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Evolutionary Secularisation of the Ottoman Law in the Nineteenth Century: Roots and Implications

Miyase Yavuz Altıntaş

Dr. Öğr. Üyesi, Iğdır Üniversitesi (**ROR ID**: 05jstgx72)
İlahiyat Fakültesi İslam Hukuku Anabilim Dalı
Assist. Prof. Dr., Iğdır University, Faculty of Theology
Department of Islamic Law
Iğdır/Turkey
miyase.yavuz.altintas@igdir.edu.tr
ORCID: 0000-0002-5338-3266

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Abstract

In the world history, the nineteenth century witnessed globally major economic, politic, and social changes. More importantly, their implications constitute today's challenges particularly for modern Muslim-majority states where the tension between state, religion and society has not been settled. There is no doubt that looking at the past where the separation between *sharīʿa* and state started clearly to appear serves for a better understanding of today's struggle in locating the role of *sharīʿa* in legal systems of modern Muslim-majority states. Many of them, i.e. the Middle Eastern and some North African states are the successors of the Ottoman Empire. The Ottomans ruled over continents for centuries thanks to their well-established governmental policy and legal system. However, they were also obliged to introduce some remarkable changes in social, political and legal spheres in the nineteenth century. The era is generally called as the process of Ottoman modernization and secularisation referring to *Tanzimat* Edict and following legal reforms. This study seeks to analyse the way Ottoman law has been transformed in the nineteenth century, as well as its roots, challenges and implications. To this end, the paper offers an answer to the questions as to whether secularisation of Ottoman law was evolutionary or revolutionary, why it had to go through a process of secularisation, and to what extent classical Ottoman system could serve this secularisation process. To address these inquiries, the study is divided into two principle sections: the first part evaluates the classical Ottoman legal system and its religious and non-religious characters, arguing that the Turkish state tradition with its influence on government and law making were in fact the changeable features of the Ottoman law.

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The second part examines the process of secularisation of law from the pre-*Tanzimat* period to the end of the Ottoman Empire. This part reveals that secularisation of the Ottoman law was of evolutionary character, and that reforms were introduced thereafter for practical purposes, i.e. meeting contemporary needs and necessities, and not for the sake of philosophical and political considerations. However, these attempts led to a gradual secularisation of the Ottoman law, and further culminated in a revolutionary approach in the republican era.

Keywords
Islamic Law, Ottoman Law, Codification, Tanzimat, 'Urf, 'Urfī Law, Qānūn

Osmanlı Hukukun Ondokuzuncu Yüzyılda Evrimsel Sekülerleşmesi: Kökler ve Etkileri

Öz
Ondokuzuncu yüzyıl dünya tarihinde küresel boyutta esaslı ekonomik, siyasi ve sosyal değişikliklere şahitlik eden bir yüzyıl olmuştur. Daha da önemlisi bu gelişmelerin etkileri günümüzün sorunlarını -özellikle din, devlet ve toplum arasındaki gerilimli ilişkinin devam ettiği modern Müslüman-çoğunluklu ülkeler için- oluşturmaktadır. Gerilimin çıkış noktasını yani geçmişte şeriat ve devlet ayrımının net bir şekilde gözükmeye başladığı dönemi incelemek bugün şeriatın modern Müslüman-çoğunluklu ülkelerin hukuk sistemlerindeki rolünü belirlemede yaşanan sıkıntıları anlamaya şüphesiz katkı sağlayacaktır. Bugün bu ülkelerin birçoğu -Ortadoğu ve bazı Kuzey Afrika ülkeleri olmak üzere- Osmanlı İmparatorluğunun mirasçısı konumundadır. Osmanlı İmparatorluğu sahip olduğu köklü devlet yönetme geleneği ve hukuk sistemi sayesinde asırlarca kıtaları aşan bir alanda hüküm sürmüştür. Fakat ondokuzuncu yüzyılda sosyal, siyasal ve hukuk alanlarında bazı önemli değişikliklere gitmeye gerek duyulmuştur. Nitekim *Tanzimat* Fermanı ve akabinde yapılan reformları işaretle bu süreç genellikle Osmanlı modernleşmesi ve sekülerleşmesinin yaşandığı dönem olarak kabul edilmektedir. Bu çalışma Osmanlı hukukunun ondokuzuncu yüzyılda nasıl bir dönüşüme uğradığını, bu dönüşümün köklerini, süreçte karşılaşılan zorlukları ve etkilerini tahlil etmeyi amaçlamaktadır. Bu doğrultuda, Osmanlı hukukunun sekülerleşmesinin evrimsel bir nitelikte mi yoksa devrimsel bir nitelikte mi olduğu, neden böyle bir sürecin yaşandığı ve klasik Osmanlı hukuk sisteminin bu sürece ne denli katkı sağladığı gibi sorulara cevap aranmaktadır. Bu sorulardan hareketle çalışma iki ana bölüme ayrılmıştır. Çalışmanın ilk kısmı klasik Osmanlı hukuk sistemini, dini ve dini olmayan özelliklerini incelemektedir. Bu kısımda, Türk devlet geleneği ve onun idare ve hukuk sistemi üzerindeki etkilerinin Osmanlı hukukunun değişime açık özelliklerini teşkil ettiği ifade edilmektedir. Çalışmanın ikinci kısmı *Tanzimat* öncesi dönemden başlayarak Osmanlı İmparatorluğunun ortadan kalkışına kadar sekülerleşme sürecini ele almaktadır. Bu bağlamda Osmanlı hukukunda sekülerleşmenin evrimsel bir nitelikte gerçekleştiği ve yapılan reformların teorik ve siyasi bir alt yapıdan uzak olarak o dönemki ihtiyaç ve zorunlulukları karşılamak üzere yapıldığını ortaya koymaktadır. Fakat bu girişimler Osmanlı hukukunun kademeli olarak sekülerleşmesini beraberinde getirmiş, nitekim süreç Cumhuriyet döneminde devrimsel bir yaklaşımın benimsenmesi şeklinde neticelenmiştir.

Anahtar Kelimeler
İslam Hukuku, Osmanlı Hukuku, Kodifikasyon, Tanzimat, Örf, Örfi Hukuk, Kanun

Introduction

Tanzimat (Reorganization) Period (1839-1876) is generally referred to as the beginning of modernization and secularisation in the Ottoman legal system.[1] Legal

[1] There is no doubt that the concept of 'secularisation' is a contentious one. There are various secularisation theories and different studies on the topic in relation to state, society, and religion, thus making

reforms in the *Tanzimat* period, both as an action and as a discourse, served as basis of reform attempts in the legal field until the demise of the Ottoman Empire in 1922. For this reason, scholarly accounts often consider *Tanzimat* to define the period from 1839 to 1922.[2] However, *Tanzimat* Period is not only about the latter attempts, but also about former efforts that facilitated legal reforms. Here, secularisation of Ottoman law may be considered as a 'process' which has its origin in the classical Ottoman legal system, and extends to the early years of the Turkish Republic.[3]

Tanzimat reforms may not be isolated from reformist attempts of previous centuries. On the *Tanzimat* reforms, two important points should be underlined: first, *Tanzimat* was not a novel notion, and that the *Tanzimat* Edict (*ferman,* unilaterally declared by the Sultan) was a continuation of classical *Kanunname* tradition in the Ottoman Empire; second, a few attempts towards legal reform in the reign of the Mahmud II (particularly some economic, administrative and military reforms introduced in his time and in the time of his predecessor Selim III) laid the ground for more comprehensive reforms in the *Tanzimat* period. Moreover, socio-cultural and economic change with the beginning of the 16th century brought along legal reforms in due course, and ultimately resulted in the establishment of the Republic of Turkey.[4]

Legal reforms in the *Tanzimat* period, while being formally introduced in Ottoman legal system, have their origins in the Turkic traditions and customs on government, administration and law-making that have been built and devised over centuries. In this context, *Mecelle* (1876) and Ottoman Law of Family Rights (1917) are

the concept approached by several research fields i.e. politics, sociology, philosophy and religion. This is why a framework on the usage of the concept is a necessity. By refraining itself from any ideological perceptions, with 'secularisation of the Ottoman law' this study basically means removing *sharīʿa* from the center of the Ottoman legal system. –'Modernization' is also rarely used within this context in the study. – In other words, it adopts Wilson's approach defining secularisation as "the process whereby religious thinking, practice and institutions lose social significance". Bryan R. Wilson, *Religion in Secular Society*, ed. by Steve Bruce (UK; Oxford: Oxford University Press, [1966] reissued 2016), 6. Similar, albeit, more detailed explanation on its being decreasing impact of not just religion but also all supernatural doctrines in shaping daily life is provided by Ertit. As he states secularisation is a sociologic concept unlike laicism (Fr. *laïcité*), which is a political concept meaning specifically the relation between state and religion and their separation. Volkan Ertit, *Sekülerleşme Teorisi* (Ankara: Liberte Yayınları, 2019), 47, 86-87. The concept of 'laïcité' is only used to express the Republic of Turkey's ideology within this study. By using 'evolutionary' and 'revolutionary', this study implies the essence of the process by seeking to comprehend how *sharīʿa* lost its previous position in the Ottoman legal thinking, practice and institutions.

2 Ahmet Mumcu, "Tanzimat Döneminde Türk Hukuku", *Adâlet Kitabı*, ed. Halil İnalcık et al. (Ankara: Kadim Yayınları, 2012), 207.

3 Reading legal changes in the late Ottoman by merely looking at *Tanzimat* period causes negligence of the multi-layered structure of the Ottoman legal system and simplification of the process. In many studies, legal changes and secularisation of the Ottoman legal system are considered to be started in the middle of the nineteenth century with adoption of European codes. See, for example, Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, [1964] 1978); Aharon Layish, "The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World", *Die Welt des Islams* 44/1 (2004), 85-113; Herbert J. Liebesny, "Religious Law and Westernization in the Moslem Near East", *The American Journal of Comparative Law* 2 (1953), 492-504.

4 Kemal Karpat, "The Transformation of the Ottoman State, 1789-1908", *International Journal of Middle East Studies* 3/3 (1972), 244.

primary examples to support this argument which remained in effect and use in some Middle Eastern states such as Lebanon, Jordan and Palestine up until recent decades.

To address the main arguments, this study first takes a look at the structure of the Ottoman legal system, and evaluates the foundations of secularisation of law in the 19th century. This part provides a general understanding of the structure of the legal system in the Ottoman Empire that serves as the basis of legal reforms in the *Tanzimat* era. The present study intends not only to provide essential background information but also to comprehend how this legal system has been secularized and how it has evolved from the classical era to the legal reform era. Thus, then, it traces the legal reform process from the pre-*Tanzimat* period to the fall of the Ottoman Empire, and assesses the impact of these reforms. To this end, track of law and legal attempts are examined, and the factors affecting the development and transformation of law are critically evaluated. Based on its findings, the study concludes that the Ottoman legal system was not purely built upon religion, and that some functional secular features also had some impact. Thus, *Tanzimat* reforms in a sense were not completely against the tradition. Yet, they were linked to previous developments in a number of fields, and incrementally influenced secularisation of the Ottoman legal system, being reappeared in a stronger form of secularisation, *laïcité*, in the Republic of Turkey.

1. Bases of the Secularisation Process in the Classical Ottoman Legal System

The present section introduces the secular feature and the base of Ottoman legal system by underlining the co-existence of *shar'ī* law and '*urfī* law, and subsequently explains the Turkic state tradition, citing examples to indicate its influences on Ottoman legal system; and lastly this section evaluates the characters of the Ottoman legal system and their impacts on law reforms in the 19th century.

1.1. Co-existence of the *Shar'ī* Law and the '*Urfī* Law

Islam was the formal religion and the Ḥanafī School of law was the formal *madhhab* of the Ottoman Empire.[5] However, in terms of civil rights, followers of other religions were free to abide by the rules of their respective religion. Additionally, they were able to practice their own law in reference to family matters and succession, and they were free to elect own head of the community.[6] Regarding other sects in Islam, there was not a strict protocol to follow until the 16th century. Application of other sects' opinion in the courts can be seen in some cases. For example, in the 15th century in Bursa, the Ḥanafī *qāḍī* (judge) of Bursa appointed the Shāfi'ī delega-

[5] See for the adoption of Ḥanafī *madhhab* as the official school of law and the formation of the Ottoman legal system between the fifteenth and eighteenth centuries, Guy Burak, *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire* (Cambridge University Press, 2015).

[6] Cevdet Küçük, "Osmanlı İmparatorluğu'nda Millet Sistemi ve Tanzimat", *Tanzimat Değişim Sürecinde Osmanlı İmparatorluğu,* ed. Halil İnalcık-Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2012), 544.

ted judges due to Shāfiʿī opinion was more convenient on a certain legal dispute.[7] Since the 16th century, the Ḥanafī sect was strictly implemented in Anatolia and Rumelia, mostly populated by Ḥanafī followers. In other areas of the empire, however, depending on the sectarian maioritv, the Ottoman Empire appointed a judge according to their sect with a chief Ḥanafī *qāḍī*.

As the formal religion of the state, Islam was the main source of law-making in the Ottoman Empire. Sources of the *sharʿī* law were classical *fiqh* books and *fatwā*s. Technicallv, *fatwā* as an opinion of *muftī* (juristconsult) is not a source of jurisdiction. However, *fatwā* influenced the Ottoman judicial system in two respects. First, if there was a *fatwā* dealing with the case, *qāḍī* (judge) should consider that *fatwā* because otherwise decision could be appealed at the *Dīvān-ı Humāyūn* (imperial council). Second, in some cases, sultan asked *fatwā* from *shaykh al-Islam* (a chief *qāḍī* and *muftī*) on a specific matter and then with the ratification of this *fatwā* by the sultan, it would become the law. In other cases, *shaykh al-Islam* offered *fatwā*s on some issues to the Sultan, and similarly, with the ratification by the Sultan, these would become the laws.[8] A remarkable example of this sort of practice is *Shaykh al-Islam* Ebu's-suūd and his corpus of *fatwā*s, *al-Maʿrūzāt*. Codification of *fatwā*s is a crucial attempt through the legal reforms. Thus, Aydın argues that this practice was pioneer and preparative for *Mecelle* and other codification movements by signaling a transformation in Islamic law from the form of a jurist law to the form of a statutory law.[9]

The *ʿurfī* law coexisted with the *sharʿī* law in the Ottoman Empire, with the *ʿurfī* law being formed by decrees and edicts of the Sultan since initial times of the Empire.[10] However, the *ʿurfī* law was recognized dominant position in the Ottoman legal system by Sultan Mehmed, the Conqueror. Sultan Mehmed utilized the *ʿurfī* law to systematise and build state institutions. He promulgated two important *kanunnames* (code of laws), one about state organisation and the other about administrative, finance and criminal issues. These codes systematized formal journal of law by separating chapters and sections.[11]

Additionally, Sultan Suleyman, the Lawgiver, placed strong emphasis upon the *ʿurfī law*. During his reign, *Shaykh al-Islam* Ebu's-suūd connected the *sharʿī* law to the *ʿurfī* law that served as administrative law of the Empire.[12] To this end, Ottoman cash *waqf* (endowment) could be considered as a controversial example. Ebu's-suūd recognized the legality and legitimacy of the cash *waqf*s because of their acceptance in

7 Mehmet Akif Aydın, *Türk Hukuk Tarihi* (İstanbul: Hars Yayınları, 2007), 97.

8 Aydın, *Türk Hukuk Tarihi,* 102.

9 Aydın, *Türk Hukuk Tarihi*, 102.

10 See for details, Halil İnalcık, "Osmanlı Hukukuna Giriş Örfi-Sultani Hukuk ve Fatih'in Kanunları", *Adâlet Kitabı*, ed. Halil İnalcık et al. (Ankara: Kadim Yayınları, 2012), 79-82.

11 İnalcık, "Osmanlı Hukukuna Giriş", 83-84.

12 Dora Glidewell Nadolski, "Ottoman and Secular Civil Law", *International Journal of Middle East Studies* 8/4 (1977), 520-521. Colin Imber examines how *Shaykh al-Islam* Ebu's-suūd brought *ʿurfī* law into conformity with *sharʿī* law by looking at numerous areas. He particularly links Ebu's-suūd's achievement with his corpus of *fatwā*s. Colin Imber, *Ebu's-suʿud: The Islamic Legal Tradition* (Stanford, California: Stanford University Press, 1997).

the society.[13] Such cases of the *'urfī* law were not considered as opposing to the basics of Islamic law, with reference to the principles of *maṣlaḥa* (public interest), *istiḥsān* (juristic preference) and *siyāsa al-shar'iyya* (regulatory instruments of *sharī'a*) as source of justification.

Initially, there was not clear separation between the *shar'ī* law and the *'urf'ī* law, yet, under common practices, private law matters, regulated in detail by Islamic law such as family law, succession, law of property, law of obligations and commercial law were broadly covered by the *shar'ī* law. However, the *'urfī* law was also implemented on those matters as needed; for example; some *'urfī* regulations were given priority on use and transfer of demesne *(mīrī land)* in the field of law of property and land law.[14] In addition to organisation of state affairs, and many varieties of the *'urfī* taxes for financial gain, criminal law was mostly regulated by the *'urfī* law based on discretionary act of *ulu'l-amr* (those in authority), known as *ta'zīr*. This system was result of a synthesis of old Turkish state tradition and the practices of previous Islamic states such as Umayyad, Abbasid, Seljuk and Mamluk.[15]

In short, Islam was dominant as the source of legitimacy in the Ottoman Empire. Therefore, there was not any inclination to separate religion and state affairs. On the contrary, the principle of *Din-ü-Devlet* (religion and state) indicates that religion and state affairs cannot be separated in the Ottoman Empire. At the same time, this principle also underlines the significance of the idea of 'state' in the Ottoman mentality.[16] Thus, as noted before, *maṣlaḥa* was one of the main explanations for the *'urfī* law practices. According to Aral, state was dominant in relations between religion and state.[17] Hence, 'the interest of the state' was the appearance of *maṣlaḥa* principle.

1.2. Tradition of Turkic State Government

Turkish state administration tradition, associated with Turkic and Iranian states in Central Asia, had also visible impact on Ottoman legal system which can be seen not just on state government practices and state institutions, but also on the understanding of law and justice.[18] Many specific examples might be addressed here regarding the tradition of Turkic state government influence on the Ottoman Empire, but

[13] Halil İnalcık, *Osmanlı'da Devlet, Hukuk, Adalet* (İstanbul: Eren Yayınları, 2005), 40; See for the debate on legality of Ottoman cash *waqf*s, Jon E. Mandaville, "Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire", *International Journal of Middle East Studies* 10/3 (1979), 289-308.

[14] Aydın, *Türk Hukuk Tarihi*, 82.

[15] Aydın, *Türk Hukuk Tarihi*, 82.

[16] İnalcık, *Osmanlı'da Devlet,* 42.

[17] Berdal Aral, "The Idea of Human Rights as Perceived in the Ottoman Empire", *Human Rights Quarterly* 26/2 (2004), 456.

[18] Prominent Turkish historian Halil İnacık especially highlights and shows this point in his various valuable works, such as *Osmanlı'da Devlet*, *Hukuk, Adalet* and "Osmanlı Hukukuna Giriş Örfi-Sultani Hukuk ve Fatih'in Kanunları". The book *Adâlet Kitabı* is also dedicated to reveal Turkic state tradition, understanding of law and justice, and their influence in the Ottoman legal system. The book includes works of different leading scholars alongside İnalcık.

I would like to emphasise two crucial examples, 'circle of justice' and *qānūn,* due to their distinctive influence on Ottoman law.

The term, 'circle of justice' was defined as "No power without troops, no troops without money, no money without prosperity, no prosperity without justice and good administration" by the Ottomans,[19] thus suggesting that justice and good administration is central to the Ottoman mentality. In this approach, non-Islamic elements and some practices contrary to the *shar'ī* law can be observed in the Ottoman implementations. For example, while Islamic law dictates that certain qualifications have to be met in order to become *ulu'l-amr,* the Ottoman practice entailed membership in the Ottoman dynasty was the prime requirement.[20] Another well-known case is fratricide. Murder without lawful base is clearly against the teachings and tenets of Islam[21] but it was practiced by Ottoman sultans to protect the state.

Tradition of *qānūn* was a result of this approach on the state and good administration. The rule legislated by sultan was named *qānūn* and *ḍawābiṭ*. Prominent Ottoman historian Tursun Beg explains the sultan's authority on legislation, stating that sultan's orders for the sake of world order *(nizām-ı ālem)* is called *siyāset-i sultānī* (politic of sultan) and *yasāq-i pādishāhī* (ban of sultan), known as *'urf*.[22] Recognition of the Sultan's authority as law-maker, in other words, refers to executive power. The concept 'world order' *(nizām-ı ālem)* refers to social balance, and highlights the exclusive position of the state, further suggesting that it is a duty for the sultan to legislate rules, in addition to the *shar'ī* law.[23] As İnalcık noted there was *de facto* separation of power and that there was place for civil law alongside the *shar'ī* law.[24] Figures as serving as the authority of executive power were referred to as *ahl al-'urf* (people of '*urf*) in the Ottoman system. The other part of the system included *ahl al-shar* (people of *shar'ī* law).[25] This distinction is important because, through legal reforms, the *ahl al-'urf* gradually dominated the Ottoman legal system, and the association between the *ahl al-'urf* and the *ahl al-shar*, in other words the '*urfī* law and the *shar'ī* law, ultimately resulted in the complete exclusion of the *ahl al-shar* in Turkey.

Kanunnames collocation of decrees and edicts of sultan, were formally drafted in order to ensure the rule of law and introduce rights and duties of people. Regarding the drafting of *kanunname*, supervision and ratification of *shaykh al-Islam* is an important point to underline as it points out the root base of legitimisation in the Ottoman Empire. As the chief religious authority, *shaykh al-Islam*'s control over non-religious rules ensures that they are translated into pieces of Islamic law. Substanti-

[19] Linda T. Darling, *A History of Social Justice and Political Power in the Middle East: the Circle of Justice from Mesopotamia to Globalization* (New York: Routledge, 2013), 2.

[20] Aral, "The Idea of Human Rights", 465.

[21] Qur'ān; al-Isrā' 17/33, al-Nisā' 4/92-93, al-Furqān 25/68.

[22] İnalcık, "Osmanlı Hukukuna Giriş", 74.

[23] Aral, "The Idea of Human Rights", 466.

[24] İnalcık, *Osmanlı'da Devlet,* 41.

[25] İnalcık, "Osmanlı Hukukuna Giriş", 74.

ally, *shaykh al-Islam* was an officer of the state who did not have any powers other than those prescribed by the political authority. This was the way of legitimisation of secular features in the Ottoman legal system. In this process, some *qānūn*s were rejected by *shaykh al-Islam* in some cases. For example, *Shaykh al-Islam* Ebu's-suūd objected to a *qānūn* in capitulation which recognized the testimony of non-Muslims and non-Ottomans, arguing that "there is no decree of sultan on unlawful thing". But on the other hand, in some cases *qānūn*s could be against the *shar'ī* law. For example, there were hard penalties in excess of Islamic boundaries based on authority of *ta'zīr*.[26] This control practice and Islamic legitimisation is an important point to be considered in the analysis of legal reforms. The first serious reform attempt, the *Tanzimat* Edict, emphasised Islam, and the *shar'ī* law in many instances, but İnalcık claims that "clarification of eligibility to the *sharī'a* in the *Tanzimat* Edict was *pro forma* Ottoman traditionalism. In so doing, sultan considered his religious authority as Caliph (a supreme religious and political leader), as well as the piety of the people, and particularly the class of *'ulamā'*".[27] Moreover, the Ottoman constitution of 1876 clearly states that Islam is the religion of state and that the sultan was the Caliph and defender of Islam. This remained the case until the removal of the statement, 'State religion is Islam,' from the 1924 constitution under the amendment made in 1928.

Ottoman legal system was neither purely Islamic nor secular but it represented a functional synthesis between religious and non-religious factors. It can be argued that Ottomans implanted the old Turkic state government practices and ideas in their system, and used them effectively. Between the *'urfī* law and the *shar'ī* law, the question of which one was more dominant or how the *'urfī* practices were included within Islamic framework put aside, the impact of recognition of secular power in rule making and *qānūn* tradition on the late 19th century Ottoman legal thinking cannot be overlooked.

1.3. Islamic or Quasi-Secular State

The Ottoman legal system accommodated multiple aspects that nourishes it for centuries and enables to rule on various regions and countries. Regarding Islamic perspective, existence of *'urf* (custom) as a source of *uṣūl al-fiqh* (Islamic legal methodology) was the main principle for the Ottoman *'urfī* law practices. However, in terms of Islamic legal methodology, the position of the *'urf* is controversial. It is not specified as a separate legal source in the classical *uṣūl al-fiqh* literature.[28] The *'urf* is divided into two types by jurists, i.e. "'*urf* that was prevalent during the time of the Prophet, and the *'urf* that emerged later or that was found to be operative in conque-

[26] Aydın, *Türk Hukuk Tarihi*, 80.

[27] Halil İnalcık, "Sened-i İttifak ve Gülhane Hatt-ı Hümâyûnu", *Tanzimat Değişim Sürecinde Osmanlı İmparatorluğu,* ed. Halil İnalcık-Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2012), 106.

[28] İbrahim Kafi Dönmez, "Örf", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (İstanbul: TDV Yayınları, 2007), 34/89.

red countries".[29] The jurists agreed upon the authority of the first type of *'urf* while the latter was controversial when it contradicted the principles of Islamic law. Therefore, Othman argues that the *'urfī* practices in the Ottoman had no binding force according to Islamic legal theory.[30] In addition, Levy claims that the *'urf* was used as an instrument of the executive power where the *sharīʿa* is theoretically supreme in most of the Muslim world.[31] Thus, it is claimed that the *'urf* appeared as a legal source from 12th century on, and it reached its peak with the *Mecelle*.[32] Yet, Dönmez emphasises that classical jurists consciously did not include the *'urf* as a legal source due to difficulty of technical explanation but it should be noted that the *'urf* is used with *istihsān* (juristic preference) and *istiṣlāḥ* (to deem proper) methods through its relation with *ra'y* (personal opinion), *hājat* (need), *zarūrāt* (essentials) and *maṣlaḥa* considerations.[33] Moreover, rational applications in the scope of the *siyāsa al-shar'iyya* are considered as a form of *ijtihād* (personal reasoning). Apaydin notes that although *ijtihād* practices of sultan and other high level political figures (i.e. *ulu'l-amr*, *amīr al-mu'minīn*, *imām*) are not *sharʿī ijtihād* but they are *'urfī ijtihād,* and that for this reason, they should not be interpreted as secular.[34]

However, contemporary studies on Ottoman law tend to state that there are some secular considerations and aspects in the Ottoman legal system. The main arguments in these studies refer to the domination of the state in its relation with religion, and to the existence of the tradition of *qānūn*s. İnalcık argues that Ottomans developed a legal system beyond *sharīʿa* in consideration of the interest of the state. He argues that the old Turkic state tradition was keystone of the Ottoman system.[35] The most prominent old Turkic state tradition, *qānūn*s of the Ottomans, are considered as secular legislation in many respects by Layish.[36] Moreover, Liebesny claims that "Islamic law never had a truly all-inclusive application in the Islamic countries. Secular legislation had developed, especially in the Ottoman".[37] Rather than thinking *qānūn* and *sharīʿa* as two separate entities, one should remark the interplay between them. Burak's recent work draws attention to reconciliation between dynastic law and Islamic law following the invasions of the Mongols in the region in order to reconstruct socio-political structure in society. He even argues that the Ḥanafī School was reshaped during this process calling the Ottoman period *the Second Formation of Hanafi law*.[38]

[29] Mohammad Zain bin Haji Othman, "Urf as a source of Islamic Law", *Islamic Studies* 20/4 (1981), 345.

[30] Othman, "Urf", 348.

[31] Reuben Levy, *The Social Structure of Islam* (Cambridge: Cambridge University Press, 1965), 258.

[32] Gideon Libson, "On the Development of Custom as a Source of Law in Islamic Law", *Islamic Law and Society* 4/2 (1997), 155.

[33] Dönmez, "Örf", 92.

[34] H. Yunus Apaydn, "Siyaset-i Şer'iyye", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (İstanbul: TDV Yayınları, 2009), 37/301.

[35] İnalcık, "Osmanlı Hukukuna Giriş", 74.

[36] Layish, "The Transformation of the Sharīʿa", 88.

[37] Liebesny, "Religious Law and Westernization", 496.

[38] Burak, *The Second Formation of Islamic Law.*

Another aspect of the Ottoman legal system is that it accommodated legal pluralism and inter-religious peace. Ottoman *Millet* system recognized legal freedom on personal law matters to Christian and Jewish communities, which is considered commendable even in contemporary standards. This system recognized broad liberties to the minorities in the Ottoman Empire regarding their life styles and social and religious customs. Ottoman experience is argued to be more humanistic than many of its contemporaries and that there are significant lessons to present societies from this practice.[39] Moreover, Barkey argues that the Ottoman Empire is an incisive good case against Huntington's 'clash of civilizations' by adducing the *Millet* system. Her remarks suggest that the Ottoman practice of *Millet* system refutes Huntington's work that rests on "the false assumption of the incompatibility of religious units and a false reading of history".[40] In addition, due to their pluralist and tolerant applications, for instance protection and welcome of the Jews of Spain in 1492 in Granada, the Ottomans are seemed to be frankly successful on the issue of human rights protection.[41] Citing the examples above, instead of stating that the Ottoman Empire was an Islamic state, Riedler refers to it as quasi-secular,[42] and Bottoni prefers to define it as "a sort of confusion between theocracy, Caesaro-papism and confessionism"[43]. As a result of these different approaches on the characteristic of the Ottoman system it can be argued that this mixed outlook of Ottoman law and its secular aspects could have made legal reforms acceptable at least in initial attempts. Thus, the *Tanzimat* Edict and legal reforms did not meet serious oppositions. Critical discussion about the way of Ottoman modernization and search for a new methodology to accommodate the *uṣūl al-fiqh* started after the Second Constitutional era, but they did not make difference, and secularisation process reached the peak in republican Turkey.

It is possible to argue that the existence of the '*urfī* law and its effective use, the tradition of *qānūn* and *kanunname,* and the understanding of *siyāsa al-shar'iyya* could be considered facilitating features in the Ottoman legal system for reforms, at least

[39] İhsan Yılmaz, "Diversity, Legal Pluralism and Peaceful Co-Existence in the Ottoman Centuries", *The Ottoman Mosaic: The Preservation of Minority Groups, Religious Tolerance, Governance of Ethnically Diverse Societies,* ed. Kemal Karpat-Yetkin Yildirim (US: CUNE Press, 2010), 97-98.

[40] Karen Barkey, "Islam and Toleration: Studying the Ottoman Imperial Model", *International Journal of Politics, Culture, and Society* 19/1-2 (2005), 17-18.

[41] Aral, "The Idea of Human Rights", 456.

[42] Florian Riedler, *Opposition to the Tanzimat State Conspiracy and Legitimacy in the Ottoman Empire 1859-1878,* (London/UK: SOAS University of London, PhD Thesis, 2003), 13.

[43] Rossella Bottoni, "The Origins of Secularism in Turkey", *Ecclesiastical Law Journal* 9/2 (2007), 177. The term *caesaro-papism* is explained as "part of Weber's political sociology and is used to indicate a distinct kind of rulership, namely that of a secular ruler who has total power over the church. Caesaro-papism entails the complete subordination of priests to secular power, and it essentially means that church matters have become part of political administration". Richard Swedberg, *The Max Weber Dictionary: Key Words and Central Concepts* (Stanford, California: Stanford Social Sciences, 2005), 22. The concept *confessionalism* refers to the system in which "citizens are classed according to religious affiliation or confession. It is equivalent to communitarianism but more focused on the religious foundation of community". John Donohue, "Changing the Lebanese Constitution: A Postmodern History", *Cardozo Law Review* 30 (2008-2009), 2512.

they may be considered as a bridge between classical period and modern period. The main goal in *Tanzimat* reforms was to stop the entire state system from falling down. It should also be noted that the first codifications or other modern attempts were about administrative, militarily or criminal issues. Regarding non-Muslim rights, in the *Millet* system, members of other religions were entitled to a peaceful life and to exercising extensive civil rights recognized by the state. This means that the reorganization, amendment, law making on some particular issues relevant to the state government, to the idea of preserving state interest, and to the principle of recognizing certain rights for the minorities were not unique to the *Tanzimat* period.

As emphasised before, for the sake of legal stability, legal reforms were first introduced to ensure strict adherence to the Ḥanafī School in the 16th century, also leading to the decline of the '*urf'ī* law as a major source of law-making,[44] and coinciding with the retreat of the Ottoman state as a major power. In addition to the social and cultural changes in the continent and their impacts on the Ottoman state and society, the decision to stop employing the '*urfī* law meant a diminished capacity of the Empire to respond to the changing needs of the time. Therefore, it was not surprising to see that Ibn ʿĀbidīn (d.1836), the last classical Ḥanafī jurist in the Ottoman Empire, was the first jurist who called for legal reforms by highlighting '*urf* shortly before the introduction of broad legal reforms.[45]

2. The Secularisation Process of the Ottoman Law

This section examines the Ottoman legal reforms in the 19th century and early 20th century. To better understand the origins of fundamental legal reforms between 1839 and 1922, pre-*Tanzimat* period is briefly analyzed. The term *Tanzimat* reforms, as noted earlier, could be used to refer to the period from the beginning of serious legal reform (1839) to the end (1922). Hence, the *Tanzimat* Edict (*Gülhane Hatt-ı Hümāyunu,* 1839) and subsequent legal attempts were bases for the entire reform period. Nevertheless, this reform period is separated into three periods, pre-*Tanzimat, Tanzimat* (1839-1876) and post-*Tanzimat* (1876-1922), in order to identify the gradual secularisation of the Ottoman legal system.

2.1. Pre-*Tanzimat* Period

Major reforms were introduced in the Ottoman legal system in the 19th and in early 20th centuries, marked by the innovations prescribed in the *Tanzimat* Edict, often cited as the start of modernization, westernisation and secularisation movements in the Empire. However, these movements cannot be isolated from the social, cultural and historical facts, and steps taken in the 17th and 18th centuries. Particular measures have been taken to address major social and economic problems that the

[44] Mehmet Akman, "Örf", *Türkiye Diyanet Vakfi İslâm Ansiklopedisi* (İstanbul: TDV Yayınları, 2007) 34/93.

[45] See Wael B. Hallaq, "A Prelude to Ottoman Reform: Ibn 'Abidin on Custom and Legal Change", *Histories of the Modern Middle East: New Directions*, ed. Israel Gershoni et al. (Boulder & London: Lynnie Rienner PuH, 2002), 37-61.

state organization faced, often in forms of technological advance. More serious and influential attempts were made during the reign of Selim III (1789-1807) and Mahmud II (1808-1839). This period is particularly important in terms of clarifying the relationship between the religion and the state. Selim III was known for his reformist agenda and for his Western orientation that he was portrayed as pro-European by the *ʿulamā*.[46] Amid tensions and objections to his reforms, Selim III was deposed by a *fatwā* of *shaykh al-Islam* subsequent to a major reform attempt by which he decided to abolish the existing army structure and replace it with a new one, known as *Nizām-ı Cedīd* (The New Army). The objection by the clerics had something to do with their tacit alliance with the traditional army, and not with religious considerations.[47] Additionally, the clergy was, in this period, very much corrupted to pay attention to their personal privileges and interests. For instance, a report indicates that *Shaykh al-Islam* Feyzullah Efendi (d. 1115/1703), exercising his influence on the administration, appointed his son Fethullah Efendi an heir to the position of *shaykh al-Islam*.[48] Thus, the disorder and breakdown in the *ʿulamā* class that was seen starting from the second half of the 16th century eventually resulted with *Tarīk-i İlmiyye'ye Dâir Ceza Kānunnamesi* which was promulgated in 1938 by Sultan Mahmud II to prevent corruption, bribery and inappropriate behaviours in the *ʿulamā* class.[49]

Mahmud II mindfully dealt with these powerful groups, abolishing the Janissaries in 1826 and restricting the power of the clergy in a number of fields. It should be recalled, however, that despite bold attempts towards reforms, Islam was always referred to as source of law-making. Sultan Mahmud's reform initiatives also addressed many issues in other areas as well. The abolishment of the Janissaries, cited as *Vak'a-i Hayriyye* (The Auspicious Incident), is considered to be a turning point for the reform movement.[50] In fact, Mahmud II's reforms served as foundations for the *Tanzimat* Edict and subsequent reforms. In this sense, it may be argued that with transformation of the authority of *shaykh al-Islam* into a new department *(Bab-u Meşihat)*, the restriction of influence of *qādī* through introduction new institutions such as municipality and ministries, *ilmiyya* (the clergy) class was replaced by *kalamiyya* class (bureaucrats) in the administration. One incident symbolizes this transition in which Mahmud II tore up a cahier of warning by the

[46] Sina Akşin, "1839'da Osmanlı Ülkesinde İdeolojik Ortam ve Osmanlı Devleti'nin Uluslararası Durumu", *Tanzimat Değişim Sürecinde Osmanlı İmparatorluğu,* ed. Halil İnalcık-Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2012), 141.

[47] Nazım İrem, "Klasik Osmanlı Adalet Rejimi ve 1839 Gülhane Kırılması", *Adâlet Kitabı*, ed. Halil İnalcık et al. (Ankara: Kadim Yayınları, 2012), 292.

[48] Ejder Okumuş, *Türkiye'nin Laikleşme Serüveninde Tanzimat* (İstanbul: İnsan Yayınları, 1999),185. See for Feyzullah Efendi's biography and career path which also sheds light into the tensions and power struggles between the state and the *ʿulamā* class in the 17th and 18th centuries. Michael Nizri, *Ottoman High Politics and the Ulema Household* (New York: Palgrave Macmillan, 2014).

[49] Musa Çadırcı, "Tanzimat'ın İlanı Sıralarında Osmanlı İmparatorluğunda Kadılık Kurumu ve 1838 Tarihli Tarîk-i İlmiyye'ye Dâir Ceza Kânunname'si", *Tarih Araştırmaları Dergisi* 14/25 (1981), 139.

[50] Moshe Ma'oz, *Ottoman Reform in Syria and Palestine 1840-1861: The Impact of the Tanzimat on Politics and Society* (Oxford: Clarendon Press, 1968), 2.

shavkh al-Islam, stressing that they should mind the religious affairs, and that the Sultan has the authority of government.[51]

Sultan Mahmud also established *Meclis-i Vālā-i Ahkām-ı Adlivve* (Supreme Council for Judicial Ordinances) which later served as the source of *Meclis-i Tanzimat* (Assembly of *Tanzimat*) in charge of *Tanzimat* reforms. In addition, through promulgation of two *kanunname*s on penal law, Sultan Mahmud II initiated a process through which property right, freedom of faith and thought and equality were discussed.[52] In other words, Sultan Mahmud's efforts greatly contributed to a transition in the secularisation process, from the *Dīvān-ı Hümāyun* (imperial council) to the general assembly, and from the *qānūn* to the rule of law. In this process, *Sened-i İttifak* (The Bill of Alliance of 1808) with *āyān*s (the landed aristocracy) also should be underlined as it is the first legal mechanism that restricted the Sultan's authority,[53] referred to by some scholars as the "Magna Carta of the Ottomans".[54] Students sent abroad for advanced education during his term also contributed to the process of secularisation as they often became familiar with the Western values and emulated them after returning to their home country. Reşit Pasha, the principal architect of the *Tanzimat* Edict, was one of these students. However Sultan Mahmud's reforms were criticized on the basis that they did not address root causes of the problems, and that they could, at best, be seen a poor response to a very broad issue.[55] However, it would have been extremely difficult to implement the *Tanzimat* reforms without these foundational efforts.

2.2. Tanzimat Period (1839-1876)

Tanzimat period was could be characterized by the infiltration of the western standards and values, not only in legal matters but also in political, administrative, financial, social and cultural fields in the Ottoman state. For this reason, *Tanzimat* period is considered as a keystone for the modernization of Turkey and its transformation into a state of law since crucial steps were taken on the executive, legislative and judicial issues in this period. The promulgation of *Gülhane Hatt-ı Hümāyunu* (*Tanzimat* Edict of 1839), and of *Islahat Fermanı* (Rescript of Reform of 1856), and the establishment of the *Nizāmiye* (regular) courts could be cited as major reform in this particular period towards reformation of the state system.

2.2.1. *Tanzimat* Edict (1839) and Rescript of Reform (1856)

On the 3 November 1839, Mustafa Reşit Pasha recited, and publicized the Imperial Edict in the name of Sultan Abdülmecid (1839-1961) in the *Gülhane* (outer garden

[51] Okumuş, *Türkiye'nin Laikleşme Serüveni,* 211.

[52] Okumuş, *Türkiye'nin Laikleşme Serüveni,* 211.

[53] İnalcık, "Sened-i İttifak", 91.

[54] Stanford Shaw-Ezel Kural Shaw, *History of the Ottoman Empire and Modern Turkey Reform, Revolution and Republic: the Rise of Modern Turkey, 1808-1975* (Cambridge: Cambridge University Press, 1977), 2/3.

[55] Frank Edgar Bailey, "Palmerston ve Osmanlı Reformu (1834-1839)", trans. Yasemin Avcı, *Tanzimat Değişim Sürecinde Osmanlı İmparatorluğu,* ed. Halil İnalcık-Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2012), 313.

of the *Topkapı* Palace), referred to since then as *Gülhane Hatt-ı Hümāyunu* that marked the beginning of a new era (1839-1876), called *Tanzimat-ı Hayriyye* (the Auspicious Reorderings). Considering that Mustafa Reşit Pasha, author of the Edict who also promulgated it, was, as noted above, a student sent abroad for education and that the document was publicized only a few months after Sultan Mahmud died, some scholars argue that it was Sultan Mahmud who drafted the Edict,[56] considered a 'charter'[57] that paved the way towards creation of the first Ottoman Constitution.

The *Tanzimat* starts with a statement specifying that divergence from Islamic principles and law was the root cause of retrogression; and in many instances, the text emphasises that salvation is possible only by turning to precepts of Qur'an and Islamic principles. This reference to Islam and its law could be considered as a sign of "traditionalism" as İnalcık's notes, but it also should be noted that the main concern and aim was to save the Empire from collapse through centralization of the authority without compromising the foundations of Islam.[58] In this sense, *Tanzimat* reforms could be viewed as reformist, and not revolutionist since the idea was not to strip the state and society off Islam. The issues and concerned addressed in the Edict may be summarized as follows:

"These institutions must be principally carried out under three heads, which are:

1. The guarantees insuring to our subjects perfect security for life, honor, and fortune.

2. A regular system of assessing and levying taxes.

3. An equally regular system for the levying of troops and the duration of their service."[59]

Subsequent to the introduction, the text elucidates on the importance the principles through which comprehensive guarantees were extended on the security of life, property and honour, prohibition of *muṣādere* (confiscation), collection of taxes, limitation of military service, expansion of the functions associated with the members of *Meclis-i Vālā* (established by Mahmud II), and preparation of a penal code.

However, because the *Tanzimat* Edict was not strong enough to maintain equality between Muslim and non-Muslim, the administration took a further step and promulgated the *Islahat Fermanı* (Rescript of Reform) on 25 February 1856 as a supplement to the former edict, stating main objective as follows:

> "The guarantees promised on our part by the Hatt-ı Hümayun of Gülhane, and in conformity with the *Tanzimat*, to all the subjects of my Empire, without distinction of classes or of religion, for the security of their persons and property and the preservation of their honour, are today con-

[56] Ahmet Mumcu, "Tanzimat Döneminde Türk Hukuku", *Adâlet Kitabı*, ed. Halil İnalcık et al. (Ankara: Kadim Yayınları, 2012), 207-208.

[57] Yavuz Abadan, "Tanzimat Fermanı'nın Tahlili", *Tanzimat Değişim Sürecinde Osmanlı İmparatorluğu,* ed. Halil İnalcık-Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2012), 71.

[58] İnalcık, "Sened-i İttifak", 92.

[59] Türk Anayasa Hukuku Sitesi, "The Rescript of Gülhane - Gülhane Hatt-ı Hümayunu", trans. unknown, (Access 28 February 2021).

> firmed and consolidated, and efficacious measures shall be taken in order that they may have their full and entire effect."[60]

The text does not make any reference to Islam or Muslim subjects, but the context suggests that the legal guarantees it provides are mostly relevant to the non-Muslim subjects *(dhimmīs)* and to their rights. Establishment of tribunal court and representation in the assemblies, attendance to civil and military schools and recruitment as civil servant are, among others, the most influential rights recognized in the document to the members of non-Muslim communities. As a result, *Islahat* Edict created legal dualism by introducing mixed courts for commercial and criminal issues between Muslims and non-Muslim subjects, or among non-Muslim subjects. It also caused disorder rather than order and peace for both Muslim and *dhimmīs* as it encouraged minorities to fight for political rights as well including independence, autonomy of Lebanon being the first concrete outcome of this tendency.[61] It can be stated that the issue of non-Muslim subjects' rights became one of the triggers and accelerator for the process of Ottoman modernization. Within this context, the first secular citizenship law in the Muslim world, *Osmanlı Tābiiyyet Kanunu* enacted in 1869, can be considered as the final step in introducing equal citizenship rights for the Ottoman subjects regardless of their religion and sects.[62]

A number of attempts towards modernizing institutions and standards have been made in reference to the *Tanzimat* Edict and the Edict of Reform. The first attempt was the codification of legal rules through substantial borrowing from western law, leading to the adoption of new hierarchical court system. Law-making was not alien to the Ottoman tradition but these secular courts were novel, and different from classical single-judge and first instance court system. Therefore, changes in the judicial system could be considered an important and influential step towards the secularisation of the Ottoman law. As the new courts also needed recruitment of new professionals specialized in the new legal system, the whole process resulted in the transformation of the classical Ottoman law from *fiqh* (Islamic jurisprudence) to modern law.

2.2.2. Codifications through Legal Borrowing and Evolution of Legal Institutions

The *Tanzimat* Edict acknowledges the need to enact new laws to stop the decline of the Empire and to make progress in certain fields 'within a few years'. Therefore, codification was the first step towards changing the entire legal system, but this was not the main objective of the edict, which, like its predecessors, was focused on the 'interest of state'. As such, it had nothing revolutionary to offer. However, codifications led to gradual and evolutionary secularism of the system, as characterized by a transition from single judge court to hierarchical courts, from *meclis* (councils) to

[60] Türk Anayasa Hukuku Sitesi, "The Rescript of Reform - Islahat Fermanı", trans. unknown, (Access 28 February 2021).

[61] Küçük, "Millet Sistemi", 551.

[62] İbrahim Serbestoğlu, "Zorunlu Bir Modernleşme Örneği Olarak Osmanlı Tabiiyet Kanunu" *Ankara Üniversitesi Osmanlı Tarihi Araştırma ve Uygulama Merkezi Dergisi* 29 (2011), 205.

parliament, and from *fiqh* to positive law. Because codifications as part of what the edict sought to accomplish were mostly in form of legal borrowing from western countries, particularly France, the term 'justice,' for instance, became "promulgation of secular legislation outside the jurisdiction of the Islamic traditions and autonomous from them in the *Tanzimat* period".[63] In this period, serious and effective role was given to the *Meclis-i Vālā* as legislative council that has been divided and merged a few times under different titles. Ultimately, this *meclis* became source of secular present time Turkey's the most significant institutions, *Danıştay* (Council of state) and *Yargıtay* (Court of appeal). The experience of *Meclis-i Vālā* may be considered as representative for whole secularisation process of the Ottoman law.

The Ottoman Penal Code of 1840 was the first major codification. Even though it was not innovative step because criminal issues were already regulated by the state under the *'urf'ī* law, the penal code combined all existing rules and organised them in a way to form a collection of criminal legal rules.[64] The code was in conformity with the *sharī'a* but also was influenced by the French penal law, the influence of which manifested itself in two major instances that mark divergence from the *sharī'a* law. First, the code reaffirms the equality of all Ottoman subjects before the law, thereby translating the principle of equality as a standard spelled out in the Tanzimat edict into a concrete practice that led to creation of secular criminal courts in 1840s. Second, the Ottoman Commercial Code of 1850, adopted from French commercial code, was, according to Starr, "the first clear example of transplanting European codes to Turkish soil".[65] In the classical time, commercial issues were mostly regulated by *'urf'ī* law, with some commercial concession to foreigners and treaty of commerce. However, it was also in the scope of *shar'ī* law because law of property and law of obligation were discussed in *fiqh* accounts in detail. For this reason, the *'ulamā* class strongly opposed the initial attempts towards promulgation of new commercial code in 1841, arguing that it stepped up the domains of *shar'ī* law.[66] The code included some significant articles against the *shar'ī* law, including one on the recognition of usury.[67] This was an important step in terms of divergence from *shar'ī* law and secularisation. Additionally, the Commercial code of 1850 led to an increased number of secular commercial courts. Before the adoption of the code, there were already councils of commerce under ministry of commerce which were then transformed into mixed commercial courts in 1848.[68] They included 7 Ottoman and 7 alien members, and were founded in urban areas İzmir, Beirut, Salonika and Cairo. This model, however, has become very popular and widespread with an amendment to the code in 1860. These courts are important

[63] June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (New York: State University of New York Press, 1992), 21.

[64] Aydın, *Türk Hukuk Tarihi*, 457.

[65] Starr, *Law as Metaphor,* 29.

[66] Starr, *Law as Metaphor,* 28.

[67] Mumcu, "Tanzimat Döneminde Türk Hukuku", 220.

[68] Aydın, *Türk Hukuk Tarihi*, 452.

because they demonstrate limitation of state authority on the judiciary, as evidenced in their panel compositions.[69]

Subsequent to the commercial code of 1850, the Ottoman Penal Code of 1851 was adopted as a revision of the first code of 1840. The revised version signifies visible departure from *shar'ī* law towards the modern system as evidenced by recognition of public prosecution and the abolition of right of forgiveness to offender in *qiṣāṣ* (retaliation) penalty.[70] In the field of criminal law, the Criminal Code of 1858, compared to the previous codes adopted in 1840 and 1851 which contained provisions incompatible with the *sharī'a* law, makes no room for substantial *sharī'a* commands and also introduces a new court system, called *Nizāmiye* courts, with courts of first instance, courts of appeal, and a court of cassation.[71] It was one of the most remarkable examples of 'legal borrowing' from Napoleonic code of 1810,[72] featuring principles of "There is no crime without a law, and no punishment without a law".[73] Moreover, *Nizāmiye* courts based on French models were significant divergence from old single judge court system. The penal code of 1858 remained in effect with a few changes until the start of the republican era.

As noted earlier, the main concern of the reforms was the salvation of the state. Centralisation of the administration was considered an initial step to accomplish this mission. Therefore, it was not surprising to see adaptation of French model continental law which offers centralisation and hierarchical court system, confirming the argument that the Ottoman reforms were a response to pressure by Western powers and an attempt to keep the state structure from complete failure. In other words, the Ottoman experience was "[l]ike other cases of legal transplantation in the history of the world, the resulting judicial system was an amalgam of local and borrowed law designed to address local needs and structures, and it was certainly not a carbon-copy of the French legal system".[74] Findley remarks that there were some changes in the tradition of Ottoman political thought from the 18th century, and that Ottomans were interested in the French system because of its emphasis upon some concepts such as freedom, equality, centralisation and bureaucratisation.[75]

To this end, it should be noted that the land law of 1858 was only partially inspired by the Western codes and was mainly based upon *kanunnames*, *fatwā*s and imperial

[69] See for an in depth analysis on the Ottoman Commercial Code of 1850, especially in terms of its coexistence with Mecelle, M. Macit Kenanoğlu, *Osmanlı Ticaret Kanunu* (Ankara: Lotus Yayınevi, 2005).

[70] See Mumcu, "Tanzimat Döneminde Türk Hukuku", 222-225; Starr, *Law as Metaphor,* 31-32.

[71] Starr, *Law as Metaphor,* 31.

[72] Avi Rubin, "Legal Borrowing and Its Impact on Ottoman Legal Culture in the Late Nineteenth Century", *Continuity and Change* 22/2 (2007), 282.

[73] Starr, *Law as Metaphor,* 32.

[74] Avi Rubin, "British Perceptions of Ottoman Judicial Reform in the Late Nineteenth Century: Some Preliminary Insights", *Law & Social Inquiry* 37/4 (2012), 992.

[75] Carter V. Findley, "Osmanlı Siyasal Düşüncesinde Devlet ve Hukuk: İnsan Hakları mı, Hukuk Devleti mi?", *Tanzimat Değişim Sürecinde Osmanlı İmparatorluğu,* ed. Halil İnalcık-Mehmet Seyitdanlıoğlu (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2012), 494-495.

decrees. Remaining in effect even in the republican era without any amendments, the law is considered as the first important national law in terms of language, technique and organisation before *Mecelle*.[76] Thus, it is argued to be "a true evolution of Turkish law".[77]

As the above cases suggest, the idea was not to make the state and law secular, but was good organisation and administration of the state, creating a state of confusion that led to inconsistent attempt. For example, it is interesting to see that there were five different types of courts during the *Tanzimat* era. *Şer'iye* courts addressed cases of personal status and pious endowments (*waqf*); courts of communities were dealing personal status issues of communities; consular courts were founded for foreigners; *Nizāmiye* courts covered the criminal, civil and commercial fields; and commercial courts addressed cases involving at least one foreigner or non-Muslim. On the actual start of secular legal system, Starr argues that it was the division of the *Meclis-i Vālā* into a legislative body, Council of state (*Şūrā-yı Devlet*) and a court of appeal (the *Dīvān-ı Ahkām-ı Adliyye*) in 1868.[78] *Dīvān-ı Ahkām-ı Adliyye* was divided into two parts for civil and criminal cases, later its name being changed to *Adliye Nezāreti* (Ministry of Justice). This was the sign of separation of powers and recognition of an independent department of justice. Thus, these gradual changes brought along secularisation of law education. As a concomitant result of developments on the legal system, it was necessary to regulate the legal education through adoption of new codes and particularly establishment of new *Nizāmiye* courts. To this end, *Kavānīn ve Nizāmāt Dershanesi* (training centre of rules and orders) were established in 1870 to teach new codes and principles. When it became evident they fell short to meet the demand, *Mekteb-i Hukūk-i Sultānī* was launched in 1874 as a first law school.[79] This concrete step meant transformation from *fiqh* to positive law education as the republican era jurists who made the system ultra-secular were educated in this modern school.

In contrast to ideological claims, the clergy did not oppose the *Tanzimat* reforms. On the contrary, they did collaborate with the political administration on the promulgation of codes and application of new rules. Even *shaykh al-Islam*s supervised the implementation of the rules, controlling whether or not they were implemented properly.[80] Even in the classical era, the clergy submitted to the political administration, but they were entitled to having a say if something seems wrong. In the decline of the Ottoman Empire, the clergy, like many other compartments within the state, was in decline. As a direct result, they were unable to offer lasting solutions to the prevailing problems in the legal domain.

[76] Aydın, *Türk Hukuk Tarihi*, 458.

[77] Quoted in Starr, *Law as Metaphor,* 30.

[78] Starr, *Law as Metaphor,* 32.

[79] See for the establishment of the first law school, Nuran Koyuncu, "Hukuk Mektebinin Doğuşu", *Gazi Üniversitesi Hukuk Fakültesi Dergisi* 16/3 (2012), 163-186.

[80] Okumuş, *Türkiye'nin Laikleşme Serüveni,* 240-243.

Cevdet Pasha could be cited as a prime exception. In a fierce debate on how to proceed in devising a new civil code, the modernists insisted on the adoption of the French civil code whereas the traditionalists, led by Cevdet Pasha, argued that drafting such a significant legal document should be based on references to the history, tradition and values of the Ottoman society. Cevdet Pasha's view received acceptance, resulting in the codification of *Mecelle-i Ahkām-ı Adliyye* (1869-1876), probably the most prominent attempt since it was an authentic Ottoman Islamic legal code.[81] Moreover, among Ḥanafī School it was doing eclectic selection (*takhayyur*) according to current condition and needs. Its significance does not only derive from its ability of demonstrating collaboration between modern and traditional systems, but also from its outlook as a prominent step in terms of practicing Islam by Ottomans.

2.3. Post-*Tanzimat* Period (1876-1922)

Meşrutiyet I (The First Ottoman Constitutional Era, 1876-1878) covers the period from the promulgation of the *Kānūn-ı Esāsī* (the Ottoman Constitution of 1876) to the abolishment of the parliament activities by Sultan Abdülhamid II on 14 February 1878. The First Ottoman Constitution was promulgated with the efforts of Young Ottomans in a traumatised period due to threats from Russia and European powers which, according to the Ottoman officer, required a thorough legal reform. *Kānūn-ı Esāsī* included 12 sections and 119 articles, and was modelled on the French-Belgian constitution of 1831.[82] The constitution continued to take gradual step over *Tanzimat* reforms towards modernization and indirectly secularisation of the legal system.

A radical effort in the *Tanzimat* period, the secular court system was incorporated into the constitution, with courts being organized by law, appointment of judges for life and no outside interference allowed. Additionally, the Ottoman Parliament was established under the constitution, and composed of two houses, *Meclis-i A'yān* (Chamber of Notables) and *Meclis-i Meb'ūsan* (Chamber of Deputies). *Dīvān-ı Ālī* was also created to deal with cases against members of the states along with the council of state as a high court. Moreover, novel advancements such as freedom of travel, freedom of the press and the security of the mails were introduced for the first time. However, article 113 protected the exclusive right of the Sultan, portrayed as sacred and responsible to no one under the constitution, and entitled to appointment and dismissal of ministries of state, declaration of war and peace, convening and dissolution of parliament and conclusion of treaties. Last but not least, Islam was stated as the official religion of the state, but all subjects were declared Ottomans and equal to each other regardless of their religious identity.

Sultan Abdülhamid II suspended the first Ottoman constitution and closed the parliament in 1878 out of political concerns which had primary relevance to the attempts towards modernization and secularisation in the Ottoman Empire. The

[81] Aydın, *Türk Hukuk Tarihi*, 459.

[82] Starr, *Law as Metaphor*, 36.

Meşrutiyet II (The Second Ottoman Constitutional Era, 1908-1922) commenced with the restoration of the Ottoman Constitution of 1876 by the Young Turk revolution of 1908 and remained in effect until its abolishment by the Sultan on 1 November 1922. During this term where it remained in effect, the most important attempt was the promulgation of the Law of Family Rights in 1917, which codified family law that is considered as "the last bastion or last stronghold" of Islamic law.[83] This was the first time in the Islamic history that family law was codified. However, it should be considered in the context of political, social and cultural circumstances. In other words, the process of secularisation of Ottoman law consisted of practical and required attempts. Therefore, it started with administrative and militarily fields, and was expanded to include other matters, finally covering the Family law.

The first legal document on family law was adopted at the parliament in 1876, focused on the limitation of financial exchange at betrothal between the families.[84] This detailed example was not directly ruled by *shar'ī* law, leading, however, to the promulgation of *Hukūk-ı Āile Kararnāmesi* (Law of Family Rights of 1917).[85] Starr upholds that recognition of principle that "the *sharī'a* courts might be ordered to apply, in all relevant cases, an opinion other than that of the school to which they were traditionally bound" by the Sudanese Mohammedan law courts in 1915 was the groundwork for the revolutionary Ottoman Law of Family Rights.[86] Law of Family rights ensured judicial unity, thus it regulated Jewish and Christian Family law in accordance with their respective legal systems. In respect to Islamic law, it took a step forward from *Mecelle* by adopting the method of choosing the most suitable view among the schools of jurisprudence (*talfīq*). As a direct outcome of this change, certain provisions were adopted on the limitation of male's right to divorce, requirement of judge or deputy to practice repudiation, state procedures and registry for divorce and marriage, right of divorce to wife on grounds of contagious disease or absence or abandoning of husband based on Maliki law, maintenance based on Ḥanbalī law, right of divorce petition on grounds of cruelty to wife, minimum age of marriage 9 for female, 12 for male and right to insert a condition against polygamous right of husband. Law of Family Rights was abolished in 1919 due to reaction of both Muslims and non-Muslims but remained in effect until 1949 in Syria and until 1951 in Jordan, and is considered as a basic family law code for Muslims in Lebanon and Syria.[87]

To complement the reforms in the court system, particularly the *Nizāmiye* courts in the *Tanzimat* period, procedural laws and codes, *Usūl-i Muhākemāt-ı Hukūkiyye Kanunu* (Code of Civil Procedure of 1879) and *Usūl-i Muhākemāt-ı Cezāiyye Kanunu*

[83] Lynn Welchman, *Women and Muslim Family Laws in Arab States A Comparative Overview of Textual Development and Advocacy*, (Amsterdam: Amsterdam University Press, 2007), 11.

[84] Starr, *Law as Metaphor*, 38.

[85] Aydın, *Türk Hukuk Tarihi*, 459-460.

[86] Starr, *Law as Metaphor,* 38.

[87] Judith E. Tucker, "Revisiting Reform: Women and the Ottoman Law of Family Rights, 1917", *The Arab Studies Journal* 4/2 (1996), 4.

(Code of Criminal Procedure of 1879) were promulgated, mostly modelled on the French law. *Mahkeme-i Teşkīlāt Kanunu* (Law of judicial organisation of 1879) was promulgated to fill gaps in judicial system, and new concepts were introduced to the system such as prosecution, enforcement offices, judicial inspectorate, regulation of court fees, new methods of execution, notary office and attorneyship.[88] Moreover, as a step further in the legal education, *Mekteb-i Hukūk-i Şāhāne* (Law Faculty) was opened to train bureaucrats and experts in the law in 1880 and a year after it was combined with *Mekteb-i Hukūk-i Sultānī*.[89]

As stated before, there was not serious opposition by the clergy, except some individual opposition to the *Tanzimat* reforms. Thus, there was not a critical search or a discussion for the new methodology to accommodate Islamic law in the system. Said Halim Paşa revealed the mainstream attitude towards European codes and legal institutions by acknowledging their "mistake" saying "we assumed that translation of the European codes would be sufficient. We imagined that only a few changes would be sufficient for their acceptance and implementation".[90] Intellectual discussions started after *Meşrutiyet* II to justify this modernization of law based on concepts of *uṣūl al-fiqh* (Islamic legal methodology) such as *'urf, ijmā'* (consensus of scholars), *istihsān, ijtihād* (personal reasoning) and their different interpretations.[91] But, it seems that it was too late because the Ottoman Empire collapsed on 1 November 1922, being replaced by the Republic of Turkey in 1923 as an ultra-secular (*laïcité*) state.

Conclusion

Secularisation of Ottoman law is a process spanning across less than one and a half ages (19th and the beginning of the 20th centuries) in terms of substantial attempts. However, there are some crucial features of the Ottoman law that made transition between classic period and reform era. The understanding of old Turkic state and tradition of law making (*qānūn*) were successfully combined with the authority of *ulu'l-amr* and flexible structure of Islamic law in the Ottoman Empire which built an Islamic structure where it effectively used the idea of state interest to make its own rules with reference to some Islamic concepts, *'urf, maṣlaḥa, sedd-i zerāi' and istihsān.* The ideas of state interest and authority to enact were keystones in terms of transition to the reform era. Therefore, new codes were adopted without any serious objection particularly which the *'urfī* law regulated before. On the other

88 Mumcu, "Tanzimat Döneminde Türk Hukuku", 225.

89 Koyuncu, "Hukuk Mektebinin Doğuşu", 176.

90 Said Halim Paşa, *Buhranlarımız ve İçtimai Hayatımız* (İstanbul: Çağdaş Kitap, 2020), 53.

91 See for debates over *ijtihād* and related legal concepts, as well as contemporary approaches emerged after *Tanzimat* and *Meşrutiyet II*, Sami Erdem, *Tanzimat Sonrası Osmanlı Hukuk Düşüncesinde Fıkıh Usûlü Kavramları ve Modern Yaklaşımlar,* (İstanbul: Marmara University, PhD Thesis, 2003); for an examination of the role of the Ottoman *ʿulamā* in the constitutional debates, Yakoob Ahmed, *The Role of the Ottoman Sunni Ulema During the Constitutional Revolution of 1908-1909/1326-1327 and the Ottoman Constitutional Debates*, (Birleşik Krallık; Londra: SOAS University of London, PhD Thesis, 2018).

hand, modernization of the administrative and military bodies already started in the reign of Selim III and Mahmud II. This modernization process with new adopted codes resulted in gradual secularisation of Ottoman law. In other words, it was not intention to break away from Islam but it was to save the Empire from decline through modernization which, however, brought about secularisation as well. The *ʿulamā* class was unable to mitigate what they would certainly consider a threat to the de-Islamization of the legal domain because it was too late when they realized this was happening because power balance was working against them and a new modern bureaucratic class was in power. As a result, secular legal system emerged in the hand of this powerful elite class in Turkey. As seen in the Ottoman reforms, this was a top-down movement, but unlike the Ottoman reforms this was not an evolutionary process; rather, it exhibited some revolutionary elements that undermined the Islamic tradition and the sentiments and priorities of the pious Muslim population of Turkey. For this reason, the debate over the place of Islam in Turkey, and the tension between secularist and Islamist, remained unsettled.

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