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Legal borrowing and its impact on Ottoman legal culture in the late nineteenth century

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ABSTRACT. *The article sheds fresh light on socio-legal change in the Ottoman Empire during the late nineteenth century by focusing on the legal culture that emerged in the newly established* Nizamiye *court system. It is argued that a characteristic* Nizamiye *discourse that emphasized procedure mirrored the syncretic nature of this judicial system. This syncretism was a typical outcome of legal borrowing, encompassing both indigenous and foreign legal traditions. In addition, the article points to the possible impact of the new legal culture on judicial strategies employed by litigants. The accentuation of procedure opened up new litigation opportunities for the wealthier classes while disadvantaging and alienating the lower strata of society. Yet Ottoman law also provided some legal solutions for the lower orders.*

During the second half of the nineteenth century the Ottoman legal system underwent sweeping reforms, together with other aspects of Ottoman society, such as the education system, the provincial administration and the financial system. Within this broad historical context, whose main thrust originated from the nineteenth century reform movement known as *Tanzimat*, a new court system was created in the mid-1860s, namely the *Nizamiye* ('regular') courts. Largely inspired by French law in terms of legal sources and structure, the new courts were designed to address criminal cases and civil and commercial disputes. The introduction of the new courts required a new division of labour in the judicial sphere and signified the end of the centuries-old dominance of the *Shari'a* courts, which had been the backbone of the Ottoman judicial system for centuries. The jurisdiction of the *Shari'a* courts was reduced to matters of personal

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status and pious endowments (Turkish *vakıf*; Arabic *wakf*). By the turn of the century, the *Nizamiye* court system had developed into a complicated web consisting of hundreds of courts of various levels and a wide range of administrative units.[1]

Despite the fact that the creation of the *Nizamiye* court system marked a remarkable change in the history of the modern Middle East, it has not received the systematic scholarly attention it deserves until recently. New comprehensive studies grounded in Ottoman sources have shed light on the evolution of the *Nizamiye* courts and their bureaucratic structure, as well as on aspects of their daily practices.[2] My purpose in this article is to discuss one aspect of the *Nizamiye* courts that has remained in obscurity, namely the distinctive *Nizamiye* legal culture that crystallized during the last two decades of the nineteenth century. As is often the case with the business of 'culture' and its various conceptual derivatives, 'legal culture' as a category of social and legal analysis has provoked a debate, mainly among sociolegal scholars.[3] In the present discussion, 'legal culture' is understood as 'one way of describing relatively stable patterns of legally oriented behaviour and attitudes'.[4] When situated within an interpretive approach to sociolegal contexts, the concept of legal culture is helpful in capturing webs of meanings and points of interplay between various interpretations in and outside the legal sphere. According to Lawrence Friedman, while the concept of legal culture is itself not measurable, it does cover a wide range of phenomena that can be measured.[5] Judicial self-portraits of legal systems or, in other words, the ideologies and images worked out by legal regimes are one such 'measurable' phenomenon.

Inspired by Mitchell de S.-O.-l'E. Lasser's innovative study of judicial discourse in the French legal system, this article explores the official self-portrait of the *Nizamiye* law, focusing on the policies of the Ottoman Ministry of Justice and the decisions of the Ottoman Court of Cassation (*Mahkeme-i Temyiz*) following the judicial reforms of 1879.[6] My approach is, however, somewhat different from Lasser's. Rather than examining the apparent gaps and discrepancies between official and unofficial judicial discourses *within* the legal system as Lasser does for the French case, this article positions the Ottoman *Nizamiye* judicial portrait in the context of legal borrowing while illustrating the syncretic nature of the Ottoman modern judicial system. The article then discusses the responses of litigants to the new judicial discourse and the legal culture in which it was embedded. I argue that the modernist legal culture that emerged in the *Nizamiye* legal system during the late nineteenth century seems to have opened up new litigation opportunities for the wealthier classes, but at the same time it disadvantaged weaker social groups due to the increasing dependency on professional legal mediation. As a final point, I believe

that the Ottoman reception of Continental law, when examined from a socio-legal perspective, provides an effective illustration of modernity in non-Western contexts.[7]

I. THE *NIZAMIYE* COURTS: A TYPICAL CASE OF LEGAL BORROWING

Legal borrowing from foreign legal systems is a salient phenomenon in world history. As a matter of fact, statutes unaffected by foreign influence in one way or another probably form the exception rather than the rule. Large-scale borrowing has characterized the radical legal change that occurred in Western Continental Europe from the eleventh century to the eighteenth century, when Roman Law gradually replaced the local customary law.[8] Similarly, pre-modern Ottoman law was largely shaped by the local custom that had prevailed in the provinces prior to their absorption into the Empire, and it even preserved some non-Turkish legal vocabulary.[9] In the nineteenth century, countries throughout the world borrowed extensively from the Napoleonic codes, and perceived the French judicial system as an 'ideal type' to be emulated.

Why would political and legal elites aspiring to transform their laws turn to foreign legal systems instead of designing utterly 'authentic' law that would reflect local needs and socio-political terrains? Once the act of borrowing has been completed, how is it possible that a legal system that took shape in a given society, while accommodating local requirements embedded in local societal structures, can be applied effectively in a different society, sometimes living in another period of history? Although legal scholars are in agreement on the major role of legal borrowing in processes of legal change, views concerning the mechanisms of legal borrowing and its motivations vary. In order to be effective, explanations of legal borrowing should be grounded in societal as much as in legal developments, and therefore they must be anchored in particular historical contexts. In the nineteenth century, French law had an enormous impact on legal elites throughout the world in spite of Napoleon's ultimate defeat, not only because it was a true legal achievement comparable in its magnitude to the Justinian codification of the sixth century, but also due to France's status and prestige.[10]

Before turning to the Ottoman case of legal borrowing, it is important to stress the selective nature of legal borrowing as a global phenomenon. According to Alan Watson, a leading theorist of legal borrowing: 'massive borrowing is not total borrowing. Some legal institutions and rules will be borrowed entire, some with modifications that may be major; some will be replaced; some will be ignored entirely.'[11] Consequently, many (if not most) of the legal regimes around the globe are essentially

hybrid, and the Ottoman judicial system of the late nineteenth century is no exception. As we shall see shortly, the massive borrowing from the French legal system during the second half of the nineteenth century did not result in a withering of the *Shari'a* courts, which had been the backbone of the Ottoman judicial system prior to the nineteenth century, but in a modified division of labour in the judicial bureaucracy, leading to an effective equilibrium between judicial organs that had originated elsewhere and local organs that had not existed in the foreign legal system.[12] The Ottoman criminal codification that had begun in 1840, revised in 1851 and then again in 1858, was one of the most salient manifestations of legal borrowing prior to the emergence of the *Nizamiye* courts. While the earlier versions of the criminal code contained a substantial presence of the *Shari'a*, and the final version was clearly derived from Napoleonic law, it was not a wholesale adoption of the French code. The Ottoman reformers chose to leave out a number of articles that were part of the French code, and added others as they saw fit.[13]

A. Heidborn argues that the *Nizamiye* judicial bodies were referred to as 'courts' for the first time in 1868, and according to Carter Findley they were not systematized until 1879.[14] When viewed as a process rather than an event, it would be reasonable to pick out the promulgation of the Provincial Reform Law of 1864 ('the *Vilayet* Law') as a defining moment in the emergence of the *Nizamiye* system as a whole, because it delineated a clearer judicial hierarchy and an unambiguous division of labour between various judicial bodies.[15] In 1864 the first *Nizamiye* judicial bodies were established in the model province of Tuna (Danube), still defined as 'councils' (*meclisler*) rather than 'courts'. In the same year, the new judicial system was extended to other provinces under the Provincial Law of 1864, which re-shaped the administrative structure of the Ottoman Empire.[16] Three years later, *Nizamiye* courts were instituted throughout the Empire, a judicial hierarchy was established and appellate procedures were fashioned.

An intensive effort at statutory codification took place between 1850 and the 1880s.[17] In the years 1868–1876 the eminent reformer and jurist Ahmet Cevdet Paşa (1822–1895) led the grand project of compiling the first Ottoman civil code, known as the *Mecelle* (pronounced 'mejelle'), which came to be a pillar of the civil domain in the *Nizamiye* court system and which was employed in the *Shari'a* courts as well. Cevdet Paşa, who started his career as a *kadı* (a judge in a *Shari'a* court), was an accomplished Muslim scholar (*alim*), and was also knowledgeable in French law.[18] From the perspective of legal borrowing, the amalgamation of local and borrowed law was apparent already at the stage of decision-making. In 1867 the government decided to adopt the French Revolutionary principle of

separation of powers. However, a debate arose over the question of whether or not to translate the French Civil Code and apply it in the Ottoman courts. Eventually, the jurists who preferred a civil code deriving from the *Şeriat* (the Ottoman term for *Shari'a*) prevailed over those who advocated the adoption of the French code.[19] This choice reflected the position of the Young Ottomans, the intellectual movement that saw no essential contradiction between Islamic law and contemporary realities.[20]

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.'[21] 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'.[22] Both positions, in my view, are guided by an 'either or' approach, having two supposedly dichotomous categories in mind, the *Shari'a* and European codes, or the religious and the secular respectively. These options do not take into account the possibility that a fully-fledged civil code could be a syncretic artifact, containing both Islamic and European features. In fact, the *Mecelle* meant more than merely a new organization of Hanefi law redacted into numbered articles. What made it a 'real' civil code, comparing to the old state law collections promulgated by the sultans, known as *kanunnames*, was its actual application as a legal standard in force in *Nizamiye* and *Shari'a* courts throughout the empire, whereas previously, the judge addressing civil and criminal matters at the local *Shari'a* court had considerable leeway in choosing the sources relevant to a particular case.[23]

If Cevdet Paşa was the visionary of the new judicial system, *Küçük* ('small') Sait Paşa (1838–1914), nine times Grand Vizier (*sadrazam*) during the reign of Abdülhamid II and a Minister of Justice in 1878–1879, was the person responsible for the maturation of the *Nizamiye* court system. He came from an Erzurum family traditionally identified with the learned class (*ilmiye*) and, like Cevdet Paşa before him, he had acquired an Islamic education, spending seven years at the Ayasofia mosque in Istanbul, where he also studied French.[24] During his term in the Ministry of Justice, three laws redefined the court system and set in motion the bureaucratic infrastructure necessary to support the working of the courts: the Law of the *Nizamiye* Judicial Organization (*Mehakim-i Nizamiye'nin Teşkilât Kanunu*), the Code of Criminal Procedure (*Usul-i Muhakemat-ı Cezaiye Kanunu*) and the Code of Civil Procedure (*Usul-i Muhakemat-ı Hukukiye*). The Law of the *Nizamiye* Judicial Organization divided the *Nizamiye* courts in Istanbul and the provinces into criminal, civil and commercial jurisdictions in the most systematic fashion so far. It

delineated three judicial levels: the courts of first instance (*bidayet*), the provincial Court of Appeal (*istinaf*) and the Court of Cassation in Istanbul (*Mahkeme-i Temyiz*). Each court consisted of criminal and civil sections, and some of the courts of first instance functioned as courts for commercial matters.[25] It is evident from the Ottoman official yearbooks that, at this point in time, *Nizamiye* courts operated in most parts of the Empire, with few exceptions.

The introduction of the procedural codes, usually ignored by historians of the late Ottoman Empire or mentioned in passing at best, is actually a milestone in the Ottoman large-scale project of legal borrowing.[26] The Code of Civil Procedure, consisting of 301 articles, many of which were translated from the French equivalent,[27] was formally presented as an amalgamation of the French Code of Civil Procedure and the procedural sections in the *Mecelle*.[28] The fact that the Code of Civil Procedure was prepared by the same committee which had compiled the *Mecelle* is indicative of its syncretic nature.[29] The Code of Criminal Procedure, consisting of 487 articles, was even a stronger indication of the legal reformers' dedication to legal borrowing, being almost an exact translation of the French Code of Criminal Procedure from 1808.[30] French procedure was not the only option that was considered. In 1877 a senior judicial official, Vahan Efendi, was sent to Europe to study various judicial procedures and recommend the one best suited to Ottoman circumstances.[31] It is true, however, that the tendency to look at France as the preferred source for legal borrowing was shared by all the reformers who supported legal borrowing.

These codes prescribed hundreds of procedural motions, from the very initial stage of submitting a civil lawsuit or criminal bill of indictment to the last stages of execution of rulings in both the civil and criminal courts. They ushered in functions hitherto unknown in Islamic law, such as the investigating magistrate (*müstantık*) and the public prosecutor (*müdde-i umumi*). The latter carried out duties in both the criminal and the civil domains. The meticulous codes allowed the judges who worked in the courts no leeway as far as procedure was concerned. When compared to the extensive discretion of the *kadı* in the *Shari'a* courts, the new limits imposed on the judge's discretion in the *Nizamiye* law constituted a significant novelty in Ottoman law.

From the perspective of comparative law, the *Nizamiye* court system, born out of the 1879 legislation, presented a (then) unique combination of *Shari'a* and selectively borrowed Continental law. At the same time, it was a typical case of legal borrowing in the sense that the partial and gradual borrowing that had started in the 1840s eventually resulted in a syncretic legal system containing both indigenous and foreign practices. The

post-1879 court of first instance (*bidayet*) is an illuminating example in this regard. The courts of first instance, which operated at the sub-district level (*kaza*) in most parts of the Empire, were divided into criminal and civil sections. Whereas the criminal sections were composed of presiding judges who were employees of the Ministry of Justice and two additional judges (*aza*), the civil sections were presided by *ex officio Shar'i* judges (*naib*) who were employees of the *Meşihat* (Ministry of the *Şeyhülislam*). The *naibs*, who presided in the *Nizamiye* civil courts, were the same people who served in the adjacent *Shari'a* court.[32] The syncretism was even more conspicuous in so far as the legal sources were concerned. The *Mecelle*, which was a formulation of the Hanefi School of Islamic Law, formed the key substantive law in the civil courts whereas the French-inspired Code of Civil Procedure dictated the legal procedure.[33]

Sait Paşa attributed much importance to realizing an effective separation between the judicial power (*kuvve-i adliye*) and the administrative power (*kuvve-i idare*). It appears from his memoir that the immediate incentive for his efforts to secure the courts' independence was an attempt to resist the frequent interventions by the European powers in the Ottoman judicial sphere, a pervasive practice that had been backed by ex-territorial agreements known as 'capitulations'.[34] Thus, somewhat ironically, the adoption of the European principle of separation of powers was a means of resisting European intrusion. Yet, it would be incorrect to view the application of this principle as merely a device in the persistent Ottoman attempt to resist Western encroachment, for Ottoman jurists at the Ministry of Justice in later years continuously tried to secure the independence of the courts vis-à-vis the administrative power in matters that had nothing to do with foreign intervention.[35]

Presenting the 'impact of the West' as a superficial, shallow imitation of Western practices is a well-known theme in Orientalist literature on the Ottoman Empire throughout the eighteenth and nineteenth centuries. This convention, shared by both contemporary European and Ottoman observers,[36] found its way into modern scholarly representations of the *Nizamiye* courts, thus creating the impression that the judicial reforms did not make a 'real' impact throughout the nineteenth century beyond the institutional level.[37] It will be demonstrated below that Ottoman legal borrowing was evident in the more elusive yet important aspect of legal culture.

II. THE SELF-PORTRAIT OF THE *NIZAMIYE* LAW: THE *CERIDE-İ MEHAKİM*

In 1873 the Ministry of Justice launched an official periodical titled *Ceride-i Mehakim* (Journal of the Courts) with the objective of assisting

judges, lawyers, prosecutors and clerks in their daily work. Each issue of the *Ceride*, which was printed once a week, and from 1879 twice a week, contained around fifteen pages with accounts of civil and criminal cases originating from courts of first instance and courts of appeal throughout the Empire, and the follow-on decisions issued by the Court of Cassation in Istanbul. These issues also contain circulars and notifications by the Ministry of Justice as well as commentaries written by judges and public prosecutors.[38] The *Ceride-i Mehakim* was an essential resource in the process of standardization. It facilitated orderly communication between the Ministry of Justice, the Grand Vizierate and the subordinate courts. It contributed to uniformity and coherence of practice in the legal system, and helped further the Ministry's reform agenda. To a certain extent, the journal created an imagined professional community composed of the growing socio-professional class that included judges, public prosecutors, attorneys and clerks. The hundreds of legal officials who worked in the courts throughout the Empire did not know each other, but they could proudly imagine themselves as members of a distinguished community. In addition, the *Ceride* served as an authoritative beacon for the judicial officials when applying numerous laws and regulations. It was even used in trials as a legal source.[39]

A comment on the state of the art is in order. Unlike the rich documentation left by the *Shari'a* courts from centuries of Ottoman history, the actual court records produced by the *Nizamiye* courts are hardly accessible at this point. As long as the protocols produced by the lower provincial courts remain inaccessible, the *Ceride* is the best non-prescriptive source on the *Nizamiye* courts, providing the kind of information about praxis that is absent from the laws and regulations. Three studies that came out in Turkish recently drew on raw data from the *Ceride*, illustrating the great potential of this source for social and socio-legal history.[40] Nevertheless, the *Ceride* is treated in these studies as a 'transparent' repository of historical data whereas in fact it should be read also as a discursive field that reveals the ideological agendas of the judicial elite.

Most relevant for the purpose of the present discussion, the *Ceride* was employed by the reformers as a showcase, presenting the law as they wanted it to be and to appear. Not that it did not represent true cases; it very well did. But the lion's share of the case reports reflected disputes that reached the highest tribunals, namely the Court of Cassation in Istanbul. The latter, by definition, promoted the vision of the judicial elite, in particular its belief in the possibility of rational law-making revolving around highly developed procedure. This message was exhibited, above all, in the form of presentation.

At first glance, the reader of the *Ceride* is struck by the neat formulaic uniformity of the case reports, especially after the introduction of the new procedural codes in 1879. While the hundreds of reports differ in length (depending the complexity of the cases), their structure is identical. A typical report of a civil case includes three parts. The first part provides details about the place and type of court that had issued the original judgement, the date at which the judgement had been issued and the names and domiciles of the litigants. If a state authority was a party (for instance, a local municipality, state banks, the Public Debt Administration), the title of the authority was specified too. The typical report also specifies whether or not the plaintiff or the defendant appeared in the Court of Cassation in person, and whether or not the plaintiff responded to the petition. It then concludes with a statement that the court had investigated the petition in accordance with the relevant article in the Code of Civil Procedure, for example:

İsa Beşe-Zade Hacı Mehmet Efendi, from the people of the quarter of Nakaş in Aintab, submitted a cassation appeal against decision number 19 that had been issued by the Aintab court of first instance in 8 Teşrinievvel 1307 [20 October 1891]. The defendants, Mehmet Sami Efendi, who is the son and heir of the deceased Hasirci-zade Ahmet Âğa, and his wife Şakire Kadın from the quarter of Kara, did not come to court on the designated day. The court had conducted its investigations in accordance with article 229 in the Code of Civil Procedure.[41]

The second part of the report, which is usually the longest one, depicts the circumstances of the dispute, the arguments raised in the original trial, and a summary of the decision that had been issued by the court of first instance (*bidayet*). This part characteristically begins with the formulation '[according to] the complete summary of the aforementioned decision' (*ilam-ı mezkürün hulâsa-yı malı*), indicating that it is based on the lower court's formal 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. In all the reports, the Court of Cassation rationalized its rulings by indicating the specific legal articles that had been misinterpreted by the lower court, in case the decision was quashed. The highly formulaic language and structure are evident mainly in the first and last parts of the reports, where the case was presented and concluded. As a rule of thumb, the misapplication of law was cast into the following formulation: 'Although the [lower] court had been required [by the law] to … it failed to do so, therefore its decision is illegal [*yolsuz ve muhalif-i kânun*] and thus quashed in accordance with article 232 in the Code of Civil procedure.'[42]

The effort invested here, consciously or not, in creating an image of rationality and coherence is shared by all modern legal regimes. As has

been demonstrated by Peter Goodrich, the Common Law legal system puts much effort into creating an image of rationality by the texts it produces, by the language it promotes and even by the architecture of its buildings. But the reality experienced in the courtroom is quite different:

> 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 … The visual metaphor of justice as something that must be visible and seen enacted has a striking poignancy in that it well captures the paramount symbolic presence of law as a façade, a drama played out before the eyes of those subject to it.[43]

The form and structure of the *Ceride*, which reflected the *Nizamiye* judicial self-portrait, should be understood against two equally significant backdrops: the French legal tradition and the way it conceived the role of the high court, on the one hand, and the Ottoman judicio-bureaucratic tradition on the other. The structure and laws of the post-Revolutionary French judicial system were a corrective reaction to the de-centralized court system of the *Ancien Régime* and the excessive powers enjoyed by its judges.[44] Preserving the uniformity of the judicial system and ensuring an unconditional application of state legislation was actually the *raison d'être* of the French *Cour de Cassation*. The authority of this high court was limited to reviewing lower judgements for misinterpretation of a substantive statute or a procedural requirement. It was not authorized to rule on the substance of the disputed judgement but, rather, merely to quash it and send it back to be re-addressed by the lower court or, alternatively, to affirm the judgement. Unlike the Common Law system, which is guided by the doctrine of precedent, formally and historically, the *Cour de Cassation*'s rulings were not meant to serve as legal precedents.[45] Ottoman procedural law followed the French model in defining the chief duty of the *Mahkeme-i Temyiz* as being to establish whether or not the judgement under review conformed to the law and the procedural requirements, and in prohibiting the high court from ruling on the essential matter.[46] Ottoman procedure in the Court of Cassation, however, diverged from the French procedure on several subtle points. For instance, once the French *Cour de Cassation* had quashed a judgement, it was required to send the case to a different court at the same judicial level.[47] The Ottoman *Mahkeme-i Temyiz*, however, was expected to send the case back to the court that had issued the original judgement, unless the litigants demanded to have it sent to a different court at the same judicial level.[48]

The discursive style displayed in the *Ceride*'s case reports is remarkably similar to that exhibited in the decisions of the French *Cour de Cassation*. Both generate an illusion of a mechanical process of adjudication involving minimum human interpretation. Lasser's description of the *Cour de Cassation*'s decisions applies perfectly to the discourse presented in the

Ceride's case reports. According to Lasser, the decisions of the French *Cour de Cassation* are brief, never diverging from the standard grammatical and stylistic template. Their univocal style does not reveal anything about alternative perspectives, disagreements among the judges or possible debates during the process of judicial decision-making. The judges are totally depersonalized; the only legitimate voice is the one of 'the court'. The decisions of the French high court rarely include the actual legislative text that supports the judgement's legal grounds. Rather, they indicate the number of the relevant article from the appropriate code, yet another means of creating a sense of mechanical application of the law that is devoid of human interpretation.[49] As already noted, this depiction applies to the *Ceride*'s discourse as well.[50] The civil case reports in the *Ceride* vary in length and may be somewhat longer than the official decisions described by Lasser. Nevertheless, akin to the French discourse, they are totally depersonalized, creating an impression that the law is being mechanically applied rather than interpreted. Perhaps it is needless to say that this impression is a matter of style rather than substance, for in reality all legal decisions, whether in the Common Law, Civil Law or Islamic Law, reflect the interpretation of statues, doctrine and/or custom by judges.

On the whole, the style of the Ottoman case reports is closer to the French discourse than it is to the pre-reform Ottoman judicial discourse exhibited in the *Shari'a* court records, the *sicil*s. The latter neither contain reference to legal sources, nor do they reveal much about the procedural aspects of the cases they represent. At the same time, the *Nizamiye* discourse and the style of the *sicil*s shared few similar features. The rich scholarship on the *sicil* has uncovered the commitment of this genre to systematic legal doctrine and practice in varying degrees across Ottoman time and space.[51] Adherence to formulaic, economical language that says little about conflicts in the courtroom is a typical characteristic of the *sicil* discourse. Hence there is no reason to assume that the Ottoman judges, whether of *Shar'i* or non-*Shar'i* background, perceived the new discourse injected by the Ministry of Justice as alien. The Turkish scholar Ebul'ula Mardin suggested in the 1940s that Cevdet Paşa, who set the *Ceride-i Mehakim* in motion, thought about it in terms of the traditional Ottoman *sakk* literature and perceived it as an integral part of this genre.[52] *Sakk* was the Ottoman version of the Islamic *shurut*, the extensive literature of manuals dealing with registration of judicial affairs. The *sakk* collections, which were written by experienced court personnel and circulated throughout the Empire for centuries, included a wide range of documents produced by the *Shari'a* courts, among them court decisions (*ilam*s), title-deeds (*hüccet*s) and Imperial decrees (*emir*, *firman*). The *sakk* collections

included exemplary cases intended to guide judges in their daily work.[53] Mardin's observation seems fairly reasonable. Though not backed by a specific reference to Cevdet's writing, it reflects the fact that the reformers' ideology and policies were inspired by both Islamic-Ottoman and Continental legal traditions. After all, Cevdet Paşa's greatest achievement, the civil code (the *Mecelle*), was an Islamic text based on the *Shari'a*. Once again, the syncretism and continuity inherent in the practice of legal borrowing is apparent.

When framing the discussion in the thorny terms of legal culture, it is important to stress that almost all aspects of the Ottoman judicial sphere were in a constant state of dynamic transformation throughout the 'long nineteenth century', that is, up until the demise of the Ottoman state. Thus it is a legal culture in the making that we are dealing with rather than a deep-seated one. It is clear that the discourse evident in the *Ceride*, discussed above, reflected the agenda of the reformers and 'the state' in general, to use a somewhat reifying term. Yet evaluations of its impact on those many individuals working in the lower courts at the centre and in the provinces as judges, clerks and prosecutors should be made with caution, given the available historical evidence.

III. STANDARDIZATION AND PROCEDURE AND SOCIAL IMPLICATIONS

Ali Şahbaz Efendi, an Ottoman scholar and lawyer, wrote in the late nineteenth century that, whereas procedure was marginal in the *Shari'a* courts, it had a direct bearing on justice in the *Nizamiye* courts, and that the need to draw up procedural law started with the creation of the *Nizamiye* courts.[54] Şahbaz Efendi's characterization of the role of procedure in the *Shari'a* court as marginal was, perhaps, an overstatement. Yet it did point toward the new emphasis on judicial procedure in the *Nizamiye* system. It appears from the many circulars issued by the Ministry of Justice and published in the *Ceride-i Mehakim* that as far as the officials at the Ministry were concerned, expanding and universalizing procedure was a top priority.[55] The Ministry used to send sample documents to the courts and expected personnel to adhere to the samples in the most pedantic manner.[56] As has been demonstrated by Iris Agmon, court personnel in the provincial *Shari'a* court system implemented instructions from Istanbul in a selective manner, to the extent that the resulting practices were an amalgamation of local practices and new procedure originating from the Imperial centre. It appears that the central authorities allowed some space for deviation from the standard.[57] This state of affairs, which may have been tolerable in the *Shari'a* courts to some degree, was

perceived in the *Nizamiye* realm as a major impediment in realizing the policy of standardization. The circulars sent by the Ministry of Justice to its employees in the *Nizamiye* courts in the centre and in the provinces, and the disciplinary measures taken against those who failed to follow procedure, leave no doubt as to the Ministry's firm intention to standardize procedure throughout the Empire. Not unexpectedly, litigants were the first ones to pay a price for the difficulties experienced by court staff in internalizing the new emphasis on procedural correctness. Presiding judges at the courts of appeal often failed to amend defects in documents sent to the Court of Cassation, which, in return, rejected many petitions for technical reasons.[58]

The Ottoman high court actively enforced the observance of procedure by the lower courts, as the following case demonstrates. On 18 June 1881, the 32-year-old Mehmet bin Halil from the county (*nahiye*) of Eyüb in the province of Sivas, who among other things was the local *müezzin* (the one who calls to prayer) and the neighborhood's night watchman, was prosecuted in the criminal court of the sub-district (*kaza*) on the charge of sexually assaulting Nazire, a 7-year-old female. Following investigation, the court convicted the defendant and sentenced him to three years of penal servitude in accordance with the Criminal Code. Mehmet appealed to the Court of Cassation, contending in his petition that the decision of the court was biased and that the case against him had not been substantiated. The Public Prosecutor (based at the Court of Cassation) stated in his opinion that there was no reason to quash the decision as far as the application of the law was concerned. Yet he made the point that the clerk at the lower court had not followed the procedure of sending the register containing the trial's documents to the Ministry of Justice. The Court of Cassation accepted the position of the Public Prosecutor. It affirmed the judgement issued by the criminal court, but at the same time it subjected the clerk at the lower court to a fine of three Ottoman liras.[59] Thus, the Public Prosecutor revealed a procedural breach, and the Court of Cassation addressed it even though it was not related to the actual case under review.

As a rule of thumb, whenever the Court of Cassation had to choose between procedural and substantive considerations when addressing appellate petitions, it chose the procedural ones.[60] The following case illustrates this tendency, which surfaces in numerous cases. On 5 July 1880, the Court of First Instance in the district of Saruhan in the province of Aydın indicted İbrahim, aged 30, on a charge of sexually assaulting Fatma, the wife of a certain Ali from the same province. İbrahim was sentenced to three years of penal servitude. Artin Efendi, İbrahim's attorney, petitioned to the high court with a request to quash the decision. He resorted to both

substantive and procedural arguments when he maintained in the appellate petition that there were contradictions between the various testimonies, and that the lower court had not followed the swearing-in procedures in an accurate manner. The Court of Cassation decided to quash the decision of the Saruhan court on the grounds that the latter had violated articles 290 and 296 of the Code of Criminal Procedure and had failed to follow the recording procedures. The above articles instructed the judges to withdraw to a conference room after the closure of the deliberations, where they were supposed to review the documents of the trial, including the protocol, and then to vote to indict or acquit. If convicted, a victim had the right to bring a civil suit against the defendant for damages.[61] It is clear that the Court of Cassation ignored the substantive argument made by the appellant (the contradiction between statements) and chose to refer only to the procedural considerations. This tendency to prefer procedural considerations over substantive ones whenever possible is a salient feature characterizing most of the decisions issued by the Court of Cassation and the lower appellate courts. Because we do not know what fraction of the total decisions made by the Court of Cassation was included in the *Ceride*, we may suspect that the editors deliberately included a larger number of procedural cases while under-representing cases which considered substantive issues. Indeed, the fact that litigants insisted on raising substantive arguments throughout the period, as appears from the decisions in the *Ceride*, implies that the court was not indifferent to such arguments. But even when considered as a matter of editorial selection alone, the multiplicity of decisions that attributed much heavier weight to procedural considerations makes it clear that it was deemed by the reformers as the preferred policy.

What was the impact of the emerging *Nizamiye* legal culture, with its glorifying attitude to procedure, on litigants' strategies? In a recent study of the strategies employed by people who were subject to criminal *Nizamiye* interrogations in the Danube province between 1864 and 1868, Milen Petrov demonstrates the extent to which ordinary Ottoman women and men effectively internalized the *Tanzimat* mindset and spoke the 'reform grammar' when dealing with their interrogators.[62]

The interrogation documents and Petrov's interpretation thereof are illuminating, but it is also important to differentiate between the criminal and the civil domains of the legal system. The criminal setting presents one of the most dramatic encounters conceivable between the state and its subjects within an unmistaken matrix of power relations. For the suspect as much as for the witness, performance in the interrogation room was often a matter of actual survival given the fact that this intimidating experience could lead, eventually, to imprisonment (and capital punishment,

in some murder situations). In this extreme setting, it is not entirely clear what the notions of 'resistance' or 'compliance' actually meant, in the context of quite a limited agency in the first place. In the civil court, however, people squabbled over capital, be it money, real estate or land. Even when one of the state authorities appeared in the civil court as a party claiming a debt, it did not enjoy an a priori legal advantage over the individual opponent. To be sure, individuals time and again won their civil cases against state authorities in the *Nizamiye* courts.[63]

In addition to the expansive procedure, what made the *Nizamiye* court system emblematically 'modern' was its regularized appellate system.[64] As already implied, the official language of the Court of Cassation signified that judicial impartiality was contingent on procedural correctness and minimal interpretation. The case reports in the *Ceride* demonstrate that many litigants took advantage of the new judicial opportunities opened up by the *Nizamiye* emphasis on procedural correctness, as illustrated in the following civil case.[65] In July 1899 the Ministry of War brought a civil suit in the Istanbul Court of First Instance – Civil Section against Saide Hanım, the widow of a senior military officer called Hidayet Paşa. The Ministry of War claimed that when the late husband had been serving in Yenişehir's military headquarters, he had sent a telegram to the Treasury asking for 79,900 kuruş to pay for provisions; because the Paşa had not notified the Treasury that he had received the money, it was assumed that he had stolen it. The Ministry also accused the dead Paşa of misappropriating 220 Ottoman lira that had been intended to pay for travel expenses. Therefore, the Ministry asked the court to order the seizure of the Paşa's property in Basra, which had been bequeathed to his widow, to satisfy the debt. Saide Hanım argued in response that her husband had failed to acknowledge receipt of the money because he had been too busy with his work. She stated that there was no evidence suggesting that he had misused the money. As for the travel expenses, she argued that the claimed sums had been paid to the Paşa following a decision made by the Cabinet Council (*Meclis-i Has-ı Vükela*). The Court of First Instance decided in favour of the defendant on both articles.

The Ministry of War appealed to the Istanbul Court of Appeal (*istinaf*), which affirmed the lower court's judgement. The Ministry of War then appealed to the highest instance, the Court of Cassation. The latter concurred with the previous decision regarding the money for provisions, but quashed the rulings concerning the travel expenses on the grounds that the court of appeal had not determined whether or not the expenses were paid in accordance with the regulations. Therefore, the Court of Cassation remanded the case to the Istanbul Court of Appeal. This time, the latter decided in favour of the Ministry of War, and ordered the widow Saide

Hanım to return 220 kuruş to the Treasury. This was not an insignificant sum; around the turn of the century, a monthly salary of 540 kuruş was considered sufficient to support a small family.[66]

The persistent Saide Hanım decided that the judicial battle was not over. At this point, she was the one who appealed to the Court of Cassation. The plaintiff (most probably at the suggestion of her attorney) changed strategy and decided to employ a procedural argument rather than substantive one. She argued that the Istanbul Court of Appeal had unlawfully charged her 400 kuruş in legal expenses even though the second trial took place under the order of the Court of Cassation. This she alleged was a violation of procedure. Minor procedural breach though it was (and completely irrelevant to the actual dispute) the Court of Cassation decided in her favour and quashed the decision of the appellate court altogether on the grounds that the latter had unlawfully charged 400 kuruş legal expenses while it was supposed to charge only 100 kuruş. The outcome of their ruling was that the case returned to the lower court; unfortunately, we do not know how it ended.[67]

The case of Saide Hanım is typical in the sense that hundreds of other decisions issued by the high court reveal that litigants recognized the value of procedural arguments in appellate courts. It is not as typical, however, when considered in socio-economic terms. Appealing a case was a costly business. First, there was the need for legal representation. The fact that professional attorneyship was introduced into the Ottoman judicial sphere at the same time as the increasing legal borrowing and the ensuing crystallization of an obsession with procedural law in the late 1870s is no coincidence. Though the concept of legal representation had existed in Islamic law, the role of the attorney as a profession regulated by the state was a novel idea.[68] The complicated procedural battleground rendered legal representation almost indispensable in the *Nizamiye* courtroom in general, and in the appellate courts in particular, and the costs involved were significant. The state-regulated tariff for 1879, for example, required litigants to pay their lawyers 50 kuruş for the first 150 words in a petition submitted to a court of appeal or to the Court of Cassation, and extra 10 kuruş for any additional 100 words. Each plea in court allowed the attorney to charge his client another 60 kuruş.[69] Secondly, there were the judicial fees. The petitioner had to be able to pay a range of court costs, from fees on initial petitions and notary expenses to fees on the execution of judgements. Those who resided in faraway places and wished to appear in court personally rather than by petition or written response had to bear the heavy costs of the journey to the tribunal. All these amounted to significant sums of money, which meant that appeals were not available to a considerable portion of the population, most notably the poor and

the lower middle classes, who might not be able to afford an expensive course of legal action.[70]

Situations of institutionalized social inequity are not unique to the Ottoman legal system. Martin Shapiro developed the theory that judicial hierarchies that support the appeal procedure are designed above all to promote the political interests of central regimes rather than facilitating individual justice.[71] Equally critical studies of modern legal systems describe modern courts as instruments serving capitalist class domination.[72] Exploring the emerging convergence between the modern state and the bourgeoisie in the Ottoman judicial sphere is an important matter that deserves further systematic research.[73] For the purposes of the present discussion, however, it is sufficient to stress that the new focus on procedural conformity created new judicial opportunities for certain social groups while alienating others.

The question remains, then: where did those who could not afford high fees and pricey legal representation take their cases following the judicial reforms? The syncretic make-up of Ottoman law allowed litigants some space for manoeuvre. Although the 1879 reform set down clear boundaries between the *Nizamiye* and *Shari'a* courts, clearly a certain degree of legal pluralism was apparent, primarily at the level of the lower courts.[74] Many cases that belonged theoretically to the jurisdiction of the *Nizamiye* courts were actually deliberated in the *Shari'a* courts and vice versa, a practice that was not deemed anomalous by *Shari'a* and *Nizamiye* court personnel or higher officials.[75] In other words, litigants performed 'forum shopping' at the lower judicial instance.[76] In fact, the Ottoman legislative body, the Council of State (*Şura-yı Devlet*), implicitly legitimized the elastic nature of the boundary between the *Shari'a* court and the civil *Nizamiye* court.[77] Though the *Shari'a* court system had its own share of reform during the second half of the nineteenth century, it nevertheless upheld two longstanding features of the *Shari'a* court culture, namely an open-door policy, and sensitivity to social justice. Whereas the *Nizamiye* court was designed to try cases in accordance with strict substantive and procedural law, the duty of the *Shari'a* judge traditionally included arbitration guided by social considerations. Whereas the *Nizamiye* modus operandi at the lower court was intended to facilitate potential judicial review at the appellate or cassation levels, the *Shari'a* court maintained its important quality as a forum for resolving socio-legal situations.[78] For litigants who were not able to hire attorneys and who lacked the means for enduring long judicial struggles while living with an unsettled situation, the *Shari'a* judicial forum must have been more appealing, less alienating, compared to the *Nizamiye* one. Preferring a *Shari'a* court over a *Nizamiye* one (when possible) was not merely a matter of socio-economic status.

Interests embedded in local circumstances and social networks, normally hidden from the historian's gaze, surely were at play. Given the present state of research and the available historical evidence, we are bound to make do with indirect indications concerning the preference of litigants with respect to forum

Several historians have identified the elusive nature of the demarcation lines between the civil *Nizamiye* court and the *Shari'a* court during the late nineteenth century. According to common wisdom, this situation, as well as the double role of the *naib* (the *Shari'a* judge who presided in both the *Shari'a* and civil *Nizamiye* courts) derived from a supposedly Ottoman failure to achieve an absolute separation between the so-called 'secular' (*Nizamiye*) and 'religious' courts due to lack of means and manpower.[79] However, it seems to me that explaining this situation in terms of bureaucratic incompetence or failure is problematic. In fact, there is evidence that by 1890 the *Nizamiye* system enjoyed a sufficient number of officials who had passed qualifying exams that enabled them to be regarded as professional *Nizamiye* personnel. Eventually, there were more certified candidates for *Nizamiye* judicial positions than vacant positions. This situation required the Ministry of Justice to instruct the nominating committees to avoid approval of candidates before positions were made available.[80] Yet the official yearbooks (*salname*) demonstrate that the *naib*s' dual-role policy remained unchanged throughout the Hamidian period. It is true that after the close of the Hamidian period (1909), which marked the end of 600 years of *Osmanlı* rule, legal and political transformation started taking new directions that also included a conscious effort to separate between the *Shar'i* and *Nizami* domains. But this was really a new age. The Hamidian reformers, while enthusiastically refashioning the *Nizamiye* court system in accordance with French law, maintained, consciously or not, the time-honoured Ottoman bureaucratic and judicial flexibility. Even though the new codification projects of the nineteenth century presented a model quite different from the venerable combination of *Kanun* (Ottoman sultanic law) and *Shari'a*, the reformers endorsed the notion of indivisible spheres. The boundaries between *Kanun*, *Shari'a* and customary law had always been elusive.[81]

IV. CONCLUSION

In itself, acknowledging the dynamics of legal borrowing in the Ottoman Empire offers limited explanatory value for understanding the sociolegal realities of the late nineteenth century. But acknowledging the worldwide ubiquity of the practice of legal borrowing does allow us to sidestep the usual preoccupation with the notion of 'Westernization', a convention

really, which habitually attracts apologetic statements in the scholarly literature on the modern Middle East. However, there is a more important reason for looking at the *Nizamiye* courts with the concept of legal borrowing in mind. Tracing the foreign origins of the *Nizamiye* court system is imperative for understanding the peculiar features of its judicial culture as well as those shared with other versions of Continental law. To argue that the Ottoman reformed law was a typical case of legal borrowing does not require resort to the simplistic and rather obsolete modernization paradigm that only a complete 'imitation' of Western praxis and worldviews may lead to modernity, or, better yet, initiate modernity in the first place. On the contrary, legal orders shaped by legal borrowing stand out as vivid manifestations of the syncretic, fluid nature of modernity. In addition, they bear witness to the fact that legal change is simultaneously shaped by both local and foreign doctrine and practice. For instance, though the formally limited discretion of the judge was a feature typical of the European Civil Law system[82], in the late nineteenth century some attempts to reduce his judicial leeway were also evident among Ottoman Hanefi jurists.[83]

The Ottoman reformers adopted large parts of French procedure, but they did not stop there. They also embraced wholeheartedly the French judicial formalism of the time and the related *au courant* faith in the power of expansive and strict procedure to facilitate judicial rationality. At the same time, they offered a unique version of the latter in that the civil *Nizamiye* courts adjudicated on the basis of Hanefi substantive law and French-inspired procedural law. Similarly, an ideology of procedural correctness co-existed with a pragmatic attitude to forum shopping. In his textbook on the *Nizamiye* procedure, the Ottoman jurist Ali Şahbaz Efendi argued that before the constitution of the *Nizamiye* courts, the practice of *ijtihad* informed the ideas and judgements that inspired judges. With the new judicial order, so his argument went, the legal article (*madde*) became the single source of adjudication. In the Islamic legal tradition, *ijtihad* describes jurists' original interpretation of the essential religio-legal texts, the Qur'an and the Sunnah. Şahbaz Efendi advised judges to adhere to the legal article and warned them not to perform *ijtihad*.[84] We may read into Şahbaz Efendi's invocation of *ijtihad* two meanings. He referred to the actual Islamic juridical term, yet he also denoted the universal practice of judicial interpretation of legal sources. This is really a lucid illustration of the *Nizamiye* state of mind, which raises the flag of judicial rationality then contradicts it with the 'old' judicial order, yet what it really suggests is a syncretic outcome. Şahbaz Efendi expressed here a key principle in French law, which prohibits judges from interpreting the law.[85] He drew a distinction between the

Nizamiye-Continental law and the *Shari'a* law by contrasting the term *ijtihad* (a central notion in Islamic jurisprudence) to the *madde* (a typically *Nizamiye* term). The word '*madde*', or 'article', was widely used in the *Nizamiye* discourse, often serving as a synonym for the law in general or to criminal charges in the criminal domain. Hence, for Şahbaz Efendi, the fact that the *Mecelle* was basically a *Shari'a* law and that the Code of Civil Procedure contained *Shar'i* elements, was not the point. The point was that only laws issued in the form of articles and legitimized by the state were valid. This is why the argument (discussed earlier) that the *Mecelle* was a change in form rather than in essence is questionable. It fails to capture the symbolic meaning of the article as an embodiment of modernist ideology and the meaning attributed to the legal standard.

The formalist discourse presented in the showcase of the *Nizamiye* court system, the *Ceride-i Mehakim*, was modelled after the French judicial discourse in the context of the Ottoman project of legal borrowing. However, describing Ottoman legal change in the late nineteenth century and the emergence of a new legal culture merely in terms of revolution, or absolute rupture, would be incorrect. Many features that came with the French judicial package were far from alien to the Ottoman judico-bureaucratic world. The relatively smooth Ottoman reception and adaptation of French law should not come as a surprise. The sophisticated bureaucratic tradition that had been a key feature of Ottoman statecraft over the centuries that preceded the nineteenth century allowed the Ottoman judicial staff to absorb new concepts of standardization and systematization without much trouble. In this respect, the judicial changes discussed above, dramatic as they were, meant both rupture and continuity.

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ENDNOTES

1 For general information on the *Nizamiye* courts, see Carter V. Findley, 'Mahkama', *Encyclopaedia of Islam* (2nd edn, Leiden, 1986).

2 See for example Sedat Bingöl, 'Nizamiye Mahkemelerin Kuruluşu ve İşleyisi 1840–1876' (unpublished Ph.D. thesis, Akdeniz University, 1998); Fatmagül Demirel, 'Adliye Nezareti'nin Kuruluşu ve Faaliyetleri (1876–1914) (unpublished Ph.D. thesis, Istanbul University, 2003); Milen V. Petrov, 'Everyday forms of compliance: subaltern commentaries on Ottoman reform, 1864–1868', *Comparative Study of Society and*

History (2004), 730–59; Avi Rubin, 'Ottoman modernity: the *Nizamiye* courts in the late nineteenth century' (unpublished Ph.D. thesis, Harvard University, 2006); Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (New York and London, 2005); and Mehmet Safa Saracoğlu, 'A dialogue in power: local administrative and judicial practices in the county of Vidin 1864–1877' (forthcoming Ph.D. thesis dissertation, Ohio State University).

3 The concept of 'legal culture' was originally introduced by Lawrence Friedman. See Lawrence M. Friedman, 'Legal culture and social development', *Law and Society Review* **4**.1 (1969), 29–44. For a summary of the debate, see David Nelken, 'Using the concept of legal culture', *Australian Journal of Legal Philosophy* **29** (2004), 1–28.

4 Nelken, 'Using the concept'.

5 Lawrence Friedman, 'The concept of legal culture: a reply', in David Nelken ed., *Comparing legal culture* (Brookfield, 1997).

6 Mitchell de S.-O.-l'E. Lasser, 'Judicial (self-) portraits: judicial discourse in the French legal system', *The Yale Law Journal* **104**.6 (1005), 1325–410.

7 On the sociolegal approach, see Roger Cotterrell, 'Subverting orthodoxy, making law central: a view of sociolegal studies', *Journal of Law and Society* **25**.2 (1998), 632–44.

8 On the phenomenon of legal borrowing, or 'legal transplant', see Alan Watson, *The evolution of law* (Baltimore, 1985); Alan Watson, 'Legal transplants and European private law', *Electronic Journal of Comparative Law* **4**.4 (2000); Lawrence Friedman, *The legal system: A social science perspective* (New York, 1975), 195; and Edward M. Wise, 'The transplant of legal patterns', *The American Journal of Comparative Law* **38**, Supplement (1990). Debates over the nature of legal borrowing are often related to the ubiquitous debate on legal autonomy, which is beyond the scope of this article.

9 Colin Imber, *The Ottoman Empire, 1300–1650: the structure of power* (New York, 2002), 247.

10 Peter De Cruz, *A modern approach to comparative law* (Deventer and Boston, 1993), 55.

11 Watson, *The evolution of law*, 94.

12 Rubin, 'Ottoman modernity'.

13 For a comparison of the two codes, see Miller, *Legislating authority*, 54–8. Miller argues that the differences between the French code and the Ottoman code reflect a growing authoritarianism in the Ottoman version of the law.

14 See A. Heidborn, *Manuel de droit public et administrative de l'empire ottoman* (Vienna and Leipzig, 1908), 226, and Findley, 'Mahkama'.

15 Indeed, the legislators explained that the law was meant to solve the confusion caused by the wide-ranging authority of the local administrative councils, which addressed administrative, civil and criminal cases. See Jun Akiba, 'From *kadi* to *naib*: re-organization of the Ottoman Sharia judiciary in the Tanzimat period', in Colin Imber and Keiko Kiyotaki eds., *Frontiers of Ottoman Studies: state, province, and the West* (London, 2005), 43–60.

16 Bingöl, 'Nizamiye Mahkemelerin Kuruluşu ve İşleyişi', 87–101.

17 For an overview of the legislation during the reform period, see Mustafa Şentop, 'Tanzimat Döneminde Kanunlaştırma Faaliyetleri Literatürü', *Türkiye Araştırmaları Literatür Dergisi* **3**.5 (2005), 647–72. On the Ottoman reception of Western law, see Gülnihal Bozkurt, *Batı Hukukunun Türkiye'de Benimsenmesi* (Ankara, 1996).

18 On Cevdet Paşa, see H. Bowen, 'Ahmad Djewdet Pasha', *Encyclopaedia of Islam*, 2nd edn, and Ebul'ula Mardin, *Medeni Hukuk Cephesinden Ahmet Cevdet Paşa* (1st published 1946; reprinted Ankara, 1996).

19 Ahmet Cevdet Paşa, *Ma'aruzat* (Istanbul, 1980).

20 Şerif Mardin, *The genesis of Young Ottoman thought: a study in the modernization of Turkish political thought* (Princeton, 1962).
21 Joseph Schacht, *An introduction to Islamic law* (Oxford, 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).
22 Majid Khadduri and Herbert Liebensky eds., *Law in the Middle East* (Washington DC, 1955), 295–6.
23 This is not to say that *kadi*s enjoyed unlimited leeway in their discretion, as Weber mistakenly assumed. As was demonstrated by Gerber, the *Shar'i* judges had an identifiable pool of sources to which they resorted. See Haim Gerber, *State, society, and law in Islam* (Albany, 1996). Nevertheless, the *Mecelle* forced the judges of the *Nizamiye* courts to bind their rulings to a single legal standard.
24 *İ*bnulemin Mahmut Kemal *İ*nal, *Osmanlı Devrinde son Sadrâzamlar* (Istanbul, 1953), 989.
25 *Düstur* (official Ottoman collection of laws and regulations), First Series (Istanbul, 1879–1908), vol. 4, 260.
26 For a pioneering study of the implication of the procedural reforms in the *Shari'a* courts, see Iris Agmon, 'Recording procedures and legal culture in the late Ottoman Sharia Court of Jaffa, 1865–1890', *Islamic Law and Society* **11** (2004).
27 George Young's translation of the procedural codes is helpful in comparing between the French versions and the Ottoman ones, as he provides the numbers of the corresponding French articles. See George Young, *Corps de droit ottoman; recueil des codes, lois, réglements, ordonnances et actes les plus importants du droit intérieur, et d'études sur le droit coutumier de l'Empire ottoman*, vol. 7 (Oxford, 1905–1906).
28 *Düstur*, First Series, vol. 4, 225–35.
29 Hifzi Veldet Velideoğlu, 'Kanunlaştırma Hareketleri ve Tanzimat', *Tanzimat*, vol. 1 (Istanbul, 1940), 198.
30 *Düstur*, First Series, I, vol. 4, 131–224.
31 Başbakanlık Osmanlı Arşıvı, Istanbul (The Prime Minister's Archive in Istanbul-Ottoman Section; hereafter BOA), *İ*.DH. 740/60556.
32 On the reformed institution of *naib*ship, see Akiba, 'From *kadi* to *naib*'
33 According to Miller, 'the civil sections remained Islamic law courts, and *naib*s, trained in the traditional system, presided over them'. See Miller, *Legislating authority*, 72. The characterization of the civil sections as 'Islamic courts' obscures the syncretic nature of the courts while ignoring the profound impact of (the largely borrowed) procedural law on the judicial process. The civil sections were an integral part of the *Nizamiye* court system in terms of law and administration. The decisions they produced were subject to appeal exclusively in the *Nizamiye* framework and not in the *Shari'a* court system.
34 Küçük Sait Paşa, *Sait Paşa'nın Hatıratı* (Istanbul, 1328 [1912]), 22.
35 For instance, see *Ceride-i Mehakim* (see note 38, below), 2914.
36 See for instance Avi Rubin, 'East, West, Ottomans and Zionists: internalized Orientalism at the turn of the 20th century', in Nedret Kuran-Burçoğlu and Susan Gilson Miller eds., *Representations of the 'Other/s' in the Mediterranean world and their impact on the region* (Istanbul, 2004). A recent excellent microhistory by Şaşmaz exposes the political interests behind Europeans' negative and often ridiculing representations of the *Nizamiye* justice. See Musa Şaşmaz, *Kürt Musa Bey Olayı (1883–1890)* (Istanbul, 2004).
37 See for example Niyazi Berkes, *The development of secularism in Turkey* (Montreal, 1964), 166. One author defines the new laws 'optional'; see Werner F. Menski,

Comparative law in global context: the legal systems of Asia and Africa (Cambridge and New York, 2006), 356.

38 Information about the *Ceride-i Mehakim* (hereafter *CM*) is available in 'Ceride-i Mehakim', *Türkiye Diyanet Vakfi İslam Ansiklopedisi* (Istanbul, 1988), 408–9, and Sedat Bingöl, 'Osmanlı Mahkenelerinde Reform ve Ceride-yi Mahakim'deki Üst Mahkeme Kararları', *Tarih İncelemeleri Dergisi* **20**.1 (2005).

39 In a certain criminal trial, the public prosecutor used the protocol of a previous session that was published in the *Ceride* to question the accuracy of the protocol prepared by the clerk. See *CM*, 2404.

40 See Bingöl, 'Nizamiye Mahkemelerin Kuruluşu ve İşleyisi'; Demirel, 'Adliye Nezareti'nin Kuruluşu ve Faaliyetleri', and Musa Şaşmaz, *Kürt Musa Bey Olayı* (Istanbul, 2004).

41 *CM*, 12,677.

42 For instance, see *CM*, 12,679 and 12,745.

43 Peter Goodrich, *Languages of law: from logics of memory to nomadic masks* (London, 1990), 188.

44 See John P. Dawson, *The oracles of the law* (Ann Arbor, 1968).

45 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**.1 (2002).

46 Code of Civil Procedure, articles 231, 232, 242.

47 Geeroms, 'Comparative law and legal translation', 205.

48 Code of Civil Procedure, article 247.

49 Lasser, 'Judicial (self-) portraits', 1340–3.

50 The *Ceride* includes a few reports of criminal cases that are brought to the reader in the form of a complete protocol or detailed minutes, but these reports form the exception.

51 Dror Ze'evi, 'The use of Ottoman Sharia court records as a source for Middle Eastern social history: a reappraisal', *Islamic Law and Society* **5** (1998), 35–56; see also Gerber, *State, society, and law in Islam*. Ottoman *Shari'a* court records have been studied extensively for more than three decades. But exploration of these courts as social spaces that deserve systematic scholarly attention in their own right is a recent undertaking that has yielded fascinating work. See Leslie Peirce, *Morality tales: law and gender in the Ottoman court of Aintab* (Berkeley and Los Angeles, 2003); Boğaç Ergene, *Local court, provincial society, and justice in the Ottoman Empire: legal practice and dispute resolution in Çankırı and Kastamonu (1652–1744)* (Leiden, 2003); and Iris Agmon, *Family and court: legal culture and Modernity in late Ottoman Palestine* (Syracuse, NY, 2006).

52 Mardin, *Medeni Hukuk Cephesinden Ahmet Cevdet Paşa*, 237–8.

53 See Süleyman Kaya, 'Mahkeme Kayıtların Kılavuzu: Sakk Mecmuaları', *Türkiye Araştırmaları Literatür Dergisi* **3**.5 (2005).

54 Ali Şahbaz Efendi, 'Usul-ı Muhakeme-i Hukukiye', manuscript (1890s), Atatürk Library, Istanbul, 1–2.

55 For instance, see *CM*, 43, 538, 1035, 13,869.

56 For example, see *CM*, 1489, 7051.

57 See Iris Agmon, 'Recording procedures'; Iris Agmon, 'Social biography of a late Ottoman *Shari'a* judge', *New Perspectives on Turkey* **30** (2004), 83–113.

58 Demirel, 'Adliye Nezareti'nin Kuruluşu ve Faaliyetleri', 182.

59 *CM*, 1553.

60 'Substantive law' and 'procedural law' are the two main categories of judicial reasoning. Substantive law refers to rights, duties or causes of action; procedural law prescribes

the procedure and methods for enforcing rights and duties. See *Merriam Webster's dictionary of law* (Springfield, MA, 1996), 386, 478.

61 *CM*, 1420.

62 Milen Petrov, 'Everyday forms of compliance: subaltern commentaries on Ottoman reform, 1864–1868', *Comparative Study of Society and History* (2004), 730–59.

63 Rubin, 'Ottoman modernity', 218–19.

64 As has been demonstrated by Powers, judicial review was not an unknown mechanism in Islamic law. See David S. Powers, 'On judicial review in Islamic law', *Law and Society Review* **26**.2 (1992), 315–41. Yet it obviously lacked the standardized, systematic and hierarchical structure of modern appeal systems.

65 In 1897, 11.9 per cent of all the civil cases addressed by the *Nizamiye* courts reached the appellate instances, the Court of Cassation included. See Tevfik Güran ed., *Osmanlı Devleti'nin İlk İstatistik Yıllığı 1897* (Ankara, 1998), 86.

66 Alan Duben and Cem Behar, Istanbul households: marriage, family and fertility 1880–1940 (Cambridge, 1991), 38.

67 *CM*, 15,202.

68 On legal representation in pre-nineteenth-century Islamic law, see Ronald C. Jennings, 'The office of Vekil (Wakil) in 17th-century Ottoman Sharia courts', *Studia Islamica* **42** (1975), 147–69. On the introduction of professional attorneyship in the Ottoman Empire, see Aylin Özman, 'The portrait of the Ottoman attorney and bar associations: state, secularization and institutionalization of professional Interests', *Der Islam* **77**.2 (2000), 319–37.

69 Young, *Corps de droit ottoman*, vol. 1, 192–3.

70 The following fees paid for proceedings at the Court of Cassation illustrate this point: *CM*, 13,110: 414.5 kuruş; *CM*, 13,364: 611 kuruş; *CM*, 15,138: 393.5 kuruş.

71 See Martin Shapiro, *Courts: a comparative and political analysis* (Chicago, 1981).

72 See for instance Peter Gabel and Jay Feinman, 'Contract law as ideology', in David Kairys ed., *The politics of law: a progressive critique* (New York, 1998); Robert Gordon, 'Critical legal histories', *Stanford Law Review* **36** (1984), 57–125.

73 See Fatma Müge Göçek, *Rise of the bourgeoisie, demise of empire: Ottoman Westernization and social change* (New York and Oxford, 1996).

74 On the concept of legal pluralism, see John Griffith, 'What is legal pluralism?', *Journal of Legal Pluralism* **24**.1 (1996), 1–50; Sally Engle Merry, 'Legal pluralism', *Law and Society Review* **22**.5 (1988), 869–901.

75 See Agmon, *Family and court*, 74, and Rubin, 'Ottoman modernity', 91–125.

76 The term 'forum shopping' describes a litigant's attempt 'to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgement or verdict'; see 'Forum shopping reconsidered', *Harvard Law Review* **103**.7 (1990), 1677–1696 (no author specified).

77 For instance, see Council of State decisions in Young, *Corps de droit ottoman*, vol. 1, 292–3, and BOA, Y.A.RES 92/1. For my interpretation of the latter document, see Rubin, 'Ottoman modernity', 91–125.

78 The role of the *Shari'a* 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. For mechanisms of arbitration in a *Shari'a* court of the seventeenth century, see Peirce, *Morality tales*. For the endurance of the *Shari'a* court's user-friendly attitude and role as facilitator of social justice in late-Ottoman Palestine, see Agmon, *Family and court*.

79 David Kushner, 'The place of the ulema in the Ottoman Empire during the Age of Reform (1839–1918)', *Turcica* **XIX** (1987), 62; Haim Gerber, *Otoman rule in Jerusalem 1890–1914* (Berlin, 1985), 143; Demirel, 'Adliye Nezareti'nin Kuruluşu ve Faaliyetleri',

86–9. The European diplomat and observer Adolf Heidborn was probably the first one to attribute the *naibs*' dominance in the *Nizamiye* civil sections to lack of sufficient *nizami* manpower. See A. Heidborn, *Manuel de droit*, 241.

80 *CM*, 8144.

81 For the amalgamation of *Shari'a* and *Kanun*, see Dror Ze'evi, 'Changes in legal-sexual discourses: sex Crimes in the Ottoman Empire', *Continuity and Change* **16**.2 (2001), 235. See also Peirce, *Morality tales*, 119.

82 See John H. Merryman, 'The French deviation', *The American Journal of Comparative* Law **44**.1 (1996).

83 Murteza Bedir, '*Fikih* to law: secularization through curriculum', *Islamic Law and Society* **11**.3 (2004), 384.

84 Şahbaz Efendi, 'Usul-ı Muhakeme-i Hukukiye', 28.

85 See Merryman, 'The French deviation', 44.