and medium crimes, in terms of trade and occupation.
- Distribution of individuals convicted of felonies and medium crimes, in terms of age.
- Distribution of cases heard by the civil sections, in terms of categories and sums of money under litigation.[35]

Statistical charts from specific courts were published in the *Ceride* on a regular basis. These charts were often different from the ones published in the statistical yearbook. In the *Ceride* it was the document that was emphasized, as a means of promoting a simplified, rational administrative conduct (see figure 3.1). For instance, a statistical chart produced by the office of public prosecution at the Istanbul (Dersaadet) criminal court of appeal specified the amount of documents it produced during the fiscal year 1306 (1890–1), arranged along two main categories: the judicial unit to which the documents were sent (indictment committee, the Court of Cassation, civil and commercial courts), and the type of documents that were sent to these units (written opinions, reports, bills of indictment). The chart revealed that the public prosecution in Istanbul produced a total of 8,738 documents during that year. But the bottom line of this statistical report was the fact that only 93 actions (1.06 percent of all actions!) were deferred to the following fiscal year. Based on this data, the Ministry of Justice sent an appreciation letter to the public prosecutor at the court of appeal, Halit Bey.[36] In the same year, the famed Cevdet Paşa, then the minister of justice, sent the following letter of approbation to the president of the Beyoğlu court of first instance-criminal section:

> The statistical tables for the year 1889 demonstrate that from 3,647 cases that arrived to the court during this year, 3,632 cases were addressed, and only fifteen cases were deferred to the following year. This is a proof of the court's devotion. I am pleased to write you this letter.[37]

The widespread employment of statistics in the *Nizamiye* judicial administration had a clear exemplary value. In the aforementioned case, the statistical data were specifically used as yet another means of fighting delays. In a more general sense, statistics were conceived as a scientific way of dealing with social issues. The Ottomans shared this modernist understanding of statecraft with other contemporary

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باش مدعی عمومیلك داڑه‌سی

وارده قسمی

١٠٤٣	اوچیوز اون بر سنه‌سندن دور اولنان اوراق
٢٠٦٨٧	اوچیوز اون ایکی سنه‌سی مارت ابتداسندن شباط غایه‌سنه قدر ورود ایدن اوراق
٢١٧٣٠	
٢٠٧٢٢	
١٠٠٨	
١٥٢	تدقیقاتی اجرا قلنوب دردست تبییض وتحریر بولنان
٨٥٦	دردست تدقیق اولوب اوچیوز اون اوچ سنه‌سنه دور اولنان

صادره قسمی

٥١٨	دعاوی حقوقیه متدائر اعلامات حقنده اولوب بامطالعه‌نامه محکمهٔ تمیز حقنده دائرهٔ علیه‌سنه تودیع قلنان
٤٧٥٥	رأساً ورسماً تابع تمیز اولان استدعا نامه اوزرینه ورود ایدن جنایت وجنحه وقباحته دائر اولوب بانبلیغنامه محکمهٔ تمیز جزا دائرهٔ علیه‌سنه اعطا قلنان
٨٩٥	نقل دعوی ومفسوخیت ووظیفه وصلاحیت ومرور زمانه دائر اولهرق محکمهٔ تمیز استدعا دائرهٔ علیه‌سنه اعطا قلنان
١٠٤٨٧	دوائر وولایاته یازیلان تذاکر ومحررات وتلغرافنامه
٣٢١٥	باظهریه دوائر عائده‌سنه کوندریلان
٥٧١	اوراقیله برلشدیریلان
١٣١	اکمال نواقصی ایچون محلرینه یازیلان
١٥٠	معامله لازمه‌سی بالاجرا ابطال ایدیلان
٢٠٧٢٢	

محکمهٔ تمیز باش مدعی عمومیلکی مأموریتنه اوچیوز اون بر سنه‌سندن دور اولنان واوچیوز اون ایکی سنه‌سی ظرفنده ورود ایدن یکرمی بر بیك یدی یوز اوتوز طاقم اعلامات و اوراقدن بالاده کوسترلدیکی وجهله یکرمی بیك یدیبوز یکرمی ایکی عددی رؤیت اولنوب متباقی بیك سکز قطعه‌سنك تدقیقاتی اجرا اولنوب دردست تبییض وتحریر اولنلردن ماعدا سکزیوز اللی التی عددینك سنهٔ جدیده‌یه دور اولنمش اولدیغی قیداً اکلاشیلمش اولدیغی مروضدر اولیابده

Figure 3.1 A statistical chart—*Ceride-i Mehakim.*

states. Ann Stoler's characterization of the European usage of statistics is just as relevant to the Ottoman case:

> Both commissions and statistics were part of the "moral science" of the nineteenth century that coded and counted society's pathologies.

> While statistics used deviations from the mean to identify deviations from the norm, commissions joined those numbers with stories culled from individual "cases" to measure gradations of morality.[38]

While I am not aware of a similar employment of statistics in the *Şeriat* courts, it is clear that the proceduralization and standardization of judicial practices, being part of the simplification vision that dominated the high-modernist mind of the judicial administration, was not limited to the *Nizamiye* domain of the judicial sphere. In chapter two I pointed to the *Law of the Şeriat Court Procedure* (1917) as a demonstration of the enduring homogeneity of the Ottoman judicial sphere, arguing that this law was indicative of proceduralization, rather than secularization of the law, regardless of the *Nizami/Şer'i* administrative distinction. Since the 1840s, a momentum of procedural innovation and professionalization was evident in the *Şer'i* domain, that is, roughly two decades before the creation of the *Nizamiye* court system.[39] Although the *Nizamiye* and *Şeriat* courts belonged to two distinct administrative units, the former was subordinated to the Ministry of Justice, and the latter to the *Meşihat* (the office of the *Şeyhülislam*), an unprecedented accentuation of documentation, registration, classification, and report routines were evident also in numerous instructions sent from the imperial capital to the provincial *Şeriat* courts, increasingly since the 1870s.[40]

In April 1879, the *Meşihat* sent detailed instructions to the *Şeriat* courts that regularized the trial procedures in these courts. The instructions referred to the following procedures: initial identification of the litigants, authorization of attorneys, registration of depositions and presentation thereof before the judge, hearing of witnesses, registration of court decisions, and the subsequent report procedure. These instructions leave no doubt; it is the document and its standard preparation, registration and classification, that formed their raison d'être. "Everything that goes on in the trial" was to be represented in writing, then classified and placed in the appropriate register, be it powers of attorney, depositions, testimonies, and so on. Each document had to be authenticated by the relevant person. Litigants authenticated their recorded depositions, witnesses confirmed their recorded statements, and judges had to validate various documents seen or produced by the court. This law was entitled *Instructions concerning the drafting of Şer'i documents in a form that will render them a lawful basis for [future] judicial actions and ruling when no [other] evidence is available.*[41] It is therefore indicative of the new association of justice with a strict adherence to procedural standards of documentation and its bearing on the *Şeriat* courts. At the same time, this

law indicated the change in the status of written documents as means of evidence. During preceding centuries, written documentation was presented in the Ottoman courts of law, but its value as means of evidence was rather limited, unmatched by the importance of oral testimonies.[42] The parallel between the *Şeriat* courts and *Nizamiye* courts, discussed in the previous chapter, is also evident in terms of the time that it took the court personnel to internalize the new emphasis of procedure. As seen earlier, the *Nizamiye* personnel needed more or less a decade to assimilate the new working routines. Similarly, almost a decade elapsed before the new instructions were implemented in the provincial *Şeriat* courts, to judge from the case of Jaffa.[43]

As shown by Agmon, until the late 1880s the judge and the scribes in the Jaffa *Şeriat* court used a mixture of locally developed recording practices together with a selective implementation of instructions from the central administration within a dynamic heuristic process. To paraphrase Scott, the Jaffa court was a social scene in which state-generated simplification, in the form of instructions from Istanbul, met practical knowledge, or *metis* (locally developed practice). It seems that eventually simplification prevailed. In the *Nizamiye* high-modernist legal culture, locally based judicial practice was conceived as an impediment, a symptom of disorder (*nizamsız*) that stood in the way of justice, exactly because justice came to be conceived in terms of uniformity of judicial practice. This was evident in the essay of the head clerk from Van, mentioned earlier, who complained that clerks who moved "from one court to another" develop numerous scribal models, which result in poor functioning.

THE FORMALIST COURT

Whereas the Ministry of Justice led the effort of proceduralizing the judicial system as such, it was the Court of Cassation that played the most active role in enforcing the observance of the new large body of procedure in the field of adjudication. This court, which stood at the top of the three-tiered judicial hierarchy, was established in 1879 instead of its predecessor, the Council of Judicial Ordinances (*Divan-ı Ahkâm-ı Adliye*). At the time of its establishment, the court consisted of criminal and civil sections, and the Petitions Department (*istida dairesi*) was added in 1887. The establishment of that department was an important development in the evolution of Ottoman legal formalism. The judges in the Petitions Department adjudicated criminal and civil cases on the basis of documents (petitions, objections to lower court decisions, and official reports), without hearing

litigants or witnesses. They were responsible for reviewing the procedural aspects of appellate petitions, and rejecting petitions that did not meet the procedural requirements of the cassation phase. The department was also authorized to issue rulings on petitions that challenged lower court decisions on the basis of procedural aspects such as jurisdiction and prescriptive periods (*mürur-i zaman*). Once its procedural validity was approved, the petition was sent to either the civil or the criminal section of the Court of Cassation.[44] The role of the high court as a guardian of procedural correctness was further bolstered by a law from 1907, which authorized the civil section of the Court of Cassation to reject any petition that did not conform to the standard template, or that was not submitted within the prescriptive period, without referring the petition to the court panel.[45]

The Ottoman Court of Cassation, which was modeled after the French *Cour de cassation*, preserved the latter's primary task of ensuring the correct and consistent application of the law.[46] As a rule of thumb, whenever the Court of Cassation had to choose between procedural and substantive considerations in addressing appellate petitions, it focused on the procedural ones.[47] Hundreds of case reports in the *Ceride* demonstrate the new judicial opportunities made available to court users by the introduction of the expansive procedure, and at the same time the trouble it caused for those who lost their cases. Employing procedural tactics was not limited to the Court of Cassation, but was apparent at all instances, as demonstrated in the following case.

In 1887, Hasan Bey and Cemal Bey from Istanbul won their civil suit against a certain restaurant keeper named Hacı Haralambo. The case was addressed at the court of first instance in the capital. Haralambo appealed to the same court in its capacity as a court of appeal, but lost again on the grounds that he had failed to state his occupation in the written petition. Haralambo appealed to the Court of Cassation through his attorney, Alexandros Efendi. The Court of Cassation quashed the lower court decision in July 1888, arguing that the decision of the appellate court to reject the petition, using the "pretext" (*serrişte*) that the occupation was not indicated in the petition, was unlawful. The Court of Cassation maintained that facilitation of potential appellate and cassation procedure was the rationale behind the legal requirement to state in writing the identification details, but since those were already known to the court, there was no need to provide them again.[48] In this case, the court of appeal turned out to be more formalistic than the Court of Cassation.

A similar case that yielded a different judicial outcome occurred six years later, in 1894, when the legal representative of the Public Debt Administration brought a suit at the Konya court of first instance against the tax farmer (*mültezim*) Hüseyin Efendi, asking the court to order the tax farmer to pay tax dues on account of revenues obtained from hunting in the county of Beyşehri (the province of Konya). The court ruled in favor of the administration. Hüseyin Efendi appealed to the same court, now in its capacity as a court of appeal; the report does not specify the points made by the tax farmer. The Konya court of appeal rejected Hüseyin's appeal because he had not stated his name, epithet, address, and occupation, as required by the *Code of Civil Procedure*. Hüseyin, the tax farmer, sent a written petition to the Court of Cassation in Istanbul, appealing from the decision of the Konya court of appeal. He argued that there was no need to state his identification details in writing, because they were already known to the court, which had previously addressed the case in its capacity as a court of first instance.

The Court of Cassation reviewed the documents and heard the attorney of the Public Debt Administration İpikian Efendi, as well as the public prosecutor, whose opinion was required by law in cases involving state authorities. The latter justified the position of the tax farmer, maintaining that the requirement to fill in the appellant's identification details was meant to facilitate the summons of the appellant to the court of appeal, but since the Konya court already had the identification details at its disposal, there was no flaw in the written petition submitted to the court in Konya. It was one of those rather atypical cases in which the Court of Cassation did not agree with the opinion of the public prosecutor. In October 1895, it therefore rejected Hüseyin's appeal, and upheld the Konya court decision.[49]

These two cases illustrate a pedantic accentuation of procedural correctness in the provincial courts of appeal. The French *cassation* method served the centralization objectives of the Ottoman legislature perfectly. The courts were expected to comply with the requirement for procedural correctness in the strictest fashion. Even the most technical fault could cause an annulment of court decisions at the Court of Cassation, and subsequently a reopening of the case at the same lower court, thus increasing the workload. As the head clerk at the Van court of commerce of eastern Anatolia said: "Obviously, no court would wish to address the same case for the second time," all the more so in an organizational environment in which delays were reflected in routine reports and statistical charts. The second case noted earlier, involving the Public Debt Administration and the tax

farmer Hüseyin Efendi, is more typical than the first (Haralambo), as far as the Court of Cassation was concerned. On the whole, the high court exhibited a stringent approach to technical flaws, rejecting many petitions for this reason.[50]

To draw on Scott's conceptualization of high-modernism, the project of codification was intended to bring about a uniform simplification. Yet, the codification of judicial procedure in the Ottoman case (and most probably in other modern contexts as well) resulted in a considerable expansion of the judicial "ammunition" at the disposal of court users, which paradoxically complicated court proceedings beyond the relatively simple technical issues, as demonstrated in the following dispute.

In 1890, four individuals, Tevfik, İsmail, Halil, and Mehmet, turned to the court of first instance in Aziziye, asking it to prevent two local landlords, Mustafa Ağa and Mehmet Ağa, from taking hold of a field that the four gentlemen claimed to be its legal owners. The Ağas did not respond to the summons sent by the court, and an ad hoc (*musahhar*) attorney was appointed. In the trial it turned out that Tevfik and his minor sister, Halime, had inherited the field from their father. Tevfik substantiated his claim by producing a title deed (*tapu*), and the judicial investigation revealed that the transfer of the land from the father to his children was registered in the land-cadastre register (*yoklama*). His claim was further supported by written statements from the village headman, *imam*, and council of elders (*ihtiyar meclisi*). The court acknowledged the ownership rights of Tevfik and his sister, and ruled in absentia against the Ağas. The *Code of Civil Procedure* allowed litigants to appeal from court decisions that had been issued in their absence by submitting a petition to the same court, without having to follow the regular appellate procedure. Decisions in absentia were valid in certain circumstances specified by the code; and the appeal from such a decision, defined "protest against the decision" (*itiraz'al'ülhüküm*), could lead to a revision of the court decision or to a new trial; or else, it could be rejected altogether.[51] The Ağas submitted a protest, which the Aziziye court found unjustified, and then turned to the Court of Cassation, raising the following procedural points: first, the Aziziye court was supposed to hear the opinion of a public prosecutor because the case involved the rights of a minor. Indeed, the *Law of the Nizamiye Judicial Organization* obliged the presence of public prosecutors in civil disputes that involved minors; second, they argued that the Aziziye court failed to indicate in its judgment the relevant legal clause on which the decision was based.

The Court of Cassation obtained the written opinion of the chief public prosecutor, who considered the Ağas' claim regarding the absence of the public prosecutor at the court of first instance unfounded, based on the documents presented to him. The Court of Cassation eventually quashed the Azizye court decision, but for procedural reasons that had not been raised by the Ağas in their petition. For one, it pointed to the fact that being a matter of landed property (*akar*), the court had to summon a land official (*arazi memuru*), which it had failed to do. In addition, the *Mecelle* stipulated that when a person was accused of occupying (*vaz'iyed*) a disputed plot of land, his actual possession of this land had to be proven in court (article 1754); yet the Aziziye court failed to meet this legal requirement. The Court of Cassation also criticized the Aziziye court for contending with the written depositions of the witnesses, without actually hearing them in person, as required in such ownership disputes. It stated that these flaws had been raised by the Ağas in their protest, and the Aziziye court had to consider them and revise its decision in absentia, but it ignored them altogether.[52] It seems that this case was initially handled by a sloppy court panel that made procedural errors throughout the proceedings. Perhaps it was not a matter of carelessness, but of bias for unknown reasons.

In theory, the task facing the Court of Cassation was straightforward, namely, examining whether or not the lower courts adhered to the legal standard provided by the codified law. In reality, however, the combination of a legally pluralistic environment with expanding positive law intended to be applied uniformly, created a procedural labyrinth that worked for some court users, and at the same time presented a challenge to the Court of Cassation. The integration of the Ottoman Empire into the world economy in the nineteenth century brought with it an increase in the number of foreign subjects living in Ottoman domains. The existence of a growing community of foreign technical experts, businessmen, migrants, adventurers, and missionaries, together with many Ottoman-born individuals who obtained foreign citizenship in order to benefit from the capitulations, further complicated the judicial scene. In the late 1880s, a representative of the Ministry of Post and Telegraph requested from the court of commerce in Sivas to order Monsieur McCalim, an American subject who served as the telegraph inspector in Sivas, to pay a debt of 7,000 *kuruş* that he owed to the ministry. The actual circumstance of the debt is not specified; the report does indicate, however, that McCalim had a guarantor, an Armenian called Artin Bakalian, who had died before the case reached the court. The court confirmed the debt

in McCalim's absence, and ordered him to pay, while notifying the Ministry of Foreign Affairs. According to the *Code of Civil Procedure*, the defendant had thirty-one days to protest a decision in absentia, but McCalim did not use this right. Eager to have the debt paid, the representative of the ministry sued Hacı Sinan Bakalian, who was the heir of McCalim's guarantor, requesting the court to execute the guarantee, and pay the debt from the guarantor's bequest. The court accepted the ministry's claim and ordered Hacı Sinan Bakalian to pay McCalim's debt. Bakalian appealed to the court of appeal in Sivas through his attorney, arguing that since McCalim was a foreigner, the *Code of Civil Procedure* did not apply in his case, and that the *Code of Commercial Procedure* was to be followed. Given that the decision against McCalim was in absentia, the *Code of Commercial Procedure* stipulated that the execution of the guarantee was contingent on the debtor's realization of his right to protest, and as long as McCalim did not follow the protest procedure, so the attorney argued, his client, the guarantor, could not be held liable. In its decision, the court of appeal maintained that the *Code of Civil Procedure* indeed established a prescriptive period of thirty-one days during which the defendant could protest a decision in absentia; but since McCalim was a foreigner, and the matter was addressed in the court of commerce, the *Code of Civil Procedure* was inapplicable to this case. According to the *Code of Commercial Procedure*, however, a decision in absentia could be subject to protest until the day of its execution, with no time limitation. The court also relied on the *Mecelle* (clause 636), according to which the guarantor was not liable to pay until the terms of the guarantee were fulfilled; and since the protest had not yet been submitted, the lower court decision to execute the guarantee was found invalid.

Not satisfied with this decision of the court of appeal, the representative of the ministry appealed to the Court of Cassation. Holding on to the procedural arsenal, he argued at first that a public prosecutor had to be present in the proceedings in accordance with the *Law of the Nizamiye Judicial Organization*, and that this requirement was not met. He also argued that contrary to the opinion of the Sivas court of appeal, the *Code of Civil Procedure* was actually applicable in the commercial court of first instance, and that therefore the prescriptive period of thirty-one days for protesting a decision in absentia was binding. Hacı Sinan Bakalian's attorney responded that according to the circulars of the Ministry of Justice, cases that previously had belonged to the mixed courts and were now addressed by the courts of commerce did not require the presence of public prosecutors. He

did not respond to the other point concerning the protest. To make things even more complicated than they already were, the chief public prosecutor stated in his opinion to the Court of Cassation that the presence of a public prosecutor in the judicial proceedings was required by the fact that the case concerned state funds, and his absence formed sufficient grounds for quashing the lower court decision. Two years after the case was addressed at the Sivas court of appeal, the Court of Cassation decided to accept the opinion of the chief public prosecutor. In addition, it agreed with the attorney of the ministry that the *Code of Civil Procedure* was applicable in the commercial court of first instance, and that the prescriptive period of thirty-one days established by this code was therefore binding in this case.[53] In this lengthy judicial battle, the skilled attorneys of both parties made the most of the opportunities provided by an expanding procedure. At various stages of this conflict, various legal sources were called upon: the *Code of Civil Procedure*, the *Code of Commercial Procedure,* the *Law of the Nizamiye Judicial Organization*, the *Mecelle*, and the circulars of the Ministry of Justice. Undoubtedly, navigating the modern legal labyrinth required the kind of procedural knowledge that most of the litigants did not possess. The effect of the growing need for legal representation, caused by the emergence of legal formalism, on the accessibility of justice is to be discussed next.

THE SOCIAL IMPLICATIONS OF PROCEDURALIZATION AND PROFESSIONALIZATION

As illustrated earlier, court users took full advantage of the new opportunities offered by the appellate courts and the formalism that was advanced in the *Nizamiye* courts. But in most cases, the proceduralization of law could be translated into judicial opportunities only with the assistance of well-informed attorneys. It is no surprise, then, that professional attorneyship made their entry into the Ottoman judicial sphere with the consolidation of legal formalism during the 1870s. The concept of legal representation had existed in premodern Ottoman law, but it was rather different from the modern notion of professional attorneyship. The main difference was that the premodern judicial agent (*vekil*) could be any individual empowered by the litigant through a special contract, and that the *vekil*'s duty was to *represent*, rather than *advocate* the interests of his client.[54] The absence of an advocacy tradition in Islamic law and Ottoman judicial practice may possibly be related to the preference given to arbitration

over adjudication geared toward win-lose outcomes in the premodern Ottoman court.[55] This tendency of the premodern *Şeriat* courts to search for solutions that would accommodate both parties was perhaps the reason for the relatively infrequent employment of *vekil*s in these courts and the limited importance of written documents.[56]

Professional attorneyship was contingent on standard legal training. An experimental version of a modern law school was established in 1870 at the Ministry of Justice under the name of *Dershâne* (classroom) of Laws, offering a one-year legal training in the fields of *Mecelle*, land laws, penal code, maritime commerce, procedural law, and various regulations related to duties in the *Nizamiye* courts. This institution did not last for long, and similar was the fate of a class in the Galatasaray *Darülfünun* that was opened in 1875.[57] In the same year, the *Law of Professional Attorneyship in the Nizamiye Courts* introduced the first official outline for the institution of professional attorneyship.[58] This law restricted legal representation to holders of licenses issued by the Ministry of Justice (then termed *Divan-ı Ahkâm-ı Adliye*). To qualify for this license, attorneys had to be graduates of law schools, at least twenty years old, and of clean record. They could not be state employees. Those who were merchants and bankers had to be without any bankruptcy warnings. This law also introduced and regulated related matters such as the power of attorney (*vekâletname*), retainer, and the bar association (*dâva vekilleri cemiyeti*). When the attorneyship law was enacted, the law school for *Şer'i* judges (established 1854) and various *medereses* were the available institutions providing legal education. Only in 1878 was a *Nizamiye* law school established in Istanbul.[59]

Once the institution and concept of professional attorneyship was officially introduced, the judicial community distinguished between professional attorneys, defined as "trial agents" (*dâva vekilleri*), and nonprofessional judicial "agents" (*vekil*). During the years that followed the enactment of the *Law of Professional Attorneyship in the Nizamiye Courts*, the Ministry of Justice had to deal with the gap between its ideal of professional legal representation, which was inspired by the European model, and the necessities "in the field," namely, the fact that the services of the nonprofessional judicial agents could not be dispensed with. In the process, the ministry explicitly advanced a negative image of the judicial agents, only to be contrasted with the licensed professional attorneys. In a circular from December 1880, which addressed the requirement for professional attorneyship in the provinces, it stated that legal unlicensed representatives "harm the people, disturb the courts and keep them busy." The circular

discussed the examination procedures in the provincial centers, and it specified the structure of these examinations.[60]

In 1886, the Ministry of Justice was forced to revoke its requirement of obtaining a license for attorneys in civil cases. The stated reason was that restriction of attorneyship in the civil courts to licensed advocates was incompatible with a provision of the *Mecelle*.[61] One scholar interprets this move as an indication of the so-called *dualism* that is thought to have characterized the *tanzimat* movement as a whole.[62] However, when viewed from the perspective of proceduralization, this move was a pragmatic response of the central administration to a growing demand for legal representation in the courts. This demand could not be met by the relatively small community of law school graduates, many of whom preferred the career paths of judges and public prosecutors, and only a minority chose to work as advocates.[63] Obviously, demand for legal advocacy was most evident in the civil domain, in which proceedings tended to be more complicated than the criminal one. In any case, the ministry's withdrawal from its earlier attempts to restrict legal representation to licensed attorneys was something of an embarrassment, as it revealed its limited ability to realize its modernist vision.[64] At the same time, the conduct of licensed attorneys was subject to criticism just as well. In October 1886, Ali Şehbaz Efendi, at that point a member of the Court of Cassation, published in the *Ceride* an essay explaining the background of the ministry's decision to abolish the restriction in the civil sections of the *Nizamiye* courts.[65] This is a fascinating judgmental text that reveals the modernist *Nizamiye* ideology, as well as the gap between discourse and praxis. Judge Şehbaz begins by reiterating the convention according to which the need for legal representation in the *Nizamiye* courts stems from the elaborate procedure, in contrast with the *Şeriat* courts, where procedure is "very simple." For this reason, argues Şehbaz, there is no real need for legal representation in the *Şeriat* courts; in fact, litigants who sue or defend themselves in person actually bolster their case. The new career path of professional attorneyship, according to Şehbaz, is a direct outcome of the new laws and the multiple procedures, and it has nothing in common with the judicial agents. Employing a somewhat paradoxical rhetoric, Şehbaz Efendi makes sure to pay his respect to the *Şeriat*, stating that it is a "huge ocean" that can be applied to every situation, whereas it is the limited nature of the new laws that renders professional attorneyship indispensable. Knowledge of these laws "allows clarifying the actual meaning of the legal clauses [. . .] and [it ensures that] litigants who encounter unfamiliar situations are not sacrificed to people's deceits

and tricks." Şehbaz reminds his colleagues that Ottoman professional attorneyship took inspiration from Europe, where "the duty of the professional court attorney is of the highest virtue." The part of the essay that describes what went wrong, despite the good intention of introducing professional attorneyship, deserves to be cited:

> We must admit with regret that most [of the attorneys] fail to perform their essential duties vis-à-vis the courts and the clients. The Ministry of Justice founded the Law School. Until graduates were produced, the number of individuals who possessed complete legal knowledge was limited to fifty. Hence, the issuance of diplomas was meant to assist the profession, while not changing the privileges of these individuals. This way, it was assumed that most of the authorized attorneys [who were not law school graduates] would be inclined to complete their legal knowledge [. . .]. In actuality, however, they chose the old trade of petition writers, which had a negative affect on the law.[66] Many attorneys have deceived their clients, charging illegal and exaggerated fees, thereby often violating judges' dignity and honor with no right [. . .]. By prolonging deliberations and undertaking measures that contradict the basic principles of attorneyship, they keep the courts needlessly busy, and injure litigants. After taking the advance payment, they begin to neglect their duties [. . .]. Some of the attorneys do not wish to talk in detail about this situation, but we have to admit that they face these evils without objection. We keep saying that our attorneys are worthy of entering the communities of the most respectable attorneys of Europe. However, the number of those [worthy attornies] is extremely limited.[67]

Bitter, generalizing critique, which contrasted a primitive, local practice (the traditional *vekil* in this case) with a European utopia, was a common phenomenon among the section of the Ottoman intelligentsia who whole-heartedly adopted Orientalist modes of representation.[68] Hence, Şehbaz account should be read as a signifier of a particular modernist discourse, and not of an actual habitude in the courts. The sources do not imply in any way that the *vekil*s were less competent than the licensed attorneys, and there is no indication of a wholesale abuse of office on the part of the attorneys, licensed or not. They do indicate, however, that the licensed attorneys tended to play more vigorously on the procedural front, thus prolonging the proceedings.[69]

How did the growing demand for legal representation affect litigants in the *Nizamiye* courts? During the nineteenth and early twentieth centuries, legal regimes throughout the world took their inspiration from the French model, and established local judicial

versions of French legal liberalism. The *Nizamiye* court system signified such a transition, which was exhibited in its formalism and developed appellate system. This change should not be interpreted as a transition from arbitrary justice to a rational one. The premodern Ottoman judicial order was a far cry from Weber's notion of arbitrary *kadi justice*. As Gerber effectively demonstrates, premodern Ottoman courts of law presented a considerable degree of consistency and predictability, thus presenting a substantial degree of "rationality." Similarly, appellate procedures were not unknown in Islamic law, nor in the Ottoman judicial system prior to the reforms of the nineteenth century.[70] Yet, in terms of practice, these features distinctly differed from modern judicial regimes, and the premodern judicial order was not committed to an explicit ideology of legal formalism. The *Nizamiye* legal discourse, by contrast, unambiguously advocated liberal concepts such as independence of the courts and judicial impartiality; the principle of procedural correctness was conceived as a means of both realizing these concepts and rendering them visible.

Nonetheless, as I argue in chapter one, the *Nizamiye* justice was expensive, in part due to the growing dependency on attorneys. As a rule of thumb, the judicial opportunities created by the formalization of the Ottoman judicial sphere mainly served the interests of the wealthier classes and the various state authorities able to bear the costs involved in the appeal procedures, such as retainers and fees. According to the official tariff from 1879 that regulated attorney's fees, clients had to pay their lawyers 50 *kuruş* for the first 150 words in an appellate petition, and an extra 10 *kuruş* for any additional 100 words. Each plea in court cost the client another 60 *kuruş*.[71] In addition, court users had to be able to pay for a wide range of judicial fees in accordance with the official tariff. Further expenses caused by travel and loss of workdays should be considered as well. All this implies a limited accessibility of the *Nizamiye* courts, and especially the appeal system. By way of illustration, in the late nineteenth century, craftsmen in Istanbul earned between 7 and 13 *kuruş* a day, which was 20 percent higher than their peers in the provinces. The salaries of civil servants were significantly higher, amounting to a monthly average of 540 *kuruş* at the same period, which was considered sufficient to support a small family.[72]

Legal representation in all judicial instances provided a significant advantage for those who could afford it, and it became indispensable in the courts of appeal and the Court of Cassation. The Ministry of Justice paid some attention to this problem by instructing

the provincial public prosecutors to provide the needy with free legal representation in criminal matters.[73] In civil matters, the *Mecelle* instructed the judge to assign an *ad hoc* attorney (*musahhar*) to defendants who were not present at the trial.[74] In 1886, the Ministry of Justice clarified that appointments of *musahhar* representatives were not included in the cancellation of the licensing requirement; namely, *musahhar* representative could be appointed only from among the licensed attorneys (*ruhsatnameli dâva vekilleri*).[75] It was an attempt to secure professional legal representation to defendants not present in court, but it did not relieve the financial burden faced by litigants in the civil domain, because in the civil and the commercial *Nizamiye* courts, the *musahhar*'s fee was added to the list of court expenses charged to the litigant who lost the case.[76] This exemplifies the difference between the *Nizamiye* and the *Şeriat* courts, as far as social justice was concerned. Unlike the former, the latter provided the *musahhar* service free of charge, even if *musahhar* attorneys tended to reserve the full benefit of their legal knowledge for those clients who paid them, while doing the minimum required for those who could not.[77]

Obviously, the poor, by definition, had no reason to turn to the *Nizamiye* civil courts, since they did not own any significant property or capital worthy of civil judicial action. As the *Ceride*'s case reports show, the accessibility of the *Nizamiye* courts was a concern mainly for the middle classes. Artisans, owners of small houses or modest portions of houses or plots, creditors or debtors of moderate sums could take the risk of appealing lower court decisions. Nevertheless, the financial risk was high, and it may have prevented many such individuals from appealing. As far as accessibility to justice was concerned, the legally pluralistic nature of the late nineteenth-century Ottoman judicial sphere provided an alternative for those who could not benefit from the proceduralization of the law by hiring skilled attorneys. Although the *Şeriat* courts were not unaffected by the spirit of legal formalism, these courts upheld their preference for arbitration over zero-sum adjudication. As demonstrated by Agmon, licensed attorneys tended to complicate and lengthen discussions in the *Şeriat* courts by resorting to procedural claims. The judges did not give up their preference for arbitration, although "in the end of the day the attorneys were incorporated into the legal culture of the court."[78] The option of forum shopping, which was apparent in both the *Şeriat* and the *Nizamiye* courts, offered some solution to those unable to benefit from the *Nizamiye* formalism.

Communal judicial action in the *Nizamiye* courts was another strategy available to individuals of moderate means, even though it was limited to disputes over borders between villages. In cases of border disputes that involved lands for public use, such as rivers and grazing lands, an entire village could form a legal entity and bring a civil suit against its neighboring village. In such cases, the law distinguished between a village of less than one hundred individuals, termed "definite community" (*kavm-i mahsur*), and a larger one, defined "indefinite community" (*kavm-i gayri mahsur*). A dispute that involved the smaller group required the presence of the entire village or their legal representatives at the trial, whereas the larger villages could send few people to be present at the deliberations.[79] The de facto meaning of this distinction is uncertain, given that in both cases, anyone could represent the group in court, as long as he could present a power-of-attorney. In any case, acting as a group in the courts was financially easier than acting individually, and the distinction between the two categories of villages provided further procedural ammunition for challenging court decisions. Such cases often involved the interests of local power-holders, such as tax farmers and big landlords; and the case reports allow only to speculate whether the villagers had true judicial agency or were just recruited or manipulated by local power-holders. The following case illustrates a typical communal course of action and the sort of local politics it was embedded in.

The people of the village Yeniköy brought a suit at the court of first instance in the county of Şile (in the vicinity of Istanbul) against their neighboring village, Ovacık, asking the court to prevent the latter from trespassing on their vineyards, which were part of the Vâlide Sultan *vakıf*, within the borders of Yeniköy. A certain Feyza Ağa represented the Ovacık village during the deliberations. It appears from the report that Feyza Ağa was a tax farmer, who owned land in the area. In the rural setting, the title *ağa* often meant that the person was landowner. The court heard the witnesses produced by both parties and then ruled against Yeniköy's claim.

The people of Yeniköy appealed to the Court of Cassation, which quashed the ruling on the grounds that the Şile court had not determined whether or not Ovacık fits the category of *indefinite community*. In addition, it argued that since the vineyard was related to the *vakıf*, the Şile court should have considered the *vakıf* officials as part of the defendant party. The exact circumstances of the dispute are unknown, but the argument made by the Court of Cassation implies that the *vakıf* officials somehow cooperated with the *ağa* against the interests of Yeniköy. The case was then sent to the court of first

instance for revision, and the court revised its decision accordingly. In the new decision, the court included the *vakıf* officials, in their capacity as defendants, and established that the village of Ovacık was a *definite community* consisting of six houses—a hamlet, rather than a village. This procedural revision did not change the actual decision, which still favored the position of the defendant, the *definite community* of Ovacık.

The determined people of Yeniköy skilfully made the most of the procedural revision of the Şile court decision. They appealed to the Court of Cassation for a second time, arguing that since the Şile court had qualified the defendant as a *definite community*, it was obliged to summon all the people of Ovacık and register them as part of the defendant party. Yeniköy argued that the Şile court passed its ruling without summoning the people of Ovacık, being satisfied with the presence of a certain Mehmet Ağa, who represented Feyza Ağa, and without deciding on the legal status of this Mehmet Ağa (did he represent Feyza Ağa? the village of Ovacık?). The nature of the relations between Mehmet Ağa and Feyza Ağa, and the relation of both to the village was surely inscribed in the daily, real-life circumstances and was known to all; but they were ambiguous in legal-procedural terms—a point stressed on in Yeniköy's petition. From the petition, it becomes quite clear that they intended to legally neutralize Feyza Ağa by resorting to procedural arguments. This impression makes sense, also given the opinion of the chief public prosecutor, who maintained that the case was a matter of a border dispute between the two villages. As such, it "was not related to the tax farmer." In other words, to the mind of the public prosecutor, the matter was none of Feyza Ağa's business, as far as the law was concerned. In May 1892, eight months after the case had been decided in Şile for the second time, the Court of Cassation accepted the opinion of the public prosecutor, and again quashed the lower court decision on the grounds that it did not establish in its ruling the legal relations between Mehmet Ağa and Ovacık. Namely, it did not establish whether or not Mehmet Ağa was formally representing Ovacık. The Court of Cassation pointed to additional procedural flaws, and sent the case back to the Şile court.[80]

The case report, worded in a formalistic style, contains only an echo of a bitter conflict, whose specific circumstances we cannot know. Nor can we speculate on the eventual outcome of this conflict. What is apparent, however, is the attempt of one village to challenge a local power-holder by competently drawing on the *Nizamiye* accentuation of judicial procedure. This example demonstrates both the

potential of proceduralization and its limitation, from the standpoint of ordinary Ottomans. The case report does not specify whether or not the people of Yeniköy were represented by a professional attorney, but the argumentation they employed required very specific knowledge of legal procedure that could not be expected from lay people, so we may assume that they benefitted from good legal advice throughout the judicial struggle with Feyza Ağa and his allies in the *vakıf*. It is difficult to imagine that a single peasant of limited means would fight the local tax farmer at the *Nizamiye* front, having to endure the high costs involved.

CONCLUSION

Huri İslamoğlu aptly summarizes the passage of Ottoman law to modernity in terms of a shifting hegemony, from the local to the central. Premodern judges had belonged to local power networks and served as "power-brokers between the local forces and the central government"; in the nineteenth century, the central government replaced them with judicial bodies, which "were expected to take over the tasks of negotiating settlements as well as implementing procedures and rules."[81] As the century approached its conclusion, the hegemony of the central government in the judicial sphere was a fait accompli. Personnel and court users took this hegemony for granted when they went about their daily businesses in the courts. From the standpoint of the central judicial administration, however, the task at hand was to *modernize* the judicial sphere. What was the meaning of *modernization* in terms of the everyday experiences in the courts? The central judicial administration expected the provincial courts to be fully exposed to its gaze, that is, to be totally legible. Legibility was enabled through an apparatus of administrative practices of registration, classification, and report. Modernization of the courts meant an increasing commitment of the judicial elite to the ideology of legal formalism. The legislature equated justice with a strict adherence of the courts to a uniform legal procedure. Hence, any deviation from the legal standard was immediately labeled "unlawful."

The enormous body of codified law and the accentuation of legal formulas and procedures allowed lawyers to monopolize the judicial sphere, by virtue of their exclusive role in translating "lay norms and description into legal categories." As argued by Friedman with regard to modern legal systems, lawyers' "command of the language and traditions which the legal system legitimates and to which it assigns a privileged place" allows them to exercise control over disputes and

their outcomes.[82] Legal formalism in the *Nizamiye* courts certainly signified a new hegemonic order. But it also signified a new conceptualization of justice, which was more embedded in Ottoman high-modernism, rather than the premodern association of justice with the relationship between the sultan and his "flock." A somewhat similar change was noticeable in eighteenth-century England, when "the rule of law" was contrasted with arbitrary rule, and formalism was understood as an expression of impartiality.[83] In the Ottoman case, this change brought with it new judicial opportunities for the state and the wealthier classes, while it alienated those who could not afford the mediation of legal experts.

Chapter 4

The Age of Accountability: Judges on Trial

In one of his essays on modernity, Anthony Giddens makes the case that modern social life consists of a unique type of human reflexivity, which is rather different from earlier types of self-monitoring. In the age of modernity "social practices are constantly examined and reformed in the light of incoming information about those very practices, thus constitutively altering their character."[1] Giddens identifies an epistemological difference between modernity and premodernity without having to fall back on simplistic dichotomies of the kind offered by the modernization theories. For Giddens, *tradition* is more than a distinctive period of time; it is a state of mind, in which reflexive monitoring of action is exercised through a perpetual reference to the past. Such a notion does not imply that premodern societies were static, and surely not "primitive." Tradition is undoubtedly reinvented by each new generation. In modern societies, however, reflexivity is obsessively centered on recently acquired knowledge.[2] In the age of modernity, no action may any longer be justified solely by custom. At the same time, knowledge is subject to constant suspicion, associated with a permanent expectation for a new, better knowledge to replace it.[3]

The scrupulous collection of statistical data from the *Nizamiye* courts was one among various expressions of a new bureaucratic consciousness that emerged in the nineteenth century, which may be summarized here, following Giddens, as state reflexivity. In the course of the nineteenth century, the Ottoman administrative discourse on a lack of discipline among state officials was increasingly

dictated by the notions of efficiency and regularity, being perceived a precondition for the proper functioning of the state.[4] The present chapter explores the issue of accountability among the judicial personnel, from both the macro perspective of the *Nizamiye* courts as a system, and the micro perspective of the individual official.

Being a precondition for state centralization, the principle of bureaucratic accountability was institutionalized and standardized during the reign of Mahmut II (1808–1839). After establishing a regular salary system, Mahmut issued a series of laws meant to render officials and judges liable for their misconduct. These laws defined bureaucratic powers and provided a more accurate meaning to the concept of corruption, which was associated primarily with receiving bribe. Later decrees and legislation paid much attention to issues of bureaucratic accountability, notably in the context of corruption.[5] In the course of the century, the expectations of the imperial administration with regard to official accountability came to include an extensive range of practices, of which corruption was but one. The present discussion focuses primarily on everyday praxis and to a lesser extent on positive law. While judicial officials were aware of the laws and penalties at the theoretical level, the *Ceride* provided the leaders of the *Nizamiye* court system with a new medium used for disseminating the principle of accountability. From the ministry's point of view, the publication of detailed reports about trials of judicial personnel served as a warning sign conveying the twin messages that the behavior of judicial officials was closely monitored, and that official misconduct resulted in penalties. Thus, through circulars distributed to the courts and through the publication of officials' transgressions, a judge who worked in the *Nizamiye* court in Jaffa, for example, or the assistant public prosecutor who served in Selanik, were made aware of the gaze of the central judicial administration. The latter was watching and punishing.

Disciplining Officials: A Normative Law Perspective

Though earlier versions of the *Criminal Code* had dealt, to some extent, with transgression of state officials (1840, 1851), the *Criminal Code* of 1858 was the first systematic treatment of official transgression through codification. The third chapter of the code contains sixteen articles that address bribery (*rüşvet*), establishing a maximum standard penalty of eight years imprisonment and the dismissal from office for officials convicted of bribery-related charges. The fourteen

clauses of the fourth chapter cover embezzlement of state funds, and other similar cases of fraud (*sirkat-ı emval-ı miriye ve irtikâbat-ı saire*). The following chapter contains eight clauses that cover abuse of office (*suistimal*) and failure to fulfill official duties. This section emphasizes the importance of the rule of law, while penalizing its opposite, namely, arbitrary official practice not sanctioned by decrees and court decisions. It also subjects officials to the authority of the courts and prevents the administrative officials from intervening in judicial proceedings. Any intervention of officials in court proceedings results in the dismissal from office and a penalty ranging from three to eighteen months imprisonment.

The *Criminal Code* differentiates between a category of misconduct that violates the principle of the rule of law, and other forms of abuse of office that injure individuals who are not part of officialdom. This distinction is reflected in the nuances of the legal terminology. Misconduct of the former category, described in the preceding clauses, is termed *suistimal*, whereas misconduct of the latter category is termed *su-yi muamelât*. These are two different constructions of the same root words, both terms mean "evil conduct." Thus, the chapter in the *Criminal Code* that covers the latter sort of abuse prescribes penalties for officials who are found guilty of torture and physical cruelty, as well as for those who charge fees and taxes not determined by laws and regulations. This category of abuse also includes judges who inflict penalties that are more severe than the ones prescribed by the letter of the law, a transgression that may entail a prison term of six months to three years and dismissal from office. Subordination is sanctioned by prescription of penalties for officials who oppose, disobey, and insult the state. The sections of the *Criminal Code* dealing with official misconduct mention the courts here and there, but basically the code does not distinguish between officials in general and judicial personnel.

The establishment of the *Nizamiye* court system in the 1860s brought about a growing apparatus of judicial personnel, consisting of judges, clerks, and prosecutors. This development, together with the importance attributed to the principle of separation of powers in the official discourse, gave way to the emergence of judicial officials as an administrative category in itself (*adliye memurları*), and its distinction from other branches of officialdom. This development is evident in the *Code of Criminal Procedure*, which established a meticulous modus operandi to be applied when judicial officials were suspected of transgression. Every judicial action against court personnel had to commence with a report submitted to the minister

of justice, who would then order the public prosecution in the capital or the provinces to investigate and prepare a report accordingly. When the accused judges were *naib*s, who actually formed the majority of the presidents in the civil sections of the *Nizamiye* courts, the authority to initiate this procedure rested with the *Şeyhülislam* if the transgression was related to the *naib*'s duties in the *Şeriat* court. If the transgression was related to his duties in the *Nizamiye* court, the minister of justice was the one to initiate the procedure. In either case, the *Nizamiye* court was the exclusive forum for trying *Nizamiye* court personnel. Once the public prosecutor completed the investigation, an indictment committee (*heyet-i ittihamiye*) formed by the next superior instance in the judicio-administrative hierarchy would review the relevant documents and make a decision by vote. If the accused was a judge in a court of first instance, his case was to be deliberated and then tried in the provincial court of appeal (*istinaf*). If the accused was a judge in the court of appeal, he would be tried in the Court of Cassation (*Temyiz*). The president in charge of the case was authorized to issue a warrant, and put the accused official under arrest for the entire process. The indictment committee could decide either to drop charges or to issue a bill of indictment and proceed to trial.[6]

TRANSGRESSING COURT OFFICIALS

The positive law, which was codified throughout the century, and especially the procedural laws of 1879 were important in shaping the legal culture of the *Nizamiye* courts. Even though legal codes are preoccupied with detailing potential situations that require legal remedies, in the final analysis they are just that, namely, a prescription of solutions to would-be scenarios. For purposes of historical analysis, an investigation of legal codes only contributes to understanding the ideal dimension of the state's discourse on law, or the vision of the architects of the legal system. By contrast, the circulars provide an opportunity to probe into judicial praxis. They were the main channel by which the Ministry of Justice transmitted habitual messages to the courts concerning regular conduct. They dealt with the nitty-gritty situations born out of the complexities of everyday life, thus revealing something of the exchange between the courts and their judicio-bureaucratic headquarters, the Ministry of Justice.

The circulars sent by the ministry to the courts during the late nineteenth century cover a wide range of activities. They address everything from the fundamental issues of procedure, such as the

application of the procedural codes and the selection of judges, to mundane matters, from the proper usage of telegraph and stamps, to instructions concerning the preparation of statistical tables and daily reports. Most of the circulars were communicated to the court personnel through the public prosecutors at the provincial courts of appeal. There were four types of circulars: One, general instructions concerning a new procedure or measure recently introduced. For example, in October 1885, the ministry informed the judicial inspectors that salaries of officials on trial, on pilgrimage, or on leave were to be cut to half.[7] The second type, illustrating the growing attention to accountability, were circulars that described a failure, and then offered a solution. The latter took various forms; most commonly the ministry reminded the officials of the relevant law, issued a new regulation, and/or threatened to take disciplinary measures. For instance, in September 1896, the ministry sent a circular to the provincial public prosecutors reminding them that although the importance of completing criminal procedures in a timely fashion had been stressed time and again, several recent reports indicated that delays were caused by negligence. Hence, it was decided to take the necessary measures against officials, who abused their office in this manner.[8]

The third type of circulars began with a citation of a specific legal clause and then described the failure in its implementation followed by a description of the damage resulting from that failure. For instance, a circular issued in May 1885 opened by pointing to article 92 of the *Law of the Nizamiye Judicial Organization*, which instructed judicial inspectors to record their activities in a special register and send it to the ministry once in three months. The author of the circular claimed that contrary to this instruction, in most provinces inspectors "neither send the registers nor pay attention to the importance of this procedure." The circular ends with a description of the damage: "as a result, complaints about officials are not treated."[9]

A good number of circulars were of a fourth type and took the form of a query submitted by the courts in "the field," starting with the phrase: "it was asked in several places [. . .]" followed by a detailed explanation or clarification of the legal clause in question. Some queries referred to ambiguities in jurisdiction, as was the case of a circular published in November 1885, dealing with the authority of municipalities to imprison individuals who had violated municipal orders. The solution in this case was quite simple. The ministry pointed to the relevant articles in the municipal laws that authorized imprisonment by municipalities on certain minor charges.[10]

Delays, irregularities in appointment procedures, and issues related to the implementation of the principle of the courts' independence were recurring themes in the circulars during the last two decades of the nineteenth century. They revealed the genuine commitment of the central judicial administration to the rationalization of the courts, as well as the reflexive efforts and disciplinary measures taken to combat irregularities. For instance, a complaint submitted by the office of the *Şeyhülislam* to the Ministry of Justice concerning the haphazard attendance of court members (*aza*s) resulted in a circular submitted in 1890 to public prosecutors throughout the empire. In this circular, the ministry scolded the judges for conducting trials in spite of the absence of court members: "As a result, matters of litigants are being neglected, and trials of detainees are being postponed." This situation seemed pressing enough to necessitate an imperial decree that reenforced the following procedure:

> *Nizamiye* court officials are required to spend at least five hours a day at the court, except for vacation days. Once in every six months, the court presidents are required to post a duty roster in the courtroom. Officials who are absent three times a month without valid excuse, have to ask for a pardon. The ministry should be informed of officials who must be absent for valid reasons. Members from other courts, or substitutes, are supposed to replace members who are not present for valid excuse.[11]

Problems in the process of selecting judicial officials formed a frequent theme in the circulars. The law laid down clear instructions as to the selection process, which was handled by special nominating committees consisting of senior judicial officials. The ministry held the nominating committees accountable for poorly qualified judicial staff. In a circular from 1900, the ministry complained that in several places careless nominating committees selected individuals with poor qualifications. Chronic nonattendance of committee members was pointed out as one of the reasons for this neglect. The ministry claimed that "according to recent reports and complaints, judicial officials chose to keep silent about this matter."[12]

The ministry paid special attention to the qualifications of the *naib*s who presided over the civil sections of the *Nizamiye* courts. A circular from January 1894 pointed out that according to recent reports, judicial proceedings had not been carried out in accordance with the law, because *naib*s lacked sufficient legal knowledge. Following consultation with the *Meşihat*, it was decided to remedy the situation by requiring the *naib*s to take exams administered by

committees including provincial public prosecutors, *mufti*s, and other members of the *ulema* corps. The first exam, requiring the composition of a ruling related to an article from the *Mecelle*, was designed for an initial selection. In the following stage, the *naib*s were examined on a certain *fetva* (a judicial opinion issued by the *mufti*), and were required to answer a question related to Islamic jurisprudence (*fıkıh*) and formulate a suitable ruling.[13] According to Jun Akiba, *naib*s working at the *Nizamiye* courts were required to take a special exam already in 1879.[14] Thus, the circular's presentation of this procedure as an innovation seems odd. One possible explanation may be that although the condition of an examination had already been set in 1879, it was only partially, or not at all, implemented. Another possibility is that the new examination procedure differed considerably from the previous one.

Through the circulars, court employees were exposed to the standards of good conduct that were set by the central judicial administration, and to the consequences of failure to meet these standards. Nevertheless, one can imagine that the reports about trials of officials, which appeared in the *Ceride*, were more effective than any circular. What was the possible reaction of a judge who served as the president of the court of first instance in, say, Jaffa, when he read that a colleague in the faraway court of Ayvalık, on the northwestern Agean coast of Anatolia, was put on trial for fabricating a trial, misusing the court's seal, and similar misdeeds?[15] To begin with, one may assume that this report immediately stood out against the rest of the *Ceride*'s monotonous legalistic and administrative content. More importantly from the ministry's point of view, the judge from Jaffa learned from these reports that individuals like himself went through similar experiences, although serving hundreds of miles away, facing similar temptations.

And temptations there were. A good number of reports tell stories of various kinds of corruption. Pure and simple bribery appears in many reports. A member of the court of first instance in the Palestinian county of Halilürrahman (Hebron) was prosecuted for receiving thirty-one *mecidiye*s from a friend who had been suspected of theft.[16] The president of the Yalvaç (Turkish İsparta, western Anatolia) court of first instance was prosecuted for arresting, and then releasing, people in exchange for bribe.[17] A gendarmerie officer who served as an assistant public prosecutor in Doyran (province of Selânik) took bribes from several individuals suspected of crimes. A member of an indictment committee in Syria was prosecuted for releasing a person accused of raping a virgin, in return for thirty *lira*s.[18] A court

president from Kırkağaç (province of Aydın, the Aegean region) faced charges because he accepted five sheep as a bribe. A court member from Kosova, who filled in for the president of the court, took advantage of a debtor, whose sheep had been confiscated. The judge sold the sheep for his own profit and released the debtor from prison.[19] A court president from Selânik, in collaboration with another member of his court and the clerk of the local *Şeriat* court, was accused of stealing fees that had been prescribed in court rulings.[20]

Some officials appear to have taken advantage of people's lack of knowledge about the regulations concerning fees, thus charging illegal fees. For instance, the investigating magistrate (*müstantık*) at the Siird (eastern Anatolia) court of first instance, a certain Şükrü Efendi, was prosecuted for charging considerable sums of money from villagers while investigating a dispute, calling it "travel expenses."[21] There were incidents of corruption that took a somewhat more subtle form, mainly in the context of conflicts of interest. For example, a member of the Çarşamba court of first instance faced a trial because he had prevented a murder trial while serving as an investigating magistrate, although there had been firm evidence against the suspect. It turned out from the investigation that he was motivated by personal tax-farming (*iltizam*) interests.[22]

Corruption was merely one type of misconduct that concerned the ministry. Other forms of abuse of authority, such as brutal or similar forms of illegal behavior of officials, were the subjects of more than a few reports. In these cases, bribes or material rewards of any kind were not mentioned as motives, and in most cases, the motives remain unclear. The range of activities included in this category, legally defined as *suistimal* (misconduct), was quite extensive; only a few reports shall be mentioned here for illustration. At times, court presidents collaborated with other officials who worked at their courts, as was the case with a court of first instance in the southeastern Anatolian city of Diyarbakır, where the president and the chief clerk (*başkâtip*) teamed up in erasing parts of a document, having it signed by a member of the court.[23] Sometimes, the entire staff of a single court faced charges. In 1891, the president of a court of first instance in Diyarbakır faced charges, together with four acting and former members of his court, as well as the chief clerk, due to illegal conduct (*hilâf-i nizam harekât ve muamelât*). In the same year, an entire court panel from the same province was prosecuted due to recurring illegal conduct.[24] The phenomenon of judges, investigating magistrates, and assistant public prosecutors tampering with documents was a recurring theme in the reports.[25] This transgression too

involved collaboration between several functionaries of the court. In 1892, the president, two members, and the chief clerk of an Adana court (south-central Anatolia) were prosecuted for misconduct that included distortion of a trial protocol and ruling.[26] A president from Konya and his court member, as well as two clerks, were prosecuted for erasing signatures from a trial protocol and ruling.[27] A court member from the eastern Anatolian city of Bitlis faced charges for forging a decision of an investigating magistrate, which allowed him to release a suspect for unspecified motivation.[28]

Inappropriate behavior of judicial personnel toward litigants and suspects or toward colleagues was also reported and punished. This category included behaviors ranging from slander to sheer violence. A court president from Gemlik (province of Hüdavendiğar) was prosecuted because he had punched a village woman.[29] A court president from the province of Aleppo was accused of illegally arresting people, scolding, and beating them.[30] A president from Konya (central Anatolia), who lost his temper, hit the court's chief clerk in the course of a trial.[31] A court president from Trablusgarp (Tripoli, North Africa) was prosecuted for assaulting a guard.[32] An unruly president from Diyarbakır faced charges for attacking a witness during a trial, and insulting the local county governor (*kaymakam*).[33] A dispute between a president from Aydın and the investigating magistrate at his court, in the course of which the former violently attacked the latter, resulted in charges.[34]

The necessity of having corrupt or violent officials prosecuted was obvious. Yet, the reports suggest that the ministry took common negligence and failure to follow procedures quite seriously as well, seeing it as a wrongdoing that deserved criminal prosecution. In most reports, the motives for such conduct were not specified, but corruption, or the more general category of improper conduct (*suistimal*), was not mentioned either. Ignorance, carelessness, or conscious disregard for the law were common reasons. For example, the entire staff of the Hakkâri (southeastern Anatolia) court of first instance was prosecuted for forming a court committee (*heyet-i hakime*) not in accordance with procedure, and unlawfully releasing a suspect of revolt.[35] An investigating magistrate in Konya was prosecuted for "not performing his duty" in the case of a person suspected of abducting a girl at night.[36] An investigating magistrate in Amasya and the assistant public prosecutor of the same court were tried for delaying many criminal cases.[37] The president of the criminal court of appeal in Diyarbakır was reprimanded for foot-dragging in concluding cases.[38] The president of the criminal section of the court of first instance in

Sivas was prosecuted for holding up a single case for forty days.[39] An investigating magistrate from Aleppo faced charges for arresting a woman for a day, and also putting a gendarme under a house arrest, without issuing arrest memoranda. In a similar case from the court of first instance in Tiberias, the president was prosecuted for keeping two convicts in prison for two months beyond their prescribed term; the investigating magistrate from the same court was prosecuted for illegally detaining a person for twenty days.[40] A court president from Baghdad faced charges for unlawful imprisonment. An assistant public prosecutor from the same city was prosecuted for an unjustified release—not backed by a court decision—of two women suspected of theft.[41]

JUDGES ON TRIAL

Reports about charges pressed against specific judicial court officials do not appear regularly in the *Ceride-i Mehakim*. It is impossible to tell why some volumes contain a good number of such reports, while there are none in others. The editorial reasons for publishing the full verbatim protocols of just a few trials of officials are similarly obscure. The issues of the year 1891, for instance, contain seventy-two reports about charges brought against court personnel. These reports are usually concise, as demonstrated in this typical report:

> The public prosecution in the provincial appellate court of Trablusgarb reported that the former *naib* and president of the Bingazi court of first instance, Salem Efendi, together with the former execution official of this court, Cemal Efendi, illegally arrested someone called Captain Muhammad Zaghtuti for three months. The relevant investigation documents were transmitted, and the sublime Ministry of Justice authorized the aforementioned public prosecution to bring the above official and president to trial.[42]

Whether the seventy-two cases cited in the *Ceride* were all the cases of that year that involved the prosecution of court officials, or whether they were merely a fraction of a larger phenomenon is an open question. In either case, the number of the transgressions recorded in these case reports is not insignificant. In 1891, a total of one hundred and fifteen individuals faced charges on account of transgressions related to their court duties; thirteen were acquitted during the pretrial or the trial stages. Court presidents made up 25.2 percent of the accused; the others were court members, clerks, prosecutors, and examining magistrates. The minister of justice authorized public

prosecutors to initiate court proceedings against nineteen judicial officials on account of receiving bribes; against another twenty-three officials for illegal arrest or release; and against sixteen employees for other types of misconduct. Of the total of one hundred and fifteen court officials, 28.6 percent faced charges for corruption.[43] According to the statistical yearbook of 1897, forty-four individuals were tried for unlawful arrests and imprisonments.[44]

I shall pick up two cases that allow a closer look into the dilemmas and responses of judges who paid a heavy price for making decisions that were not in line with the expectations of the system. The first is the case of Ali Eşref Efendi, who presided over the court of first instance in the Aegean town of Ayvalık. The editors of the *Ceride* decided to publish the verbatim protocol of the trial as a message to other judges who might encounter a similar dilemma (figure 4.1).[45] Judge Ali Eşref Efendi was arrested in November 1885, following an investigation conducted by a special committee. He was tried, four months later, at the criminal section of the court of first instance in Karesi, the provincial center of Hüdavendiğar, to which Ayvalık belonged. The public prosecutor accused the judge of issuing a *Nizamiye* court decision (*ilam*) that confirmed the freedom of Bezmihal, the manumitted

Figure 4.1 Two pages from the verbatim report of Ali Eşref Efendi's trial—*Ceride-i Mehakim*.

female-slave (*cariye*) of the county governor (*kaymakam*) of Ayvalık, Emin Bey. This decision was considered unlawful, because it had not been preceded by a court hearing, as required by law. In addition to this serious charge, the judge was also accused of violating the orders of the Ministry of Justice when allowing two of his employees to travel away for a week without obtaining the ministry's permission.

A year earlier, the female-slave of the governor reached out to the judge's wife, claiming that her master, who had legally manumitted her at some earlier point, changed his mind and now intended to sell her. She also complained about his violent conduct. The judge's wife let Bezmihal stay with them for a while, and in the meantime, advised Bezmihal to present her case before her husband, the court president. The president responded by having one of his court members, the Greek İkonimidi Efendi, issue a court decision that validated Bezmihal's freedom, and prohibited her sale on the basis of the Constitution of 1876. The court member İkonomidi Efendi, who appeared in the trial as a witness, described the unusual request of the president, and his own response to this request:

> One day, Eşref Efendi came from his home, and entered the courtroom in a state of agitation. He took out a piece of paper from his pocket and told me: "write what I am telling you." I picked up a pen. He ordered: "a one-paragraph *Nizamiye* ruling (*ilâm*) has to be written concerning the freedom of Bezmihal, the female-slave of Emin Bey. Put the decision in the register, and have it signed with the seals of the court members." I warned Ali Eşref Efendi that this [action] would contradict the norm (*hilâf-i vaki'*); that the [other] members would disagree, and that this was a big responsibility. He replied: "I can't inflict a punishment on the governor [for his violent treatment of Bezmihal]. I just want to save his slave from slavery (*ancak cariyeyi esaretten kurtarmak istiyorum*). This slave escaped from the governor's house, and took refuge with my wife. I am not sending her back to the governor's house. Governor Emin Bey beaten her.[46]

Why was Ali Eşref reluctant to keep the other members of the court in the picture, while ignoring the standard procedure that required a proper hearing? Possibly, he suspected that the governor would not save effort to abort this intervention, perhaps by exercising influence on the court members. It should be reminded that unlike the president, who was a professional judge, appointed by the central provincial administration, court members were elected representatives of the local elite. As far as the local notables were concerned, membership in the local judicio-administrative bodies was a means

of preserving political power.[47] Thus, they might have been prone to political pressures. By acting fast, without resorting to the standard procedure, Judge Ali Eşref hoped to secure Bezmihal's freedom.

Bezmihal's attempt to improve her position by approaching the judge was not unusual behavior. In his definitive social history of slavery in the late Ottoman Empire, Ehud Toledano argues that the state steadily backed down from its traditional support of the slavers, thereby assuming the role of a substitute patron vis-à-vis the slaves. Through interventions that took various forms, such as legislation and court rulings, the state assumed a new protective role with regard to the slaves: "when approached by absconding enslaved persons, the *tanzimat*-state offered protection and benevolence-that is, manumission and responsible placement."[48] In the second half of the century, issuance of manumission documents by courts and officials became a common practice, and related procedures were legislated concurrently.[49] Slaves recognized the change in official attitudes to enslavement, as well as the promise for freedom, represented by the official document. At the same time, slavers often disregarded these documents, considering them as mere formalities, or destroyed them. In such cases, slaves tried "to reclaim their freedom on the basis of the destroyed papers."[50] This was exactly the situation of Bezmihal, who managed to get hold of a manumission document from the *Şeriat* court. Her slaver changed his mind about her manumission, thereby disrespecting the formal document that was at her disposal. She reacted by absconding and trying to attain another document of manumission.

After the issuance of the court decision, the governor paid a visit to the judge's house, accompanied by a friend who later testified in the trial. According to this testimony, governor Emin Bey managed to convince Bezmihal to return to his house, promising her that he will avoid beating her. His success in bringing Bezmihal back home did not satisfy him though. The governor was determined to take revenge and get rid of the judge, who was probably watching the governor, making sure he respected the court ruling and his own pledge for a fair treatment of Bezmihal. According to the testimony of the court member İkonimidi Efendi, once the governor had learnt about the flaws in the judicial procedure, he turned to the public prosecutor in Karesi in order to initiate the judicial process that resulted in Ali Eşref Efendi's arrest.[51]

As expected, the Karesi criminal court, which tried Ali Eşref Efendi, was not interested in the question of Bezmihal's freedom, but with the procedural legitimacy of Ali Eşref's conduct. Obviously, Ali

Eşref took into account the fact that his benevolent intentions might mean little in the *Nizamiye* formalist legal culture, so his written defense was rather legalistic in style:

> First, there had been no court decision that was allegedly forged, and the alleged charge of forgery had not been founded; secondly, the responsibility (*memuriyet*) of setting up the court decision is demonstrated in the *Criminal Code*. In these circumstances, in order to inflict the [relevant] legal penalties on the perpetrator (*fail*), and especially in the case of forgery, the forger of the documents must be an official. The court decisions that are issued by the courts of first instance are kept in the courts. The preparation of protocols, as well as all the duties related to the scribal actions, is not supposed to be referred to the court presidents. All of these responsibilities are exclusively part of the duties of the head clerk (*başkâtip*) and the recording clerk (*zabt kâtibi*). Hence, attributing the responsibility stemming from the act of the head clerk—defined here as a witness—to someone else, is inconceivable. [In addition], this matter is considered to belong to the *Şeriat* court. Since a *Şeriat* court decision had been already issued, the litigant (*zat-ı maslahat*) does not need a *Nizamiye* court decision, unless he has a malicious intention, and he wishes to achieve a certain goal. It is apparent that the document mentioned above was not issued by way of a forgery. The damaged person and the [actual] damage should be proven. All the details of the clauses regarding forgery are presented in clause 56 in the *Code of Civil Procedure*, and in the fourth chapter of the *Code of Criminal Procedure*. As to the abovementioned document, even if the private plaintiff was able to demonstrate to the court a forgery, he was unable to prove a malicious intention.[52]

Ali Eşref Efendi implied that the only possible charge against him could be forgery of a court decision. He argued that such an intention could not be proven; an actual damage was not substantiated; and a damaged party had not been established as a means of proving his culpability. The public prosecutor, Ali Haydar Bey, exposed the weakness of this argument when stating that the charges against Ali Eşref were "matters of public rights, and therefore there is no need to look for an injured party or a private plaintiff."[53] He also condemned Ali Eşref Efendi's attempt to describe the court ruling (*ilâm*) as a "written order" (*tenbihname*).

In itself, the ruling of the court that tried Ali Eşref Efendi revealed no consideration of the impression that Ali Efendi had been guided by compassion toward the female-slave. However, given the tendency of the *Nizamiye* courts to frame their legal decisions in a strictly technical language focused on the codified clause, it is difficult to tell what

impact his humane intentions made on the court panel. Comparing the court decision to the penalty defined in the *Criminal Code*, however, may be indicative. The court found him guilty on all charges and sentenced him to six months' imprisonment, beginning with his arrest on November 4, 1885, in addition to a fine of five *liras*.[54] Since Ali Eşref Efendi had already spent the preceding six months in prison waiting for his trial, the sentence given on June 2, 1886, actually meant the end of his imprisonment. The court based its sentence on article 127 in the *Criminal Code*, which prescribed a penalty of one–three years imprisonment for misusing or destroying state documents. Hence, the court appeared to be rather lenient in its decision; perhaps because it knew that this episode marked the end of Ali Eşref Efendi's judicial career.

The central administration invested quite an effort in disciplining its employees, attempting to create an environment of a constant scrutiny and administrative reflexivity. At the same time, judicial officials who had been prosecuted could employ their legal knowledge and familiarity with the legal system in order to save their career and good name. In October 1883, the Court of Cassation addressed an appellate petition that had been submitted by the president of the Menteşe court of first instance (in Southwestern Anatolia, on the Aegean Sea), a certain Neş'et Efendi.[55] According to the case report, five months earlier, the same Court of Cassation had convicted judge Neş'et Efendi on the charge of unlawfully imprisoning a box maker. In its initial decision, the Court of Cassation established that Neş'et Efendi had summoned, arrested, and released the box maker without having the investigating magistrate issue a decision, in accordance with procedure. The court found the judge guilty, and sentenced him to six months in prison, forbidding him to serve in courts of law and councils permanently.

Neş'et Efendi, who decided to clear his good name and fight for his professional future, appealed to the Court of Cassation, arguing that following the resignation of the permanent investigating magistrate at his court, he authorized the head clerk to serve as a substitute investigating magistrate, in accordance with the *Law of the Nizamiye Judicial Organization*. This was an odd argument, given the fact that the clause mentioned by Neş'et Efendi (clause 21) referred to absence of court presidents rather than investigating magistrates. Specifically, this clause stipulated that in the absence of a court president in the county court, the next most senior official will perform his duties.[56] Hence, in his petition, Neş'et Efendi referred to the wrong law.[57] The law certainly did not allow presidents to appoint clerks as a substitute

investigating magistrate. Plausibly, the reference made by Neş'et Efendi to the wrong clause of the wrong code was a matter of ignorance, rather than some attempt to trick the Court of Cassation, the mistake being quite conspicuous.

Neş'et Efendi made in his appellate petition an additional argument, this time procedural. He argued that clauses 20, 91, and 390 of the *Code of Criminal Procedure* were violated in the course of the prosecution process that had led to his indictment. Clause 20 stated that public prosecutors were responsible to investigate and pursue all the crimes qualified as *cünha* (crime of medium severity) and *cinayet* (felony). Neş'et Efendi argued in this regard that the public prosecutor who had prosecuted him did not establish malicious intent. Again, this was quite an awkward argument. The article cited was quite general, and Neş'et Efendi did not specify in what way exactly the public prosecutor had betrayed his duty. Article 91 required that the warrant presented to the accused should contain a description of the accusation, and a citation of the relevant legal article.[58]

As to the last procedural violation alleged by Neş'et Efendi, article 390 was part of the procedure required in cases of prosecution of judicial officials. It stated that had the public prosecutor not found necessary information in the documents submitted to him by the Ministry of Justice or the parties involved, he was required to appoint an investigating magistrate from the relevant provincial court of appeal in order to hear more witnesses, and conduct further investigations.[59] Neş'et Efendi argued that no investigating magistrate had been involved in the prosecution against him. This too was a questionable argument, considering the fact that it was up to the public prosecutor's discretion to decide whether a further investigation by an investigating magistrate was necessary. Finally, the appellant made the case that the penalty inflicted on him was not in proportion with the attributed transgression.

The Court of Cassation ruled in favor of the appellant, on the grounds that an indictment committee had not been involved in the investigations, as required by the procedural law. This point was slightly different from the one raised by Neş'et Efendi, who had argued that an *investigating magistrate* was not involved; the Court of Cassation, however, found fault in the fact that an *indictment committee* had not been involved. Again, it appears that Neş'et Efendi was not too versed in the nuts and bolts of the legal procedure, yet eventually he was able to realize his goal, thanks to the review process.[60]

Employment of criminal prosecution as a means of disciplining court personnel was extensive, yet it was not the only disciplinary measure available. In some situations, the central judicial administration was satisfied with taking measures that did not involve a criminal prosecution of disobedient officials. One common measure in this regard was the administrative custom of forced *becayiş*, namely, exchange of offices between two officials. For instance, in 1882, the assistant public prosecutor in the northern Iraqi city of Mosul was forced to exchange posts with a colleague from Baghdad as a disciplinary measure, due to misconduct.[61] Official correspondence about specific instances of forced *becayiş* often reveals the vague boundary between misconducts committed by judicial personnel and mere local power struggles among officials. For instance, in the early 1880s, the provincial governor of Selânik sent to the Ministry of Interior several complaints regarding the president of the Selânik criminal court, strongly demanding to dismiss the judge due to an alleged misconduct. However, an investigation conducted by the Ministry of Justice revealed that there were no evidential grounds for prosecution, and that the governor's complaints resulted from a mutual aversion between the judge and the governor rather than misconduct of the former. The judge did not have to stand a trial, but he had to exchange posts with a colleague in the Macedonian city of Manastır.[62]

Aside from top-down disciplinary pressures, conduct of judges was potentially subject to a different kind of monitoring, involving the active participation of litigants. *İştikâ-i anilhükkâm dâvası*, or "a complaint on the judges' lawsuit," was a legal device designed to enable litigants to actually sue judges on the basis of personal official liability, and even demand damages due to abuse of authority. This practice, adopted from the French procedure and common in the civil domain, was different from the cases presented earlier in that the plaintiff was not the public prosecutor, but one of the parties involved in the trial. The damaged party could sue either the court president who had addressed the case, one of the court members, or the entire court panel. There were two possible grounds for initiating *iştikâ-i anilhükkâm* lawsuit. First, the judge could be accused of resorting to fraud and deceit while handling the trial or issuing the decision, or of receiving bribes; second, the judge could be accused of violating the legal rights of the litigant.[63] Judges who lost in *iştikâ-i anilhükkâm* trials could appeal to a higher court, as any other civil plaintiff. For instance, in November 1896, the Jeddah (T. Cidde) court of appeal in the Hijaz addressed an *iştikâ-i anilhükkâm* lawsuit brought by a

certain Sheikh Mehmet Efendi against Saleh Shawaf Efendi, who was the deputy (*vekil*) of the president of the Hudeyde court of commerce in Yemen. The plaintiff argued that the president and one of the court members violated Mehmet Efendi's rights when addressing a dispute in which he was involved. The court of appeal was convinced, and ordered the judge to pay Mehmet Efendi 10,520 *kuruş* in damages. This was a significant sum, considering that a member of the court of first instance at the county level earned a monthly salary that did not exceed 1,000 *kuruş*. The judge, Saleh Efendi, appealed to the Court of Cassation. He argued that the Jeddah decision was unlawful, because the requirement of having the public prosecutor present in trials of *iştikâ-i anilhükkâm* was not fulfilled. The Court of Cassation's investigation revealed that the public prosecutor was indeed absent. Therefore, it decided to quash the decision and return the case to the court of appeal in Jeddah.[64]

The principle of accountability was embedded in the *Nizamiye* formalist culture, and it was internalized by the courts rather effectively, not only in the appellate instances. In March 1890, the civil court of first instance in the imperial capital addressed a dispute that required the presentation of an earlier amicable agreement (*sulh*) formally approved by a *Şeriat* court decision. In the course of its investigation, the civil court noticed that instead of charging the parties a fee of 300 *kuruş*, as required for this sort of actions, the *Şeriat* court contended with a fee of 150 *kuruş*. This was indicated by the revenue stamp (*pul*) on the document. Based on a calculation of the disputed sum, and in agreement with the Stamp Law (*Damga Kanunu*), the court required the judge to pay the remainder of the fee, and inflicted on him a penalty of 270 *lira*s for his failure to charge the required fee; the fine had to be paid to the court's coffer. The penalized judge, which happened to be the chief *Şer'i* judge (*kazasker*) of the Rumelia region, challenged this decision by petitioning to the Court of Cassation.[65] The fact that the latter quashed the decision of the lower court for procedural reasons makes no difference when thinking about the meaning of this case. The court of first instance was not drawn back by the seniority of the negligent judge, and the editor of *Hukuk*, the private law journal that published both the decision of the lower court and that of the Court of Cassation, thought it an exemplary case.

A Comment on Judicial Corruption

Throughout the century and increasingly toward its end, the state sent a clear and simple message to its executors of the law: judges,

prosecutors, notaries, and clerks. All of them were made aware of the fact that they were under constant scrutiny. This message was transmitted through daily circulars that concerned nitty-gritty irregularities in the courts, through the prosecution of transgressing officials and the publication of these trial protocols in the *Ceride-i Mehakim*, and through routine laws and regulations. Generally speaking, the responses of the Ministry of Justice to irregularities in the daily conduct of the courts followed one of two patterns. The first took the form of circulars indicating specific problems and offering specific "solutions," normally by drawing attention to the relevant law or regulation, sometimes accompanied by the threat of punishment. A stricter type of response was dictated by the principle of personal accountability, often leading to dismissals and trials of judicial officials.

Increasing state reflexivity was apparent in the attempts of the central judicial administration to promote aptitude and prevent misconduct among the court personnel. The last minister of justice of the Hamidian era, Abdurrahman Nurettin Paşa, who served thirteen years in office, made the struggle against judicial corruption a top priority.[66] The increasing sensitivity of the state to the issue of official discipline might create an impression of mounting corruption among the judicial officials. But given that there is always "corruption" in every institution, the mere extent of countermeasures provides little indication of the actual scope of corruption.[67] How can one evaluate the *scope* of corruption, which rarely leaves traces in the documents? Ottoman sources do not allow a definite estimate as to the scope of corruption among the judiciary in the early-modern and modern periods. Whereas Ahmet Mumcu gives the impression that corruption in the early-modern courts was overall widespread, Gerber argues that the court records and complaint registers (*şikâyet defterleri*) from the same period suggest the contrary. He reaches the conclusion that the Ottoman judicial system was generally fair, even though some corruption did exist.[68]

Clearly, in the late nineteenth and early twentieth centuries, the central judicial administration treated bribery of officials as an intolerable practice and took measures against it. Judicial officials who chose to accept bribes, thereby abusing the principle of impartiality, knew that there was nothing normative in this practice, and that the risks were high. For this reason, a groundless allegation of corruptions against an official was, in itself, a crime. In 1881, the *mutasarrıf* (governor of a provincial district) of Rize (Black Sea region), Rüşdi Paşa, was brought to trial, and found guilty of abusing his position on several accounts. Apart from such acts as the unlawful release of

criminals from prison, the charges also included a false accusation of bribery against the provincial governor.[69] Local interest groups of local notables and people of influence were aware of the seriousness with which the central administration treated official corruption. In 1879, such a group from Kayseri, in central Anatolia, sent a petition to the capital objecting to the appointment of an official called Hacı Rauf Bey as the president of the local court of first instance. Among the objections raised in the petition was an accusation of corruption following which Hacı Rauf Bey he was summoned to a hearing in the provincial capital.[70]

In his study of seventeenth- and eighteenth-century Ottoman courts in Çankırı and Kastamonu, Ergene does not doubt the existence of corruption in the judicial system. He mentions some anecdotal evidence from the court records and attributes importance to accounts of Western observers, which contain "a cultural, political and ethnographic substance missing from the court records and other archival documents."[71] These observers give an impression of a rather corrupt judiciary. A strong anti-Ottoman bias is apparent in the many European consular reports and travelogues that portray "Ottoman corruption" in the nineteenth century as well, and since most of these accounts do not indicate their sources, it is often impossible to distinguish between fiction and reality.[72] To what extent the Ottoman judiciary was corrupt in the early-modern and modern periods remains an open question, given the available sources. From a comparative perspective, there is no evidence to suggest that the Ottoman judiciary was more (or less) corrupt than any other contemporary judicial system. Ergene proposes to give up the attempts to prove or controvert corruption in the judiciary, and ask instead more subtle questions, such as how corruption was exhibited and dealt with in daily interactions involving the courts and their users.[73] In a somewhat similar fashion, the present discussion is not aimed at "resolving" the question of how corrupt the Ottoman judiciary was. If anything, it contributes to the vagueness of this issue by demonstrating that in the eyes of the central judicial administration, corruption was but one component in a larger category of official transgression, which also included violation of procedure.

Chapter 5

The Age of Centralization: The Public Prosecution

The reformed judicial system as a whole manifested a good deal of continuity, in terms of legal sources and praxis; yet, public prosecution was one of the more salient novelties in the Ottoman judicial sphere. This institution is usually associated with the task of prosecution in the domain of criminal law. Rudolph Peters correctly points to the dramatic change in the attitude of the Ottoman state to criminal law, signified by the introduction of public prosecution. According to Peters, "the office of the public prosecutor symbolized a new attitude by the state to punishment," which thus became an exclusive responsibility of the state.[1] The criminal aspects in the daily work of the public prosecutors, however, formed but only one facet of their activity in the *Nizamiye* court system. In addition to their duties in criminal prosecution, they were assigned the role of "guardians of justice" through their duties in civil law, and more importantly, through their extensive supervisory responsibilities. This institution has not yet received the scholarly attention it deserves. The concept of state centralization was exhibited in the hierarchical structure of this institution, which was headed by the chief public prosecutor at the Court of Cassation in Istanbul. A web of provincial public prosecutors in the provincial centers empire-wide and their assistants at the courts of first instance was charged with the duty of overseeing the overall performance of the courts.

What was Weird about Public Prosecution?

The procedural codes and the *Law of the Nizamiye Judicial Organization* ushered in the institution of public prosecution. The

need for public prosecution was mentioned in earlier statutes, but its duties were not defined, and, apparently, the Ministry of Justice lacked the means to manage an extensive web of public prosecutors until 1879.[2] According to Joseph Schacht, Islamic law, which does not recognize an office of public prosecution, renders the initiation of all legal actions the sole responsibility of the private plaintiff, including seizing the defendant and bringing him before the judge.[3] Schacht makes the point that in practice, however, premodern Islamic states did recognize a sort of "public" litigation that was clearly the business of the state, in the form of the office of the *muhtesip* (Arabic *muhtasib*), the regulator of the marketplace, who represented the local *kadı*.[4] In the Ottoman Empire before the reforms of 1879, a variety of officials had the duty to initiate a criminal prosecution. Uriel Heyd mentions in this regard the police superintendent (*subaşı*), the tax farmer (*amil*) or tax collector (*emin*), the local governor (*voyvoda*), the night watchman (*asebaşı*, *aseler kethüdası*), the *imam*, the military officer, and the chief doorkeeper (*kapıcıbaşı*) of the palace, in addition to the *muhtesip*.[5] Yet, the involvement of these state-agents in criminal proceedings did not contravene the fundamental right of private individuals to pursue a criminal action, sometimes supported by an imperial decree (*firman*) obtained from Istanbul to be presented before the local court of law.[6]

A function akin to public prosecution was first mentioned in the *Provincial Law* of 1864, defined as an official representing the state in legal matters. Generally speaking, institutional reforms in the nineteenth century were heuristic in nature and the Ottoman case was no exception: public prosecution required fifteen years of evolution since its introduction in 1864. This process is reflected in the changing legal terminology. The *Provincial Law* of 1864 and the immediate regulations that followed depicted the official resembling the public prosecutor as a "representative of the state," while employing a rather vague and general definition of his duty.[7] The actual Ottoman term for public prosecutor, *müdde-i umumi*, appeared for the first time in a law from 1870 concerning administrative officials and the *Nizamiye* courts. This law defined the public prosecutor as "an official who represents the state in the court of appeal (*divan-ı temyiz*) in his capacity as plaintiff (*müddei*) against criminals (*erbab-ı cinayet*) in criminal and legal matters."[8] Nevertheless, the duties of public prosecutors were yet to be defined. The role of the Ottoman public prosecutor became clearer and more similar to that of the French *Ministère public* in the Constitution of 1876, which defined his duty as follows: "The public prosecutors are officials appointed in criminal matters to protect the

public rights. Their duties and ranks will be determined by a law."[9] Interestingly, in the same year, French-style public prosecution was introduced in Egypt as well. It was not before 1879, however, that the detailed procedures concerning the working of the Ottoman public prosecution were prescribed.

In the years 1917–1923, the distinguished Ottoman historian and former senior official Abdurrahman Şeref Efendi, published a series of articles in the empire-wide circulating newspaper *Sabah*, under the title "Discussions on History" (*musahabe-yi tarihiye*). In these articles he addressed a wide range of themes related to everyday life in the late nineteenth century, employing a straightforward writing style. His short essay dedicated to the subject of public prosecutors sheds light on the ways in which people experienced the court as a result of this innovation and the wider transformation of the judicial field. Perplexed by the new judicial arrangements of 1879, Abdurrahman Şeref Efendi wondered: "What do public prosecutors do? How will they affect the situation in court?" and he added: "Now people are unable to make sense of these places." Eager to learn about the nature of this new office, he consulted with students at the new school for civil servants (*Mülkiye*) and then spent a day at the criminal court in Istanbul, in order to get a first-hand impression. Abdurrahman Efendi unfolds three cases aimed at illustrating the important role of the public prosecutor. His vivid report deserves to be presented here in full:

> One rainy evening, while trying to avoid a carriage passing-by from the fish market, a child who sold baskets accidentally bumped into a crate of olives in a grocery. The furious grocer came out of his shop and knocked the child down by slapping him once or twice. Then he started kicking the crate. The child was crying. The grocer scolded the passers-by, who had been drawn by the shouting and wanted to intervene. Two gentlemen from among these passers-by went to complain at the police station, where depositions were taken from them. This was one of the cases addressed at the court on that day. In the corridor the bailiff loudly called up the beater and the beaten. The two had not arrive, but the two gentlemen who had given statements at the police station were summoned in order to testify. They were heard. The grocer was punished with a week of imprisonment. Isn't it weird (*tuhaf*)? No complaint-writer (*şikâyetçi*), no complainant. Perhaps the beaten child did not even turn to the police. The grocer was sentenced by the court, owing to the testimonies of two gentlemen, who knew neither the beater nor the one who was beaten. There was a third litigant, namely the public prosecutor. I and my friend were discussing this matter.

> As to the second case: A certain *şeyh* brought a shawl to be sold at the covered bazaar. He gave it to the town crier, to put it up for auction. Since the crier had not presented [the shawl] at the auction as he was asked to, the *şeyh*, who lost his patience, started an argument that turned into a fight. The matter reached the court, following a complaint made by the *şeyh*. The *şeyh*, in a suitable appearance, was pointing towards the crier ominously and complained in frenzy before the court. The summoned witnesses informed [the court] that the *şeyh* had beaten the crier, endeavoring to defend the crier. The public prosecutor intervened in the matter, and the *şeyh* was punished. This sentence made the listeners laugh but was also a lesson.
>
> On the day we visited the criminal court, there was also a murder case. Someone called Karpuzoğlu Kerope from the fire brigade of Salmatomruk [in Istanbul] assaulted his friend in a fit of rage. The friend was injured and died twenty-eight hours later. The related documents were read at the trial, and evidence was heard. Some [witnesses] identified the killer as Kerope, while others identified him as Serope. The defense attorney, appointed by the court, was a grey-bearded Armenian, who pled in accordance with procedure. His defense was quite vigorous. Specifically, he argued for the release of his client on account of the uncertainty concerning the identity of the murderer, being either Kerope or Serope. When the judges withdrew to the conference room, a tall firefighter stood up and approached the attorney in a threatening manner. He was irritably yelling such things as: "Was it you that gave my name? Were you there when my friend was beaten?" Apparently, he was a friend of the deceased. The gendarmes forced the fellow to sit down. Had the court hall not been crowded, the attorney would surely take a few blows. In fact, the statement given by one of the witnesses during the trial contradicted the earlier deposition that he had given at the police station. Therefore, upon the request of the public prosecutor, the poor, ignorant man was arrested on charge of perjury.[10]

The drama that was part and parcel of the daily realities in the criminal court is keenly presented in this report. More important for the purpose of the present discussion is the role of the public prosecutor as facilitator of the law, regardless of the litigants' actions or claims. In each of the three cases, the intervention of the public prosecution in the proceedings led to unexpected twists in the judicial outcome. For Abdurrahman Efendi, a court decision without the involvement of a complainant in the first case was nothing short of "weird," to use his own terminology. In the second case, the oddity became mockery, when the public prosecutor turned the plaintiff (the *şeyh*) into a culprit and had him punished. Similarly, in the third case, it is the

witness that was eventually arrested and probably punished on the charge of perjury, following the intervention of the public prosecutor. What appeared odd to Abdurrahman Efendi was the irrelevance of the claims made by either the plaintiffs or the defendants to the cases addressed by the *Nizamiye* criminal court. It is the clear-cut separation between "public" and "private" legal domains, adopted from the Continental legal tradition, and the associated dominance of the public prosecutor that made the new judicial situations appear strange. Another feature of the new setting that somehow escaped Abdurrahman Efendi's attention, yet was evident in his depiction, was what can roughly be called "the marginalization of the judge" in the *Nizamiye* system. The latter is hardly mentioned in the account, while the public prosecutor appears as the one holding the ultimate agency in the court.

Guardians of the Law

The key duty of the public prosecutors, as prescribed by the *Law of the Nizamiye Judicial Organization*, was to maintain public order and enforce the rule of law (art. 56). According to the same law, public prosecutors in the provincial centers and their assistants in the counties were subordinate directly to the Ministry of Justice; their appointments and dismissals were subject to imperial decrees (*irade-i seniye*), a feature that indicates the importance attributed to public prosecution in the course of centralization. As was the case with all judicial officials, the *Law of the Nizamiye Judicial Organization* established clear hierarchy and structure. There was a public prosecutor in each court of appeal (*istinaf*), assistant public prosecutors in the criminal sections of the county courts of first instance (*bidayet*), and they were all subordinate to the chief public prosecutor (*baş müdde-i umumi*) at the Court of Cassation in Istanbul.

In the criminal domain, the public prosecutors were the ultimate representatives of "the state" writ large. They were in charge of investigating and prosecuting all crimes designated as *cinayet* (felony) and *cünha* (crimes of medium severity), as well as supervising the execution of the relevant court decisions. They held the related powers, ranging from having officials assist them in carrying out their duties, to confiscating incriminating documents and detaining suspects until the trial. The roles of the public prosecutors in the criminal domain are quite obvious. Exactly for this reason, it is really the civil domain and the administrative aspects of their work that call for special consideration. The unique structure of the civil sections of the *Nizamiye*

courts of first instance, being a combination of *Nizamiye* procedure and *Şer'i* substantive law applied by *Şer'i* judges, is yet another reason for focusing on the position of public prosecutors in the civil domain. A statistical chart that concludes the volume of documents produced by the office of the chief public prosecutor in Istanbul during the fiscal year 1891–2 reveals that its involvement in civil proceedings that reached the cassation phase was as extensive as its involvement in criminal ones. Out of the 12,821 documents submitted by the chief public prosecution to the Court of Cassation at that year, 5,443 dealt with civil proceedings, and 5,607 addressed criminal matters. Another 5,696 opinions addressed issues of jurisdiction, competence of courts, and prescriptive periods (*mürur-i zaman*: time after which a legal action cannot be taken), and the like.[11]

In both the Continental and common-law legal traditions, the public prosecutor is charged with the duty and authority to represent the public interest in civil matters, a feature historically inherited from the ancient French *Procureurs Generaux*. But what is the practical meaning of *public interest*? According to Renè David and Henry De Vries, the French *ministère public* represents community interests in general, rather than "the specific interests of the State as a party in an adversary proceeding."[12] The common law and the Continental law offer somewhat different types of public prosecution. However, the difference between these various versions is "one of degree—one of frequency of intervention and amount of power—rather than one of function."[13] The notion of *public interest* is obviously an obscure one; its actual meaning is dictated by specific interests in particular contexts. Given the all-embracing nature of the term *public interest*, the difference between *the state* and *community interests* seems more a matter of a (legalistic) discursive distinction that reproduces and reinforces a reified notion of the state. The Ottoman vocabulary that describes the role of the public prosecutor in the civil domain reiterates the French jargon, especially in its depiction of the public prosecutor as a representative of the public rights (*hukuk-ı umumiye*).[14]

The *Law of the Nizamiye Judicial Organization*, which was the founding text of the *Nizamiye* court system, circumscribed four instances that justified intervention by public prosecutors in civil proceedings:

1. Judicial situations that concerned the public order, the domain of the state, an entire community, public establishments, and the poor.

2. Violation of the regulations defining the work of judges.
3. Judicial situations pertaining to incompetence of a judicial instance.
4. Judicial situations pertaining to individuals subject to guardianship, minors, and foreigners.

This definition of the powers of the public prosecution in civil cases displays a good deal of legal transplant from the French judicial system. Nevertheless, borrowing in this case was as selective as any other borrowed component of the *Nizamiye* law. The Ottoman legislature preserved the extensive powers of the public prosecutors in the realm of judicial administration, but it chose to restrict the role of the prosecutors in the field of civil law to the task of submitting legal opinions to the courts. By comparison, the French law rendered the *Ministère public* an active participant in civil litigation. The *Ministère public* could commence an action on his own initiative, or in his capacity as a representative of the government.[15] What did the word *intervention* mean in the Ottoman law then? In theory, the competence of public prosecutors in civil proceedings was limited to submitting legal opinions in the cases defined earlier. They issued case-specific opinions after investigating aspects of public rights. The judges were under no formal obligation to accept these opinions.[16]

Why did the Ottoman legislature avoid adoption of the extensive powers of the French *Ministère public* in civil and personal status litigation? Once again, the existing body of *Şer'i* law, which shaped the legal imagination of the reformers, seemed to have defined the boundaries of legal borrowing. The Ottoman jurist Ali Şehbaz Efendi suggested that the role and authority of the public prosecutor in civil proceedings evoked the position of the *mufti* in the *Şeriat* courts.[17] The tasks conducted by the public prosecutor in the civil domain were not anchored in the *Şeriat*, but, rather, in the *Nizamiye* procedural codes; yet, its objective was identical, namely, issuance of some kind of a legal opinion (*fetva*). In both cases, the judges may or may not have taken the opinion of the *mufti* or that of the public prosecutor into consideration. This hypothetical comparison, not developed thoroughly by Şehbaz Efendi, is interesting, because it epitomizes an essential difference between the *Şeriat* and the *Nizamiye* courts in the late nineteenth century. In the *Şeriat* courts, the judge could opt to obtain a *mufti*'s opinion, or to disregard it altogether. Litigants were free to approach a *mufti* of their choice and acquire a legal opinion (*fetva*) to be presented *by them* before the judge. In the *Nizamiye* court, by contrast, the judge did not have to accept the opinion of the

public prosecution either (in cases that required such opinion), but he was obliged to hear it. By the same token, while the *fetva* was an outcome of the litigant's initiative, litigants in the *Nizamiye* courts were not involved in the procurement of the public prosecutor's legal opinion. Şehbaz Efendi interpreted this difference as an indication of the public prosecutor's neutrality. The involvement of the public prosecutor in civil proceedings, at least in theory, was defined by the letter of the law and reinforced by the appellate instances.

Perplexity caused by the introduction of public prosecution was not limited to judicial laymen such as the publicist Abdurrahman Efendi, quoted earlier. Rather, it was evident also among court personnel in the civil domain of the *Nizamiye* courts. Judicial officials in the civil sections of the *Nizamiye* courts often did not fully comprehend the practical implications of the doctrinal separation between public and private rights, and what it actually meant, as far as the involvement of public prosecutors in civil proceedings was concerned.[18] In later years, one of the most recurring reasons given by the Court of Cassation for quashing decisions made by civil *Nizamiye* courts of first instance was their failure to comply with the requirement to hear the opinion of public prosecutors in the civil situations prescribed by the law. For example, civil proceedings that involved petitions challenging the competence of judges required the actual presence of the public prosecutor in court. Chronic violation of this requirement by courts of first instance resulted in a large-scale annulments of court decisions by the Court of Cassation.[19] In fact, one of the most widespread grounds for quashing decisions issued by the civil sections of the lower *Nizamiye* courts was the absence of public prosecutors in proceedings that involved state agencies. The presence of public prosecutors in such cases was stipulated in the *Law of the Judicial Nizamiye Organization*, which was the basis of the 1879 reforms. This specific kind of procedural flaw is quite frequent in the case reports published in the *Ceride-i Mehakim*. The following example, which demonstrates this point, is one among many.

In March 1890, the Maraş court of first instance in the province of Aleppo addressed a lawsuit submitted by the Imperial Treasury against a certain Hâfız-zade Hüseyin Efendi. The attorney who represented the Treasury asked the court to order Hüseyin Efendi to pay taxes on account of his ownership of 245 goats. The court reviewed the documents of ownership (*kuçan*), received a report of the municipal council that indicated that all the required taxes had been paid, and heard witnesses. It ruled in favor of the defendant. The representative of the Treasury appealed to the Court of Cassation, resorting

to the following arguments: first, the court of first instance mixed up the numbers of goats owned by the defendant in two different villages; second, since the witnesses came from the defendant's village, the court was supposed to verify the witnesses' reliability (*tezkiye*), but no such procedure was mentioned in the court decision. In its ruling, the Court of Cassation accepted the petition and quashed the decision. It accepted the Treasury's argument concerning the *tezkiye*, but added an additional reason for the annulment, which had not been raised by the appellant. Namely, the investigation of the Court of Cassation revealed that no public prosecutor was present at the trial, and his opinion was not produced.[20] Typically, whenever the Court of Cassation revealed in its investigation that no public prosecutor's opinion had been obtained in civil trials involving state agencies and funds, it either presented this procedural breach as the sole reason for quashing the disputed court decision, or added it to the arguments raised by the appellant, regardless of whether or not the appellant had mentioned this breach.[21]

What was the reason for this chronic breach at the lower civil courts on the one hand, and the salient importance attributed to the enforcement of this requirement on the other? There is more than one possible explanation for both aspects. Sheer inefficiency or incompetence of judges failing to comprehend properly the new procedures may be one reason. Nonetheless, it does not explain why this specific violation became of focus of Court of Cassation's attention and why it was more widespread than other procedural violations. In addition, the violations of this procedure persisted for a long period of time after the introduction of the reforms, into the 1890s and beyond. It should also be noted that the requirement of obtaining the opinion of a public prosecutor in civil trials was not a complicated or vague procedure to begin with. One explanation is related to the gap between the reformers' design and the available means to realize it. They assigned the public prosecutors the role of guardians of the public rights in the juridical and the judicio-administrative sense, but this scheme could be only realized in the capital and the provincial centers. Shortage of trained assistant public prosecutors forced the *Nizamiye* courts in the provincial counties to employ gendarmerie officers as assistant public prosecutors. This compromise solution had a negative impact on daily judicial activities. Correspondence between the Ministry of the Interior, the Ministry of Gendarmerie, and the Ministry of Justice throughout 1899 reveals the problems caused by employing gendarmerie officers in lieu of professional assistant public prosecutors. According to reports from provincial counties, the judicial duties of

the police officers who served as assistant public prosecutors were neglected, because they were busy with "hunting bandits" across the provinces and with other regular police tasks.[22] Even the very ability of the gendarmerie to perform its basic police tasks was in question. Due to the government's severe financial difficulties during the late century, the gendarmerie corps in many parts of the empire had to endure irregular and decreasing salaries. This crucial element of their working conditions had an immediate impact on their functioning and on the rule of law in general. According to Nadir Özbek, provincial governors sent scores of telegrams to Istanbul, desperately requesting funds for the payment of wages. The crisis reached a high point in 1897, when the government cut the budget of the gendarmerie by 40 percent, a decision that had a devastating effect on the government's ability to enforce order, when numerous gendarmes abandoned their posts.[23] Hence, the high expectations set by the reformers and the Court of Cassation's effort to enforce them in its rulings seem almost pointless, given the state of the Ottoman gendarmerie during the 1890s.

Considering the versatility of the *naib*s, it might be that their reluctance to have public prosecutors present in their courts was a sort of conscious resistance. Şehbaz Efendi's comparison of the *mufti* with the public prosecutors once again may help to accentuate the difference between the two judicial forums. The *naib* was not obliged to accept the opinions of either, in both the *Şeriat* and *Nizamiye* forums, yet the fact that in the latter the public prosecutor was not only a jurist but a representative of the state vis-à-vis both the *naib* and the litigants rendered the weight of his opinion in the *Nizamiye* court quite different from that of the *mufti* in the *Şeriat* court. Moreover, the public prosecutor was the exclusive *Nizamiye* persona in the former judicial forum, representing the *Nizamiye* legal culture, with its emphasis on procedure and adjudication (as opposed to the arbitration-minded *Şeriat* court).[24] Givern that the *naib* was an employee of the *Meşihat*, encounters between the assistant public prosecutor and the *naib* called for tension and competition, potentially challenging the authority of the *naib*. In situations when disputes between the assistant public prosecutors and the presidents of the local courts of first instant became severe, the ministry ordered a transfer. For instance, following recurring disputes between the provincial public prosecutor of Manastır, Atıf Bey, and the president of the local courts of first instance, the public prosecutor was ordered to exchange posts with a colleague from Kosova, Nazif Bey.[25]

In a circular sent from the Ministry of Justice to the public prosecutors in the capital and the provinces in January 1880, it was emphasized that public prosecutors were neither authorized to prosecute in civil trials, nor was the court obliged to accept their opinion. At the same time, the authors of this circular, in line with the actual law that regulated the work of the prosecutors, made sure to remind the judicial community that public prosecutors were instructed to turn to the Court of Cassation (through the chief public prosecutor), whenever suspecting that the court in their jurisdiction had violated the rights of the litigants in any specific case. This reinforced the status of the prosecutors as active inspectors, in their capacity as guardians of the public rights. Needless to say, the category of *violation of public rights* is a very wide one.[26] Judges were aware of the gaze that the central judicial administration directed toward their courts, through the public prosecutors.

Not involving the public prosecutor in cases that required his attendance by law seems to have been a reasonable way for the *naib* to avoid such stressful situations and to safeguard the exclusiveness of his authority in "his" court. Such strategy made sense because there was always a good chance that this procedural violation would not be detected. As was the case with all civil disputes addressed by the courts of first instance, procedural breaches could be exposed only when a court decision was subject to appeal. Given the costs entailed by appellate procedures, not all litigants could afford appeals, and others would think twice before initiating an appellate procedure.

The implementation of the requirement to hear the public prosecutor in the designated civil disputes was a top priority as far as the Ministry of Justice was concerned. Attorneys were well aware of that, often playing this winning card in their judicial tussles. In November 1895, a certain Ayşe Kadın from the Eastern-Anatolian city of Erzincan brought a civil suit against the Treasury. She claimed that the Treasury auctioned off a house that had been bequeathed to her and her brother on account of her brother's debt to the Treasury. Ayşe requested the court to order the Treasury a reimbursement in accordance with her respective share of the house, being half of its total value. Against her claim, the attorney of the Treasury argued that the brother was the sole owner of the house. The Erzincan court of first instance ruled in favor of Ayşe, after establishing that the two siblings inherited equal shares from their father. The Treasury appealed to the Court of Cassation, which, two years later, quashed the decision of the Erzincan court, for the reason that the latter was content with reviewing the written opinion of the public prosecutor, while failing to have him physically present at the trial.[27]

THE "STATE EFFECT": THE SUPERVISORY DUTIES OF THE PUBLIC PROSECUTORS

Judges in the civil and the criminal *Nizamiye* courts had all the reasons to be wary of the public prosecutor's gaze. The powers of the public prosecutors were extensive, more than any other functionary in the *Nizamiye* court system. As far as the Ministry of Justice was concerned, the provincial public prosecutors were the "field commanders" of the *Nizamiye* court system, representing the interests of the Ministry of Justice. This feature of their daily work was evident, first and foremost, in their administrative supervisory duties and authorities prescribed by law. They were the ones to take action in cases of complaints concerning the incompetence of judges, and they were authorized to demand information from the files of all cases addressed by the civil courts. In addition, they supervised the execution of the decisions from all *Nizamiye* courts.[28] Less conspicuous than the codes, yet even more suggestive, is the fact that most of the routine instructions issued by the Ministry of Justice in the form of circulars were originally addressed to the public prosecutors (and not to the presidents or the clerks of the courts), who were required to make sure they reach the judicial personnel. This practice reflected the major administrative role of the public prosecutors as the executors of the overall judicial agenda. In all administrative matters, the Ministry of Justice communicated with the presidents in the Court of Cassation, the appellate courts and the courts of first instance through the chief public prosecutor, the provincial public prosecutors at the appellate courts, and the assistant public prosecutors at the courts of first instance respectively. By the same token, the Ministry of Justice did not allow court presidents to communicate with the ministry independently, only via the public prosecutors.[29]

The supervisory duties of the provincial public prosecutors expanded in the wake of the reforms of 1879, reflecting the accentuation of state centralization during the Hamidian era. In 1884, the Ministry of Justice secured the consent of the *Meşihat* (the office of the *Şeyhülislam*) to the presence of public prosecutors in the provincial commissions that administered the qualifying exams for *naib*s. No doubt, this move provided the ministry with an important foothold in the supervision of *naib*s' work.[30] The daily administrative duties of the public prosecutors included even the most prosaic bureaucratic matters concerning the *Nizamiye* personnel. For instance, starting from 1889, judicial officials who wished to obtain travel permissions for health-related reasons were required to send their petitions to the

provincial public prosecutor.[31] Similarly, a circular from 1891 mentioned the role of public prosecutors in supervising the allowance of pension funds.[32] The public prosecutors were even responsible for making sure that the issues of the *Ceride-i Mehakim*, the professional journal of the *Nizamiye* staff, reached judicial personnel on time, and they also collected unpaid subscription fees![33] The enormous amount of information that originated from the courts across the empire in accordance with the elaborate report procedure was accumulated in the provincial offices of the public prosecutions. Their gaze encompassed the judicial work of the courts, the personal matters of the staff, and the financial aspects of court administration. Court staff dealt with significant sums of money through the collection of fees. The public prosecutors were responsible of ensuring that revenues were handled properly and reached the Treasury. At the end of each month, the courts were required to submit to the provincial public prosecutors reports on the revenues from stamps issued for various fees. In a circular from October 1894, the ministry complained that "these registers are not prepared on time, and consequently, billing actions are being harmed." It ordered the courts to avoid such delays.[34]

At this point, I would like to situate the discussion in the conceptual context of the critical scholarship that tackles the notion of the state. This critique is shared by a group of social scientists and historians, who have problematized the mainstream understanding of the state as a descriptive and analytic framework, especially as far as the pair *state and society* is concerned. They employ different vocabularies and approaches when addressing their subject matters, but they share the basic argument, that the state should be analyzed as a reified construct. In other words, the common association of the state with the coherence and agency resembling an organism cannot be understood simply in terms of analytic convenience. The first systematic attempt to pin down the deceptive appearance of the state as a freestanding entity may be attributed to Marxist thinkers.[35] Nevertheless, as argued by Philip Abrams, Marxist theorists, somewhat paradoxically, contributed to the enduring reification of the state by adhering to the logic that treated it as a single agent, with a will and power of its own. According to Abrams, the only way out of the reification matrix is to understand the state as historically constructed.[36]

The framework suggested by Timothy Mitchell is one of the most effective theoretical responses to Abram's call. Rather than asking "what is the State," Mitchell suggests to see the intangible boundary between state and society not as an analytical problem that potentially

could be solved somehow someday, but rather as a clue to the very nature of the state. Therefore, he advances an investigation of the processes by which the *effect* of an apparent distinctiveness of the state is produced within various historical contexts, and shared by both political regimes and their academic observers.[37]

Let us return now to the intellectual exercise offered by Şehbaz Efendi, who compares the *mufti* with the public prosecutor. Being two very different institutions in terms of function and history, the scholarly value of this comparison should not be overstated. Yet, from the litigants' point of view, it *does* illustrate the alienating nature of the *Nizamiye* judicial process in comparison to the *Şeriat* court. The option of obtaining a *fetva* allowed litigants in the *Şeriat* courts a somewhat stronger agency than the one permitted by the *Nizamiye* procedure. More important to the present discussion though, this comparison points to the difference in the degree of the state effect experienced in both forums. *The state* was quite present in the reformed *Şeriat* court of the late nineteenth century in many forms, from the personnel-related procedures, to the seals on documents produced by the court. In the *Nizamiye* judicial forum, however, the public prosecutors, who much like the *mufti*s interpreted the law and served as legal advisors to the judge, diverged from the *mufti*s by the fact that they represented *the state* and *the public rights*. Thus both personnel and litigants experienced the state effect in the *Nizamiye* court differently than in the *Şeriat* court.

Apparently, wording is never innocent, not even in prescriptive and formal legal texts that are designed to create an impression of impersonal rationality and impartiality, such as legal codes. In codes and official terminology, it was the public prosecutor, and not the judge, who was closely associated with *the state*. The Ottoman legal lexicon of the late nineteenth century gave an accurate expression to the notion of the public prosecution as the ultimate representative of the state, contributing to the notion of the reified state. The entry opens stating that public prosecutors "are officials appointed by the Sultanate for the purpose of protecting the public rights in legal matters."[38] In their capacity as state officials, both the judge and the public prosecutor were appointed by the state, and both represented the state, as any official did. Whereas the role of the judges was to adjudicate, the public prosecutors were in charge of enforcing the rule of law.

At the same time, the association of the public prosecution with the state was also a matter of institutional competition in the context of the relationship between the Ministry of Justice and the *Meşihat*. In the late nineteenth century, *kadı*ship was a reformed institution

(at that point officially termed *naib*), a far cry from the image it later assumed in modern scholarship. Nevertheless, it was a solid, mature judicial institution, with roots going centuries back in Islamic history. Public prosecution, by contrast, being a novel concept in Ottoman law, could be more easily designed and shaped to realize the pressing objectives that derived from the immediate circumstances. The *Nizamiye* courts in particular, and the judicial sphere in general, the *Şeriat* courts included, had been intensively refashioned and developed for more than two decades before the foundation of the ministry.[39] During these years, the jurisdiction of the *Şeriat* court diminished considerably in favor of the *Nizamiye* court, and many of the duties previously under the responsibility of the *Meşihat* were transferred to the Ministry of Justice. Obviously, the reformers at the Ministry of Justice were unable to build the *Nizamiye* system from scratch even if they wanted to, which, in itself, is an implausible assumption. They had to work and carry out the reforms with the existing manpower and bureaucratic infrastructure.

The diverse makeup of the judicial personnel at all levels of the *Nizamiye* judicial officialdom is surprising only when considered through the essentializing and rather anachronistic binarism of "secular" versus "religious" personnel. The Ministry perceived the dual role of the *naib*s in both the *Şeriat* courts and the civil sections of the *Nizamiye* courts as a given, and certainly not as an anomaly it had to "fix." Rather than focusing on the religious/secular distinction, whether by way of reinforcing this distinction or trying to refute it, looking at the law as a "contested domain" appears to be a more fruitful and less anachronistic course of investigation.[40] The institution of public prosecution illustrates this point. There is no evidence that the Ministry of Justice was engaged in an effort to rid its courts of *naib*s, or officials of *İlmiye* education in general. But it did use the institution of public prosecution to bolster its hold over the judicial sphere. As I demonstrate in chapter two, the judicial sphere of the late nineteenth century housed a number of judicial forums. The structure of the *Nizamiye* court system created a sort of special "partnership" between the Ministry of Justice and the *Meşihat* in the domain of civil law. The civil sections operated in accordance with *Nizamiye* procedures, but were presided over by judges who were employees of the *Meşihat*. Like all partnerships, this joint venture contained aspects of conflict and cooperation, tensions and agreement. The Ministry used the two institutions that were under its complete control (i.e., not shared with the *Meşihat*), namely, the public prosecution and the Court of Cassation, to maintain its control over the civil sections.

Thus, the supervisory and administrative authorities of the public prosecutors should be explained not only in terms of state reifications and legal praxis, but also in terms of the power relations between the Ministry of Justice and the *Meşihat*. An examination of seventy-three appointment documents of public prosecutors on district and provincial levels from 1893 to 1897 reveals a pattern.[41] A clear movement between the position of public prosecution and the position of judgeship in the criminal sections of the *Nizamiye* courts is evident. During this period, thirty-eight public prosecutors at the appellate and county levels were appointed as court presidents in the criminal sections of the *Nizamiye* courts; nineteen presidents in the criminal sections were appointed as public prosecutors (or assistant public prosecutors); and five law school graduates were appointed as public prosecutors. No movement between judgeship positions in the civil sections and public prosecution positions was apparent (as I show later, some public prosecutors started their career in the *Şeriat* courts as clerks). This situation illustrates the kind of administrative compartmentalization that characterized the *Nizamiye* court system. The public prosecution and the criminal sections were identified exclusively with the Ministry of Justice, in terms of personnel and procedure. The civil sections were identified with the Ministry of Justice in terms of procedure, but with the *Meşihat* in terms of adjudicating personnel (*naib*s). Hence, it was only natural for the Ministry to render the public prosecutors its "agents" in the civil domain. This observation should be qualified, however, by the fact that in the lower courts of the county level, the duties of the assistant public prosecutors were often carried out by gendarmerie officers (who were not employees of the Ministry of Justice).

In addition, it seems that the presence of qualified public prosecutors was less felt in counties remote from provincial centers. In a circular to the courts from 1889, the ministry scolded assistant public prosecutors for neglecting their judicial duties in the counties of their jurisdictions, because they were too busy assisting their superiors at the provincial courts of appeal:

> It has been reported that in some provinces assistant public prosecutors at the courts of first instance in the provincial centers help the public prosecutors of the appellate courts (*istinaf*). Namely, the assistant public prosecutors are busy with matters related to trials that take place in the courts of appeal; [as a result,] their mediation is not accessible to the adjunct counties [of their jurisdiction]. Involvement of assistant public prosecutors of the courts of first instance with matters that are addressed by the public prosecutors at the appellate courts is a source of disorder, and it is unlawful. Appellate public prosecutors should not

> be directly informed of cases from the counties that are deliberated at the courts of first instance at the provincial centers, in order to prevent a conflict interests. From now on, [public prosecutors] are warned to avoid exceeding their duties.[42]

In addition to the problem of collaboration between public prosecutors in the provincial centers at the expense of their duties in the more remote areas, this circular exhibits the ministry's awareness of the problematic conflict between the supervisory duties of the prosecutors and their judicial tasks, and its potential threat to the neutrality of the courts. It tried to deal with this threat by reminding the prosecutors that they should not exceed their jurisdiction. It is impossible to say, however, to what extent this warning was effective.

Professional Public Prosecutors

In January 1880, merely months after the creation of the position of public prosecution, the British consul in Sivas shared with the ambassador his impression of the assistant public prosecutor in Amasya:

> The Assistant Public Prosecutor of Amasya is a young man of 22 or 23, who has never studied law; has never passed the slight examination required by the new regulations; and is so ignorant of legal procedure that he recently sent a summons to a French subject, ordering him to appear before the Court, and threatening, if he did not do so, to send a party of zaptiyehs [gendarmes] to bring him by force. This matter is now in the hands of M. Doulcet, the French Consular Agent at Samsun.
>
> The sole qualification of this young gentleman for the responsible post of Public Prosecutor in the important sandjak of Amasia seems to be that he is the son of the well-known Kurd Chief, Beder Khan Bey, and, if all I heard be true, he is animated in no small degree by those feelings of dislike towards Christians which have been shown more than once by other members of his family.[43]

Given the overall prejudiced attitude of the consuls toward the judicial reforms of 1879, there may be some exaggeration in this negative characterization of the assistant public prosecutor in Amasya. Nevertheless, there is no doubt that the challenge of stuffing scores of public prosecution positions across the empire within several months was grave, resulting in many compromises, which had a negative impact on the administration of justice. Yet, it appears that as the central judicial administration realized the full implications of this

office, it tended to appoint individuals of more appropriate experience and competence. This is evident from curriculum vitas of public prosecutors, and also from the fact that, on the whole, consular complaints about public prosecutors were relatively rare.

Curriculum vitas of professional public prosecutors suggest a diverse range of educational and professional backgrounds.[44] There were no standard requirements for service at the public prosecution. In a time when standardized legal education was in a formative and early phase, and available to a few individuals only, experience in the bureaucracy was a sufficient qualification. Curriculum vitas of public prosecutors and official correspondence regarding appointments give the impression that most officials who were appointed as public prosecutors and who were not law school graduates had gained considerable experience in the Ottoman civil service prior to their appointment. Few were appointed as public prosecutors immediately after graduating law school.

It was often the case that after spending several years in nonjudicial units of the bureaucracy, officials joined the ranks of the judicial personnel, performing clerical duties for several years, before they were appointed as public prosecutors. For instance, Mehmet Halit, born in 1851/2, graduated from a secondary school (*rüştiye*) and joined the bureaucracy at the age of sixteen. After serving at the Ministry of Pious Foundations (*Evkaf-ı Hümayun*) and at the Department of Accounts (*Divan-ı Muhasebat-ı Maliye*), he joined the judicial administration to serve as a clerk in various units, including the civil section of the Court of Cassation. After fifteen years of service, at the age of thirty-one, he was appointed as assistant public prosecutor at the Malatya court of first instance.[45] Similar was the career path of Mahmut Vefik Bey from Baghdad, who entered the civil service in Baghdad at the age of thirteen, and later on worked as a clerk at the provincial court of appeal. He must have excelled (and was surely fortunate to belong to the "right" patronage network) as he found his way up to the Court of Cassation in Istanbul, where he served as a clerk in the office of the chief public prosecutor. He was appointed as assistant public prosecutor at the age of thirty-eight, twenty-five years after he had joined officialdom.[46] Some individuals had held major positions before being appointed as public prosecutors. Osman Faik from Sivas, a graduate of the prestigious School for Civil Service (*Mülkiye*), held several appointments as subdistrict governor (*kaymakam*) in Malatya, Sivas, Gaza, and Buka'ul-aziz (Syria) before he became an assistant public prosecutor at the age of forty-three.[47]

Some public prosecutors started their judicial career in the *Şer'i* domain. The educational and professional background of a certain Mehmet Namık from Konya, born in 1847/8, illustrates the movement of personnel between the *Şer'i* and the *Nizamiye* domains. A secondary school graduate, Mehmet Namık, started his career in the administrative corps (*mülkiye*), and then worked as a clerk in various *Şeriat* courts for several years. He was appointed as assistant public prosecutor at the age of thirty-four. He wrote in his CV that he could write Turkish, and also knew some French.[48] Similarly, Mehmet Ali from Amasya, born in 1854/5, wrote in his CV, next to his name, that he was the "son of Hâfız Ahmet Efendi from the *ulema*," assuming that this pedigree would work for him. After graduating from high school, he continued to *Şer'i* studies in a *medrese*, in the course of which he studied Islamic jurisprudence (*fiqih*), and *Nizamiye* civil law (*Mecelle*), as he wrote in his CV. At the age of sixteen he worked as a clerk in the *Şeriat* court (probably in his hometown), and later on he joined the secretarial ranks at the public prosecution in Istanbul. He became an assistant public prosecutor at the age of twenty-seven.[49] Others had more solid *Şer'i* backgrounds. Musa Umran Ibn al-Sayyid Ibrahim Ali Efendi from Jerusalem, born in 1843/44, went to a Kur'an school, and joined the secretarial staff in the Jerusalem *Şeriat* court when he was seventeen years old. Later on he became a head clerk, and then a *naib* at the same court. He was appointed as assistant public prosecutor at the age of forty.[50] Generally speaking, the position of head clerk in the court of first instance was one of the more solid stepping stones for the position of public prosecutor.[51]

The career paths that preceded the appointments as public prosecutors demonstrate that experience in the bureaucracy was the most important qualification, being the source of professional authority. Not all public prosecutors had a career history in judicial units, but the vast majority had spent a good number of years in the civil service. Enforcement of procedural correctness was the public prosecutor's most important duty. However, it was not the specific judicial knowledge that was deemed the most essential requirement, but rather a broad experience in the bureaucracy, which led to an identification of the public prosecution with the interests of *the state*.

Conclusion

From all the new functions that were introduced through the *Nizamiye* court system, the institution of the public prosecution was the most influential innovation. Whereas the position of the public

prosecutor in the criminal domain lends itself somewhat too conveniently to the reifying metaphor of the *gaze of the state* and the related intrusive practices of the state that are commonly associated with modernity, *Nizamiye* civil litigation in the Ottoman context provides an opportunity to complicate, and actually historicize, the meaning of the state.

A depiction of the Ottoman public prosecution as a judicio-bureaucratic vehicle that was intended, first and foremost, to realize the objectives of the centralizing state is not incorrect. But the analysis should not stop at this statement. I have argued that the presentation of the public prosecution as the ultimate embodiment of the state, exhibited both in practice and discourse, was in itself a means of creating the state effect in the judicial sphere. At the same time, this institution served the immediate interests of the newly created Ministry of Justice, mainly, strengthening its hold over the judicial sphere. This need resulted from the fact that a mature judicial system had already existed before the creation of the ministry and the introduction of the judicial reforms, and that the ministry had to share its authority with the *Meşihat* at the lower administrative level. I also tried to point to the related tensions that were inherent at the local level. Arguably, when *naib*s ignored the law that required the presence of the public prosecutor in their courts, they plausibly did not resist *the state* as such; rather, they tried to prevent a judicio-bureaucratic encroachment by the new powerful official. By the same token, keeping the public prosecutor out of their courts may have allowed them to preserve the "user-friendly" feature of the *Şeriat* court's legal culture.

Concluding Remarks

Unthinking the Religious/Secular Binarism

Written in 1909, A. Heidborn's manual on the reformed Ottoman legal system has been one of the most cited sources of information on the *Nizamiye* courts. His account of the structure of the *Nizamiye* judicial system is based on a careful translation of Ottoman laws and regulations, backed by references in accordance with the academic apparatus. The statements he makes on the actual performance of these courts, however, are not supported by references; rather, they reflect his own impression. The concept of letting *Şer'i* judges (*naib*s) apply a *Nizamiye* law is represented in Heidborn's account as a "defect" of this particular judicial system. He assumes a deep antagonism of the *Şer'i* education toward non-*Şer'i* laws:

> de même, l'art.3 de l'instruction du 15.12.1291 engage les *naib*s à n'appliquer, en leur qualité de président nizamiyé, que le droit nizamiyé. Mais ces dispositions sont restées plus ou moins illusoires, vu la médiocre connaissance que les juges du chériat ont du droit nizamiyé et vu surtout l'aveuglement où les a plongés l'enseignement des medressés et du mekteb-i-nuwâb, enseignement qui leur inculque le plus profond dédain pour tout ce qui n'est pas chériat.[1]

Heidborn, who otherwise pedantically supports his account by references, does not provide any evidence to his view of the *naib*s as ignorant, whose education demonstrates "the most profound contempt towards everything that is not *Şeriat*." Yet, from Heidborn's point of view, there is no need for evidence in the first place, because for enlightened Frenchmen or Englishmen of the period, an inherent conflict between the *Şeriat* and the *Nizamiye* (so-called secular) laws belongs to the category of things that go without saying. Contemporary European observers of the *Nizamiye* courts, such as Heidborn and the British consuls, who reported on the judicial system, had no reason to assume otherwise. The French legal system, which was praised for its rationality, resulted from an historical, at

times bloody, process through which the clergy had lost much of its political power. In the minds of the foreign observers, the legitimacy and prestige of the *Code Napoleon* stemmed not from the sacred, but rather from human reason. Hence, the presence of *Şer'i* law and lawyers of *Şer'i* education in the reformed judicial system of the Ottoman Empire signified the incompleteness of the reform project. The fact that unlike European history a struggle between the church and the state was not an essential feature of Ottoman history was not accounted for.

Later historians, who mentioned the *Nizamiye* courts in passing or treated them more elaborately, have repeated this presumption, often representing it through the concept of *duality*: a conflict between pseudosecular modernists and religious reactionaries, which supposedly characterized the entire reform movement of the nineteenth century.[2] This notion of an unfinished *imitation* was perpetuated in modern scholarship. The development of Kemalist secularism further bolstered the representation of the *Nizamiye* system as an anomalous combination of two inherently different legal traditions. Reading history backward, the Ottoman reform was often positioned as the point of departure for a linear process that would inevitably lead to the secularism of the Turkish Republic.[3]

To my mind, unthinking the image of the *Nizamiye* courts as *harbingers* of later secularization is a crucial prerequisite for understanding the nuances related to questions that have been discussed in the present study, including such issues as the performance of the courts, judicial integrity, legal culture, and legal pluralism. There was nothing predestined in the events that marked the collapse of the Ottoman Empire and its aftermath. Historical contingency presents itself in each of the momentous events that took place during the last two decades of Ottoman existence: the 1908 Revolution, the rapid fading of Young Turk liberalism, the fatal decision to side with Germany, the failures and successes of the Ottoman army during the Great War, and, eventually, the emergence of a new regional order. The causality that underlines these developments makes sense in retrospective; yet none of these occurrences was inevitable, and all of them were set in specific circumstances. The emergence of Kemalist secularism may not be used as historical evidence for statements regarding the *tanzimat*. Turkey was not a reincarnation of the Ottoman Empire; it was but one type of polity that emerged from the wreckage of a multiethnic Empire, along with other types of states, which took different paths due to different circumstances. In this regard, this study joins an ongoing effort of Ottomanists to offer alternative interpretations

of the Ottoman nineteenth century, in which *westernization* is not treated as a self-explanatory concept, and interpretations of sociocultural changes are not dictated by categories that emerged after World War I.[4]

Ottoman Sociolegal Change

This study has suggested, therefore, that concepts such as *duality*, *secularization*, or accounts that tell the story of a struggle between secular modernists and Muslim traditionalists have little relevance for *explaining* Ottoman legal change in the nineteenth century. On the contrary, the reformed Ottoman judicial sphere was an amalgam that encompassed selectively borrowed (French) and selectively codified local (Ottoman-Muslim) law. In the same way, the judicial rank and file consisted of men of varied educational backgrounds.[5] There is no evidence that this amalgam was considered a compromise necessitated by lack of means to realize the full imitation of the French legal system. When other legal systems are considered, it is clear that amalgamation, and not imitation, is the normal pattern that underlies legal change. The fusion of Islamic, customary, and borrowed law, which was evident in the *corpus juris* applied in the *Nizamiye* courts, is, in itself, a case of historical continuity. Legal transplantation was already apparent in the Sultanic law (*kanun*) that had been applied in the Ottoman courts before the nineteenth century; the *kanun* was a hybrid legal artifact that combined Islamic, customary, and borrowed concepts.

Legal amalgam should not be interpreted as an indication of legal harmony. The *Nizamiye* courts exhibited irregularities and injustices as any other judicial system. Whereas positive law demarcated jurisdictional boundaries between *Nizamiye*, *Şeriat*, and other judicial forums, these boundaries were crossed through the practice of forum shopping (chapter two). Whereas the central judicial administration was trying to enforce judicial integrity, corruption was nevertheless evident, even if constantly under check (chapter four). Conflicts between officials over jurisdiction and influence were also evident, and they were often embedded in foreign schemes (chapter one).

Glocal Modernity, Glocal Law

In recent years, the term *glocalization* has been used extensively, in both scholarly and business discourses, to describe the multiple combinations of the global and the local in a world that, in many aspects,

takes on the features of a global village. The technological inventions of the late twentieth century may have increased the pace of change, yet, the fusion of the global and the local is a marker of modernity from the start, already apparent in the nineteenth century. Regularity and uniformity of administrative practice have been outstanding global features of nineteenth-century modernity. The most immediate expression to this change in the Ottoman part of the world was apparent in the key term *nizam* (order, law, organization, regularity, method, uniformity) and its various derivatives, which had come to symbolize the reform movement as a whole: *Nizami* army, *tanzimat*, *nizamname*s, *Nizamiye* courts. The term *nizam* became a synonym of law, replacing the previous association of the law with *adalet*, or *justice*. The trend that was identified by Scott as *simplification*, namely, the desire of officials to simplify praxis and render society and nature legible through standardization, and their unconditional conviction in the power of generic formulas to replace local forms of knowledge, was also evident in Ottoman judicial culture. This change took the form of legal formalism, which became the dominant paradigm, noticeable in the proceduralization of court routines and in the legal discourse (chapter three). The procedural obsession of the Ministry of Justice was injected into the lower *Nizamiye* courts via the Court of Cassation and the office of the provincial public prosecution (chapter five). The Ottoman commitment to legal positivism was entrenched in an ideology of scientific positivism that attracted many elites all over the globe in the nineteenth century. At the basis of this ideology was the faith in the power of scientific progress to design society along rational lines.[6] In this mindset, elaborate legal procedure was conceived as an objective, rationalist ordering of the judicial sphere.

EXPENSIVE JUSTICE

Ottoman society was affected by modernity in ways that were simultaneously similar to and different from other societies of the nineteenth century. The rising price of justice concerned Ottoman court users as much as it concerned litigants in other parts of the world, and it still does. The foundation and maintenance of the *Nizamiye* court system required enormous financial resources, which on the whole were in short supply during the closing decades of the Ottoman era. The new salaried positions that were created for the *Nizamiye* courts, along with the new appellate mechanisms that were introduced in most provinces, were sustained by an elaborate system of judicial fees, of

which crime suspects and convicts were not spared. The growing need for legal advocacy further contributed to the rising price of Ottoman justice. Whereas in the premodern Ottoman courts judicial advocacy was not essential, it became almost a sine qua non in the *Nizamiye* courts, especially in the appellate instances. The proceduralization of judicial proceedings rendered the exchange that took place in the court largely unintelligible to the lay court user. Those who could not afford legal advocacy could make little sense of the technical discourse in court (chapters one and three). As far as civil litigation was concerned, the services provided by the *Nizamiye* courts were accessible mainly to the wealthier classes. The available options for forum shopping, demonstrated in Iris Agmon's work on the *Şeriat* courts and in the present study, provided *some* remedy for this situation, which can only be described as an infringement on social justice. The *Şeriat* courts, reformed as they were, retained much of their previous user-friendliness thus offering a more affordable alternative to the *Nizamiye* courts in civil proceedings.

Future Research

The problematization of the *westernization/secularization* narrative opens up new venues for reconstructing the passage of Middle East law to modernity. In other words, investigating the nitty-gritty practices that made up the daily interactions in the courts leads to a complicated picture, in which the notion of *westernization* loses much of its explanatory meaning. Nevertheless, a considerable part of this picture needs to be filled by further research. No doubt, eagle-eye explorations of the court system should be followed by bottom-up research. Microhistories of specific *Nizamiye* courts in various provincial localities, or of specific disputes in the pretrial and trial phases, will surely provide important insights on the dynamics of Ottoman sociolegal change.[7] Such studies will probably allow a more nuanced understanding of interactions between center and periphery; the dissemination of legal knowledge; the impact of local politics and power relations on the judicial proceedings; and the possible roles played by the courts in local political settings in the various parts of the empire.

The survival tactics adopted by the Hamidian regime vis-à-vis the challenge posed by separatist revolutionary movements and other forms of political opposition have been studied rather extensively. Nevertheless, the ways it utilized the legal toolbox provided by the new court system for the purpose of defeating subversive activity

hardly received scholarly attention.[8] Tensions between sincere commitment to the rule of law (demonstrated in the present study) and possible pressure of the regime to compromise this principle for political reasons require systematic exploration.

This is merely an illustration of issues that require further research. Whatever the conclusions of such future studies will be, we may safely assume that the deeper we probe into the everyday dynamics of Ottoman sociolegal settings, the further away we move from simple conceptualizations of the passage of Middle Eastern law to modernity.

Notes

Introduction

1. Michael Baye, Dan Kovenock, and Caspar de Vries, "Comparative Analysis of Litigation Systems: An Auction-Theoretic Approach," *The Economic Journal* 115 (2005): 583–601. On the differences between costs of litigation in the United States and Britain, see Richard Posner, "Explaining the Variance in the Number of Tort Suits across U.S. States and between the United States and England," *Journal of Legal Studies* 26 (1997): 477–90.
2. For a thoughtful discussion on the history of "the West" as a descriptive category while questioning the analytical validity of this homogenizing category, see Zachary Lockman, *Contending Visions of the Middle East: The History and Politics of Orientalism* (Cambridge, UK: Cambridge University Press, 2004). On studies that demonstrate the *impact-of-the-West* genre, see Ed Engelhardt, *Turquie et le Tanzimat ou Histoire des rèformes dans l'Empire ottoman depuis 1826 jusqu'a nos jours* (Paris: Librairie Cottilon, 1884); H. A. R. Gibb and H. Bowen, *Islamic Society and the West: A Study of the Impact of Western Civilization on Moslem Culture in the Near East* (two volumes) (London, New York: Oxford University Press, 1950–7); Roderic H. Davison, *Reform in the Ottoman Empire, 1856–1876* (Princeton, NJ: Princeton University Press, 1963); Bernard Lewis, *The Emergence of Modern Turkey* (London, New York: Oxford University Press, 1965); Şerif Mardin, *The Genesis of Young Ottoman Thought: A Study of the Modernisation of Turkish Political Ideas, 1856–1876* (Princeton: Princeton University Press, 1962). On a critique on the Turkish historiography of the *Tanzimat*, see Bülent Özdemir, *Ottoman Reforms and Social Life: Reflections from Salonica, 1830–1850* (Istanbul: Isis, 2003), 21–51. For critical analysis of the Declinist discourse, see Cemal Kafadar, "The Question of Ottoman Decline," *Harvard Middle Eastern and Islamic Review* 4 (1997–8): 30–75; Donald Quataert, "Ottoman History Writing and Changing Attitudes Towards the Notion of 'Decline,'" *History Compass* 1 (2003).
3. Suraiya Faroqhi and Fikret Adanır (eds.), *The Ottomans and the Balkans: A Discussion of Historiography* (Leiden: Brill, 2002). On the early Turkish historiography, see Buşra Ersanlı, "The Ottoman Empire in the Historiography of the Kemalist Era: A Theory of Fatal

Decline," in *The Ottomans and the Balkans*, 115–54. For the Egyptian representation of its Ottoman past, see Ehud R. Toledano, "Forgetting Egypt's Ottoman Past," in *Cultural Horizons: A Festschrift in Honor of Talat S. Halman*, ed. Jayne L. Warner, vol. 1 (Syracuse: Syracuse University Press, 2001), 150–67.

4. For a detailed survey of the scholarship on Abdülhamid II, see Kemal H. Karpat, *The Politicization of Islam: Reconstructing Identity, State, Faith, and Community in the Late Ottoman State* (Oxford, New York: Oxford University Press, 2001), 444–7.
5. An indication of this shift is Stanford Shaw's textbook, still valuable after more than thirty years, which includes a good deal of social and economic history. See Stanford J. Shaw, *History of the Ottoman Empire and Modern Turkey* (Cambridge, New York: Cambridge University Press, 1976–1977). As Quataert recently wrote, this book "saved Ottoman history from always being reduced to the 'Eastern Question' and gave it a life that facilitated the emergence of studies comparing and contrasting Ottoman experiences with those of other great political systems." Donald Quataert, "Remembering Stanford Jay Shaw, 1930–2006," in H-Net Discussion Networks: H-Turk (posted December 18, 2009), http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=H-Turk&month=0912&week=c&msg=tWe/g%2BnFkWuD4oQ%2BN8MuoA&user=&pw=.
6. See, for instance, Albert Hourani, *A Vision of History: Near Eastern and Other Essays* (Beirut: Khayats, 1961). Roger Owen, "The Middle East in the Eighteenth Century-An 'Islamic' Society in Decline? A Critique of Gibb and Bowen's *Islamic Society and the West*," *Bulletin (British Society for Middle Eastern Studies)* 3 (1976): 110–17.
7. Ursula Wokoeck attributes the success of *Orientalism* mainly to two factors: first, the timing of *Orientalism*, namely, its role in the post-structuralist trends that have affected the humanities and the social sciences as a whole, as well as its relevance to contemporary political issues. The moral position that Said takes up with regard to Middle East studies as a product of prejudice and political aspirations is an additional factor. For an analysis of the various aspects of the impact of *Orientalism*, see Ursula Wokoeck, *German Orientalism: The Study of the Middle East and Islam from 1800 to 1945* (London, New York: Routledge, 2009).
8. Ehud R. Toledano, "Social and Economic Change in 'the Long Nineteenth Century,'" in *The Cambridge History of Egypt*, vol. 2, ed. M. W. Daly (Cambridge, UK: Cambridge University Press, 1998), 252–83.
9. For a theoretical discussion of the conservative and revisionist approaches to the passage to modernity in the Middle East, see Dror Ze'evi, "Back to Napoleon? Thoughts on the Beginning of the Modern Era in the Middle East," *Mediterranean Historical Review* 19 (2004): 73–94.

10. Juan R. Cole, *Napoleon's Egypt: Invading the Middle East* (New York: Palgrave Macmillan, 2007).
11. For a reevaluation of the world-system approach, see Huri İslamoğlu İnan, "Introduction: 'Oriental Despotism' in World-System Perspective," in *The Ottoman Empire and the World Economy*, ed. Huri İslamoğlu İnan (Cambridge: Cambridge University Press, 1987), 1–24.
12. S. N. Eisenstadt, "Multiple Modernities," *Daedalus* 129 (2000): 15.
13. Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000).
14. Harry Harootunian, "Ghostly Comparisons," in *Impacts of Modernities,* eds. Thomas Lamarre and Kang Nae-hui (Hong Kong: Hong Kong University Press, 2004), 39–40. On the constitution of an evolutionary time and space as a means of empowering the West, see Johannes Fabian, *Time and the Other: How Anthropology Makes its Object* (New York: Columbia University Press, 1983).
15. Harootunian, "Ghostly Comparisons," 41.
16. This call echoes Michel De-Certeau's theorizing in *The Practice of Everyday Life* (Berkeley: University of California Press, 1984), yet De-Certeau does not deal with non-Western modernities.
17. To my mind, Giddens offers one of the most effective portrayals of modernity as a specific epoch and a state of mind. His analysis contains both the institutional and ontological aspects of modernity. He provides a series of characteristics of modernity, some of which may have existed in premodern times, yet they increased in intensity during modern times; among these features are unprecedented reflexivity, separation of time and space, separation of social relations from local contexts of interaction (*disembedding*), and the rising social function of trust. Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990).
18. For a recent study that explores Ottoman modernity as exhibited and constructed through state prisons during the second Constitutional period (1908–18), see K. F. Schull, "Penal Institutions, Nation-State Construction, and Modernity in the Late Ottoman Empire, 1908–1919" (PhD diss., University of California, Los Angeles, 2007).
19. Max Weber argued that rational legal systems emerged in Europe (and nowhere else) in order to sustain industrial capitalism, which required predictability in judicial decisions concerning contracts. Employing a somewhat circular logic, he argued that the existence of legal rationality in Europe was a major reason that capitalism emerged first in Europe. Max Weber, *Economy and Society*, two volumes (Berkeley: University of California Press, 1978). Weber's optimism concerning the relations between capitalism and the rule of law has been subject to extensive criticism, mostly neo-Marxian, that advanced a critical approach to the intersection of law, modernity, and capitalism, overall

arguing that concepts such as *the rule of law* and legal equality are myths meant to conceal the fact that modern legal systems serve the capitalist interests of the wealthier classes. One of the brightest critiques is offered in Neumann's legal theory, first introduced in 1936, in his PhD dissertation. Franz Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa, UK: Berg, 1986). For an analysis of neo-Marxian critique on the concept of the rule of law, see William E. Scheuerman, *Frankfurt School Perspectives on Globalization, Democracy, and the Law* (New York: Routledge, 2007).

20. For a review of this literature, see Mustafa Şentop, "Tanzimat Dönemi Kanunlaştırma Faaliyetleri Literatürü," *Türkiye Araştırmaları Liteatür Dergisi* 3 (2005): 647–72.
21. Sedat Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu: Nizamiye Mahkemelerinin Kuruluşu ve İşleyisi 1840–1876* (Eskişehir: Anadolu Üniversitesi, 2004); Ekrem Buğra Ekinci, *Osmanlı Mahkemeleri* (Istanbul: Arı Sanat, 2004); Fatmagül Demirel, *Adliye Nezareti: Kuruluşu ve Faaliyetleri, 1876–1914* (Istanbul: Boğaziçi Üniversitesi, 2007).
22. Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (New York, London: Routledge, 2005), 1.
23. One rare exception is a register of some sixty cases that were addressed in 1887 at the criminal *Nizamiye* court of first instance in Jaffa. Haim Gerber analyzed this register and reached interesting conclusions regarding the performance of this court, which also serve the present study (chapter one). Haim Gerber, *Ottoman Rule in Jerusalem, 1890–1914* (Berlin: Klaus Schwarz, 1985).
24. This is not to underestimate the distortions resulting from the tendency to treat the *sicil* as a transparent source. In recent years, *sicil* specialists have emphasized the need to read the *sicil* as a constructed, rather than a transparent, artifact. See Dror Ze'evi, "The Use of Ottoman Shari'a Court Records as a Source for Middle Eastern Social History: A Reappraisal," *Islamic Law and Society* 5 (1998): 35–57; Najwa al-Qattan, "Textual Differentiation in the Damascus Sijil: Religious Discrimination or Politics of Gender?" in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira El-Azhary Sonbol (New York: Syracuse University Press, 1996), 191–201. For a discussion of developments in the approaches to *sicil*, see Iris Agmon and Ido Shahar, "Introduction," in *Islamic Law and Society, Theme Issue: Shifting Perspectives in the Study of Shari'a Courts: Methodologies and Paradigms*, eds. Iris Agmon and Ido Shahar, *Islamic Law and Society* 15 (2008): 1–19.
25. On the implementation of the new instructions regarding the recording procedure in the *Şeriat* courts, investigated from perspective that approaches judicial reform "from the bottom up," see Iris Agmon, "Recording Procedures and Legal Culture in the Late Ottoman

Shari'a Court of Jaffa, 1865–1890," *Islamic Law and Society* 11 (2004): 333–77.

26. In 1879, the journal was restructured and the page and issue numbering started anew. In 1901, its title was changed to *Ceride-i Mehakim-i Adliye* (Journal of the Courts of Law) for unknown reasons, and later to *Ceride-i Adliye* (Law Journal). Henceforth, CM.
27. CM, 809, 3,792.
28. CM, 4,160.
29. CM, 5,583.
30. For recent studies that, to varying degrees, draw on the *Ceride-i Mehakim*, see Demirel, *Adliye Nezareti*; Musa Şeşmaz, *Kürt Musa Bey Olayı* (Istanbul: Kitabevi, 2004).
31. In Gabriel Piterberg's words: "the linguistic turn, which rocked the historical discipline—indeed the social sciences as a whole—to its foundations, has gone largely unnoticed [in Ottoman studies]." Gabriel Piterberg, *An Ottoman Tragedy: History and Historiography at Play* (Berkeley: University of California Press, 2003), 50. For similar criticism, see Suraiya Faroqhi, "In Search of Ottoman History," *Journal of Peasant Studies* 18 (1991): 211–41; Halil Berktay, "The Search for the Peasant in Western and Turkish History/Historiography," in *New Approaches to State and Peasant in Ottoman History*, eds. Halil. Berktay and Suraiya Faroqhi (London: Frank Cass, 1992), 109–84; Edhem Eldem, *French Trade in Istanbul in the Eighteenth Century* (Leiden: Brill, 1999), 7.
32. Anthropologist Ann Stoler offers an illuminating critique and calls for rendering the archive as a subject for research in the context of postcolonial studies. Ann L. Stoler, "Colonial Archives and the Arts of Governance," *Archival Science* 2 (2002): 87–109. For historical studies that yield a similar conclusion, see Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and their Tellers in Sixteenth-Century France* (Stanford: Stanford University Press, 1987); Roberto Gonzalez Echevarria, *Myth and Archive: A Theory of Latin American Narrative* (Cambridge: Cambridge University Press, 1990).
33. This style resorted to both French and Ottoman judicial discourses. For my analysis of the discursive aspects of the *Ceride-i Mehakim*, see Avi Rubin, "Legal Borrowing and its Impact on Ottoman Legal Culture in the Late Nineteenth Century," *Continuity and Change* 22 (2007): 279–303.
34. Peter Goodrich describes the gap between the image of rationality produced by legal texts, language, and even architecture, and the actual realities in the courts: "The day in the court is likely rather to be experienced in terms of confusion, ambiguity, incomprehension, panic and frustration, and if justice is seen to be done it is so seen by outsiders to the process." Peter Goodrich, *Language of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990), 188. For a similar argument concerning misleading

language of the *sicil*, see Boğaç A. Ergene, "Why did Ümmü Gülsüm Go to Court? Ottoman Legal Practice between History and Anthropology," *Islamic Law and Society* 17 (2010): 226.
35. Stoler, "Colonial Archives," 100; emphasis in the original.
36. Lawrence M. Friedman, "Litigation and Society," *Annual Review of Sociology* 15 (1989): 4.
37. *The New York Times*, December 19, 1903.
38. İsmail Hakkı Uzunçarşılı, *Midhat Paşa ve Taif Mahkumları* (Ankara: Türk Kurumu Basimevi, 1950); Uzunçarşılı, *Midhat Paşa ve Yildiz Mahkemesi* (Ankara: Türk Tarih Kurumu, 1967).

1 THE *NIZAMIYE* COURT SYSTEM: AN OVERVIEW

1. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens: University of Georgia Press, 1993).
2. Colin Imber, *The Ottoman Empire, 1300–1650: The Structure of Power* (New York: Palgrave Macmillan, 2002), 247.
3. For summaries of the various positions and developments in the debate over legal transplantation, see Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge, UK: Cambridge University Press, 2006), 50–8; Michele Graziadei, "Legal Transplants and the Frontiers of Legal Knowledge," *Theoretical Inquiries in Law*, edited volume: *Histories of Legal Transplantations*, eds. Assaf Likhovsky et al., 10 (2009): 723–43.
4. Alan Watson, *The Evolution of Law* (Baltimore, Maryland: The Johns Hopkins University Press, 1985), 29.
5. For a discussion of Montesquieu's views in this regard, see Norbert Rouland, *Legal Anthropology* (London: Athlone Press, 1994).
6. Graziadei, "Legal Transplants," 727.
7. Ali Şehbaz Efendi, "Usul-i Muhakeme-i Cezaiye" (Manuscript, 1896, Atatürk Library), 18–20.
8. Victor Hugo, *Les Misérables*, trans. C. E. Wilbour (New York: Modern Library, 1992).
9. Hüseyin Galıp, *Kamus-ı Hukuk* (Istanbul: Cemal Efendi Matbaası, 1305), 37–8.
10. Şehbaz Efendi, "Usul-i Muhakemat-ı Cezaiye," 19.
11. Ibid, 19–24.
12. An ambivalent approach toward the value of a professionalized bureaucracy was already evident in the nineteenth century. Whereas Max Weber perceived the bureaucratization of the states as a movement toward rationality and "disenchantment," Alexis de Tocqueville stressed the inherent dangers for the proper development of European democracies. For an analysis of social theories about modern bureaucracy and a rather pessimistic view of its effects on the development of democracy, see Henry Jacoby, *The Bureaucratization of the World*,

trans. E. L. Kanes (Berkeley: University of California Press, 1973). Carter Findley's work remains the most comprehensive study on the development of Ottoman bureaucracy during the long nineteenth century. Carter V. Findley, *Bureaucratic Reform in the Ottoman Empire: The Sublime Porte, 1789–1922* (Princeton, NJ: Princeton University Press, 1980); Findley, *Ottoman Civil Officialdom: A Social History* (Princeton, NJ: Princeton University Press, 1989). For a recent innovative prosopographic study of Ottoman *paşa*s, see Olivier Bouquet, *Les pachas du sultan: essai sur les agents supérieurs de l'État ottoman (1839–1909)* (Paris: Peeters, 2007).

13. Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (New York, London: Routledge, 2005).
14. Halil Cin and Ahmed Akgündüz, *Türk Hukuk Tarihi* (Istanbul: Osmanlı Araştırmalar Vakfı, 1995), 282. For the first systematic study of the judicial decisions of the Supreme Council of Judicial Ordinances, see Omri Paz, "Crime, Criminals, and the Ottoman State: Anatolia between the Late 1830s and the Late 1860," PhD diss., Tel-Aviv University, 2011.
15. Paz, "Crime, Criminals, and the Ottoman State."
16. Ekrem Buğra Ekinci, *Osmanlı Mahkemeleri* (Istanbul: Arı Sanat, 2004), 133–7.
17. The uneasy process of the emancipation of European Jewry in the nineteenth century is a case in point. Reinhard Rürup, "Progress and its Limits: The Revolution of 1848 and European Jewry," in *Europe in 1848: Revolution and Reform*, eds. Dieter Dowe et al. (New York: Berghahn Books, 2001), 749–64.
18. Roger Owen, *The Middle East in the World Economy: 1800–1914* (London: I.B. Tauris, 2002). The first edition was published in 1981; though Owen's thesis was elaborated and refined in later studies, the main argument remained unchallenged.
19. See, for instance, Edhem Eldem, Daniel Goffman, and Bruce A. Masters, *The Ottoman City between East and West: Aleppo, Izmir, and Istanbul* (Cambridge: Cambridge University Press, 1999).
20. Owen, *The Middle East*, 90.
21. Ekinci, *Osmanlı Mahkemeleri*, 103–104.
22. Professional commercial courts were established in England as late as 1895. Richard Hooley, "The Commercial Court in England," in *Commercial Justice: Proceedings, Multilateral Meeting* (Strasbourg: Council of Europe Publishing, 1996), 33–6.
23. Halil İnalcik, "Imtiyazat," in *Encyclopedia of Islam*, 2nd edition; Stanford Shaw, *Between Old and New: The Ottoman Empire under Sultan Selim III, 1789–1807* (Cambridge, Mass.: Harvard University Press, 1971), 177–8.
24. Maurits H. van Den Boogert, *The Capitulations and the Ottoman Legal System: Qadis, Consuls and Beratlıs in the 18th Century* (Leiden, Boston: Brill, 2005), 63–115.

25. Feroz Ahmad, "Ottoman Perceptions of the Capitulations, 1800–1914," *Journal of Islamic Studies* 11 (2000): 1–20. For a list of capitulatory agreements, see Gregoire Aristarchi Bey, *Législation ottoman ou recueil des lois, réglements ordonnances, traités, capitulations et autres documents officiels de l'Empire Ottoman*, volume 4 (Constantinople, 1874–88).
26. *Düstur*, 1st edition, volume 1, 608–24.
27. Carter V. Findley, "The Evolution of the System of Provincial Administration as Viewed from the Center," in *Palestine in the Late Ottoman Period: Political, Social, and Economic Transformation*, ed. David Kushner (Jerusalem: Yad Yizhak Ben-Zvi; Leiden: E.J. Brill, 1986), 4–29. The provincial laws are often presented in scholarship as yet another example of *the impact of the West*, or as an imitation of the French prefectural system. As noted by Findley, the division into four levels of administrative jurisdictions had been typical of the *Timar* system of the fifteenth and sixteenth centuries, and the Ottoman provincial administration lacked certain key motifs that defined the French one, such as the commune-like character of the lowest administrative level.
28. "Vilâyet Nizamnamesi," *Düstur*, 1st edition, articles 16–24.
29. For the reforms in the *Şeriat* courts, see Jun Akiba, "From Kadi to Naib: Reorganization of the Ottoman Sharia Judiciary in the Tanzimat Period," in *Frontiers of Ottoman Studies: State, Province, and the West*, eds. Colin Imber and Keiko Kiyotaki (London: I.B. Tauris, 2005), 43–60; Iris Agmon, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse: Syracuse University Press, 2006); Hamiyet Sezer Feyzioğlu and Selda Kılıç, "Tanzimat Arifesinde Kadılık-Naiplik Kurumu," *Tarih Araştırmaları Dergisi* 24 (2005): 31–53.
30. M. S. Saracoğlu, "Letter from Vidin: A Study of Ottoman Governmentality and Politics of Local Administration, 1864–1877" (PhD diss., Ohio State University, 2007).
31. On Cevdet Paşa, see H. Bowen, "Ahmad Djewdet Pasha," in *Encyclopaedia of Islam*, 2nd edition; Ebul'ula Mardin, *Medeni Hukuk Cephesinden Ahmet Cevdet Paşa* (Ankara: Türkiye Diyanet Vakfı Yayınları, 1996).
32. Ahmet Cevdet Paşa, *Tezakir*, ed. Cavid Baysun (Ankara: Türk Tarih Kurumu, 1953), 62–3.
33. Ahmet Cevdet Paşa, *Mâruzat* (Istanbul: Çağrı Yayinları, 1980); Niyazi Berkes, *The Development of Secularism in Turkey* (Montreal: McGill University Press, 1964), 166–9; Mardin, *Cevdet Paşa*, 63–4.
34. Atef Bey, *Mecelle-yi Ahkâm-ı Adliye'den Kavaid-i küliye Şerhi* (Istanbul: Mahmut Bey Matbaası, 1327).
35. Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 92. For a list of articles in the *Mecelle* that are analogous to the French Civil Code, see Demetrius Nicolaides, *Legislation*

Ottomane: Septieme Partie contenant le Code Civil Ottoman, livres IX–XVI (Constantinople, 1888).

36. Majid Khadduri and Herbert Liebensky (eds.), *Law in the Middle East* (Washington D.C.: The Middle East Institute, 1955), 295–6.
37. This is not to say that *kadı*s enjoyed unlimited leeway in their discretion, as suggested by Weber's notion of "kadi justice." As demonstrated by Gerber, *Şer'i* judges had an identifiable pool of sources to which they resorted. Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994). Nevertheless, the *Mecelle* forced the judges of the *Nizamiye* courts to bind their rulings to a single legal standard.
38. Ruth Gavison, "Abolition of the Mejelle: Custom and the Fiqe Principles," *Mishpatim* 14 (1985): 325–66 (Hebrew).
39. *Düstur*, 1st edition, volume 4, 1–40.
40. Ibid.
41. BOA İ.DH. 740/50556.
42. For the *Code of Civil Procedure*, see *Düstur*, 1st edition, volume 4, 261–332. For the *Code of Criminal Procedure*, see ibid, 136–231. For the *Law of the Nizamiye Judicial Organization*, see ibid, 245–60.
43. There is an extensive literature in Turkish on legislation during the long nineteenth century. This literature, rich and helpful as it may be, focuses on the normative aspects of the reforms and to a much lesser extent on the implementation and reception thereof. The following account on the structure of the *Nizamiye* courts is based on the actual statues, all published in the *Düstur*, and on the following secondary literature: Mehmet Şevki, *Sakk-ı Adli-yi Hukukı* (Istanbul: Mahmud Bey Matbaası, 1327); Şevket Yorgaki, *Usul-i Muhakeme-i Hukukiye Kanun-ı Muvakkatı Şerhi* (Kostantiniye, 1304); Şevket Yorgaki, *Teşkilât-ı Mehakim Kanunu Şerhi* (Dersaadet, 1325); Ahmet Lutfi, *Mır'at-ı Adalet: Tarihçe-i Adliye-i Devlet-i Âliye* (Istanbul: Matbaa-ı Nişan Berberian, 1306); A. Heidborn, *Manuel de droit public et administratif de l'Empire ottoman* (Vienne-Leipzig: C.W. Stern, 1908); Cin and Akgündüz, *Türk Hukuk Tarihi*; Ekinci, *Osmanlı Mahkemeleri*; Fatmagül Demirel, *Adliye Nezareti: Kuruluşu ve Faaliyetleri, 1876–1914* (Istanbul: Boğaziçi Üniversitesi, 2007).
44. BNA (British National Archives), FO 424/106, 168.
45. *Düstur*, 2nd edition, volume 5, 322–48.
46. Miller, *Legislating Authority,* 72–8.
47. Şevki, *Sakk-ı Adli-yi Hukukı*, 96.
48. CM, 4,971.
49. According to Heidborn, Mondays were dedicated to Belgian, Danish, Spanish, French, and Swedish businessmen. Tuesdays were dedicated to Italian and Persian businessmen, Wednesdays to Britons and Austro-Hungarians, and Thursdays to Greek merchants. Saturdays

were dedicated to Russians, Germans, and Romanians. Heidborn, *Manuel de droit public et administratif*, 236.

50. I discuss the peculiarity of the double-role of the *naib* in chapter two.
51. *Düstur*, 1st edition, volume 4, 225–35.
52. CM, 161.
53. At the turn of the century, two-section courts of appeal operated in the provinces of Edirne, Selanik, Manastır, Aydın, Erzurum, Syria, Aleppo, and Baghdad , whereas a single-section court of appeal operated in the provinces of Yanya, Kosova, Cezâyir-i Bahr-i Sefid, Konya, Ankara, Kastamonu, Sivas, Trabzon, Van, Adana, Diyarbekir. and Hüdavendiğar. Demirel, *Adliye Nezareti*, 158.
54. The Ottoman term *temyiz* was adopted from the Arabic تمييز, which means: distinction, discretion, preference, and so on.
55. For instance, see *Hukuk*, 166.
56. The list of those who served in the position of minister of justice from 1876 to 1878 included Ahmet Cevdet Paşa, Asım Paşa, Safvet Paşa, Damat Mahmut Celaleddin Paşa, Server Paşa, Mahmut Paşa, Server Paşa (second term), Hurşit Paşa. See Demirel, *Adliye Nezareti*, 39–40.
57. Enver Ziya Karal, *Osmanlı Tarihi*, Volume 8 (Ankara: Türk Tarih Kurumu Basimevi, 1996).
58. Mehmet Akıf Aydın, *Türk Hukuk Tarihi* (Istanbul: Düzey, 2005), 88–9. According to Colin Imber, the premodern judges were highly accessible and rather efficient thanks to "the absence of lawyers and the fact that the public seem to have had access to the judge or his deputy at all hours." Imber, *The Ottoman Empire*, 232.
59. BNA, FO 424/91, 27.
60. Ibid.
61. Ibid., 28.
62. During the early 1880s, British consuls complained time and again about the incompetence of judicial officials, their ignorance, corruption, and the generally miserable condition of the courts. See, for instance, BNA, PRO 30/29/348, 177; FO 424/106, 10, 53, 182–3, 211, 507.
63. BNA, FO 424/106, 110.
64. Reşat Kasaba, "Treaties and Friendships: British Imperialism, the Ottoman Empire, and China in the Nineteenth Century," *Journal of World History* 4 (1993): 227–9.
65. BNA, PRO 30/29/348, 223.
66. BNA, FO 424/106, 186.
67. BNA, PRO 30/29/348, 344.
68. BNA, FO 424/145, 3.
69. Engin D. Akarlı, *The Long Peace: Ottoman Lebanon, 1861–1920* (Berkeley: University of California Press, 1993), 142.
70. BNA, PRO 30/29/348, 77.

71. BNA, PRO 30/29/348, 268.
72. BNA, PRO 30/29/348, 376.
73. CM, 2,914.
74. CM, 14,317.
75. Ibid.
76. Haim Gerber, *Ottoman Rule in Jerusalem, 1890–1914* (Berlin: Klaus Schwarz, 1985), 130–3. For the central role played by the municipal council in the provincial administration and for domination of the notables, see also Mahmud Yazbak, *Haifa in the Late Ottoman Period, 1864–1914: A Muslim Town in Transition* (Leiden: Brill, 1998); Findley, "The Evolution of the System of Provincial Administration."
77. Donald Quataert, "The Age of Reforms, 1812–1914," in *An Economic and Social History of the Ottoman Empire*, volume 2, eds. Halil İnalcik and Donald Quataert (Cambridge, New York: Cambridge University Press, 1994), 773–4; Şevket Pamuk, *A Monetary History of the Ottoman Empire* (Cambridge, UK: Cambridge University Press, 2000), 213–21.
78. BNA, PRO 30/29/347, 10.
79. BNA, PRO 30/29/348, 198–9.
80. BNA, FO 424/106, 536.
81. BNA, FO 424/106, 42–3.
82. In 1895, for instance, revenues from court fees charged by the *Nizamiye* courts of the Hüdavendiğar province covered 74 percent of the expenditures, amounting to 1,2756,000 *kuruş*. *Hüdavendiğar Vilayeti Salnamesi*, 1313 [1895].
83. This is only a partial list of the fees, described in a tariff that contained 122 clauses. CM, 24, 29–36; 37–40, 47–8; 3,793–3,803; *Düstur* 1st edition, volume 5, 582–96.
84. In a circular from July 1885, the ministry warned the judicial employees that irregularities in handling the fees might prevent the payment of salaries. CM, 2,833. On the payment of fees in the case of convicts, see CM, 6,672–6,676; *Hukuk*, 686–7.
85. *Düstur*, 1st edition, volume 4, 730.
86. Ibid.
87. Brian Z. Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge, UK; New York: Cambridge University Press, 2004), 75.
88. In an article that has become a canonical text in sociolegal studies, Marc Galanter proposes a model that reflects the causal relations between material resources and disadvantages in the judicial system, arguing, in a nutshell, that modern law alienates all those who are not wealthy enough due to unequal access to legal representation and inherent biases in judicial institutions. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (1975): 95–160. For

a comprehensive review of the literature on inequality and law, see Carrol Seron, "Law and Inequality: Race, Gender . . . and, of Course, Class," *Annual Review of Sociology* 22 (1996): 187–212.

89. In 1879, the British vice-consul in Diyarbakır, Thomas Boyajian, reported that "the new taxes imposed on the poor people on presenting a petition to the Court, their having to pay so many piastres for registration, so much in taking their cases to some other department, is actually preventing the people from taking their cases before the magistrates." BNA, FO 424/91, 3. Similar impression is evident from Ottoman official correspondence: BOA, ŞD 2473/14.
90. Boğaç A. Ergene, *Local Court, Provincial Society and Justice in the Ottoman Empire* (Leiden, Boston: Brill, 2003), 90–8.
91. For general introductions of the critique offered by the school of Critical Legal Studies, see Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard University Press, 1988); Richard W. Bauman, *Critical Legal Studies: A Guide to the Literature* (Boulder, Colorado: Westview Press, 1996).
92. See my discussion on the employment of statistics in the *Nizamiye* court system in chapter three. The following data is derived from Tevfik Güran (ed.), *Osmanlı Devletin'nin İlk İstatistik Yıllığı, 1897* (Ankara: T.C. Başbakanlık Devlet İstatistik Enstitüsü, 1997), 59–88.
93. In 1906, 20.9 million individuals lived in the Ottoman lands. Kemal H. Karpat, *Ottoman Population 1830–1914: Demographics and Social Characteristics* (Madison, Wisconsin: University of Madison Press, 1985), 168–9.
94. CM, 15,403–15,669. This span includes four cases that required nine, seven, four, and six years until a decision was reached at the Court of Cassation. These cases were not included in the calculation of the average since cases that took more than three years to be resolved were on the whole rare.
95. CM, 13,838.
96. CM, 13,006.
97. CM, 13,837.
98. CM, 13,054.
99. CM, 14,686.
100. Natan Brun, *Shoftim u-Mishpetanim be Erets Yisrael: Ben Kushta li-Yerushalayim, 1900–1930* (Jerusalem: Magnes, 2008) [Hebrew].
101. BNA, FO 424/106, 447–8.
102. Thomas Kühn, "Shaping and Reshaping Colonial Ottomanism: Contesting Boundaries of Difference and Integration in Ottoman Yemen, 1872–1910," *Comparative Studies of South Asia, Africa and the Middle East* 27 (2007): 315–17.
103. Gerber, *Ottoman Rule in Jerusalem*, 143–59; David Yellin, *Yerushalayim shel Tmol* (Jerusalem: R. Mas, 1972).
104. CM, 5,278–5,85, 5,295–301.

105. Said Paşa's perfectionism and attention to details to the extent that he tended to do the work of his clerks was well known. Findley, *Ottoman Civil Officialdom*, 239.
106. Şevket Pamuk, "Institutional Change and the Longevity of the Ottoman Empire, 1500–1800," *Journal of Interdisciplinary History* 35 (2004): 225–47.

2 The Ottoman Judicial Mall: A Legally Pluralistic Perspective

1. See, for instance, Binnaz Toprak, *Islam and Political Development in Turkey* (Leiden: E.J. Brill, 1981), 49; Niyazi Berkes, *The Development of Secularism in Turkey* (Montreal: McGill University Press, 1964); İlber Ortaylı, *İmparatorluğun En Uzun Yüzyılı* (Istanbul: Alkım, 2005); Jacob Landau, *Ataturk and the Modernization of Turkey* (Leiden: E.J. Brill, 1984), 248; M. Şükrü Hanioğlu, *A Brief History of the Late Ottoman Empire* (Princeton: Princeton University Press, 2008). See my discussion on the concept of duality in Avi Rubin, "Ottoman Judicial Change in the Age of Modernity: A Reappraisal," *History Compass* 7 (2009): 119–40.
2. For the premodern *kanun*, see Colin Imber, *The Ottoman Empire, 1300–1650: The Structure of Power* (New York: Palgrave Macmillan, 2002), 244–51.
3. Huri İslamoğlu, *Ottoman History as World History* (Istanbul: İsis, 2007), 180.
4. Dror Ze'evi, "Changes in Legal-Sexual Discourses: Sex Crimes in the Ottoman Empire," *Continuity and Change* 16 (2001): 219–42; Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994), 60–4; Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley, Los Angeles: University of California Press, 2003), 119.
5. Carter V. Findley, *The Turks in World History* (New York: Oxford University Press, 2005), 160–1; emphasis mine.
6. And at times *hukuk*-civil or *adi*-regular.
7. Berkes, *The Development of Secularism in Turkey*, 5.
8. Ibid., 6.
9. Modernization theory was developed in the context of the Cold War, and was often applied as an academic justification for U.S. foreign policy and political agendas. For a history of the modernization theory, see Nils Gilman, *Mandarines of the Future: Modernization Theory in Cold War America* (Baltimore, Maryland: Johns Hopkins University Press, 2003).

10. Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, California: Stanford University Press, 2003), 205–56.
11. Benjamin C. Fortna, "Islamic Morality in Late Ottoman 'Secular' Schools," *International Journal of Middle East Studies* 32 (2000): 369–93.
12. Michel de Certeau, *The Practice of Everyday Life* (Berkeley: University of California Press, 1988).
13. See, for instance, Leopold Popisil, *The Anthropology of Law: A Comparative Theory of Law* (New York: Harper and Row), 1971.
14. Two milestones in this effort are: John Griffiths, "What is Legal Pluralism?," *Journal of Legal Pluralism* 24 (1986): 1–55; Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22 (1988): 869–96.
15. Brian Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20 (1993): 192–217.
16. Gordon R. Woodman, "The Idea of Legal Pluralism," in *Legal Pluralism in the Arab World*, eds. Baudouin Dupret, Mautits Berger, and Laila al-Zwaini (The Hague, London, Boston: Kluwer Law International, 1999), 3–20.
17. John Griffiths, "Legal Pluralism and the Theory of Legislation—With Special Reference to the Regulations of Euthanasia," in *Legal Polycentricity: Consequences of Pluralism in Law*, eds. Hanne Petersen and Henrik Zahle (Brookfield, USA: Dartmouth, 1995), 201–34; Engle Merry, "Legal Pluralism."
18. Griffiths, "What is Legal Pluralism?," 3–4.
19. M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford: Clarendon Press, 1975), 1.
20. Griffiths, "What is Legal Pluralism?," 3.
21. Brian Tamanaha, "A Non-Essentialist Version of Legal Pluralism," *Journal of Law and Society* 27 (2000): 316.
22. For discussions on the need to employ litigants' point of view as the major perspective in studying legal pluralism, see Jacque Vanderlinden, "Return to Legal Pluralism: Twenty Years Later," *Journal of Legal Pluralism* 28 (1989): 149–57; Tamanaha, "A Non-Essentialist Version of Legal Pluralism," 315.
23. "Forum Shopping Reconsidered," *Harvard Law Review* 103 (1990): 1677–96 (author not specified).
24. Ido Shahar, "Legal Pluralism and the Study of Shari'a Courts," *Islamic Law and Society* 15 (2008): 123–4.
25. While consistency was the aim of codification, realities—social, political, and economic—constantly change and therefore require new judicial solutions. Given these changes, codification hardly ever works as well as it should. It may be compared to computer programming. Quite frequently, new programs come out causing an endless amount of trouble, because not all the implications and interactions had been considered. As time goes by, one can learn from previous

mistakes, but it is a very lengthy process. I owe this clarification (and eye-opening metaphor!) to Ursula Wokoeck.

26. The premodern *kanunnames*, by contrast, had to be validated by each new sultan.
27. Art. 233, *Code of Civil Procedure*.
28. In the provinces, the *Şeriat* courts were authorized to address all cases related to *vakıf* property. In the capital, however, a special court, *mahkeme-yi teftiş*, was founded specifically for this matter. *Hukuk*, 722.
29. Iris Agmon, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse: Syracuse University Press, 2006), 74.
30. CM, 13,107–10.
31. Ibid.
32. Family endowments allowed the endower to designate his family and descendants the sole beneficiaries, without having to allocate revenues to the charitable purposes of the *vakıf*. The original purpose of the *vakıf* as a charitable institution could be fulfilled after the extinction of the endower's line of descent, which rendered the *vakıf* institution an effective mechanism for transmission of property from parents to children and accumulation of wealth. As a result, the majority of Ottoman *vakıf*s were family endowments. Beshara Doumani, "Endowing Family: Waqf, Property Devolution, and Gender in Greater Syria, 1800 to 1860," *Comparative Studies in Society and History* 40 (1998): 3–41.
33. CM, 11,718–19.
34. CM, 12,830–2.
35. CM, 11,588–90.
36. A similar case came to the Court of Cassation a month earlier, in which the litigants chose not to employ the argument of jurisdiction. It resulted in an annulment of the *Nizamiye* court decision exactly for this reason. CM, 11,601–3.
37. See, for instance, CM, 615–23; 11,559–60.
38. CM, 11,155–7.
39. Given the fact that the *kadı*s at the local *Şeriat* courts were the same individuals who presided the civil sections of the *Nizamiye* courts, Mustafa could have made this argument only when referring to either a *Şeriat* court from another locality or to a different *kadı* at some earlier period, from the same locality. High-degree turnover of *kadı*s was typical to Ottoman judicial bureaucracy of the late nineteenth century, when judges usually did not serve more than a couple of years at the same place. The possibility that Mustafa referred to a *Şeriat* court in another locality is as plausible, because both litigants resided in the township of Çay, which was part of the Hüdavendiğar province, southwest to the Sea of Marmara, while the disputed land was in Karacaköy, a township that belonged to the distant (in those days' terms) district (*sancak*) of Çatalca, near Istanbul.

40. This clause established that a case that resulted in a registered court decision, and that conformed to procedure, may not be readdressed. It is not clear, however, why the Court of Cassation referred to the *Mecelle* rather than the *Code of Civil Procedure*, which instructed the high court to quash rulings that had not been issued by competent courts (art. 233). The code of procedure was meant to substitute the procedural parts of the *Mecelle*, yet perhaps the *Şeriat* court decision had been issued before the legislation of the *Code of Civil Procedure* (1879), when the division of labor between the *Nizamiye* and *Şer'i* forums was less formal. Plausibly, the Court of Cassation wished to avoid the injustice of applying new laws to earlier situations. However, in such cases, the case reports usually record anachronistic application of laws as a cause for annulment of lower court decisions. See, for instance, CM, 11,745–8.
41. CM, 14,477–8.
42. Ex-officio members of these courts were often merchants of foreign nationality.
43. In a ruling from June 1895, the Court of Cassation quashed a decision issued by the court of first instance in the central-Anatolian town of Beyşehri because it failed to set up a special panel (*heyet*) when addressing a case in commercial capacity. CM, 12,401–3.
44. CM, 12,484–5.
45. For instance, CM, 15,424–6.
46. CM, 15,501–3. For an analogous case originating from Beirut, in which a litigant questioned the competence of the court of commerce because he was not a member of the merchants' class, see CM, 11,366–7.
47. CM, 3,090.
48. Haim Gerber, *Ottoman Rule in Jerusalem, 1890–1914* (Berlin: Klaus Schwarz, 1985), 127.
49. Abdurrahman Hakkı, *Kavanin ve Nizamât Mecmuası* (Dersaadet: Matbaa-yı Osmaniye, 1312 [1896]), 41–4; CM, 11,694. An imperial decree from 1903, which authorized the administrative council of Beersheba to sit as a court of first instance in cases of landholding, suggests that special local circumstances resulted in delegating more extensive judicial authorities to some local councils. On the case of Beersheba, see Yasemin Avcı, "The Application of the *Tanzimat* in the Desert: The Bedouins and the Creation of a New Town in Southern Palestine (1860–1914)," *Middle Eastern Studies* 45.6 (2006), 976.
50. "Law of Provincial Administration" (1871) in *Düstur*, 1st edition, volume 1,625–51.
51. CM, 11,605–6.
52. CM, 8,621.
53. George Young, *Corps de droit ottoman; recueil des codes, lois, réglements, ordonnances et actes les plus importants du droit intéerieur, et*

d'études sur le droit coutumier de l'Empire ottoman, volume 1 (Oxford: The Clarendon Press, 1905–1906), 292–3.

54. Ekrem Buğra Ekinci, *Osmanlı Mahkemeleri* (Istanbul: Arı Sanat, 2004), 199–200; CM, 4,861–2; *Hukuk*, 113–4.
55. *Hukuk*, 519.
56. CM, 15,259–60.
57. *Düstur*, 1st edition, volume 7, 411–12.
58. Regulation concerning the Şeriat courts from September 14, 1859, Art. 54, in Gregoire Aristarchi Bey, *Législation ottoman ou recueil des lois, réglements ordonnances, traités, capitulations et autres documents officiels de l'Empire Ottoman*, volume 4 (Constantinople, 1874–88), 335.
59. The case belonged to the court of commerce because the defendant in this case was an Ottoman subject. See Young, *Corps de droit ottoman,* 252.
60. My analysis of this affair resorts to the documents enclosed in BOA, Y.A.RES 92/1, which also include a summary of the protest made by the consulate.
61. Agmon, *Family and Court*, 139.
62. Ibid. The role of the *Şeriat* court as a reliever of social tensions in the community seems to have been a feature inherent to its legal culture across Ottoman territories and periods. Leslie Peirce describes mechanisms of arbitrations facilitated by the court in seventeenth-century Aintab. According to Peirce, the *Şeriat* encouraged the function of arbitration. Peirce, *Morality Tales*, 122–3. On the *Şeriat* court as a facilitator of amicable agreements, see Boğaç A. Ergene, "Why did Ümmü Gülsüm Go to Court? Ottoman Legal Practice between History and Anthropology," *Islamic Law and Society* 17 (2010).
63. This principle was reiterated in 1892. *Hukuk*, 408.
64. BOA, Y.A.RES 92/1.
65. Feroz Ahmad, "Ottoman Perceptions of the Capitulations, 1800–1914," *Journal of Islamic Studies* 11 (2000): 1–20.
66. Ali Şehbaz Efendi, "Usul-i Muhakeme-i Hukukiye" (Manuscript, 1896, Atatürk Library), 36.
67. Mehmed Tahir, *Osmanlı Müelifleri* (Istanbul: Meral, 1972), 39.
68. Selim Deringil, *The Well-Protected Domains: Ideology and the Legitimation of Power in the Ottoman Empire, 1876–1909* (London, New York: I.B. Tauris, 1998), 44–67; Huri İslamoğlu, "Mukayeseli Tarih Yazını için bir öneri: Hukuk, Mülkiyet, Meşrutiyet," *Toplum ve Bilim* 62 (1993): 19–32.
69. In few courts, however, the president of the civil section in the court of first instance was not a *naib*. See, for instance, *Diyarbakır Salnemeleri, 1286–1323*, ed. Ahmet Zeki İzgöer, vol. 3 (Diyarbakır: Diyarbakır Büyükşehir Belediyesi, 1999), 305; *Konya Vilâyet-i Salnamesi* (Konya: Konya Vilâyet Matbaası, 1315).

70. Heidborn was probably the first to attribute the *naib*s' dominancy in the civil sections to a supposedly lack of sufficient *nizami* manpower that could staff the civil sections. His skepticism as to the ability of the "religious" *naib*s to implement the "secular" laws has reverberated in later scholarship. See A. Heidborn, *Manuel de droit public et administratif de l'Empire ottoman* (Vienne-Leipzig: C.W. Stern, 1908), 241. David Kushner argues that "the lines of demarcation between the religious court and the *nizami* court continued for a long time to be unclear." He attributes this ambiguity to the double role of the *naib*s in both the "religious and the secular judicial systems." David Kushner, "The Place of the Ulema in the Ottoman Empire during the Age of Reform (1839–1918)," *Turcica* 19 (1987): 62. Similarly, according to Jun Akiba, "the government saw a source of trouble in the double role of *naib*s [. . .] and seemed skeptical of their competence as *Nizamiye* judges." Jun Akiba, "A New School for Qadis: Education of Sharia Judges in the Late Ottoman Empire," *Turcica* 35 (2003): 149; Haim Gerber, raising no doubt, attributes the dual role of the *naib* to the "state's inability to maintain manifold judiciary system," but he does not provide evidence to sustain this explanation. Gerber, *Ottoman Rule in Jerusalem*, 143. See also Roderic H. Davison, *Reform in the Ottoman Empire, 1856–1876* (Princeton, NJ: Princeton University Press, 1963), 256.
71. CM, 8,144–5.
72. Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (New York, London: Routledge, 2005), 64, 72–8.
73. For a study of the Law School, see Ali Adem Yörük, "Mekteb-i Hukuku'un Kuruluşu ve Faaliyetleri (1878-1900), MA diss., Marmara University, 2008.
74. Mahmoud Yazbak, "Nabulsi Ulama in the Late Ottoman Period, 1864–1914," *International Journal of Middle East Studies* 29 (1997): 71–91.
75. Avi Rubin, "Legal Borrowing and its Impact on Ottoman Legal Culture in the Late Nineteenth Century," *Continuity and Change* 22 (2007).
76. Kemal H. Karpat, "*İfta* and *Kaza*: The *İlmiye* State and Modernism in Turkey, 1820–1960," in *Frontiers of Ottoman Studies*, eds. Colin Imber and Keiko Kiyotaki, volume 1 (London, New York: I. B. Tauris, 2005), 33–4.
77. For the dispossession of the *naib*s from the civil *Nizamiye* courts, see Fatmagül Demirel, *Adliye Nezareti: Kuruluşu ve Faaliyetleri, 1876–1914* (Istanbul: Boğaziçi Üniversitesi, 2007), 89–90.
78. Amit Bein, "Politics, Military Conscription, and Religious Education in the Late Ottoman Empire," *International Journal of Middle East Studies* 38 (2006): 283–301.
79. *Düstur,* 2nd edition, volume 9, 270.

80. Berkes, *The Development of Secularism in Turkey*, 416.
81. See also clauses 39,51,58. *Düstur*, 2nd edition, volume 9, 783–94.

3 THE AGE OF PROCEDURE

1. This characterization of Ottoman justice refers to the formal, hegemonic conception thereof. Boğaç Ergene demonstrates that the premodern Ottoman discourse of justice was more diverse than conventionally assumed. It contained various interpretations, some of which were actually counterhegemonic. Boğaç Ergene, "On Ottoman Justice: Interpretations in Conflict (1600–1800)," *Islamic Law and Society* 8 (2001): 52–87.
2. Halil İnalcik, *Osmanlı'da Devlet, Hukuk, Adalet* (Istanbul: Eren, 2000).
3. Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994), 154–73; Michael Ursinus, *Grievance Administration (şikayet) in an Ottoman Province: The Kaymakam of Rumelia's 'Record Book of Complaints' of 1781–1783* (London, New York: RoutledgeCurzon, 2005). For an example of Palestinian peasants who had direct recourse to Istanbul in the context of troubled relations with local officials, see Amy Singer, *Palestinian Peasants and Ottoman Officials* (Cambridge UK: Cambridge University Press, 1994).
4. Şerif Mardin, "The Influence of the French Revolution on the Ottoman Empire," *International Social Science Journal* 41 (1989): 17.
5. Sami Şemseddin, *Kamus-i Türki* (Dersaadet: İkdam Matbaası, 1317 [1899]).
6. Legal formalism, being an offshoot of legal positivism, maintains that judges' interpretation of the rules can and should be kept as minimal as possible, because individual interpretation of positive law does not agree with the principle of separation of powers. The state is the sole producer of the rules, and in principle they can form a coherent system. This conceptualization of the judicial process has been subject to a vast body of scholarly critique for many decades, mainly from the perspective of legal realism and critical legal studies. According to this criticism, legal formalism is a myth, which conceals the fact that adjudication is always a highly interpretive act. As such, all judicial processes are imbued with conflicting interests, and they reflect dynamic power fields and power relations. For studies that summarize the debate concerning the two conceptualizations, see Brian Leiter, "Legal Realism and Legal Positivism Reconsidered," *Ethics* 111 (2001): 278–301; Roy L. Brooks, *Structures of Decision Making: From Legal Formalism to Critical Theory* (Durham, NC: Carolina Academic Press, 2005); John P. McCormick, "Three Ways of Thinking 'Critically' about the Law," *The American Political Science Review* 93 (1999): 413–28.

7. For instance, Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977).
8. Max Weber, *On Law in Economy and Society* (Cambridge, USA: Harvard University Press, 1954), 61–4.
9. Weber argues that the highest level of legal rationality emerged exclusively in the West, where it was embedded in modern capitalism, and was not to be found in the legal systems of the Orient. Accordingly, Weber's sociology of law is an attempt to explain why rational legal thought evolved in modern Western civilization (already a highly contested unit of analysis in itself) and not elsewhere. For a critique on Weber's failure to explain the irrational aspects of modern legal systems, as well as the rational aspects in premodern legal systems, see Leon Shaskolsky Sheleff, *Sociological Cohesion and Legal Coercion: A Critique of Weber, Durkheim, and Marx* (Amsterdam, Atlanta, GA: Rodopi, 1997), 35–81. For a critique on Weber's Eurocentric concept of rationality, see Patricia Crone, "Weber, Islamic Law, and the Rise of Capitalism," in *Max Weber and Islam*, eds. Toby E. Huff and Wolfgang Schluchter (New Brunswick: Transaction, 1999), 247–72. For a general reappraisal of Weber's notion of rationality, see Joyce S. Sterling and Wilbert E. Moore, "Weber's Analysis of Legal Rationalization: A Critique and Constructive Modification," *Sociological Forum* 2 (1987): 67–89.
10. Sammy Adelman and Ken Foster, "Critical Legal Theory: The Power of Law," in *The Critical Lawyers' Handbook*, eds. Ian Grigg-Spall and Paddy Ireland (London and Concord, Mass.: Pluto Press, 1992), 39–43.
11. James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven and London: Yale University Press, 1998), 89–90.
12. Ibid., 318.
13. For critiques on the state/society conception, see Timothy Mitchell, "The Limits of the State: Beyond Statist Approaches and Their Critics," *American Political Science Review* 85 (1991): 77–96; Mitchell, "Society, Economy, and the State Effect," in *State/Culture: State-Formation after the Cultural Turn*, ed. George Steinmetz (Ithaca and London: Cornell University Press, 1999), 76–97; Roger Owen, *State, Power and Politics in the Making of the Modern Middle East* (London and New York: Routledge, 2000), 41–2.
14. Huri İslamoğlu, "Politics of Administering Property: Law and Statistics in the 19th Century Ottoman Empire," in *Constituting Modernity: Private Property in the East and the West*, ed. Huri İslamoğlu (London: I.B. Tauris, 2004), 276–319.
15. CM, 4,879.
16. CM, 4,763–4.

17. For instance, the *Code of Commerce* from 1850 (315 articles); the *Land Code* of 1858 (132 articles); the *Criminal Code* of 1858 (264 articles); the *Civil Code* (*Mecelle*) of 1869–1876 (1851 articles); the *Law of Commercial Procedure* from 1861 (83 articles); the *Code of Maritime Commerce* from 1863 (282 articles); the *Code of Criminal Procedure* from 1879 (487 articles); the *Code of Civil Procedure* from 1879 (296 articles).
18. R. C. van Caengem, *An Historical Introduction to Private Law* (Cambridge, UK and New York: Cambridge University Press, 1992), 8–9.
19. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, eds. Guenther Roth and Claus Wittich, trans. Ephraim Fischoff et al. (New York: Bedminster Press, 1968), 763, 1395.
20. Ali Şehbaz Efendi, "Usul-i Muhakeme-i Hukukiye" (Manuscript, 1896, Atatürk Library), 28.
21. See, for instance, Anton Minkov, "Ottoman *Tapu* Title Deeds in the Eighteenth and Nineteenth Centuries: Origin, Typology and Diplomatics," *Islamic Law and Society* 7 (2000): 65–101.
22. CM, 43. For a court decision that was quashed by the Court of Cassation because the lower court had failed to determine whether the prescriptive period was calculated in accordance with the lunar calendar or the civil one, see *Hukuk*, 247–8.
23. CM, 538; *Code of Criminal Procedure*, articles 445, 446.
24. CM, 1,035.
25. CM, 1,489.
26. CM, 13,869–70.
27. *Code of Civil Procedure*, articles 15–32.
28. According to Young, the Court of Cassation neither heard witnesses nor summoned the litigants, but decided on the basis of submitted documents, including protocols and depositions. George Young, *Corps de droit ottoman; recueil des codes, lois, réglements, ordonnances et actes les plus importants du droit intéerieur, et d'études sur le droit coutumier de l'Empire ottoman*, volume 1 (Oxford: The Clarendon Press, 1905–1906), 181. However, the case reports of the *Ceride* show that the appellants and defendants (or their attorneys) were allowed to make oral statements in the presence of the court, if they wished to.
29. CM, 4,765.
30. Avi Rubin, "Legal Borrowing and its Impact on Ottoman Legal Culture in the Late Nineteenth Century," *Continuity and Change* 22 (2007). On the French judicial discourse, see Mitchel de S.-O.-l'E. Lasser, "Judicial (Self-) Portraits: Judicial Discourse in the French Legal System," *The Yale Law Journal* 104 (1995): 1325–410.
31. For instance, Silvana Patriarca, *Numbers and Nationhood: Writing Statistics in Nineteenth-Century Italy* (Cambridge, UK and New York:

Cambridge University Press, 1996); Gyan Prakash, "Body Politic in Colonial India," in *Questions of Modernity,* ed. Timothy Mitchell (Minneapolis: University of Minnesota Press, 2000), 189–222.

32. Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990), 36–45.
33. Fatma Müge Göçek and Şükrü Hanioğlu, "Western Knowledge, Imperial Control, and the Use of Statistics in the Ottoman Empire," in *Cultural Horizons*, volume 1, ed. Jane L. Warner (New York: Syracuse University Press, 2001), 105–17. On the developed statistical tradition in Egypt in the nineteenth and early twentieth centuries, see Roger Owen, "The Population Census of 1917 and its Relationship to Egypt's Three 19th Century Statistical Regimes," *Journal of Historical Sociology* 9 (1996): 457–72.
34. CM, 43,1,401, 1,538, 5,824–9.
35. Tevfik Güran (ed.), *Osmanlı Devletin'nin İlk İstatistik Yıllığı, 1897* (Ankara: T.C. Başbakanlık Devlet İstatistik Enstitüsü, 1997), 59–88.
36. CM, 8,591–3.
37. CM, 6,591–2.
38. Ann L. Stoler, "Colonial Archives and the Arts of Governance," *Archival Science* 2 (2002): 106.
39. Iris Agmon, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse: Syracuse University Press, 2006); Jun Akiba, "From Kadi to Naib: Reorganization of the Ottoman Sharia Judiciary in the Tanzimat Period," in *Frontiers of Ottoman Studies: State, Province, and the West*, eds. Colin Imber and Keiko Kiyotaki (London: I.B. Tauris, 2005), 43–60; Akiba, "A New School for Qadis: Education of Sharia Judges in the Late Ottoman Empire," *Turcica* 35 (2003); Hamiyet Sezer Feyzioğlu and Selda Kılıç, "Tanzimat Arifesinde Kadılık-Naiplik Kurumu," *Tarih Araştırmaları Dergisi* 24 (2005); Ekrem Buğra Ekinci, *Osmanlı Mahkemeleri* (Istanbul: Arı Sanat, 2004), 256–97.
40. Iris Agmon, "Recording Procedures and Legal Culture in the Late Ottoman Shari'a Court of Jaffa, 1865–1890," *Islamic Law and Society* 11 (2004); Iris Agmon, "Text, Court, and Family in Late-Nineteenth Century Palestine," in *Family History in the Middle East: Household, Property, and Gender*, ed. Beshara Doumani (Albany: SUNY Press, 2003), 201–29.
41. *Düstur,* 1st edition, volume 4, 78–92.
42. Working on early-modern *Şeriat* courts in northern Anatolia, Boğaç Ergene found hardly any evidence for the usage of court records as evidentiary instruments in litigation. Boğaç Ergene, "Evidence in Ottoman Courts: Oral and Written Documentation in Early-Modern Courts of Islamic Law," *Journal of the American Oriental Society* 124 (2004): 471–91.
43. Agmon, "Recording Procedures," 365.

44. *Düstur* 1st edition, volume 5, 853–4; *Hukuk*, 713–14.
45. *Düstur* 1st edition, volume 8, 665. This decision was indicative of the large number of appeals in the preceding years, which challenged court decisions on grounds of violating prescriptive periods, benefitting from the unprecedented emphasis on this issue. In both the criminal and the civil domains, the violation of prescriptive periods was conceived as a fundamental detriment to justice. *Hukuk*, 507–12; 586–9; 612–14; 621–8; 659–64; 678–80.
46. Sofie M. F. Geeroms, "Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not be Translated," *The American Journal of Comparative Law* 50 (2002): 204–208; Walter Cairns and Robert McKeon, *Introduction to French Law* (London: Cavendish, 1995), 37–9.
47. Rubin, "Legal Borrowing," 291–2.
48. CM, 11,510–11.
49. CM, 12,615–7.
50. For a similar case that resulted in a similar decision by the Court of Cassation, see CM, 13,364. See also Fatmagül Demirel, *Adliye Nezareti: Kuruluşu ve Faaliyetleri, 1876–1914* (Istanbul: Boğaziçi Üniversitesi, 2007), 182.
51. *Code of Civil Procedure*, articles 139–58.
52. CM, 11,512–14.
53. CM, 12,448–51.
54. Ronald C. Jennings, "The Office of Vekil (Wakil) in 17th-Century Ottoman Sharia Courts," *Studia Islamica* 42 (1975): 147–69.
55. Majid Khadduri, "Nature and Sources of Islamic Law," *George Washington Law Review* 22 (1953): 9; on mechanisms of arbitration in a premodern Ottoman court, see Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley, Los Angeles: University of California Press, 2003); Boğaç Ergene, "Pursuing Justice in an Islamic Context: Dispute Resolution in Ottoman Court of Law," *Political and Legal Anthropology Review* 27 (2004): 67–87.
56. Jennings, "The Office of Vekil."
57. Sedat Bingöl, *Tanzimat Devrinde Osmanlı'da Targı Reformu: Nizamiye Mahkemelerinin Kuruluşu ve İşleyisi 1840–1876* (Eskişehir: Anadolu Üniversitesi, 2004), 113–14.
58. *Düstur* 1st edition, volume 3, 198–209.
59. Classes started in 1880. On the establishment and operation of the Law School in Istanbul, see Ali Adem Yörük, "Mekteb-i Hukuku'un Kuruluşu ve Faaliyetleri (1878–1900)" (MA diss., Marmara University, 2008).
60. Five questions on the *Mecelle*, three questions on the *Land Law*, three questions about *tahrir* from the *Mecelle*, four questions on the *Code of Commerce*, three questions on the *Criminal Code*. Additional eight–ten questions had to be asked generally on land laws, *Law of*

Maritime Commerce, the *Code of Commercial Procedure*, and the Codes of civil and criminal procedures. CM, 601–2.

61. CM, 3,711.
62. Aylin Özman, "The Portrait of the Ottoman Attorney and Bar Associations: State, Secularization and Institutionalization of Professional Interests," *Der Islam* 77 (2000): 330.
63. Yörük, "Mekteb-i Hukuk'un Kuruluşu," 166, 168.
64. Attempts to establish bar associations in the provinces were unsuccessful, and the Istanbul bar, which was established in 1876, had little impact. Ibid.; Donald M. Reid, *Lawyers and Politics in the Arab World, 1880–1960* (Minneapolis, Chicago: Bibliotheca Islamica, 1981), 84.
65. CM, 3,714-7.
66. Şehbaz refers here to the practice known as *kâğıt haffaflığı*, namely, writing official papers in return for payment. In the nineteenth century, this practice assumed a negative image in the eyes of the reformers. Carter Findley, *Ottoman Civil Officialdom: A Social History* (Princeton, NJ: Princeton University Press, 1989), 216.
67. CM, 3,716–7.
68. See, for instance, Mehmet Refik Tamimi and Mehmet Behcet, *Beirut Vilayeti* (Beyrut: Vilayet Matbaası, 1333 [1917]). For a study of this text, see Avi Rubin, "East, West, Ottomans and Zionists: Internalized Orientalism at the Turn of the 20th Century," in *Representations of the "Other/s" in the Mediterranean World and their Impact on the Region*, eds. Nedret Kuran-Burçoğlu and Susan Gilson Miller (Istanbul: Isis, 2004), 149–66.
69. Agmon, *Family and Court*, 123.
70. Gerber, *State, Society and Law in Islam*. On appellate procedures in Islamic law and premodern Morocco, see David S. Powers, "On Judicial Review in Islamic Law," *Law and Society Review* 26 (1992): 315–41. On premodern appellate structures in the Ottoman Empire, see Rossitsa Gradeva, "On Judicial Hierarchy in the Ottoman Empire: The Case of Sofia from the Seventeenth to the Beginning of the Eighteenth Century," in *Dispensing Justice in Islam: Qadis and their Judgments*, eds. Muhammad K. Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 296–8.
71. Young, *Corps de droit ottoman*, volume 1, 192–3.
72. Alan Duben and Cem Behar, *Istanbul Households: Marriage, Family and Fertility 1880–1940* (Cambridge: Cambridge University Press, 1991), 36–8.
73. CM, 411.
74. *Mecelle*, article 1791.
75. CM, 3,839.
76. This was the case, for instance, in the Trablusgarb court of commerce. I thank Claudia Gazzini for sharing this information with me.

77. Agmon, *Family and Court*, 173. The fact that the impact of a policy shaped in the *Nizamiye* judicial administration was clearly evident in the *Şeriat* courts as well is yet another indication of the inseparability of the two judicial forums.
78. Ibid., 194.
79. *Mecelle*, clauses 1645 and 1646. In cases involving entire villages, a copy of the court decision was given to the village headman (*muhtar*), or to another representative of the village. *Code of Civil Procedure*, article 137.
80. CM, 9,625–6 and 9,631. For other cases of communal judicial actions, see CM, 11,025, 11,172.
81. İslamoğlu, "Politics of Administering Property," 219.
82. F Lawrence M. Friedman, "Litigation and Society," *Annual Review of Sociology* 15 (1989): 21.
83. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), 265.

4 The Age of Accountability: Judges on Trial

1. Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990), 36–45.
2. According to Lars Kaspersen's representation of Giddnes' point on reflexivity, the difference between premodern and modern societies is a matter of the extent of reflexivity. In other words, modern societies are *more* reflexive than premodern ones. Lars Bo Kaspersen, *Anthony Giddens: An Introduction to a Social Theorist* (Oxford, UK: Blackwell, 2000), 88. To my mind, Kaspersen misses an important nuance here; Giddens does not argue that premodern societies were less reflexive, but, rather, that they exercised a different kind of reflexivity. Giddens, *The Consequences of Modernity*, 38.
3. Giddens, *The Consequences of Modernity*, 38.
4. Carter V. Findley, *Bureaucratic Reform in the Ottoman Empire: The Sublime Porte, 1789–1922* (Princeton, NJ: Princeton University Press, 1980), 194.
5. Stanford Shaw, *History of the Ottoman Empire and Modern Turkey* (Cambridge, New York: Cambridge University Press, 1976–1977), 39–40; Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (New York, London: Routledge, 2005), 27. Also, see the entire chapter 5 of the Imperial Decree of Gülhane from 1839 in Ahmet Lütfi, *Mır'at-ı Adalet: Tarihçe-i Adliye-i Devlet-i Âliye* (Istanbul: Matbaa-ı Nişan Berberian, 1306 [1886/7]), 136–8; and articles 67–81 of the *Criminal Code*.
6. *Code of Criminal Procedure*, articles 387–403.

7. CM, 3,041.
8. CM, 12,595.
9. CM, 2,690.
10. CM, 3,090.
11. CM, 6,464.
12. CM, 15, 179–80. Also, see CM, 1,417, 1,545, 14,253–4.
13. CM, 11,182–3. Committees for the selection of *naib*s to serve in the *Nizamiye* courts were set up in the early 1880s in order to ensure that they possessed the proper qualifications and knowledge. These committees were administered by the *Meşihat*, but they included a representative of the Ministry of Justice. BOA, Y.PRK.AZN 1/42.
14. Jun Akiba, "A New School for Qadis: Education of Sharia Judges in the Late Ottoman Empire," *Turcica* 35 (2003): 146.
15. CM, 3,503–26.
16. CM, 2,977.
17. CM, 11,038.
18. CM, 2,642.
19. CM, 8,431.
20. CM, 9,294.
21. CM, 11,166. For similar cases, see 11,278; 11,357; 11,645.
22. CM, 13,853–4.
23. CM, 11,231.
24. CM, 8,589, 8,607.
25. CM, 11,247; 11,294; 11,421.
26. CM, 9,246.
27. CM, 8,830.
28. CM, 8,352.
29. CM, 2,593.
30. CM, 2,994.
31. CM, 2,614.
32. CM, 9,390.
33. CM, 9,454–5.
34. CM, 9,486.
35. CM, 11,006.
36. CM, 2,673.
37. CM, 2,866.
38. CM, 9,102.
39. CM. 11,294.
40. CM, 7,818, 8,622, 8,669.
41. CM, 8,320, 8,574.
42. CM, 8,654.
43. These data were retrieved from the issues of the *Ceride* beginning with January 1891 (p. 8,383) and ending January 1892 (p. 9,213). A relatively large number of similar reports exist also in the volumes of the years 1885, 1890, and 1894.

44. Tevfik Güran (ed.), *Osmanlı Devletin'nin İlk İstatistik Yıllığı, 1897* (Ankara: T.C. Başbakanlık Devlet İstatistik Enstitüsü, 1997), 60.
45. CM, 3,503–3,526.
46. CM, 3,507.
47. See, for instance, M. S. Saracoğlu, "Letter from Vidin: A Study of Ottoman Governmentality and Politics of Local Administration, 1864–1877" (PhD diss., Ohio State University, 2007).
48. Ehud R. Toledano, *As if Silent and Absent: Bonds of Enslavement in the Islamic Middle East* (New Haven: Yale University Press, *2007*), 111.
49. According to Erdem, "automatic manumission" was more widespread in Istanbul, the Balkan provinces, and Western Anatolia than it was in the Arabic speaking provinces. Y. Hakan Erdem, *Slavery in the Ottoman Empire and its Demise, 1800–1909* (New York: Macmillan; St. Martin's Press, 1996), 154–60.
50. Toledano, *As if Silent and Absent*, 116.
51. CM, 3,508.
52. CM, 3,511–2.
53. CM, 3,512.
54. CM, 3,525–6.
55. The following description is based on CM, 1,859.
56. *Law of the Nizamiye Judicial Organization*, article 21.
57. He should have consulted the *Code of Criminal Procedure*, which instructed the presiding judge to appoint temporarily one of the court members in lieu of an investigating magistrate absent due to sickness or dismissal.
58. *Code of Criminal Procedure*, article 91.
59. *Code of Criminal Procedure*, article 390.
60. CM, 1,859.
61. BOA, İ.DH. 847/68057.
62. BOA, İ.DH., 833/67011.
63. Hüseyin Galıp, *Kamus-ı Hukuk* (Istanbul: Cemal Efendi Matbaası, 1305 [1887]), 34–5; *Code of Civil Procedure*, articles 255–69.
64. CM, 13,981.
65. *Hukuk*, 305–308.
66. Fatmagül Demirel, *Adliye Nezareti: Kuruluşu ve Faaliyetleri (1876–1914)* (Istanbul: Boğaziçi Üniversitesi, 2008), 44.
67. For an example to the subjective nature of interpretations of corruption, see David P. Redlawsk and James A. McCann, "Popular Interpretations of 'Corruption' and their Partisan Consequences," *Political Behavior* 27 (2005): 261–83. For a study that lumps together a wide range of administrative failures in a single homogenizing category of corruption, see James J. Reid, *Crisis of the Ottoman Empire: Prelude to Collapse 1839–1878* (Stuttgart: F. Steiner, 2000), 86–104. Corruption, in his analysis, seems to encompass everything, from irregular implementation of Imperial decrees to "dishonesty" of officials.

68. Ahmet Mumcu, *Osmanlı Devletinde Rüşvet: Özelikle Adlı Rüşvet* (Ankara: Ankara Üniversitası, Hukuk Fakultesi, 1969); Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994), 157–9. Gerber reaches the same conclusion with regard to the *Nizamiye* court in Jerusalem: Gerber, *Ottoman Rule in Jerusalem, 1890–1914* (Berlin: Klaus Schwarz, 1985), 143–59.
69. BNA, PRO 30/29/348, 14–15.
70. NBA, FO, 424/106, 1–2.
71. Boğaç Ergene, *Local Court, Provincial Society and Justice in the Ottoman Empire: Legal Practice and Dispute Resolution in Çankırı and Kastamonu (1652–1744)* (Leiden; Boston: Brill, 2003), 111.
72. Christoph Herzog, "Corruption and Limits of the State in the Ottoman Province of Baghdad during the 19th Century," *The MIT Electronic Journal of Middle East Studies*, theme issue: *Borderlands of the Ottoman Empire in the 19th and Early 20th Centuries*, ed. Thomas Kühn, 3 (2003): 38. Herzog recognizes the weakness of the European accounts on Ottoman corruption as a historical source, yet he argues that they should not be disregarded, given the paucity of alternative sources. In fact, he advances the working assumption that these accounts should be considered reliable "as long as we do not have evidence to the contrary." In light of the repetitious nature of Orientalist discourses and the fictitious nature of some of its basic stereotypes, however, such a working assumption seems questionable.
73. Ergene, *Local Court*, 99–124.

5 The Age of Centralization: The Public Prosecution

1. Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge, UK and New York: Cambridge University Press, 2005), 129.
2. Gülnihal Bozkurt, *Batı Hukukunun Türkiye'de Benimsenmesi* (Ankara: Türk Tarih Kurumu Basimevi, 1989), 105–106.
3. Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964).
4. Ibid., 190. For a discussion of the integration of *hisba* into the modern office of public prosecution in Yemen, see Brinkley Messick, "Prosecution in Yemen: The Introduction of the *Niyaba*," *International Journal of Middle East Studies* 15 (1983): 507–18.
5. Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Menage (Oxford: Clarendon Press, 1973), 242.
6. Ibid.
7. *Düstur*, 1st edition, volume 1, 608–24.
8. *Düstur*, 1st edition, volume 1, 699.

9. *Kanun-ı Esasi*, article 91, in *Düstur*, 1st edition, volume 4, 1–40.
10. Abdurrahman Şeref, *Tarih Musahebeleri* (Istanbul: Matbaa-yı Amire, 1340 [1924]), 342–347.
11. CM, 9,440.
12. Renè David and Henry P. de Vries, *The French Legal System: An Introduction to Civil Law Systems* (New York: Oceana Publications, 1958), 21.
13. Mauro Cappelletti and Joseph M. Perillo, *Civil Procedure in Italy* (The Hague: M. Nijhoff, 1965), 830. For a comparative discussion on the role played by public prosecution in the civil domain, see Vera Langer, "Public Interest in Civil Law, Socialist Law, and Common Law Systems: The Role of the Public Prosecutor," *The American Journal of Comparative Law* 36 (1988): 279–305.
14. See, for instance, Ali Şehbaz Efendi, "Usul-i Muhakeme-i Hukukiye" (Manuscript, 1896, Atatürk Library), 20. On public rights, see Hüseyin Galıp, *Kamus-ı Hukuk* (Istanbul: Cemal Efendi Matbaası, 1305 [1887/8]), 108, 216–17.
15. Langer, "Public Interest," 281–83.
16. Şehbaz Efendi, "Usul-i Muhakeme-i Hukukiye," 18–21; CM, 209.
17. Şehbaz Efendi, "Usul-i Muhakeme-i Hukukiye," 19.
18. CM, 209.
19. CM, 6,543–4.
20. CM, 13,136.
21. See, for instance, CM, 11,700; 12,515; 12,967; 13,895; 15,184; 14,968; 15,087; 15,645.
22. BOA DH.TMIK.S. 26/19; NBA, PRO, 30/29/348, 388.
23. Nadir Özbek, "Policing the Countryside: Gendarmes of the Late 19th-Century Ottoman Empire (1876–1908)," *International Journal of Middle East Studies* 40 (2008): 46–67.
24. On the distinct legal culture of the *Nizamye* courts, see Avi Rubin, "Legal Borrowing and its Impact on Ottoman Legal Culture in the Late Nineteenth Century," *Continuity and Change* 22 (2007): 279–303.
25. BOA İ.DH. 814/65701.
26. CM, 209–12.
27. CM, 14,968–70.
28. *Law of Nizamiye Judicial Organization*, articles 65, 73.
29. CM, 241–2.
30. CM, 11,182–3.
31. CM, 6,191–2.
32. CM, 9,006.
33. CM, 809.
34. CM, 11,774.
35. On Marxist theories of the state, see Boris Frankel, "On the State of the State: Marxist Theories of the State after Leninism," *Theory and Society* 7 (1979): 199–242; Bob Jessop, *State Theory: Putting the Capitalist State in its Place* (Cambridge: Polity Press, 1990).

36. Philip Abrams, "Notes on the Difficulty of Studying the State," *Journal of Historical Sociology* 1 (1988): 58–89.
37. Timothy Mitchell, "Society, Economy, and the State Effect," in *State/Culture: State-Formation after the Cultural Turn*, ed. George Steinmetz (Ithaca and London: Cornell University Press, 1999), 76–97. On the reification of the state, see also Roger Owen, *State, Power and Politics in the Making of the Modern Middle East* (London and New York: Routledge, 2000), 41; Gabriel Piterberg, *An Ottoman Tragedy: History and Historiography at Play* (Berkeley: University of California Press, 2003).
38. Galıp, *Kamus-ı Hukuk*, 216.
39. Jun Akiba, "From Kadi to Naib: Reorganization of the Ottoman Sharia Judiciary in the Tanzimat Period," in *Frontiers of Ottoman Studies: State, Province, and the West*, eds. Colin Imber and Keiko Kiyotaki (London: I.B. Tauris, 2005), 43–60; Halil Cin, "Tanzimat Döneminde Osmanlı Hukuku ve Yargılama Usulleri," in *150.Yılında Tanzimat*, ed. Hakkı Dursun Yıldız (Ankara: Türk Tarih Kurumu Yayınları, 1992), 11–32.
40. Law as a "contested domain" follows Huri Islamoğlu's interpretation of economy, law, and the state in the nineteenth century. Huri Islamoğlu, "Property as a Contested Domain: A Reevaluation of the Ottoman Land Code of 1858," in *New Perspectives on Property and Land in the Middle East*, ed. Roger Owen (Cambridge, Mass.: Harvard University Press, 2000), 3–62.
41. BOA, İ.AZN 10/1311 Z-02; 10/1311 Za-14; 10/1311 Za-15; 9/ 1311/Ş-08 ; AZN 9/ 1311/Ş-07; 9/ 1311/Ş-02; 8/ 1311/B-03; 8/ 1311/C-09; 8/ 1311/C-08; 8/ 1311/Ca-09; 5/ 1311/Ra-03; 5/ 1311/S-12; 5/ 1311/S-08; 5/ 1311/S-07; 14/ 1312/Z-16; 13/1312/N-06; 13/ 1312/N-04; 12/ 1312/B-10; 19/ 1313/Z-10; 19/ 1313/Z-14; 19/ 1313/Za-01; 18/ 1313/N-14; 18/ 1313/N-09; 18/ 1313/Ş-25; 18/ 1313/Ş-01; 17/ 1313/B-04; 17/ 1313/B-09; 17/ 1313/B-02; 17/ 1313/C-14; 17/ 1313/C-13; 16/ 1313/Ca-06; 16/ 1313/R-03; 16/ 1313/Ra-16; 15/1313/M-14; 24/ 1314/N-08; 24/ 1314/N-07; 24/ 1314/Ş-11; 23/ 1314/B-32; 23/ 1314/B-31; 23/1314/B-29; 23/1314/B-26; 22/1314/C-17; 22/1314/Ca-07; 22/1314/Ca-02; 21/ 1314/R-10; 21/ 1314/Ra-22; 21/ 1314/ Ra-05; 21/ 1314/Ra-04; 30/ 1316/S-11; 20/ 1314/S-06; 20/ 1314/M-23; 29/ 1315/L-05; 29/ 1315/N-03; 27/ 1315/R-13; 26/ 1315/M-06; 33/ 1316/Z-17; 33/ 1316/Za-12; 33/ 1316/Za-08.
42. CM, 6,048–9.
43. BNA, FO, 424/106, 149.
44. The term *professional* is used here to distinguish the regular public prosecutors from the gendarmerie officers, who performed the duties of prosecutor in the county courts.
45. BOA İ.DH. 849/68185.
46. BOA İ.DH. 831/66940.

47. BOA İ.DH. 833/67013.
48. BOA İ.DH. 831/66883.
49. BOA İ.DH. 848/68109.
50. BOA İ.DH. 848/68109.
51. BOA İ.DH. 807/65273.

CONCLUDING REMARKS

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2. Bernard Lewis, *The Emergence of Modern Turkey* (London; New York: Oxford University Press, 1965); Roderic H. Davison, *Reform in the Ottoman Empire, 1856–1876* Princeton, NJ: Princeton University Press, 1963).
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5. Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (New York; London: Routledge, 2005).
6. James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven; London: Yale University Press, 1998).
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8. The following studies of political trials are exception in this regard: Şaşmaz, *Kürt Musa Bey Olayı* (Istanbul: Kitabevi, 2004); Dick Douwes and Norman L. Lewis, "The Trials of Syrian Ismailis in the First Decade of the 20th Century," *International Journal of Middle East Studies* 21 (1989): 215–32.

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Index

Abdülaziz (sultan, 1861–1876), 17
Abdülhamid II (sultan, 1876–1909), 3, 17, 39, 54, 79, 160
Abdülmecit (sultan, 1839–1861), 23
Abdurrahman Nureddin Paşa, 37, 131
Abrams, Philip, 145
abuse of office, misconduct (*suistimal*), 72, 83, 115, 117, 119–21, 123, 129, 131
  See also discipline and indiscipline among officials
Adana, 44–5, 121, 168
administrative Councils (*meclis-i idare*), 24, 28–9, 70–1, 81, 174
administrative officials (*mülkiye*), 38, 43
advocacy. *See* attorneys
Agmon, Iris, 63, 76, 96, 157
Ahmad, Feroz, 27
Ahmet Esat Efendi, 79
Akiba, Jun, 119
Aleppo, 25–6, 121–2, 140, 168
Alexandria, 25
Amasya, 121, 149, 151
Ankara, 168
Arbitration, 76, 102, 107, 142, 175, 181
archival fetishism, 12
Armenians, 41
Asad, Talal, 58–9
attorneys, 8, 10, 67, 90, 95, 98, 101–7, 110, 140, 157
Auctions, 46, 64, 143
the "auspicious event," 23
Aydın, 121, 168
Ayvalık, 119, 123–4
Aziziye, 99–100

Baghdad, 122, 129, 150, 168
Bailiffs, 33
Baker, Valentine, 51
Bankruptcy, 73–6
Becayiş (permutation), 129
Beersheba, 174
Beirut, 25–6, 174
Berkes, Niyazi, 57–8, 80
Beyoğlu, 93
Beyşehri, 98, 174
bill of indictment, 52, 116
Bingazi, 122
Bitlis, 121
Bolu, 69
Bosnia, 29
bribery. *See* corruption
Britain, 39–41, 111, 149, 159, 165
British Law, 1, 26
Brun, Natan, 50
Buka'ul-aziz, 150
Bureaucracy, 23–4, 54, 150–1, 164–5

Cairo, 26
Canik, 65
capitalism, 8, 25, 161–2, 178
capitulations, 26–7, 77, 100
Çarşamba, 120
Çatalca, 173
Çay, 173
Cemaleddin Efendi, 79
Centralization, 16, 23, 27–8, 62–3, 84, 92, 98, 114, 133, 144, 152
Ceride-i Mehakim (Journal of the Courts), 9–14, 91, 93, 97, 114, 119, 122–3, 131, 137, 145, 163

Cevdet Paşa, Ahmet, 30, 37, 53, 79, 93, 168
Cezâyir-i Bahr-i Sefid, 168
Chakrabarty, Dipesh, 6
Cinayet (felony), 35, 46, 49, 92–3, 128, 137
civil code. *See* Mecelle
clerks (of the courts), 33, 87, 90, 96, 115, 120–2, 126–7, 131, 148, 150–1
Code Napoleon, 78, 154
Code of Civil Procedure, 32, 35, 38, 63–4, 80, 89–90, 98–9, 101–2, 126, 174, 179, 182
Code of Commerce, 68, 76, 78, 179, 181
Code of Commercial Procedure, 26, 68, 101–2, 179, 182
Code of Criminal Procedure, 32, 115, 126, 128, 179, 182
Code of Maritime Commerce, 68, 179, 181–2
codification, 2, 23, 32, 59, 62, 81, 84, 88–9, 99, 114, 171
commercial courts. *See* courts of commerce
Common Law, 91, 138
communal judicial action, 108
Continental Law, 42, 88–9, 91, 137–8
Constitution, 1876, 31, 38, 124, 134
Consuls, 25, 27, 39–41, 50, 53, 73, 149, 153, 168, 170
corruption, 16, 39, 45–6, 54, 114, 119–21, 123, 130, 131–2, 155, 168, 185–6
Council of Elders (*ihtiyar meclisi*), 99
Council of Investigations (*meclis-i tahkik*), 24
Council of Judicial Appeals and Crimes (*meclis-i temyiz-i Hukuk ve Cinayet*), 28
Council of Judicial Ordinances (*Divan-ı Ahkam-ı Adliye*), 96
Council of State, 43, 72, 74, 76
Cour de Cassation, 91, 97
court expenses. *See* judicial fees
Court of Cassation (*Temyiz*), 9, 13, 32, 35–6, 38, 46, 49, 64–7, 69–72, 80, 87, 91, 93, 96–102, 104, 106, 108–9, 116, 127–8, 130, 133, 137–8, 140–4, 147, 150, 156, 168
court users. *See* Litigants
courts of appeal (*istinaf*), 32–3, 35, 41–2, 45–6, 87, 90, 93, 97–8, 102, 106, 116–17, 137, 140, 143–4, 148, 150, 157, 168
courts of commerce (*ticaret*), 7, 26, 28–9, 34, 45, 48, 63, 68–70, 72, 74–5, 78, 81, 93, 100–2, 107, 174
courts of first instance (*bidayet*), 32–5, 43–6, 68, 78, 87, 116, 130, 133, 137, 140, 143–4, 148–9, 151, 162, 174–5
credit, 8, 25, 48
Crete, 29
criminal code, 24, 52, 54, 62, 78, 114–15, 126, 179, 181
criminal law, 8, 16, 24, 32, 56, 133
Critical Legal Studies, 48, 170, 177
Cuma, 66
Cünha (crimes of medium severity), 36, 46, 49, 92–3, 128, 137

Damascus, 26
Darülfünun, 103
Dava vekilleri. See attorneys
David, Renè, 138
De Certeau, Michel, 59
debt, 8, 25, 30, 67, 69–71, 73–6, 100–1, 143
Decline Thesis, 3, 159
Denizli, 49
discipline and indiscipline among officials, 16, 24, 54, 113–23, 127, 129, 131
See also abuse of office
Divan-ı Ahkâm-ı Adliye. See Council of Judicial Ordinances
Diyarbakır, 120–1, 168, 170

Doyran, 119
duality of the judicial system, 15, 55–7, 77–8, 80–1, 104, 154–5, 171
Düstur, 74–5

Edirne, 26, 64, 87, 168
Egypt, 29, 58–9, 135, 160, 180
Eisenstadt, S.N., 5
equality before the law, 25
Ergene, Boğaç, 47, 132
Erzincan, 143
Erzurum, 168
execution officers, 33, 35, 122

Fetva (Arabic: *fatwa*), 119, 139–40, 146
Fortna, Benjamin, 59
forum shopping, 15, 61–5, 67–71, 73, 81, 107, 155, 157
France, 7, 149
French legal system, French law, 7, 15, 19–20, 26, 30, 32, 54, 78, 88, 98, 105–6, 134, 138–9, 153, 155, 166
Friedman, Lawrence, 14, 110

Gaza, 150
Gemlik, 121
Gendarmerie, 24, 35, 40, 51, 119, 141–2, 148
Gendarmerie Council, 24
Gerber, Haim, 52, 70, 106, 131
Gerede, 69
German embassy, 74–6
Germany, 75, 154
Giddens, Anthony, 92, 113
Glocalization, 155–6
Grand Vizierate, 38, 75, 80
Griffith, John, 60
guarantees, 8, 48, 100–1

Haifa, 25, 63
Hakkari, 121
Hakki Paşa, 41
Halilürrahman (Hebron), 119
Hanafi law, 30–1, 54, 63
Harootonian, Harry, 6–7
Harvey, David, 85
Hayrabolu, 64–5
Heidborn, A., 153, 176
Heyd, Uriel, 134
High Council of Appeal (*divan-ı temyiz*), 29
high modernism, 85, 95–6, 99
The Hijaz, 29, 129
Hooker, Barry, 60
Hüdavendiğar, 72, 121, 123, 168–9, 173
Hudeyde, 130
Hugo, Victor, 21
Hukuk (journal), 130
Hüseyin Rıza Paşa, 37

Iade-i hukuk-ı memnua (restoring revoked rights), 22
Ijtihad, 88
impact-of-the-west paradigm, 2, 5–6, 159
Imperial Edict of Gülhane, 22–3
İmroz (Gökçeada), 52
In absentia court decisions, 99, 101
independence of the courts, 31, 38–44, 106, 115, 118, 148
indictment committee (*heyet-i ithamiye*), 35, 93, 116, 119, 128
inheritance, 38, 63, 66, 73–7, 99, 143
investigating magistrate (*müstantık*), 120–2, 127–8
irregularities. *See* Nizamiye courts, functioning of
Islamoğlu, Huri, 86, 110
Israel, 31
Istanbul, 24–6, 33, 39, 67, 70, 93, 96–7, 103, 106, 130, 134–5, 142, 151, 173, 182
İstida Dairesi. See Petition Department
iştikâ-i anilhükkâm davası, 129–30
istintak (criminal pre-trial investigation), 87
Italian embassy, 75

itiraz'al'ülhüküm. *See* Protest against the Decision
Izmir, 25–6, 75

Jaffa, 52, 63, 96, 162
Jeddah, 129–30
Jerusalem, 52, 70, 151, 186
judges, 10, 25, 29, 31, 33–6, 39, 41–2, 45–6, 54, 67, 72, 78, 90–1, 104–5, 107, 110, 113–27, 130, 137, 139–41, 143–4, 146–7, 168, 173, 176
judicial agents. See *vekil*
judicial effectiveness, 47–8, 51–2, 54
judicial fees, 8, 45–7, 74, 106–7, 115, 120, 130, 145, 156–7, 169
judicial inspector (*müfettiş*), 29, 40, 44–5, 117
judicial personnel, 16
judicial reforms, 23, 37, 41, 51, 54, 57, 71–2, 76, 106, 141, 144, 147, 149, 152, 154, 162, 167
justice, 7–8, 13, 16, 39, 47, 83, 95–6, 106–7, 110–11, 119–120, 129, 156, 163, 177, 181

kabahat (offence), 36, 46, 49, 92
Kabuli Paşa, 30
Kadı, 24, 38–9, 42, 134, 146, 167, 173
  see also judges
kadi justice (Weber's concept of), 106, 167
Kanun (sultanic law), 19, 31, 56, 63, 79, 155, 171
kaymakam (governor of a county), 28, 121, 124, 150
Karacaköy, 173
Karesi, 123, 125
Kastamonu, 69
kavm-i mahsur (definite community), 108–9
Kayseri, 42, 132
Kazasker, 130
Khadduri, Majid, 30
Kırkağaç, 120
Kırkkilise, 87
Koçgiri, 65
Konya, 40, 42, 98, 121, 151, 168
Kosova, 120, 142, 168
Kühn, Thomas, 51
Kurds, 41, 149

Land Law, 54, 78, 179, 181
Law of the *Nizamiye Judicial Organization*, 32, 38, 99, 101–2, 117, 127, 133, 137–8, 140
Law of the Peace Judges, 33
Law School (Nizami), 12, 33, 77, 79, 103–5, 148, 150, 176, 181
Law School for Şer'i Judges, 33, 103
Layard, Sir Austen Henry, 39–40, 45, 50
Lebanon, 29, 41
legal borrowing, 2, 15, 19–23, 26, 28–9, 32, 53, 60, 78–9, 84, 139, 155, 164
legal centralism, 60
legal culture, 54, 76, 79, 84, 87, 89, 91, 96, 107, 116, 126, 130, 142, 152, 154, 156, 175, 187
legal formalism, 15–16, 32, 36, 54, 84–5, 89, 96, 102, 106–7, 110–11, 126, 130, 156, 177
legal pluralism, 15, 55, 59–63, 68–9, 71–4, 81, 100, 107, 154
legal positivism, 88, 156, 177
legal procedure, 13, 21–2, 30, 43, 52, 63, 76, 78, 80, 84–6, 88–9, 95–8, 99–104, 106, 109–10, 116, 128, 132, 139, 141, 143, 149, 156
legal rationality, 84, 106, 146, 153, 156, 161, 163–4, 178
legal reform. *See* judicial reforms
legal transplantation. *See* legal borrowing
legislation, 8, 24, 28–9, 56, 59, 79, 114, 125, 167
Liebensky, Herbert, 30

Litigants, 42, 45–6, 55, 59, 61–3, 65, 67–9, 71–3, 76, 81, 95, 97, 99–100, 102, 104–7, 110, 118, 121, 129, 136, 139–40, 142–3, 146, 156–7, 179
litigation, 1, 9, 12, 14, 139, 157, 159

madde (clause in a codified law), 88, 91, 117, 128
Mahmut II (sultan, 1784–1839), 23–4, 36, 114
Malatya, 150
Manastir, 129, 142, 168
Maraş, 140
Mardin, Şerif, 83
Marxist theorists, 30–31, 145, 161–2, 187
Mecelle, 30–2, 42, 51, 54, 63–4, 67, 78, 89, 100–4, 107, 119, 151, 166–7, 174, 179, 181
meclis-i idare. *See* administrative councils
meclis-i tefrik. *See* nominating councils
Medical School, 12
Medrese, 33, 103, 151
Menteşe, 49, 127
merchants, 7, 25–7, 34, 68–70, 73, 75–6, 174
Meşihat. *See* Ministry of the *Şeyhülislam*
Midhat Paşa, 16, 45
Miller, Ruth A., 8, 24
ministère public, 134, 138–9
  See also public prosecutors
Ministry of Commerce, 68
Ministry of Foreign Affairs, 74–5, 101
Ministry of Gendarmerie, 38, 141
Ministry of Interior, 129, 141
Ministry of Justice (*Nezaret-i Adliye*), 9, 12, 33–9, 42, 44, 46, 54, 67–8, 73, 78, 80, 84, 89–90, 93, 95–6, 101–7, 114–8, 124, 129, 131, 134, 137, 141, 143–4, 146–9, 152, 156
Ministry of Pious Endowments, 64, 150
Ministry of Post and Telegraph, 100–2
Ministry of the *Şeyhülislam* (*Meşihat*), 75–6, 78, 80, 95, 118, 142, 144, 146–8, 152, 184
Ministry of Trials (*Nezaret-i Deavi*), 36
Mitchell, Timothy, 145
mixed courts. *See* courts of commerce
modernity, 2, 86, 110, 113, 157–8, 160
  in historiography, 2–7, 15, 55, 77, 152–4, 176
  periodization of, 4
  as a global phenomenon, 7, 155–6
  and capitalism, 8, 161, 178
modernization theory, 4–5, 58, 113, 171
Mosul, 129
müdür (head of a township), 28
mufti, 42, 119, 139, 142, 146
muhtar (village headman), 28, 52, 99, 183
muhtesip, 134
Mumcu, Ahmet, 131
municipal councils, 43, 70, 117, 140, 169
mürur-i zaman. *See* prescriptive period
musahhar (*ad hoc* attorney), 99, 107
müstantık. *See* investigating magistrate
mutasarrıf (district governor), 28, 131

naib (Şer'i judge), 78–9, 115, 118–9, 122, 138, 142–34, 147–8, 151–3, 175–6
  See also judges
nikah, 66
nizam, 83–4, 86, 156

Nizamiye courts
accessibility of, 102, 106–7, 146, 157
civil courts, 8, 35–6, 44–5, 48, 63, 68–9, 78–9, 90, 93, 104, 107, 116, 118, 137–8, 140–1, 143–4, 147–8, 173, 175–6
criminal courts, 24, 28–9, 34–6, 45, 48, 52, 78–9, 90, 93, 104, 107, 135–7, 144, 148, 152, 162
delays in, 90, 93, 98, 117–18, 121–2, 145
division of labor with the Şeriat courts, 24, 63–6, 68, 70, 72–3, 77, 80, 155, 176, 183
foundation of, 23–4, 27–8, 30, 53, 115
functioning of, 8–9, 46–50, 54, 87, 90, 96, 103, 117–18, 121, 131, 148, 154–5, 168
in historiography, 2, 8, 20
as a manifestation of Ottoman modernity, 7–8, 104
and non-Muslim staff, 25
salaries of staff, 12, 39, 41, 44–6, 117, 130, 169
as secular courts, 15, 55, 57, 147, 153
selection of court officials, 117–19, 144, 184
structure of, 32
and the usage of documentation, 89–90, 93, 95–6
nominating councils (*meclis-i tefrik*), 28
notaries, 33, 131
Nurettin Paşa, Abdurrahman, 37, 131

Orientalist paradigm, Orientalism, 4, 105, 160
Ottoman archives, 12–13
Ottoman colonialism, 51
Ottoman modernity. *See* modernity
Ovacık, 108–9
Owen, Roger, 25
ownership, 8, 30, 48, 64–5, 99–100, 140, 143
Özbek, Nadir, 142

Palestine, 52
peace tribunals (*sulh*), 33, 130
penal servitude (*kürek*), 24
Pension funds, 145
personal status, 63
Petach Tikva, 52
Peters, Rudolph, 133
Petition Department (*istida dairesi*), 36, 96–7
pious endowments (*vakıf*), 38, 63–6, 108–10, 173
prescriptive period (*mürur-i zaman*), 97, 101–2, 138, 179, 181
private rights, 140
procedural law. *See* legal procedure
proceduralization, 8, 16, 81, 84–6, 95–6, 102, 104, 107, 110, 151, 156–7
procureurs generaux, 138
professionalization, 22–3, 54, 63, 84, 95, 102, 164
Protest against the Decision (*itiraz'al'ülhüküm*), 46, 99, 101–2
Public Debt Administration, 44, 98
public interest, notion of, 138
public prosecutors, 10, 12, 16, 31, 33, 35, 39–40, 43–6, 53, 72, 90–1, 93, 98–102, 104, 107, 109, 115–19, 121–3, 128–31, 133–52, 156
public rights, 126, 135, 138, 140–1, 143, 146

rent, 8, 48
Reşit Paşa, Mustafa, 23
Rize, 131
Roman Law, 19
Rumelia, 130

rule of law, 31, 47, 111, 115, 137, 142, 158, 161–2
Russia, 27

Sabah (newspaper), 135
Said, Edward, 3
Said Paşa, 37, 44–5, 53, 171
Salisbury, Marquis of, 39
Samsun, 149
Sandıklı, 67
Schacht, Joseph, 30, 134
School for Civil Servants, 12, 135, 150
School for Şer'i judges, 33, 103
School of Literature, 12
Scott, James C., 85–6, 96, 99, 156
Secretariat of Foreign Affairs, 38
Secularism, 57–8, 154
secularization, 2, 55–9, 61, 78, 80, 95, 154–5, 157
  See also Nizamiye courts, as secular courts
Selânik, 26, 75, 120, 129, 168
separation of powers, 27, 29, 38–44, 50, 53, 115, 177
Shahar, Ido, 61
sicil (court case registration in the Şeriat courts), 9, 12, 162, 164
Siird, 120
Sivas, 40–1, 50, 65, 100–102, 122, 149–50, 168
Siyasa shar'iyya, 56
slaves, slavery, 38, 124–6
social inequality, 47, 162, 169–70
social justice, 76, 107, 157
standardization, 85–7, 89, 95, 156
Stamp Law, 130
the state as a reified concept, 61, 84, 86, 138, 145–6, 152, 188
Statistics, 9, 48–50, 87, 91–5, 98, 113, 117, 180
Stoler, Ann, 13–14, 94
suistimal. See abuse of office
sulh (amicable agreement), 130, 175
Supreme Council of Judicial Ordinances (*Meclis-i Vâlâ-yı Ahkâm-ı Adliye*), 24, 35, 96, 165
Syria, 45, 119, 150, 168
Şehbaz Efendi, Ali, 21–2, 77, 88–9, 104–5, 139–40, 142, 146
Şeref Efendi, Abdurrahman, 135–7, 140
Şer'i law (*Şeriat*), 32, 42, 56, 58, 77–9, 106, 119, 134, 138–9, 151, 153–5, 182
Şeriat courts, 2, 9, 12, 15, 23–5, 28, 30–1, 34, 42, 51, 55, 63–8, 72–8, 80–1, 85, 95–6, 103–4, 107, 116, 120, 125–6, 130, 139, 142, 146–8, 151, 155, 157, 162, 166, 173, 175, 183
Şeyhülislam, 29, 79–80, 116
Şile, 108–9
Şiran, 71

Tamanaha, Brian, 61
tanzimat, 2–4, 8, 14, 15, 22–4, 28, 33, 55–6, 68, 70, 80, 104, 125, 154, 156, 159
Tanzimat Department, 74
tapu, 64, 67, 99
Tavas, 50
tax-farming (*iltizam*), 48, 71, 98, 108–10, 120, 134
taxes, 27, 56, 71, 86, 98, 115, 140
tezkiye, 141
Tiberias, 122
Toledano, Ehud R., 125
Trablusgarp (Tripoli), 121–2, 182
Trabzon, 41, 65, 168
Treasury, 53, 71, 140–1, 143, 145
Treaty of Adrianople (1829), 25
Treaty of Balta Liman (1838), 25
Treaty of küçük Kaynarca (1774), 27
Turkey, 154

ulema (the learned class), 24, 56, 78–80, 119, 151
Uzunçarşılı, İsmail Hakki, 17

Vahan Efendi, 32
vali (provincial governor), 28, 39–41, 142

Van, 87, 98, 168
Vekil, 102–5
  See also attorneys
Vidin, 29
vilâyet laws (provincial laws, 1864, 1871), 28–9, 34, 38–9, 70, 134, 166
De Vries, Rene, 138

Watson, Alan, 20
Weber, Max, 84, 86, 88, 106, 178
westernization, 2, 8, 15, 19, 25, 155, 157, 189
world economy, 23, 25, 30, 100, 161
world-system perspective, 4–5

Yalvaç, 119
Yanya, 168
Yazbak, Mahmoud, 79
Yellin, David, 52
Yeniköy, 108–10
Yenişehir, 72
Yemen, 29, 51, 130
Yildiz trial, 17
Yoklama (land-cadastre register), 99
Young Turks, 3, 33, 79–80, 154

zabt (court proceedings), 9
Zara, 65
Zionist settlers, 50