MODERNIZATION IN THE LEGAL FIELD DURING THE LATE OTTOMAN ERA AND ITS IMPACT ON THE STATE PERCEPTION OF WOMEN ON THE MARGINS

By

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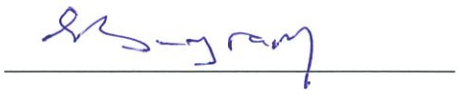

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ABSTRACT

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Büşra Demirkol

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The main aim of this study is to try to understand modernization attempts of the Ottoman Empire during the nineteenth and twentieth centuries through reforms in the legal field and to reveal reforms' effects on the state-society relationship through state perception of the women marginality. Although questioned reforms in the legal field was covering a range of changes from new courts to the constitution of police service, limited scope of the study is restricted to focus on reforms in the penal law. By examining 1840, 1851 and 1858 penal codes, the study aimed to focus on changing state mindset which lies behind the codification activities during the questioned terms. In order to understand how reforms in the legal structure and formal law change the relationship between the state and society, state perception of the women marginality is taken as an epitomic case. In a more detailed way, the questions of abortion, prostitution and incarceration practices of women inmates are taken as specific case studies. At this point this study mainly argues that, while until the nineteenth century the Ottoman sui generis legal structure and culture was recognizing a legal freedom to women marginality in a quite extensive private manner, during the modernization attempts of the empire, legitimately private women marginality was redefined and repositioning within the boundaries of public and subjected to state intervention through reforms in the penal field. In other words, the women marginality and criminality was redefined and constructed through reforms in the legal and especially penal field during the late Ottoman era.

Keywords: Modernization, Tanzimat Era, legal system, the Islamic law, women, criminality.

ÖZET

GEÇ OSMANLI DÖNEMİ BOYUNCA HUKUKİ ALANDA MODERNLEŞME VE BUNUN KADIN MARJİNALLERE DAİR DEVLET ALGISINA ETKİSİ

Büşra Demirkol

Türkiye Çalışmaları Yüksek Lisans Programı, Yüksek Lisans Tezi, Ekim 2017

Tez Danışmanı: Doç. Dr. Selçuk Akşin Somel

Bu çalışmanın temel amacı, Osmanlı Devleti'nin 19 ve 20. yüzyıldaki modernleşme çabasını hukuki reformlar üzerinden ele almak ve bu dönüşümün devlet-toplum ilişkisindeki yansımalarını devletin kadın suçlulara yaklaşımı üzerinden incelemektir. Her ne kadar bahsedilen hukuki reformlar, yeni mahkemelerden polis teşkilatının yapılandırılmasına kadar çok çeşitli alanlarda gerçekleşen şumüllü bir dönüşümü kapsıyor olsa da, bu çalışmanın sınırlı kapasitesi ceza hukuku alanındaki reformlara yoğunlaşmıştır. Özellikle 1840, 1851 ve 1858 kanunları incelenerek dönemin kodifikasyon çalışmalarının ardındaki devletin değişen zihniyetine yoğunlaşılmıştır. Yapısal anlamdaki ve formal hukuktaki bu değişikliklerin pratik alanda devlet ve toplum arasındaki ilişkiyi nasıl dönüştürdüğünü incelemek amacıyla dönemin ceza hukukunun kadınların failleştiği suçlara dair tutumu ele alınmıştır. Vaka çalışmalarının alanları kürtaj, fuhuş ve kadın mahkumların hapsedilme pratikleri olarak sınırlandırılmıştır. Zira kadın marjinalitesi, kadının doğurgan kapasitesi nedeniyle nüfus ve cinsellik tartışmalarının odağında olmuştur. Bu noktada bu çalışmanın temel iddiası, 19. yüzyıla gelene kadar Osmanlı'nın kendine özgü hukuki yapı ve kültüründe oldukça geniş bir mahrem alanda kendisine meşru bir özgürlük tanınmış olan kadın marjinalitesinin, modernleşen devlet zihniyeti tarafından müdahaleci bir biçimde hukuk yoluyla mahremden kamusala geçirilmiş olduğudur. Bir diğer deyişle, ceza hukuku alanındaki reformlar, çeşitli düzenlemeler ve kodifikasyon çalışmaları yoluyla kadın cinselliği, marjinalliği ve suçluluğu yeniden biçimlendirilip kurgulanmıştır.

Anahtar Kelimeler: Modernleşme, Tanzimat Dönemi, hukuk sistemi, İslam hukuku, kadın, suç.

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"Shadowfax. He is the lord of all horses and has been my friend through many dangers."

-Gandalf

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CHAPTER I
Introduction

This thesis aims to examine reforms and transformations in the legal field during the late 19th and early 20th centuries in the Ottoman Empire through case studies of criminalization of certain acts in which women become agents and their penal execution. Although, the change in the legal field was a comprehensive transformation which covered from the creation of a new court system (*nizâmiye*) to a fundamentally new prison system, restricted scope of this study is the legal transformation in the criminal field which consists of various legislation activities, codifications, measurements and regulations. The transformation in the Ottoman state mind itself brought along a different state-society relationship. But how can we understand such an abstract concept of relationship between two huge and intangible notions? I think that is possible to overcome this problem through an examination of changing in criminal law. Since, in the scope of criminal law, one can find both the state's self-positioning and perception and its approach to society. Consequently, reforms in the legal field became a fertile zone in which it can be scrutinized indicators of the changing in the relationship between state and society.

As Avi Rubin states, until recent years, predominant approach to change in the legal field in the Ottoman Empire was based on a limited prescription of Westernization and imitation.[1] However the process of legal change was not as superficial as suggested. By originating an amalgamation of the shar'ia and 'urf, the Ottoman legal culture transformed and embraced modern legal structure in an idiosynratic way. In order to have an appropriate understanding on the nature of this change, it must be understood firstly legal sources of the Ottoman legal thought, their historical development and the inner relationship between their coexistence. In this study, it is argued that one of the main sources of Ottoman law, the shari'a was developed based on a flexible legal culture with independent and autonomous scholars. For this reason, contrarily to the modern state's interventionist legislation role which reshapes the society through its legal tools, the Islamic law was improved in more social and fluid ways by an autonomous judiciary class. However, during its historical development, the independency of Islamic law was jeopardized by growing impacts of political interventions. The Ottoman

[1] Avi Rubin, "Modernity as a Code: The Ottoman Empire and the Global Movement Codification", Journal of the Economic and Social History of the Orient 59, no.5, (2016), 828.

Empire had also an important role in this delicate interaction between policy and law with its highly centralized and well-organized state structure and strong legitimizing point to impact the Islamic law as an Islamic state which conquered nearly all major Muslim lands. Consequently, the process of institutionalization of the shari'a in the empire (especially with appointment of judicial authorities from the center and denomination of Shayk al-Islam as a state official) caused a certain restriction on the sui generis development of Islamic law.

When it comes to the 19th century like the whole state, it's institutions and mindset were changing, the law also received its share. Akarlı, qualifies the changing in the legal field as a radical one, and this radical transformation was not derived only from insufficiency of legal structure towards recent challenges but also the preferred authoritarian way of Ottoman state to deal with these challenges by having the upper hand.[2] Through this new positioning of the state in the legal field, "Law became a tool to shape society rather than a means of balancing interests and maintaining regime legitimately."[3] Since the theoretical approach which embraced by this study is based on insturmentalization of law as a constitutive force, at this point proceeding with it would be meaningful.

In modern states, law constitute an excellent apparatus to control mental frames and classificatory schemes of society. Since, it is vested with the power of naming by being *norma normarum*. As the *norm of norms* and *structuring stucture*, law dominates interpretative procedures and gives the meaning of words, definitions and society's perceptual schemes. In other words, through the exercise of naming, law establishes the distinction between legal vs illegal and became a medium of social construction of criminality. By means of its semantic capacity on production of the definition, law can configure crimes or can criminalize certain acts while tolerating others. Thus, insturmentalization of law to reshape the society is quite reasonable strategy for a state on the verge of modernity as Ottoman Empire.

In the context of Ottoman reformation attempts in legal field, reconfigurations of acts and

[2] Engin Deniz Akarlı, "The Ruler and Law Making in the Ottoman Empire", in *Law and Empire: Ideas, Practices, Actors*, ed. Jeroen Duindam, Jill Harries, Caroline Humfress and Nimrod Hurvitz (Leiden/Boston: Brill, 2013), 89.
[3] Ibid.

crimes were mostly realized through codification activities in the penal field. As an illustration, the 1840 Penal Code was an attempt to discipline and control civil servants and bureaucracy by formalizing the law according to political interests of the term and by inventing new criminal notions as corruption. In the 1851 Penal Code, the state made a self-redefinition through the law launching itself as a social body that the subjects are bounded with a legal bondage. Through this new positioning of the state towards society, it is encountered that a novel understanding in definition and limits of victimhood in related with the abstraction of the state as a social body. In the following codification, a new type of crime, victimless crimes emerged. This definition of "victimless" provided possibility to strengthen political authority of the state through legislation, since in victimless crime cases, the ultimate victim was the state as social body and the guardian of public order. To sum up, by examining of codifications in the penal field, I aimed to revealed firstly, changing nature of the relationship between the state and society in the Ottoman Empire, an empire on the verge of modernity; and secondly state's new approach towards the law was observed through its insturmentalization of law and reconfiguration of crimes during the reform attempts in the legal field.

In order to concretize the subject of changed and gradually modernized nature of the state-society relationship through insturmentalization of law as a tool to construct criminality in the late Ottoman Empire, women on the margins is taken as case study in the scope of this study. The women constitute a "fertile" zone to explore modern interventionist state's legal thought, due to their reproductive capacity and its direct relationship to question of population which turns the borders of the womb to political boundaries.[4] Furthermore, the gendered crimes in which women become agents such as abortion and prostitution under the rubric of fornication, were left to a large extent to certain private zone by the Islamic and statute law until the modernization attempt in the 19th century. However, in the questioned term this legitimately intimate and tolerated acts in the private zone, became subjects of new criminal codifications, legal measurements and regulations. Thus it is argued that, the tolerated gendered crimes until the 19th century, were reconfigured and in this process women on the margins were criminalized by the state and its constitutive tool of production of meaning, the law. Another case in which repositioning of women on the margins between private and public by the reformist mentality of the Ottoman state, was issue of incarceration of marginal women.

[4] Ruth Austin Miller, *The Limits of Bodily Integrity : Abortion, Adultery, and Rape Legislation in Comparative Perspective*, (Ashgate Publishing Company, 2007), 48.

During the late 19th century reform movement in prisons, the state reconfigured the women inmates too. However, the share of women from the Ottoman reformative mentality in prisons, was just a precarious repositioning in limbo between the private and public zone. Since, the incarceration practices for women inmates were deprived from gaining of new prison system, and based on a makeshift solution of renting private houses and entitling them as "women prisons". In the scope of this study, I tried to conceptualize these case studies as examples of modernization Ottoman state-society relationship, because the shifting from being legitimately intimate and private to being illegal and public bear the signature of a modern interventionist state's legal thought.

To conclude, the reforms presented in the 19th century in the legal field, especially in the criminal law, reflect that the Ottoman state was in a transitional way to become a modern state. All changes in the relationship between the state, law and society show that the empire was beginning to redefine itself, and in order to preserve this new self definition it insturmentalized the criminal code to control and discipline its components as well as its bureaucracy. Furthermore, the state embraced an interventionist policy which transform the intimate to political. As illustrated in case studies, crimes and criminals were defined by new reformist approach of the state and it ultimately shows that the question of crime and criminality are socially constructed notions.

Literature Review

As already explained, the subject of this study is modernization in the legal field and its reshaping impacts on the women marginality. As it is seen, rather than being a massive and monolith issue, it is an eclectic and fragmental one. Therefore, it requires a three-step literature research according to different aspects of the subject. Firstly, an essential reading is made in order to gain a general approach to the main sources of Ottoman legal structure. Secondly, I focus on the reforms and changes in the legal structure and more specifically in the penal law. Thirdly, reforms' reshaping impacts on the crime and criminality, especially women marginality were examined through more specific research sources.

In order to introduce principal characteristics of the Ottoman legal structure and culture, this study highly referred to two pioneering historians of Ottoman law, Haim Gerber and Uriel Heyd. Firstly, Gerber's book named Islamic Law and Culture 1600-1840,

constituted not just a principal reading to understand components and structure of the Islamic law but also a theoretical approach to the legal studies. Gerber's work brings in its wake a descriptive and an explanatory narrative of Islamic legal structure with an analytical and theoretical approach to the law itself. It means that he shows us to how state and society relationship can be read through the legal structure of a state and legal culture of a society. In other words, he insturmentalized law as a useful lens to better see and analyze state and society relationship. This study is highly inspired by the theoretical approach to the law in Gerber's work. However, while his theoretical side is much more close to the anthropology, I tried to be in collaboration with more sociological approaches to the law. After shaping an anthropological theoretical framework, Gerber considers the Islamic legal system as a tool to rectify the political system and structure of states. Rather than a descriptive book about the shari'a, Gerber's work provides a highly critical approach about substantial approaches to the Islamic law. According to Gerber, suggestions on Oriental despotism, patriarchal state system, sultanism and lack of bureaucratic structure are quite exaggerated and barely derived from evidences. To illustrate he tries to enlighten the relationship among law, society and the state in the Ottoman Empire by directly examining primary sources. For example, by examining running of the law through kadı records and Şikayet Defterleri, one may catch the nature of the political regime and culture. Furthermore, the place of the written documents in this legal system reflects an existence of structural legalism by providing continuity, predictability and accountability. Even within an amalgamation of various bodies of law, there was not an unpredictable, unreliable and arbitrary legal running as suggested by Weberian inspired authors. Along with the confront of substantial approaches to the shari'a, Gerber's work provides an essential reading in order to understand relationship between different components of the Ottoman legal system and positioning of these elements in a highly centralized governmental body.

After gaining a general approach to Islamic law and its positioning in the Ottoman Empire, in order to have a more specific view about Ottoman penal law, Uriel Heyd's work Studies in Old Ottoman Criminal Law is read as a principal reference book. This provides a substantial reading to understand the development of Ottoman criminal law from the classical age to the early modernity. In the book one can find original text and English translation of the criminal code of the Sultan Süleyman the Magnificent. Furthermore, the Dulkadir Criminal Law is presented and examined as a separate chapter. Since the focus of this thesis is on criminality, Heyd's book is quite essential to

understand Ottoman criminal justice, the positioning of the legal components as the shari'a, kanun and 'urf in this system and the management of tension between them. Besides presenting legal structure with a special focus on criminal law, the book is quite component to gain knowledge about the practical application of criminal justice, trial procedures and ways of punishments.

While Heyd's book provides essential readings about Ottoman penal law until the last criminal code before the Tanzimat era, for penal codification during this reformative period of time, this study takes advantage of Ruth Austin Miller's meritorious work named Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey. Although the name does not provide any detail about which periods of the empire is examined, it starts from the Tanzimat era to the early modern Turkey. In this book one can find quite detailed analysis about three important penal codifications in 1840, 1851 and 1858. On the further side of elaborate analysis of primary sources of penal codes, the originality of Miller's work is about her approach to the modern codification activities as a way of strengthen control of state power over the society by means of law. Because as Avi Rubin states, until recent years, predominant approach to change in the legal field in the Ottoman Empire was based on a limited prescription of Westernization and imitation, however Miller's work goes beyond this restricted approach by presenting a critical and deeper approach to essential points in the mentality of legislating in itself. Her book is in fact an evaluated version of her doctorate thesis named From Fiqh to Fascism, as can be seen from the name, her main point is about the changing nature of the law. According to Miller, during the 19th century in the Ottoman Empire, the law was focusing on the protection of the state and the bureaucracy rather than society or individual. According to Miller, especially in questioned penal codifications, the amount of crimes against the state or political crimes was strongly predominating crimes against individuals. Furthermore, the state was re-positioning itself in the criminal justice as a victim with an intention to extend the limits of crimes and their respective penalties in order to strengthen political authority of the state through legislation. Thus, criminal justice becomes more and more concerned with the state and its protection during the Tanzimat era. At first glance, one may think that Miller's work's focus on the political mentality of legislation is not quite relevant to this thesis's focus on the state perception of women marginality. However, it is highly stimulating book for this study by revealing how political interests of the state could insturmentalize the penal code and could redefine the limits of public and private in order to strengthen its power over the society through women marginality.

CHAPTER II

A Theoretical Approach to the Relationship Between Law, Policy and Modernization

As Avi Rubin argues, 19th century codification activities can be interpreted as an indicator of the passage to modernity.[5] Thus in order to understand the legislation's meanings and position in this passage, first it must be understood, what modernity and the modern state represents. This chapter aimed firstly to clarify what are the essential elements of modernity as a way of thought and secondly its impacts on the concept of state and law.

2.1. Law as a Constitutive Force in a State on the Verge of Modernity

According to Anthony Giddens, to adequately attempt to understand the nature of modernity, it must be comprehended that the nature of discontinuities from traditional cultures, initiated by the new dynamism of modern institutions.[6] This point of departure is specifically insightful for the scope of Ottoman legal development, since the relationship between the shari'a and the statute law was in a deep flux by means of 19th century legislation and codification activities. For Giddens, the underlying features of the dynamism of modern institutions derives from the separation of time and space—the disembedding of social systems and the reflexive ordering and reordering of social relations, which effects the actions of individuals and groups.[7] The relation between modernity and time and space is based on this de-linking of time from space. While in pre-modern agrarian societies, time was perceived as an extension of space and spatial agrarian activity, with the invention of the mechanical clock, it became a separate notion. After this de-linking, the connections between social activity and its embedding place were also separated[8]. It brings us to the notion of "disembedding" which means "lifting out of social relations from local contexts of interaction and their restructuring across indefinite spans of time-space."[9] At this point, two types of disembedding mechanisms were decisive for the development of modern social institutions: symbolic tokens and expert systems. Symbolic tokens were medias, which were passed around independently from any

[5] Avi Rubin, "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification", *Journal of the Economic and Social History of the* Orient 59, no. 5 (2016), 837.
[6] Anthony Giddens, *The Consequences of Modernity*, (John Wiley & Sons, 2013), 16.
[7] Ibid, 17.
[8] Ibid, 20.
[9] Ibid, 21.

individuals or groups.[10] For example, a media of political legitimacy is a kind symbolic token, which allows the exercise of certain political power by a centralized state. Secondly, "expert systems" means "the ubiquitous presence of professionals."[11] Although even pre-modern societies had the concept of expertise, it was in the context of modernity that expertise became professionalization under a standardized and institutional authority. For example, in the Islamic legal context, it is certain that the fuquha were genuine legal experts, however, they "never became a comprehensive and continuous system of expertise based on the claim for an exclusive and homogenous set of standards regardless of local circumstances and legal arrangements."[12] In this study, it is argued that these constitutive features of modern thought were mobilized in the Ottoman Empire during the 19th century. And there was an effort to exercise central political power through the insturmentalization of legislation. Because, as shown in chapter three, legislation activities, especially penal codification, mainly aimed to discipline and control state officials whose gifted by symbolic tokens of the central state authority. It can be said that disembedded social practices of Ottoman society in the 19th century were redefined and re-regulated through new legislations, and in this redefinition and regulation process of certain social practices, the reflexivity of modernity can be traced. For Giddens, "The reflexivity of modern social life consists in the fact that social practices are constantly examined and reformed in the light of incoming information about those very practices, thus constitutively altering their character."[13] As an illustration from the scope of this study, certain gendered criminal acts in which women become agents such as abortion and prostitution will be taken as case studies. The main argument is that, although these two gendered acts were subjected to criminality, in fact they were left in a certain private zone of individuals until the 19th century modernization attempts in the legal field. The shar'i and *kanunî* approaches until the 19th century and after the 19th century to these criminal acts will be compared for revealing the Ottoman state's change in positioning towards these crimes.
Inevitably, along with the criminalization of certain gender acts, changing approach to the penal execution of women during the late 19th and early 20th centuries will be traced. To clarify and sum up the intersection between theoretical approach and case studies it can be said that, abortion, prostitution and imprisonment of women were re-examined and reformed in light of new information and ways of thoughts of reform-minded governmental elites

[10] Ibid, 22.
[11] Avi Rubin, "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification", *Journal of the Economic and Social History of the* Orient 59, no. 5 (2016), 838.
[12] Ibid.
[13] Anthony Giddens, *The Consequences of Modernity*, (John Wiley & Sons, 2013), 38.

during the late 19th and early 20th centuries. Thereby, they were re-regulated and controlled by a new legislative approach, which disembedded and redefined the *kanunî* and shar'i origins of their regulation.

Now first of all, this study will consider modernity in the scope of the constitutional frameworks of the state. As all socio-political entities, the concept of state is not an extant *(zatı ile kâim)* but made and built. Thus, each state's self-definition is incessantly being altered according to changes in a myriad of conditions in military, economy, demography or internal and external policy.[14] But "the modern state appears as an artificial, engineered institutional complex" rather than any other type of state in the history.[15] Thus, the states of the 18th and 19th centuries fed themselves with an act of will and deliberation, which was reflected even in explicit enactments. The abundance of significant enactments in the Ottoman Empire during the 19th century, such as The Imperial Edict of Gülhane and the Royal Edict of Reform, can be interpreted under the scope of the characteristic of the modern state suggested by Poggi. Another feature of the modern state is that of being engineered. "The state is designed, and is intended to operate, as a machine whose parts all mesh, a machine propelled by energy and directed by information flowing from a single center in the service of a plurality of coordinated tasks."[16] This metaphor tells that administrative and legislative reforms were used to monopolize power in a central state authority. Under this umbrella, the legislative activities, which mainly focus on controlling state officials in the empire, can be considered as an effort to create a solid and monopolized state machine.

When it comes to the novelty initiated with regards to the state-society relationship by this modern political thought, it can be said that neither state nor society is perceived as a massive and homogeneous entity. The modern state "addresses individuals in their differentiated, abstract capacity as citizens."[17] And consequently, "by his will or otherwise the individual finds himself implicated in the state with vitally significant levels of his whole being…… The state organization reaches deep into the personal existence of man, forms his being."[18] It is argued that these descriptions plainly depict the focus of this study on the new kind of state

[14] Gianfranco Poggi, *The Development of The Modern State: A Sociological Introduction*, (Stanford University Press, 1978), 88.
[15] Ibid, 95.
[16] Ibid, 98.
[17] Ibid, 97.
[18] Hermann Heller, *Staatslehre*, cited by Gianfranco Poggi, *The Development of The Modern State: A Sociological Introduction*, (Stanford University Press, 1978), 99.

control on abortion by criminalizing it and on prostitution by medicalizing it during 19th century Ottoman Empire.

In order to better understand why the legal field had a such significant place in the Ottoman reform movement, and to gain a better analytical view of the recently questioned state, law and society relationship, one must understand modern interventionist law which vested with a significant constitutive force over society. Here, Pierre Bourdieu's sociological understanding of law will provide a useful theoretical approach. Bourdieu's contribution to the sociology of law and legal thought is closely connected with his theory of domination and symbolic violence. As a distinctive feature of the modern state, he talks about the changing nature of violence. While one of the most efficient thinkers on the nature of the modern state, Max Weber explains the state as a "human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory"[19], Bourdieu claims that there was a change in the nature of domination. It was much more about the complex and latent execution of symbolic violence rather than the practice of a brutal and physical violence.
More precisely, the possession of the monopoly of legitimate physical violence was now clinched with the articulation and execution of symbolic violence. In the simplest and broadest sense, symbolic violence is production of a process of concentration of certain tools[20] in the hand of the state[21] which are vested with to control "classificatory schemes, mental structures, the perceptual schemata, definitions of the situation and interpretive procedures".[22] There are evidently certain common mental frames that society agreed to in a general way. However, disputes and struggles about these frames are also as real as the existence of common ways of thinking. At this point, it is the state who has the ultimate force of adjudication about disputes by using its legal and legislative power. Thereby, the law is an excellent configuration of symbolic violence and power, and in this way, it gains social significance over society. Because "Law provides its own foundation, that is based on a

[19] Max Weber, "Politics As Vocation", in the *From Max Weber: Essays in Sociology*, ed. H.H. Gerth and C. Wright Mills, (New York: Oxford University Press, 1946), 11.
[20] For example, for Bourdieu the school and educational system constitutes one these control mechanisms. For further information see, Pierre Bourdieu, *The Inheritors: Students and Their Relations to Culture*, University of Chicago Press 1979.
[21] Pierre Bourdieu, "Rethinking the State: Genesis and Stcructure of the Bureaucratic Field", *Sociological Theory* 12, no.1, (1994), 4.
[22] Pierre Bourdieu and Loïc J.D. Wacquant, *An Invantion to Reflexive Sociology*, (The University of Chicago, 1992), 12-14.

fundamental norm, a 'norm of norms' …. from which all lower ranked norms are in turn deduced."[23]

Bourdieu explains this qualification of *norma normarum* with the power of naming. As an illustration, a trial is an organization of a showdown between oppositional sides. The disputes can only be resolved with the judgement of a legal authority, which symbolizes the "monopoly of the power to impose a universally recognized principle of knowledge of the social world, a principle of legitimized distribution."[24] A further sentence explains the articulation of the monopoly of symbolic violence, which was represented by the ultimate power of naming the monopoly of legitimate violence;

"…. judicial power, through judgments accompanied by penalties that can include acts of physical constraint such as the taking of life, liberty, or property, demonstrates the special point of view, transcending individual perspectives—the sovereign vision of the State. For the State alone holds the monopoly of legitimized symbolic violence."[25]

In other words, through the exercise of naming, the law establishes distinctions and classifications such as legal vs illegal or just vs unjust. In this way, the legal field gains a special importance by producing, and at the same time practicing, the concept of symbolic violence of the state. It represents "the quintessential form of authorized, public, official speech which is spoken in the name of and to everyone."[26]

Moreover, the concept of symbolic power constitutes a differentiation point, which takes Bourdieu's thoughts on the state a step further than old, materialistic theories of the state as an apparatus to control the military force, the police power and institutions of discipline and punishment, like schools and prisons. This is because he analyses the state through its capacity to form and dictate mental categories, schémas of vision and division. In this mental formation activity, law is a crucial field and the apparatus of reproduction, the definition and execution of meanings, "is a bastion of symbolic violence that allows the reproduction of the structure of social domination and the perception of the legitimacy of that process."[27]

[23] Pierre Bourdieu, "The Force of Law: Toward A Sociology of the Juridical Field", *Hastings L.J.* 38 (1986), 819.
[24] Ibid, 837.
[25] Ibid, 838.
[26] Ibid.
[27] Mauricio García Villegas, "On Pierre Bourdieu's Legal Thought." *Droit et société* 1 (2004), 66.

According to Bourdieu, during periods of crisis, "the will to transform the world by transforming the words for naming it"[28] reveals itself more definitely than at any other time. However, in order to achieve its goal, this effort to reform schémas of perceptions and divisions strictly depends on one condition—it has to conform with the historical background while "announcing what is in the process of developing."[29] So, the symbolic power of naming does not have a magical or prophetic talent to make a revolutionary admission in society, but has a decisive capacity and role to legitimize and naturalize newly burgeoning principles of vision and divisions in the immanent historical power.[30] The concretization of the symbolic power of naming, its decisive nature on the objective structures of the social world, is summarized by the author as such:

"The judgments by which law distributes differing amounts of different kinds of capital to the different actors (or institutions) in society conclude, or at least limit, struggle, exchange, or negotiation concerning the qualities of individuals or groups, concerning the membership of individuals within groups, concerning the correct attribution of names (whether proper or common) and titles, concerning union or separation—in short, concerning the entire practical activity of 'world making' (marriages, divorces, substitutions, associations, dissolutions) which constitutes social units."[31]

While supposing that the law creates the social world in some way, Bourdieu tries to be cautious by reminding that this "world making" is a reciprocal process, meaning the law is also a constructed institution by socio-historical conditions.[32] Here, his famous and complex expression of *structured structures* comes to our rescue. This concept obviously elucidates that a broader socio-historical process produces societies' schémas of perception and judgement, which are reciprocally efficient elements to construct the social world.[33]

To conclude, the law is a *structuring structure* that has a privileged form of the symbolic power of naming to contribute to the construction of the world by submitting principles of vision and division, but at the same time it is a *structured structure* which emerged as a production of socio-historical conditions. In the same fashion, this study tried to embrace the dual understanding of law, thereby the Ottoman legal developments from the 19th century is

[28] Pierre Bourdieu, "The Force of Law: Toward A Sociology of the Juridical Field", *Hastings L.J.* 38 (1986), 839.
[29] Ibid, 840.
[30] Ibid.
[31] Ibid, 838.
[32] Ibid, 839.
[33] Ibid.

examined as a *structured structure.* In order to understand its construction as a structured entity in its historical conditions, the sources (the shari'a and the urf) and the relationship between these sources during the second and third chapters are scrunitized. And second side of this duality, law as a *structuring structure* is examined through its constitutive force on two gendered acts, their criminalization patterns and imprisonment practices towards women criminal agents.

CHAPTER III

Components of Ottoman Law and Legal Thought

3.1. General Approach to the Islamic Law Through An Historical Skecth

Since one of the sources that Ottoman law was substantially based on was the shari'a, any attempt to analyze it must touch on the general aspects of Islamic law. Therefore, this chapter will try to propose an overview of Islamic law. In order to understand the foundations and dynamics of the sharia, one should have a historical sketch of Arabian society, which was the first and formative community of Islam and Islamic law. During pre-Islamic times, legal thought and institutions in the Arabian Peninsula were founded mainly upon two sources: first, the customary law, which was highly inspired by complex commercial relations in Mecca and Medina and second, a source of law that was derived from ancient Arabian tribal law emphasizing the tribes' secularity and values. Although these two sources constituted a rough outline for legal issues, there was not a systematized judicial system due to the lack of central authority. In this pre-Islamic society, Muhammad had a certain personal authority even before the declaration of his prophethood, when he was known as Muhammad'ul-Amin. Arabian tribal leaders trusted him as an arbiter in conflicts and disputes. After the declaration of his prophethood, naturally he gained much more authority than a regular arbitrator and "became a ruler and lawgiver of a new society on a religious basis." His main concern was not to change customary law or make a legal revolution but to guide society according to the new religious and ethical standards of Islam.

According to Schacht, a characteristic feature of this period of new Islamic legislation was "the tendency to impose ethical standard on the believer."[34] After the death of the Prophet in 632, the period of al-Khulafa'al-Rashidun had begun, which is regarded as another sacred history. Like the Prophet, these four khalifs were lawgivers in a society where administrative and legislative duties were not yet separated. During this period, these all-purpose leaders were interested in the conquest and rule of different lands rather than regulating domestic legal and political structure. Despite that, we can distinguish the formation of a crucial source of Islamic law in this period. As is known, pre-Islamic Arabs held patriarchs, predecessors and traditions in high esteem. For them, "whatever was customary was right and proper;

[34] Joseph Schacht, *An Introduction to Islamic Law*, (Oxford: The Clarendon Press, 1964), 11.

whatever the forefathers had done deserved to be imitated."[35] This approach constitutes an early understanding of sunna, which had disclosed again in a religious character as exemplar acts of the Prophet and became the second most important source of Islamic law. As it is seen, the retention of pre-Islamic legal practices and approaches was still quite extensive and influential on the formation of Islamic legal thought. Joseph Schact explains this situation by exemplifying the emergence of another significant source of Islamic law, "Hand in hand with the retention of legal institutions and practices went the reception of legal concepts and maxims, extending to methods of reasoning and even to fundamental ideas of legal science; for instance, the concept of the *opinio prudentium* of Roman law seems to have provided the model for the highly organized concept of the 'consensus of the scholars' as formulated by the ancient schools of Islamic law, and the scale of the 'five qualifications' was derived."[36] To conclude, in the first century of Islam certain embryonic forms of crucial and distinctive sources of Islamic law, like sunna and ijtihad, came into existence through an interaction with pre-Islamic legal culture, and the old arbitration and negotiation traditions in legal thought had been largely modified and reformed to a more lawful nature during the period between 632 and 661.

In the following period, during the Umayyads dynasty, there was an effort for the centralization and bureaucratization of administration. Political conditions of the era, including great wars against external enemies, especially the Byzantines, and an emphasis on having new sources of revenue were triggers for the development of an administrative and fiscal law.[37] A new, more complex type of society was being shaped by means of territorial extension. Therefore, pre-Islamic customary law, arbitration and negotiation were no longer sufficient. As a reflection of these new conquests and centralization tendencies, the backbone of the Islamic administration of justice had emerged. First, it is encountered that the appointment of Islamic judges, or kadis. According to Schacht, it was the era where the transition from an Arab concept of hakam, who is basically an arbitrator, to the Islamic judge, a kadı, who is a delegate of the governor, had been realized.[38] During this time, the concept of an Islamic judge did not mean a professionalization but rather a sufficiency; not a practitioner of law but a person who was sufficiently "interested in the subject to have given it serious

[35] Ibid, 17.
[36] Ibid, 20.
[37] Ibid, 23.
[38] Ibid, 24.

thought in their spare time."[39] The expected intellectual capacity of a kadi was the ability to review the legality of customary acts according to Islamic norms, therefore, "the specialists from whom the kadis came increasingly to be recruited were found among those pious persons whose interest in religion caused them to elaborate, by individual reasoning, an Islamic way of life."[40] This emergence of the notion of sufficiency for becoming a kadi connotes the emergence of a notion of law separate from arbitration and negotiation. Despite the appointment of kadis and a definition of the limits of their jurisdiction by the central state, according to Hallaq, this did not mean that the law was a product of government as it is in modern law. On the contrary, sharia was a jurists' law, which was produced by society and its communities.[41] For Hallaq, "the Community, the common social world, organically produced its own legal experts, persons who were qualified to fulfill a variety of legal functions that, in totality, made up the Islamic legal system."[42] He explains that Islamic jurists were coming from lower and middle social classes and "as a product of their own social environment, the legists' fate and worldview were inextricably intertwined with the interests of their societies."[43] Therefore, they were representing "the pervasive egalitarianism of the Qur'an".

In order to explain his point, Hallaq illustrates the two most important roles of Islamic legal agents, the mufti and the kadi. First, he emphasizes the mufti's easy accessibility for legal consultation and free consultation. Moreover, the first law books were a product of these broadly accessible, question-and-answer activities for any social strata, therefore, they were characteristically social. Besides, "the fatwā is the product of legal expertise and advanced legal knowledge, all grounded in a deep concern for the society and for its general moral principles and not for a state or a top-down law."[44] Secondly, Hallaq mentions the accessibility of kadis without any ceremony or professional mediation: "no gulf existed between the court as a legal institution and the consumers of law."[45] Thus, "the sharia and its jurists emerged from the midst of society" and "the legislative power in Islam was entirely embedded in a socially based, divine body of law."[46]

[39] Ibid, 26.
[40] Ibid.
[41] Wael B. Hallaq, *An Introduction to Islamic Law*, (Cambridge; New York: Cambridge University Press, 2009), 8.
[42] Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*, (New York: Columbia University Press, 2014), 116.
[43] Ibid, 117.
[44] Ibid, 120.
[45] Ibid, 122.
[46] Wael B. Hallaq, *An Introduction to Islamic Law*, (Cambridge; New York: Cambridge University Press, 2009),

In time, the number of people who were sufficiently interested in Islamic legal concerns increased, and we encounter the formation of ancient schools of law in great centers of Islam, like the schools of Kufa and Basra in Iraq or Medina and Mecca in Hijaz. As we have seen during the early Islamic period, law was highly influenced by Arabian tradition and customary legal thought. Over time, legal culture became Islamicized and, "the zenith of the reception of Koranic norms into early Islamic law coincides with the rise of the ancient schools at the beginning of the second century of Islam."[47] In this sense of Islamization, members of the ancient schools constituted a religious opposition to the administrative practice of law. Besides these ancient schools, there was a much more "pious" school called the Traditionists. To seek theoretical justification methods for the Sunna and Ijma, the Traditionists tended to move backwards. They were quite strict in accepting any claim of Sunna and brought a system of report of ear or eye witnesses on the words or acts of the Prophet, handed down orally by an uninterrupted chain (*isnad*) of trustworthy persons.
Despite their all pietism, they remained a minority and the other ancient schools of law gained wide currency. Although they were not prevalently influential, the Traditionists strengthened "the tendency to Islamicize, to introduce Islamic norms into the sphere of law."[48]

Another crucial development of the era was the emergence of a strong inclination towards the reasoning and systematization of Islamic law. To illustrate, individual reasoning called ra'y/opinion had always been a method for judging the blanks of the sharia, however, ancient schools of law brought new ways of individual reasoning by creating certain criteria. In this way, it is encountered that the notions of qiyas (analogy or parity of reasoning), istihsan (discretionary opinion of expert for reasons of public interest) and istihsab (the personal approval or preference of expert's reasoning). As Schacht says, "The development of legal theory in the second century of Islam was dominated by the struggle between two concepts: that of the common doctrine of the community, and that of the authority of the traditions from the Prophet."[49] This definition of the reasoning methods is a strong sign of the transition from traditional and customary legal thought to a more systematic and disciplinarian reasoning.
Methodological efforts of ancient schools of law had crucial impacts on the sharia. For example, the minimum amount for the mahr was designated in this period through a kiyas between the minimum value of stolen goods for the hadd punishment and the nuptial gift.

[47] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: The Clarendon Press, 1964), 29
[48] Ibid, 37.
[49] Ibid, 38.

When looking at the Abbasid period, the tendency towards Islamization was continuing and consolidating. The Abbasid dynasty declared themselves the caliph, and in order to forge ahead from the defeated house of Umayyad, they gained legitimacy by attributing an enormous importance to the sharia, claiming that it established the rule of Allah on earth. However, scholars did not believe in the sincerity of the dynasty, and so "it soon appeared that the rule of God on earth as preached by the early Abbasids was but a polite formula to cover their own absolute despotism."[50]

Take, for example, the idea of empowering the caliph with the rights of a religious expert, especially the right to exercise his personal opinion (*ijtihad al-ray*) in the legal sphere. It was explicitly a move beyond administrative regulation towards legislation, and it is clearly opposite to the approach found in Umar ibn Abd al-Aziz words, "There is no Prophet after ours, and no holy book after ours; what Allah has allowed or forbidden through our Prophet remains so for ever; I am not one who decides but only one who carries out, not an innovator but a follower."[51] In this way the kadı became dependent on the ruler's so-called legal power, and he remained within the limits deigned by the siyasa sharia. Thereby, for the first time since its formation, the Islamic legal sphere became a field where can be observed a competition of different agents, and "as a result of all this, a double administration of justice, one religious and exercised by the kadi on the basis of the shari'a, the other secular and exercised by the political authorities on the basis of custom, of equity and fairness, sometimes of arbitrariness of governmental regulations, and in modern times of enacted codes, has prevailed in practically the whole of the Islamic world."[52] During this politically strict period, what Islamic law gained was the establishment of a stable link between the kadi and the sharia. This meant that in order to become a kadi, it was not sufficient to only be interested in the sharia, and it was required to become a specialist in the sharia. It can be said that during the Abbasid period, the kadi completely became the Islamic judge. During the Umayyad period, the kadi was both the judge and secretary of the governor, whereas in the early Abbasid period the kadi was discharged from administrative duties and the investigation of criminal cases. Thereby, criminal justice abandoned the practical application of the sharia and emerged in the sphere of political authorities.

[50] Ibid, 49.
[51] Ibid, 53.
[52] Ibid, 54.

In this period, it is also seen that the early traces and formation of two important legal traditions that they will be seen again in the Ottoman Empire. First, the creation of chief kadi (*kadi'l-kudat*), who was an embryonic version of the position of şeyhülislam, and second, the tradition of the Courts of Complaints investigation presided over by the caliph or sultan, who listened to complaints about unfair applications of the law. In conclusion, during the Abbasid period one can encounter that the specialization of the kadi's duties regarding legal issues by the removal of their administrative authority, an intense political intervention to the Islamic legal sphere by empowering caliphs with the authority of ijtihad al-ray, and the formation of significant traditions at the intersection of political and legal spheres, such as the emergence of the chief kadi and the Courts of Complaints. In the following era, around the middle of the third century of the Hijra (9th century BC), perhaps the most important development was realized—the formation of schools of law, or madhabs.

As touched upon previously, the ancient schools of law were based on cities, whereas in this period this geographic character of the school had been transformed into an allegiance with an individual master in one of the great centers of Islamic legal thought. For example, the Iraqi school of Kufa brought forth Abu Hanifa and his followers, like Abu Yusuf and Shaybani, or from the school of Medina, Malik and his follower Shafi. These new schools were quite important because they created the classical theory of Islamic law, the usul al-fıkh. Because of this development, the primary sources of Islamic law were composed of the four principles of the sharia: the Qur'an, the sunna of the Prophet, the ijma/consensus of the scholars, and the *kiyas*/analogical reasoning. The Qur'an is not a code of law, however, it contains basic legal principles about rituals, war and peace, marriage, divorce, succession, commercial transactions and several penal laws. The Sunna is the exemplary and explanatory behavior of the Prophet. It was supplemented for the Qur'an, and one can learn about it from the hadith collections, which were intertwined with the strict conditions of *isnad*. These two sources were the immutable and divine basis of Islamic law. Mandates from the ijma were also bound to specific conditions in order to be validated like any *isnad* of the sunna. First, the consensus must have come from the two immutable sources. Second, the people making ijma must have been experts/fuquha and competent of ijtima—consensus among extra-judicial persons could not be validated. Moreover, in a specific time zone, all competent experts of ijtima must have agreed on the mandate in question. *Kiyas* (analogical reasoning) was a way of reasoning that was only valid for issues that experts could not find any response to in the other three sources.

In addition to these primary sources, which were accepted by all madhabs, there were secondary sources discussed among different madhabs.

3.2. Modern Approaches to the Shari'a

As it is seen from the historical development of Islamic legal thought, Islamic law is composed of the Shari'a and fiqh. The distinction between these two notions is summarized by Rudolph Peters, "If the shari'a is God's law, the fiqh is the scholarly discipline aimed at formulating the prescriptions of the shari'a on the basis of the revealed texts and using various hermeneutic devices. What we find in the fiqh texts is the jurists' approximations to the divine law."[53] While fiqh texts and discussions demonstrate scholarly character, the shari'a approaches law as codes.

In Arabic, the term shari'a is derived from the word 'shari', which means "a clearly defined way, main road, highway" or "situated on a main road, at the side of the road."[54] This word has urban denotations, but also has a public connotation, which could be related to its prospective legal content, as "a public road where everyone has the right to circulate."[55] In the context of prophetic religions, the word shari'a means a "prophet's manner/road as his religion", like shari'al Musa. In the context of Islam, the word shari'a became a more comprehensive notion which covered the Muslim's religious duties and behavioral codes of a good behavior.[56] However, some theories on Islamic law, such as those by Hamilton Gibb, prefer to mostly focus on the essential religious character of the shari'a. By comparing Islamic law and "the science of law", he suggests that "the Law was never quite separate in conception from Duty, and never became fully self-conscious. The Shari'a was thus never erected into a formal code, but remained, as it has been well said, 'a discussion on the duties of Muslims.' "[57] It is undeniable that while regulating mundane legal issues, the shari'a has always been a religious and sacred character, derived from God's revelations. However, Haim Gerber describes the consideration of law as God's law as "only on the general and ideological plane. There was also the pragmatic, day-today level that has to be taken into

[53] Rudolph Peters, "From jurists' law to statute law or what happens when the shari'a is codified", *Mediterranean Politics* 7, no.3 (2002): 84
[54] The Encyclopedia of Islam, (Leiden: Brill, 1997), v.IX, 321.
[55] Ibid, 321.
[56] Hamilton Alexander Rosskeen Gibb, *Mohammedanism*. (Oxford University Press, 1970), 100-101
[57] Haim Gerber, *Islamic Law and Culture, 1600-1840* (Leiden: Brill, 1999), 6.

consideration." Yet, this consideration of possibilities came from the use of the law in day-to-day life, and therefore, one can remain an essentialist.

As an illustration, Rosen's work *Anthropology of Justice: Law as Culture in Islamic Studies* criticized by Gerber as having a heavy and highly sophisticated essentialism.[58] The stuyd is based on analyses about day-to-day legal practices in Morocco. Since he was highly inspired by Max Weber, before discussing Rosen's work, it is useful to mention Weberian thoughts on law. Weber's main contribution to the issue derives from notions of rationality and predictability. First, for Weber, law is nothing other than a process of the rationalization of ruling. In primitive societies, the law was divine and actors behind the rules were charismatic leaders like magicians or prophets. In modern societies, ruling became independent from charisma and originated from rational, objective and professional lawmakers. The quality of being rational in Weberian legal thought is based on the social reality of a society in an analytical and organizational way: "what Weber calls formal-rational legal authority, namely, a system of politics in which domination is exercised by means of a logically consistent system of consciously made legal rules, corresponds to Weber's theory of Islamic law and culture value, which asserts the positivity of all norms."[59] If the rules are not convenient to a society's moral values and realities, then these rules are not rational and objective but arbitrary. Secondly, this rationalization of the law brings up a standard of calculability for social acts. Thus, this rationalization implements requirements of a certain mode of production, i.e. Western capitalism, that it cannot be found in any other history. He suggests that Western capitalism would not have arisen without "the rational structures of law and of administration"[60] and states that "there is, after all then, a connection between calculability and the logical analysis of meaning: the latter is the only type of legal thinking that leads, even potentially, to the systematic organization of law and it is only through its systematization that the legal order can achieve a maximum degree of calculability"[61] As it is understood, Weberian legal thought is built upon sharp distinctions between charismatic-rational authorities and formal rational law and substantive rational law, which is "an amalgamation of sacred and secular law, and arbitrary intervention by the ruler in legal

[58] Haim Gerber, *Islamic Law and Culture, 1600-1840* (Leiden: Brill, 1999), 9.
[59] Harold J. Berman, "Some False Premises of Max Weber's Sociology of Law." Wash. ULQ 65 (1987), 758.
[60] Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (New York/London: Routledge, 2005), 25.
[61] Ibid, 90.

processes."[62] While Western law exemplifies formal-rational and capitalistic types of law, law in Eastern societies remains traditional and substantially rational. Therefore, "Islamic law was diametrically opposed to Western law, being unstructured, run more by intuition, directed at best by culture or mores than by rigorous reasoning."[63] According to Gerber, this essentialist theory of Weber's had reached a sophisticated argumentative point by Lawrence Rosen. Indeed, the Weberian approach to Islamic law was updated in Rosen's studies based on present-day law in Morocco.

According to Rosen, the formation of law in Islamic societies highly inspires and even "mimics the extrajudicial world"[64] , and legal judgments are derived from cultures. For example, in Moroccan society, bargaining is a very common practice, which has a determinant effect on legal culture. "For rather than aimed simply at the invocation of the state or religious power, rather than being devoted mainly to the creation of a logically consistent body of legal doctrine the aim of the qadi is to put people back in the position of being able to negotiate their own permissible relationships without predetermining just what the outcome of those negotiations ought to be."[65] Thereby, Islamic law is an extension of the culture of Middle Eastern societies, as it lacks objective and systematic rational reasoning. Rosen might be right in his analysis of Moroccan society, which was his case-study, however it can be argued that his approach is biased due to the generalization of his analysis for all Islamic societies and Islamic law itself. As Haim Gerber said, law is different from one state, society and culture to another.[66] Even in the same political body, it can be encountered different applications and approaches of law.

Here it must be added that the urf, customary law and social traditions are secondary sources of the Islamic law. However, the claim that cultural features have highly determinant influences on the operation or practice of law goes beyond the reality of being only one of the sources by claiming that "the main source" of law is cultural. Besides, the existence of the discipline of fiqh falsifies this claim by demonstrating a purely intellectual effort to create a scholarly and reasonable legal body. Regarding anthropological studies of Islamic law, it must be mentioned that the article "Shifting Perspectives in the Study of Shariʿa Courts" written by

[62] Haim Gerber, *Islamic Law and Culture, 1600-1840* (Leiden: Brill, 1999), 9.
[63] Ibid, 13.
[64] Lawrence Rosen, *The Anthropology of Justice, Law as Culture in Islamic Society* (Cambridge, Eng.: Cambridge University Press, 1989, repr. 1990), 11
[65] Ibid, 17.
[66] Haim Gerber, *Islamic Law and Culture, 1600-1840* (Leiden: Brill, 1999), 26.

Iris Agmon and Ido Shahar.[67] The authors' main argument is that the existence of a shifting of interest and change in attitude towards Islamic socio-legal history is a result of academic traditions and division of labor in three different sub-disciplines: legal history, social history and legal anthropology.

For a long time, Islamic legal studies were under the influence of Orientalist lenses. As it is already mentioned, there was a predominant inclination towards the Weberian approach on *Kadijustiz*, which attributed an unlimited authority and arbitrary nature to the Islamic judge by accepting him as a reflection of political Oriental despotism. Up until the 1990s, it can be traced that the impact of this essentialist point of view in academia. For example, historians from the German philological tradition tended to interpret Islamic law as a pure theoretical framework, which could not be enforced and practiced in daily life. Obviously, this biased approach reflects a lack of examination of sharia court records. On the other hand, social historians were enthusiastic to study the practice of Islamic law as a means of possibly creating a history from below. However, their interests remained in the social interactions between people-people or people-legal experts and could not move to the institutional structure of Islamic law.

When it comes to the relationship between Islamic legal studies and anthropology, it is inevitable to encounter Immanuel Wallerstein's *Opening the Social Sciences*, in which one can find an incisive illustration of the scientific traces of Eurocentrism and the Eurocentric gaze on "the Rest" of the world. Today, what is called "social science" in fact all driving from was formed in the early 19th century. Examining the status and hierarchies between history, sociology and anthropology demonstrates the hierarchy between "the West and the Rest", and moreover, how these scientific domains turned into tools of European gaze around the world. In the 19th century, the world, from Europe's perspective, consisted of three concentric circles. The first bent was the core of the modern capitalist world. This can be illustrated here with Hegel's term of "historical nations". What is meant by this is that history is a past in a sense of progress and development into modernity. So, history was really limited to western European societies. These are the most advanced, modern capitalist nations. "The Rest" is in stagnation and repetition according to this progressive frame. Corresponding to the discipline of that idea is history. If you enrolled in a history program in a European university during the19th century, you would not be able to find any Chinese or Turkish or Egyptian histories

[67] Iris Agmon and Ido Shahar, "Introduction" Islamic Law and Society 15, no. 1 (2008): 1-19.

because they weren't accepted as historical nations. The second bent covers only high civilizations. These were not historical nations but old imperial states like the empires of the Mungols, Persians and Ottomans. Their situation was distinct from tribal non-state societies because of their advanced civilized state societies, however, they did not have any qualities of modernity and capitalism, requirements for belonging to first bent. They were seen as colonial, or fit to be colonized, in the eyes of the inner circle. In a word, this circle's situation was precarious. The third belt concerned the foothill of world societies, which were non-state, tribal societies found mostly in Africa. As small communities without state structure and a monotheistic religion, these were regarded as the subject matter of anthropology. This was a very imperial discipline, and it can be said that say that anthropology was a kind of scientific extension of the new European imperialism over tribal societies. When imperialist leaders perceived these lands as empty and ownerless, anthropology also perceived them "without history." Thus, as a reflection of the side of anthropology in this division of labor, legal anthropologists were interested in Bedouin law rather than Islamic law.

It must be admitted that the study Islamic law demands knowledge of languages and familiarity with legal discourses. Therefore, these authors argue that because of different reasons and limits, sharia court studies had suffered from "disciplinary orphanhood".[68] However, the criticism of Orientalism in academia triggered a brand-new interest in Islamic legal studies. In this period, Dror Ze'evi brings a more balanced approach. He urged scholars to treat court records as "a source that reflects society and culture as through a simple looking glass or a mirror."[69] In addition, he suggested a more cultural and historical approach, which treats Islamic law as a cultural artifact and a "product of a specific sociological event that must be analyzed within the context of its production."[70] As it can be seen, an anthropological approach to Islamic legal studies was originally derived from an Orientalist scientific division of labor and culturalism. This can be better understood if one consider Rosen's work as a product of this historical path.

After a necessary emphasis on the anthropological approaches to Islamic law, which assumed the sharia to be merely a cultural production rather than a discipline, another similar theoretical tendency should be mentioned. This tendency suggested that the shari'a was a

[68] Ibid, 9.
[69] Dror Ze'evi, "The Use of Ottoman Shari'a Court Records As A Source for Middle Eastern Social History: A Reappraisal." Islamic Law and Society 5, no. 1 (1998): 42.
[70] Ibid.

legal theoretical body rather than a practical system of law. N.J. Coulson supports this theory by explaining that in the early centuries of Islam, there was a widespread tendency among qadis to refuse appointments.[71] He quoted Khalid b. Abi Imran's refusal, "Are you not then aware that when Allah has no more use for a creature, He casts him into the circle of officials?"[72] Coulson suggests that during the early decades of Islam, pious scholars preferred to study the Shari'a only as a religious and legal doctrine rather than dealing with it as a governmental function. Finally, the abhorrence of the practice of law by pious fuquha caused a cleavage between doctrine and practice in Islamic law and caused the restriction of the Shari'a as a theoretical legal construct. As Haim Gerber said, this approach could only be valid for a particular period of time.[73] It is true that during the questioned term, Umayyad Caliphs (660-750), serious conflicts arose between judges and rulers.[74] But if one consider the political and historical conditions of the era, the fuquha's attitude of refusal can be interpreted as an intellectual protest to the political authority, and therefore, cannot constitute a characteristic of Islamic law.

The last approach is better intentioned, and tends to glorify the early ages of Islamic legal thought by claiming that after the dynamic formative period, Islamic law felt into decay and intellectual paralysis. Joseph Schacht is a representative of this approach. For him, from the emergence of the later schools of law (madhabs), the devotion to the created models by certain masters caused a serious intellectual restriction among specialists. Likewise, the intellectual closing of the gate of ijtihad caused serious disputes about the creativeness and dynamism of Islamic legal thought. A considerable number of scholars agree that the end of individual reasoning condemned Islamic law to a state of stability and immutability in all its details.

3.3. The Relationship Between the Statute Law and the Shari'a

Since one of the sources that Ottoman law was substantially based on was the statute law along with the shari'a, any attempt to analyze it must touch on its specific ways of coexistence and the relationship between these two sources in the Ottoman legal system.

[71] Noel James Coulson, "Doctrine and Practice in Islamic Law: One Aspect of The Problem." Bulletin of the School of Oriental and African Studies 18, no. 2 (1956): 217.
[72] Ibid.
[73] Haim Gerber, *Islamic Law and Culture, 1600-1840* (Leiden: Brill, 1999), 8.
[74] Ibid.

The main approaches to the Ottoman legal system can be grouped under three rubrics-- the first one suggests that Ottoman law was fundamentally predicated on the urf, which is derived from the sultan's will and common usage[75]. One of the most important scholars of this notion is Ömer Lütfi Barkan. According to Barkan, from the early period Ottoman rulers were ~~quite~~ realist and pragmatist, rather than pious, concerning legal issues.[76] Since the sharia could not provide an adequate public law for complex and developed states, the orf became nominal in broader spheres as administration and governance became much more efficient.[77] Barkan mentioned a strong duality between the customary law, which was substantially efficient in the political and administrative spheres, and the sharia, which was fed from ijtihads and court decisions derived from everyday life.[78] For Barkan, this was not a simple coexistence but a strong duality, as it is understood that the predominate law in between them was the urf. It is clear that the independence of administrative and organizational law from the sharia is decisive for Barkan's analyses. However, this promotion of an administrative and organizational sphere in which the urf is overwhelming connotes a belittlement about the social sphere of common people in which the sharia is nominal. Thus, it can be claimed that the first approach's consideration of this issue from a state-oriented lens can be an impediment to understanding the socio-legal relationship between society and the state.

Contrary to the first approach, the second approach considers Ottoman law as a genuine application of the shari'a. Certainly the second group was aware of the existence of the urf but claimed that the customary law was processed as a legitimate juridical right given to the political authorities by the sharia. Hereby, the Ottoman legal system totally protected its religious character. This second approach is mostly represented by theologian-historians like Ahmet Akgüdüz. The third approach is much more deliberate in comparison to the others. It claims that the Ottoman law had a hybrid legal character by mixing customary law and the shari'a. This hybridity manifested itself not only in legal doctrines but also in practice. This approach is on the rise in studies concerning Ottoman legal history, with contemporary contributions by scholars like Avi Rubin, Haim Gerber and Sami Zubeida.

[75] Uriel Heyd, *Studies In Old Ottoman Criminal Law*, Ed. by Victor Louis Ménage, (Oxford: Clarendon Press, 1973), 169.

[76] Ömer Lütfi Barkan, "Osmanlı İmparatorluğu Teşkilat ve Müesseselerinin Şer'iliği Meselesi", *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 11, no. 3-4 (1945), 211.

[77] Ibid, 212.

[78] Ibid, 214.

As the most well-known scholar on the subject, Halil İnalcık, states, even the acceptance of customary law as a legal source is a contradictive issue in Islamic legal doctrine; since the urf, as an essential dynamic of the Ottoman law system, was beyond the sharia.[79] Because of this coexistence of different legal sources, certain essential changes had occurred in the concept of the state and law in Islamic thought during the Ottoman Empire.[80] This is exemplified during Mehmed II's reign—while the administrative law of the state was independent from the sharia, the ulama class was accepted among state elites. Furthermore, the sultan's capacity of legislation was accepted an inevitable necessity caused by the zeitgeist and legitimized as a part of *istislah* and *istihsan*.[81] In this regard, this reciprocal intellectual transaction between the Islamic legal thought and the Ottoman statecraft created the authentic character of Ottoman law.

The epicenter of these three approaches is a composition of the relations between different sources of law: the shari'a and the *kanun*. In order to better understand this composition, one must know the limits of state authority in Hanafite law, which is the engaged madhhab by the Ottoman Empire. In his article, *Secular and Religious Elements in Hanafite Law*, Baber Johansen interrogates the existence of "certain norms describing the ideal relationship between government and society that were universally acknowledged by Muslim scholars"[82]. Although considerations about the limits of government authority are diversified in different periods, throughout Islamic history there was a consensus among Muslim scholars that there must be a powerful military and political leader to protect the Muslim community. This essential need constitutes the realpolitik base of a Muslim sovereign's legal prerogatives.
Apart from this practical reason, the "*mutlaq*" character of political authority can be better understood through a theoretical difference between *huquq al-ibad* and *huquq Allah* in fiqh. *Huquq al-ibad* means the legal claims of men: "all huquq al-ibad are supposed to be the property of private legal persons who decide of their own accord whether they want the authorities to interfere with their conflicts or not."[83] For Johansen, "Justice in the *huquq al-ibad* can never have an absolute character" and "it is achieved through relativism."[84] Whereas,

[79] Halil İnalcık, *Osmanlı'da Devlet, Hukuk, Adalet*, (Istanbul: Eren Yayincilik 2000), 33.
[80] Ibid, 34.
[81] Ibid, 45.
[82] Baber Johansen, "Secular and Religious Elements in Hanafite Law. Function and Limits of the Absolute Character of Government Authority," republished in idem, *Contingency in a Sacred Law, Legal and Ethical Norms in the Muslim Faith* (Leiden: Brill, 1999 [org.1981]), 189.
[83] Ibid, 210.
[84] Ibid.

the term *haqq Allah* is in sharp contrast to this relativity by representing absolute claims.[85] At this point, the Muslim government gains vital importance as "the guardian of the absolute" and "the representative of God's claims that enters into relations with the individual legal persons."[86]

The abstract term of "God's claim" can be concretized as the public interest of Muslim society. Thereby, "the public sphere is the realm of the absolute, the realm of God, as represented by the ruler."[87] According to Johansen, in order to conserve the private and individualistic character of Hanafite law, Hanafite legal experts tried to uphold a judicial concept of ideal government against this intensification of legal power at the hands of the state. For this legal ideal to function, "the absolute character of government action is only accepted as long as it secures the settlement of the humdrum, non-absolute issues of daily life by individual legal persons."[88] Because of this preference and protectionism of *huquq al-ibad* among Hanafite experts, many important scholars were of the opinion that Islamic law was exclusively private law. However, from the early and classical period, they could not restrain the rise of political justice in the name of Allah. In the 8th century one of the most important legal terms emerged in Islamic law history, *ta'zir*, meaning "an undefined penalty for an undefined delict violating either claims of God or claims of men, punishable either by the government or by private persons."[89] Based on a reported principle from the Prophet as "He who extends the punishment of non-*hadd* offence to that of *hadd* is a transgressor,"[90] legal experts tried to depict the limits of *ta'zir* punishment but it expanded in broader realms over time. Another notion of the limits of political authority in the sharia is siyasa. While the limits of *ta'zir* could be depicted by Islamic law, the siyasa right was accepted as an independent component from the sharia.

Consequently, despite all efforts of Hanafite experts to protect the legal independence of the sharia, "the state as the guardian of the *huquq Allah* necessarily partakes of its absolute character," and, furthermore, the concept of siyasa provided the political authority an ambiguous realm to practice. Johansen states that this extension of state action to an

[85] Ibid, 211.
[86] Ibid, 215.
[87] Ibid, 212.
[88] Ibid, 218.
[89] Ibid, 216.
[90] The Encyclopedia of Islam, (Leiden: Brill 1997), 406.

ambiguous realm caused a precarious and fragile relationship between jurists and political apparatus[91], but "most of the time, the fuquha have accepted this ambiguity as a necessary evil which helped to maintain the social, economic and political structure, in which the jurists were firmly embedded."[92] As can be seen, even within one of the most individualistic and private legal traditions, the Hanafite madhhab, it was a highly problematic issue to depict governmental legal authority over the individual legal persons. The rough sketch of the relationship between Hanafite jurists and political authority provides us with certain clues to understanding the liaison between the shari'a and *kanun*.

Uriel Heyd, one of the most significant scholars of Ottoman legal history, examines this issue in old Ottoman law by focusing on criminal justice. This is a fertile point of view because "the criminal law in the sharia never had much practical importance in the lands of Islam"[93] for two main reasons. Firstly, only a limited number of penalties were defined for few crimes. Secondly, the conditioned rules for evidence by the sharia were so rigid that a good deal of crimes could not be charged appropriately. Therefore, jurist law of the sharia kadi's role in criminal justice gradually withdrew and became the subject of extraordinary jurisdictions, which "were free from the rigid rules of the sharia penal law and criminal procedure, and were guided in the main by customary law (*urf*), the public interest (*al-maslaha al-amma*) and, in particular the consideration of administrative and political expediency."[94] As mentioned earlier in the Hanafite tradition section, public interest constituted a crucial point in legitimizing political legal authority. Just as significant as the good of the community, the notion of *fasad-al zaman* was another argument that can be seen at the start of *Kanunname-i Mısır,* promulgated in 1525 by Ibrahim Pasha. In this edict, a causality had been established between changing historical conditions, the zeitgeist and the rise of statute law and non-shari regulations by stating that, "in the course of time, crimes have multiplied -to such an extent that disputes and feuds can no longer be decided by the sword of the tongue of the guardians of the holy law, but require the tongue of the sword of those empowered to inflict heavy punishment (the non-sharia judges)."[95]It is obvious that the historical-political conditions of

[91] Baber Johansen, "Secular and Religious Elements in Hanafite Law. Function and Limits of the Absolute Character of Government Authority," republished in idem, *Contingency in a Sacred Law, Legal and Ethical Norms in the Muslim* Faith (Leiden: Brill, 1999 [org.1981]), 217.
[92] Ibid, 218.
[93] Uriel Heyd, *Studies In Old Ottoman Criminal Law*, Ed. by Victor Louis Ménage, (Oxford: Clarendon Press, 1973), 1.
[94] Ibid, 199.
[95] Ibid, 3.

the period had an influence on the edict. During the term in question, the mid-14th century, the governor of Egypt, Ahmed Pasha, rose against the sultan's authority by imposing heavy taxes to create a military force independent from the center.[96] Thus, taking into consideration the political climate, it can be said that the main goal of the *kanunnâme* was to empower the central authority and keep under control the questioned region by contenting the common people. This political concern for the central state was not particular for *Kanunname-i Mısır* in 1525; contrarily, it can be generalized as one of the main purposes for the edict. Likewise, according to Heyd, "Kanunnames were issued in response to the complaints of the people about the tyranny of the local officials and fief-holders."[97] This goal can also be understood by the practice of reading *kanunnâmes* out loud in public places, which was done in order to ensure the constituent's knowledge about them and to give them the right to claim an official copy. In this respect, Ottoman statute law was rooted in Eastern models such as Abbasid, Mongol and Mameluke, as the term "*kanun*" basically meant tax regulations in order to prevent excess collecting by local agents.[98]

The second measure to protect common people against the tyranny of local administrators was maybe the most important practice of the Ottoman legal system and was also located at the intersection of the relationship between the sharia and the state. According to Heyd, since the Ottoman sultans never relied on justice practiced by *ehl-i urf* or executive organs, they appointed local *kadı*s to curb and supervise the people.[99] While the relationship between law and government in Islam had been based on the dissolution of law and practical politics since the Abbasid period[100], in the Ottoman Empire, the *kadı* became a state functionary and gained a broader administrative role than a simple jurisdictional authority. As a result of this institutional change, he was responsible for administrative, civilian and municipal issues.[101] As an administrator the *kadı* was the inspector of waqfs, the notary public, responsible for public security, the supervisor of subaşı and zabits and the supervisor of tax collecting. As *muhtesib*, he was responsible for the order in l*onca*s and in the market. Additionally, he determined the official fixed price, *narh*, which had a vital importance on the economy of the

[96] Mahmut Demir, "Makbûl İbrahim Paşa'nın Veziriazamlığı ve Mısır'daki Faaliyetleri." *Mediterranean Journal of Humanities* 4, no.1 (2014), 98.
[97] Uriel Heyd, *Studies In Old Ottoman Criminal Law*, Ed. by Victor Louis Ménage, (Oxford: Clarendon Press, 1973), 3.
[98] Ibid, 192.
[99] Ibid, 177.
[100] Haim Gerber, *Islamic Law and Culture, 1600-1840* (Leiden: Brill, 1999), 48.
[101] İlber Ortaylı, *Hukuk ve İdare Adamı Olarak Osmanlı Devletinde Kadı*. (Turhan Kitabevi, 1994), 39.

city. Also, if there was a fortress in his place of duty, he was the one responsible to inspect military forces in the castle. All things considered, the kadi's power was not only pertinent to religious and legal fields, but it was also constituting as a political authority.

Another important duty innovated in the historical formalization of the Ottoman kadı was his body of archival material. Although the practice of record-keeping by *kadı*s reaches back into the early periods of Islamic legal history, these diwans were considered private property which did not constitute any legal interest.[102] The innovation made by the Ottomans was to accept these records as public domain which must be stored in a public space.[103] According to Najwa al-Qattan, this attribution of a public value to record-keeping and archiving of justice was "intrinsically politic" because it was a complementary practice of "the assimilation of the religious/legal establishment into the hierarchical apparatus of the Ottoman state".[104] For al-Qattan, it was another aspect of the bureaucratization of the practice of justice which transformed *kadı* justice to be able "to testify tangibly to authority"[105].

These are all indicators of a significant association of the administration of Islamic justice and the administration of practical policies in the Ottoman Empire. The application of sharia in the Ottoman Empire was already positioned at the intersection of religion, law, and politics.
The Islamic judicial court became a hybrid institutional innovation which unified the practice of Islamic law and the policies of central government. The kadı became a practical political agent, alongside being al- hakim al-shar'i. Given these points, it is clear that there was already an association of law and practical policies even before the pre-Tanzimat era.

Besides the local *kadı*'s situation, another Ottoman innovation which supplied the bureaucratization of the ulema was "that in many of their fetvas, the Ottoman şeyhülislams and lower-ranking muftis dealt with matters regulated not by the religious law but by the kanun."[106] Heyd states that it was not an exceptional approach but a frequent attitude among muftis to consult the *nişancı*, who was responsible for the *kanun* in the imperial Divan, before

[102] Wael B. Hallaq, *Sharī'a: Theory, Practice, Transformations*, (New York: Cambridge University Press, 2009), 219.
[103] Najwa Al-Qattan, "Inside The Ottoman Courthouse: Territorial Law at the Intersection of State and Religion", In *The Early Modern Ottomans: Remapping the Empire*, ed. Virginia H. Aksan and Daniel Goffman, (Cambridge: Cambridge University Press, 2007), 203.
[104] Ibid.
[105] Ibid.
[106] Uriel Heyd, *Kanun and Sharia in Old Ottoman Criminal Justice*, (Jerusalem: Israel Academy of Sciences and Humanities, 1967), 9.

giving a fetva.[107] They were referring to related *kanun*s in their fetvas. Thus, it can be said that there was a sympathy and inclination among muftis to conform with the government in the execution of *kanun*s. An interesting and hybrid term between the statute law and the sharia, is "*mufti-i kanun*", a term used by muftis to refer to a *nişancı*.[108]

For Heyd, this consultation mechanism between muftis and *nişancı* was an evident practice, which shows the recognition of *kanun* as a source of law even by sharia's experts.[109] Last but not least, it is important to realize that the muftis' approach constitutes a decisive point, since the local *kadı*s were using *fetva* collections written by muftis in order to make decisions about daily legal cases. That is to say, by means of the consultation mechanism, the statute law diffused top-to-bottom in the legal system of sharia. By the same token, another situation for pursuing the bureaucratization of the ulama was the ranking of chief *kadı*s of the empire among members of the supreme policy-steering body, the imperial Divan. Here, chief *kadı*s were cognizant of political assessments and inclinations of the government, and they were generally sympathetic to them.[110]

This sympathy manifested itself especially in the application of criminal justice and its procedure. In fact, the approach which the sharia tried to practice as criminal justice was essentially different from the attitude of the statute law towards crime and punishment.[111] At first appearance, the *kanun*'s attitude can be perceived as much more tolerant, placid and clement because of several inclinations to lessen the severe punishments described by the sharia, such as death by stoning for committing *zinâ*/adultery. For Heyd, nothing could be more incorrect than this perception, which is derived from a superficial reading.[112] Despite the truth that Ottoman statute law tried to lessen the severity of some *hadd* punishments, it was really inclined to more easily convict criminals and make punishments even more severe than predicated by the sharia.[113] The sharia was highly reluctant to convict people as long as the crime did not fall into *huquq Allah*. The conditions necessary to decide a conviction were

[107] Uriel Heyd, *Studies In Old Ottoman Criminal Law*, Ed. by Victor Louis Ménage, (Oxford: Clarendon Press, 1973), 189.
[108] Ibid, 189-190
[109] Ibid.
[110] Uriel Heyd, *Kanun and Sharia in Old Ottoman Criminal Justice*, (Jerusalem: Israel Academy of Sciences and Humanities, 1967), 13.
[111] Ibid, 11
[112] Heyd, Uriel. "Eski Osmanlı Ceza Hukukunda Kanun ve Şeriat." Çev. Selahâddin Eroğlu, Türk Hukuk ve Kültür Tarihi Üzerine Makaleler, Ankara (2002). p.644
[113] Ibid, 644.

deliberately difficult to fulfill. Some of the basic points which reflected the mental origins of criminal justice as a thought in the Islamic law were relatively short while for decision of the time-out, extensive proof that was almost impossible to meet, the right of withdrawal for the confessor and accepting the confessor as someone virtuous and respectable. Despite its respective attitude towards the sharia, the statute law towards crime and punishment was the opposite of it.

The *kanun*'s inclination to simplify the process of reaching a conviction manifested itself in six points. First, insufficient and inadmissible kinds of evidence in the sharia were accepted as enough and decent while reaching a conviction. Second, while torturing a suspicious person was illegal in the sharia, it was quite widespread and explicitly practiced in the Ottoman criminal justice procedure. Third, while confession under torture was admissible under the sharia, it constituted a sufficient indication for blame in the *kanun*. Fourth, as a traversable attitude towards strict conditions of evidences in the sharia, circumstantial evidence was accepted as sufficient to convict the person. This acceptance was especially strong if the suspect had previously been convicted and/or his/her neighbors were witness against the suspect by declaring that the suspect was not well-behaved. This issue of the acceptance of circumstantial evidence was powerful enough to change a criminal justice procedure. For example, if a person entered a house intending to commit a criminal act but he/she did not actually commit any offense in the end, according to sharia he/she would be accepted as innocent, however, for the *kanun*, if this person had a criminal past he/she could have easily been punished even if the criminal intention was not realized.[114]

Additionally, there were numerous fetvas in the *kanun* which allowed the practice of capital punishment for offenses which were not required to be punished as severely in the sharia. As a condition for this penalty, the crime should not have been an exceptional event for the convict-- on the contrary, it had to have been a constant habit, which turned the guilty over to a *sa'i bi'l-fesad*. Therefore, *nizam-i memleket içün* (for the sake of the order of the country), *sıyaneten li'l-i'ibad* (to protect the people), and '*ibreten li's-sa'irin* (to give a warning example to others), authorities could give this kind of excessive conviction in political nature.

[114] Uriel Heyd, *Kanun and Sharia in Old Ottoman Criminal Justice*, (Jerusalem: Israel Academy of Sciences and Humanities, 1967), 11.

In the fifth way of reaching a conviction, there were several punishments which were unknown in the sharia but described by the *kanun*. For example, the was the punishment of emasculation for the crime of abducting a child. Lastly, although monetary penalties were described as "tyrannical innovations"[115] by simple majority of the fuquha, they were one of the most frequent punishments in the Ottoman Empire. In fact, monetary penalties were not innovated by the Ottoman government, they already had validity in other Islamic states. However, in older Islamic governments, these kinds of punishments were given by the secular judges of *mazalim* courts who were outside of the sharia, while in the Ottoman Empire this "tyrannical innovation" was practiced by Islamic judges. Another specificity that was added by the Ottoman legal system was the classification and changing of monetary penalties according to the guilty's economic situation. Also, interestingly the convertibleness of monetary penalties to *ta'zir* punishments could be made by the *kadı*. According to Heyd, while this shows that the inclination of the statute law was complementary to the sharia, it reflects an effort to legitimize the application of monetary penalties by pinning it on already admissible and respective forms of punishments like the *ta'zir*.

The convertibleness of *ta'zir* punishments to monetary penalties was also an indicator of the politicization of sentences according to the historical-political conditions. For Heyd, the main reason for this conversion was, of course, economic, since the Ottoman government aimed to augment the salaries of officers by means of this revenue.[116] Furthermore, the right to collect monetary penalties was rendered just as an execution of the *iltizam* system.[117] A second example of the politicization of penalties was the invention of penal servitude on the galleys (*kürek*). A firman dated in 1572 explicitly detailed how the mental map of penalizing could be politicized and shaped according to the conditions. The timing of the firman's issue was quite meaningful, as it was only four months after the failure of the Ottoman fleet in the sea-battle of Lepanto.[118] The firman was clearly ordering that convicts ~~should~~ be sent to the galleys in lieu of being sentenced to capital or corporal punishments because the Ottoman fleet was heavily suffering from the urgent need for labor.[119] This was not an exceptional event for the battle of 1572, but an attitude which was practiced frequently. "When not enough men could

[115] Ibid.
[116] Heyd, Uriel. "Eski Osmanlı Ceza Hukukunda Kanun ve Şeriat." Çev. Selahâddin Eroğlu, Türk Hukuk ve Kültür Tarihi Üzerine Makaleler, Ankara (2002). p.645
[117] Ibid., p.645
[118] Uriel Heyd, *Kanun and Sharia in Old Ottoman Criminal Justice*, (Jerusalem: Israel Academy of Sciences and Humanities, 1967), 17
[119] Ibid.

be mobilized on a voluntary basis and the supply of prisoners-of-war and other slaves ran out, criminals and alleged criminals became a principal source of the necessary manpower."[120] As it can be seen, the attitude towards crime and punishment in the Ottoman Empire was not solid and inflexible, but receptive and politically innovative in accordance with the historical conditions in which the state was positioned.

In the final analysis, during the early modern period of the Ottoman state, "The traditional gulf between the fuquha and the umara, the men of the law and the men of the sword, was bridged for the most part, and the cadis loyally executed the Government's orders and secular regulations."[121] They became state functionaries who were charged with administrative and political duties which surpassed their religious and legal roles. Even in the limits of their jurisdictional authority, the fuquha and *kadı*s were not reluctant to formalize and practice the sharia according to the preferences and needs of the central political authority.

As Heyd summarizes, "Even in the high courts of law in the capital, and in the Government's intervention in criminal affairs, justice became more and more jeopardized by a deep-rooted propensity of Ottoman public law --the total predominance of the principle of raison d'état over other, religious, legal or moral considerations."[122] The main reason underlying this complaisance and tender-mindedness among the ulama was undoubtedly the nature of Ottoman rule as a world empire, which controlled a large extent of Islamic countries. It must be remembered that there was no similar Muslim state in the history of Islam that enjoyed such puissant political stability and widespread legitimacy (created by conquering nearly all Muslim lands) as the Ottoman Empire.[123] The empire had become the commander of holy war. The jihad was a decisive concept that determined the embryonic Islamic theory of government to define the legal status of people, lands and taxation under an Islamic supremacy.[124] For instance, except alms-tax (zakat), all forms of taxes in the juristic scheme of taxation, including poll-tax (jizya), tribute (kharaj), and tithe ('ushr), were concepts related to the holy war.[125] Therefore, being the leader of the jihad against *küffar* and the guardian of the Muslims, the Ottoman sultans enjoyed the virtuous testimonial of a representative ruler of

[120] Ibid.
[121] Ibid, 13.
[122] Ibid, 17.
[123] Haim Gerber, *Islamic Law and Culture, 1600-1840* (Leiden: Brill, 1999), 51.
[124] Colin Imber, *Ebu's-suud: The Islamic Legal Tradition*, (Stanford University Press, 1997), 67.
[125] Ibid, 69.

the religion. One of the most distinct legitimizations of the sultan's authority over the sharia, based on the religious nature of his sovereignty, can be seen in investing in him the appellation of Caliph by Ebu's-Su'ud. According to Imber, in this way the shayk al-Islam conceded to the sultan's interpretative power and discretion over the application of sharia.[126] To put it another way, this was an "equation of royal and divine justice"[127] from the early modern period of the Ottoman Empire and an ideological attitude which blurred the definite distinction between juristic and political authority prescribed by early Islamic jurists.

In order to concretize the affirmative attitude of the ulama towards the sultan's authority, Heyd also refers to a *fetva* collection stored in Topkapı Palace, issued by shayk al-Islams as a response to the sultans'demand to legalize non-sharia punishments.[128] In these documents the sultan was cited as *sebeb-i nizam-i alem*, the fountainhead of the order of the universe and as the *veliyü'l-emr* or Muslim ruler[129], therefore it was in his faculty to determine the penalties on conditions that were coherent with the sharia. However, as shown above, this coherence to the sharia principle could be interpreted according to secular purposes and sometimes exceeded by the statute law in the case of political or economic needs.

Ultimately, the classical political theory of Islam, which supposed that the law as a legal body developed by pious jurists according to principals derived from the God's command, the Qur'an and the Sunnah, came before the state, which was naturally mundane.[130] For this reason, the political authority was not permitted to intervene in this sacred-origin law--throughout history and specifically in the period of Ottoman rule, which had a highly centralized governmental body, "the state became something which was rooted and penetrated in the religion, law and society rather than something which sat on top of them".[131]

3.4. From Statute Law to Codification

The peculiarity of early Islamic law as an independent legal body from state authority was, to a large extent, already ruined during the historical development of the Ottoman Empire. That

[126] Ibid, 270.
[127] Ibid.
[128] Uriel Heyd, *Kanun and Sharia in Old Ottoman Criminal Justice*, (Jerusalem: Israel Academy of Sciences and Humanities, 1967), 12.
[129] Ibid, 13.
[130] Haim Gerber, *Islamic Law and Culture, 1600-1840*, (Leiden: Brill, 1999), 44.
[131] I tried to make an inversion inspired by the statement of "The state was thus something which sat on top of society, not something which was rooted in it." written by Patricia Crone and Martin Hinds in God's Caliph. (Cambridge University Press, 1986)

is to say, in the conversion process from a doctrinaire legal body to practical law, judiciaries were not totally self-ordained and autonomous, but were contingent upon certain limits depicted by governmental authority regarding jurisdictional principles. Despite the intervention of state authority by determining and declaring its interpretational preferences for the application of law, legal running of the sharia were still based on *kadı* justice and incomparable to modern judicial understanding. However, it is important to realize that the involvement of governmental authority in judicial interpretation did not mean an exact dominating monopoly of law-making. In other words, despite the intervention of state authority by determining and declaring interpretational preferences for the application of law, legal running of the sharia was still based on *kadı* justice and incomparable to modern judicial understanding.

A genuine step towards modernization in the legal dimension was realized with codification activities that started during the Tanzimat Era. The concept of codification was essentially different from the previous judicial mentality—while the sharia derived its authority substantially from sacred sources, the understanding of law flourished with the concept of codification. It suggests that in a questioned field of law the admissible and regulating authority solely and exclusively belongs to the state's legislation. In other words, the state authority attempts to monopolize all judicial rule by gradually excluding principally independent and interpretative justices applied by *kadı*s. Therefore, modernization efforts in the legal dimension were not a simple part of the reform program but a vital key to ensuring the centralization of the state apparatus.

It is not a coincidence that codification began in the Ottoman Empire in the 19th century. It was perhaps the most important aspect of a recently questioned and freshly burgeoning issue: the changing thought about the relationship between the state and the law. Even in the Edict of Gülhane in 1839, a crucial and decisive role was valued for reforms in the legal dimension and legislation by stating that:

"...It has been hereafter considered requisite and significant that some novel legislation be imposed and established for the finely administration of the High [Ottoman] State and the lands of our great cities; the fundamental articles of this required legislation consist of the recommendations for safety of life; protection of chastity, honor and property; the assignation

of taxes and procedures of recruitment and the duration of employment of the required soldiers... "[132]

As explained in the above quote, for the Ottoman Empire and reform-minded elites, legislation constituted one of the most important instruments used to make genuine reform in all domains.[133]

Moreover, legal reforms also constituted efficient mechanisms of centralization in a crumbling empire during the long 19th century.[134] Hence, the sequence of codifications in different domains was not a coincidence. Although this paper will examine and discuss features and meanings of codifications in the criminal field, here it is useful and explanatory to mention the sequence of appearances of legal regulations in various fields.

The first codification was realized in the penal code in 1840, however, this codification was much more focused on bureaucratic crimes rather than addressing general society, and it aimed to discipline state officials. In other words, it can be said that the very first codification reflected the state's efforts to strengthen the state apparatus itself—to ensure an integrity and durability in its institutions by disciplining and punishing officers.

According to Kırlı, the emphasis on disciplining state officials represented the Ottoman state's concerns to centralize and create a new configuration of power, which eliminated local power elites and pressure groups. Since the old tax system was based on the practice of *iltizam*, there was a reciprocal dependency between local governess and local elites, which served economic profits and political interests. In the provinces, these pressure groups traditionally exchanged certain gifts called *hediye-baha, bohça-baha* or *kudumiye*.[135] At this point it is important to note that before 1838 in the Ottoman Empire, state officials did not have any determined salary and earned their income from this economy of traditional gift-giving. However, with a new tax system based on *muhassıl*s and the creation of a salary system, the state aimed to

[132] Halil İnalcık and Mehmet Seyitdanlıoğlu, eds. *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu*, (Ankara: Phoenix Yayınevi, 2006), 1. *"... bundan böyle Devlet-i Aliyye ve memalik-i mahrüsamızın hüsn-i idaresi zımmında b'azı kavanin-i cedide vaz' ve tesisi lazım ve mühimm görünerek işbu kavanin-i mukteziyyenin mevadd-ı esasiyyesi dahi emniyyet-i can ve mahfüziyyet-i ırz ve namus ve mal t'ayin-i vergi ve asakir-i mukteziyyenin suret-i celb ve müddet-i istihdamı kaziyelerinden ibaret olup ..."*

[133] Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified", *Mediterranean Politics* 7, no.3, (2002), 88.

[134] Ibid.

[135] Cengiz Kırlı, *Yolsuzluğun İcadı: 1840 Ceza Kanunu, İktidar ve Bürokrasi*. (İstanbul: Verita, 2015), 33.

destroy the clientelism and interdependency between local elites and officers and to constitute a new configuration of power based on the central governmental authority.[136] In 1840, just two years after the ordinance of a regular salary application, it is not a surprise that the concept of a regular salary was not yet well-practiced in the bureaucratic field and was still considered precarious. Therefore, the state assumed a menacing attitude towards its officials. So, when we consider the historical context of the period, the main goal and concerns of the government to centralize and strengthen the state apparatus can be better understood.
Evidently, the codification efforts of the penal code in 1840 were serving to destroy decentralized elements in the late Ottoman Empire, and the efforts? expressly show an aspect of instrumentalization of the law according to the political interests of the state.

The second change in the legal field was realized in the Commercial Code of 1850. The reason underlying this change was much more simple and obvious in comparison to the 1840 Penal Code. The increasing penetration of Western capitalism and production in the international market demanded new legal regulations. Since the Ottoman Empire was drastically losing its political and economic power, the state could not resist the domination of international commercial agents, and these new regulations were formalizing according to the inclinations and interests of Western countries.

The third legal change occurred in the penal domain in 1851. Since this codification was based on the sharia, we can consider it as a regulation inspired by native legal sources. In fact, the 1851 Penal Code was a follow-up regulation to the 1840 Penal Code. These were the first two penal codes codified in the Tanzimat Era, and they inherently carried the traces of old Ottoman penal regulations. As it was already mentioned, the main goal of the *kanunnâmes* in the Ottoman Empire was to ensure public safety by controlling local governors' and fief-holders' excessive use of power. These first two regulations in the penal domain reflected again this main concern of public policy. Also, in these regulations there was not a differentiation between crimes against the state and crimes against a person. This absence can be interpreted as a heritage from the old division of labor between the sharia and the statute law, because in the old Ottoman penal codes, crimes against a person were accepted as relevant to the sharia.

[136] Ibid, 97.

Another codification in the penal domain was realized in 1858. In the commission preparing the codification, we again encounter Ahmet Cevdet Paşa. Certain discussions of the 1858 Penal Code are still contentious among scholars. For example, according to Gülnihal Bozkurt, the codification was more or less a mot-a-mot translation of the 1810 French Code Penal,[137] however, Ahmet Akgündüz argues that despite a great beneficial occupancy from the French Penal Code dated in 1810, the 1858 Penal Code still had distinct points.[138] This codification will be examined in detail in the following chapter.

The fifth legal change encountered was the 1858 Land Law. This was the first geographical and conceptual law directly focused on land. According to scholars,[139] it is placed among the most original legal regulations, like the *Mecelle,* because there was not any inspiration or influence from Western sources or political domination. This codification also carried traces of Ahmet Cevdet Paşa, who was in the commission which consisted of four important pashas. The main goal of the codification was again to constitute and strengthen the authority of the central state over land through a strict bureaucratic ruling and control.[140] Moreover, through this new regulation, the central government gave a right of land title to the peasantry, ayans and local power groups. In this way, a legal basis was created for land ownership, and this enabled the application of a more regular and fair assessment. One could note that the codification of the land law was also an instrument of centralization efforts of the Ottoman state during the late 19th century.

The sixth and maybe most original codification of the Ottoman Empire was the *Mecelle*. During the questioned era, the codification of civil law initiated a discussion between two different groups.[141] Under the leadership of Âli Paşa, Western-oriented reformers suggested that the French Code Civil should be accepted after some retouches. However, more traditional reformers like Ahmed Cevdet Paşa claimed that such an intimate domain as civil law must be rooted in Islamic tradition. He stated that, "*since altering and converting the fundamental legislation of another nation in this fashion would be as destroying that*

[137] Gülnihal Bozkurt, *Batı Hukukunun Türkiye'de Benimsenmesi: Osmanlı Devleti'nden Türkiye Cumhuriyeti'ne Resepsiyon Süreci*, 1839-1939, (Türk Tarih Kurumu Basımevi, 1996), 100.

[138] Ahmet Akgündüz, "1274/1858 Tarihli Osmanlı Ceza Kanunnâmesinin Hukukî Kaynakları, Tatbik Şekli ve Men'-i İrtikâb Kanunnâmesi", *Belleten*, LI, sy. 199, (1987), 160-161.

[139] E. Attila Aytekin, "Hukuk, Tarih ve Tarihyazımı: 1858 Osmanlı Arazi Kanunnâmesine Yönelik Yaklaşımlar", *Türkiye Araştırmaları Literatür Dergisi*, Cilt: 3, no. 5, (İstanbul: 2005) 723.

[140] Musa Gümüş, "Osmanlı Devleti'nde Kanunlaştırma Hareketleri, İdeolojisi ve Kurumları", *Tarih Okulu Dergisi*, no. XIV (2013), 173.

[141] Ibid, 174.

nation"[142], which meant that codification adapted from another country would ruin the order of the original society. This great care and attention to protect the essence of the society's legal history based on the sharia is what made the *Mecelle* an original codification.

The Family Law was considered relatively late, legislated in 1917. It is believed that the postponement of legislative regulations in a highly intimate area like family was not a coincidence, but a manifestation of the preferences of political interests and attention for a smooth transition. Triggers for legal regulation came as consequences of wars in the second half of the 19th century. In this era, the empire was positioned in different wars, which resulted in a decrease in society's male population, and therefore, differentiation in family law became necessary. Women gradually became the backbone of economic and social life and emerged as new legal respondents. Some regulations encountered within this codification were the right to espouse for young women and widows despite the disallowance of parents, the prohibition to marry Persian nationals, a legal restriction to polygamy, the application of an age limit for marriage, the application of compulsory registration of marriages and divorces with *Sicil-i Nüfus Nizamnâmesi* and married women's right to divorce by reason of disappearance or illness of their husbands.[143] As it can be seen, the codification reflected social consequences of the historical conditions of wartime. Furthermore, it manifested a state-sponsored feminist policy regarding the configuration of gender roles in society. Another significant feature and novelty of this codification was its goal to constitute a legal unification among different millets by containing provisions about them.

Consequently, modernization efforts and reforms during the late Ottoman Empire explicitly manifested themselves in the legal field. Through these legislative regulations we can distinguish that the Ottoman state carried traces of the essential characteristics of the concept of the modern state by formalizing the law according to political interests of the era, inventing new criminal notions as corruption,[144] and initiating a new and more strict and controlling attitude towards state officials and the common people. As Rudolph Peters states, "Legislation

[142] Ahmet Cevdet Paşa, *Tezâkir*, (Ankara: Türk Tarih Kurumu Basımevi, 1991), 63. "*başka bir milletin kavanin-i esasiyesini böyle kalb ve tahvil etmek ol milleti imha hükmünde olacağından"*

[143] Mehmet Ünal, "Medenî Kanunun Kabulünden Önce Türk Aile Hukukundan Düzenlemeler ve Özellikle 1917 Tarihli Hukuk-i Aile Kararnâmesi", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Cilt: 34, no. I, (1977), 394.

[144] Cengiz Kırlı, *Yolsuzluğun İcadı: 1840 Ceza Kanunu, İktidar, ve Bürokrasi*, (İstanbul: Verita, 2015)

was not only an instrument of reform, but also of centralization and legal unification."[145] These were clearly political concerns and interests.

When the codification compared with the shari'a, traces of modern state mentality can be better distinguished. As examined in previous chapters, the shari'a developed as a jurists' law; that is to say, a legal tradition that was substantially independent from political authority and interests. However, the codification had extensive potential to promote the political interests of the state authority. Secondly, the sharia was based on fiqh texts which were highly discursive and resulted in different interpretations of the same issue.[146] But through codification, the legal authority determined a clear, definite and unambiguous attitude towards criminal issues. Through legislation, the central state eliminated all possible approaches which could come from various legal actors, and declared its own legal attitude as the only way. This authoritative approach to regulating the legal issues of a society is evidently one of the most important characteristics of modern interventionist state mentality. Thus, a new ideological inclination and relationship between the state, law and society manifested itself in the legislative reforms of the Tanzimat Era.

[145] Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified", *Mediterranean Politics* 7, no.3, (2002), 88.
[146] Ibid, 89.

CHAPTER IV

The Transformation of the Law During the Tanzimat Era

The legal transformation during the late 19th and early 20th century was not solely a transitional period, but an important part of a much larger reform movement that began in the late Ottoman Empire. Therefore, in order to better understand this legal transformation and its sociopolitical reasons and consequences, one must have general background information about the Tanzimat Era

4.1. General Approach to the Tanzimat Era

In the literature, the Tanzimat Era officially began with the promulgation of the Imperial Edict of Gülhane in 1839, however, it had deep roots in the reigns of two former sultans, Selim III and Mahmud II. The process of change had already begun in the 18th century under the reign of Selim III. There was a certain awareness about intellectual, political and, especially, military changes in Europe. Selim III started a comprehensive reform program called *nizâm-ı cedid*. The main idea of the *nizâm-ı cedid* was to strengthen central authority by reorganizing taxation, land tenure and military order. According to Zürcher, the difference between Selim III's reform and other centralization movements, like in 17th century, was that he was a bridge between two different reform mentalities from the classical era and 19th century. He was looking towards Europe instead of searching for a golden age in the history of his own empire, and therefore, he created channels of interaction between Ottoman government elites and European ideas.[147] For example, Berkes explains that in the introduction of a significant booklet written by Seyyid Mustafa (a professor in a new engineering school founded by Selim III), technical progress in Europe was compared with scientific backwardness in the Eastern world because of religious fanaticism and superstition. Mustafa praised the reforms which introduced new mathematical technics to the military field. According to Berkes, for the first time, a distinction was made in this way between the East and the West in the Ottoman elites' mental world.[148] Despite all of the importance and necessity of European-inspired technical reforms, this evoked a strong reaction. For İnalcık, the real trigger on reactions was the menacing threat of the ayan's arbitrary practices by Selim's new economic order, which

[147] Eric Jan Zürcher, *Turkey: A Modern History*, (London-New York: I.B. Tauris, Revised Third Edition, 2004), 22.

[148] Niyazi Berkes, *The Development of Secularism In Turkey*, (Montreal: McGill University Press, 1964), 79.

canalized taxes towards the new treasury, *irâd-ı cedit*.[149] In conclusion, reform movements and efforts for strengthening the central authority of the empire were ruptured by the conservative coalition of the ayan, the ulama and the Janissaries.[150]

In 1808 Sultan Mahmud II came to the throne with the help of the ayan of Rusçuk Alemdar Mustafa Pasha. Because Mahmud II had witnessed his uncle's tragic death, he pursued a prudent policy during his first 18 years,[151] despite his reform-mindedness. During this relatively stagnant period, he mainly dealt with the semi-independent ayans and gained superiority in Anatolia and Balkans.[152] From 1826 onwards, he channeled his efforts into reform movements. According to Zürcher, his reforms to create a more effective fiscal system, a more central bureaucracy and also, in the provinces of this tax system, modern education institutions to raise a new class of bureaucrats, can be interpreted as tools to strengthen central authority by means of a modern military.[153] The turning point in his military reform was the abolition of the Janissaries. In this way, the sultan eliminated the potential of uprising.
Besides this military milestone, it is believed that reforms in educational and administrative fields were vested with constituent importance. Due to the existence of foreign instructors in the newly founded modern educational institutions and the requirement of learning of foreign languages, Ottoman students were sent to Europe for the first time in 1827. The foundation of *Tercüme Odası* created a new type of man who was fully-equipped intellectually and enthusiastic to interact with Europe. Indeed, peres fondateurs of the Tanzimat Era would have arisen among this cadre. In conclusion, it is certain that Sultan Mahmud II and his reform-mindedness provided the proper atmosphere and incubation for the Tanzimat Era. Even the term "Tanzimat" is an indicator of the continuity of this mentality, as it was first mentioned in 1838 during Mahmud II's reign. [154]

After Mahmud II, his son Abdülmecid succeeded the throne. Like his father, he was reform-minded. However, he was only sixteen-years-old, and for this reason he received substantial

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[149] Halil İnalcık, *"Tanzimat Nedir?"*, 249. Accessed October 25, 2017, http://www.inalcik.com/images/pdfs/89230630TANZiMATNEDiR.pdf
[150] Ibid, 250.
[151] Halil İnalcık and Mehmet Seyitdanlıoğlu, eds. *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu*, (Ankara: Phoenix Yayınevi, 2006), 83.
[152] Eric Jan Zürcher, *Turkey: A Modern History*, (London-New York: I.B. Tauris, Revised Third Edition, 2004), 30.
[153] Ibid, 39.
[154] Ibid, p.36.

support from statesman[155] and especially from Mustafa Reşit Paşa. According to Zürcher, the main difference of the reign of Abdülmecid I was the shifting of political power from the court to the *Babıali*; from the sultan to the bureaucrats.[156] For example, during this period the restriction of capital punishment was a way of withdrawing from the right of siyaset by the Sultan,[157] and it can be interpreted as an indicator of this power transition in order to ensure bureaucrats' security .

In this direction, an edict of reform was written by the authorities and read in 1839 by Mustafa Reşit Paşa. The Credo of the Noble Edict of the Rose Chamber was a guarantee of security of life, property and honor for all subjects of the empire, a new systematized tax system eliminating abuses of tax farming, a fair military conscription and equality before the law for all subjects regardless of religion. For many scholars, the main underlying reason for the edict was the political repression of practiced by foreign forces. Although the timing of the edict reflected a certain diplomatic concern supporting England in the Egypt crisis, it was a product of the genuine reform concerns of bureaucrats.[158] But on the other hand, these reformists were already heavily influenced by European ideas. In his article *Tanzimat Fermanı'nın Mânâsı Yeni Bir İzah Denemesi*, Şerif Mardin mentions significant findings about the mindset of the era. Through the official reports of the meeting between the Minister of Foreign Affairs of England and Mustafa Reşit Paşa, Mardin sketches in Paşa's world of political thought. For him, Mahmud II's ruling was an insufferable tyranny, and the only way to save the empire was to establish new institutions according to principals of reason and a consistent government system which was independent from the sultan's individual decisions.[159] For Mardin, this constant emphasis on institutions and principals of reason was highly divergent from classical Ottoman political thought and inspired by European liberal thoughts during that time.[160] The impact of these thoughts on institutionalization can be seen in different reform areas such as education, military and finance. However, due to the limited

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[155] Edouard Philippe Engelhadt, *La Turquie et Le Tanzimat ou Histoire des Réformes Dans L'Empire Ottoman*, (Paris: A. Cotillon, 1882), 35. Accessed October 25, 2017, https://archive.org/details/laturquieetletan01engeuoft

[156] Eric Jan Zürcher, *Turkey: A Modern History*, (London-New York: I.B. Tauris, Revised Third Edition, 2004), 54.

[157] Ahmet Mumcu, *Osmanlı Devleti'nde Siyaseten Katl*, (Ankara: Ankara Üniversitesi Yayınları, 1963), 176.

[158] Eric Jan Zürcher, *Turkey: A Modern History*, (London-New York: I.B. Tauris, Revised Third Edition, 2004), 52.

[159] Şerif Mardin, "Tanzimat Fermanı'nın Mânâsı Yeni Bir İzah Denemesi", in ed. Halil İnalcık and Mehmet Seyitdanlıoğlu, *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu*, (Ankara: Phoenix Yayınevi, 2006), 95.

[160] Ibid, 96.

scope of this thesis, this study will concentrate on the legal reforms that were carried out in the Tanzimat Era; more specifically, on the modernization of criminal law.

4.2. Modernization in Legal Field

Tanzimat reforms in the legal field manifested themselves in two different ways—first, with a sequence of codification, and secondly, through changes in the courthouse. In conjunction with a general picture of legal novelties in a different legal field, this section focuses on changes in penal codes and criminal courts. First of all, it is important to understand the reasons underlying these changes in order to consider them appropriately as a component of a comprehensive reform movement.

According to Mehmet Akif Aydın, the most important reasons for the legal reforms were the insufficiency of the legal education in madrasas, the difficulty facing kadıs while trying to find related legal approaches among a myriad of opinions, picking the appropriate approach for cases and applying the justice.[161] This approach is supported by the statements of Ahmed Cevdet Pasha, one of the famous minds of the legal reform movement in the Tanzimat Era. He states, "Islamic jurisprudence, then, is an immense ocean and in order to find solutions for problems by bringing to its surface the pearls of the topics required need an enormous skill and mastery. And especially for the Hanafite madhhab, there were, in subsequent generations, very many independent interpreters, mujtahids and there emerged many controversies so that Hanafite jurisprudence, like Shafi'ite jurisprudence, has branched out and become diverse to the extent that it cannot anymore be examined carefully. Therefore, it is tremendously difficult to distinguish the correct opinion among the various views and to apply it to the cases. … Therefore, if a book on legal transactions, mu'amalat, were to be composed that it easy to consult being free from controversies and containing only the preferred opinions, then everybody could read it easily and apply it to this transactions."[162]

This attitude depicts a misleading causal relation by implying that there were complaints from kadıs and that the reason underlying the legal reforms was to answer to the demands of the ulema. However, there was a displeasure and reluctance towards legal reforms among

[161] Mehmet Akif Aydın, *İslâm-Osmanlı Aile Hukuku*, (İstanbul: Marmara Üniversitesi İlahiyat Fakültesi Yayınları, 1985), 128.

[162] Ahmet Cevdet Paşa, *Mecelle,* (1868). Cited by Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified", *Mediterranean Politics* 7, no.3, (2002). 88-89.

members of the ilmiyye class. To illustrate this, one can refer to the tension between Shayk al-Islam Hasan Fehmi Efendi and Ahmed Cevdet Paşa during preparation of the *Mecelle*. The commission which would prepare the *Mecelle* was included in the scope of the Ministry of Justice. Under these circumstances, Hasan Fehmi Efendi objected by arguing that this kind of a commission must be affiliated with the *Meşihat*.[163] For Ekrem Buğra Ekinci, this was not a personal tension but a reflection of concerns about the exclusion of the ulema.[164] Thus, a demand from the ulema cannot be cited as a reason for new legislation activities.

In fact, the statements of Ahmed Cevdet Pasha quoted above can be understood as a strategy of moderation for smooth reactions from ulema. Thus, this political attitude of Ahmed Cevdet Pasha was implicitly criticized by one of the most important historians of the era, Ahmed Lütfi Efendi. According to him, Ahmed Cevdet Pasha thoroughly internalized his transition to the *mülkiye* class despite his past in the *ilmiyye* class, and for this reason he could not protect the *ilmiyye* class and shari'a courts from shrinking during the legislative reforms.[165] Given these points, the reasons supposed by Ahmed Cevdet Pasha carried traces of political concerns rather than reflecting convincing causal relations. The real reasons were derived from more realpolitik concerns, consisting of meeting the political domination of Western states, the need for new legislation due to increasing economic relations with foreigners and the inclination towards centralization.

In the 19th century, Western states became more and more interested in Ottoman internal affairs under the pretext of their common religious affairs with minorities in Ottoman society. In the 1856 Paris Conference, they explicitly declared for the first time their demand for reforms in the legal field. That same year, the Ottoman Empire declared the Edict of Islahat. There is a consensus among various scholars that, along with sincere efforts to reform the administrative and legal structure of Ottoman elite, this was a political strategy to steer Western powers away from political intervention by showing "a mimetic response to a reified West."[166] Another document which provides evidence about Western countries' domination was the report submitted in 1861 by the ambassador of England in Istanbul, Sir H. Bulwer to

[163] Ekrem Buğra Ekinci, *Tanzimat ve Sonrası Osmanlı Mahkemeleri*, (İstanbul: Arı Sanat Yayınları, 2004), 105.
[164] Ibid.
[165] *Vak'anüvis Ahmed Lütfi Efendi Tarihi*, İstanbul: Yapı Kredi Yayınları, Türkiye Ekonomik ve Toplumsal Tarih Vakfı Serisi, 1999), 210.
[166] Avi Rubin, "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification" *Journal of the Economic and Social History of the Orient* 59, no. 5 (2016), 835.

Bâb-ı Âli. In this report, England clearly demanded a new court structure which differentiated civil law courts, commercial courts and penal courts, and each of these courts must have members from each religion in the empire.[167] On the other side, Monsieur Bourée, the French ambassador in Istanbul, was putting pressure on the government to adopt French codes.[168] The political domination of Western countries was dramatically depicted in *Tezakir,* written by Ahmed Cevdet Pasha. He states,

"One of the primary reasons that created difficulties at that time for the state affairs was the fact that the British and French Embassies competed to exert influence in the Capital. Namely, the British Ambassador Canning had been interfering in the Sublime Porte activities all along. The French, on the other hand, had acquired quite much fame in this competition and the French Embassy thus had the desire to have superiority in terms of influence. Reşid Paşa had favored the British policy all along, while his rivals, Âli Paşa and Fuad Paşa, having been through his own education school, totally adhered to the French policies. The Commander-in-Chief Ömer Paşa favored the British, while the previous." Commander-in-Chief of the military, Rıza Paşa was a close confidant of the French Embassy more than anyone."[169]

However, considering the political domination of foreign forces as major reason for the reform movement is not the appropriate approach. This is because the reforms were based on a frank and innate belief among the 18th and 19th century Ottoman sultans and elites about the necessity of reforms for the survival of the empire. This belief had been clinched with political interest in centralization since the 18th century, especially under the reigns of Sultan Selim III and Sultan Mahmud II. In order to achieve this goal, legislative reforms in the old Ottoman decentralization-minded administrative structure were inevitable. The efforts of centralization were manifested in the transition from the fusion of the statute law and the sharia to the codification in which the central state became the only authority to control legislation. This issue will be examined in a detail in the chapter *from statute law to codification*.

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[167] Edouard Philippe Engelhadt, *La Turquie et Le Tanzimat ou Histoire des Réformes Dans L'Empire Ottoman*, (Paris: A. Cotillon, 1882), 173. Accessed October 25, 2017, https://archive.org/details/laturquieetletan01engeuoft

[168] Ekrem Buğra Ekinci, *Tanzimat ve Sonrası Osmanlı Mahkemeleri*, (İstanbul: Arı Sanat Yayınları, 2004), 16.

[169] Ahmet Cevdet Paşa, *Tezâkir*, Vol. 1. (Ankara: Türk Tarih Kurumu Basımevi, 1986), 26. "*Ol esnada umur-ı devleti müşkilata düşüren başlıca bir sebeb dahi İngiliz ve Fransız sefâretlerinin Derseadet'te nüfuz yarışına çıkmaları hususu idi. Şöyle ki İngiliz elçisi Canning öteden beri Bâbıâli'nin icraatına müdahale eylerdi. Fransızlar ise bu muharebede hayli şan kazanıp bu cihetle Fransa sefâreti nüfuzca ana tefevvuk dâiyesine düşmüş idi. Reşid Paşa öteden beri İngiltere politikasına mâil olup anın mekteb-i terbiyesinden çıkıp da sonra ana rakıyb olan Âli Paşa ve Fuad Paşa ise bütün bütün Fransa politikasına bağlandılar. Serdar-ı ekrem Ömer Paşa İngilizlere mâil olup Serasker-i esbak Rıza Paşa ise herkesden ziyâde Fransa sefâreti ile hem-râz idi."*

The third reason for reform was the increasing commercial relationship between the Western traders and the Ottoman merchants, requiring a new and integrated body of law. After the Industrial Revolution, Ottoman lands became an attractive market for foreign traders.
Moreover, by means of military, economic and political forces, Westerners were paying lower amounts of customs duty. Despite an attempt by Sultan Abdülmecid in 1861 with *Kanlıca Ticaret Muahadeleri*, Western traders could protect their advantageous position by imposing a 5% tariff, while the amount applied to native traders for exportation was 12%.[170] Thus, the advantageous position of foreign traders in Ottoman lands was also a reason for the increasing commercial relations. In the face of this new interrelation, finding a solution to a dispute between an Ottoman merchant and a foreign one became a problem. Normally, these kinds of mixed-nature cases were in the scope of kadı justice. In the sharia they were authorized to judge according to customary law for commercial cases, however, due to the increasing interrelation between merchants, kadıs could not deal with these issues. This caused a reluctance among traders to go to court, and they started to prefer to resolve issues amongst themselves. Since this informal dispute solution among traders limited the government's authority, the Ottoman state had to make codifications and reform commercial courts.
Consequently, commercial law became the first field with legal reforms.

After explaining the realpolitik reasons underlying the modernization from a legal dimension, in the following chapter the codification activities can be analyzed.

4.3. Codification Activities in the Penal Field

In the limited scope of this study, it is especially interested in reforms in the penal field, which reflected the intrinsically changing modes of thoughts on crime and punishment.
Differentiations in constituent mentality on crime and punishment manifested the reconfiguration of the relationship between the state authority and society. However, reconfiguration of the field of crime control and criminal justice was not solely a mode of thought, but a new set of institutions and structures.[171] For this reason, one must examine

[170] Cihan Özgün, *"Osmanlı Ekonomi Politiğine Kısa Bir Bakış (XVIII- XIX. Yüzyıllar)"*, *Tarih Okulu* Sonbahar, no.1, (2008), 9.
[171] David Garland, "The Limits of The Sovereign State, Strategies of Crime Control in Contemporary Society" *The British Journal of Criminology* 36, no. 4 (1996), 164.

codification in the penal field as constituent element of institutional and structural changes. As it is already mentioned, three new penal codes were enacted after the Edict of Gülhane in 1840, 1851 and 1858. In this chapter, these will be examined in detail.

4.3.1. The 1840 Criminal Code

This is the first codification, enacted only seven months after the Edict of Gülhane. In the Tezekere-i Ma'ruza section, a credo of the edict was qualified as *"ehemm-i mehâmm-i menafi-i mülkiye"*, the most important elements of the public welfare and approved by saying that

"...because of the fact that the articles pertaining to the safety of life and property and the protection of chastity and honor are of utmost importance for the public benefit, and since these articles and some of their required details have been debated for some time by the words of some delegates, the Criminal Legal Code that has been thus penned down with the unity of [wise] minds and arrangement of sections and fragments..."[172]

This codification carried traces of the traditional mentality of Ottoman kanunnames by emphasizing the control and discipline of state officials' authority over the people. As Halil İnalcık states regarding the questioned years, "As soon as the Tanzimat was proclaimed he (Reşid Pasha) gave careful attention to the complaints and petitions submitted to the High Council on these matters, and he did not hesitate to demote, or to fine, or even imprison governors, *muhassıls,* and other officials as prescribed by the newly established penal code if they were found to be unlawfully collecting fees, demanding services and taking bribes as before."[173] At first glance this similar approach constitutes a continuity of mindset, however when examining the code, it distinguished a modern understanding of the state which defines, disciplines and polices civil servants. It can even be said that a major concern underlying the code was to organize a centralized, rational and uniform bureaucratic structure. Thus, the denotation and intention of Ottoman criminal justice became more and more a question of bureaucratic regulation rather than the protection of the subject.

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[172] Ahmet Akgündüz, Mukayeseli İslâm ve Osmanlı Hukuku Külliyatı, No. 6, (Dicle Üniversitesi Hukuk Fakültesi Yayınları, 1986), 810. *"... emniyet-i can ve mal ve muhafaza-i ırz ve namus maddeleri ehemm-i mehâmm-i menafi-i mülkiyeden olmasıyla bu maddeler ve bazı müteferriât-ı lâzımesi bazı vükelâ kavilleriyle bir müddetten beri müzakere kılınmakta olduğundan cem'i ukûl ve tertibi bend ve füsûl ile bu babda kaleme alınmış olan Ceza Kanunnamesi..."*

[173] Halil İnalcık, *The Ottoman Empire: Conquest, Organization and Economy*, (London: Variorum Reprints, 1978), in the article of Application of Tanzimat and Its Social Effects, 10.

This situation can also be distinguished in the definition of crime and victim. In the very beginning of the code, the first article of chapter one dealt with the crime of murders and sedition as attacks on the state and the sultan rather than crimes against persons by stating that: "...an obvious move like treason against the Sultan, the legal Sovereign of all the subject peoples of the High [Ottoman] State without any exception and attempt to awaken unrest against the High [Ottoman] State and effort to murder life..."[174] Furthermore, the article's way of dealing with the murder issue reflected the state's policing of civil servants because it divided the hypothetical murderer as either a civil servant or common person.

In the same chapter, the code focuses on the murder issue in subsequent articles. The interesting point is that when it comes to cases from common people, the focal point of these articles is explicitly on the procedural processes of cases, like the position of provincial and central councils of new jurisdictional systems or the exact requirement of *ferman-ı âlâ* needed by the sultan for the execution. However, there are no statements about the issue of intent, witness or degree of violence which were constituent points of the classical Islamic approach to crime and criminality. Consequently, there was a certain shift from classical shar'i attitude to a new, modern, state-oriented, political-interested approach to criminality.

This indefiniteness and negligence towards the quality of criminal behavior in personal crime cases switched when it came to cases in which civil servants were criminals. It must be accepted that the main focus of criminal justice was still on the procedural and institutional process, and it is also necessary to explain that criminal behavior gained a certain importance in political cases when compared to personal ones. As an illustration, in the second chapter, which focuses on the rebellion, the code defines criminal behavior in detail. It could be verbal or in deed form. The criminal could provoke or encourage its environment to rebel, or he/she could be directly involved in a conspiracy plan, or physically support a rebellion by providing gunpowder or weapons. As it is seen, when it comes to a crime vested with political character, the code was not tightlipped when defining this criminal behavior.

[174] Ahmet Akgündüz, *Mukayeseli İslâm ve Osmanlı Hukuku Külliyatı*, (Dicle Üniversitesi Hukuk Fakültesi Yayınları, 1986), Vol.6, 811. *"Bilâ istisna tebea-i Devlet-i Aliyyeden olanların metbû-u şer'îsi olan Padişahına ihanet ve Devlet-i Aliyye aleyhine îkâz-ı fitneye cesaret ve katl-i nefse cür'et misillû bir harelcet-i sarîhası.."*

Another interesting approach by the state towards political crimes can be seen in the qualification of rebellion as *"Devlet-i Aliyyeye ve kavânin ve nizâmâta mugayir harekât"*. This emphasis was odd because throughout the code there was not any qualification "against law and regulation" for any other type of crime. In fact, this was the point that differentiated a criminal act from an ordinary one—the transgressive quality and innate mentality underlying a crime was the point at which the law was violated. However, this foundational factor was verbalized only in the political case. As Ruth Miller analyzes, "This is precisely the direction in which law begins to develop. The article simply shows that the extent to which the 1840 code is geared toward the state and the bureaucracy rather than society or the individual. The 'laws and regulations' of importance are those relating to the state. Law indeed exists solely to define and to protect the state."[175] Thus, on the point of criminality, the state protected its political interests more than individual rights. Therefore, "legislation of criminal law became a question of defining the bureaucracy".[176] As an illustration, Miller appeals to subjects of trials that took place from 1840 to 1875. According to her examinations, was a significant abundance of political crimes in comparison to personal crimes—especially in regions that opposed the state's central government, including the southwestern Balkans, western Anatolia and south eastern Anatolia with Mosul.[177] The high ratio of cases and punishments of political crimes in these menacing regions from 1840 onwards was not a coincidence but a deliberate strategy of the state because "the Ottoman government therefore spent the 1840s and 1850s putting into play any and all possible symbols of its authority, including its newly articulated criminal law."[178] To summarize, when one consider the donnee of criminal law activity with regional political patterns, it is clear that criminal law and justice had been instrumental for the state's policy and interests.

4.3.2. The 1851 Penal Code

The 1851 Penal Code was not an independent codification, but officially an extension of the 1840 Penal Code. Just like 1840 Criminal Code, the regulation in 1851 commenced by approving the credo of the Edict of Gülhane, which consisted of protection of life, property and honor. As an interesting novelty in the code, the principles of the Tanzimat were qualified

[175] Ruth Austin Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*, (Routledge, 2005), 30.
[176] Ibid, 33.
[177] Ibid, 34.
[178] Ibid.

as steady and inviolable because they were based on the grounds of the sharia.[179] In this way, crimes against the state, law and Tanzimat gradually gained a character of sin in addition to their mundane nature of criminality. A moral and religious value was charged to the crimes committed in the political domain. Therefore, the code established a certain incorporation between the sharia and political aims of the Tanzimat, and this was for the benefit of latter. In fact, as Miller perceptively states, "As the bureaucracy became gradually inviolate, that is, religion and religious functionaries lent authenticity to this transformation."[180]

After the introduction, in the first article of chapter one, it is encountered a short but a significant expression of "... a move like attempt to awaken unrest against the High [Ottoman] State, which is the legal Sovereign of all the subject peoples of the High [Ottoman] State without any exception and effort to murder life..."[181] First of all, the statement connotes an abstraction of the state as a social body that subjects are bound to with legal bondage. In fact, this social abstraction of the state is a manifestation of a changing political mindset. If one compare the questioned statement in the 1851 Penal Code with its equivalent in the 1840 Criminal Code, the shift becomes clear. In the 1840 Penal Code, the equivalent version of the questioned expression is "*... treason against the Sultan, the legal Sovereign of all the subject peoples of the High [Ottoman] State without any exception and attempt to awaken unrest against the High [Ottoman] State and in order to murder life...*"[182] As it is seen, in the 1851 code the Sultan is substituted by the state, which is an explicit shift "from traditional absolutism represented by the monarch toward modern authoritarianism represented by the state".[183]

Another point to note in the relevant statement is that the quality of the legal bondage between the subject and the state intrinsically connotes one of the elements of the Tanzimat mindset: equality. The legal bondage at issue transcended any differences in religion and provided equality between different millets in the empire, just as it was supposed in the Tanzimat Edict.

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[179] *"esas-ı adumül-indiras Şer'-i şerif üzerine mebnî olarak tekallübat-ı dehriye kabil-i tegayyür ve tezelzül olamayacağı derkârdır."*
[180] Ibid, 32.
[181] "*Bilâ istisna tebea-i Devlet-i Aliyyeden olanların metbû-u şer'îsi olan Devlet-i Aliyye aleyhine ikaz-ı fitneye cesaret ve katl-i nefse cür'et misillû bir hareket…"*
[182] *"Bilâ istisna tebea-i Devlet-i Aliyyeden olanların metbû-u şer'îsi olan Padişahına ihanet ve Devlet-i Aliyye aleyhine îkâz-ı fitneye cesaret ve katl-i nefse…"*
[183] Ibid, 43.

In the same article, it is encountered that another novel understanding of the definition and limits of victimhood in relation to the abstraction of the state as a social body. In the statement of "*Even when the heirs of that slain deceased accept the blood money [offered to them], or they prefer to totally forgive the murderer, the officer that attempted the evil act of that execution shall doubtlessly be sentenced to execution politically and legally*."[184], victimhood moved beyond a personal or individual question, since the victim became a member of an abstract political body and person of the Sultan. For this reason, despite the amnesty rights of a person, the state could continue to maintain the trial and punish the crime as a part of the victim in fact. This understanding also constitutes the core mentality of governmental litigation in modern law.

Redefinition of victimhood and crime became evident in a trial in 1851, which dealt with an investigation of the governor of Üsküp, Tosun Pasha. He was investigated because of his arbitrary application of violence by lashing various convicts in his place of duty. The interesting point here is that the document qualified this arbitrary violence and punishment as only, contrary to the Tanzimat.[185] This definition of the crime, being referred to as only an adverseness to the principles of the Tanzimat, connoted that the victim in this case was the state rather than the convicted persons. Thus, the concept of victim, crime and criminality was redefined according to a new, modern political mindset of the state.

The second chapter of the code dealt with crimes committed against another principle of the Tanzimat Edict: honor. As a novel definition of punishment, the first article of the chapter refered to *hadd-i şer'î*, shar'i punishment for crimes against honor. In the second article, this egalitarian approach, which allowed *hadd-i şer'i* for anyone, was defined in a detailed way, and one can again encounter a differentiation between the common people and civil servants. Thus, by stating that, "*On the grounds that such an act occurred in the Capital and its charge requires merely admonition, and since admonition is implemented according to one's condition and reputation; if that person is from the prestigious scholars and from the generous lords or from the people with high ranks, that person should be admonished by*

[184] "*Velev ol maktûlün veresesi diyet ahziyle razı olmak veyahut ol kâtili bütün bütün affetmek suretinde olsalar bile, işbu idam madde-i kabîhasına cesaret eden memur beher hal siyaseten ve nizamen idam kılına"*
[185] Meclis-i Vâlâ 8340, 27 B 1268. *"tanzimat-ı hayriyenin mugayiri"*

being summoned to the High Council."[186], the code prescribed a solid distinction regarding regular criminals and rank-possessing criminals. Because in these cases the criminal did not only violate a person's individual honor. Rather, the crime became a violation of state authority and the state's self-definition if the criminal was an official. To summarize, the protection of legal and political arrangement in the reform era still constituted the mindset underlying the definition of the criminal and criminality in the 1851 Penal Code.

Following the article of that same chapter is an example of state self-disciplining. In this article, an implicit warning about the process of criminal justice in the Meclis-i Vâlâ was remarked on by stating that. *"On the grounds that the High Council would be the council of attention and equity, utmost attention to the differentiation and implementation of such articles as different from absconding and grudge articles, and refraining from the responsibility that might rise against and falling to no fault during implementation [of law] without ever refraining from telling the truth shall all be the duties of the aforementioned Council."* [187] Therefore, the article constituted an illustration for the instrumentalization of criminal law as a self-disciplining ~~utile~~ tool for the protection of the state's institutional identity.

In the following chapter, the first statement of the first article says, "No one's assets or properties who is a subject of the High [Ottoman] State shall be seized."[188] This again explicitly shows the new understanding of state as a social body and the transformation of an individual to a member of this abstract political entity. In the following articles of chapter three, the code dealt with crimes against property with a special focus on potential crimes that could be committed by state officials, such as bribery, deliberatly deficient bookkeeping and corruption. Throughout the chapter, elaborated details are indicated in order to provide a strict self-policing, and as Miller captures in the questioned chapter, "deviant bureaucratic behavior became almost the sole focus of the law."[189]

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[186] *"Bu misillû madde Dersaadet'te vuku bulduğu ve cünhası yalnız tazirde kaldığı surette tazir dahi herkesin hal ve şanına göre olduğundan ol kimse ulemay-ı fihamdan ve sâdât-i kiramdan ve zi-rütbe zevattan ise Meclis-i Vâlâya celb ile tazir kılma,"*

[187] *"Meclis-i Vâlâ meclis-i dikkat ve hakkaniyet olacağından bu misillû mevaddın tasahhub ve garaz maddelerinden ârî olarak fark ve temvizine kemal-i dikkat ve hilafında vaki olacak mesuliyetten mübâadet eylemek ve doğruyu çekinmiyerek söyleyip ihzarda kusur eylememek meclis-i mezkûrun vazife-i zimmeti ola."*

[188] *"Taraf-ı Devlet-i Aliyyeden kimesnenin mal ve emlakine vaz-ı yed olunmaya."*

[189] Ruth Austin Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*, (Routledge, 2005), 46.

4.3.3. The 1858 Penal Code

The 1858 Penal Code was the most polemic codification in the penal field, as the French Code Pénal of 1810 constituted the main source of its formation. Discussions on the translational character of the 1851 Penal Code range widely in various disciplines—from law, political science and the science of translation. Such an extensive and multi-disciplinarian dispute about the code goes beyond scope of this study, however, in order to better understand the normative and authoritarian character of the code, certain comparison between the two questioned codifications will be mentioned from time to time.

First of all, in comparison with the two former penal codifications, the 1858 Penal Code expressed an increase in crimes against the person or individual. The reason for this change was the formational and contextual inspiration from the French Penal Code, which had abundant regulations of crimes against the individual. At first glance, the effect of its reception could be interpreted as a recession of state-oriented interests underlying the codification activities. However, the most interesting point, which reveals the authoritarian character of the Ottoman penal code and state-oriented disciplinarian intentions of legislators, appears when we compare the Ottoman version with the French one. According to Ruth Miller's study[190], in the 1810 French Penal Code, 33% of the articles regulated crimes against individuals and 36% of them concerned political crimes, or crimes against the state. However, the 1858 Ottoman Penal Code dealt to a large extent with political crimes. Nearly half of the articles concerned political crimes at the ratio of 42%. On the other hand, private crimes, or crimes against persons, constituted only 24% of articles.[191] As it can be seen, even in a penal code known for its autocratic character in legal history, there is a certain balance and closeness between regulations on crimes against persons and crimes against the state.

However, the Ottoman version of the penal code again revealed the state-oriented legal interests of legislators and reformers. At this point, one can argue that crimes against persons were already of concern under the shari'a, therefore, there was no need to codify them. This argument is not valid because in the questioned period there was a two-folded judiciary structure, as shar'i courts and *Nizamiye* courts, and in the latter newly established codifications were being practiced by legal experts. For this reason, legislative regulations in

[190] Ibid, 58.

[191] These proportions are approved in a detailed doctoral theses is written in Yıldız Technical University, in the Science of Translation department by Senem Öner. See also: Öner, Senem. "Çeviri yoluyla kanun yapmak: 1858 tarihli Osmanlı Ceza Kanunu'nun 1810 tarihli Fransız Ceza Kanunu'ndan çevrilmesi." PhD diss., YTÜ Sosyal Bilimler Enstitüsü, 2012.

the field of crimes against persons have as much vital importance as crimes against the state. On the issue of a dual court system, this sui generis institutional development also had crucial importance in Ottoman reforms in the legal field. However, due to the limited scope of this paper this subject can only be briefly touched upon.

The first article of the 1858 Penal Code explicitly reveals the main intention of the code by stating that: *"On the grounds that, just as the implementation of punishments for crimes that directly target the government falls in the responsibility of the state, when the crimes against a person violate the public security, their punishment shall also be carried out by the State..*."[192] In this state, a new criminality and punishment mindset emerged by taking crimes against persons into the scope of crimes against the state in one form or another. According to the political interests of the central state, this is again a strategy of instrumentalization of the penal code in order to redefine the limits of public and private. At this point, Ruth Miller's categorization of crimes provides a useful framework to better understand the state's new position towards crime. She states, "Before, there were crimes against victims, which defined the limits of an individual's freedom of action. There were victimless crimes, which defined the boundaries of social morality. But in 1839, the year in which the Ottoman government set out to 'reorganize' itself, these two categories began to collapse into discursive crime, which redefined only the legal system against which they had been committed."[193] Thus, there was an intention to extend the limits of crimes and their respective penalties in order to strengthen political authority of the state through legislation. The emergence of the state as guardian of public order in the 1858 Penal Code manifests this inclination of state-oriented legislation.

Another interesting point is that in the first article there were references to the shari'a, *ulül-emr* and *ta'zir*. This is interesting because in the former penal code we encountered the replacement of the Sultan with the Sublime State. Now, the return of the sultan under the title of *ulül-emr* was part of a strategy of legitimization for the extension of discursive crimes over the crimes against persons. In order to rationalize the state's superior gaze as the guardian of the public, the code appeals to the shar'i law and its political and criminal terminology. As we have already examined in previous chapters, the division between *huquq al-ibad* and *huquq*

[192] *"Doğrudan doğruya hükümet aleyhine vuku bulan cerâyimin icrây-ı mücâzatı devlete ait olduğu gibi, bir şahıs aleyhinde vuku bulan cerâyimin âsayiş-i umumiyi ihlal eylemesi ciheti dahi kezalik devlete ait olduğundan…."*

[193] Ruth Austin Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*, (Routledge, 2005), 2.

Allah was a crucial element of the shari'a. Although the sovereign state had certain rights to define and enforce *ta'zir* punishments, there was a strong tendency among Islamic jurists to protect the independency and privacy of *huquq al-ibad*. Yet the article makes an ambiguous claim by stating that "crimes against any person". While there were meticulous definitions and delimitations in order to protect the individual in the shari'a, in the Ottoman penal code, the limits of public order were deliberately uncertain and vague. Furthermore, the conjunction of "*kezalik"* ("likewise") also caused an equivocation. This expression connoted that this was not a particular approach for a specific and defined situation, but a general understanding to redefine limits of crimes by claiming that crimes against persons menace the public order as well. As it can be seen, despite the contrast between the legal culture of the shari'a and codification, legislators still chose to refer to Islamic law in order to rationalize their authoritarian and state-oriented redefinition of the relationship between state and society by veiling it with shar'i legal theory.

The same questioned article presented a further expression in which another intention to legitimize can be traced. The article accentuated that the law of persons and individual rights could not be jeopardized by the extension of crimes against the state, by stating that *"... işbu Kanunname mütekeffil ve mutazammın olup ancak herhalde şe r'an muayyen olan hukuk-u şahsiyeye halel gelmeyecektir."* This shows that legislators were fully aware of such an extensive expression, which took crimes against persons into the scope of crimes against the state, and this is highly problematic and provocative. This consciousness becomes clear when looking at a primary source document brought into view by Mehmet Gayretli. This is a rough draft of the 1858 Penal Code written by the commission of codification,[194] and it provides an exceptional understanding of the formation process of the code. On the basis of this exceptional document we distinguish that the first article, which indicated that there would not be any jeopardizing of individual rights, was not a genuine part of the codification process. Contrarily, this expression, written by hand in the margins,[195] means that the

[194] Ceza Kanunu Müsveddesi, Ali Emiri Kavanin, no.64, (İstanbul: Millet Kütüphanesi) Cited by, Mehmet Gayretli, "Osmanlı Ceza Kanununun Kaynağı Üzerindeki Tartışmalar ve Bu Kanuna Ait Bir Taslak Metninin Bir Kısmıyla ilgili Değerlendirmeler", 3. Accessed October 25, 2017, http://hukuk.istanbul.edu.tr/cezahukuku/wp-content/uploads/2015/11/1858-OSMANLI-CEZA-KANUNU.pdf

[195] Mehmet Gayretli, "Osmanlı Ceza Kanununun Kaynağı Üzerindeki Tartışmalar ve Bu Kanuna Ait Bir Taslak Metninin Bir Kısmıyla ilgili Değerlendirmeler", 7. Accessed October 25, 2017, http://hukuk.istanbul.edu.tr/cezahukuku/wp-content/uploads/2015/11/1858-OSMANLI-CEZA-KANUNU.pdf

legislators retrospectively understood its importance and then added it precipitately. Therefore, legitimizing the intention of the questioned expression became clear. To summarize, at the very beginning of the code the distinction between criminal law and political law was deliberately blurred and comments on this blurring and consciousness of the intention manifested themselves in the legitimization attempt by referring to the shari'a in order to pacify potential critics and reactions.

In following articles of chapter one, one can encountered that the classification of crimes inspired by the 1810 French Penal Code. In order to clarify this inspiration, it is useful to borrow a chart from Tobias Heinzelmann's "The Tulers Monologue: The Rhetoric of the Ottoman Penal Code of 1858" article[196]:

French *Code Pénal*	*Cezā Ḳānūnnāmesi*	Content
Livre I[er]	Preface (*muḳaddime*), sections 1–3	Dispositions préliminaires des peines en matière criminelle et correctionelle, et leurs effets – *ʿAlelʿumūm cürm-ü cezālarıñ derecātiyle uṣūl-i ʿumūmīye beyānı*
Livre II	Preface (*muḳaddime*), section 4	Des personnes punissables, excusables ou responsables, pour crimes ou pour délits – *Medār-i ʿafv-u mesʾūlīyet olub olmayan ve cezāya istiḥḳāḳı mūcib olan ḥālāt*
Livre III, Titre I[er]	First chapter (*birinci bāb*)	Crimes et délits contre la chose publique – *Żarar-ı ʿāmm olan cināyet ve cünḥa*
Livre III, Titre II	Second chapter (*bāb-ı şānī*)	Crimes et délits contre des particuliers – *Eşḫāṣ ḥaḳḳında vuḳūʿbulan cināyet ve cünḥa*
Livre IV	Third chapter (*bāb-ı şāliş*)	Contraventions de police et Peines – *Ümūr-ı taḥaffuẓīye ve tanẓīfīye ve żābıṭaya muḫālif ḥareket ėdenleriñ mücāzātı*

As can be seen from the chart, the classification of crimes was based on a mot-a-mot translation of the 1810 French Penal Code. The novel point here is that such a classification of

[196] Tobias Heinzelmann, "The Ruler's Monologue: The Rhetoric of the Ottoman Penal Code of 1858." *Die Welt des Islams* 54, no. 3-4 (2014), 310.

offenses was made for the first time in the scope of *kanun*[197] by stating that *"Kanunen mücâzat olunan cerâyim"*.

In the third article of the same chapter, we encounter an interesting type of punishment which was *"hukuk-u medeniyeden iskat"* or "forfeiting of civil rights". The subject matter of this withdrawal was explained in article thirty-one by stating that,

"The penalty of eternal forfeiture from civil law is composed firstly of the punishment of being eternally deprived from the right to any official ranks or positions, and secondly of being deprived from all of the municipal rights, in other words, from holding any official position by the land and the nation and the artisans, and thirdly of being unable to teach in any education institutions and fourthly of being unable to be employed in the judicial process, and, shall their testimony be required in a court case, their testimony shall have the value of ordinary information and thus void by the court and of being unable to act on behalf of someone else in a court, and fifthly of being unable to be guardian, and sixthly of being unable to carry weapons." [198]

The notion of civil rights and its subject matters were again codified and inspired by and even literally translated from the 1810 French Penal Code, and constituted a novelty in Ottoman legislation.

Similar to a classification made for offenses, there was also a classification for the administrative processes and punishments for different crimes. In the second chapter, we encounter a definite, detailed and specified process and punishment for various crimes, like the matter of being under police supervision (article 14), the matter of penal servitude (article 19-20-21) or the matter of confinement in the fortress (article 22-23-24-25). In chapter three, one of the most important process of punishment was defined imprisonment. This definition was a legislative complement to a broader institutional prison reform during the late 19th century. In the same year, with the codification of penal law in 1858, M. Gordon, an English major and consultant at *Meclis-i Muvakkata* for reforms in jailhouses (the exact term was *mahbes*—Important because after a report submitted by Gordon, the notion of *hapishane* emerged in the criminal terminology of the empire.) He presented a report which prescribed a

[197] Ibid, 314.

[198] *"Hukuk-u medeniyeden müebbeden iskat cezası müebbeden rütbe ve memuriyetten mahrumiyet cezasına müstahak olmak ve sâniyen kâffe-i hukuk-u belediyeden yani memleketçe ve milletçe ve esnafça bir memuriyet-i resmiyede bulunmaktan mahrum olmak ve sâlisen bir mektep hocalığında kullanılmamak ve râbian icray-ı tahkikatta kullanılmamak ve bir davada kendisinden istizah- ı keyfiyet lazım geldiği takdirde ifadesi bayağı malumat hükmünde kabul olunup davaca hükümsüz tutulmak ve bir davada vekâlet edememek ve hâmisen vasî olamamak ve sâdisen silah taşımaya sâli*h olmamak *hususlarından ibarettir."*

classification of prisons under four different types of criminal behavior: accused *(zanlı)*, misdemeanor *(kabahat sahiplerine)*, less serious offence *(erbab-ı cünhaya)* and serious offence *(mürtekib-i cinayet)*.[199] As it can be seen, the classification of punishment and criminal behavior constituted a reform-minded mentality towards criminality in the modernization period of the state.

Chapter four depicted the boundaries of legal responsibility. As a detailed definition of the penal sanctioning process, this was also a novelty in the scope of penal code. Based on the expression of *"Hadd-i bülûğa vâsıl olmayan"* we can distinguish an inclination towards the use of shar'i terminology even in a high degree of translation activity on the penal code. In the French equivalent of the article, the age of legal responsibility was sixteen, however, the Ottoman version kept a mindset of delimitation of the shari'a while adopting the French penal code's structure. In the following chapter, it encountered that a specified *bab* on the *"zarar-ı âmm olan cinayet ve cünha ile mücâzât-ı mürettibeleri"*. Such an extensive focus on the issue of public interest, and the crimes which jeopardize it, was a novel attitude when one considers the two former penal codes in the empire. Thus, it is inevitable to agree with Miller's claims that there was growing authoritarianism, and the legislation of criminal law became more and more concerned with the state and its protection[200].

[199] Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 179.
[200] Ruth Austin Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*, (Routledge, 2005), 55.

CHAPTER V

Case Study: Reshaping Women on the Margins

In this chapter, certain gendered crimes in which women become agents were taken as case studies in order to reveal the gradually modernized legal thought of the Ottoman state and its repositioning towards society. At this point, it can be said that the women constitute a"fertile" zone to explore modern interventionist state's legal thought, since their reproductive capacity is directly related to question of population, public health and public morality. As an inevitable dimension of criminalization of women, the incarceration practices of them is also considered as a case in which repositioning of women on the margins between private and public by the reformist mentality of the Ottoman state could be revealed.

5.1. Criminalization of Abortion

The process of criminalization of abortion was not solely a legal issue but part of a broader transformation in the general policy of sanitation and demography in the Ottoman reform era. For this reason, before examining the criminalization of abortion through legislative activities, we must present an overview of the historical pattern of the policy of medicine and demography in the 19th century.

In this long 19th century, vital demographic changes had occurred in the Ottoman Empire. Especially liberation movements and engagements in long and multiple wars had resulted in major land and population losses. Therefore, the question of population became an important subject in the state's agenda. Under these circumstances, the productive capacity of women and the body gained a broader social and political meaning for the purpose of social engineering and population increase among reformers. At this point, reforms in sanitation and the emergence of a public health understanding were not a coincidence but a deliberate attempt to promote and control the population. In the pre-modern Ottoman Empire, health organizations, hospitals and medical schools were under the scope of *vakf* institutions, which were founded by charitable members of the ruling elites and sultans. Along the same line, medical madrasa education was provided under these *imaret*s. Furthermore, since the capacity of these educational institutions was quite restricted, an overwhelming majority of physicians were being trained in a master-apprentice relationship typical of any artisanship of the era,

and they were presenting medical service in their private clinics commercially.[201] In order to illustrate, seventeenth century statistics show that just 3% of physicians were working in *darüşşifa*s.[202]

In this way, pre-modern health organization in the Ottoman Empire had a certain independence from the state, and it can be said that the healthcare of the population was not an issue in the agenda of the state as a direct duty to manage.[203] By the 19th century, the state became aware of public healthcare as a result of the increasing interest in the issue in Europe and European-inspired, reform-minded sultans and governing elites. In the very first years of this century, a state hospital was founded along with a modern medical school in order to provide a modern medical education for military physicians.[204] This first attempt was interrupted by domestic political affairs, but right after the elimination of the most menacing opposition in 1826, another institutional reform occurred in the realm of medicine with the initiation of *Tıbbhâne-i Amire ve Cerrahhâne* Hospitals in 1827.[205] After two years, the school was renamed as *Mekteb-i Tıbbiye-i Şahane.* Furthermore, in these two medical institutions' curricula there was a course of public health. In 1867, we encounter the first civilian medical school with the establishment of *Mekteb-i Tıbbiye-i Mülkiye.* In the following years, many civilian hospitals were initiated with various characteristics and specializations, such as the *Vakıf Gureba* Hospital, the Zeyneb Kamil Maternity Hospital, The Women's Hospital *(Altıncı Daire-i Belediyye Nisa Hastanesi),* The *Darülaceze* and the Şişli Children's Hospital. As Demirci and Somel state, these transformations in the realm of medicine explicitly indicated that there was a growing state concern about public health conditions.[206]

After giving a general sketch about the growing interest in control public health, we would like to focus on two important and meaningful parts of this transformation: state intervention to midwifery and pharmaceutical measurements. These two developments were directly connected to the anti-abortion policies of the state. Likewise, to pre-modern physicians who received their education in a master-apprentice way, and who independently practiced

[201] İbrahim Halil Kalkan, "Medicine and Politics in the Late Ottoman Empire (1876-1909)" (MA Thesis Boğaziçi Üniversitesi Atatürk İlkeleri ve İnkılap Tarihi Enstitüsü, 2004), 9.
[202] Ibid.
[203] Selçuk Akşin Somel, "Osmanlı Son Döneminde Iskat-ı Cenin Meselesi", *Kebikeç* 13 (2002), 66.
[204] Ibid.
[205] Ibid.
[206] Tuba Demirci and Selçuk Akşin Somel, "Women's Bodies, Demography, and Public Health: Abortion Policy and Perspectives in the Ottoman Empire of The Nineteenth Century" *Journal of the History of Sexuality* 17, no. 3 (2008), 381.

medicine, midwifery was a widespread and well-accepted occupation, autonomously practiced by unofficial agents. In fact, their denomination as "unofficial" is improper, as there was not any notion of "official" midwifery until 1842. In that year, a specific course on midwifery opened in the medical school.[207] Attendance of this course was a requirement, at least for the midwives in the capital, and at the end of a course, a document called *şehadetnâme* would be given to the attendant midwifes.[208] In the opposite case, practicing midwifery would be banished and constituted as a criminal act. ~~For~~ Somel states that at the end of the year 1845, 36 midwives received diplomas from this specific course, and none of these women were Jewish. It is an interesting detail which verified the reputation of Jewish midwives as "bloodstained midwives" or *kanlı ebe,* which implied their assistance in practicing abortion.[209] The first legislative measurement to control midwifery as a profession was the publication of the Regulation Concerning the Practice of the Medical Profession in the Municipalities of the Imperial Domains in 1861 (*Memâlik-i Mahrûse-i Şâhânede Tabâbet-i Belediyye İcrâsına Dâir Nizamnâme).* While an official recognition and permission was given to midwives with diplomas[210], the regulation connoted that practicing midwifery without an official diploma approved by the *Mekteb-i Tıbbiye* was forbidden. Furthermore, this regulation prohibited the use of any surgical instruments by midwifes.[211]

Other than these institutional and legislative measurements, we also encounter a discursive opposition towards the traditional midwifery occupation. The best-known representative of this discursive campaign was Besim Ömer, a pioneer specialist of gynecology in the 19th century Ottoman Empire. In her book, *The Politics of Reproduction in Ottoman Society*, Güllhan Balsoy depicted this devaluation of traditional midwifery through the idealization of the modern professionalization of medicine by Besim Ömer. While promoting the professionalization of midwifery, Besim Ömer created a dichotomy between traditional midwifes and modern-trained, diplomate midwifes and doctors.[212] Beyond the expression of educational concerns, promoting midwifery as a modern professionalization meant, in fact, "turning them into a civil servant" because they were "useful for surveillance on families in

[207] Ibid, 394.
[208] Gülhan Balsoy, *The Politics of Reproduction in Ottoman Society, 1838–1900,* (Routledge, 2015), 23.
[209] Selçuk Akşin Somel, "Osmanlı Son Döneminde Iskat-ı Cenin Meselesi", *Kebikeç* 13 (2002), 80.
[210] Ibid, 81.
[211] Ibid.
[212] Gülhan Balsoy, *The Politics of Reproduction in Ottoman Society, 1838–1900,* (Routledge, 2015), 23.

the prohibition of abortion."[213] Thus, taking measures against the use of pharmaceuticals as a mean to perform an abortion in the same period was not a coincidence but the other side of the same coin.

Since 1789, there were already certain measurements to defeat the prescription and use of abortion medications by physicians and pharmaceuticals.[214] In the following term, during the reign of Sultan Mahmud II, this attitude became more serious. In 1827, an order issued that midwifes from four different *millet*s should not give any abortion medicine to pregnant women, and in the opposite case, punishment of any contrarians was accepted in the shar'i[215], by stating that,

"It has been investigated and verified that some women with the craft of midwifery from the Muslim or Christian populations in the esteemed Capital have been involved in prescribing medication to the unmarried and fault-based pregnant ladies and thus have led to baby miscarriages and in the meantime have even caused some to die; since the hindrance and prevention of this blasphemous act by all means and the protection of the humans from this illness are the compulsory requirement of religion, would it be legally legitimate, by the High Excellency's legal order (the fatwa-granter and), to prevent and hinder those able women from that evil act, and if they do not comply, to penalize them, through the high legal order, if harm arise from their continual habit of prescribing medication for the purpose of miscarriage and thus causing miscarriage of baby or even death of the mothers?
The answer is given as "Yes, it would." in the respectable fatwa."[216]

Thus, in the same document we saw that İlya Makzi(?) aka *"Kanlı Ebe"* and two other women banished to Thessalonica [217], *"On the grounds that İlya Makzi (?), one from the Jewish ladies, known to public with the name 'Murderer Midwife' and her assistant named*

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[213] Ece Cihan Ertem, "Anti-abortion Policies in Late Ottoman Empire and Early Republican Turkey: Intervention of State on Women's Body and Reproductivity", *Fe Dergi* 3, no. 1 (2011), 50.
[214] Selçuk Akşin Somel, "Osmanlı Son Döneminde Iskat-ı Cenin Meselesi", *Kebikeç* 13 (2002), 71-72.
[215] Ahmet Hezarfen, "Ba'zı Belgelerin Işığında Iskat-ı Cenîn ve Hayat Kadınları", *Tarih ve Toplum* 35, no. 207, (2001), 182.
[216] BOA., C.SH-9/437. Cited by Fatma Şimşek, Haldun Eroğlu and Güven Dinç, "Osmanlı İmparatorluğu'nda Iskat-ı Cenin", *Uluslararası Sosyal Aratırmalar Dergisi* 2, no.6, (2009), p.598. *"Âsitâne-i aliyyede ehl-i İslâm veyâhûd ve nasarâdan ebelik san'atıyla me'lûf olan ba'zı karılar mücerreed tam' ve irtikaba mebnî hâmile hâtûnlara devâ verip îfâ-yı ıskat-ı cenîn ettirmek ve aralıkda birazının dahî helâkına sebeb olmakda oldukları tahkîk olunub bu emr-i münkîrin beher hâl men' ve def'iyle âmme-i nâsın muzırrâtdan kurtarılması lâzime-i zimmet-i diyânet olduğundan ol irâde-i muktezâ-yı şer'iyyesi taraf-ı hazret-i fetvâ-penâhileri ledel-istifsâr ebelik dâ'îyesinde olan hüner hâtûnlara ıskat-ı cenîn içün devâ verib ıskat-ı cenîne sebeb olduğundan ma'âda ba'zı hâtûnların dahî helâkına sebeb olub bu fi'il-i şen'iyi mu'tâd etmekden nâşî zarârı olsa hüner bu fi'il-i şen'iden emr-i âlî evâmir ile zecr ve men' olunup ita'ât etmez ise te'dîp olunmağa emr-i meşrû' olur mu? El-cevâb, olur deyü fetvâ-yı şerîfe verilmiş…."*
[217] Ibid. *"….Yahûdî karılardan Katil Ebe dimekle ma'rûf İlya Makzi(?) makûle ve kalfası mesâbesinden olan Rahil Polisa(?) nâm kimesneler öteden berü bu kâr-ı mekrûh ile me'lûfe oldukları mütevâtir ve yalnız tenbîh ve te'kîd ile memnû' ve münzecir olamayacakları zâhîr oldu#una binâen ibretü'l-sâ'îrin üçü birden Selânik'e nefy ve ta'zîb olunmuş…."*

Rahil Polisa (?) have been rumored to be involved in this unpleasant act, and since it is obvious that they cannot be hindered and prevented by solely being warned or admonished, all three of them were exiled and barred in Thessaloniki, as a deterrent to others..."

Another remarkable step concerning abortion was a firman enacted in 1838 during the reign of Sultan Abdülmecid. According to Somel, with this enaction, administrative attempts and measurements concerning the issue gained a more systematic and consistent character.[218] Furthermore, this firman was prepared by the benefit of different reports written by members of the *Meclis-i Umûr-ı Nâfia*, *Dâr-ı Şûrâ-yı Bâb-ı Âlî and Meclis-i Vâlâ-yı Ahkâm-ı Adliye*. This is a meaningful detail because, as Somel analyzes, the formation process of the firman in such high-level bureaucratic councils explicitly demonstrated that the question of abortion was subject to a vital importance in the state's agenda.[219]

In his article, Somel examines these three reports in a meticulous and detailed way. Since these reports provided crucial and insightful points from the mindset of the state in the questioned period, it is quite valuable for us to refer to them in order to appropriately understand the process of the criminalization of abortion in the 19th century. The first report commenced by making a rationalization for anti-abortion policies. It states that since a state's power depended on its population, one of the most important issues of the state was to promote population increase and to eliminate menaces, which could cause a population decrease. In that era, the reproduction of human beings qualified as a requirement of divine reason.[220] However, a traversable attitude, *ıskat-ı cenin,* became common among Ottoman society and especially among inhabitants of Istanbul.[221] Again, religious elements were used in the report by stating that whomever committed this sin would be punished in the afterlife.[222] Here, an interesting semantic bridge between the state's concerns on public healthcare and the divine responsibility of the sultan was established. This report provides an insightful understanding of the state's perception on abortion. According to the report there were two main reasons underlying the prevalence of practicing *iskat-ı cenin* in Ottoman

[218] Selçuk Akşin Somel, "Osmanlı Son Döneminde Iskat-ı Cenin Meselesi", *Kebikeç* 13 (2002), 71.
[219] BOA Cevdet Sıhhiye 437 – 12 Ş 1242 Buyruldu. Cited by Selçuk Akşin Somel, "Osmanlı Son Döneminde Iskat-ı Cenin Meselesi", *Kebikeç* 13 (2002), 72.
[220] *"muhtezâ-yı hikmet-i Samedâniyeden",*
[221] Ibid.
[222] ."*bu hususu mükibbe olanların mücâzât-ı uhreviyeye mazhar olacakları*

society: one was hedonism and the other was an economic concern.[223] Therefore, certain realistic solutions were offered for the restriction of abortion caused financial concerns. Although, in the 1838 firman these solutions did not play a part, during the following years we encounter a special salary named *tev'em* for parents who had twins and triplets. Besides these generous policies for disadvantaged families, strict measurements were put in place to eliminate the practice of *ıskat-ı cenin*. First, the chief physician would warn all midwifes, physicians and pharmacists about not providing any abortion medication and, secondly, midwifes from different *millet*s would take an oath on the issue under the supervision of their religious and judicial leaders.[224] As it can be seen, this first report explicitly revealed that governmental elites were fully aware of the social and political aspects of the reproductive capacity of women. Their novel interests in public health derived from demographical concerns. The growing inclination to control the midwifery occupation and pharmaceutical selling was an aspect of these new demographic policies. And, in order to achieve control over the reproductive capacity of women, they appealed to religious elements and rationalization derived from divine sources.

The contribution of *Meclis-i Vâlâ-yı Ahkâm-ı Adliye* to the report, revealed the transformation of the character of the state-society relationship because it tried to mobilize social control mechanisms in Ottoman society.[225] It presupposed that an accidental or deliberate ıskat-ı cenin case would be known among inhabitants of district.[226] For this reason, anyone informed about a deliberate attempt or practice of abortion was responsible to inform the state authorities, otherwise their negligence would constitute a crime.

Furthermore, any woman practicing abortion on her own will would be severely punished by her husband. This point constituted a great divergence from the old attitude toward the ıskat-ı cenin question. According to one of the classical fiqh works, *Dürerü'l Hükkâm*, if a woman practiced ıskat-ı cenin without the permission of her husband, she had to pay a special compensation called *gurre* to her husband.[227] This principle connotes that if parents together

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[223] *"bu huhusı ba'zıları tenperverlik ve rahatı içün iltizâm ve ba'zısı dahi idâresinden 'âciz oldığına mebni icrâsına mecbûren ikdâm etmekde"*

[224] Ibid.

[225] Ibid, 77.

[226] *"ve bir mahalde sakat vuku'ında kazâ'en nevechile olmuş ise elbette vuku'bulan mahallin konşularının yevahud âhirinin ma'lûmı olacağından..."*

[227] Molla Hüsrev, *Dürerü'l Hükkâm*, cilt 2, 104-106. Cited by Selçuk Akşin Somel, "Osmanlı Son Döneminde Iskat-ı Cenin Meselesi." *Kebikeç* 13 (2002), 65-88.

decided on an abortion, it did not constitute a criminal act. It is clear that the state started to intervene in these issues because of its intimate borders of the sharia. This state intervention will be mentioned again in the legislative activities regarding abortion.

Consequently, a firman was enacted in 1838 based mainly on these reports written by various crucial councils of the state. According to Somel's examinations, there were some important contributions of the firman to the total content of these three articles.[228] First, the firman glorified becoming parents by considering children as a part and fruit of the heart.[229] Therefore, attempting and practicing abortion was an ungratefulness against this precious felicity and a kind of deviance.[230] Secondly, the mobilization of social control mechanisms were crystallized in this firman. Since state officially had potential informant habitants searching for any deliberate attempt or practice of abortion.[231] Thus, an articulation of citizens to *zâbitân* was promoted in the scope of preventing abortion.

All things considered, the 1838 firman was vested with constituent elements of anti-abortion policies and a redefinition of the reproductive capacity of women. In order to control the practice of abortion, the state regulated certain measurements in the realm of medicine and pharmaceuticals. Among these regulations, redefinition of the midwifery as a profession occupation had a special importance. Besides these concrete precautions, a new discursive attitude was initiated by qualifying abortion as a deviance, glorifying parenthood and sublimating the child as a felicity. Appealing to religious values and notions constituted the most important point of this discursive campaign. In fact, there were significant controversial points between the state's attitude and the shari'a's approach to abortion. For this reason, the mobilization of religious elements requires a more careful examination.

In order to understand these contentious matters, one must know how the shari'a approaches the issue. In fact, even in the shari'a there is not a consensus, as different schools of Islamic law hold different views on the issue. Since the Hanafite madhhab was preferred in the Ottoman Empire, we will handle the subject in accordance with Hanafite legal tradition, which is known as the most liberal one. According to this school, abortion is not an absolute

[228] Selçuk Akşin Somel, "Osmanlı Son Döneminde Iskat-ı Cenin Meselesi." *Kebikeç* 13 (2002), 76.
[229] *"kıt'a ül-dîl ve semere-i fu'âd"*
[230] *"âsâr-ı dalâl ve 'inâd"*
[231] *"....kasden sakat oldığına her kim vâkıf olub da derhâl zâbitân tarafına haber vermez...."*

criminal act but a conditional one. The decisive matter which makes abortion a crime is the appearance of a fetus' organs, *"müstebînü'l-hılka"*. Because, before this decisive point the fetus is not accepted as a human being but only a piece of meat, *"mudğa"*.[232] The period before the fetus shows any indications of *"müstebînü'l-hılka"* is determined as 120 days.
Therefore, within 120 days of conception abortion does not constitute any criminal act, however it is accepted as *makruh*, a "reprehensible action"[233] which does not require any punishment. Since the Ottoman Empire embraced the Hanafite legal tradition, this framework constituted their approach to abortion. In fact, fetva collections show that the Ottoman legal attitude toward the issue was in accordance with the Hanafite framework. For example, in *Fetâvâ-yı Üskübî*, the decisive matter of the appearance of a fetus' organs for the penal sanctioning of abortion was clearly expressed.[234] At this point, Somel's study provides us an insightful investigation into the apparence of the abortion question in fetva collections, which were not stable. According to his examinations, "….this issue(abortion) does not seem to have found a place in any of the fatwa collections prior to the seventeenth century. Late-seventeenth-, eighteenth-, and early-nineteenth-century collections, in contrast, contain series of fatwas concerning miscarriages resulting from physical violence by third parties as well as on abortions."[235] This increased rate was an indicator of a growing interest of the authorities on a women's womb. But the increase of the appearance of the issue in fetva collections could also mean that there was an inclination towards abortion or a growing worry about religion's attitude towards the issue, since fetva collections were based on questions asked to the juridical authorities regarding daily problems. Therefore, this increase in appearance could have had social origins as well as authoritative ones.

To summarize, the Ottoman law based on the shari'a and Hanafite legal tradition approached the issue in conformity with its religious sources. Abortion was not an absolute but a conditional criminal act. Fetvas explicitly showed that if the abortion was practiced by the common consent of husband and wife, it would not constitute a crime punishable by the

[232] İsmail Bilgili, "İslam Hukukunda Cenin Hakkı ve Onuruyla İlgili Hükümler", *Journal of Islamic Law Studies* 24 (2014).
[233] The Encyclopedia of Islam, (Leiden: Brill 1997), vol. IV, 194.
[234] *Fetâvâ-yı Üskübî*, v. 295. Cited by Merve Özdemir, "Osmanlı Fetvalarında Iskat-ı Cenininin Cezai Sonuçları", *Journal of International Social Research* 9, no. 46 (2016). *"Hind karnında olan veledini ilâc edip ihrâcında şer'an ism var mıdır? el-Cevab: Halkından bir şey müstebîn olmadı ise yokdur."*
[235] Tuba Demirci and Selçuk Akşin Somel, "Women's Bodies, Demography, and Public Health: Abortion Policy and Perspectives in the Ottoman Empire of The Nineteenth Century" *Journal of the History of Sexuality* 17, no. 3 (2008), 384.

judge, but it was still a sin and was discouraged. This common consent had an enormous impact on the Ottoman legal tradition, and it was able to change a criminal act, which required a definite penal sanctioning into a sin. As one can remember, the decisive point which turned abortion into a criminal act was whether the fetus became a *müstebînü'l-hılka* or not. However, even in one of the latest fetva collections, (significant because it is clear that there was a growing state interest in the issue from the 19th century) an interesting fetva states that, *"*If Hind, the wife of Zeyd, being pregnant, renders an obviously-grown fetus dead by taking medication in order to have a miscarriage, while blood money or miscarriage compensation is not required to be paid by Hind's relatives, does Hind become faulty? The answer: Yes, she does."[236] Even in the case of the abortion of a *müstebînü'l-hılka* fetus, if it was a shared decision by both husband and wife, there were not any penal results in court. This shows that the common consent of husband and wife had such a transformative power for the Ottoman *fukuha* to change the nature of a criminal act from punitive to moral.

However, growing political interests in population demographic anxieties from the 19th century had crucial effects on the criminalization of abortion. Despite *fetva*s in the 19th and 20th centuries, the practice of abortion became a criminal act by adjudicating contrary to the shari'a's approach. As an illustration, we can refer a document sent by the Governor of Istanbul to the Ministry of Interior which states,

"On the grounds that it is apparent that a miscarriage occurred to Saadet Hanım, the spouse of Abdulvahab Efendi, an inhabitant of the Makriköy of Osmaniye town, and that, the aforementioned, having been pregnant for two months, employed medication [for this purpose], investigation documents have been transferred to the public prosecutor's office and Abdulvahap Efendi has been taken into custody and the miscarried fetus taken into protection, referring to the warning of Istanbul Battalion Commandership, submitted in declaration from the Capital Gendarmerie Regiment Commandership. The ultimate command of the firman in this regard belongs to the possessor of the commands."[237]

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[236] İsmail Cebeci, *Ceride-i İlmiyye Fetvaları*, (İstanbul: Klasik, 2009), 303. *"Zeyd'in zevcesi Hind-i hâmil, Zeyd'in izniyle ıskât-ı cenin için ilâc içmekle müstebînü'l-hılka bir cenîn-i meyyit ilkâ eylese Hind'in âkilesine yâ Hind'e diyet yâ gurre lâzime olmayıp lâkin Hind âsime olur mu? El-Cevab: Olur."*

[237] BOA., DH.EUM.AYS-61/27. Cited by Fatma Şimşek, Haldun Eroğlu and Güven Dinç, "Osmanlı İmparatorluğu'nda Iskat-ı Cenin", *Uluslararası Sosyal Aratırmalar Dergisi* 2, no.6, (2009), 604. "…. *Makriköy'ün Osmâniye karyesinden sâkin Abdülvahab Efendi'nin zevcesi Saadet Hânım'da ıskat-i cenin vukua geldiği ve iki aydan beri hâmile bulunan mezburenin muâlece isti'mâl eylediği tebeyyün edildğiinden bu bâbda tanzim edilen taktikat evrâkının müddei umumiliğine tevdi' kılındığı ve Abdülvahab Efendi'nin taht-i tevkîfe ve cenîni sâkıtın taht-i muhafazaya alındığı İstanbul Tabûru Kumândânlığının iş'ârına atfen dersaadet Jandarma Âlây Kumanadanlığından izbâr kılınmağla ma'rûzdur ol bâbda emr-i fermân hazret-i veliyyü'l-emrindir…"*

In this case, practicing abortion was totally within the boundaries of conditional legitimacy if practiced before 120 days with the consent of husband and wife. According to Islamic law, it did not constitute any criminality, but despite that reality, the husband was arrested. It clearly shows that law was changing substantially in the empire in the direction of the political interests of the state during the questioned era. Another significant case, about a government official, revealed the deliberate criminalization of abortion despite the shari'a's relatively liberal approach. The district governor of Kirmastı, Süleyman Rauf Bey, was on an offensive trial to help his wife perform an abortion.[238] It was again a clear contravention of the shari'a, which tolerated abortion under the condition of the common decision of both parents.

In the same fashion, the imposition of punishment to whomever aided a woman for performing an abortion by giving medicine or directly curetting was equivocal in Islamic criminal justice. According to Imam İbn Âbidîn, a fakih, an *Emin el-fetva* (the state employee as *mufti*) and a jurist in Syria in 19th century Ottoman Empire, If a woman demand medicine for performing an abortion, even the fetus was *müstebînü'l-hılka,* and even if the women died because of this act, the person who gave the pharmaceutical aid could not be penalized. This fetva was in sharp contrast to the measurements which regulated pharmaceuticals', physicians' and midwifes' aids to women for performing abortion as strictly criminal.[239] Because, according to the shari'a, they could not be regarded as responsible in abortion acts in which the conscious agent was a pregnant woman. These measurements did not remained unfulfilled in the realm of criminal justice. For example, a document sent by the Governor of Thessalonica to Istanbul reported that a man (Limnili Dimitri) and his wife were banished to the Monastery of Aynaroz and Mevlova because of their assistance in performing an abortion, by stating,

"It is the submission of your low servant (me) that the person named Dimitri Haskarı from the island of Limni had intercourse with his daughter and resorted to the fault of miscarrying the baby, which is apparent through their statements and confessions, and based on the fact that this action of theirs is a major offense, it was officially declared from the Greek Patriarch that the [male] perpetrator be sent to exile the Zograf Monastery in Aynaroz and

[238] BOA., İ.AZN-66/1324 R-01. Cited by Fatma Şimşek, Haldun Eroğlu and Güven Dinç, "Osmanlı İmparatorluğu'nda Iskat-ı Cenin", *Uluslararası Sosyal Aratırmalar Dergisi* 2, no.6, (2009), 605.

[239] Muhammed Emin b. Ömer b. Abdülazîz ed-Dımaşkî Ibn Abidin, Hâşiyetu Reddi'l-muhtâr ale'd-Dürri'l-muhtâr: Şerh-i Tenvîri'l-ebsâr, (İstanbul: Kahraman Yayınları, 1984) vol. VI, 591. Cited by Merve Özdemir, "Osmanlı Fetvalarında Iskât-ı Cenînîn Cezai Sonuçları", The Journal of Internatioanl Social Research 9, no.46, (2016), 957. *"Hind-i hâmil zevci Zeyd'in izni yoğ iken vâlidesi Zeyneb'e "İskât-ı haml içün bana ilâc eyle" deyu emredip Zeyneb dahi ilâc etmekle Hind müstebînü'l-hılka bir cenîn-i meyyit ilkâ ve ba'dehu vaz'-ı hamlinden nâşî Hind dahi fevt olsa Zeyneb'e ne lâzım olur? el-Cevab: Nesne lâzım olmaz."*

that the [female] perpetrator be sent to exile in the Lemyinos Monastery in Mevlova on the island Midilli, reserved for women. Just as the [female] perpetrator was sent to the exile location, the [male] perpetrator's transportation the monastery, by the high decree of yours, was dated as 17 Ş. 72. The [male] perpetrator, exactly in line with the orders stated in the previous order of yours, which is worthy of respect and princely honor, was transferred and dispatched to the monastery, by the blessing of the Lord. The command is yours, the High possessor of commands, on this occasion and in every condition." On 29. L. 72, Governor of Thessaliki Province, Ahmed, your servant."[240]

As can be seen in the document, helping to perform an abortion qualified as "*cinâyât-ı azîme",* a severe homicide and the punishment was also quite harsh. This controversy, between Imam Ibn-i Âbidîn's legal approach and the application of criminal justice by the state's agents, was a clear indicator that abortion was criminalized in favor of the state's political and demographical interests.

Besides specific measurements and firmans enacted contrarily to the shari'a, the question of abortion also took a place in new legislative regulations in the same opponent way in the Islamic law. In 1858 Penal Code, we encounter detailed and severe measures under a specific chapter dedicated to the punishments of performers of *iskat-ı cenin* and sellers of toxic substances without permission (kefilsiz Semmiyât fürûhat edenlerin). Even the denomination of the chapter indicated that the reform of the pharmaceutical profession was directly connected to the state's concerns on abortion. Article 192 states that, "If a person, through battery or any other action, causes a pregnant lady to experience miscarriage, after the legal blood money is paid, if that violation occurred on purpose, that person then shall be put to temporary penal servitude."[241] The following article states that *"If a pregnant lady, whether with her consent or not, takes medication in order to miscarry a fetus, or, if a person defines*

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[240] BOA., A.MKT.UM-242/19. Cited by Fatma Şimşek, Haldun Eroğlu and Güven Dinç, "Osmanlı İmparatorluğu'nda Iskat-ı Cenin", *Uluslararası Sosyal Aratırmalar Dergisi* 2, no.6, (2009), 605. *"Ma'rûz-i çâker-i kemineleridir ki, Limni cezîreli Dimitri Haskârı nâm şahsın kerîmesiyle birleşib ıskat-i cenîn mâdde-i kabihesine ictisâr eyledikleri kendi ikrâr ve î'tirâflarıyla sâbit olarak bunların işbû hareketleri cinâyât-ı azîmeden olduğu ve merkumun Aynaroz'da kâ'în Zoğraf manastırına ve mezbûrenin dahî Midilli cezîresinde vâki' Mevlova'da nisâlara mahsûs olan Lemyinos manastırına nefy ve tagrîb olunmaları Rum Patriği cânibinden bâ-takrîr inhâ olunarak mezbûre mahal-i menfâsına gönderildiği misillü merkum dahî î'zâm buyrulduğu beyân-i âlîyesiyle vüsûlünde manastır-i mezbûre irsâli fî 17 Ş. 72 târîhiyle müverrah olub bu kere şeref-efzâ-yı südûr olan emrnâme-i sâmî-i hidivânelerinde emr ve irâde buyrulub merkum dahî bi'l-vüsul tıbk-i irâde-i sâbıka-i asâfâneleri üzere manastır-i mezbûra sevk ve î'zâm kılınmış idüğü bi-lütf-i Teâlâ muhat-ı 'ilm-i âlî-i fehimâneleri buyruldukda ol bâbda ve her hâlde emr ve fermân hazret-i veliyyü'l-emrindir, fî 29 L.72, Vâli-yi eyâlet-i Selânik Ahmed bendeleri."*

[241] Ahmet Akgündüz, *Mukayeseli İslâm ve Osmanlı Hukuku Külliyatı*, (Dicle Üniversitesi Hukuk Fakültesi Yayınları, 1986), Vol.6, 864. *"Bir kimse darp vahut sair güne bir fiil ile bir hâmile hatunun iskat-ı cenin eylemesine sebep olur ise, diyet-i şeriyesi istîfa oluıduktan sonra, eğer bu teaddîsi an kasdin olmuş ise muvakkaten küreğe konulur."*

the methods and tools to do so and thus leads to a miscarriage of a baby, then the responsible person shall be sentenced to prison from six months to two years. And if the responsible person is a physician or an operator or a pharmacist, then s/he shall be sentenced to temporary penal servitude."[242] It can be argued that, the increase in the severity of punishment can also be interpreted as an indicator of the transformation of the general policy of public health as a tool to control intimate spheres, which reveals new political meanings embedded into professions as well as women's reproductive capacity.

An Alternative to a Conclusion: Biopolitics, Alteration in Sovereign Rights and Transformation of Intimate to Political

In summary, this section shows that in the 19th century Ottoman Empire reform movements, the female body and the question of abortion was going through a process of politicization and criminalization. The historico-political conditions of the term, the massive loss of population due to various wars and major demographic changes due to grand territorial loss triggered the state's concerns on the political, economic and military results of depopulation. As Balsoy argues, "the population policies of the 19th century were predominantly formulated through women's sexuality and the female body."[243] In a period where the empire faced nationalist and separatist movements of its minorities, the quantity as well as the quality of the population gained much more importance and meaning. Under these circumstances, abortion fueled the contemporary fear of "race suicide"[244] meaning "racism that a society will practice against itself"[245] and became an "internal enemy"[246]. Thereby, a new approach to criminalize abortion in the direction of the demographic policies of the state had emerged, and "the intimate became highly political in the specific context of the 19th century Ottoman past."[247] As previously stated, this process of criminalization of abortion went hand in hand with

[242] Ibid. *"Bir hamile hatunun gerek rızası olsun ve gerek rızası olmasın, iskat-ı cenin ettirmek için ilaç içirip yahut esbab ve vesailini tarif edip de eseriyle çocuğu düşürülür ise, buna sebep olan kimse altı aydan iki seneye kadar hapis olunur. Ve eğer buna sebep olan tabip ve cerrah ve eczacı ise muvakkaten küreğe konulur."*

[243] Gülhan Balsoy, *The Politics of Reproduction in Ottoman Society, 1838–1900*, (Routledge, 2015), 1.

[244] Ruth Austin Miller, *The Limits of Bodily Integrity : Abortion, Adultery, and Rape Legislation in Comparative Perspective*, (Ashgate Publishing Company, 2007), 18.

[245] Ann Laura Stoler, Race and The Education of Desire: Foucault's History of Sexuality and The Colonial Order of Things. (Duke University Press, 1995),

[246] Ibid.

[247] Gülhan Balsoy, *The Politics of Reproduction in Ottoman Society, 1838–1900*, (Routledge, 2015), 11.

reforms in the realm of medicine, like the control of physicians and pharmaceuticals and the professionalization of midwifery within the new understanding of public healthcare.

According to Miller, the criminalization of abortion and its articulation to public health was an indicator of a modern sovereign-state relationship, which is highly related to Michel Foucault's concept of bio-power.[248] Since his conception of bio-politics and alteration of nature of the power requires much more attention, we would like to briefly discuss his suggestions on biopolitics and power. Although in the scope of this study we do not appeal to a Foucauldian theoretical framework, to include his specific conception of bio-politics is useful to reveal the relevancy between the criminalization of abortion and modernization in the mindset of the empire after the Tanzimat Era.

In *History of Sexuality*, he defines the conception of biopolitics as,

"Pour la première fois sans doute dans l'histoire,[249] le biologique se réfléchir dans le politique; le fait de vivre n'est plus ce soubasssement inaccessible qui n'émerge que de temps en temps, dans le hasar de la mort et sa fatalité; il passe pour une part dans le champ de contrôle du savoir et d'intervention du pouvior. Celui-ci n'aura plus affaire seulement à des sujets de droit sur lesquels la prise ultime est la mort, mais à des êtres vivants, et la prise qu'il pourra exercer sur eux devra se placer au niveau de la vie elle-même; c'est la prise en charge de la vie, plus que la menace du meurtre, qui donne au pouvoir son accès jusqu'au corps. Si on peut appeler "bio-histoire" les pressions par lesquelles les mouvements de la vie et les processus de l'histoire interfèrent les un avec les autres, il faudrait parler de "bio-politique" pour designer ce qui fair entrer la vie et ses mécanismes dans le domaine des calculs explicites et fait du pouvoir-savoir un agent de transformation de la vie humaine; ce n'est point que la vie été exhaustivement intégrée à des techniques qui la dominant et la gerent; sans cesse elle leur échappe. Hors du monde occidental, la famine existe, à une échelle plus importante que jamais; et les risqué biologiques encourus par l'espèce sont peut-être plus grands, plus graves en tout cas, qu'avant la naissance de la microbiologie. Mais ce qu'ın pourrait appeler le "seuil de modernité biologique", d'une société se situe au moment ou l'espèce entre comme enjeu dans ses propres stratégie politique. L'homme, pendant de millénaires, est resté ce qu'il était pour Aristote: un animal vivant et de plus capable d'une existence politique; l'homme modern est un animal dans la politique duquel sa vie d'être vivant est en question."[250]

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[248] Ruth Austin Miller, *The Limits of Bodily Integrity : Abortion, Adultery, and Rape Legislation in Comparative Perspective*, (Ashgate Publishing Company, 2007), 22.

[249] According to Umut Koloş, this historical process that Foucault tells us was 18th century. Koloş, Umut, Foucault, İktidar ve Hukuk; Modern Hukukun Soybilimi. İstanbul Bilgi Üniversitesi Yayınları. 2016. p.205

[250] Michel Foucault, *Histoire de la Sexualité I, La Volonté de Savoir*, (Paris: Gallimard, 2013), 282. "…. for the first time in history, no doubt, biological existence was reflected in political existence; the fact of living was no longer an inaccessible substrate that only emerged from time to time, amid the randomness of death and its fatality; part of it passed into knowledge's field of control and power's sphere of intervention. Power would no longer be dealing simply with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would have to be applied at the level of

As it can be seen, there is an alteration in the nature of power, hereafter power does not mean the ability to claim lives and legitimate killing but gains a much more complex nature and claims life itself. The change in the nature of power infers also an alteration in the sovereign right to claim. In the scope of our limited study, we saw that many declarations of edicts in the 19th century of the empire were regulated in order to create a new rhetoric to formalize the criminalization of abortion. But here we would like to touch upon a persuasive edict to reveal the change in sovereign rights in the scope of biopolitics; the firman of 1838 declared that,

"Rabbimiz Te'âlâ ve Takaddes Hazretleri zât-ı merâhim-simât-ı Hazret-i Şehinşâhiye tükenmez 'ömr 'afiyet ihsân buyursun heme-ân mesâ'i-i cemile-i Şâhâneleri icrâ-yı emr-i Rabbâniye ve men' ve ref'-i menâhiye mğnhasır ve dâ'imâ himem ve'l-inhamm-ımülukâneleri vedi'a-i Samedâniyye olan re'âyâ ve berâyânın istikmâl-ı emr-i refâh ve râhatlarıyle berâber mugayır-i şer'i-şerif olan ahvâl-i müstetbi'ül-melâlin def 'ü izâlesine sarf buyurulmakda olduğu emr-i zâhir idüğünden…."[251]

In this statement, it is encountered that the mobilization of religious baggage to create a rights rhetoric of the sovereign on the lives and reproductivity of the population, by connoting that the population and the subject of the state were escrowed to the Sultan by Allah.

Furthermore, the principal concerns of biopolitics can be traced in the statement. In the scope of biopolitics, a human being is not regarded as a bodily-integrated political subject but as cellular and reproductive member of a population.[252] Thus, the notion was specifically called "biopolitics of the population" by Foucault.[253] The focus of the state's power was neither about territory nor about bodies, but about the population.[254] Therefore, the subject of biopolitics is not individual bodies, but it concerns the bodies' biological features in the scope of the constitutive elements of the population.[255] His own words, which depicts a great

life itself: it was the taking charge of life, no more than threat of death, that gave power its access even to body. For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question."

[251] BOA Cevdet Sıhhiye 437 – 12 Ş 1242 Buyruldu. Cited by Selçuk Akşin Somel, "Osmanlı Son Döneminde Iskat-ı Cenin Meselesi." *Kebikeç* 13 (2002).

[252] Umut Koloş, *Foucault, İktidar ve Hukuk; Modern Hukukun Soybilimi*, (İstanbul: İstanbul Bilgi Üniversitesi Yayınları, 2016), 2.

[253] Michel Foucault, *Histoire de la Sexualité I, La Volonté de Savoir*, (Paris: Gallimard, 2013), 44.

[254] Michel Foucault, "La Fonction Politique de l'Intellectuel", *Dits Ecrits* III, no.184, (1976). Accessed October 25, 2017, http://1libertaire.free.fr/MFoucault134.html

[255] Thomas Lemke, *Bio-Politics, An Advanced Introduction*, (New York-London: New York University Press, 2011), 35.

metaphor, will be much more meaningful and appropriate at this point, "Ce à quoi on a affaire dans cette nouvelle technologie de pouvoir, ce n'est pas exactement la société (ou, enfin, le corps social tel que le définissent les juristes) ; ce n'est pas non plus l'individu-corps. C'est un nouveau corps: corps multiple, corps à nombre de têtes, sinan infini, du moins pas nécessairement dénombrable. C'est la notion de "population". "[256]

Another document which reveals the biopolitical principals underlying the process of criminalization of abortion as a result of concerns on the population states that,

"*With respect to the fact that the Muslim population has been on sharp decrease due to the military recruitment and miscarriages of the babies, and that, some villages even remain totally deprived of Muslim population and that, the Christian-populated villages, on the contrary, have been gaining extension and prosperity due to the lack of these two aforementioned reasons, it is compulsory for the esteemed government to find a solution for the miscarriage of babies, which is a hazardous malady inflicting the Ottoman lands.*"[257]

As it can be seen, state authority was explicitly dealing with the question of abortion in the scope of the population. To summarize, the principal elements of the conception of biopolitics revealed themselves in the 19th century Ottoman state mindset with "the transformation of sovereign right and the shift in focus from the citizen to the population, the emergence of fertility as subjects of political interest and the modern subjects as 'an animal whose politics places his existence as living being in question.'"[258]

Ultimately the biopolitics embraced by the state was what turned the question of abortion into a criminal behavior, since, in this context, to perform abortion became a menace to the sovereign rights which claim to make alive. Thereby, the issue of abortion, a politically irrelevant act, which even had a conditional independence and privacy according to the shari'a, was altered to a criminal behavior in the edicts and legislation, regardless of the

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[256] Michel Foucault, *Il Faut Défendre La Société, Cours au Collège de France*, (Paris: Gallimard-Seuil, 2012), 301. "….what we are dealing with in this new technology of power is not exactly society (or at least not the social body, as defined by the jurists), nor is it the individual-as-body. It is a new body, a multiple body with so many heads that, while they might not be infinity in number, cannot necessarily be counted. Biopolitics deals with the population."

[257] BOA., İ.DAH-1185/92723. Cited by Fatma Şimşek, Haldun Eroğlu and Güven Dinç, "Osmanlı İmparatorluğu'nda Iskat-ı Cenin", *Uluslararası Sosyal Aratırmalar Dergisi* 2, no.6, (2009), 602. *"….nüfus-i İslâmiye bir tarâfdan asker alınmak diğer tarafdan çocuk düşürmek sebebleriyle hayli tenâkus eylemekde hattâ ba'zı karyeler nüfus-i İslâmiyeden bütün bütün hâli kalmakda ve Hıristiyân sâkin olan karyeler ise şu iki sebebin fıkdânı cihetiyle bilâkis kesb-i vüseât ve ma'mûriyet eylemekde olmasına nazaran bu ıskat-i cenîn mâddesi mehâlik-i Osmâniye için illet-i mehâlike kabilinden olarak hükümet-i seniyyenin buna bir çâre bulması farz-i ayn olduğundan…"*

[258] Ruth Austin Miller, *The Limits of Bodily Integrity : Abortion, Adultery, and Rape Legislation in Comparative Perspective*, (Ashgate Publishing Company, 2007), 28.

conditional tolerance given by the Islamic law. In the final analysis, during the 19th century Ottoman Empire, an intimate and private zone in the scope of the shari'a was redefined by new legal regulations under the scope of new sovereign rights and charged a public characteristic. As Miller said, in fact "the borders of the womb are political boundaries." [259]

5.2. Relimitation of the Question of Prostitution

The aim of this section is to understand how transformations in the legal field reshape the relationship between the state and a group of women on the margins as prostitutes. My argument in this section is that while the state was going on a modernization process and frontiers between the statute law and sharia were changing, the boundaries of women marginality received its share and went into a transitional and re-definitional phase. During this redefinition, newly emerging concerns of a state on the verge of modernity can be observed alongside with three new methods of control such as medicalization, administrative registration and spatial delimitation of prostitution. In the following lines, firstly shari'a's and the *kanun*'s approach to prostitution will be examined, secondly the impacts of legal transformations during the 19th and early 20th centuries to the question will be discussed and lastly the transforming effect of legal changes will be elaborated through three newly mobilized control methods which bear infact the signature of a modern interventionist state.

The Islamic law deals with the issue of prostitution as a branch of a broader criminal concept, i.e. adultery or *zinâ*. *Zinâ* is a single legal category which is charged with multiple meanings; it covers any kind of illegal sexual intercourse ranging from homosexuality to prostitution. According to Imber, illicity of a sexual intercourse is defined by sharia through a single element, which is the lack of "ownership" (*milk*).[260] Thus this sole factor which defines licit or illicit sexual relation is the main reason of the broadness of *zinâ* definition, because it basically renders illegal any intercourse other than slavery and marriage. In order to understand the gravity of shari' approach to the issue, it is sufficient to remember that adultery is included among the *hudud* crimes which means crimes committed against God.

[259] Ibid, 48.

[260] Colin Imber, "Zina In Ottoman Law", in *Contribution à l'Histoire Economique et Sociale de l'Empire Ottoman*, (Paris: Institut Français d'Etudes Anatoiennes d'Istanbul and l'Associacition pour le Developpement des Etudes Turcques, Collection Turcica 3), 60.

Furthermore among other crimes against huquq Allah, the most severe physical punishment belongs to zinâ, such as the death penalty by stoning if offenders are married.[261] However to implement this straight form of punishment is rather difficult, because it was conditioned by a strict rule of evidence that to fulfill is nearly impractical. In order to convict an offender for a *zinâ* crime, four male eyewitnesses have to see the exact intercourse, furthermore these four witnessers' reliability have to be approved by the judicial authority. If the offender him/herself would like to confess, he/she have to repeat the confession on four separate occasion and each time the judicial authority must warn the confessor to do not. As a matter of fact the Prophet himself is reported to have dealt with the issue of *zinâ* within this direction.[262] Along with rigid rules of evidence, there is a further trammel, i.e. if the plaintiff cannot prove the offense, he/she will be faced with charge *kadhf*, or calumny. False accusation of *zinâ* is itself defined as another crime against God which demands 80 lashes.
Consequently, although adultery is a serious *hadd* crime and necessitates a fixed penalty, due to nearly impossible rules of evidence and risk of false accusation of *zinâ*, its punishment within the boundaries of *hudud* crimes is more or less impracticable. Thus while fornication is a *hadd* crime theoretically, in practice the Islamic law is disposed to deal with the crime under the category of discretionary punishment.

According to Imber, this reluctance to punish adultery as a *hadd* crime is not an unconscious attitude, but having a purpose to prevent the conviction itself.[263] Before passing to the statute law's approach to adultery, it would be meaningful to examine this unwillingness in the Islamic legal tradition to punish severely the crime of *zinâ*. Since the Islamic law is one of the main legal sources of Ottoman law, shari' concerns on the issue of *zinâ* will have a clear impact upon the legal positioning of women on the social margins in the Ottoman Empire.
Again inspired by Imber, if we consider the inclination to obstract convictions for *zinâ* crimes together with another tendency in Islamic legal tradition, i.e. concession to honor killing, the examination of these two opposing inclinations about the same crime might lead us to a

[261] The death penalty by stoning has dubious origins in Islam, since there is not any statement in Qur'an. Although, there were some reluctant condemnation to stoning by the Prophet, some scholars argue that this was a reluctant approving of traditions. Since the stoning to death as a penalty was originally a Jewish tradition which had influences on Arab culture. For a more insightful research on the issue of stoning in Islamic legal tradition see; Vivian Elyse Semerdjian, " "Off the Straight Path": Gender, Public Morality and Legal Administration in Ottoman Aleppo, Syria" (PhD. diss., Georgetown University, 2002), 69.
[262] Vivian Elyse Semerdjian, " "Off the Straight Path": Gender, Public Morality and Legal Administration in Ottoman Aleppo, Syria" (PhD. diss., Georgetown University, 2002), 74.
[263] Colin Imber, "Zina In Ottoman Law", in *Contribution à l'Histoire Economique et Sociale de l'Empire Ottoman*, (Paris: Institut Français d'Etudes Anatoiennes d'Istanbul and l'Associacition pour le Developpement des Etudes Turcques, Collection Turcica 3), 61.

broader and more insightful point about the shar'i positioning of zina between the private and the public. According to the shari'a, if a man finds his *mahram* (his wife, daughter, slave or a female relative) while committing adultery, and murders his *mahram* and her lover for this reason, his act does not constitute a regular homicide crime and therefore not conceive retaliation (*kısas*).[264] What does it mean? It means that by aggravating the rules of evidence and at the same time by conceding to honor crime, the Islamic law "implies that punishment for breaches of this morality is a private, not a public matter."[265] This is an important point because it leads us to understand a latent and essential attitude of the shari' legal thought underneath the formal structure of the Islamic law. Thus through this co-consideration of these two tendencies towards adultery, it could be argued that at the first instance, the shari'a treats the issue as a private matter by leaving space for people to claim private justice and also by precluding rules of evidence, by discouraging any plaintiff with a serious legal menace of *kadhf* and by dishearting any confession with warning of *kadı* about grave consequences of the act. This legal approach is also valid at the second level of case, namely if a legal case of adultery is brought to the Islamic court, because of the impractible rules of evidence the crime will be punished through discretionary chastiment. Furthermore, looking at the specific issue of prostitution, there is a second approach which restricts the application of fixed penalty described for *zinâ* to the prostitution cases. According to a legal principle named *shubha* described by the Hanafite school of law, if an illegal act has some resemblance to a legal one, the court overlooks the illegality of the questioned act by adapting a broad legal interpretation. Evidently in the case of prostitution, the fee of sexual work constitutes a resemblance to the *mahr* which is accepted as an "exchange for the vulva" *('iwad'an al-bud')*[266] and it triggers the principle of *shubha* in Hanafite jurisdictional field. Due to this legal ambiguity, according to the Hanafite School, the person charged with *zinâ* crime could do this illegal act by comparison to a legal one, and it would be not a fair criminal justice to punish him/her by fixed *Hadd* penalty.[267]

Notwithstanding the tendency to prevent accusation and conviction of illicit sex, the shari'a leaves a massive space for *siyasa* when it comes to a habitual criminality. In fact, the perpetual habit (*adet-i müstemirre*) is charged with a potential to extend the quality of the

[264] Ibid, 64-66.
[265] Ibid, 66.
[266] Ibid, 60.
[267] James E. Baldwin, "Prostitution, Islamic law and Ottoman societies", *Journal of the Economic and Social History of the Orient* 55, no. 1 (2012), 125.

crime from the boundaries of the private to the public. As an example of this shift in punishment of illicit sex from private to public zone, Imber mentions a fatwa from 16th century which declares that "if the *imam* considers the execution of a habitual sodomite to be in the public interest (*maslaha*), he is permitted to do so"[268]. It is clear that the turning point for the way of punishment is whether the illicit sex is a perpetual habit or not. If illicit sexual transgression is a habitual act, then the issue becomes a public matter and the Islamic juridical authority transfers the relevant issue to the political authority[269] with a wide-ranging prerogative to penalize even through execution. To understand this shift from private to public realm and from the Islamic judicial authority to the political authority is important for this section, because it is clear that the issue of prostitution is characteristically a perpetual act even a profession. To sum up, one can see that the shari'a does not provide a clear-cut dealing with the issue of prostitution by embracing a dual approach. On the one hand, as a branch of *zinâ* crime, its accusation and conviction are highly discouraged by several jurisprudential mechanisms, but on the other hand because its perpetual character, penalization of prostitution can be left to a large extent under the heel of political authority.

The Ottoman statute law, like the shari'a, refrains from clearly defining the issue of prostitution, which again remains under the category of fornication or *zinâ*. According to Ze'evi, unlike other contentious issues between the shari'a and the *kanun*, regulating criminality in sexual field was left to the shari'a with trivial changes.[270] It means that while the boundaries of transgression were reserved to a large extent[271], penal consequences of the transgression were amended by *kanunnâme*s. The approach of the statute law towards the punishment of illicit sex can be evidently noticed in one of the most important jurisprudential textual body of the Ottoman statute law, the *Kanun-i Osmani* of Kanuni Sultan Süleyman. Notably, the legal code of 16th century starts with the issue of the regulation of fornication

[268] Al-Mawardî, al-Ahkâm al-sultâniyya, trans. E. Fagnan, Statuts Gouvernmentaux Algiers, 480. Cited by, Colin Imber, "Zina In Ottoman Law", in *Contribution à l'Histoire Economique et Sociale de l'Empire Ottoman*, (Paris: Institut Français d'Etudes Anatoiennes d'Istanbul and l'Associacition pour le Developpement des Etudes Turcques, Collection Turcica 3), 64.

[269] For the meaning of imam in the context as the political authority see Ibn Nujayms's ,nterpretation, *Bahr*, vol. 5, 16-17, Cited by Colin Imber, "Zina In Ottoman Law", in *Contribution à l'Histoire Economique et Sociale de l'Empire Ottoman*, (Paris: Institut Français d'Etudes Anatoiennes d'Istanbul and l'Associacition pour le Developpement des Etudes Turcques, Collection Turcica 3), 64.

[270] Dror Ze'evi, *Producing Desire, Changing Sexual Discourse in the Ottoman Middle East, 1500- 1900*, (Berkeley: University of California Press, 2006), 52.

[271] I said to a large extent because the statute law does not change any boundary of transgression, however, add some other offenses in the category of zinâ which were not in the sharia, such as abduction and attempted forced entry with the aim of zinâ.

(*derbeyân-ı zinâ ve gayri*), and even this choice of beginning reflects the importance attached to the issue. The section starts with the concerns about fornication attempted by a married Muslim male and regulates an elaborate discretionary penalty on the base of pecuniary punishment. It states that;

"If a person commits fornication and [this] is proved against him— if the fornicator is married and is rich, possessing one thousand akçe or more, a fine of 300s akçe shall be collected [from him], provided he does not suffer the [death] penalty; if he is in average circumstances, his property amounting to six hundred akçe, a fine of 200 akçe shall be collected; if he is poor, his property amounting to four hundred akçe a fine of 100 akçe shall be collected; and if he is [in even] worse [circumstances], a fine of 50 akçe or a fine of 40 akçe shall be collected."[272]

The *kanunnâme* then continues with articles regulating the punishment according to the differences such as men and women, Muslim and non-Muslims, adults and minors, free and slave, and poor and rich. If we disregard the pecuniary aspects of punishing the fornicator, the basic gridlines of categorization of the accused are totally shar'i. In addition to this formal demarcation lines, it appears to be that the latent attitude which can be qualified as tolerant by leaving, even promoting an extensive space for privacy that described in the shar'i approach to the illicit sex, is also shared by the statute law. My argument is based on an article in the *Kanun-i Osman*i which states that, "If a person knows of [an act of] fornication [but] does not go to the *cadi* and tell him, no fine is [to be collected]. If he knows of a theft [but] does not tell [the *cadi*] a fine of 10 *akçe* shall be collected."[273] By comparing denunciation of the crime of fornication with another *hadd* crime, theft, the article explicitly leads the society to conceal the illicit sex and keep it in the private zone.

Moreover, the concession of honor crime in a case of caught on the very act of fornication is also a common point that one can notice in the articles which state that, "If a person finds his wife somewhere committing fornication with [another] person [and] kills both of them together— provided he immediately calls people into his house and takes them to witness, the claims of the heirs of those killed shall not be heard [in court]."[274] and "Or if a person finds a stranger in his house, strikes him with a weapon and wounds him— provided he calls people to witness that he has wounded [him in these circumstances], no [capital or severe corporal]

[272] Uriel Heyd, *Studies In Old Ottoman Criminal Law*, Ed. by Victor Louis Ménage, (Oxford: Clarendon Press, 1973), 95.
[273] Ibid, 102.
[274] Ibid, 98.

punishment shall be demanded for him either."[275] As it is seen, promoting private justice by paving the way of honor crime is identical as in the shari'a. However, the statue law tries to restrict the extensity of the shari'a by requiring from the man to prove his purpose to murder by "calling people to witness the circumstances". Consequently, this sharing of the essential attitude towards the illicit sex shows that "the underlying structure and the legal minds that created the *kanun* were greatly influenced by the *şeriat*".[276]

However, notwithstanding these fundamental similarities, the customary law of the empire and the empire's own political concerns had a major impact upon the amendments concerning this issue; in fact, the statute law "imitates but do not reproduce the shari'a."[277] Apart from regulting punishments which do not exist in the Islamic law as pecuniary fines or forced labor , there are other examples where the effects of the customary law and governmental concerns over the statute law could be traced. Firstly, the *kanun* adds new offences within the framework of *zinâ* which are not defined in the shari'a such as the abduction of women or boys for sexual aims and entering a house with intent to commit adultery. Secondly, certain patriarchal amendments which do not exist in the shari'a but made by the statue law appears to be noteworthy. For example, while a married woman commits adultery, she is accepted as the only liable person for her crime in the Islamic law, however according to the statute law if the husband of the questioned woman accepts her despite her crime and does not want to divorce from his wife, he must pay himself the pecuniary punishment originally imposed upon her according to his financial means.[278] The relevant article states that, "If it is a married woman who commits fornication, her husband shall pay the fine. If he (nevertheless) accepts (her) and he is rich, he shall pay 100 *akçe* by way of a fine (imposed) on a (consenting) cuckold."[279] Imber interprets this amendment as an effect of customary law of the society on the Ottoman legal thought, because while the shari'a deals with the accusation as an individualistic way by accepting *muhsane* as an independent person on her own criminal potential, the *kanun* recognizes "the male guardian's responsibility".[280]

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[275] Ibid.

[276] Dror Ze'evi, "Changes in Legal Sexual Discourses; Sex Crimes in the Ottoman Empire", *Continuity and Change* 16, no.2, (2001), 227.

[277] Colin Imber, "Zina In Ottoman Law", in *Contribution à l'Histoire Economique et Sociale de l'Empire Ottoman*, (Paris: Institut Français d'Etudes Anatoiennes d'Istanbul and l'Associacition pour le Developpement des Etudes Turcques, Collection Turcica 3), 67.

[278] Vivian Elyse Semerdjian, " "Off the Straight Path": Gender, Public Morality and Legal Administration in Ottoman Aleppo, Syria" (PhD. diss., Georgetown University, 2002), 87.

[279] Uriel Heyd, *Studies In Old Ottoman Criminal Law*, Ed. by Victor Louis Ménage, (Oxford: Clarendon Press, 1973), 96.

[280] Ibid, 70.

After having provided a general sketch about the crime of fornication which constitutes a skeletal structure of the essential approach towards the issue of prostitution in the shari'a and the *kanun*, one may examine the issue in its own specificity. As already mentioned, early *kanunnâmes* such as Selim I's *Kanunnâme* and Süleyman's *Kanun-i Osmani* do not directly describe the crime of prostitution. However, there is a concept which is directly related to prostitution and in fact considered a serious criminal behavior within the scale of *zinâ*; pimping or procuring.

In the collection of criminal *kanunnâmes* from the 16th century, there are two different sentences which deal with the question of procurement. The first one states that the *kadı* should punish a procurer according to *ta'zir*, furthermore the offender should be exhibited, and in the case of lashing it is possible to convert each stroke to a fine of one *akçe*.[281] Second provision is much more severe by demanding that a procurer should be branded in his/her forehead.[282] Evidently the state adapted a tougher line to the question of procurement than the prostitution itself. Besides, penalizations with characteristically social punishments like *teşhir* and branding show us that the point of the state was much more about the public; the possible motives behind such severe punishments might be to calm down popular anger or to warn them about the inviolability of public order.

Moreover, the reason of this emphasis on the procurement could be the aim to consider the question of prostitution in a larger scale, within an organized context, while the prostitute could be qualified as victim; the procurer was the criminal. Semerdjian's study on illicit sex in Aleppo also shows this concern on the big picture in the *kanunnâmes* by stating "….the *kanunnâmes* discuss prostitution most often in the form of forcing or coercing one to commit *zinâ*. Coercing someone to commit *zinâ* was considered a more severe crime by the Ottomans than prostitution itself, because the prostitute was viewed as having committed the act against her will."[283]

This emphasis on the coercion can be found in fetvas too. For example, an expertise from the

[281] Uriel Heyd, *Studies In Old Ottoman Criminal Law*, Ed. by Victor Louis Ménage, (Oxford: Clarendon Press, 1973), 71, clause 57 "Eger bir kişi püzevenklik eylese kadı tazir idüb teşhir ide, ağaç başına bir akçe cürm alına"
[282] Ibid, 114.
[283] Elyse Semerdjian, *Off the Straight Path: Illicit Sex, Law, and Community in the Ottoman Aleppo*. (New York: Syracuse University Press, 2008), 38.

17th century belonging to Şeyhülislam Alî Efendi Çatalcalı states that "What [punishment] is necessary for the Muslim Zeyd, who brings strangers to his wife Hind who sits with them and touches their hands? Answer: Severe corporal punishment (*taʿzīr-i şedīd*)."[284] As can be seen, while there is a tendency to leave the issue of *zinâ* to the private realm and avoid any conviction, when it comes to the coercion, the *kanun* becomes quite clear and distinct towards the criminality. Here, one should discern also that the prostitution is not directly mentioned under the scope of *zinâ* crime, instead the issue rises to surface within the context of pimping and procuring which are categorized under the headings of "mutual beating and abuse" and "drinking, theft, robbery and other offenses". The fact that the issue of prostitution in a specific manner emerges only when dealing with the crime of procurement in the *kanunnâmes* shows us that a peculiar legal thought underlined the formal jurisprudential textual body. It means the state took the question of prostitution seriously only if it became a threat to public order. Furthermore, the nature of the shar'i courts in the empire also support the state's attitude, because "Ottoman shari'a courts were essentially reactive in nature: they did not actively prosecute but rather responded to the lawsuits brought by individuals... This feature of Ottoman sharia courts procedure had a significant impact on the courts' handling of prostitution."[285]

To support this argument, Semerdjian's work on gender and marginality based on the court records of Ottoman Aleppo will provide some evidence. In her doctorate thesis, Semerdjian argues that, for the sexual transgression cases while the state was exceptionally absent, to police and to conduct a case was bound up community's concerns about the questioned crimes.[286] She argues that "Frequently, cases of prostitution, procuring, cursing and drunkenness were bought to court from neighborhoods."[287] Thus the prostitution became a judicial case mostly after complaints of the community and their denouncement or sudden attacks which reflects "neighborhood solidarity with respect to cases of public morality"[288]. It means that the state preferred to abstain until the issue of prostitution triggered a public complaint and a public reaction. The most telling example of this attitude of the state could

[284] Alî Efendi Çatalcalı, Fetâvâ-yi ʿAlî Efendi, Süleymaniye Library, Istanbul, MS Aya Sofya 1572: fos. 81b-82a. Cited by James E. Baldwin, "Prostitution, Islamic law and Ottoman societies", *Journal of the Economic and Social History of the Orient* 55, no. 1 (2012), 131.
[285] Ibid, 136.
[286] Vivian Elyse Semerdjian, " "Off the Straight Path": Gender, Public Morality and Legal Administration in Ottoman Aleppo, Syria" (PhD. diss., Georgetown University, 2002), 4.
[287] Ibid, 125.
[288] Ibid, 155.

be traced back to the 16th century Istanbul; despite the fact that the authorities were informed about existence of prostitution in certain quarters, prostitution became prohibited only during the limited consecrated periods such as the month of Ramadan.[289]

After discussing approaches to the question of sexual transgression in the shari'a and the statute law during the classical age and before passing to the changes in this attitude during the 19th and early 20th centuries, it should be noted that the construction of an officially promoted illicit sexuality already began from the 18th century onwards. In her elaborative study, Tuğ shows that the Ottoman central government started to create certain social and institutional limits to the authority of the local judges "by the establishment of a much more hierarchical appellate and judicial review system"[290] which would provide the opportunity of judiciary surveillance of sexual transgression by the state authority. As a result of this state intervention to the jurisprudential field, Tuğ argues that "a stricter politico-administrative jurisdiction over sexual crime did intensify the scrutiny of sexual and moral order by employing the existing mechanisms of control as well as developing new ones."[291] For example, from the 18th century onwards, there is an increase in the penalization of sexual offenses by means of discretionary punishment together with a proliferation of the legal categories of sexual crimes at the expense of *hadd* punishment.[292] This inclination toward discretionary punishment was legalized by stating that, "[The cadis] are to carry out the laws of shari'a … but are ordered to refer matters relating to public order (*nizam-ı memleket*), the protection and defense of the subjects, and the capital or severe corporal punishment (*siyaset*) [of criminals] to the [local] representatives of the Sultan (*vükela-i devlet*) who are the governors in charge of military and serious penal affairs (*hükkam-ı seyf ü siyaset*)."[293] This aim can also be traced in the jurisdictional language which define illicit sex. Both Semerdjian and Tuğ argue that there is a certain mobilization of a euphemistic language in the court records[294] while a proliferation of the definition of sexual crimes[295] emerge in the

[289] Metin And, *Istanbul in the 16th century; The City, The Palace, Daily Life* (İstanbul: Akbank Yayınları, 1994), 256.
[290] Başak Tuğ, "Politics of Honor: The Institutional and Social Frontiers of "Illicit" Sex in Mid-Eighteenth-Century Ottoman Anatolia", (PhD. Diss., New York University, 2009), 38.
[291] Ibid, 2.
[292] Ibid, 218.
[293] Uriel Heyd, *Studies In Old Ottoman Criminal Law*, Ed. by Victor Louis Ménage, (Oxford: Clarendon Press, 1973), 209. -Millî Tetebbü'ler Mecmu'ası, i-ii, Istanbul, 1331.
[294] Vivian Elyse Semerdjian, " "Off the Straight Path": Gender, Public Morality and Legal Administration in Ottoman Aleppo, Syria" (PhD. diss., Georgetown University, 2002), 171.
[295] Başak Tuğ, "Politics of Honor: The Institutional and Social Frontiers of "Illicit" Sex in Mid-Eighteenth-Century Ottoman Anatolia", (PhD. Diss., New York University, 2009), 175.

jurisdictional language. For Semerdjian, euphemisms in the court records such as "evil doer" (*sharrira*) and "off the straight path" (*'alâ ghayr al-tariq al-mustaqim*), could represent a technique used to moderate the punishment. According to her, "by encoding crimes with euphemisms the courts deviated from the standard categories of Islamic law and created a legal loophole by which violent corporal punishment could be avoided."[296] Tuğ's analyses of this phenomenon is not different. For her, "legal practice in Anatolia in the eighteenth century created its own terminology such as "indecent act" (*fi'l-i şeni')* or "violation of honor" (*hetk-i ırz*) which was not directly inspired by either shariʿa or *kanun* in normative law. These terms were rather reflections of the politico-legal praxis of finding a way to avoid the stringent shariʿa of creating rules on fornication and adultery (*zinâ*)."[297] Tuğ also states that this emphasis on the reconceptualization of deviance in the sexual relations derived from the anxieties of the state about public and gender order, since the new perception of public and gender order of the Ottoman state was strongly associated with its honor and legitimacy conceptions in the 18th century.[298] This concern about public order would trigger the development of new control mechanisms over prostitution during the 19th and early 20th centuries.

Looking at the Ottoman reform era, it is important to touch upon the characteristics of this period for the empire because the spatiotemporal peculiarities of this era the also constitute a fertile base for the changing attitude towards the question of prostitution. It can be said that the entire 19th century was a time of duality nearly in every aspect of life. As already mentioned, among the reasons of need for a new legislation, a growing trade capacity and economical interests of Western powers in the Ottoman lands caused new and powerful commercial relations between the Ottoman market and Westerner traders. Also there was an interaction and patronage-clientelism relationships between the non-Muslim minorities and the representations of Great Powers, which rendered the Ottoman capital city more appealing for strangers. In addition to European mechants, the Crimean War also brought an important amount of foreign soldiers with their families into Istanbul. This newly coming European people and families had a powerful cultural impact on the Ottoman society which was already being in a transitional and culturally critical period. As Özbek states, "Particularly in the

[296] Elyse Semerdjian, "Sinful professions: Illegal Occupations of Women in Ottoman Aleppo, Syria." *Hawwa* 1, no. 1 (2003), 72.
[297] Başak Tuğ, "Politics of Honor: The Institutional and Social Frontiers of "Illicit" Sex in Mid-Eighteenth-Century Ottoman Anatolia", (PhD. Diss., New York University, 2009), 216.
[298] Ibid, 38.

second half of the nineteenth century, the increased trade and expanded economic opportunities that followed the Crimean War of 1853–56 and the Russo-Turkish War of 1877–78 transformed the city into an entrepreneurial centre for both Ottomans and Europeans"[299] Besides, because of the harsh economical conditions and consequences of territorial losses, a serious amount of peasants and economically disadvantageous people migrated to the capital with hopes to find some economical sources. These vibrant demographic movements and cultural interactions had also an impact upon sexuality. As a part of the transformation of the population and the urbanization of the city, a leisure economy including a sex industry started to grow especially in Beyoğlu.[300] Also from the efforts paid by the Ottoman authorities to control brothels, it can be assumed that this cosmopolite and vibrant atmosphere had its impact vis-á-vis sexual transgressions too. As an illustration of this dynamism one can take into consideration the accounts of the military physician Ahmet Said Bey about the increasing extensity of syphilis emanated from prostitution in Anatolia after the Crimean War.[301] Consequently, it can be said that due to the frequent wars, massive migration movements and economic woes in the 19th century Ottoman Empire, the question of prostitution became widespread in the empire and this general situation triggered the state's regulations efforts.

After this overview, the state's changing attitude towards the question of prostitution will be discussed. In this period the basic jurisprudential gridlines of the sharia and the *kanunnâmes* towards the *zinâ* and prostitution remained unchanged. However, the state's newly emerged concerns about the issue imposed its mark upon the legal arrangements and specific amendments in the late 19th and early 20th centuries. These regulations can be roughly summed up under three headings such as medicalization, administrative registration and spatial delimitation of the question of prostitution. Since these three new methods of control were interlaced with each other, in the following lines they will be examined together.

First of all, the attempts to control and discipline prostitution emerged in the agenda of the state within the scope of measures against syphilis. Although from the 1850s there was an

[299] Müge Özbek, "The Regulation of Prostitution in Beyoğlu (1875–1915)", *Middle Eastern Studies* 46, no. 4 (2010), 556.
[300] Ibid.
[301] Cited by Feridun Nafiz Uzluk in his traduction of Jerome Fracastor, La Syphilis(1530) Golvalıların Hastalığı Üzerine 3 Kitap, Çev. Feridun Nafiz Uzluk, (Ankara: Ankara Üniversitesi Tıp Fakültesi Yayınları, 1945), 25.

awareness about the disease[302], it became an urgent issue due to its rapid spread in the 1870s.[303] In a 1878 report which projects an intervention by the state authority to the question of prostitution, the recommendation is made to keep brothels in Galata and Beyoğlu under perpetual medical control. The document states that by a state intervention the freedom of prostitution can be restricted, however the seriousness of syphilis as a contagious disease required this intervention, because to protect the public health is a principal responsibility of the state.[304]The cautious language of the document possibly aimed at not to jeopardize the privileges conceded to non-Muslim foreigners. According to Toprak, prostitutes and procurers in Istanbul in the 19th and 20th century were mostly non-Muslim and some of them could only be trialed by the consulates of foreign states in a system of legal pluralism of the period.[305] A vivid description of the advantaged status of the non-Muslim prostitutes can be found in Sevengil's study *İstanbul Nasıl Eğleniyordu* as, "In those coffeehouses and taverns, drunken foreign prostitutes, accompanied by unprofessional orchestras, sang and danced, many a lusty eye watched them, admired them and applauded them until their hands got hurt. On the other hand, the brothels sheltering non-Muslim prostitutes were gathered in some certain districts and they began to practice their trade overtly."[306] However, even though being under delicate international circumstances it was still highly remarkable to mention a certain liberty for the prostitution business in Istanbul. Moving back to the report discussed above, there is another meaningful point which is the qualification of the protection of public health as a main duty of the political power. It could be interpreted as one of the first attempts of the instrumentalization of sanitary policy to gain control over the prostitution issue.

Two years later from this first report, in 1880 the Council of State sent a booklet to the Municipality of Istanbul concerning medical regulations which focuses on the prostitutes. This booklet was updated in 1884 under the title of "The Ordinance for the Sanitary Inspection of the Brothels within the Borders of the Municipality of the Sixth District".[307] According to the ordinance two physicians were to be assigned for medical regulations in the area. Along with their medical surveillance over brothels and prostitutes, they were required

[302] Nuran Yıldırım, "Salgınlar", in *Dünden Bugüne İstanbul Ansiklopedisi* 3 (1994), 425.
[303] İbrahim Halil Kalkan, "Medicine and Politics in the Late Ottoman Empire (1876-1909)", (MA Thesis, Boğaziçi Üniversitesi, 2004), 63.
[304] Ibid.
[305] Zafer Toprak, "İstanbul'da Fuhuş ve Zührevi Hastalıklar", *Tarih ve Toplum* 29, (1987), 32.
[306] Ahmet Refik Sevengil, İstanbul Nasıl Eğleniyordu, (İstanbul: İletişim Yayınları, 1985), p.172. I used the translation written by Bahar Çolak, "Portraits of Women in the Late Nineteenth Century Ottoman Empire From the Pen of Ahmed Midhat Efendi", (MA Thesis, Bilkent University, 2002)
[307] Osman Nuri Ergin, *Mecelle-i Umur-ı Belediye*, (İstanbul: IBB Yayınları, 1995). vol.VI, p.3301

to prepare a monthly report to sent to the government. Moreover, an administrative commission was decided to be formed under the Municipality of Sixth District to license the brothels and register sex workers in each brothel by indicating their name, pseudonym, age, nationality and address. Also, along with the brothels, licenses were to be given to prostitutes to regulate the process of medical examinations.[308]

In the district of Beyoğlu, a hospital was opened to serve specifically to prostitutes in 1879.[309] A certain rate of pecuniary contribution for the hospital expenses was taken from brothels according to their size, location and number of workers.[310] The Council of the State severely warned the related body of the Ministry of Internal Affairs that this fundraising from brothels should not be named as a tax.[311] Although patients among prostitutes had to be interned in this hospital in theory, conditions of the hospital was not sufficient to treat them.[312] Thereby this place gradually turned into a residence to isolate severely ill prostitutes rather than a hospital. Despite its insufficiency, the doctor-bureaucrat Agop Bey was constantly insisting that if a woman turns about to carry veneral disease through medical examination, it a necessity to sent her to the hospital in order to protect public health, and if she resists then apply to the public authority to use force if necessary.[313] As can be seen the emphasis of Agop Bey was not on the treatment of the patient but on the protection of public. It can be stated that this emphasis on the public constitutes a continuity in the approach towards sexual transgression, since in pre-modern *kanunnâmes* also the main policit of deporting prostitutes served to protect the public order and peace of neighborhood rather than the punishment of the individual criminal. Secondly, the insistence upon sending prostitute patients to an inefficient hospital signified the actual existence of a binary function of medical policies, i.e. to treat the patient and perhaps more importantly, to put her under surveillance.

At this point, it should be mentioned that the same concerns about public visibility of

[308] Müge Özbek, "The Regulation of Prostitution in Beyoğlu (1875–1915)", *Middle Eastern Studies* 46, no. 4 (2010), 557.
[309] Necati Çavdar, and Erol Karcı. "XIX. Yüzyıl Osmanlı Sağlık Teşkilatlanması'na Dair Bibliyografik Bir Deneme" *Electronic Turkish Studies* 9, no. 4 (2014), 261.
[310] Osman Nuri Ergin, *Mecelle-i Umur-ı Belediye*, (İstanbul: IBB Yayınları, 1995). vol.VI, p.3305
[311] Ebru Boyar, "Profitable Prostitution: State Use of Immoral Earnings for Social Benefit in the Late Ottoman Empire." *Bulgarian Historical Review* 1-2 (2009), 148.
[312] Nuran Yıldırım, "Beyoğlu Nisa Hastanesi", in *Dünden Bugüne İstanbul Ansiklopedisi* (1994), vol.2, 222.
[313] İbrahim Halil Kalkan, "Medicine and Politics in the Late Ottoman Empire (1876-1909)" (MA Thesis, Boğaziçi University, 2004), 65.

prostitutes were also trigger of medical surveillance of them in Egypt also. Although, in this period Egypt had a privileged and semi-independent status from the empire, its modernization path was still quite parallel to the Ottoman state and for this reason it is still meaningful to touch upon it. According to Clot Bey, a crucial doctor-bureaucrat of Khedival Egypt, "There should be no obstacle to forcing these women to report to the hospitals, given the fact that they have no sense of propriety in shamelessly practicing prostitution and adultery….
Furthermore, by forcing them [to be medically examined] we will be committing an act of charity since we will be helping in curing them as well as protecting (the health) of the populace [*hifz siyanat al-ahali*]. If they refuse, [then we can force them] to change their profession. This is one of the most important matters regarding health, and I urge you [*Diwan Khidiwi*] to pay considerable attention to it since examining these women is far better than banning them [from their trade]. This is so because these women are an essential link in preserving the health of the free women [*al-nisa' al-ahrar*]."[314] As one can see, Clot Bey's approach to the question of prostitution was identical to Agop Bey's attitude. They were all in a consensus about a medical surveillance over prostitutes, even by forcing this as a requirement. What lay behind this emphasis of the necessity of medical control of prostitutes was in fact the protection of public health of free people against the "evil people" (*al-nas al-ashrar*). Moreover, based on the expressions of Clot Bey, one can argue that the medical surveillance of prostitutes was also instrumentalized to gain certain control and discursive power over the "free people" and public.

The given dichotomy between "evil" people and "free" people lead us to the spatial regulation of prostitution. As already mentioned, during the classical age of the empire, the quartiers' self-regulating solidarity networks were effectively protecting their *mahalle*s by denunciating[315], busting and bringing illicit sex cases to the law while the state appointed judicial authority and was inclined to abstain from being involved in dealing with sexual transgression crimes. However, in the 19th and early 20th centuries the state authority started to embrace the question of prostitution within the scope of urban governance. In this period, inspired by the Napoleonic registration system and the Parisian *quartiers resérvés*, prostitution was reconstructed as a distinct and legal profession which had to belong spatially

[314] DWQ, Diwan al-Jihadiyya, Register 437, doc. 143 p.169, 7 Jumada II 1263 / 23 May 1847. Cited by, Khaled Fahmy, "Prostitution In 19th Century Egypt", In *Outside In: On the Margins of the Middle East*, ed. Eugene Rogan, (London/New York: I. B. Tauris, 2002), 87.
[315] mostly by tarring because it give the opportunity to do not take risk of kadhf, katran çalmanın fuhuş ve zina vakalarının hukuki case haline gelmesindeki yeri için see. Fikret yılmaz

specific and socially excluded jurisdictional reservations of the state controlled brothels and hospitals.[316] An ordinance about the municipal police's (*zabıta*) assignments in 1861 clearly reflects spatial regulation of the prostitution. According to the document, in the case of any encountering with a woman on the street in an inconvenient time such as late night, the police must interrogate her, and if the woman is a member of "*ehl-i ırz takımı*", a decent honorable woman, the police must take care of her by sending her to the *mahalle* with quarter watchers. On the other hand, if the women is among the prostitutes, "*fahişe takımı*", the police must sent them to their "*mahall-i mahsusalarına*", their specific neighborhood.[317] Another document from 1878 explicitly shows the specific attention given by the state authority to these zones and their spatial regulation and order. They were considered to be dangerous zones because of the presence of prostitutes; for this reason the governmental authority warned about these zones and specifically imposed an emphasized discipline and surveillance over them. It was stated that "Since many foreigners and various kinds of men are residing in the quarter and also people in pursuit of all kinds of extremes live there', it was suggested that the order and security of Beyoğlu required special attention. Particularly places like brothels, drinking houses, gambling houses and the people working in these places should be subject to strict supervision to limit the harm they cause."[318] Also as the most important evidence of spatial regulation and concerns towards prostitution one can take into consideration of presence of *Beyoğlu 6. Daire Nisâ Hastanesi* ("Hospital for Women of the Sixth District of Pera") which opened in 1879 to serve specifically and only for prostitutes.[319]

As a further demonstration of anxieties about zoning laws and spatial limitations of the issue of prostitution, one can take a look at a circular issued in Egypt in 1893. Accordingly, "The Ministry of Interior has often received complaints from the populace of some urban centres of prostitutes taking up residence in places that are in close proximity to the residences of families and free people [*al-ahrar*]. [The petitions complained that this practice] contravenes morality [*al-adab*] and violates the tranquility of the populace. In addition, some prostitutes have been in the habit of walking promiscuously [*mutahattikat*] down the streets with no decency or respect. And since these two matters constitute a violation of public morality in

[316] Hatice Ayşe Polat, "Contending Sovereigns, Contentious Spaces: Illicit Migration and Urban Governance in the Late Ottoman Empire", *Global Histories: A Student Journal* 3, no. 1 (2017), 113-114.
[317] Düstur, i. Tertip, Cilt 2, s.754. Cited by, Gökçen Alpkaya, "Tanzimat'ın "Daha Az Eşit" Unsurları: Kadınlar ve Köleler", *Osmanlı Tarihi Araştırma ve Uygulama Merkezi Dergisi OTAM* 1, no. 1 (1990), 5.
[318] BOA, A.MKT.MHM, 482/24, 1294.Zilhicce.21 (2 Jan. 1878). Cited by, Müge Özbek, "The Regulation of Prostitution in Beyoğlu (1875–1915)", *Middle Eastern Studies* 46, no. 4 (2010), 557.
[319] Nuran Yıldırım, "Beyoğlu Nisa Hastanesi." In *Dünden Bugüne İstanbul Ansiklopedisi* vol.2, (1994), 222.

addition to being a cause of numerous complaints, it has become necessary to put an end to them… [by] forbidding prostitutes from taking up residence among the dwellings of *al-ahrar*, and designating a special area for their residence away from other houses; and they have to be warned not to frequent public thoroughfares in an indecent manner."[320] Quite similar, even perhaps identical complaints of certain quarter residents and equal response of the state authority can be found also in late 19th - early 20th centuries Istanbul. For example, on the basis of several petitions submitted to the Beyoğlu police, Özbek states that the residents of Beyoğlu found that existence of brothels and prostitutes among the houses of respectable families unacceptable.[321] As an answer to these complaints, the police at municipality meetings insistently proposed to collect all brothels to a specific location and requested from the legal authority the creation of a spatial regulation specific to the question of prostitution.[322] According to Tuğ, the ideological and legal basis of this regulation on illicit sex was "the exercise of power and the maintenance of peace and order for its subjects"[323] as an indispensable element of political legitimacy but also "a persistent emphasis on honor—with regard to sexual violence but not necessarily restricted to it."[324] Thus, one can resume that maintaining security and order and guarding the public morality constituted the ideological basis of spatial regulations of prostitution. For instance, an additional penal code article prepared by the Director of Police in 1911 explicitly shows that the reasoning underlined in the regulations of prostitution was essentially about public order, public health and public morality; in this document it was stated that "those who prevent the police while taking the necessary measures to protect the morality of the people, guarantee the security and order of the neighbourhoods and avoid the dissemination of venereal diseases and those who do not heed the warnings of the police in this respect are to be imprisoned from twenty-four hours to ten days and will pay a specified amount of cash."[325]

[320] DWQ, Muhafazat al-'Arish, Register L/10/30/1, 111 (old), letter no90 pp.20-24, 2 Rabi' II 1311/ 12 October 1893. Cited by, Khaled Fahmy, "Prostitution In 19th Century Egypt", In *Outside In: On the Margins of the Middle East*, ed. Eugene Rogan, (London/New York: I. B. Tauris, 2002), 89.
[321] BOA, DH.EUM.THR, 47/36, 1328.21. Şaban (28 Aug. 1910), Cited by, Müge Özbek, "The Regulation of Prostitution in Beyoğlu (1875–1915)", *Middle Eastern Studies* 46, no. 4 (2010), 562-563.
[322] BOA, DH.EUM.THR, 46/25, 1328.15. Şaban (22 Aug. 1910), Cited by, Müge Özbek, "The Regulation of Prostitution in Beyoğlu (1875–1915)", *Middle Eastern Studies* 46, no. 4 (2010), 564.
[323] Başak Tuğ, "Gendered Subjects In Ottoman Constitutional Agreements, 1740-1860", European Journal of Turkish Studies 18, (2014), 6.
[324] Ibid, 2.
[325] BOA, DH.EUM.KADL, 7/15, 1329.Safer.8 (8 Feb. 1911). Cited by, Müge Özbek, "The Regulation of Prostitution in Beyoğlu (1875–1915)", *Middle Eastern Studies* 46, no. 4 (2010), 565.

5.3. Incarceration of Criminal Women: A Simple Ignorence or Governance Trough Precarity?

In previous chapters, reflections of Ottoman legal modernization in crimes in which specifically women become agents were analyzed and it is argued that certain gendered acts as abortion and prostitution were criminalized by modern statecraft and its legal apparatus. After examine the construction of specific gendered crimes, in this chapter, it is aimed that to scrutinize management of women inmates during this late Ottoman modernization period. Similarly, to the construction of certain women crimes, incarceration practices and imprisonment procedure of women on the margins is reshaped during the late 19th and early 20th centuries. In order to thoroughly comprehend the approach to women inmates and their positioning in modernization attempts on incarceration practices in the late Ottoman period, firstly these reformation attempts in the scope of prisons should be understood.

Penal institutions would be added on the agenda of the state in the Tanzimat Era. Until the 19th century incarceration practices of the empire were based on various dungeons and *tomruk*s. In these places, there was not any classifications of neither age nor degree of criminality. There was not any specific architectural or spatial condition for places of incarceration, the main criterion of an imprisonment place was only about to provide sufficient physical restriction to shut in convicts. Even in the first years of awareness about necessity of a reform in incarceration practices, the state's only concern about these buildings was "to be quite strong and solid".[326] Here, the convicts were having to finance themselves. They were responsible of themselves from feeding to dressing. Since the inmates were dependent to their relevant, the *zindan*s were placed near to residential areas. In the means of visiting hours, the Ottoman dungeons were quite liberal, because the convicts could be visited at any time of day. According to Peters, due to these relatively liberal conditions of imprisonment practices social exclusion and stigmatization of inmates was quite light compared to convicts in institutional prisons.[327] The representative of the state authority was jailer. However, he was not having any salary. The acknowledged way of earning money for the jailor was based on racketeering of convicts. Even to step into the dungeon was subjected a charge named "*ayakbastı ücreti*", the charge of first step. This practice of racketeering was

[326] Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 82.
[327] Rudolph Peters, "Prisons and Marginalization in Nineteenth Century Egypt", In E. Rogan (Ed.), *Outside in: On The Margins of The Modern Middle East*, (London: I.B. Tauris, 2001), 40.

causing lack of standardization in treatment of convicts. For example, if an inmate could give enough money, he could have a bad near the window which means near to the fresh air.[328] Despite these lack of standardization and bureaucratization in incarceration practices of the Ottoman empire from classification to treatment of convicts, one can still trace two rough sketch. Firstly, the inmates who convicted to heavy sentence were experiencing labour-intensive criminal enforcements as *kürek* and *kalabendlik,* therefore it can be said that there was a rough classification of inmates based on criminality degree. Secondly, conveniently in the Ottoman understanding of social class, there was a spatial differentiation between inmates from *reaya* and inmates from *askerî* class. In the capital city, while Baba Cafer Dungeon was belonged to common people, the Yedikule and Rumelihisarı dungeons were for convicts from the Ottoman political elites and foreigners.[329] To sum up, until the 19th century the incarceration practices of the empire was faraway from modern understanding of penal institutions. However, this situation was not a special condition to the empire, but a situation shared universally. As a matter of fact, institutionalization of penalty was firstly part of modern state apparatus which concerns its control over population through standardization, and secondly an invention of European puritan modernism and protestant ethics which integrate concerns of correction and improvement of criminals to the penalty. At first these issues were discussed in Europe, especially in England and Holland and also in North America and after a while standardization of penal administration, putting jailors in a standard salary with strict banishment of racketeering and categorization of convicts based on age, sex and criminality degree and correction of inmates came into effect in England in 1815.[330] Therefore it is not surprisingly that one of the main triggers of prison reform in the Ottoman Empire was an English ambassador, Stratford Canning.

In 1851, Canning warned the Ottoman state by writing a specific report named Momerandum on Improvement of Prisons in Turkey about the urgent necessity of an amelioration and regulation in prisons based on his intensive examination and researches on incarceration practices and places in the empire, for example in 1850 during the general inspections of places of confinement by the Ottoman state, he organized a second supervision by alerting of all his consuls of the empire on the base of a specific survey written by himself. In the

[328] Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 16.
[329] Ibid, 29.
[330] Ibid, 58-66.

report, the new approach to imprisonment and criminality of European states can be found as definition of criminality as a treatable disease, qualification of improvements of prisons as a part of civilization, the importance of imprisonment, labor and religion education for correction of inmates. Those are all essential elements of the science of constructing and administering and if a government would like to take its part between civilized societies, it is impossible to ignore miserable situation of its prisons as in the Ottoman case. Canning was also threating the Ottoman state by claiming that the malfunctions of imprisonment practices can cause a rebellion among non-Muslim subjects of the state. Through this menacing attitude with a civilizing mission, it can be understood that just like various reforms in the late Ottoman Empire, the prison reform was also insturmentalized as a matter of diplomatic maneuver by foreigner political powers and became subject to an international affair. It also means that a hopeful struggling for the Ottoman Empire to be accepted among "civilized" European powers if it reforms can be done. For example, an English commander (M. Gordon) was appointed as a counsellor by the Ottoman state to the temporal council for reorganization of prisons. Besides to make use of his ideas and knowledge, it can be also interpreted as a wish to have a witness about the Ottoman reform working. Right after the report of Canning, in 1851 and 1852 the first attempts to construct buildings as distinct prisons started in the empire despite all economical insufficiency. In 1856, the first legal attempt about categorization of prisons based on criminality degree was deeply discussed in Meclis-i Tanzimat. In the same year, a special budget was defined for prisons. In 1858, based on the report of the English counsellor, M. Gordon, closure places of the empire were entitled under the name of "prison" (*hapis*) instead of incarceration place (*mahbes*) and categorized according to criminality degree. In 1868, a serious standardization attempt realized by publishing a regulation of administration, management and treatment of prisoners. After regulating the administrative affairs, in 1880, the state started to discipline and regulate everyday life of prisoners by settling specific time for sleeping and waking up, for religious services, for working, cleaning and resting. Moreover, a disciplinary code and procedure was defined by describing the good and the bad behavior in the prison. Also, "in order to prevent prisoners to remain idle"[332], some workplaces constructed in prisons. Besides, inner regulations of the prisons, the Ottoman state tried to rebuild prisons according to new architectural standards defined for a prison. In 1871 a model-prison built in Istanbul and from then on "an interminable construction work"[333] started throughout the empire despite all

[332] Ibid, 357. "…mu'attal kalmamaları için..."
[333] Ibid, 328.

economical inabilities. In this constructional period beginning with a new model-prison, the Ottoman state started to take into consideration the question of women inmates in the scope of production of penal space. Indeed, the question of women inmates' importance was firstly touched upon in 1851 in the report of Canning and in 1858 Meclis-i Tanzimat planned a specific prison building for women by inspiring M. Cordon's suggestion[334], however it could not be never realized in the way proposed.

In the classical age of Ottoman Empire, although a separation between inmates according to their sexes, there was not any specific dungeon or prison building for women inmates. There were two main spatial practices for women convicts, first was the separate dormitory in dungeons, especially in Baba Cafer Dungeon, and second was religious leaders' houses. For example during the reign of Selim III, an imam's house near to Ağakapısı was used as an incarceration space for women inmates.[335] The Ottoman prison reform for women inmates can be summarized as a transition from dungeons and imam's houses to rented local houses for women convicts whom will be under the supervision of women guards. Ultimately, these places which made by a makeshift method were started to entitle as women prisons by the state. Actually a document dated 1850 shows that there was certain willingness among state officials to build a specific women prison in the scope of Bab-ı Zaptiye in Cağaloğlu, even financial and architectural investigation were made by the Director of Official Buildings (*Ebniye-i Mîriye Müdürü*) Hacı Hüsam Efendi.[336] Similar plans and demands from various regions of the empire can be found, an example of these plans is presented in appendix 1. As an instance, in 1883 in Karesi also a women prison was planned and financial demand of the building was indicated as 11490 *kuruş*, however it could not be realized due to financial insufficiency and women inmates in Balıkesir were deplaced to a rented house style prison.[337] This example can be accepted as a general and common situation of the women prisons issue in the empire.

[334] Ali Karaca, "XIX. Yüzyılda Fahişe Hatunlara Uygulanan Cezalar: Hapis ve Sürgün", In. *Hapishane Kitabı*, Ed. Emine Gürsoy Naskali and Hilal Oytun Altun, (İstanbul: Kitabevi, 2010), 155.
[335] Ayşe Özdemir Kızılkan, Osmanlı'da Kadın Hapishaneleri ve Kadın Mahkumlar (1839-1922), (PhD. Diss., Süleyman Demirel Üniversitesi, 2011), 77
[336] C. ZB 3622. Arşiv Belgelerine Göre Osmanlı'da Kadın, (İstanbul: T.C. Başbakanlık Devlet Arşivleri Genel Müdürlüğü, Osmanlı Arşivi Daire Başkanlığı, Yayın no.137, 2015), 325.
[337] Emine Gürsoy Naskali and Hilal Oytun Altun, Zindanlar ve Mahkumlar, (İstanbul: Babil Yayınları, 2006), 69

Despite all idealized building plans, under these circumstances, the deemed appropriate penal conditions for women was renting houses and entitling them as women's prisons. According to a document written by the Grand Council (*Meclis-i Kebîr*) of Ankara dated 1859, until that day the women inmates convicted from minor offences to felony were kept in trustworthy places as imam's house, however it cannot be no longer an appropriate method and there was an urgent need to permanent and separate place due to the term of imprisonment of certain convicts reached 5 to 7 years.[338] However, placement of criminal women into the imam's and local authority's houses could be still encountered. For example, in 1907 a letter sent by the Office of Internal Affairs states that even so it is allowed according to provisions of law to rent a space as women goal on payment of a small fee, it is not necessary to have a permanent goal in townships because there will not be always criminal women in questioned places instead of presenting a permanent goal, criminalized women in townships should be placed into imam's and local authority's houses in change of an appropriate fee.[339]

One of the first example of the transition from imam's house to the rented houses was realized in Yozgat by contracting Esma Hanım's, a braver woman comparatively her equals who capable to discipline women inmates[340], house as a special prison to women.[341] While according to the Instruction of Prison Guardians regulated in 1876, all female and male guardians should be familiar with the penal law and well-educated, however when it comes to be a guard or guardian in women prisons, it can be seen that these criteria can be neglected. This was not a discrete application for once only, on the contrary the renting method was constituting the main and humble share of women inmates of the Ottoman prison reform. As further illustrations, one can consider formation of spatial practices of "*nisâ habshânesi*" based on renting in other cities as Maraş in 1871[342] and Rhodes in 1874.[343] In these places to provide all needs of the inmates from feeding to security was responsibility of the host.[344] In

[338] Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 359.
[339] DH. MKT, 1142/14. Arşiv Belgelerine Göre Osmanlı'da Kadın, (İstanbul: T.C. Başbakanlık Devlet Arşivleri Genel Müdürlüğü, Osmanlı Arşivi Daire Başkanlığı, Yayın no.137, 2015), 333.
[340] "emsâline nispetle cesûre ve zapt ve rabta muktedire"
[341] İ. MVL, nr. 18264. Cited by, Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 359.
[342] İ. DH, nr. 60618, Cited by Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 360.
[343] Ali Fuat Örenç, *Yakın Dönem Tarihimizde Rodos ve Oniki Ada*, Cited by Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 361.
[344] Gizem Sivri, "Osmanlı'da Kadın Mahkum Olmak: Kadınları Mahkum Etme ve Denetleme Pratikleri Üzerine Bir Değerlendirme (1840-1919)", *Toplumsal Tarih* 283, Temmuz, (2017), 88.

this regard, it can be said that the state tried to subsidize women inmates as male convicts. This assuming responsibility for inmates was a gaining of Ottoman prison reform mentality and women were not excluded from this new conscientious approach to criminals. However, it is still can be seen, women inmates were abandoned to private persons and leaved to the mercy of "trustworthy" people rather than guardians as attendant part of a relatively standardized and supervised system. As a matter of fact, according to male guardians, female wardens were in a significantly autonomous and adrift positioning in the Ottoman prison reform by being the vital agents to maintain order, security and supervision all in all.[345]

Alongside attempts to regulate spatial practices of women inmates by renting houses, some administrative regulations were also taken into consideration. Especially in the 1880 Directory of Prisons emphasized that if and only women guards and guardians can be assigned for women prisons and dormitories.[346] For example, according to the İstanbul Public Prison records in 1901, two female guardians named Fatıma Seher Hanım and Çankırılı Nazife Hanım were assigned in the prison for women inmates. However, the number of female guard and guardians would be insufficient always, event the present guardians were reluctant and inclined to quite because of irregular and poor payments. For example, a female guardian of Nazilli Women Prison resigned after rejection of her rise in salary demand.[347] Since there was not any other possibility to rent another house as a women prison, the governor of Aydın suggested to preserve the present situation by rising her salary as she demanded. Unfortunately, there was not any other information about the consequence of his suggestion. Another example of quit realized in Çatalca, because the female guardian of Çatalca Prison could not be able paid along 3 months, she had to resign from her job.[348] In an other example, a female guardian named Sıdıka Hanım, which again means the host of rented house for women prisoners, demanded a rising in her salary and also in the rental fee.[349] However, her application was rejected. A document dated 1900 from Saruhan, reveals that most of rental fees of houses for women prisons could not be paid regularly and this situation

[345] Kent Schull, *Prisons In The Late Ottoman Empire, Microcosms of Modernity*, (Edinburgh University Press, 2014), 126.
[346] Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 388.
[347] Saadet Tekin, "19.yüzyılın sonu 20. yüzyılın başlarında Nazilli Hapishanelerine Kısa Bir Bakış", *Tarih ve Toplum* 205, January 2001), 14.
[348] Ayşe Özdemir Kızılkan, "Osmanlı'da Kadın Hapishaneleri ve Kadın Mahkumlar (1839-1922)", (PhD. Diss., Süleyman Demirel Üniversitesi, 2011), 87.
[349] BOA. DH. MB. HPS., Dosya No: 165, Gömlek No: 69, Tarih: 14.N.1338. Cited by, Saadet Tekin, "19.yüzyılın sonu 20. yüzyılın başlarında Nazilli Hapishanelerine Kısa Bir Bakış", *Tarih ve Toplum* 205, January 2001), 93.

caused serious complaints of hosts. In Saruhan, the owners wrote a petition in demanding the rental fees of prisons, however their demands were rejected due to financial insufficiency of internal affairs.[350] In this system of rented women prisons, documentation and recordkeeping procedures were not regular as in an institutional male prison. Even because of the malfunctions in recordkeeping, sometimes female guardians were not able to get their payments. For example, a guardian from Lazistan Women Prison, Emine Hanım's salary could not be paid because her information could not be found in questioned records.[351] Another example of lack of payment realized in Fethiye but in this time it was a deliberate decision of the state. In Fethiye Women Prison a female guardian who was working for free demanded a certain payment for her job, but it was rejected by stating that "it is not possible to pay a salary."[352] To conclude, although the 1880 Directory of Prisons emphasized that the responsibilities and duties of male and female guardians as identical[353], the female guardians were working in precarious conditions. They were less paying in compare to the male guardians and as can be understood from documents which reveals petitions written by the female guardians, even they mostly could not get their disadvantageous payments.

At this point it is very interesting and crucial to indicate that the point which change amount of payment of a guardian was not the sex of the guardian. But it was if and only sex of the gendered place. It means that the spatial discrimination conducted by the state between women prisons and men prisons was such an extent that able to cut across a much more deep-rooted and long-established discrimination criterion which is sex. In order to better argument this point, one can take into consideration of a case of claim his rights of a male guardian in 1916. Ahmed Hamdi, the questioned male guardian was assigned in Çankırı Women Prison, he demanded an increase in salary, since his payment was 70 *kuruş* while guardians in male prison who have the same function was earning 200 *kuruş*. In the end, his demand was rejected.[354] This case explicitly shows that the main criterion of amount of a guardian's salart was not his/her sex but the gendered place in which he/her works. Double standard applied to

[350] BOA. DH. TMIK.S., Dosya No: 30, Gömlek No: 22, Tarih: 18.M.1318. Saadet Tekin, "19.yüzyılın sonu 20. yüzyılın başlarında Nazilli Hapishanelerine Kısa Bir Bakış", *Tarih ve Toplum* 205, January 2001), 93.
[351] BOA. DH. TMIK.S., Dosya No: 30, Gömlek No: 22, Tarih: 18.M.1318. Saadet Tekin, "19.yüzyılın sonu 20. yüzyılın başlarında Nazilli Hapishanelerine Kısa Bir Bakış", *Tarih ve Toplum* 205, January 2001), 93.
[352] BOA., DH. MB. HPS ., nr., 90-66. Cited by Ayşe Özdemir Kızılkan, "Osmanlı'da Kadın Hapishaneleri ve Kadın Mahkumlar (1839-1922)", (PhD. Diss., Süleyman Demirel Üniversitesi, 2011), 90.
[353] Fatmagül Demirel, "Osmanlı Hapishanesinin Gardiyanları", *Hukuk ve Adalet Eleştirel Hukuk Dergisi*, no. 9, (2007), 258.
[354] BOA., DH.MB.HPS ., nr., 92-10. Cited by Ayşe Özdemir Kızılkan, Osmanlı'da Kadın Hapishaneleri ve Kadın Mahkumlar (1839-1922), (PhD. Diss., Süleyman Demirel Üniversitesi, 2011), 87.

women and men prisons indicates that the state does not treat male and female inmates equally by reducing even neglecting women prisons' needs from physical to administrative. In addition, as a part of those gendered spaces, women prisons' male or female guardians were taking their shares.

While the women inmates were not taken into consideration as a genuine part of prison reform, because they were not adapted to the reformative system nor physically neither administratively; however, the state's discursive power on prisoners' correction through labor was still valid for women. As mentioned before, forced labor was described as a method of correction firstly by European puritan thoughts on penalty. Inspired by European examples and guided by English counsellors, the Ottoman prison reform also adopted this correctional approach towards convicts. Penal proceeding was already becoming gradually bureaucratized by means of new codifications in the penal field. In parallel with criminal codes, new regulations on forced labor of convicts from severe penalties and light sentences were made. Prisoners convicted from severe penalties were subjected to hard labor (*kürek cezası*) in the Imperial Shipyard (*Tersâne-i Âmire*). Since the Imperial Shipyard was overcrowded, for example in 1859 the number of prisoners reached 1109[355], new penal institutions which would function as center of hard labor were built in various places as Selânik[356], Vidin[357] and Sinop.[358] Furthermore, a detailed procedural guide about treatment of these convicts was demanded by the Grand Admiral of the navy of the empire (*kapudan paşa*) and an instruction with a title of "administration and conservation of prisoners" was written by *Meclis-i Vâlâ*.[359] As can be seen, labor procedure of convicts became an issue which taken into consideration gingerly by the state.

Moreover, a second ordinance named "the ordinance on internal administration of jails and prisons" (*tevkifhâne ve hapishanelerin idâre-i dâhiliyyelerine dair nizamnâme*) was issued by the Ministry of Gendarme (*Zaptiye Müşirliği*) in 1880. The fifth chapter of the ordinance

[355] Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 225.
[356] İ. MVL, nr.438/19430 (18 Rebiyü'l-âhir 1277) Cited by Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 230.
[357] İ. MVL, nr. 19551. (3 Cemaziyü'l-âhır 1277) Cited by Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 230.
[358] İ. MVL, nr. 19576, (16 Şaban 1277) Cited by Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 230.
[359] Gültekin Yıldız, *Mapusâne: Osmanli Hapishanelerinin Kuruluş Serüveni (1839-1908)*, (İstanbul: Kitabevi, 2012), 234.

clearly states that all prisoners have to work in obligatory industrial activities which are defined as 6 hours per day during the winter session and 8 hours per day during the summer session.[360] Prisoners who already knew a certain artisanship should ply their trades. The ones who were not familiar with any artisanship had to learn at least one craft. The revenue of this obligatory industrial activities would be shared between the government, the prisoners and the administrative office.

The last article of the ordinance designated that the aforementioned regulations and ordinance were constituted the general procedure and valid for everywhere.[361] Based on this article, it can be understood reasonably that forced labor execution was valid for women inmates.
However, according to Özdemir Kızılkan, engaging into forced labor do not constitute a typical penal execution in women prisoners' cases. Nevertheless, during state of emergency as war, the state could decide to benefit from producing capacity of women prisoners.[362] Since the archival records on the labor of women prisoners are quite parallel with war times from the early 20th century, it can be said that Özdemir Kızılkan is right in her suggestion. At this point, one should remark that differently from attitude towards male criminals, there was an interesting discourse ruled by the state on women labor in prisons. It was suggested that convicted women especially from prostitution were doomed ones because they had to choose prostitution while struggling to make a living. By forcing them to labor in prisons, the state was trying to gain them a decent way of earning their lives and at the same time it was an effective way of struggle against the issue of prostitution. A document dated 1904 reveals that a group of hussy women were gathered up from streets and kept in the jail and forced to labor for two years in Kayseri[363]. In this unlawful incarceration practice, the aim was firstly maintaining of public order by controlling these hussy women and secondly correction of them by training and forcing labor. During this period, the municipality was covering all their expenses like feeding and clothing. However, due to their expenses the municipality informed the Ministry of Internal Affairs. In the response of the ministry, it is asked that if there is any other way of correction, they should be canalized to this way, secondly it is proposed that these women should be turned over their relevant. The authorities in Kayseri responded that the relevant of women were already needy persons who could not protect these women, thus it

[360] Ibid, 257.
[361] Ibid, 258.
[362] Ayşe Özdemir Kızılkan, "Osmanlı'da Kadın Hapishaneleri ve Kadın Mahkumlar (1839-1922)", (PhD. Diss., Süleyman Demirel Üniversitesi, 2011), 104.
[363] Ibid, 119.

is suggested that under these circumstances release of these women could disturb the peace again. Unfortunately, it is not known that how correspondence ended up. However, the correspondence is still valuable because it explicitly reveals that an unlawful incarceration practice could be legalized by just engaging a certain forced labor into the penal execution of inmates, even the inmates were neither taken to court nor convicted.

A further example took place in İstanbul in 16 August 1910. In that year, the Chief of Police of İstanbul applied to the General Directorate of Security and demanded that the prostitutes who break the peace and public order by explicitly prostituting in streets and neighborhoods should be forced to labor in military tailoring workshops. He added that, by this way, the prostitutes who had to choose prostitution because of poverty could gain and spend their lives honorably and also withdrawal of women from prostitution would be quite beneficent for the public order of the city.[364] The General Directorate of Security approved this demand and applied to the Ministry of War (*Harbiye Nezareti*). In the response to appeal, the ministry states that, the ministry has been always bearing their hands to the Muslim Ottoman women by providing them job and means of substances, however the present situation of aforementioned women does not constitute a need, since they chose prostitution not because of their needy conditions, contrarily they do it because it is their habit. From this answer, one can assume that the demand of the General Directorate of Security was rejected by the ministry. The vital point in the correspondence is that, the police could apply to forced labor as a practical way of gaining control over prostitutes. This example again shows that the labor as a correctional penal execution could be insturmentalized by the state in order to legalize certain arbitrary incarceration practices especially towards the prostitutes.

In conclusion, through examined cases, it can be argued that during the 19th and early 20th centuries, the Ottoman state's approach to women prisoners was discriminatory and their positioning in the Ottoman prison reform was highly precarious. As Sivri argues that, the women inmates were constituting only an expendable part of modernization attempts in the field of penal execution and imprisonment practices.[365] Through specific incarceration practices like creation of "women prisons" basically renting houses, employing unqualified

[364] Yavuz Selim Karakışla, "Askeri Dikimevlerinde İşe Alınan Müslüman Fahişeler", *Toplumsal Tarih* 112, (Nisan, 2003), 99.
[365] Gizem Sivri, "Women's Prisons and Women Prisoners In The Late Ottoman Empire (1840-1920): From Invisibility to Expendability", (Unpublished MA Thesis, Boğaziçi University, 2017)

house owners as female guardians and applying unlawful closure practices towards prostitutes, the state stigmatized women inmates to precarious conditions during the penal execution. At this point one should ask that, was this a simple negligence of women criminal agency by perceiving them as an expendable part of reform movement in penal field, or was it also a possibility to govern through precarity, especially a subaltern group of society as women in margins? Indeed, precarity is a concept about social insecurity which especially common used in studies on neoliberal policies and migration. However, as Koselleck states that concepts do not constitute stagnant way of thoughts, contrarily they embrace new meanings from sociopolitical conditions and historical patterns.[366] Moreover, the concept of precarity which mentioned here is inspired by Butler's ontological precariousness which means a simple and omnipresent dependency on people as an inevitable bringing of social life.[367] Nevertheless, the ontological precariousness itself refers always given norms, social and political orders which were historically constructed for augment precariousness for some and diminish it for others and "These normative conditions for the production of the subject produce an historically contingent ontology, such that our very capacity to discern and name the "being" of the subject is dependent on norms that facilitate that recognition."[368] Through this approach to the production of precariousness, it can be argued that in the Ottoman reformative mentality towards prisons, the norm which facilitate the recognition of subject who deserve to minimum precarity, was being male and majority. It is explicit that during the Ottoman prison reform in late 19th and early 20th centuries, the male prisoners were always recognized as subjects who need and "deserve" the reform. On the other hand, women inmates were stigmatized in precarious conditions through specific incarceration practices and their equal need for a reform in prisons were not recognized by the state.

This specific distribution of precarity was not a simple negligence towards women inmates. It was a certain condition of domination which is "not to be understood as determinate but, on the contrary as decidedly productive: in its productivity as an instrument of governance and a condition of economic exploitation, and also as a productive, always incalculable, and potentially empowering subjectification."[369] At this point, if one can remember specific

[366] R. Koselleck, 'Begriffsgeschichte and Social History.' In *Futures Past* (New York: Columbia University Press, 2004) Cited by Franco Barchiesi, "Precarity as Capture: A Conceptual Reconstruction and Critique of the Worker-Slave Analogy", In *Selected Works of Franco Barchiesi*, (The Ohio State University, 2012), 1.
[367] Judith Butler, F*rames of War: When Is Life Grievable?*, (London/New York: Verso, 2016), 14.
[368] Ibid, 4.
[369] Isabell Lorey, "Becoming common: Precarization as political constituting." *E-flux Journal* 17 (2010), 6. Accessed 25 October, 2017.

incarceration and closure practices maintained by the police towards women in Kayseri and İstanbul, it can be understood that why the expendability of women prisoners was not a simple negligence but also an example of governance through precarity. Because unrecognition and expendability of women inmates by the Ottoman modernization mentality were giving at the same time an incalculable space of manoeuvre to the state on control, incarceration even closure of women on the margins. By providing an extent and incalculable control mechanism to the state, the precariousness of the women inmates was becoming productive while de-subjectification women in the scope of modernization in the penal execution.

CHAPTER VI

Conclusion

This study has aimed to examine changing nature of the relationship between the state, law and society through 19th century legal transformations in the Ottoman Empire. Rather than reductive diatomic suggestions on this transformation as Westernization vs. traditional Ottoman legal culture or secularization vs. religious Ottoman legal culture, I tried to deal with the issue through two fundamental points; firstly it tried to depict different sources of the Ottoman law (the shari'a, the 'urf, the statute law and the relationship between them which constitutes a special legal amalgamation unique to the Ottoman Empire) and their historical developments. This attempt to set out Ottoman legal culture in its origins gave us the chance to perceive the law as an historical and intellectual construction. As Bourdieu's said, a structurant structure. Secondly, it is tried to deal with the legal transformation in its socio-historical conditions which was a genuine vivid reform era for the empire. In this reformative era, legislation and codification activities charged with the aim of control and discipline the state's itself (the bureaucracy) and the society. It is argued that the state during the 19th and early 20th centruies, was fully aware of the constitutive force of law on institutions and also on the people.

In order to reveal the awareness of a state on the verge of modernity to utilize the law, the study tried to catch indicators of new reformist mindset of the state for control and discipline in legislation activities and especially in penal codifications. In the 1840 Penal Code, the state's self definition after the Tanzimat Edict can be traced. And most importantly the great effort to protect this new self definition of the state through a new concept of criminality specially focused on the bureaucracy and çivil servants. In the 1851 Penal Code, one can encountered a new concept of the state as a social body that the subjects are bounded with a legal bondage. Through this new conception of the state, the state-society relationship also redefined because there emerged a new definition and limits of victimhood in related with the abstraction of the state as a social body. In 1858 Penal Code, the changing was on going. With this codification the state extended limits of crimes and their respective penalties in order to strengthen political authority over the criminal field.

In order to concretize the research subject as the changing nature of the state-society

relationship through insturmentalization of law as a control and discipline mechanisms (or in fact as an instruction book for control and discipline mechanisms), the changing approach of state's towards certain gendered crimes as abortion and prostitution, and transformation of penal execution for women on the margins were taken as case studies. It is argued that the 19th century reformist mindset in the legal field reshaped the concept of criminality in gendered crimes. Since, for example abortion and prostiution were left in a certain intimate and private zone, from the 19th century a certain meaning of criminality was emposed them through new legislative regulations and semantic management of notions.

In the process of criminalization abortion went hand in hand with the changing in policy of sanitation and demography with the emergence of concept of public health care in the empire. Thereby in this process, the question of abortion articulated to the public health and became a subject of modern sovereign-state and its biopolitics. This process was also an indicator of changing in the nature of power and the state's rights by transforming the intimate to public. As the second case, prostitution was also a question left in private zone which means this kind of sexual transgression turns out a criminal case when a complaint arrived to the judicial authority. However in the 19th century the state's approach to the question gained a public character through again the notion of public health. Furthermore, modern control mechanisms such as medicalization, registration and spatial regulation were mobilized by the state in order to discipline these women on the margins.

As the third case, incarceration practices towards criminal women, reveals again repositioning of women on the margins in the limbo between the private and public zone. Especially in the scope of improsonment, it was constituting gravely precarious legal and physical conditions for women inmates. Through specific incarceration practices like creation of "women prisons" basically renting houses, employing unqualified house owners as female guardians and applying unlawful closure practices towards prostitutes, the state stigmatized women inmates to precarious conditions during the penal execution. While a series of reforms were making in male prisons from bureaucratization of administration to physical rebuilding works, women were lefted in precarity and it reveals again the limited and expendable place of the women on the margins. At this point, it is argued that this specific distribution of precarity was not a simple negligence towards women inmates, but it was also a certain condition of domination which provides an extent and incalculable control mechanism to the state.

These three cases were chosen to reveal the changing and gradually modernized state-society relationship during the late Ottoman era. In this radical transformation, law was charged with a duty of redefinition of concepts like crime, criminal and the state as social body whom its subjects were bounded with a legal bondage. It is argued that insturmentalization of law by the state is one of signatures of modern state which again reveals that the Ottoman state were in a modernization patterns. And it was not in a way of imitation of Western legal thought, rather in a sui generis way by reconceptualization of its own legal sources, the shari'a and the statute law, and the relationship between them. It means, the Ottoman reformist elites and statecraft had been already gained a modern way of thought on the law and legal field. Because instead of imitating a legal system, the state reconfigured its own sources in a new autocratic way and furthermore, tried to use law as a *structuring structure* to produce new meanings. These two attempts were explicitly bearing signature of a modern mindset.

In conclusion, neither law nor criminality are immutable notions. Contrarily, they are socio-historical construction. This process of construction and nature of building-up, change according to historical conditions. Throughout the long 19th and early 20th centuries, the Ottoman Empire provided to readers a significant example for this socio-historical construction of the law and criminality. As a final analysis, this interventionist building-up process in the legal field reflected also fundamental features of the modern state which appeals researchers to concern the issue from a comparative historical point of view.

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