Law and Order in Ottoman Iraq: Implementation of the Ottoman Criminal Justice System (1840-1870)

Meryem Yetkin

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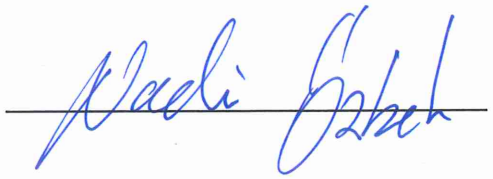
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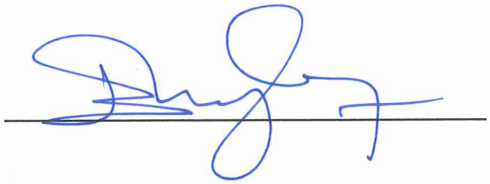
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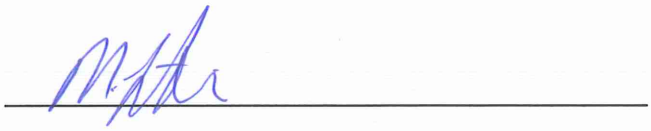
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Declaration of Originality

The intellectual content of this thesis, which has been written by me and for which I take full responsibility, is my own, original work, and it has not been previously or concurrently submitted elsewhere for any other examination or degree of higher education. The sources of all paraphrased and quoted materials, concepts, and ideas are fully cited, and the admissible contributions and assistance of others with respect to the conception of the work as well as to linguistic expression are explicitly acknowledged herein.



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Abstract

Law and Order in Ottoman Iraq:
Implementation of the Criminal Justice System (1840-1870)

Meryem Yetkin, Master's Candidate at the Atatürk Institute
for Modern Turkish History at Boğaziçi University, 2019

Professor Nadir Özbek, Thesis Advisor

This thesis discusses the initiation of Ottoman-reformed criminal procedures and courts into the provinces of Iraq between the 1840s and the late 1860s. It evaluates the Ottoman government's efforts to gain monopoly over the right to dispense justice in the region within the scope of the Ottoman centralization in its distant provinces. The introduction of new legal organization and the Tanzimat criminal procedures were part of the Ottoman attempt at reassertion of authority in the region. The records from the courts of the Iraqi provinces and the correspondences between the central and the provincial governments indicate how the Ottoman state prioritize the operation of justice as a mark of a legitimate governance in Iraq. The Tanzimat government gave significance to the standardization of trials and the adjudication of the criminal cases among the people of Iraq as a way to gain their loyalty. Besides the introduction of the criminal procedures, the implementation of an effective penal policy toward alleged criminals was seen as another solution by the government to pacify the tribal population and to establish a stable social order. In addition to the Ottoman government's judicial and penal policies, this thesis evaluates the Iraqi people's attitude toward the Ottoman courts to understand state-society relations in a region where tribal confederations were still strong and the people unaccustomed to the Ottoman judicial system.

41,000 words

Özet

Osmanlı Irak'ında Hukuk ve Asayiş:
Ceza Yargılama Sisteminin Uygulanması (1840-1870)

Meryem Yetkin, Yüksek Lisans Adayı, 2019
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Profesör Nadir Özbek, Tez Danışmanı

1840'lı yıllardan başlayıp 1860'ların sonuna kadar olan dönemi elen alan bu tez, Tanzimat döneminin ceza yargılama usullerinin ve mahkemelerin Irak eyaletine uygulanmasını incelemektedir. Tez, Osmanlı hükümetinin merkezden uzak eyaletlerde adalet dağıtım hakkını kendi tekeline alma çabalarını, merkezileşme politikaları çerçevesinde ele almaktadır. Yeni hukuk düzeninin ve ceza muhakeme usullerinin bölgede uygulanması, Osmanlı hükümetinin Irak'ta kurmaya çalıştığı otoritenin unsurlarıdır. Irak mahkeme kayıtları ve merkezi hükümet ile vilayet yönetimi arasındaki yazışmalar Osmanlı devletinin adaletin tesis edilmesini meşru bir yönetimin göstergesi olarak ne derece öncelediğini göstermektedir. Tanzimat idaresi, bölgedeki insanların Osmanlı'ya yönelik bağlılığını elde edebilmek için insanlar arasında cereyan eden ceza davalarının mahkemelerde karara bağlanmasına ve yargılamanın standartlaşmasına büyük önem vermiştir. Mahkemelerdeki yargılama esaslarının yanı sıra, sosyal düzenin sağlanabilmesi ve bölgedeki aşiret nüfuslarının pasivize edilmesi için zanlılara yönelik etkili bir ceza politikasının uygulanması hükümet tarafından bir diğer çözüm yolu olarak görülmüştür. Bütün bu politikaların yanı sıra, bu tez Irak'taki insanların Osmanlı mahkemelerine yönelik takındıkları tutumu irdeleyerek, aşiret yapılarının halen güçlü olduğu ve insanların Osmanlı hukuk sistemine aşina olmadıkları bir bölgede devlet-toplum ilişkileri üzerine söylene gelen tezleri sorgulamayı hedeflemektedir.

41.000 kelime

To my beloved parents
Semira and Necati Yetkin

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Abbreviations

A.AMD	Âmedi Kalemi Evrakı
A.MKT	Mektubî Kalemi Evrakı
A.MKT.MVL	Meclis-i Vâlâ Evrakı
A.MKT.UM	Umum Vilayet Evrakı
C.ZB	Cevdet/ Zaptiye
İ.DH	İrade Dahiliye
İ.MVL	İrade Meclis-i Vala
M.	Muharrem
S	Safer
Ra	Rebîulevvel
R	Rebîulâhir
Ca	Cemâziyelevvel
C	Cemâziyelâhir
B	Receb
Ş	Şaban
N	Ramazan
L	Şevval
Za	Zilkâde
Z	Zilhicce

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1

Introduction

Why did an inhabitant of Iraq who belonged to a tribe like everybody else in the region apply to the Provincial Council in order to solve a bloody conflict rather than seek his/her right through a tribal leader or a sheikhly figure, as could be more expected of the time? What are the factors that induced the plaintiff to turn to the official judicial authorities? In areas where governmental control was loose and the local allegiances already existed, factors that deter a litigant to pursue an alternative authority are noteworthy since the procedures of court lengthen and complicate the process. The two main factors that brought the tribal population of Iraq to the court of the Ottoman authorities are the Ottoman government's policy of centralization in the region and the legal reforms it applied for the establishment of a more effective and disciplinary justice system.

Throughout the second half of the nineteenth century, Iraq experienced a transformation toward the reorganization of its social and political structures. The Ottoman central government tried to incorporate region into the imperial governance structure mostly by pacifying the tribal order and eliminating the local powerholders. Centralization policies were realized in several ways, and ranged from the collaboration with tribal leaders to the use of military force as a last resort. In general, the main goal of the centralization was to the settle the nomadic and semi-nomadic tribes in order to extract more revenue and establish a stable public order. Although the Ottoman central government

aimed to deconstruct the tribal structure in Iraq, establishing control over the strong tribal confederations continued to be the most formidable task of each governor in Baghdad.[1] Therefore, in a region where ruling families, tribal chiefs and sheikhs continued to exist despite the interventionist policies of the central government that restored its authority only in the 1830s, it is possible that multiple actors could claim predominance over the judicial authority. Corollary to the centralization policies in the region, the Ottoman central government attempted to monopolize the jurisdiction in the Iraqi provinces by strengthening the provincial administration and the legal organization.

The endeavor to gain monopoly over jurisdiction was connected with the Ottoman governmentality of the 19th century. The Ottoman central authority was preoccupied with the question of order in this period much more than before. As a term, order (*asayiş*) which connotes to social peace and security, appears in official documents and correspondences more frequently after the *Tanzimat*.[2] Ottoman officials' preoccupation with the terms like order and security reflects the concern over the danger of lawlessness in the center and the provinces of the empire.[3] Although these concepts were already valid for the Ottoman governance in the previous centuries, they surrounded the Ottoman administrative mind in the reform period more intensely since the consolidation of central authority had utmost priority. Therefore, the establishment of a new legal framework and application of normative law all around the Empire occupied the reform agenda. Considerable amount of laws and regulations was produced and codified in this period in order to standardize and consolidate the Ottoman administration. By reorganizing the Ottoman legal system and standardizing the law, T*anzimat* reformers proposed to reach multiple objectives such as bringing the provincial governors under the control of the central administration, controlling the everyday life of Ottoman subjects and also to fulfilling the promises of the Imperial Edict regarding the security of life, honor and property of all Ottoman people.

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1 Ebubekir Ceylan, *The Ottoman Origins of Modern Iraq: Political Reform, Modernization and Development in the Nineteenth-Century Middle East* (London: I.B.Tauris, 2011), 134.

2 Noemi Levy, *Osmanlı İstanbul'unda Asayiş (1879-1909)* (İstanbul: İletişim Yayınları, 2017), 59.

3 Avi Rubin, "Was There a Rule of Law in the Late Ottoman Empire?" *British Journal of Middle Eastern Studies* 46, no.1 (2017): 1-16.

During the nineteenth century Ottoman legal organization gradually underwent several changes. Starting from the early 1840s, the provincial councils which were created as the backbones of the *Tanzimat* in the provinces, were given judicial authority. Besides the presence of people from among the *ulema,* councils included members from administrative cadres and representatives of Muslims and non-Muslim populations unlike the Ottoman Sharia courts with only judge. Councils, as the judicial bodies, were organized in accordance with the *Tanzimat* principle of equality before the law and were responsible for solving the legal cases according to the codified laws and regulations. However, from the beginning of the *Tanzimat* until the demise of the Ottoman Empire, the Sharia courts remained side by side with the provincial councils and then with the *Nizamiye* courts which were established toward the end of the 1860s.[4] Although there was not a consistent or clear division of labor between the councils and the Sharia courts in the early years of the *Tanzimat*, criminal matters that required capital punishment or penal servitude were under the jurisdiction of the councils and the commercial courts that were created in 1840s for the resolution of disputes among Ottoman and foreign traders.[5]

The Provincial Law of 1864 initiated the division of labor between the courts through the reforms over the administration of provinces[6]. As the law separated the provincial administration into hierarchical levels, it brought the separation of administration and judicial power which is the distinguishing aspect of the *Nizamiye* law.[7] After the regulation of the Provincial Law of 1864 and through its extension to the whole empire in 1871[8], a new kind of court

4 Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity*, (New York: Palgrave Macmillian, 2011), 55.

5 Ekrem Buğra Ekinci, *Osmanlı Mahkemeleri,* (İstanbul: Arı Sanat Yayınları, 2004) 103-104.

6 Jun Akiba, "From Kadı to Naib: Reorganization of the Ottoman Sharia Judiciary in the Tanzimat Period, in *Frontiers of Ottoman Studies: State, Province, and the West.* Vol 1. ed. Colin Imber and Keiko Kiyotaki (London and New York: I.B.Tauris, 2005), 52-54.

7 Rubin, *Ottoman Nizamiye Courts, 27.*

8 Abdülhamit Kırmızı, "Taming the Governors: The Swinging Pendulum of Power Over the Ottoman Provinces in the Nineteenth Century", *The International Journal of Regional and Local Studies* 6, no.1 (2010): 9.

organization was formed- the *Nizamiye*. Besides numerous laws and regulations between 1864 and 1879, the promulgation of two codes and one law in 1879 consolidated the *Nizamiye* court system and changed its structure: the Law of the *Nizamiye* Judicial Organization (Mehakim-i *Nizamiye*'nin Teşkilat Kanunu), the Code of the Criminal Procedure (Usul-ı Muhakemat-ı Cezaiye Kanunu) and the Code of Civil Procedure (Usul-ı Muhakemat-ı Hukukiye).

As the legal organization was subjected to reform, the perception and the application of the law also began to change. The field of criminal law became the first and the most vigorous part of the legal reforms. The first Ottoman Criminal Code in its modern form was produced in 1840 immediately after the promulgation of *Gülhane* Edict in 1839. The Code combined the existing administrative and the religious laws of the Empire, but by stipulating specific punishments for crimes for the first time[9] it reflects the changing mentality and attitude of the state toward crime and adjudication. The codification of Criminal Law in 1840, which was followed by the new versions in 1851 and 1858, paved the way for the transformation of Ottoman criminal justice system. In this period, an effective criminal justice system came to be perceived as the guarantor of a stable social order. Other crucial components of the system were the introduction of a hierarchical judicial organization, urban and rural policing institutions and the establishment of prisons. These institutions were intertwined since the judicial authorities worked together with police forces in the processes of criminal investigations, arresting of suspects and interrogation for the trials. Also, successes or the failures of the prison system directly influenced the operation of justice all around the Empire. The development of all these branches of the criminal justice system indicate the preoccupation toward the establishment of stable order and law.

Together with the transformation in the imperial domain, why the Ottoman authorities became more active and interventionist toward crime that occurred in both the urban and the rural settlements of Iraq is another question that should be raised. Although there is no socio-legal work regarding Iraq, studies over the Ottoman *kadı* courts from various time periods and regions

9 Kent Schull, *Prisons in the Late Ottoman Empire Microcosms of Modernity* (Edinburgh University Press, 2014), 25.

of the Empire indicate that centuries-old Sharia courts were working sufficiently and historians were impressed by the knowledge that Ottoman people possessed regarding legal concepts and procedures which enabled them to benefit from the courts.[10] Indeed the court arena created a forum for the voices of the powerless people in society.[11] Therefore it is not possible to argue that the Ottoman government was unconcerned about lawlessness or to assume that the Ottoman legal system was useless and unfair prior to the *Tanzimat* period, even though the reformers portrayed it as such to justify the legal changes. Avi Rubin, historian of the 19th century judicial system, perceived the modern Ottoman *Nizamiye* courts as no fairer or more efficient than the pre-modern sharia courts.[12] However, distinct from the perception of the previous centuries, justice came to be associated with adherence to the codified laws and the legal procedures which could enable a uniform and a centralized judicial authority.[13]

Taking into consideration the comparisons of the centuries-long sharia court system and the reformed judicial system of the 19th century, it appears that the significance of studying legal reforms does not just come from searching for whether reforms were successful in sustaining justice or not, but rather than in studying the socio-political agenda of the reforms and their reflections upon the daily lives of people. Therefore, a socio-legal study over the provinces of Iraq after the implementation of *Tanzimat* reforms and the criminal policies in the region could give us an opportunity to see how the Ottoman government tried to manage and pacify a population that was depicted as "unstable" and "unreliable". In this sense it is meaningful to question the relationship between the existence of crime in the everyday life of Iraqi people and the establishment of Ottoman statecraft in the region. If we accept law enforcement as one of the most crucial step in establishing governmental power, the

10 Iris Agmon, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine* (New York: Syracause University Press, 2006), 116.

11 Leslie Pierce, *Morality Tales: Law and Gender in the Ottoman Court of Aintap* (London: University of California Press, 2003), 373.

12 Rubin, "Was There a Rule of Law in the Late Ottoman Empire?", 7.

13 Rubin, *Ottoman Nizamiye Courts*, 84.

adjudication of criminal cases and punitive measures requires more elaborate consideration.

Unlike the literature on the socio-legal history of the many Arab provincial capitals like Cairo, Damascus, Aleppo and Jerusalem, there are not studies about the legal history of the Iraqi cities neither regarding the nineteenth century nor the previous centuries. Until recently the history of Iraq under Ottoman rule has been ignored compared to other places. Most of the studies on the Iraqi cities cover the period of the Abbasid rule or the modern history of the region after the dissolution of the Ottoman Empire. The Saljukid, Mongolian and the Ottoman history in the region were neglected as a result of the nationalist narratives which preferred to skip these periods.[14] Thankfully, similar to the historiographical changes regarding, other parts of the Empire during the Ottoman period, the literature on Iraq has increased as well. However, studies benefitting from the Ottoman archival sources still remained in the minority.

§ 1.1 Literature Review

Stephen H. Longrigg's book, *Four Centuries of Modern Iraq* was written in 1925 and continued to be one of the pioneering works in the literature. He has no predecessors in narrating the history of Ottoman period in the region. The book covers the history of Iraq from sixteenth century to the beginning of the twentieth century. Longrigg benefitted from a wide range of sources such as the traveler accounts, the record of the East India Company and the chronicles regarding to the region. In the sense of political history, the *Four Centuries of Modern Iraq* is a good account but the author ignores the social history of the region. For instance, regarding to the judicial system of Iraq, he contented with an evaluation in a one paragraph.[15]

Dina Rizk Khoury's book *State and Provincial Society in the Ottoman Empire: Mosul, 1540-1834* indicates the linkage between the provincial and imperial politics in the province of Mosul. She shed light on the politics of war

14 Ceylan, *The Ottoman Origins of Modern Iraq*, 6.

15 Stephen H. Longrigg, *Four Centuries of Modern Iraq* (Oxford: The Clarendon Press, 1925), 315.

making, tax farming and the position of local notables in the region. Khoury's work enable us to question the role of the state and the local powerful families in Mosul by considering economic relations until the fall of the Mamluks in Baghdad and restoration of the Ottoman rule. While Khoury studies the early-modern period, Sarah Shield's work *Mosul Before Iraq* covers economic history of the region where Khoury lefts, from 1835 when the region became subject to the reforms to the end of the Ottoman Empire by the World War. Shield indicates significance of Mosul as the city situated at the center of the economic networks of the region for regional production, consumption and exchange. Although Shields provides invaluable knowledge regarding to the economic activity in Mosul, it is not possible to find daily lives of Mosuli villagers and the experiences of local people in this study.[16]

Tom Nieuwenhuis's work *Politics and Society in Early Modern Iraq: Mamluk Pashas, Tribal Shayks and Local Rule between 1802 and 1831* is an exception in the sense that as an anthropologist he focuses on the social history of Iraqi provinces which was a virgin research area. After the chapter on the structure of Mamluk Power, the part on "the rural world" that covers the peasants, nomads and the tribal structures of the region is the original one that contributes our knowledge on the socio-demographic aspects of the rural population in Iraq. However, Nieuwenhuis was criticized due to his lack of mastery in the English and Arabic. For these reasons he had to rely on French sources and the secondary literature, but could not benefit from the Ottoman, Arab and the British archives and the chronicles.

Gökhan Çetinsaya made contributions to the history of Iraq in the late nineteenth century by his work *Ottoman Administration of Iraq 1890-1908* in which he benefits mainly from the Ottoman Archives unlike other studies in the literature. He evaluates Ottoman administration in the region between the period 1890-1908 as the general history of the regime of Sultan Abdulhamid

16 Comparing to other provinces of Iraq, Mosul has drawn the most attention and was subjected to more studies due to its location and economic significance. See other works on Mosul: Davut Hut, "Musul Vilayeti'nin İdari, İktisadi ve Sosyal Yapısı (1864-1909)", (Phd. Diss, Marmara University, 2006). Beyza Karakaya, "Musul Vilayeti Hapishaneleri (1864-1909)" (Master's thesis, Marmara University, 2016).

II. Nevertheless, he indicates reform proposals and the problems of local administration in the Iraqi provinces. The chapter regarding the tribal structure and the policies employed by the Ottoman government toward tribes as well as the part devoted to Shi'i population and growing influence of Iran over the Iraqi provinces made book not only significant for the administrative history but also for the social history of Ottoman Iraq in the late nineteenth century.

Comparing to other periods, the period after 1831 when Ottoman government began to consolidate its authority in Iraq and initiated Tanzimat reforms remained to be the less studied one except Ebubekir Ceylan's work *The Ottoman Origins of Modern Iraq: Political Reform, Modernization and Development in the Nineteenth-Century Middle East.* By using the Ottoman and British Archival sources, Ceylan focuses on administrative and political history of "Ottoman Iraq" in this period by evaluating the government's policies of centralization and modernization under the authority of provincial governors. Besides the role of the provincial governors, he indicates how Ottoman government tried to consolidate its authority through the establishment of administrative councils. Also, chapter on the implementation of the Ottoman Land Code of 1858 in the Iraqi provinces and its influence on the tribal rule over land contributed our knowledge regarding how imperial reforms took form in Iraq.

While the literature on Iraq is one pier of this thesis, socio-legal history of the nineteenth century Ottoman Empire is the another one. As it could be seen from the brief review of the literature on the history of Iraq under the Ottoman rule while the administrative and political history of the region improved, the social and the legal history of the Iraqi provinces remained to be a virgin research field. The aim of this thesis is to contribute to this field. Indeed, similar to the literature on the social history of Iraq, socio-legal history of the nineteenth century Ottoman Empire is less sophisticated comparing to the early modern period of Ottoman history. Despite the limitations of sharia court registers, Ottomanists produced qualified works that devoted to the law and order in the Ottoman Empire and the legal and the criminal history of the

pre-19th century.[17] However, fortunately, mostly in the last 10 to 15 years historians began to produce works that brought the abundant records kept in the nineteenth century Ottoman councils and the courts. While these works both inspired me to search on the court records in Ottoman history and enabled to make comparisons between the law enforcement in Iraq and the other parts of the empire.

Milen V. Petrov's article on the province of Danube is one of the best example that uses *Nizamiye* court records to write the history of the court proceedings in a region which was chosen as a pilot region for the Tanzimat reforms and also the narratives of non-elite social actors living there.[18] Petrov indicates that people utilized the new legal procedures to pursue their advantage and negotiated with the Tanzimat state in this pilot region. Avi Rubin made important contribution to the field with his work *Ottoman Nizamiye Courts: Law and Modernity* by indicating the judicial change occurred in the legal organization of Ottoman empire and the perception of law. By elaborating the legal case published in *Ceride-i Mehakim* (Journal of Courts), he discusses the legal procedures and the working of *Nizamiye* courts. Besides his elaborations toward the working of the court after 1876,[19] Rubin mainly contributed to the literature by his analysis of the daily interactions inside the *Nizamiye* court system similar to Milen V. Petrov. Distinctively, Rubin provides

17 Leslie Pierce, *Morality Tales*; Boğaç Ergene, *Local Court, Provincial Society, and Justice in the Ottoman Empire: Legal Practice and Dispute Resolutiun in Çankırı and Kastamonu (1652-1744)*, (Leiden: E.J. Brill, 2003); Eyal Ginio, "The Administration of Criminal Justice in Ottoman Selanik (Salonica) During the Eighteenth Century", *Turcica* 30 (1998); Suraiya Faroqhi, *Coping with the State: Political Conflict and Crime in the Ottoman Empire 1550-1720* (Istanbul: Isis Press, 1995); Fariba Zarinebaf, *Crime&Punishment in Istanbul 1700-1800* (Berkeley and Los Angeles: University of California Press, 2010); Betül Başaran, *Social Control and Policing in Istanbul at the End of the Eighteenth Century: Between Crisis and Order* (Leiden and Boston, MA: Brill, 2014); Başak Tuğ, *Politics of Honor in Ottoman Anatolia: Sexual Violence and Socio-Legal Surveillance in the Eighteenth Century* (Leiden: Brill, 2017).

18 Milen V. Petrov, "Everyday Form of Compliance: Subaltern Commentaries on Ottoman Reform, 1864-1868" *Comparative Studies in Society and History* 46 (2004): 730-759.

19 The judical process and the working of the Nizamiye courts before the 1876 were already indicated in the literature of the legal history in Turkish. See: Sedat Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu: Nizamiye Mahkemelerinin Kuruluşu ve İşleyişi 1840-1876* (Eskişehir, Anadolu Üniversitesi Edebiyat Fakültesi Yayınları, 2004).

more sophisticated discussions over the law in the nineteenth century Ottoman Empire by making conceptualizations like "legal formalism", "procedural correctness" and "legal pluralism" which offer reconsideration for the legal change and the law enforcement in this period.

Ebru Aykut Türker is another scholar who uses *Nizamiye* court records for her exceptional work on rural arson and poison murders in the nineteenth century Ottoman Empire. By using the records and the interrogation minutes, Türker aims to uncover the justice perceived by common people in the everyday conflicts in which they might have use arson and poison as the means to implement their own mechanisms of resolution. The colorful accounts of poisonous wives indicate how the perception of justice differed from the justice defined by the Ottoman legal mind. The time period of the records which Türker uses overlap with other scholars that mentioned above. In this sense, Omri Paz's Phd dissertation *Crime, Criminals, and the Ottoman State: Anatolia Between the late 1830s and the late 1860s* was designed to fill the lacuna from 1840 until the establishment of the *Nizamiye* court system after 1864.[20]

Through analyzing the legal cases and the interrogation reports, Paz aims to reveal the shifts in the Ottoman criminal procedures and the law enforcement in Anatolian provinces. Paz links his research on the criminal proceedings with the search on how inhabitants of these provinces experienced Ottoman centralization and modernity when Ottoman understanding of the state-building became intricate to penal policy. Beside the time-period of the study, one of the unique aspects of the dissertation is the evaluation of the daily works of the criminal courts in a whole criminal justice system in which development of criminal law and the Ottoman police institutions were significant components.

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20 The history of the criminal justice system in Egypt in this time period is an exception since the existence of the elaborate works in the literature. For example see: Khaled Fahmy, "The Anatomy of Justice in Nineteenth-Century Egypt" *Die Welt Des Islam* 39 (1999): 340-377; Rudolph Peters, "Murder on the Nile: Homicide Trials in 19th century Egyptian Shari'a Courts" *Die Welt des Islams* 30 (1990): 95-115; idem, "Administration and Magistrates: The Development of Secular Judiciary in Egypt 1842-1871" *Die Welt Des Islams* 39 (1999): 378-397; Liat Kozma, *Women on the Margins and Legal Reform in Late Nineteenth-Century Egypt* (Unpublished Phd. Diss., New York University, 2006).

Despite the growing literature on the socio-legal history of nineteenth century Ottoman Empire, still we have limited knowledge on the daily working of the new judicial organizations in the various parts of the Empire. Variations between the implementation of legal reforms and the penal policies among Ottoman provinces still require additional works. Studies on different locales would clarify whether the reformed legal system contradicted, cooperated or merged into the centuries-long sharia court system. Uncertainity over the co-existent operation of sharia courts and *Tanzimat* legal organizations has not yet removed and continued to remain as an issue to discuss.

§ 1.2 Research Question and the Sources

In this thesis I will try to understand and explain the influence of Ottoman criminal law enforcement and penal policy in Iraq in a period that Ottoman central government attempted to centralize the provincial administration of the region. One of the aims of the thesis is to reveal how the new legal organization of Tanzimat period was adopted and functioned in the provinces of Iraq where people neither legally nor socially accustomed to the Ottoman imperial ruling. Therefore, the attitudes of people toward the criminal court organization in a frontier region where tribal confederations were existent and population was ethnically and denominatially diversified is another focus of the thesis to see how Ottoman criminal justice system and the governance was perceived in Iraq.

My research is based on the criminal court records of the Mosul and Baghdad provinces of Iraq which were sent to the Council of Supreme Ordinances in Istanbul. These records and the correspondences between the central judicial authority and the provincial governance includes the information regarding to the legal case, the victim, the perpetrator and the litigants. Some of the cases has interrogation reports which provide the details of the case and some of them do not include these minutes but only the reports written by the local councils. I benefitted from the correspondences between the Ottoman central bureaucratic agencies and the provincial government of Iraq regarding to the appointment and the role of the court members, the conditions of prisons and the police stations in Baghdad and Mosul which were crucial for the well-

functioning of criminal justice system in the region. Besides the secondary sources on the socio-legal history of Ottoman Empire and the history of the Iraq, the memorandums and the reports written by both Ottoman and English senior officials are the other significant sources of this study.

§ 1.3 Outline of Chapters

The introduction of the thesis briefly touches the significance of studying Ottoman criminal adjudication in the provinces of Iraq when the region underwent a reorganization within the scope of *Tanzimat* reforms. The objectives and the questions of this study were tried to be explained in the very introduction. This chapter includes a short review of literature over the history of Iraq and the Ottoman legal transformation in the nineteenth century. Also, the materials and the sources on which this thesis relies on were mentioned.

Chapter 2 briefly discusses transformation that Ottoman government experienced in the nineteenth century and the main objectives of the period regarding the governance of Ottoman populations in the urban and rural parts of the empire. The chapter aims to contextualize Ottoman law enforcement within the scope of the Ottoman centralization period. In this sense, the councils established in the Ottoman provinces for centralization of the administration and the laws and regulations that were produced for the establishment of Ottoman government's monopoly over justice were mentioned. The chapter also focuses on the evolution of the Ottoman criminal justice system and the three Ottoman Criminal Code respectively to indicate how Ottoman governmentality intertwined with the establishment of control over people who were living in the territories of the Empire.

Chapter 3 indicates the introduction of *Tanzimat* reforms and the local councils into the provinces of Mosul and Baghdad. The legal functions of these provincial councils have priority in this thesis comparing to their administrative and financial tasks. The tribal population of Iraq and their socio-legal dynamics were discussed in order to explain the historical setting of the region. In this chapter, based on the archival documents, I tried to explain struggle of the Ottoman central government to gain the monopoly over the legal sphere by eliminating tribal leaders and sheikhs in the region. Also, concerns and

regulations that were initiated by Ottoman provincial governors regarding the trial and the punishments of accused people in the court of Iraq were another focus of the chapter.

In the Chapter 4, I discuss the dynamics of the incorporation of Iraq into the centrally controlled judicial system of Ottoman Empire based on the legal cases occurred in Mosul and Baghdad between 1840s and 1860s. The chapter indicates how Ottoman criminal procedures were applied in the Iraqi provinces as a significant part of the centralization of administration in the region. Also, type of crimes and punishments of the alleged criminals were evaluated through the court records in order to indicate the purposes of the penal policy implemented in Iraq. Discussion over preferences of the central judicial authority between the *Tanzimat* and sharia criminal procedures, aims to explain the disciplinary aspect of the judicial reforms. In this sense, roles of the *zaptiye* forces and the police stations were evaluated for the effectiveness of the criminal justice system in the provinces of Mosul and Baghdad. In the conclusive part of the thesis, instead of making a summary of chapters, I demonstrated my arguments and the research findings regarding to the goals of the criminal justice system in Iraq and the role of people in all these processes toward the courts of Ottoman central administration.

2

Ottoman Judicial Reforms and New Criminal Proceedings

The Ottoman Empire experienced a process of transformation in almost all fields of state organization beginning with the reign of Sultan Selim (1789-1807) until the dissolution of the Empire. Selim III's reform agenda, which encompassed various aspects of administration and the social life of Ottoman people, was taken over and continued by his more determined and steady successor, Mahmud II. Due to the intensity of the reform program and its transformative effects on Ottoman society, this period of time has been called as the long nineteenth century. The reform minded policy makers aimed to reorganize the central government and restructure power relations in the both the center and the periphery of the Empire to strengthen the functional capacity of the government.

After Selim III's establishment of a new military under the *Nizam-ı Cedid* and the opening of modern schools and initiation of fiscal reforms, the abolishment of Janissary Corps by Mahmud II was a crucial step in centralization. This is because the Janissaries were a centuries-old Ottoman institution responsible for the protection of the Sultan, his empire and maintenance of public order. Beyond their initial duty of guarding the sultan, Janissaries had turned into a strong socio-economic group that affiliated with the guilds and the Bektashi sufi order, which often deposed sultans whose policies were against its own political and economic interests. By abolishing the Corps,

Mahmud II eliminated the most powerful voice of the opposition and greatly altered the balance of power. After erasing the power groups resistant to his rule, the reorganization of the central government came to the front. Firstly, an Imperial Advisory Council (*Meclis-i Meşveret*) was established, followed by the Supreme Council of Judicial Ordinance (*Meclis-i Valâ-yı Ahkâm-ı Adliye*) by the end of Mahmud II's reign, the latter of which played a pioneering role in the planning and enforcing of the Tanzimat policies.

The early reforms initiated during the first half of the nineteenth century laid the groundwork for the more intense period of *Tanzimat* reforms, beginning with the promulgation of Gülhane Edict in 1839. With this promulgation, the Ottoman government guaranteed the protection of life, property and honor of all Ottoman subjects. The Edict declared the necessity for new regulations in order to establish a fair governance and to rectify the ongoing problems. The fulfillment of these promises was connected with the realization of several reforms, such as the elimination of tax-farming system and its replacement with a fair taxation, a new system of military service based upon conscription of both Muslim and non-Muslim subjects, and an end to punishment without trial by adopting a new criminal procedure.

The extension of the functioning of government means greater penetration of state authority into the lives of people and into the governance of provinces, which were only partially under the control of central government before. In order to better manage the populace, the Ottoman central government strived to establish its direct authority throughout the nineteenth century by implementing reforms in the fields of bureaucracy, security organizations, land regime, legal institutions etc. The main objective of policy makers was the elimination of real or alternative actors in the Ottoman lands since establishing a centralized state depended on sustaining firm control over the semi-autonomous and autonomous provinces. Therefore, the Men of *Tanzimat* embraced and continued Mahmud II's policy of centralization to integrate the provinces with the center.[1]

The Ottoman government's ambition of reconfiguring its periphery could only be realized through the suppression of local families who held the real

1 Ceylan, *Ottoman Origins of Modern Iraq*, 16.

power in distant territories. Additionally, in order to reassert and consolidate central authority, certain bureaucratic organizations, buildings[2] and the appointment of bureaucrats were all initiated by the central authority. Nevertheless, the government's attempt to centralize was not a unilateral process. The Ottoman state was not a sole actor acting in a vacuum but local authorities and ordinary Ottoman subjects were part of the process.[3] Instead of viewing imperial centralization as a zero-sum game,[4] we need to take the dynamism of the give-and-take strategy that was adopted in this process into the consideration. Hence, it should be noted that strengthening central administration in the provinces was a process that includes both resistance and bargaining.

The Gülhane Rescript was an official announcement and a promise of the central government to provide individual rights and security to Ottoman subjects regardless of their religion and class. Butrus Abu Manneh interprets this announcement as: "the rescript emphasized the right of security for the individual. When the subject is protected against injustice and enjoys security of life, honor and fortune, he will not commit disloyalty but his actions will be devoted to the well-being of state and community."[5] In the reorganization of the governance, gaining the loyalty of people who were living in different parts of the Empire became crucial for the proper functioning of the provincial governments. Acceptance or disloyalty on part of the populace had a significant impact on the Ottoman administration, since the extension of the power through several state apparatuses meant interference in the ongoing order in the provinces, which in turn might be perceived as either just or unjust by the inhabitants.

2 For the representation of state in the city centers by the complex of government buildings during the Tanzimat see Yasemin Avcı, *Osmanlı Hükümet Konakları: Tanzimat Döneminde Kent Mekanında Devletin Erki ve Temsili,* (İstanbul: Tarih Vakfı Yurt Yayınları, 2017).

3 Ebru Aykut Türker, Alternative Claims on Jusice and Law: Rural Arson and Poison Murder in the 19th Century Ottoman Empire (PhD Diss., Boğaziçi University, 2011), 3.

4 Ceylan, *Ottoman Origins of Modern Iraq,* 16.

5 Butrus Abu-Manneh, *Some Aspects of Ottoman Rule in Syria in the Second Half of the Nineteenth Century: Reforms, Islam and Caliphate* (PhD Diss., University of Oxford, 1971), 8.

§ 2.1 Maintaining Public Order and Law Enforcement

The Ottoman central bureaucracy was well aware of the worsening perception of Ottoman rule as a result of the top-down policies of the past, especially of Mahmud II. Therefore, the language of the reform period was constructed more consciously in order to redeem the Ottoman administration in the eyes of its subjects. While the government aimed to realize centralization by extending its functioning even into the distant provinces, this required providing some benefit to the people in exchange. Since state formation in the provinces and improvement of administrative apparatuses were linked to the struggle over the centralization of finance and revenue extraction, the Ottoman central government tried to give back in order to make up for what it took. In his studies on Ottoman public finance and taxation from the beginning of the Tanzimat to the Second Constitutional period, Nadir Özbek mentions the social and political costs resulting from increasing tax revenues. In order to compensate for military expenditures and the costs of debts, the government increased the tax burden on Ottoman peasants, while the tax base failed to shift to the urban population and capital-owners.[6] In addition to the tax collection, providing manpower via conscription for modern regular armies was another demand laid on the Ottoman population in this period.[7] It is evident that the initiation of reforms for the well-being of Ottoman state and society had costs for the population among varied regions of the Empire. Indeed, the people reacted to Tanzimat reforms in several parts of the Empire.[8]

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6 Nadir Özbek, *İmparatorluğun Bedeli: Osmanlı'da Vergi, Siyaset ve Toplumsal Adalet (1839-1908)*, (İstanbul: Boğaziçi Üniversitesi Yayınevi, 2015), 17.

7 For the history of conscription and the modernization of army in Ottoman Empire see: Gültekin Yıldız, *Neferin Adı yok: Zorunlu Askerliğe Geçiş Sürecinde Osmanlı Devleti'nde Ordu ve Toplum (1826-1839,* (İstanbul: Kitabevi, 2009); Khaled Fahmy, *All the Pasha's Men: Mehmed Ali, His Army and the Making of Modern Egypt*, (Cambridge: Cambridge University Press, 1997); Erik J. Zürcher, *Arming the State: Military Conscription in the Middle East and Central Asia 1775-1925,* (New York: I.B.Tauris, 1999).

8 For the reactions to the application of Tanzimat reforms see: Halil İnalcık, "Tanzimat'ın Uygulanması ve Sosyal Tepkiler" in *Tanzimat: Değişim Sürecinde Osmanlı İmparatorluğu* ed. Halil İnalcık and Mehmet Seyitdanlıoğlu (Ankara, Phoenix Yayınevi, 2006).

In the context in which the central administration enforces new regulations, establishing public security and order not only enables a proper ground for the government to act on but also provides a justification to demand loyalty from its subjects. For these reasons, the reforms initiated in the fields of politics, finance and military developed in tandem with the reorganization of the judicial administration and the criminal justice system which aimed to establish monopoly over the justice and violence. The modernizing Ottoman administration was preoccupied with the suppression of crime and the punishment of criminals on a legal basis. Since a well-functioning criminal justice system provides legitimacy for the government, enhancing crime prevention capacity and control over population came to be the focus of the administration. In his work on "governmentality", Foucault defines the population as the object that the government must take into account in order to govern effectively in a rational and conscious manner. Similar to his conceptualization of the population "as the ultimate end of the government," the Ottoman population was composed of subjects with needs and aspirations, but also an object in the hands of the government.[9]

Throughout the nineteenth century, the enactment and enforcement of new laws and regulations through the reorganization of the administrative units was linked to the formation of a centralized and efficient government. By enforcement of new laws, I do not just mean the application of law, but rather what Jacques Derrida defined as "an authorized force, a force that justifies itself or is justified in applying itself".[10] In this sense, the enforcement of law refers to the concept of force that is immanent in the word itself. The enforceability of law connotates governmental force which could be physical or symbolic, brutal or discursive, coercive or regulative.[11] In the context of Ottoman Empire, the enforcement of new laws and regulations regarding the es-

9 Michel Foucault, "Governmentality" in *Power: Essential Works of Foucault 1954-1984* ed. J.D. Faubion (New York: The New Press, 2001), p. 2016-217.

10 Jacques Derrida, "Force of Law: The "Mystical Foundation of Athority" in *Deconstruction and the Possibility of Justice* ed. by D. Cornell, M. Rosenfeld, D.G.Carlson (London: Routledge, 1992) 5.

11 Ibid., 6.

tablishment of order and the dispersion of justice includes almost all the connotations mentioned by Derrida. Since the establishment of a centralized administration in the provinces is a power struggle for the assertion of authority, the relation between the power/force/authority and law is more complex than it presented.

The establishment of order as a discourse used by the Ottoman bureaucrats, meant establishing the primacy of Ottoman administration and suppressing all "outlawed" entities which constituted a challenge to the central government's monopoly over administration. In this sense, the strengthened power of the central administration requires legitimacy both through the consent of people and legality. Therefore the Ottoman central government's endeavor to acquire a monopoly over the administration of the distant provinces went hand in hand with the enforcement of law. In the sense of the establishment of law and order not only in the center but also in the peripheries, an examination over the local councils which were the most significant means to implement *Tanzimat* principles in the provinces seems necessary to understand how policies of the administration of provinces and the justice were merged.

§ 2.2 Establishment of New Councils and their Legal Functions

The newly established bureaucratic councils, legal institutions and security organizations were the instruments for sustaining state authority both in the center and in the periphery. These were also the means for establishing control over the local power holders and penetrating into the daily lives of people. Through these bureaucratic institutions, the central administration could provide order and increase its power for the governance of financial sources in the distant provinces. Although states had to ensure security and justice in order to preserve the legitimacy on the eyes of people regardless of the time

period,[12] providing public order (*asayiş*) and the maintenance of law and security had the utmost significance for the governments which try to rule its territories without intermediaries.

The reorganization of the bureaucracy was the need of the hour in order to thoroughly reform the Ottoman administration and to realize the objectives of the *Tanzimat*. Both the reformist pashas and the Sultan were aware that a successful centralization depended on the performance of the bureaucrats.[13] Toward the end of his reign, on 24 March 1838, Mahmud II established the *Meclis-i Valâ-yı Ahkâm-ı Adliye*, the legislative council in the imperial center. This was because the old methods of preparing and promulgating laws and regulations was unfit to handle the complex legislations produced in this period.[14] After the proclamation of the Gülhane Rescript, the Supreme Council became the main legislative organ responsible for preparing the laws and regulations for the realization of the reforms and to check whether these laws were being applied or not.[15] Beside its legislative function, the Supreme Council also served as a high court for the lawsuits conducted in governor's divans or other judicial organs in the provinces. Avi Rubin considers the establishment of the Supreme Council as the beginning of the process that eventually led to the emergence of the *Nizamiye* courts. Also, setting up a high court had the potential to challenge the judicial monopoly of the *sharia* courts[16] since these were the only authorized body until the middle of the nineteenth century.

The first major legislative task of the Supreme Council was the preparation of the Penal Code of 1840. In this Code, the Supreme Council was described

12 Maurus Reinkowski, "The State's security and the Subjects' Prosperity: Notions of Order in Ottoman bureaucratic Correspondence 19th Century" in *Legitimizing the Order: the Ottoman Rhetoric of State Power* ed. by Hakan Karateke and Maurus Reinkowsk (Leiden and Boston: Brill, 2005), 201.

13 Rubin, *Ottoman Nizamiye Courts,* 23.

14 Ehud R, Toledano. "The Legislative Process in the Ottoman Empire in the Early Tanzimat Period: A Footnote", *International Journal of Turkish Studies* 11 (1980), 99-106.

15 Ali Akyıldız, "Meclis-i Vâlâ-yı Ahkâm-ı Adliyye.", *TDV İslam Ansiklopedisi,* Vol. XXVIII: 250-251.

16 Rubin, *Ottoman Nizamiye Courts,* 24.

as "the staunch protector of all established laws and regulations" in the Ottoman Empire.[17] The Council was performing the function of the court of first instance for the trials of politicians and government officials who were violating laws and acting against the aims of the *Tanzimat*.[18] In addition, the Supreme Council was also a final court of appeal for the serious criminal cases which were heard in the provincial councils first. In the following years, Supreme Council was divided into various sections to increase its efficiency and subjected to a number of reforms in order to eliminate the problems due to the multiplicity of tasks. [19]

After the example of Supreme Council in the center, administrative councils in the provinces and sub-provinces were established as a result of the attempt to restructure local administrations. Councils of the Overseas of Tax Collection (*Meclis-i Muhassılin*) began to be formed in order to realize a fair system of taxation, one of the main aims of the *Tanzimat*.[20] These councils were indeed a novelty in the administration of provinces as they enabled the official participation of regional people as the representatives of different population groups in local governance. The structure of these assemblies, the composition of the members and the problems they faced were also decisive in the later formation of *vilayet, liva* and *kaza* councils.[21] The *Meclis-i Muhassılin* was composed of the *muhassıl*, a finance clerk, a census clerk and a real estate clerk, a mufti, a police officer, four elders and a judge of the community, and if there were non-muslims, a metropolitan and a *kocabaşı*. They were responsible for coming together at least two or three days in a week to discuss the administrative issues of the province.[22]

17 1840 Penal Code, Article VII (4).

18 See Cengiz Kırlı, *Yolsuzluğun İcadı* (İstanbul: Verita, 2015) for the trials of three Ottoman statesmen in the Meclis-i Valâ, who accused with corruption: Governor of Edirne Nafiz Pasha, Governor of İzmit Akif Pasha and Grand Vizier Hüsrev Pasha.

19 See Ekrem Buğra Ekinci, *Osmanlı Mahkemeleri: Tanzimat ve Sonrası,* (İstanbul: Arı Sanat Yayınları, 2004).

20 Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu*, 52.

21 İlber Ortaylı, "Tanzimat'tan Sonra Mahalli İdareler 1840-1878", *Türkiye ve Orta Doğu Amme İdaresi Enstitüsü Yayınları* 142 (1974*),* 15.

22 Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu*, 53.

Although these councils were not established as courts, they performed judicial duties especially after the task of adjudication was given with the promulgation of 1840 Criminal Code.[23] The cases outside of the scope of the criminal code were still tried in the *kadı* courts. Despite the existence of non-sharia judicial organs, the *kadı* courts (as well-developed institutions) were defined as *mahkeme* (court of law) and others functioned in the name of *meclisler* (councils).[24] However, judicial function of these courts put an end to the monopoly of the sharia courts over the operation of justice. In accordance with the new criminal procedure, all criminal offenses that do not fall within the scope of personal law began to appear in councils otherwise it would be tried in the sharia court. However, homicide cases were to be reviewed in the council after the fulfillment of interrogation process, as the requirements of the Criminal Code.[25] Thus, it can be said that the local councils became the criminal court for the serious crimes such as murder and injury from the very beginning of the Tanzimat period, with the participation of the *kadı* or his vicegerent *naib*.

Although *muhassıllık* was abolished in 1841, the councils maintained their previous structure but were now named as State Councils (*Memleket Meclisi*). The Councils continued to perform the judicial functions, which was clarified with a precept sent by the center in 1843. According to this precept, felonies and murder cases that occurred in the provinces were to be heard in the province where the crime had been committed, and the records of the trials were to be sent to Istanbul.[26] Sending criminals to the center without the first trial in the province and the execution of the convicted criminals without the approval of central judicial authority were both forbidden.

State Councils were reorganized and renamed again as *Eyalet Meclisleri* in 1849 with an instruction titled as *Eyalet Meclislerine Verilecek Talimat-ı Seniye*. Since the main target was the improvement of the local administration for the

23 Macit Kenanoğlu, "Nizamiye Mahkemeleri", *TDV İslam Ansiklopedisi* Vol. XXXIII: 185.

24 Rubin, *Ottoman Nizamiye Courts*, 28.

25 Sedat Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu,* 63.

26 Ibid., 65. "Taşralarda vukû'bulan cürm ü cinayet ve bunlara dair dava ve şikayetlerin ma'rifet-i şer' ile ve inzimam-ı re'y ile meclis-i memleket ile rü'yet olunarak...".

purpose of tax collection, effective recruitment, and the maintenance of public order, the provincial administration was divided and a new provincial unit was formed in the form of the sub-district (*kaza*). The *Memleket Meclisi* at the provincial level was headed by the provincial governor (*vali*) and at the district level by the district governor (*kaymakam*).[27] According to this regulation provincial councils were divided as *Eyalet* and *Sancak Meclisi* known as Grand Councils and Small Councils.[28] Legal disputes and crimes committed at the district level would be heard in the small councils. However, cases in which the plaintiff couldn't reach an agreement and major cases such as homicide and highway robbery would be heard in the grand councils.[29]

§ 2.3 Evolution of the Ottoman Criminal Justice System

From 1840s to the late 1860s, the Supreme Council and the provincial administration established a new criminal justice system. This system was different from the operation of sharia courts and the *Nizamiye* court system that would be follow in the late 1860s.[30] The creation of criminal law and the courts were the innovations of this new system. Omri Paz describes this shift as a transition from a system based on private, tort-like prosecution to a bureaucratic and public system.[31] The Ottoman government's ambition to penetrate society and to establish a centralized government in its provinces paved the way for this process. The distinctive features of this new system can be distinguished from its operation as an activist legal system: a hierarchical review system and inquisitorial proceedings.[32]

27 Paz, *Crime, Criminals and the Ottoman State*, 84.

28 Musa Çadırcı, Tanzimat *Sürecinde Türkiye: Ülke Yönetimi*, (Ankara: İmge Kitabevi, 2017), 274.

29 Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu,* 70.

30 Omri Paz, "Documenting Justice New Recording Practices and the Establishment of an Activist Criminal Court System in the Ottoman Provinces (1840s-late 1860s)" *Islamic Law and Society* 21 (2014), 82.

31 Ibid., 85.

32 Ibid., 86.; Milen Petrov, Everyday Form of Compliance: Subaltern Commentaries on Ottoman Reform, 1864-1868", *Comparative Studies in Society and History* 46 (2004), 730-759.

Unlike sharia courts, these new bureaucratic judicial councils were expected to decide for the criminal trials in accordance to the provisions of a state-produced normative legal document: the Ottoman Penal Code of 1840, 1851 and later its last and the most developed version of 1858. Also, as a requirement of new criminal procedures, the new courts had to gather evidences through interrogations. The police could assist in some cases, but it was done mostly through *ad hoc* interrogation committees made up of several court members. Again, as distinct to the operation of sharia courts which could impose certain penalties after the decision was taken by the *kadı*, decisions in this new court system were submitted for review to the next higher court in the system[33] (the grand council in the province or the *Meclis-i Vâlâ* at the center).

Like other early modern empires, prior to the modernization period in the nineteenth century, the Ottoman state had limited capacity and governmental apparatus. In the sense of the criminal court system and the penal policy, its function was limited to sustaining order and providing a forum for the resolution of disputes.[34] The judicial authority was responsible for implementing the settlements that parties reached in the court.[35] When a criminal offense occurred, the victim or legal heirs brought the case to the *kadı* court and complained against the offender. A single judge (*kadı*) heard both plaintiffs and defendants and interrogated them. People who were brought to the court had to prove their reliability by providing witnesses before their testimony. At the end of the hearing, the judge would decide and give a sentence. His decision

33 Petrov, "Everyday Form of Compliance", 737.

34 In her study on the crime and punishment in Istanbul Fariba Zarinebaf argues that during the eighteenth century Ottoman state tried to impose a regime of social control and policing in the imperial center that was experiencing rapid urban growth and increased social conflict and crime. As a result, she indicates how Ottoman penal system changed toward charging penal servitude and imprisonment. Although her study shows that the transformation of criminal system began from the eighteenth century, it is not easy to generalize her argument for the other parts of the empire since Istanbul was distinctive in the sense of imperial attention. Fariba Zarinebaf, *Crime and Punishment in Istanbul, 1700-1800*, (London: University of California Press), 2010.

35 Paz, *Crime, Criminals and the Ottoman State*, 15.

was recorded in the court record (*sicill*) by a clerk (*katip*) and a legal deed (*hüccet*) was issued. In cases involving bodily harm, the plaintiff had right to decide on the punishment. In cases of murder, depending on how it was done, heirs of victim could demand retaliation (*kısas*), choose blood money (*diyet*) for the compensation or could pardon (*afv*) the defendant.[36] The plaintiff legally had right to choose one of them by his/her freewill.

The proceedings in the sharia courts were quick, and the courts were more accessible and cheaper than the modern form of criminal courts, but these courts had less bureaucratic capability for the crime detection proceedings. Also, the policing practices crucial for the detection of crimes were at the hand of local actors who were employed by local governor. In terms of crime prevention, they had interrogative capabilities but had no investigative functions. Before the implementation of the reformed legal and policing systems, the most effective crime prevention method was collective responsibility (*kasame)* which was outlawed by the new regulations after Tanzimat.[37] From the initiation of the Tanzimat (1830s-1870s), the Ottoman government began to implement new methods for crime detection and prevention by initiating several criminal proceedings, such as the reorganization of legal system and the codification of criminal law.

The rhetoric in the Gülhane Imperial Edict was an attempt to reposition Ottoman ideals of justice in the context of the nineteenth century. After the reorganization of bureaucratic agencies, the Supreme Council of Judicial Ordinance began to enact laws and regulations. The promulgation of the Criminal Code in 1840 was among the first codification activities of *Tanzimat* period. Ruth Miller describes the aim of the enactment of 1840 Criminal Code as "a reinterpretation of what had come to be seen as authentic and classical reinterpretation, however effected for thoroughly modern aims".[38] Miller emphasizes the classical sources of the code, as the 1840 Ottoman criminal code

36 Ibid., 17.

37 Türker, *Alternative Claims on Justice and Law*, 4.

38 Ruth Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (Routledge, 2005), 19.

was not a rupture from sharia criminal rules, but the codification and implementation of these principles are different from the previous centuries – this new implementation being described by Miller as "modern".

The codification of law was the key constituent of legal reform and the transformation of justice system in the Ottoman Empire. Codification was the most efficient way to centralize and standardize the judicial administration, since codified compilations were projected to sustain more predictable and consistent adjudication. Although Ottoman sultans had been distributing sultanic prescriptive texts known as *kanunnames* to the provinces since the early days of the Empire, these *kanunnames* were quite different from the codified law in that they were regional and unsystematic. *Kanunnames* did not include general principles but were written in the form of legal guidance for the state officials. However, the codes of the nineteenth century were designed to be applied all over the Ottoman lands and were systematic in the sense that they were divided into chapters and sub-chapters according to the subjects.[39]

The Criminal Code of 1840 did not meet the contemporary standards of criminal codes and remained inadequate to respond to the needs of the Ottoman government. However, it was the first code that brought the principle of legality and outlawed the arbitrary punishments imposed by the administrative authorities, which could enable a centrally controlled judicial system.[40] The 1840 Criminal Code was followed by new codes in 1851 and 1858 which were more detailed and arguably more professional. In addition to the legislative council in the imperial center, the *Meclis-i Vâlâ-yı Ahkâm-ı Adliye*, local councils in the provinces were responsible for the application of the Criminal Code to reach decisions regarding the punishment of convicts. Therefore, a brief evaluation of the Ottoman Criminal Codes is crucial for understanding the changes in the perception of law and punishment which enabled the Ottoman administration to gain a monopoly over the adjudication of criminal cases.

39 Avi Rubin, "Was There a Rule of Law in the Ottoman Empire?", *British Journal of Middle Eastern Studies,* 2017, 10.

40 Sedat Bingöl, "Tanzimat Sonrası Taşra ve Merkezde Yargı Reformu" *Osmanlı: Teşkilat*, ed. by Güler Eren, (Ankara: Yeni Türkiye Yayınları, 1999), 534.

§ 2.4 The Three Criminal Codes in the *Tanzimat* Period

The first penal code was published in 1840, and two were later promulgated in 1851 and 1858, respectively. The goal of these *Tanzimat* penal codes was to establish a centralized and a unified criminal justice system by standardizing criminal law in the administration of the state. Although many scholars explain this rationalization of the justice system as the sign of westernization and secularization of the Ottoman Empire, this was not an abrogation of Islamic law but rather a transformation of sharia in accordance with the requirements of the day.[41] The debate on the source of the criminal law in the literature[42] has predominance over the application and the context of these codes. While drafting criminal codes, Ottoman bureaucrats made use of Western examples, especially the French Criminal Code of 1810. However, they did not copy the French Code but rather translated it to the Islamic and Ottoman legal tradition. Ahmet Cevdet Pasha, as one of the most significant intellectual and political figures of the period, was among the members of the commission that prepared the law. According to his notes in the *Tezakir* regarding the preparation of the Code, it can be understood that the committee took a selective attitude toward the laws in the French criminal code.[43]

In her analytical comparison of three penal codes in the context of nineteenth century, Ruth Miller rejects claims characterizing the penal codes and new court system as within a secular framework. She claims that the new laws were not a rupture from the old penal system, which was based on Islamic courts and ulema.[44] She points out a rising Islamic discourse in the 1851 Penal Code as the beginning of a textual incorporation of şer'i thought into the Tanzimat legal framework.[45] Despite her significant contribution to the literature,

41 Kent Schull, *Prisons in the Late Ottoman Empire Microcosms of Modernity*, (Edinburgh University Press, 2014), 33.

42 Mustafa Şentop, "Tanzimat Dönemi Kanunlaştırma Faaliyetleri Literatürü", *Türkiye Araştırmaları Literatür Dergisi:* Türk Hukuk Tarihi 3 (2005): 647-672.

43 Cevdet Paşa, *Tezakir*, prepared by Cavid Baysun (Ankara: Türk Tarih Kurumu Basımevi, 1991), 73. *"ol vakit Meclisce elde ceza kanunnamesi müsveddesi olup takım takım anı tashih ile fasıl fasıl havas-ı vükela huzurunda kıraat ile kabul olundukça tebyize verirdim."*

44 Ruth Miller, *Legislating Authority,* 45.

45 Ibid., 68-92.

Miller's perspective toward the transformation of criminal justice system in the nineteenth century disregards the Ottoman government's increasing attention and active role in monitoring criminal acts committed against individuals. Rather, she argued that the main goal of the codification of criminal law was to clamp down on bureaucratic crimes and enhance internal scrutiny within the organs of the state itself. By promulgating these codes, the government firstly attempted to police its own bureaucracy. In this regard, she highlights the increasing attention of the Ottoman government towards political crime by arguing that the state became the only victim of the legal system's notice.[46]

Although one of the primary goals of the Criminal Codes was to protect the Ottoman administration against the tyranny and abuse of the expanding bureaucratic class, there was nevertheless an increasing tendency towards the protection of the individual rights especially with the promulgation of 1858 Criminal Code. Instead of evaluating three Ottoman Penal Codes as if they were the same, the differentiation among the codes should be taken into account as it shows a transformation of Ottoman penal policy. The 1840 Penal Code was comprised of a preamble and 42 articles in 13 chapters, and did not cover the offenses in a detailed manner. Corroborating Miller's argument, the first Criminal Code of Tanzimat mostly includes crimes related to the state officials. While 18 of the articles dealt with bureaucratic crimes, 15 dealt with state security and public order and 7 covered the newly established provincial councils.[47]

Considering the categories of the articles, it can be argued that the 1840 code represents the conventional criminal policy of Ottoman administration. Still, the code was reformist in the sense that it enabled a unified criminal justice system, since the code became the main source of authority in the application of the criminal procedures. The creation of a unified criminal justice system could only be realized by establishing the principle of legality that conditions the punishment in accordance with law.[48] In this regard, the power to

46 Ibid., 8.

47 Paz, *Crime, Criminals and the Ottoman State*, 54.

48 Ibid., 57.

interrogate and punish the suspects according to the penal code was placed in the hands of the councils and this practice was persistently emphasized in the Ottoman official newspaper, *Takvim-i Vekayi*.[49]

On the other hand, the Penal Code initiated several differences from the previous Ottoman criminal law which shows the differentiation in the criminal justice as well. Although Islamic legal procedures continued to be applied in criminal cases, the code was not comprehensive regarding all the penalties defined by the sharia law, but stipulated punishments which were not included in the sharia law such as the hard labor. The Ottoman state has already applied hard labor before the nineteenth century, but it was the first time that this practice gained legal aspect as distinct from the sharia law. Also, the Penal Code outlawed two traditional punishments in the Ottoman Empire: the use of judicial torture and collective criminal responsibility (*kasame*) which was a common practice for the crime prevention. For the first time in Ottoman legal tradition, the 1840 penal code brought specific punishments for offenses. The punishment for homicide and incitement to rebellion was determined as capital punishment,[50] but for the homicide cases the law allows the victim's heirs to decide between retaliation or pardoning for the convicts in accordance to the Sharia. However, unlike Islamic law, the Penal Code sentenced murderers to imprisonment at hard labor even if the heirs waived retaliation in favor of

49 Takvim-i Vekayi, 3 October 1841; *Anadoluda kain kazalar ahalisinden katl ve sirkat ve sair kabahatlere cür'etleri mahalleri mecalisinde bi'l muhakeme ve't-tedkik sabit ve mütehakkak olan eşhas haklarında Ceza Kanunname-i Hümayunu ahkam-ı ma'delet ittisamına tatbikan lazım gelen mücazatın icrası isti'zanına dair mecalis-i merkume tarafından varid olan mazbata ve i'lam ve tahrirat-ı saire hasebi'l-kanun Meclis-i Vâlâ-yı Ahkam-ı Adliye'ye havale olunarak şer'i şerife ve kanun-ı münife tatbikan tekrar tedkikat-ı kamile ve muktaziye bi'l-icra eşhas-ı merkumenin müstehak oldukları mücazat-ı şer'iyye ve te'dibat-ı nizamiyeyi mübeyyin terkim olunan mazbatalar Meclis-i Umumi'de dahi kıraat olunarak eşhas-ı merkumenin mütecasir oldukları cünha ve kabahatlarına göre şer'i şerife ve ceza kanunname-i münifine tatbikan karargir olan cezalarının icrası hak-i pay-i hümayun-ı hazret-i mülukaneden isti'zan ile celadetriz-i sünuh ve südur buyurulan irade-i mehabet-i ifade-i malumu olarak mucebince mahallerine bildirilmiş ve keyfiyet herkesin malumu olarak o makule mugayir-i şer' ve kanun hareketten mücanebet eylemeleri ihtarıyla eşhas-ı merkumenin esamisi ve cünha ve kabahatları zirde beyan olunmuştur"*

50 Paz, *Crime, Criminals and the Ottoman State*, 58.

blood money.[51] So, except in the case of capital punishment a culprit had to go to the prison in anyway.

Due to the more active and intrusive nature of governance during the *Tanzimat* era, offenses against individuals were no longer a private matter between the plaintiff and the defendant. Therefore, the following codes had to regulate these offenses even though the 1840 code had left it within the remit of sharia law. Due to this tendency and the decisions of Supreme Council, Toledano argues that the Ottoman Penal Code of 1851 was organized according to cumulative rulings between 1840 and 1851.[52] The new penal code, published in 17 February 1851, differed from the previous one in its arrangement of certain crimes and offences such as manslaughter, kidnapping of girls[53], falsification of documents and offences connected with agriculture and taxes which were not specified before.[54]

The Penal Code of 1851 was divided into three subjects according to principles of Gülhane Rescript; life, honor and property.[55] The first chapter includes articles on life-threatening offenses such as homicide, highway robbery and incitement. The second chapter was divided between several issues including honor, verbal insult, gambling, public disorder etc. The last chapter deals with offenses against property such as theft, embezzlement, forgery, fraud.[56] Articles 11 and 12 confirmed the right of the state, which was stipulated first in 1840 Penal Code, to sentence a murderer with its own authority regardless of heir's demand for blood money or pardon. In addition to this, in cases where the heirs are absent or non-existent, the state could appoint itself as the

51 Ibid., 59.

52 Toledano, "The Legislative Process in the Ottoman Empire in the Early Tanzimat Period: A Footnote", *International Journal of Turkish Studies* 1 (1980): 99-108.

53 For the history abduction in the nineteenth century Ottoman Empire and the legal arrengements regarding to the issue see: Gamze İlaslan, *Abduction of Women and Elopement in the Nineteenth century Ottoman Nizamiye Courts* (Master's thesis, Boğaziçi University, 2015).

54 Gabriel Bear, "Tanzimat in Egypt-The Penal Code", *Bulletin of the School of Oriental and African Studies* 26, no.1 (1963), 33.

55 Ibid., 38.

56 Paz, *Crime, Criminals and the Ottoman State*, 62.

representative of victim and open a public prosecution.[57] This innovation appeared in Article 12:

> should the murdered person be in another land, or should the heirs be in the provinces, until the arrival of the expected heir is manifest, let the murderer be placed under arrest, but in case the heirs of the murdered cannot be found, let the murderer thus be executed or pay the "blood money" into the treasury.

Similar to the Penal Code of 1840, corruption and malfeasance of state officials was another significant topic in the Code of 1851. In Ottoman criminal law and in the criminal court, an inequality existed where emphasis was placed on the offender but not on the offense.[58] For instance, there is a differentiation between the punishment of crime that committed by a state official and an ordinary man. Also for the punishment of crime against property, if the convicted is a civil servant he would be expelled from his position, but if he was not he would be exiled from their community[59] Kent Schull evaluates the Penal Code of 1851 as an expanded version of the previous one since it did not bring any major changes to the criminal legal procedure. In this sense the main purpose of the 1851 Code was the maintenance of public order, prevention of tyranny and corruption of government officials and also the protection of individual rights.[60]

Certainty regarding crimes and penalties was one of the most distinctive features of modern criminal law. The 1858 Ottoman Criminal Code was the closest one to this principle. Compared to the previous two codes, its most

57 Miller, *Legislating Authority*, 49.

58 Paz, *Crime, Criminals and the Ottoman State*, 65.

59 Miller, *Legislating Authority,* 45. article. 1: "... -for example, should someone attempt to exercise sovereignty over another person's property or land- let him be suppressed and should he usurp the land by some means, let the usuped property and land to owner, if they still exist. Let the (perpetrator) who dared to commit this unlawful act be expelled and dismissed from his position if he is a functionary of the state; if he is not, then let him be banished and exiled to a region outside of his own for one year.

60 Kent Schull, "Criminal Codes Crime, and the Transformation of Punishment in the Late Ottoman Empire" in *Law and Legality in the Ottoman Empire and Republic of Turkey* ed. by K. Schull, M.S. Saraçoğlu and R. Zens, (Bloomington: Indiana University Press, 2016), 160.

distinctive feature was the codification of personal rights by including a section devoted to the protection of individual rights. For the first time, offenses were classified into three groups, according to the gravity of the penalty: *cinayet, cünha* and *kabahat*. The crime of *cinayet* (homicide) was defined in Article 3 as an offense carrying several punishments, depending on the context, such as capital punishment, lifetime imprisonment with hard labor, permanent exile, permanent deprivation of office and loss of civil rights. Article 4 was dedicated to the crime of *cünha*, which carried the punishment of imprisonment for over a week, temporary exile, deprivation from office and fines. The category of crime defined as *kabahat* in Article 5 carried a penalty of imprisonment ranging from one day to one week, and a fine not exceeding one hundred *kuruş*. It is clear that the severity of penalties is according to the type of crime. The purposes of punishments in these three categories also varied since the penalties for *cinayet* aimed to deter criminals, the punishment for *cünha* aimed to correct, and those for *kabahat* were for admonition.[61]

The certainty of punishments and elaborate categorization of crimes are two distinctive features of 1858 Criminal Code which were crucial characteristics of the operation of reformed judicial system and the application of Tanzimat penal policy. Compared to the earlier Codes, the penal sanctions became more severe in 1858, especially with an increase in the duration of imprisonment, which became the most prevalent form of punishment in this century. This Code was also divided into three parts, with the first part dealing with crimes against state and consisting of 119 articles regarding the bribery and the external and internal security of government. The second part deals with crimes against individuals and comprised of 85 articles, including homicide, violation of honor and injury. The section devoted to the protection of individual parts was divided into three further parts: crimes committed against one's life and individual security, crimes against the honor and dignity, and violations regarding an individual's properties. The shortest chapter is the third one composed of 11 articles and concerns with the crimes regarding to public health or police regulations. The ratio of articles regarding to crimes against people and property is higher in the 1858 Penal Code than it was in the

61 Paz, Crime, *Criminals and the Ottoman State*, 72.

1840 and 1851 Codes. The very first article of the code indicates that the state has the authority to punish infractions against itself and the public order. Punishing crimes committed against individuals is also within the remit of the state since they violate public order.[62]

Due to the emphasis on public order and a low ratio of articles on crimes against people, which is 24% of the code (while 42% of the articles are concerned with political crime)[63], Ruth Miller argues that actual focus of the legislation was once more the concept of political crime.[64] In spite of her profound analytical perspective toward the codes, Miller has a tendency to prioritize political crime without adequately considering the increased attention that Ottoman bureaucrats began to pay toward the protection of individual rights. The Ottoman state's persistent regard for political crimes could not be a reason to ignore the growing attention and intervention to criminal offenses against ordinary persons. Rather than upholding an abstract concept of order, the government played an active and interventionist role in public life. Fighting against crimes that violated the rights of individuals was the means to play this active role. Indeed, concern for public order is both a policy to govern social life and an attempt to protect the integrity of the state. Therefore, the articles dealing with the issue of public order are connected with the articles directly addressing crimes against individuals.

After the changing mentality toward criminal justice that emerged by the 1858 Criminal Code, both the numbers of trials and convictions increased. In this regard, novelties introduced by 1858 Code and the structure of the criminal court system both played a significant role. The division of provincial councils - which were functioning like a criminal court - into two sections, the Administrative Council (*Meclis-i İdare*) and the Investigative Council (*Meclis-i Tahkik*) in 1854, was one of the important steps for more efficient functioning of the courts.[65] Separating the administrative and judicial duties of the councils aimed to enhance the functioning capacity of the councils. The

62 Şentop, *Tanzimat Dönemi Osmanlı Ceza Hukuku: Kanunlar- Tadiller – Layihalar – Uygulama* (İstanbul: Yaylacık Matbaası, 2004), 91.

63 Miller, *Legislating Authority*, 58.

64 Ibid, 55.

65 Bingöl, *Nizamiye Mahkemeleri*, 42-43; Ekinci, *Osmanlı Mahkemeleri*, 159-164.

Assembly would decide in accordance with the standard and codified law and this decision would be presented to the governor, who would then present it for the approval of the Grand Assembly of the province. According to the type of crime, approval for the punishment had to be sought from the central judicial administration. This was true for the death penalty, decided by the grand council in a province in accordance with the articles of the Code, for which a request had to be submitted to the Supreme Council for the fulfillment of the Tanzimat's principle regarding to the security of life.[66]

This system continued until the Provincial Law of 1864, which restructured the administrative and judicial organization of the provinces. The regulation began to be applied to the other provinces after its success in the Danube, such as Bosnia, Damascus, and Erzurum. In 1867, the law of Provincial Administration was published with some modifications in order to extend it to the other *vilayet*s.[67] With this regulation, the *eyalet* system was abolished and the term *vilayet* was introduced as the new term of administration. The border and the administrative authorities of the provinces was rearranged according to the new regulation and the provinces (*vilayet*) was divided into sub-provinces (*liva*) which was also divided into districts (*kaza*) and villages (*kura*) became the smallest unit of administration in this structure.[68]

Besides the administrative regulations, the Provincial Law regulated the legal organization as well. The most striking difference was the separation of the administrative and judicial functions of the local councils in order to prevent any confusion regarding to the tasks of administrative units. According to the Law of 1864, a Council of Judicial Appeals (*Meclis-i Temyiz-i Hukuk*) was to be established to handle the retrial of cases which were heard in the lower courts but required a revision, or in case the plaintiff might resort to an

66 Ekinci, *Osmanlı Mahkemeleri*, 163.

67 Abdülhamit Kırmızı, "Taming the Governors: The Swinging Pendulum of Power over the Ottoman Provinces in the Nineteenth Century." *The International Journal of Regional and Local Studies* 6 no.1 (2010), 8.

68 Abdülhamit Kırmızı, *Abdülhamid'in Valileri Osmanlı Vilayet İdaresi 1895-908,* (İstanbul: Klasik Yayınları, 2008), 26-27.

upper court against the decision of the first trial.[69] The High Council of Crimes (*Meclis-i Kebir-i Cinayet*) was also formed in the provinces to hear the cases that were given for appeal from the council of the sub-provinces and the districts.[70] In addition to these Councils in the provincial centers, a *Meclis-i Deavî* began to be formed in each district under the authority of the district governor (*kaymakam*) and a sharia judge (*hakim*) in order to hear the criminal cases that were categorized as *kabahat* and *cünha* in the Criminal Code of 1858.[71]

The principle of separation of administrative and judicial powers was one of the distinctive features of the new judicial system which went on to consolidate the *Nizamiye* courts in the Ottoman Empire.[72] After the establishment of the Ministry of Justice, the *Nizamiye* court organization was reformed and restructured to the three-level court system in the provinces: The Courts of First Instance (*Bidayet*), the Court of Appellate (*İstinaf*) and the Court of Cassation (*Mahkeme-i Temyiz*). The separation of the judicial and administrative organs in the provinces, rooted in the French doctrine of the separation of powers, aimed to make the judicial system more responsive and dynamic. Besides the restructuring of the courts in the sub-provinces and districts, the establishment of a hierarchical court system in the provinces facilitated the people's access to the courts to appeal for the retrial of their legal cases.

69 Mehmed Seyitdanlıoğlu, *Tanzimat Döneminde Modern Belediyeciliğin Doğuşu: Yerel Yönetim Metinleri,* (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2010), 54 article 18.

70 Ibid., 55 article 22.

71 Bingöl, *Tanzimat Devrinde Osmanlıda Yargı Reformu*, 160.

72 Rubin, *Ottoman Nizamiye Courts*, 27.

3

The Administrative and Legal Transformation in the Provinces of Mosul and Baghdad

The Ottoman rule in Iraq is divided into five periods. The first period begins with the conquest of the region by Sultan Süleyman in 1534 and ended with the entry of Safavids in 1623. The second period starts with the reconquest by Murad IV in 1638 and lasted until 1749 which is the beginning of Mamluk rule in Baghdad. The period covering the era between 1749 and 1831 is accepted as the Mamluk rule. The fourth period begins with the fall of Mamluk rule in 1831 and lasted until the end of the governorship of Midhat Pasha. The final period covers the period after the 1869 and ends in 1917 with the British occupation of Baghdad.[1] The time period of this thesis fits into the fourth era of this periodization. However, since the legal transformation is the focus of the thesis, rather than beginning from 1831, I began with the initiation of *Tanzimat* reforms in 1840s.

Establishment of the provincial councils in Iraq was one of the most significant steps for the extension of Tanzimat reforms into the region. The expected function of these councils was to strengthen the central government's control over the administration of distant provinces. The creation of provincial councils was declared with an imperial *ferman* in 7 February 1840 but it

1 Ceylan, *The Ottoman Origins of Modern Iraq, 3.*

was applied to Ottoman Iraq gradually. Like other provinces of Ottoman Empire, Baghdad already had a *divân* that fulfilled administrative responsibilities before the Tanzimat. In many provinces of the Empire after the abolishment of *muhassıllık* institution, local councils known as *muhassıllık meclisleri* (Councils of the Overseas of Tax Collection) were replaced with *memleket meclisleri (*state councils). In Baghdad the old institution of advisory councils evolved into a provincial council in 1841, since no *muhassıl* had ever been appointed to Baghdad.[2]

Unlike the expeditious incorporation of Baghdad's administration, Mosul came under Tanzimat regulations after the appointment of Mehmed Vecihi Pasha as the governor in 1848. Grand Council of Mosul was established in 1848 with the election of Muslim and non-Muslim representatives.[3] In this sense Mosul could be described as one of the exceptional places where Tanzimat reforms couldn't apply until the end of 1840s.[4] One of the reasons can be traced from Mehmed Vecihi Pasha's description of tribal population in Mosul as uncivilized nomads[5] which indicates Ottoman government's difficulty in reaching a compromise with local people about the initiation of reforms. In addition to the provincial governor's expression toward the conditions in Mosul, considering that inhabitants of Baghdad had affiliations with several tribes as well, the earlier incorporation of Baghdad is likely a result of the relative priority of the district for the Ottoman central government, compared to other parts of Iraq.

As both the executive and legislative organ of the Tanzimat reforms, it is crucial to see the functioning and the composition of the provincial councils. The advisory council of Baghdad was gathering three days a week under the supervision of provincial governor, namely Ali Rıza Pasha. Each day was specified for certain themes and one of them was allocated for religious, administrative and all legal issues; both *örfî* and *şer'î*.[6] It is noteworthy to cite the

2 Ibid.,, 110.

3 Hut, *Musul Vilayeti'nin İdari, İktisadi ve Sosyal Yapısı*, 20.

4 Ibid.,21.

5 BOA, C.ZB 3398 29 Ra 1264 (5 March 1848).

6 Ceylan, *The Ottoman Origins of Modern Iraq*, 111.

names of the permanent members of 1841 Council of Baghdad on Tuesday that listed by Ebubekir Ceylan[7] since their social, religious and administrative profiles were significant to understand in what kind of court structure and atmosphere the legal cases were tried.

All permanent members of the council in 1841:
The provincial judge (*qadı*)
Seyyid Mahmud Efendi, *müfti* of Baghdad
Muhammed Said Efendi, *ex-müfti*
Abdullah Efendi, *müfti* of *Shafi* sect
Seyyid Mahmud Efendi, *nakîb* of Baghdad
İbrahim Pasha-zade Abdülkadir Bey, an *emîr* of Kurdistan
Ahmed Ağa, *ex-mütesellim* of Basra
Zehîr-zâde Abdüllatif çelebi, merchant
Butros, son of İskender, Christian merchant
Yasef Serkız, Christian merchant
Yasef Gale, from the Jewish community.

As can be seen from the list, most of the members were among the religious men due to the content of the day council gathered. However, as the Tanzimat reforms prescribed, representative of religious communities and communal leaders were members of the commission which differentiated this new court organization from sharia court structure. Because of this restructuring of courts and also enactment of new codes, scholars interpret legal reforms in the Tanzimat as one but nevertheless the most significant component of secularization of Ottoman government. However, it is explicit from the number of *ilmiye* members of the court that they probably had a large say in deciding cases. In addition to a *müfti*, most probably a Hanafi one, a Shafi müfti was present in the council due to the prevalence of Shafi sect among Baghdadi people. Although the *qadı* was not head of the trials in the council as it was in the pre-Tanzimat preiod, by looking both their plurality and diversity it can be argued that legal authorities still had priority. As the judicial authority, the Council of Baghdad was responsible for hearing personal disputes, commercial issues and *shari'a* court cases. Before the reorganization of

7 Ibid., 112.

Necip Pasha, the council would meet first for three and later two days a week. However, due to the high number of people's appeals to the court, the council began to gather five days in a week.[8] As a result, the Council of Baghdad left a good deal of court registers and council records.

Although Tanzimat reforms were initiated in Baghdad by Necib Pasha in the early 1840s, more elaborate and extensive reforms were realized after 1849 by Abdulkerim Nadir Pasha and Mehmed Namık Pasha[9], then intensified by Midhat Pasha between 1869-1872. The provincial regulations of 1849 which renamed *memleket meclisleri* as *eyâlet meclisleri* (provincial councils) and initiated small councils in each sub-provinces of the Ottoman Empire[10], were adapted to Baghdad in 1851. Before the establishment of sub-councils, *Meclis-i Kebîr* (the Grand Council) was established in Baghdad in 1851.[11] Although all the small councils were not established by 1851, the aim was the improvement of governance by dividing and multiplying the administrative units. Through this regulation the governance of the region began to be operated between three layers: the central government, the province of Baghdad as the center of administration and the small councils in the sub-districts of the provinces.

Besides the establishment of provincial councils, small councils began to specialize in several fields. Separation of councils into several branches meant an increase in the number of courts that people could bring their cases to. If we ignore the efficieny of these small councils for the moment, it can be argued that this specialization in certain fields reflects a further step in the functioning of judicial system. The council of the Sixth Army, council of investigation (*meclis-i tahkîk*), court of appeal (*temyîz-i hukuk meclisi*), criminal council (*cinâyet meclisi*) and *meclis-i de'âvî* (claims tribunal) were among the examples of the small councils. There are administrative and hierarchical differences among these councils. For instance, when a judicial case occurred in a

8 Ceylan, *The Ottoman Origins of Modern Iraq*, 114.

9 Gökhan Çetinsaya, *Ottoman Administration of Iraq, 1890-1908* (London and New York: Routledge, 2006), 6.

10 Musa Çadırcı, *Tanzimat Döneminde Anadolu Kentlerinin Sosyal ve Ekonomik Yapıları* (Ankara: Türk Tarih Kurumu, 1991).

11 Ceylan, *The Ottoman Origins of Modern Iraq*, 118.

county (*kazâ*), it would first be heard in the *meclis-i de'âvî*. If it could not be resolved in the county council, the case was brought to the *temyîz-i hukûk meclisi* in the sub-province. As a last resort *dîvân-ı temyîz* was the highest office in the borders of a province.[12] However depending on the type of crime and the position of criminal whether a government official or not, the court of the last resort could be changed as specified in the criminal code. According to the reformed justice system of Tanzimat, the provincial council had to appeal to the decision of Supreme Council in Istanbul (*Meclis-i Vâlâ-yı Ahkâm-ı Adliye)* for the criminal cases which requires the application of punishments such as death penalty, hard labour and banishment of the convicted people.

Iraq was not a stable and compatible region for applying the reforms planned in a distant imperial center. The realization of both administrative and judicial regulations were requiring certain amount of financial sources and also a considerable time period. Therefore, the central government preferred to incorporate Mosul as a *sancak* of Baghdad in order to solve problems under a single administration. Since Mosul became part of Baghdad in 1851, its governor Vecihi Pasha was called to the province of Baghdad. When central authority asked Vecihi Pasha to his suggestions for the administrative reforms, his notions indicate his deeper insight regarding Iraq and its population as compared to the central state. He proposed that the actual solution for the administrative and financial problems of the Ottoman Iraq was to establish law and order in the region and collect taxes through establishing control over tribes.[13] His emphasis on law and order could be traced from the report he wrote to Istanbul after his arrival in to Mosul in 1848. Notably, he himself obeyed the law of Tanzimat by paying all costs of his travel to people, unlike his predecessors. By narrating how people confused to his payment he emphasized to the beginning of a new period in Mosul through his governorship.[14]

As a Men of Tanzimat, Vecihi Pasha declared that the elders of the community were his fathers (*pederim*), the middle-aged were his brothers

12 Ibid., 122

13 Çetinsaya, *Ottoman Administration of Iraq*, 7.

14 BOA., İ.MVL, 119/2981, 29 Ra 1264 (5 March 1848).

(*karındaşım*) and the youths were his children (*evladım*). Vecihi Pasha promised the main assurances of the Tanzimat edicts: fair taxation and the protection of life, property and honor of all people. He also invited people to come to complain if something contrary to these promises occured since the doors of his house were open to all people of Mosul regardless of religion. By making such a declaration he offered his guarantee that this new period would be different from the "atrocity of the past". Among the guarantees of this new period, Vecihi Pasha referred to the rule of law and the existence of the provincial council, where all segments of society would have representatives. Vecihi Pasha mentioned the judicial function of the council since the legal cases would be heard there and reminded that all these cases would be tried in accordance to sharia and the law as well as the righteous procedures[15] which are the backbones of the Tanzimat legal mind. The promises of Vecihi Pasha in 1848 reflect the agenda of Tanzimat governors to reorganize the administration of the region and to gain the loyalty of the people.

§ 3.1 The Tribal Population of Iraqi Provinces

The tribal population of Iraq was composed of nomadic, semi-settled and settled people. In the middle of the nineteenth century, the estimated population of Iraq was 1,290,000. Approximately 35% of this population was nomadic, 41 percent was rural (which corresponds to 525,000 people in number - the largest population group) and only 24% of the people in Iraq were urban.[16] There was a hierarchy in the tribal structure of Iraq. In descending order of size, these were: the qabila or confedaration (under the leadership of a paramount shaikh in Arab areas, or *beg* in Kurdish areas), the ashira or tribe (under a shaikh or agha), the fakh or section, and the bayt or house.[17] The tribal structure of Iraq was accepted as one of the most serious challenges for governors aiming to implement reforms, especially in the fields of military and finance

15 Ibid., "*usûl-i hakkāniyet iltizâm olunarak kâffe-i husûsât şer'i şerîf ve kānûn-ı münîfe tatbikān ve usûl-i hakkāniyete tevfîkān tanzîm ve rü'yet olunmalıdır*."

16 Tom Nieuwenhuis, *Politics and Society in Early Modern Iraq: Mamluk Pashas, Tribal Shayks and Local Rule between 1802 and 1831* (The Hague: Martinius Nijhoff, 1982), 10.

17 Çetinsaya, *Ottoman Administration of Iraq*, 72.

and the establishment of a stable order. By evaluating the reports of the provincial governors to the Sultan Abdulhamid II, Gökhan Çetinsaya summarizes the general view of Ottoman statesmen toward Iraq:

> Ottoman authorities regarded the presence of this large tribal population as a major obstacle to good government in Iraq, and to economic and social progress. The tribes were seen as a standing menace to law and order, as recalcitrant to taxation and conscription, and as an obstacle to the establishment of effective governmental authority. At the root of these problems lay the tribes' status as semi-autonomous political, social, and even military units, ruled by their own chiefs, bound by their own internal loyalties and governed by their own customary laws.[18]

As social entities, tribes were influential over the relations with the administrative center not only in the modernization period but almost in all episodes of the Ottoman state. However, depicting the tribal population as the "evildoers" who were obstacles for the modernizing reforms of Ottoman bureaucrats represents the perspective of central state which aimed to eliminate all alternative sources of power in the nineteenth century context. Tribes were part and parcel of these reforms, whether incorporating or resisting. Counter to the general view of tribes as distinctive socio-economic structures positioned in the stark contrast to central authority, Samira Haj proposes greater consideration of the economic and social interdependencies between tribes, settled populations and the central government. She argues that assumptions regarding the inherent contradictions between these actors originate from the perception of "Islamic" societies as within the grip of despotism. In this perception, rulership is superimposed upon these societies by force without any bargaining.[19]

18 Ibid., 72.

19 Samira Haj, "The Problems of Tribalism: The Case of Nineteenth Century Iraqi History", *Social History* 16 (1991), 45.

Map 3.1 The Map of Iraq published by Erkan-ı Harbiye-i Umumiye



SOURCE BOA., HRT.h 101 29 Rebiülahir 1331 (7 April 1913)

By ignoring the complexities of tribe-state relations and advancing an essentialist understanding of tribal entities, an inherent conflict has been postulating in the history of Iraq as well. The underlying cause of this inherent conflict is the distinctive nature attributed to the tribes. As Ghassan al-Atiyah argues in his study on Iraq: "War rather than peace was their natural condition. Each tribe had its own rules and norms which regulated a life based on the principle of equality of kinsfolk and of the supremacy of communal interest…. Traditionally, the bedouin tribes had defied all kinds of authority and had constituted a permanent menace to the settled tribes and fringe towns".[20] Haj falsifies these essentialist notions by indicating economic interdependency between tribes and towns. Since the tribal economy was agrarian and pastoral, it was an integral part of wider economy and the urban economy based on the

20 Ghassan al'Atiyah, *Iraq: 1908-1921: A Socio-Political Study* (Beirut, Arab Institute for Research and Publishing, 1973). 22-23.

subsistence provided from the tribal population. Also, different tribes had distinctive relations and linkages with the center depending on their social and economic situations.[21] Therefore, instead of simply adopting an ahistorical perspective regarding tribal structure, the interrelation and interdependency between tribes, towns and state should be taken into consideration whenever cooperation or resistance become subjects of a historical study.

The Ottoman government had multi-dimensional and dynamic relations with the tribes in Iraq through centuries. After the 1830s, Ottoman governments embraced several policies toward tribes such as favoring some, incorporating certain tribes into the provincial administration, generating inter-tribal friction and intra-tribal rivalries, and as a last resort, using military force for pacifying tribes.[22] The main aims of these efforts were to establish order and extract revenues by settling tribes. Settlement of nomadic tribes was the most important means of ensuring the cultivation of the land and establishing control over the population. Although Midhat Pasha was the most successful one in the settlement and the pacification of tribes, Namık Pasha's endeavor was a break from the Ottoman government's policies before his governorship.[23] However, this break doesn't mean a total dissolution of tribal life but rather offered an alternative and more "attractive" way of life, at least in the mind of governors. Stephen Hemsley Longrigg indicates the solution of tribal problems from the eyes of Necip and Namık Pashas as :"settle your tribes on the land: help them to irrigate by canals: give them security to hold: tax lightly and justly: allow no trespass against those you have settled: reward generously, punish constructively".[24] Such an ambivalent solution couldn't be achieved completely, but the perception of the pashas reflects that the reforms and policies were specifically aimed at the tribes.

After the abolishment of Mamluk rule in the reign of Mahmud II, the aim of Ottoman policy in the region was the dissolution of the power of the tribal

21 Haj, "The Problems of Tribalism", 49-54.

22 Ebubekir Ceylan, "Carrot or Stick Ottoman Tribal Policy in Baghdad, 1831-1876", *International Journal of Contemporary Iraqi Studies* 3 no.2 (2009): 173.

23 Ibid., 184.

24 Longrigg, *Four Centuries of Modern Iraq* (Oxford: The Clarendon Press, 1925), 289.

confederations. Although Ottoman tribal policy mainly relied on the "divide and rule" principle of reiterating rivalries among families, shaikhs or tribal sections[25], incorporation of tribal leaders into the provincial political mechanism was another significant method of detribalization. Above all, settlement of tribes before the implementation of each policy held utmost priority for Ottoman governors. In accordance to James Scott's evaluation of the sedentarization as the way of making a society legible[26], Ottoman government attempted to arrange the Iraqi population in order to simplify modern state functions such as taxation, conscription and establishing order. As the realization of settlement policy, the central government began to prevent tribal mobility between the mountain pastures and winter base. Later, certain lands were appropriated for nomads, and new villages and houses were built. Some tribes were even equipped with agricultural tools by the local governors in Baghdad.[27]

As in many other provinces of Ottoman Empire, city centers in Iraq had urban populations but what was distinctive was that the remaining parts of the region were populated by nomads and semi-nomads. Ottoman Iraq can be divided into several demographic zones according to type of population, ethnic origins and religious differences. The central and southern parts of Iraq with an Arab population were more nomadic than the northern parts where Kurdish people lived. On the other hand, if we accept Baghdad as the geographic center of Ottoman Iraq, while the south of Baghdad was composed of mostly Shiite Arabs, Sunni Arabs populated most of the Baghdad and its northern hinterland. The north-east of Baghdad was dominated by the Sunni Kurdish population which adhered to religious *tariqas.*[28] The Kurdish populated north had many security issues as well but since the southern region had a more mobile population, settlement policies were adopted more extensively

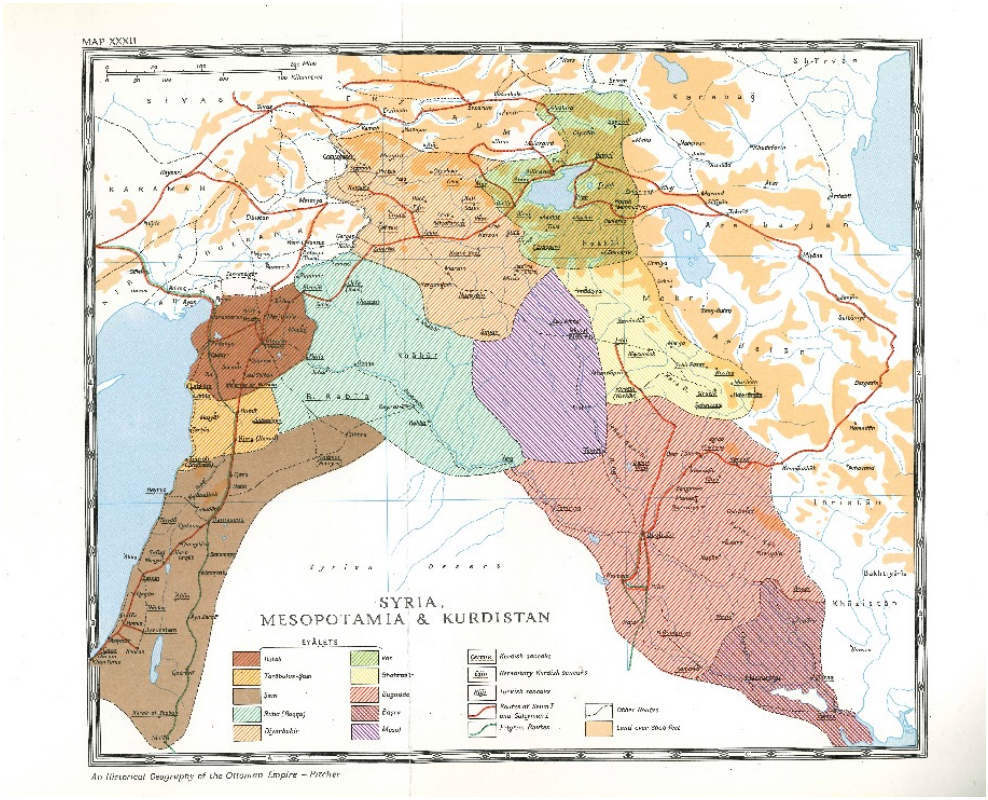
25 Çetinsaya, *Ottoman Administration of Iraq*, 73.

26 James C. Scott, *Seeing Like a State: How Certain Schemes to Improve Human Condition Have Failed* (New Haven and London: Yale University Press, 1998), 2.

27 Ceylan," Carrot or Stick?",182.

28 Hanna Batatu, *The Old Social Classes and the Revolutionary Movement in Iraq*, Princeton and New Jersey: Princeton University Press, 1978), 37-39.

there.[29] In order to cope with the mobility in the region the Ottoman government adopted a policy of division of the tribal areas into a number of tax-farming units. By this territorial division, governors aimed to achieve both detribalization and increased tax revenues. Another layer of this policy was to appoint tribal sheikhs as the rulers of their own region as *kaymakam*. Especially after the introduction of Provincial Law of 1864 into Iraq, tribal areas began to be converted into *kaymakamlıks* which means "the extension of the Ottoman administrative presence and the contraction of tribal areas".[30]



Map 3.2 Ottoman Syria, Mesopotamia & Kurdistan[31]

In his short governorship, Midhat Pasha furthered the settlement policies of Namık Pasha. His endeavor for the settlement of the Muntafiq and Shammar,

29 Ceylan, "Carrot or Stick?", 183.

30 Ceylan, *The Ottoman Origins of Modern Iraq*, 143.

31 Donald Edgar Pitcher, *An Historical Geography of the Ottoman Empire*, (Leiden: E.J. Brill, 1972), 141.

two big tribes of Iraq, indicates the extent of the detribalization policy. Although the Muntafiq region was a tax-farm, after the new *vilâyet* system, Midhat Pasha called the sheikh of the Muntafiq tribe Nasır Pasha to Baghdad and set up a new *sancak* in the name of Nasıriyah. By this way, sheikh became the *mutasarrıf* of the *sancak* in addition to the prestige of being an Ottoman *pasha*.[32] In 1870 Midhat Pasha sent an Arabic letter to the sheikh of Shammar tribe Farhan Pasha, calling him to adopt settlement by giving up their primitive lifestyle. He offered to establish a *sancak* for the Shammar tribe along the Tigris River, between Tikrit and Mosul. As with the Muntafiq tribe, Midhat Pasha stated that Farhan Pasha would be given *mutasarrıflık* of the region.[33] Ottoman governors, especially Midhat Pasha, were successful in drawing the tribal sheikhs into the political ground. Settlement policies and the establishment of new administrative units as *kaymakamlık* and *sancak* facilitated the restructuring of tribes in the Iraqi provinces. All these policies and especially the settlement of tribes aimed to provide security in the region and to some extent contributed to the well-being of the province.[34]

§ 3.2 Struggle over the Legal Sphere

While financial and administrative reforms in Ottoman Iraq have been the subject of many studies, the social and legal history of the region remains understudied. We have very little knowledge on the social life of ordinary Iraqi people throughout the centuries of Ottoman rule. The underlying reason for this gap in the literature is the non-existence of court registers of Iraq until the legal system of Tanzimat period. Since other Arab provinces such as Syrian, Egyptian and Palestinian cities had *kadı* court registers that survived until today, we have knowledge on the social organization and daily lives of the people who lived there.[35] However, after the implementation of Tanzimat reforms,

32 Ceylan, *The Ottoman Origins of Modern Iraq*, 150-51.

33 Sinan Marufoğlu, *Osmanlı Döneminde Kuzey Irak* (İstanbul: Eren Yayıncılık, 1998), 181.

34 Ceylan, *The Ottoman Origins of Modern Iraq*, 152.

35 See: Dror Ze'evi, "Women in 17th Century Jerusalem: Western and Indigenous Perspectives", *International Journal of Middle East Studies* 27 (1995), 157-173; Anna Würth, "A Sana'a Court:

Ottoman archival sources offer opportunities to enrich the literature on the history of Iraq by using correspondences between central government and Iraqi provinces on the legal issues and the criminal cases occurred in the region.

Although the Ottoman central government was trying to establish monopoly over the administration of the province by incorporating or eliminating alternative authorities, it was not easy to control a distant province in all spheres with the state apparatuses of the nineteenth century. However, correspondence between Baghdad and Istanbul indicates that the Ottoman government was eager to diminish the authority of local power holders not only in administration but also in the legal and religious spheres. Therefore, it can be argued that one of the *Tanzimat* policy was to disrupt the legal power of local authorities by establishing monopoly over justice and this policy was expressed by the central authority to the provincial governors.

While Ottoman government aimed to implement "divide and rule" policy and achieve incorporation of some tribes into the modernizing administration, the rising social power of sheikhs disturbed central government in the legal field. Martin van Bruinessen indicates the growing authority of sheikhs in Kurdish region in these words:

> Until the early nineteenth century, these Kurdish rulers had administered justice; they had sufficient legitimacy and power to impose solutions to conflicts between the tribes under heir rule. When they disappeared, society needed a new type of authority enjoying sufficiently

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The Family and the Ability to Negotiate", *Islamic Law and Society 2* no.3 (1995), 320-340; Amy Singer, *Palestinian Peasants and Ottoman Officials: Rural Administration around Sixteenth Century Jerusalem* (Cambridge: Cambridge University Press, 1994); Abdul Karim Rafeq, "The Law Court Registers and their Importance for a Socio-economic and Urban Study of Ottoman Syria" *Islamic Law and Society* 5 no.1 (1998): 35-56; Kenneth Cuno, *The Pasha's Peasants: Land, Society and Economy in Lower Egypt, 1740-1858* (Cambridge: Cambridge University Press, 1992; Abraham Marcus, The Middle East on the Eve of Modernity Aleppo in the Eighteenth Century (New York: Columbia University, 1989).

> wide confidence and legitimacy for peace-making roles, and the sheikhs were the most obvious candidates.[36]

As a solution to the growing power of sheikhs Mehmed Namık Pasha, during his second governorship in Baghdad (1861-1868), affixed his seal as *mir* of Iraqi army and as *vali* of Baghdad, on a report indicating the need for the appointment of *naibs*[37] to the sub-districts of Iraq. As a response to the demand, Mehmed Namık Pasha preferred to appoint experienced and elected persons among the ulema of the province to the required places, as the people had previously had to appeal to some troublesome Muslims or sheikhs[38]. In the Arab provinces of the empire, it was common to choose among the local ulema.[39] In the same record, the governor of Baghdad expressed his discontent at the fact that people took their legal cases to Arab sheikhs or persons among the ulema of the region, as contrary to the principles of justice and Ottoman governance. According to his statements, the rule of sheikhs depending on outdated knowledge was the source of Mehmed Namık Pasha's disapproval.[40]

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36 Martin van Bruinessen, *Agha, Shaikh and State: The Social and Political Structures of Kurdistan* (London: Zed Books 1992), 69.

37 *Naibs* were the members of *ilmiye* class. After graduated from Ottoman *medreses*, they were performing the assistantship of *kadıs* due to their training in the field of *fıqh*. In practice, *naibs* were owning same authorization with *kadıs* and they were responsible to inspect and investigate a criminal case by arriving at the scene in order to dispense imperial justice. For the *naibs* in the Ottoman Empire see: Mehmet İpşirli, "Nâib" *TDV İslam Ansiklopedisi,* Vol. XXXII: 312-313

38 BOA., İ.MVL, 477/21587, 12 R 1279 (7 October 1862).

39 Mehmet İpşirli, "Nâib", 312.

40 BOA., İ.MVL, 477/21587- 2/1, 12 R 1279 (6 October 1862). "*eyâlet-i merkûm ise ekser mahallerinde naib'üş-şer'i ve kaymakam ve müdîr olmayıp ahâlisinin şer'i şerîf ve kavânîn-i münîfe taalluk ve tertîb eder kâffe-i de'âvî ve hukuku hükümetini ahkâm-ı şerî'at-ı nebeviyye ve hükümet-i sultâniyesinin hilâfı olarak arap şeyhleri ve şeyhi ulemâları öteden beri adet-i kadimeleri üzere kendi bilenlerine bildikleri gibi fasl-ı rü'yet etmekte veyahud kuvve-yi müctemi'ân maslaha ile birbirleri üzerine varıp oradan ahz-ı intikām eylemekte oldukları ve biraz yerlerinde dahi yalnız kaymakam veya müdür olup naib'üş-şer'i bulunmadığı cihetle o emirde hükümetin tesis ve istikrârı zımnında lüzûm-ı hakîkî görünen mahallere refte refte kaymakam ve müdürler intihâb ve tayin kılınmakta olduğu sırada..*"

The customary law was well established among the Arab tribal societies. People had to acknowledge this unwritten source of law in order to remain in tribal and family relationships. Disputes are referred to sheikhs who appeals to the tribal councils which composed of the elders of the community. The decision was binding on the parties and sheikhs were responsible for the implementation of the result.[41] This legal power of the local powerholders began to contradict with the imposition of Ottoman direct rule. The solution that was proposed was the establishment of state councils *(meclis-i memleket*) in the districts in cooperation with district governors (or directors) in order to conduct the trial of legal cases such as homicide in accordance to sharia and the *kanûn-ı münîf.*[42] It is noteworthy that Pasha mentioned only the trial of murder cases but not the other criminal or commercial disputes among people.

Besides the effort to centralize the operation of justice in the region, Mehmed Namık Pasha expressed his intention to utilize the appointment of legal officers to the districts in order to address the question of Shiism. Since the province of Baghdad was on the border between Ottoman Empire and Iran, the government was alarmed toward the transgressions of both religious and territorial borders. Especially in the province of Baghdad, Arabic-speaking Shi'i Muslims constituted majority of the population.[43] However the source of anxiety that the Ottoman government had was the growth of the Shi'i population and the spread of Shi'ism through conversion of people during the nineteenth century. In addition to the religious concerns, conversion

41 Albertine Jwaideh, "Tribalism and Modern Society: Iraq, a Case Study" *Introduction to Islamic Civilization*, eds. R.M Savory (Cambridge: Cambridge University Press, 1976), 162.

42 Ibid., 4/1, *Meşâyih-i arab mârifetiyle hodbehod rü'yet olunan mevâd-ı cinâyet ve hukuka dair husûsâtın birer meclis-i memleket teşkîliyle hükümete taalluk ettikçe ahkâm-ı şer'iyye ve nizâmiyeye tatbikān orada rü'yet-i tesviyesi zımnında mal sandıklarından üçer beşer yüz kuruş maaş tahkîkiyle ulemâ-i eyâletten müntehib birer nâib tayin ve ârâm ve sûret-i memuriyetleri tâlimât-ı mahsûsa ile kendilerine beyân ifhâm kılındığından…*"

43 Çetinsaya, *Ottoman Administration of Iraq*, 99.

to Shiism was perceived as a political risk since the change in sectarian affiliation would bring a shift in political loyalties.[44] Both provincial officers and the central government mentioned the need to control this spread in the Iraqi lands. The intensification of Shi'i propaganda from the early nineteenth century is evident in the local chronicles.[45] Yitzhak Nakash argues that there is a causal link between the Ottoman centralization policies and the conversion of tribes. Ottoman policy of fragmenting the tribal system might be a reason for the conversion to Shi'ism since it caused an identity crisis among the settled tribesmen. The settlement policy altered their former way of life, causing a sense of displacement and alienation among them. Therefore, conversions to Shi'ism could be interpreted as a reaction of the tribesmen to the breakdown of their socioeconomic and political organization. In addition to being a reaction to government policies, conversion was a means of a new beginning and a rearrangement of the religious and social identity for tribesmen.[46]

The sacred shrines located in the Najaf, Karbala, Kazimayn and Samarra make Mosul and Baghdad significant for Shi'ism and also keep the relation between people of Iran and Iraq dynamic. Shi'i ulama and Shi'i *mollas* known as *akhunds*, by means of their great prosperity and prestige in the region, had considerable influence in the expansion of Shi'ism.[47] Religious figures arrived from Iran and parts of Arabia, while some *sayyids* among the shrine cities who had claim to be descended from *Ali*,[48] had missionary activities to propagate Shi'ite creed and to convert the tribal leaders and the rest. In addition to the role of the sheikhs, central government was uncomfortable with the legal authority and the activities of some "people among the regional ulema" due to the fact that they were Shiite. These Shi'is and Iranian religious figures who were crossing the border were among the regional ulama who were seen as threats to Ottoman judicial authority in the Iraqi region.

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44 Faruk Yaslıçimen, "Saving the Minds and Loyalties of Subjects: Ottoman Education Policy Against the Spread of Shiism in Iraq During the Time of Abdulhamid II" *Divan Disiplinlerarası Çalışmalar Dergisi* 41 (2016/2), 65.

45 Yitzhak Nakash, *The Shi'is of Iraq*, (Princeton: Princeton University Press, 1994), 41.

46 Ibid., 45.

47 Çetinsaya, *Ottoman Administration of Iraq*, 100.

48 Nakash, *The Shi'is of Iraq*, 38.

As experts of the history of Iraq, both Yitzhak Nakash and Gökhan Çetinsaya highlight that during the Hamidian era the Ottoman government's main reaction to the propagation of Shi'ism was the establishment of schools and the expansion of Sunni education. Unlike the scholarly arguments regarding the late nineteenth century, we know very little about the Ottoman attempts to stop the dissemination of Shiite creed in the region before the reign of Abdulhamid II. Since there were no institutional precautions like the establishment of Ottoman schools, the *Tanzimat* governors' maneuvers to "protect" people from the Shiite propagation were usually ignored or considered less serious in comparison to those implemented during Hamidian regime. However, by looking at the archival sources it can be said that during this period, Ottoman central government aimed to compete with Shi'i expansion by elaborating its own legal power, through the appointment of *naibs* as judicial and religious figures.

The Great Council of the province of Baghdad expressed the influence of shi'i expansionism among the people, especially in the districts located in the frontiers of two states. People who were living in these districts of Baghdad are described as inhabitants accustomed to shi'ism due to their consort with the people of Iran. Along with the interaction among the regional people, religious figures known as *ihvans* had detrimental effects on people, according to the perspective of the Ottoman government. The Council argued that these *ihvans* were sent to change the views of people and to deprave them. These activities caused the conversion of people to Shi'ism, and the Council reflected their concern that as a consequence people would lose their loyalty to Ottoman state.[49] As a solution, the Council of the province of Baghdad proposed to appoint officials among the ulema and righteous men especially where the *akhunds* were active and in the majority.[50]

The following document revealed by *Meclis-i Vâlâ-yı Ahkâm-ı Adliye* reflects how Ottoman central government correlated the denominational crises

49 BOA., İ.MVL, 477/21587- 3/1, 12 R 1279 (6 October 1862).

50 Ibid., "*Ulemâ-yı İran derûn-ı eyâlette geşt ü güzâr ederek izhan-i ahâliyi ifsâd ile bu yüzden tayin edilmiş olduklarından ve bunun esbâb-ı mâniası ise emirnâme-i sami-i mezkûre beyân buyurulduğu vechile şâyia*-i ahundelerinin bulundukları mahallere sulehâ ve ulemâ-yı eyâletten birer zatın tayiniyle…"

and legal issues in Baghdad. First of all, as distinguished from the Great Council of Baghdad, the *Meclis-i Vâlâ* listed the bedouin nature of tribes and their ignorance among the reasons of the conversions in the region together with the influence of missionary activities stemming from Iran. In addition to the spiritual and internal damages, the central government evaluated the situation of the province of Baghdad as contrary to the main targets of *Tanzimat* principle; the protection of the rights of people.[51] The Ottoman central government blamed Arab sheikhs and the shiite ulema on the grounds that they abuse the law of people in the legal cases in order to prevail in the hostilities among each other. Therefore, like the provincial government, the central administration approved the appointment of *naibs* as the representatives of the Ottoman judico-administration to prevent the abuses and to realize the protection of the personal rights in the region. Although there wasn't any example for the abuses of sheikhs in these correspondences, the cruel punishments and tortures of the tribal sheikhs such as murdering, cutting ears and scratching the eyes of people, were reflected into other documents.[52]

The Ottoman government designated two different but interrelated tasks to the appointed judicial officers. First of all, they had to secure justice in the Iraqi lands, which would also be a means of strengthening people's loyalty to the Ottomans. In this sense, gaining the obedience and loyalty of people was causally linked to the administration of justice in accordance to the *Tanzimat* principles. *Naibs* were ordered to provide the necessary means to enable people to taste the benefits of justice. By dispensing justice, it was foreseen that *naibs* could correct the opinions and beliefs of people which was important

51 Ibid., 4/1,"*Bağdad eyâletinin hudud-ı İraniyeye mücâvereti ekseri mahallerinde bulunan bir takım bedevi'ut-tab' aşâir ve kabâil halkının hâl-i cehl ve nadanide bulunmaları cihetleriyle oralarda bir müddetten beri münteşir olan mezheb-i şiiye o makûle cehl-i nasın akāid-i diniyelerini şaşırtmak ve de nâ-meşrû inhak ettirmiş olduğuna ve bu halin mâ'nen ve bâtınen fenalığından başka usûl-i tanzimiyenin üssü'l esâsı olan muhâfaza-i hukuk-i teb'a maddesinin esbâb-ı mesbutadan naşi düçâr müşkilât olması dahi tecvîz olunur mevâddan olmadığına binâen*.."

52 Ceylan, *The Ottoman Origins of Modern Iraq*, 140.

for keeping them as the subjects of the sultan.[53] According to the instructions given to *naibs* by the governor of Iraq, it is stated that although *naibs* were seemingly tasked with implementing the provisions of sharia, they were also responsible for giving advice and reminding people of the requirements of the religion. Along with these implicit responsibilities, the *naibs* had more explicit issues to address, such as the imamate and the propagation of official *madhab* (sect). They were instructed to pray with people who participate in the congregation and teach them true religious knowledge. Besides all these legal and religious affairs, *naibs* were seen as part of the Ottoman policy of sectarian counter propaganda. In the very same instruction, they were held responsible to call people to the Hanafite *madhab* which was the official sect of the Ottoman state. However, most probably in order to prevent conversion by force it was stated that only people who were willing would be call Hanafism.[54]

In order to stop the spread of Shiism among people, the court officers were given the responsibility to increase the religious awareness of the community and to draw people into the masjid to fulfill their communal religious duties. It is well-known that Ottoman government was pushing for religious uniformity as a means of penetration into the region. Selim Deringil evaluates this religious uniformity as a means by which normative standards of behavior could be imposed on the population.[55] Applied to the judgement of qadis or *naibs*, taking advice or lessons from appointed *naib*s and accepting the Hanafi *madhab* are among the normative standards of behavior which kept the people of Iraq and Ottoman provincial administration together.

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53 BOA., İ.MVL, 477/21587- 2/1, 12 R 1279 (6 October 1862), "Üslûb-ı hâkimâne üzerine ahâliye nîmet-i mâdelet-i seniyyeden lezzet aldırılarak refte refte tashih-i akāid ve efkâr ile mezheb-i seniyyede ve tâb'iyyet-i sultân-ı seniyyede sebât ve kararları…"

54 "*Vâlî-yi müşârün-ileyhin göndermiş olduğu nâiblere verilip melfûf olan talimât-ı hakimânede ulemâ-yı mûmâ-ileyh zâhiren icrâ-yı ahkâm-ı şer'iyyeye memur kılınmış ise de esas vazîfeleri halka ifâ-i mevâ'ız ve telkîn-i ferâiz eylemek ve tedrîs-i ulûm edip cemâ'atle iktidâ edenlere namaz kıldırmak ve mezheb-i Hanefîyi isteyenlere tebliğ etmek gibi umûr-ı müstahseneye münhasır olarak…*"

55 Selim Deringil, "Struggle Against Shiism in Hamidian Iraq: A Study in Ottoman Counter-Propaganda" *Die Welt des Islams* 30 (1990), 53.

When the variety of the responsibilities is considered it is explicit that the scope of the tasks was very broad and that the *naibs* were overburdened. The realization of both legal affairs and counter-propagative activities from a single office could not be possible. The continued emphasis on very similar problems and the implementation of more concrete policies during the reign of Abdulhamid II indicate the inefficiency of the propagation of the *naibs* during the *Tanzimat* period. The extensive policy during the 1890s included the opening of Sunni learning centers such as mosques and *medreses*, and bringing Shii children from the region to the *mekteb-i aşiret* (tribal schools)[56] in Istanbul. Although these initiatives correspond with the intentions of the Ottoman government as expressed in the documents written in 1870s, the lack of an institutional infrastructure seems to be the underlying reason for the disappointing outcome of the counter-propagative activities of *naibs*. However, unlike the initiatives of these learning centers, the endeavor of countering Shii expansionism was bound to the personal efforts of legal officials in 1860s.

By taking into consideration the influence of Shii ulema and *akhunds,* the Ottoman government's expectations from *naibs* do not seem delusional. Yet unlike Shii religious figures, *naibs* had multiple responsibilities and official positions which had a strong potential to undermine their efforts. By inferring the inefficiency of *naibs* as propagators of Ottoman perception of true religion, is it possible to propound a similar futileness for their legal contributions as well? As mentioned above, they were responsible for bringing people to the court of government and weakening the legal authority of local sheikhs and ulema. It is crucial that both Ottoman central and local provincial governments highlight the handling of cases of homicide and bodily harm (*katl ve cerh misillü cinâyât ve mevâd*), and did not mention any other subjects. Such a specific emphasis gives us clues regarding to the situation of the cities in Iraq.

Establishing public order (*âsâyiş)* and providing a stable life in Iraq was among the most significant matters for the provincial and central government. Although establishment of public order is an illusory concept from the lens of a historian, owing to the fact that it is a discourse created to justify all actions of governments, the court records and the litigations reveal the reasons why

56 Ibid., 58.

the Ottoman government paid attention to the homicide and injury cases. The content of various criminal cases received in Istanbul during the Ottoman Empire and now available for researchers in the archives exhibits the abundance of murder cases and physical injuries. Furthermore, appeals by Iraqi people to the courts can give us an idea regarding the functions of *naibs* who seemed to be effective for drawing people into the court or contrary to the narrations of provincial government that people had already perceived the judicial authority of central state as part of their lives.

§ 3.3 The Legal Arrangements for the Operation of Justice

The correspondence between the provincial government of Baghdad and the central government in Istanbul show how regulations regarding the procedures of trials and the punishment of convicts in Iraq were developed. Although the legal codes were sent to the provinces and the governors were informed about the legal principles on several occasions, the existing capacities and limitations of the provinces affected the realization of reforms. However, as it was indicated in the appointment of *naibs* to the districts of Baghdad, the legal adjustments were reshaped in the course of time according to the conditions of Iraq. Since the central government aimed to establish a monopoly over dispensing justice, they did not hesitate to make arrangements and adaptations in the operation of justice unless it contradicted the objectives of the reformed criminal justice system of the *Tanzimat* state.

Geographical distance between Istanbul and Baghdad was the first problem that emerged during the trials of criminal cases. Since the judgement and punishment of the convicted people were the most crucial parts of an efficient justice system which provides the continuation of litigation, this part became the subject of consideration among the provincial government and the central judicial council. In 1842, five men from Baghdad were sentenced to five years in prison and according to correspondence between the Supreme Council and the Council of Baghdad, they were to be sent to Istanbul for penal servitude. However, the Directorate of Gendarmerie later informed that these five men were not received in Istanbul. After this incident, the provincial government demanded that these convicts be charged inside the province on the grounds

that the distance between Baghdad and Istanbul created difficulty and greater expenditure. The council also proposed that sentencing them in their homeland could serve as a warning for the others.[57] However, at the end of the document, it was stated that although it was difficult to maintain the original punishment, if it remained obligatory then an attempt to send these five men would be made once again.

After the failure of the arrival of these five murderers, the central authority accepted the difficulties and economic burden of transporting people from Baghdad to Istanbul at the very beginning of the *Tanzimat* period. Although the Council of Baghdad acquired permission to charge these criminals in Iraqi lands in 1842, the official decision regarding to the punishment of criminals in the location the crime occurred was expressed by the *Meclis-i Vâlâ* in 1849. The central judicial authority made a ruling on the issue in 1849 by promulgating that although these kinds of criminals should be incarcerated in the Imperial Shipyard or police stations, Baghdad was exempted from this rule. It was allowed to charge criminals of murder and highway robbery cases in the provinces of Iraq based on the law and with the permission of the Supreme Council. In addition to the distance and difficulties, the possibility of criminals fleeing on the road was another factor that deterred central judicial authority from the expedition of criminals to the imperial shipyard.[58]

Although a hierarchical review system was established in the *Tanzimat* period, the Ottoman government aimed to enhance the functioning of punitive system by judging and sentencing culprits in the provinces. Central judicial

57 BOA., İ.MVL 144/4052 12 B 1258 (19 August 1842): "*Bu havâlînin dersa'âdete ubudiyeti cihetle bu makûlelerin gönderilmesi külfet ve meşakkati mûceb ve burada tevkîfiyle mücazât-ı kānûniyelerinin icrâsı emsâlinin kesb-i intibâh ve ibret eylemesini müstevcib olacağı…*"

58 Ibid.,3/1: "*Katl ve kat-i tarîk misillü cünhâ-i cesime ashâbının dersa'âdete celbiyle müddet-i cezâlarının tersâne-i âmire vesâir zabıta mahallerinde ifâsı nizâm-ı iktizâsından ise de vâkı'â Bağdadın mesâfe-i baîdede bulunması cihetle bu misillü mücrimînin bu tarafa gönderilmesi bazı mertebe-i masrafı ve külfeti mûcib olduğundan başka esnâ-yı rahda firâr etmeleri dahî melhûz idüğünden icâb-ı bi'l-mutâla'a bundan böyle Bağdad ve Sayda misillü mesâfe-i baîde bulunan mahaller işbu nizâmdan müstesna tutularak oralarda vukû' bulan kat'î tarîk gibi ashâb-ı cünhânın keyfiyetleri usûl-i carîsi vechile bu taraftan istîzân ile müte'allik buyurulacak irâde-i seniyye tevfîken mücâzât-ı kānûniyelerinin mahallerinde icrâsı daha münâsib…*"

authority insisted on the appropriate trial of criminal cases in order to expedite the reveal of the decree and to prevent all kinds of negligences. This concern was transmitted by the central government to all provincial governments of Ottoman Empire in 1856. The central administration criticized the judicial processes since people who committed murder or serious crimes had been sent from the various provinces of Ottoman lands to Istanbul without a proper judgement and had to wait long times due to the lack of an heir or attorney. Therefore, the accused had to stay in prisons for a long time even though their penalty wasn't approved. Most of them had no possibility of sending for their heirs or to prove the legitimacy of their heirdom. Therefore, in accordance to Article 3 of the Ottoman Criminal Code of 1851,[59] the Ottoman government ordered that the accused should be fairly judged in the Grand Councils (*Meclis-i Kebîr*) or Investigative Councils (*Meclis-i Tahkîkât*) of the districts where alleged criminals were living. These people should be imprisoned in their homelands and punished in accordance with the *ferman* sent from Istanbul after the review of *Meclis-i Vâlâ* and *Meclis-i Zabtiye*.[60] By this way, central authority aimed to accelerate the process of judgement and to establish a more reliable and predictable criminal justice system.

Besides the process of trial, the condition and capacity of prisons in Iraq was another significant factor preventing the application of an efficient punitive policy in the region. Like many other places within the Ottoman state, prisons in Iraq were not suitable to respond the *Tanzimat* penal policies. As

59 *Taşralarda vukû' bulan katl ve idâm maddeleri memleket meclis-i meşveretinde ma'rifet-i şer'le tevâtüren isbât olunup veyahud şâhitler kemâl-i dikkatle tezkiye birle da'vâsı görülüp ba'dehû i'lâm-ı şer'îsi ve meclis mazbatası Dersa'âdet'e bi'l-irsâl taraf-ı fetvâ-penâhî'ye takdîm ile tasdik olunup ondan sonra dahi hâk-i pây-i Hümâyûna arz ile fermân-ı âlî göndermedikçe icrâ olunmaya.*

60 BOA., A.MKT.UM 217/80, 29 B 1272 (19 July 1859): "*O makûle eşhâs-ı müttehimenin murâfaai şer'iye ve muhâkeme-i mukteziyelerinin herhangi sancak ve kazâda ise mensûb olduğu eyâletin meclis-i kebîrinde veyahud meclis-i tahkikatta bî-garaz ve hakkânîyetle bi'l-icrâ eşhâs-ı müttehimenin mahallince tevkîfiyle evvel emirde hakkında lâhık olacağı hükm-i şer'i ve kanunînin bi'l-i'lâm ve mazbata derbâr-ı şevket karardan istirâd ile ba'dehu vukû' bulacak irâde üzerine icrâ-yı icâbına i'tina olunması husûsunun lazım gelenlere iş'âr kılınması meclis-i zabtiye ve meclis-i vâlâ'da tezekkür ve tensîb olunarak…*"

the history of prisons did not go back earlier than the nineteenth century in almost the whole world, the positioning of prisons at the heart of criminal justice was an innovation in Ottoman society as well. Although imprisonment, closure and being a prisoner are very old practices, prison as a space and as a governmental institution is a different form compared to the previous ones.[61] Before the nineteenth century, any fortress, a palace and even the house of a provincial governor were used as prisons as long as they were suitable for preventing the escape of suspects. The main purpose of putting someone in these places was not punishment but incarceration for a temporary period until the trial or execution took place. However, this penal policy changed during nineteenth century toward a punishment policy, a shift Foucault calls "the birth of prison".[62] In this sense, the reform and institutionalization of the prisons marks the beginning of a new punitive system and shows a preference toward incarceration rather than corporal punishments.

Not only in the Ottoman Empire but in the European continent as well, transformation in punitive policies did not always correspond with the capacity of governmental apparatuses to implement the punishments. Inconvenience, lack of security, crowdedness, and malnutrition in the prisons all created a gap between the punitive aims of the government and its actual capabilities .[63] Similar to the prisons in the other provinces of Ottoman Empire, prisons of Iraq[64] during the *Tanzimat* period were gradually transformed but never reached the level that fulfilled the purpose of punitive policies. During the 1860s, the fortress of Baghdad was being used as the prison not only for

61 Gültekin Yıldız, *Mapusane: Osmanlı Hapishanelerinin Kuruluş Serüveni (1839-1908)* (İstanbul: Kitabevi, 2012), 8.

62 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (London: Penguin Books, 1991).

63 For the details of the Ottoman prisons and the problems see: Gültekin Yıldız, *Mapusane*; Kent F. Schull, *Prisons in the Late Ottoman Empire: Microcosms of Modernity* (Edinburgh: Edinburgh University Press, 2014); Noemi Levy and Alexandre Toumarkine, *Osmanlı'da Asayiş, Suç ve Ceza 18. ve 20. Yüzyıllar* (İstanbul: Tarih Vakfı Yurt Yayınları, 2008).

64 For the prisons in Mosul see: Beyza Karakaya, "Musul Vilayeti Hapishaneleri (1864-1909)", (Master's thesis, Marmara University, 2016).

the people of Baghdad but also for people who were living in its districts: Mosul, Sulaimaniyah and Shahrizor. Therefore, in 1861, the government of Baghdad informed Istanbul that the fortress was not sufficient and asked for the permission to build a new prison in the same fortress. In order to convince the Ottoman central government, they proposed that if an engineer from Iraq built the new prison, it would be less costly and more durable.[65] The *Meclis-i Vâlâ* approved the building of an additional prison in the fortress with an admonishment to keep the expenditures low.[66]

In the beginning of 1860s, the main purpose of reforms for prisons in Iraq was to enhance their capacity, as opposed to a spatial reorganization. The conventional form of prisons located in the fortresses or governmental buildings was still prevailing in Iraq, but even the increased capacity of the fortress of Baghdad began to be insufficient as a result of the operation of changing punitive policies in the region. Consequently, the government of Baghdad sent a document to the Ministry of Interior in 1870 requesting permission to build a new prison. The document describes the inadequacy and the improper conditions of the central prison in Baghdad. The problem of over-crowding was highlighted, especially since there was no place in Iraq except the prison in Baghdad where those charged with murder could be imprisoned. As a result, all of them were sent to there and the number of prisoners rose to between 600 and 700. The document also provides more details regarding the physical conditions of prisons and how prisoners were classified according to the type of crime they committed.

There were two different locations designated as prisons in Baghdad. One of these were the rooms of *atîk-i sekbân*[67] where those accused of ordinary crimes, and murderers who had not yet been sentenced were held. The other

65 BOA., İ.MVL 439/19487, 06 Ca 1277 (20 November 1860).

66 Ibid.

67 Sekbân and Sekbân-ı Cedîd were the groups among the Ottoman military forces located in both the center and the provinces. During the reign of Mahmud II, the *Sekban* forces began to be incorporated into the new military organization under the name of *Sekbân-ı Cedîd*. However increasing number and priority of *Sekbans* caused grievance among the Janissaries and it turned into a conflict. Members of Sekban-ı Cedid dispersed throughout of Istanbul after they were defeated by Janissaries in the bloody street fights. See: Abdulkadir Özcan, "Sekbân-ı Cedîd" *TDV İslam Ansiklopedisi*, Vol. XXXVI: 328-329.

prison was the one located in the fortress (defined as a ramshackle building in the document) where prisoners who committed major offenses were incarcerated. The need for a new prison were expressed by highlighting that these two locations were not purpose-built prisons and unprotected, pointing out that the one in the castle was surrounded by four walls made only of clay.

The government of Baghdad defined prisoners staying in the castle as harmful people who were always committing major offenses. In addition to the claim of their disposition to criminality, it is stated that two companies from *Asâkir-i Nizâmiye* and additional guardsmen were posted around the prison since the prisoners kept attempting to escape by organizing people and attacking the guards. These murderers were described as unruly within the prison as well.[68] In order to address these problems, the provincial government of Baghdad proposed to build a masonry prison that would have capacity to hold four hundred prisoners. The Ministry of Interior approved the demand of the Baghdad government and gave orders to build an organized masonry prison (*muntazam ve kârgir*) financed by the center.[69]

In addition to the prosecution of criminals and the conditions of prisons, the Governor of Baghdad highlighted another aspect of the operation of justice in Iraq by problematizing the infliction of punishments. Abdülkerim Nadir Pasha sent a letter of gratitude to Istanbul in 1849 upon the sultan's issuing of an edict accepting his demand to punish criminals according to the degree and category of their crimes. The governor complained that petty criminals were treated similar to those prisoners guilty of major crimes which contradicted the principle of justice and the criminal code. Defining this unjust treatment as against the mercy of the sultan, the governor wished to introduce an

68 BOA., İ.DH 616/42902, 22 R 1278 (27 October 1861): "*Hapishane çamurdan dört duvar ile muhatab olduğundan ve derûnunda dört yüz beş yüz ne kadar cinâyet-i cesîme ashâbı mevcûd olarak bunların ise her biri şekâvet-i müstemirre ve fezâhat-ı cesîme erbâbından gayet mazarrat adamlar olmakla beraber hapishanede dahî tahammül edilemeyecek …(?) bulunduklarından ikide bir de cumhûr ve cemiyetle nöbetçiler üzerine hücûm edip kaçmağa kalkıştıkları cihetle muhafazaları için mu'ayyen olan bir bölük zabıtadan başka asâkîr-i nizâmiyeden dahi iki bölük tahsîsiyle hapishanenin duvarları üzerinden müte'addid nöbetçiler ikāmesine mecbûriyet gelmiş…*"

69 Ibid., 4/1.

arrangement in order to correct the ongoing punitive applications by referring to the Criminal Code.[70] It is explicit that Abdülkerim Nadir Pasha was discontented with the application of punishment in which prisoners were not differentiated according to the category of offense.

The Code he mentioned is the first one issued in 1840, just after the promulgation of the *Tanzimat* edict. Although the Criminal Code of 1840 is the least detailed one compared to the following two Codes, it delineated several crimes such as murder, robbery, swearing, assaulting and insulting in the different articles. According to the type and the severity of the crime, the sort of punishments and the terms of prison were designated in the Code. Abdülkerim Nadir Pasha wished to apply the judicial principles of the Criminal Code to the convicts depending on the crimes they committed rather than a punitive policy which targeted to discipline everyone who ended up in the prison. Also, in accordance with the mindset of *Tanzimat* codification, the governor of Baghdad associated the realization of justice with adherence to the codified law. Although he depicted the situation as contrary to the mercy of the sultan, he didn't refer to the justice of Ottoman sultan but to the justice codified in Criminal Code of 1840. Abdülkerim Nadir Pasha's adherence to the Criminal Code reflects one of the main goals of the criminal justice system in the *Tanzimat* period: the standardization of punishments. By specifying the category of crimes and punishments, a standard application could be achieved which would ameliorate the functioning of justice in the eyes of people. His repeated reference to the Code indicated his desire to establish "rule of law" that would eliminate arbitrary rulings and illegal violence. In short, his correspondence with the government in Istanbul aimed to categorize prisoners and to define standard crimes which would make jurisdiction more rational and reliable.

Besides conformity to the Code the standardization of punishments, commitment to the procedure was another mark of *Tanzimat* legal thinking, which

70 BOA., A.MKT 216/70, 11 N 1265 (31 July 1849): "*Cünhâ-i hafife ashâbından bazı kesâna pırangada bulunanlar gibi mu'âmele olunmakta olduğu tahkîk buyurulup ancak bu ise usûl-i âdile ve kāvânîn-i cezâ-yı seniyyenin bi'l-vechile hilâfı olarak buna bu vechile merhamet-i seniyye razı olmadığından ol bâbda ne vechile mu'âmele olunmak lazım geleceği tafsîlen iş'âr ve beyân ve âna göre icrâ-yı iktizâsı emr-i fermân buyurulmuş…*"

will be discussed more comprehensively in the following chapter. As the highest judicial authority *Meclis-i Vâlâ* consistently demanded documents pertaining to legal cases from the Ottoman provinces in their complete form. Documents had to indicate information regarding the plaintiff, defendant and witnesses, as well as the interrogation reports. Interrogation protocol includes the questions of the investigating magistrate (*müstantık)* and the answers of the litigants, accused ones and witnesses. These interrogation reports facilitated court procedures by providing prior knowledge about all the details of criminal cases to the judges. While there are interrogation reports which consist of tens of pages, some of them are quite short, while on some occasions they were completely omitted. Using the information provided in interrogation protocols, court members could compare the testimonies of different people, which enhanced the credibility of court decisions.

The review over the murder of Naile by Hamid bin Abdullah in the *Selamiye* district of Mosul in 1851 demonstrates how *Meclis-i Vâlâ-yı Ahkâm-ı Adliye* scrutinized the documents regarding legal cases. The *Meclis-i Vâlâ* demanded a retrial of this case upon receiving conflicting expressions regarding the date of the murder.[71] Although we do not have interrogation protocols of this murder case in the archive, from the answer of *Meclis-i Vâlâ* we can trace that after the examination of protocols, there was indeed controversy. Despite the testimonies of two men as the eyewitnesses during the murder of Naile and the Council of Mosul's expression that the woman died because of a bullet in the right side of her head, the date of the case may have been a reason for the re-investigation of murder. After this delay, *Meclis-i Vâlâ* found Hamid bin Abdullah guilty and appealed to Naile's heirs for their decision regarding how to punish the convicted murderer.

The case of Naile indicates the significance of the consistency of information given to the *Meclis-i Vâlâ* as the highest authority in deciding punishments for the accused in homicide cases. In other cases, the *Meclis-i Vâlâ* did not reveal the decision nor order rehearings which extended the time period. This shows that the Governor of Baghdad, Mehmed Necib Pasha, paid attention to the procedure of the investigations from the very early period of the

71 BOA., İ.MVL 216/7186, 27 N 1267 (26 July 1851).

Tanzimat in Iraq. In 1847, he revealed that in accordance to a decree from Istanbul, reports of testimonies in the trial of murder cases should be in the form of questions and responses.[72] Since the appropriate questioning of the plaintiff, defendant and the witnesses is the backbone of the inspection of a criminal issue, as the head of the judicial body, Mehmed Necib Pasha ordered the court officers to pay attention to this procedural requirement from early on.

Although he aimed to fulfill the requirements of the interrogation process, Mehmed Necib Pasha had mixed conventional practices and the *Tanzimat* reforms. In the same report, he expressed his concern toward the people of Mosul correlated with the examination of the crimes. He stated that people of Mosul cannot be compared with the population of other districts since they are "bloodthirsty" people and inclined to depravity. When was reflecting his apprehensions, Mehmed Necib Pasha gave clues upon how interrogations were realized before the rearrangements of *Tanzimat* penal policies. He was concerned about the potential for people to abuse this interrogative procedure and the outlawing of death, torture and ferule. He feared that in the absence of these corporal punishments during the interrogation, these "evil-doers" might dare to commit more murders.[73]

Despite his concerns and distrust of the people of Mosul, Mehmed Necib Pasha accepted the non-violent interrogative format of court hearings after the passing of regulations abolishing torture and illegal punishment. Although the provincial governor of Baghdad perceived the pre-*Tanzimat* form of trials more efficient and reliable, he had to accept these new regulations since justice came to be defined as the fulfillment of the procedural requirements of the

72 BOA., A.MKT 65/50, 20 S 1263 (7 February 1847): "*Katl maddesi vukûʿunda tedfikât-ı kâmilenin icrâsıyla baʿdehu iktizâsına bakılmak üzere evvel-emirde rüsûm-ı muhâkemât ve ifadâtın bi't-tatbikan suâl ve cevâb gibi mazbatasının bi't-tanzim ol bâbda verilecek iʿlâm-ı şerʿî ile beraber derbâr-ı şevketkarara takdîmi husûs bi'l-cümle mahaller memurları taraflarına emr-i iş'âr buyurulduğu…*"

73 Ibid., "*Bu havâli ahâlisi mahalle-i sâ'ire ahâlisine bir sûretle kıyâs kabul etmeyip begâyet hûnrîz ve müstaʿid fesâd adamlar olarak katl maddesi hakkında vukûʿ bulan tedfîkat mülabesesiyle o misilliler bundan sonra ölüm ve darb ve değnek yoktur diyerek fırsat bilip isyana ..(?) olmayacak sûretle katl fezâhatına cür'et etmekte olduğuna ve o haline hînde bilâ fasıla yüzden ziyâde katl arzuhâlleri verilmiş ve daha ileride fesâd-ı azîme vukûʿ melhut idüğüne mebnî…*"

criminal justice system that was established in the *Tanzimat* period, which will be discuss in the Chapter 4. Indeed, the provincial administration's demands and the central judicial authority's briefs indicates that from the 1840s, the penal policy of the *Tanzimat* was initiated and adapted into Iraq in order to fulfill the administrative requirements of managing the demographic and social conditions of life in the Iraqi provinces.

4

Crime and Punishment in Iraq

Procedural correctness came to be perceived as the essence of justice after the second half of the nineteenth century. Emphasis on the procedures of judicial practices was one of the crucial steps undergirding efforts to establish a monopoly over the right to dispense justice. In the context of Ottoman statecraft during the last century of the Empire, as a component of administrative centralization, the proceduralization of justice facilitated the centralization of judicial administration. Avi Rubin depicts the modernization of Ottoman law as a transition to a mode of legal formalism not only realized as legal procedure but as a legal culture in which procedure became the focal point of jurisprudence. In this new perception, acting according to procedures became the distinguishing mark between lawful and unlawful legal practices.[1] Justice was objectified when presenting objective and universal procedures as the indicators of a well-functioning court system where human agency was excluded. In this legal mindset, justice came to be defined in terms of abiding by the procedural standards.

Several regulations in the legal sphere such as the codification of law, the documentation of legal cases and the reporting of court trials put this changing judicial perception into practice. Codified law ranging from criminal to commercial (and to civil law in the later period) that had to be applied all over

1 Rubin, *Ottoman Nizamiye Courts*, 84.

the imperial terrain, functioned as the regulatory apparatus of central administration on the daily working of Ottoman courts. On the other hand, documents produced by the courts as case reports enabled checking and controlling the legitimacy of trials. Although Ottoman *kadı* courts were producing written documents in the preceding centuries, their records (known as *sicils*) are textually limited in comparison to the records from the nineteenth century. Boğaç Ergene indicates that cases were heard and resolved by a court and recorded without describing the full scope of the litigation process. The record of the case contains only the names of the litigants, a brief summary of allegations and counter-allegations, a short description of evidence presented by litigants, and the names of witnesses. Hearing the narratives in the litigants' own words is almost impossible through these registers.[2] Nevertheless, *sicils* have greatly enriched the study of the social, economic and cultural history of the Ottoman Empire and its provinces.

Using these *kadı* court records regarding Ottoman women, children, both wealthier and lower classes, consumption practices and crimes (etc.), Ottomanists have incorporated multifarious actors and subjects into Ottoman historiography. However, in contrast to the sharia court registers, some of the nineteenth-century court records contain first-person statements of ordinary people which enable historians to access the voices and everyday life practices of non-elite subjects. Endeavors to standardize court records and elaborate their contents qualitatively distinguishes nineteenth century reporting from the previous centuries' documentation. In this sense, the intensification of interrogation procedures and protocols which had to be sent to the central judicial administration have presented more detailed information regarding the era for study by historians.

In addition to more detailed legal records, introduction of a review system by the imperial court in Istanbul as an obligation for the final verdict of serious crimes underpinned efforts for judicial centralization. The power of punish-

2 Boğaç Ergene, "Pursuing Justice in an Islamic Context: Dispute Resolution in Ottoman Courts of Law, *Political and Legal Anthropology Review* 27 no.1 (2004): 51-71.

ment and right to dispense justice were concentrated in the hands of the central government.[3] As a result of these procedural requirements, operation of courts was brought within the surveillance of the central judicial administration. While record-keeping became more sophisticated, the gaze of the central judicial administration[4] also reconstituted the operation of law and the way of dispensing justice, especially in the distant regions of the Empire.

During the *Tanzimat* era, the reorganization of the functioning of Ottoman courts in a hierarchical review system brought the application of justice in the Ottoman provinces into the scope of the central administration. Provincial councils had to get permission from the *Meclis-i Vâlâ* before applying punishments, even though they were specified for each crime in the Criminal Code. The Supreme Council became a last resort for deciding on the penalty in criminal cases concerning violations of the rights of people. This was a notable difference between the operation of courts of *Tanzimat* and the centuries-long practices of *kadı* courts. Although religious law was intertwined with the criminal codes, in matters of criminal cases, the judgements as per the Sharia and the Criminal law could differ, by giving the last say to different agencies. Essentially, Sharia law made a distinction between transgressions against the private rights of people and violations of the rights of God. While homicide and wounding fall under the former category, crimes such as highway robbery, theft or drinking alcohol were placed in the latter. Such distinction was important in practice since the heirs or injured ones had central role in deciding the punishment for crimes violating private rights. In accordance with their preferences, a sharia court could impose retaliatory punishment (kısâs), compensatory penalties (diyet), or honor the plaintiff's decision to forgive the criminal. On the other hand, infringements upon the rights of God required certain *hadd* penalties.[5]

Although the right of the heirs to demand retaliation was preserved in all the Criminal Codes, in practice, the separate categories of crimes appear to have been unified under the authority of the Supreme Council. Unlike sharia

3 Ebru Aykut Türker, "Judicial Reforms, Sharia Law, and the Death Penalty in the Late Ottoman Empire" *Journal of the Ottoman and Turkish Studies Association* 4 no.1 (2017), 11.

4 Rubin, *Ottoman Nizamiye Courts*, 89.

5 Petrov, "Everyday Forms of Compliance", 736.

courts, councils and the *Nizamiye* courts in the later period applied the ultimate decision of the central judicial administration, which may require interference to the decision of heirs. Also, these councils had to adhere to state-produced normative legal documents in the form of penal code, which included penalties like imprisonment for hard labor, which was not stated in the sharia law.[6] This hierarchical review system had been applied in the operation of provincial councils of Iraq as well. Also, the councils applied almost all the procedures of this reformed judicial system or repeated trials in pursuit of justice if *Meclis-i Vâlâ* found something contrary to the legal procedures.

In the province of Mosul and Baghdad, the records indicate that justice was administered through the judicial functioning of provincial councils and sub-councils. As it was discussed in Chapter 3, the application of judicial changes in Iraq was part of the incorporation of the region into the centralization process of Ottoman provinces. The Ottoman central government insisted on dispensing justice in the region through trials in the Councils, since it was the most peaceful and subtle way to establish control over an unsteady population. One of the aims of this chapter is to discuss how the application of law enforcement and criminal procedures in Baghdad and Mosul influenced the administration of the region. The way that trials were realized and preferences over the type and source of punishments in murder cases will be examined to see the purpose of the administration of law. Also, besides evaluating the criminal policies of government in collaboration with policing forces, this part of the thesis will attempt to describe the influence of punitive measures on the everyday life of Iraqi people and the way they responded. By analyzing daily interactions inside the courts, I focus on how criminal policy in the general sense affected state-society relations, rather than focusing on the success or failure of the judicio-administrative measures taken by both the central and the provincial government.

6 Ibid., 737.

§ 4.1 Application of Criminal Procedures in Iraq

In his work on *Nizâmiye* courts, Avi Rubin conceptualizes the late nineteenth century as "the age of procedure" and evaluates how justice came to be defined in terms of procedural standards by exhibiting examples from the *Nizâmiye* courts. The records sent from Baghdad to the *Meclis-i Vâlâ* between the 1850s and 1860s indicates that before the establishment of Nizâmiye courts, provincial councils (as the judicial organs) had also influenced the evolution of the perception of justice into legal formalism in this era. Since the *Meclis-i Vâlâ* was functioning as a high court in a hierarchical review system for almost all parts of the Empire, it continuously supervised the level of adherence to the procedures by lower courts for the decision of serious crimes and bureaucratic cases. In the course of the implementation of *Tanzimat*, the provincial courts and governors had to adopt the new form of legality by adhering to judicial procedures due to the supervision and surveillance of the imperial court. Indeed, adherence to the legal procedures was one of the ways to control and curtail the power of the provincial governors. In the case of Iraq as well, to be congruent to the legal procedures came to forefront and settled as a legal practice through interventions of the imperial judicial administration.

The principle of legality necessitates the administration of punishment in adherence to the law, as well as the imposition of penalties in accordance to the decision of the court which had to get approval from İstanbul. Three unnamed bandits in the Sulaymaniyyah district and three highwaymen in Mosul were sentenced to same punishment at the end as a result of their infringement of public security and homicide. However, the interrogation of culprits, the documentation of all legal process and the review procedure by the Supreme Council differentiates these legal cases; while the former was perceived as contrary to the principles of Tanzimat state, the latter correctly adhered to the criminal and punitive policies of the era. The evaluation of these two cases indicates the emphasis on the procedural aspects of Ottoman governmentality regarding law and order in Mosul and Baghdad during the nineteenth century. Although establishing order in the provinces was very crucial for the success of provincial governance, the method to realize it seems to have been as significant as it for the Ottoman central state.

Ömer Lütfi Pasha's execution of three bandits from the Hemavend tribe in 1859 without waiting for approval from Istanbul is given as a famous indicator of the seriousness with which adherence to the hierarchical review structure in such criminal cases was to be taken. Although these three men's punishment was indeed the death sentence according to Criminal Code (since they had committed the crime of highway robbery), Ömer Lütfi Pasha was dismissed from the position of provincial governorship because his act of execution was illegal without approval from Istanbul. This case shows that even a high-ranking official such as the governor of a province who was also a former Serdâr-ı Ekrem, could be removed from his position as a consequence of disregarding the legal procedure. This case indicates two significant aspects of implementation of legal procedures and regulations: establishing control over administration of provinces as well as provincial rulers.

Despite the popularity of this recurring narration by historians, it is not a totally accurate portrayal of the administration of justice in Iraq. Since Iraq was a province composed of multiethnic and multi-denominational tribes, the region was described as unstable and people were depicted as disobedient and rebellious in nature. Despite all these notions, concern for order did not legitimize any precautions that would suspend rules or an execution without due process of law. In addition to the intervention of central administration in the aforementioned case, the comparison of court records indicates the exceptionality of Ömer Lütfi Pasha's execution. The problematization of tribal population in Iraq was prevailing before and after the governance of Ömer Lütfi Pasha, but neither the death sentences nor the imprisonment of offenders could be applied without the approval of the Supreme Council.

In his letter of defense, Ömer Lütfi Pasha used the very same discourse toward the region and people of Iraq as his reasoning for the non-procedural execution of the three men. Although he accepted that his decision was contrary to the core of the law, he defended himself by elucidating the disorder that had occurred in the Sulaymaniyyah district because of the bandits of Hemavend tribe. He stated that these three men were the most rebellious and troublesome among twenty brigands, and that he had executed them as a warning to others. In order to justify his action, Ömer Lütfi Pasha appeals to the most sensitive affairs of Ottoman administration: internal security and tax

collection. The tax-paying Ottoman subjects had to flee from their homes to Iran or to the mountains because of bloody assaults by the bandits[7] which had thus caused disorder, depopulation and consequently loss of revenue for the government in the region. In his letter, Ömer Lütfi Pasha argued that the urgency of the issue and the distance from Dersaadet (Istanbul) meant that waiting for permission would unduly delay the punishment, which could damage the faith of the populace in the justice of Ottoman Empire, and lead people to leave their villages.

The justification provided by the Governor of Baghdad reflects the prevalent way in which justice was dispensed since previous times; inflicting punishment immediately after the guilt was ascertained. However, in principle, such a punitive policy contradicted the criminal and penal procedures established after the *Tanzimat*. The right of discretionary punishment by the administrative authority was restricted due to the requirement of documenting legal cases and sending them to the central judicial administration to get the ultimate decision. Even though the punishment for banditry, a *hadd* crime that infringes the right of God, was certain in both the Sharia and the Criminal Code, the provincial authorities had to adhere to the criminal procedures in order to curtail any sort of arbitrary punishment and autonomy of provincial administration. Ömer Lütfi Pasha paid more attention to practical implementation rather than fulfillment of legal procedures, but Article 16 of the Criminal Code was enough to clarify the state's position on the issue: "convicts sentenced to death shall not be executed until the warrant, bearing the Imperial Cypher, setting forth the proof of the charge and the sentence has been formally read at the place of execution."[8]

Although the Governor of Baghdad had stated his intention as establishing justice for the well-being of people in the Suleymaniyyah district, his con-

7 BOA., İ.DH, 450/29737, 16 C 1276 (10 January 1860): "*mezkûr Hemavend eşkiyasının şu vakt-i nâzikede mütecâsir oldukları envâ' te'addî ve zulmden esnâ-yı râhda vâki' kazâsının devlet-i âliyeye vergi verir umum ahâlîsi kuralarını terk ederek İrana ve dağlara savuşdukları cihetle*"

8 Walpole, *The Ottoman Penal Code*, 7.

travention of the Tanzimat's principle of the attentiveness to procedure, resulted in his deposition from office.[9] Comparing this judicial process with another case of highway robbery, which resulted in the murder of two merchants in the district of Ninova village near Mosul in 1867, indicates how legal procedures were now applied in accordance to the criminal justice proposed by the Tanzimat in Ottoman Iraq. Even though the same punishment was inflicted in these two cases, unlike Ömer Lütfi Pasha's independent decision of capital punishment, in the latter case the judicial procedures applied by the Council of Mosul and the criminals were prisoned until the decision of central judicial administration reached the province. This legal case allows us to discuss the new aspects of the criminal justice system in the province of Iraq. First of all, unlike Ömer Lütfi Pasha's prompt decision to execute the offenders, it shows that the regional court followed procedural stages in dealing with a homicide case. The punishment of these culprits has potential to initiate a debate on the punitive policy of *Tanzimat* state in the region with examining various criminal cases. On a side note, actors present in the records who were tasked with detecting of crimes indicate the multiple layers of criminal prosecution.

A criminal case was reported in 1867 when two dead bodies were found next to Koyuncak Hill in the Ninova village, located at the exit of Mosul. The bodies were identified as Beybaşızade Mehmed and el-Hac Ahmed from Kastamonu. An examination revealed that they were foreigners and had died due to several bodily injuries. Nevşehirli Hacı Osman bin Ahmed was brought in for interrogation after it was discovered that he had been the victims' companion on the road. In the interrogation, he stated that while they were returning back to their homeland from Baghdad, they camped near Koyuncak Hill for the night. Unlike his two friends, he did not sleep, but kept watch instead. Suddenly, three men attacked them with maces and stones, but he managed to escape with a head injury and hid in a caravanserai's kitchen. The in-

9 Roderic H. Davison, *Reform in the Ottoman Empire, 1856-1876* (Princeton: Princeton University Press, 1963), 138.

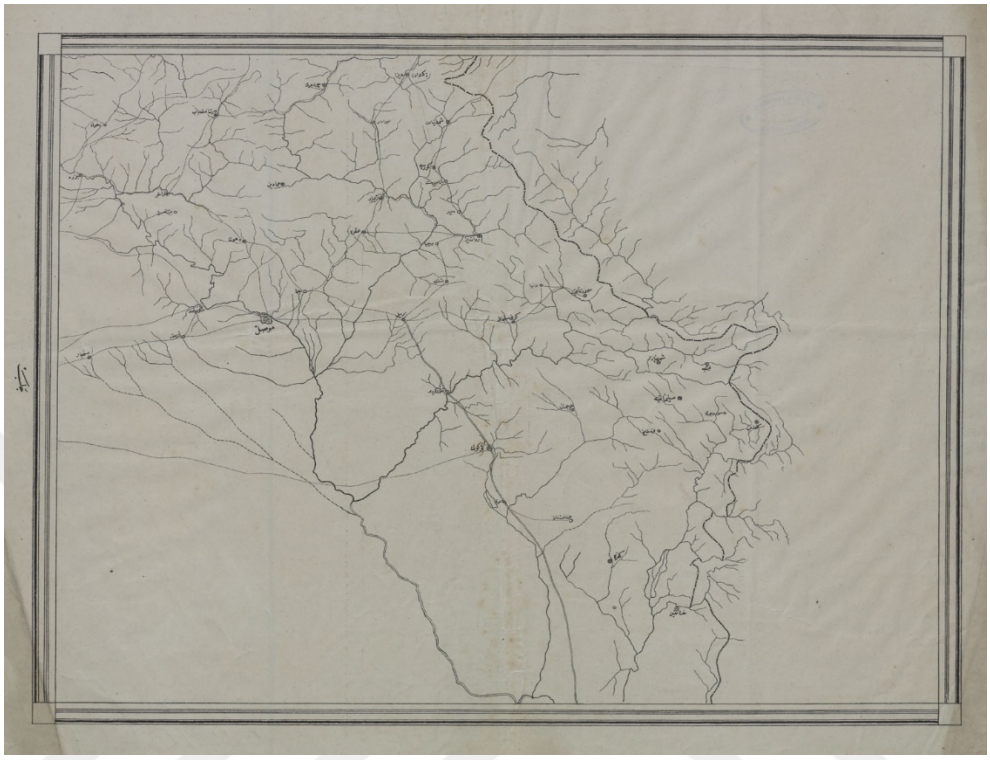
terrogator asked Hacı Osman whether someone saw them in this location during the daytime and he mentions three men who came and asked them their route.[10]

The report states that the people in the description provided by Hacı Osman wore what resembled the clothing of irregular soldiers, and that detectives were dispatched everywhere to find them. Besides officials, an irregular Ebu Nişan Mustafa was sent as a spy to investigate this issue, first to Kirkuk and then Cizre. Mustafa explained that he went to the home of Abdullah Kuran who was not available in Mosul during the time of homicide and he was prominent in these kinds of acts. Upon the information that Abdullhah Kuran's wife gave, Ebu Nişan Mustafa followed them to Kirkuk but was unable to find them again. After Abdullah and Mehmed Ali turned back to Mosul, Abdullah notified Mustafa that they were in Cizre when Mustafa questioned him. Relying on Abdullah's statement, Mustafa went to Cizre and tried to get information from people in the coffeehouse regarding what Abdullah and his son did there. According to Mustafa's report, people in the coffeehouse stated that Abdullah Kuran had been trying to sell a jacket and a Persian shawl. Consequently, the house of Abdullah was raided and the items they were trying to sell were found to have belonged to the murder victims.[11]

10 BOA., İ.MVL 582/26160 19 Ş 1284 (13 February 1868) One of the three men said that "I'm among people of Cizre and I came to serve in 'Osmanlılık' but since there is no old Ottomannes we are turning to Cizre." Depiction of Baghdad or Mosul as "Osmanlılık" by a man from Cizre indicates how provincial centers were correlated with Ottoman rule in the mind of people who were living in the periphery of a province. Also, by expressing what was his understanding of Ottomannes, his criticisms shows that some people differentiated provincial administration as old and new during the end of 1860s and had problems with changing form of administration.

11 Ibid.

Map 4.1 Map of the Province of Mosul



SOURCE BOA., HRT.h 981 29 Zilhicce 1341 (12 August 1923)

Following an investigation by regular and irregular officials, it became clear that Abdullah Kuran and his son Mehmed Ali had been involved in the murder of the two passengers. Later on, in the investigation process six potential culprits were named by people of the region. Beginning with Abdullah's son Mehmed Ali as the first respondent, all of them were interrogated. Abdullah Kuran, Mehmed Ali and Hüseyin Çavuş (sergeant) had been captured in Mosul in May, two months after the murder, but Ömer Ağa and Ömer Çavuş were found and arrested from Siirt in June.[12] The sixth person was Ebu Nişan himself, who was questioned upon the accusations of others that he was also involved in highway robbery. Mehmed Ali narrated the story of how they came together, where they stayed and gave the names of everyone who had shared

12 The city located in the southeast of Anatolia and surrounded with the contemporary cities of Turkey; Mardin, Batman, Siirt, Van and Hakkari.

the stolen properties from passengers, including that of his father. However, he denied his own involvement in the murder and theft and claimed that he had been asleep on the night in question. After Mehmed Ali's confession, all suspects had to elaborate what had happened on and after this night, including their plan of attack to passengers.

Despite the fact that everyone except Mehmed Ali accepted having involvement in the planning and execution of the highway robbery, none of them acknowledged the crime of homicide and accused each other. What is exceptional about this case is that the alleged criminals clearly confessed how they had been seeking occasions to intercept and rob travelers around Mosul province, while in almost all other trials, the convicts preferred to deny allegations. Even though nearly all of them denied the accusation of murder, they were rather upfront regarding their criminal habits. This could be due to one of two reasons: either they knew it was too late to falsify allegations after being arrested, or because they might already be planning to escape from prison (which was not unrealistic, considering the conditions of prisons as described in the previous chapter). Nevertheless, beginning with Abdullah Kuran,[13] almost all the alleged criminals gave enough information to be sentenced as a result of infringement of the security of roads[14] which had to be sustained by the state.

All the alleged criminals were captured by June, while the interrogations were completed and the reports of the Council written in August of 1867. The Governor of Baghdad, Namık Pasha, sent a report along with interrogation protocols and registers written in the Council of Mosul to Istanbul on 10 September 1867 for the decision of imperial judicial administration and approval of the *Fetvahane* (Office of the Grand Mufti). The decision regarding punishments of each person who had participated in the crime took nine days after the arrival of reports from Bagdad and written on 19 September. Therefore,

13 Abdullah Kuran said that he came together with Ömer Ağa and Ömer Çavuş in a coffeehouse located in Saraykapısı in order to rob anyone who came across in the road.

14 In his interrogation Ömer Ağa confessed that he joined to others after they promised him to stole an animal for him from a Persian caravan stopped in the desert. In the following pages similar to Ömer Ağa, Ömer Çavuş expressed his motivation to follow passengers as robbery when interrogator asked him "why did you go?".

the judicial procedures beginning from interrogation to the decision of punishment took three months in total, in this case. As a rare example in the interrogation reports during the 1850s and 1860s in the courts of Mosul and Baghdad, the defendants conducted face-to-face confrontations which were recorded as a part in the name of *muvaceheler*. As a useful summary for the readers of ten pages long interrogation report, the section demonstrates the confrontation contains the words of each person with his signature and indicates who accepted which crime and who else they accused:

- Abdullah Kuran

  During the homicide, Ömer Ağa, Ömer Çavuş, Ebu Nişan and Hüseyin Çavuş were together with me. My son was not there. The murderer is Ömer Ağa.

- Ömer Ağa

  During the homicide, Ömer Çavuş, Abdullah Kuran, Ebu Nişan and Hüseyin Çavuş were together with me. Mehmed Ali was together with us too, but Hüseyin Çavuş and Reşid were not. The murderer is Abdullah Kuran.

- Ömer Çavuş

  During the homicide Ömer Ağa, Abdullah Kuran and Mehmed Ali were together with me, and there wasn't anyone else. I took the bag and went away. The murderer is someone among those who remained. The sword belongs to Ömer Ağa. I didn't see him give the sword to Abdullah Kuran.

- Mehmed Ali

  I was not there when the homicide happened. Ömer Ağa, Ömer Çavuş and my father Abdullah Kuran were there.

- Hüseyin Çavuş

  Although I was with them earlier, I was not there when the homicide occured.

- Ebu Nişan

I was not there before or after the murder. The testimonies of Abdullah Kuran and Ömer Ağa regarding me stem from the fact that I investigated and indicated this case of murder.[15]

Although this section summarizes the confessions and accusations, the report of the Supreme Council indicates that the decision of punishment was taken after comparing the details given in the personal interrogations. Unlike Ömer Lütfi Pasha's punishment of the three bandits, Abdullah Kuran and his group were charged in accordance with the principles of the Criminal Code of 1858. Despite the fact that there are several differences between the crimes committed in Sulaymaniyyah and in the Ninova village, both groups committed the crime of banditry and murder and furthermore had made these acts a habit, which increases the degree of punishment for every type of offense. The record from the *Meclis-i Vâlâ* shows that the verdict ruled Ömer Ağa, Ömer Çavuş and Abdullah Kuran guilty – they were held responsible for the homicides, while Hüseyin Çavuş was considered to have left them before the murders occurred. However, it stated that all of alleged criminals, except Ebu Nişan Mustafa (who had been wrongly accused by Abdullah Kuran and Ömer Ağa), were together during the interception and larceny. The court did not punish Mustafa due to the fact that he worked for the government, understanding that the culprits might simply have wanted to take revenge for his role in bringing them in.

Abdullah Kuran, Ömer Ağa and Ömer Çavuş were all given capital punishment, based on an appendix of article 62 of the Criminal Code of 1858. According to the article, armed individuals roaming the mountains and the countryside in order to rob passengers should be sentenced to provisional or lifelong sentence of hard labor, depending on the degree of their brigandage (*şekâvet*). However, the punishment for criminals who had previous conviction in murder, were recidivists in brigandage, or who had tortured or murdered someone during highway robbery, was the death sentence. On the other hand, Mehmed Ali and Hüseyin Çavuş were sentenced to penal servitude for 5 years, while Ebu Nişan Mustafa was released from the police station due to

15 BOA., İ.MVL 582/26160-3/4 19 Ş 1284 (13 February 1868).

the invalidity and unreliability of the testimonies of the other five convicts against him.

Despite the differences in the legal processes, three unnamed bandits and three highwaymen were given death sentence because of their act of homicide and infringement of public security. Although the maintenance of public order is a preeminent concern of all governments, including the centuries-old Ottoman administration, order (*âsâyiş*) and security (*emniyet*) came to be used more frequently in correspondence between the central government and provincial administrations[16] during the nineteenth century (as socio-political requirements of reconfiguration of political rule). However, by comparing the jurisdiction of two criminal cases, it can be deduced that the mere maintenance of order and security did not have legitimacy but instead had to comply with legal arrangements too. While the stabilization of the region and establishing order in the provinces of Iraq carried utmost significance for the Ottoman governance, the method to realize it seems to have been as significant as these goals.

Even though several military campaigns were arranged against disobedient tribes or brigands throughout the century, this measure was not a preferable one and adopted as a last resort. The Ottoman central government preferred to co-opt tribal leaders by inducing them through several gifts[17] or payments[18]. On the other hand, considering the rate of crime and the government's concern over the trial of murder cases as it was narrated in the Chapter 3, establishing security and order in the region also required an effective judicial system which could identify and eliminate as many evil-doers as possible.

16 For the examples of these correspondences between Baghdad government and Istanbul see: BOA., A.AMD, 63/57 20 Ş 1265 (8 September 1849); BOA., A.MKT 225/37 29 L 1265 (17 September 1849); BOA., A.MKT.MVL 46/1 03 Z 1267 (29 September 1851); BOA., A.AMD 32/54 19 Z 1267 (15 Octover 1851); BOA., A.AMKT.MVL 63/50 06 N 1269 (13 June 1853); BOA., A.MKT.UM 118/15 07 Ra 1269 (19 December 1852); BOA., İ.MVL, 357/15628 10 Za 1272 (13 July 1856); BOA., A.MKT.UM 216/27 9 Ra 1272 (19 November 1855); BOA., A.MKT.UM 316/22 07 Za 1274 (19 June 1858).

17 BOA., A.MKT.MVL 43/60 21 N 1267 (20 July 1851); BOA., A.MKT.MVL 50/57 07 Ca 1268 (28 February 1852); BOA., A.AMD 72/47 29 Z 1273 (20 August 1857).

18 BOA., A.MKT.MVL 33/108 21 Z 1266 (28 October 1850); BOA., A.MKT.MVL 38/80 30 Ra 1267 (2 February 1851).

By incarcerating or (in some critical cases) executing offenders through fulfilling all the criminal procedures, Ottoman administration aimed to form a legitimate jurisdiction, as opposed to harsh military intervention. Putting aside the procedural aspects, the highway robbery and murder committed in Mosul is a good example for understanding the application of punitive policy in the region. This can be elaborated by seeing the various punishments imposed upon convicts in the courts of Ottoman Iraq, and the role of the police forces simultaneously as the agents of legal processes in the rest of the chapter.

§ 4.2 The Execution of Capital Punishment in Iraq

The execution of bandits and robbers in the provinces of Baghdad and Mosul were examples of the continuation of capital punishment that exists in the Criminal Code for serious crimes such as premeditated murder, banditry and rebellion.[19] However, considering the totality of the records of criminal trials in the Ottoman archive, these cases appeared to be in the minority, compared to sentences of incarceration. Studies on the Ottoman criminal justice system in the nineteenth century and court records from Iraq indicate that despite the continuation of capital punishment, incarceration became the primary form of punishment. This was due to the transformation of Ottoman penal policy by the codification of criminal law, establishing criminal courts, prisons and police organization. However, since the death sentence is the most severe form of punishment, even the few cases and their underlying reasons are crucial to conceive the distinctive aspects of transformation of the punitive policy for each region. During the nineteenth century, with the exception of the death sentence, punishment underwent a profound change.[20] In general sense, the transition from capital and corporal punishments to incarceration and fines also meant a transformation in the disciplinary regulations of governmental authorities. But still we cannot overlook the fact that for each locality,

19 All Criminal Codes beginning from 1840, 1851 and 1858 continued to include punishments sanctioned by Islamic law such as *hadd, qisas, diyet* and *ta'zir* by codifying and standardizing together with other forms of punishments like hard labor.

20 Schull, *Prisons in the late Ottoman Empire*, 24.

depending on the social and political environment, this transformation has unique characteristics.

Regarding the change in punitive policies, in her article on the application of death sentence and its discussion by elites in the late Ottoman Empire, Ebru Aykut Türker argues that procedural correctness as a requirement of the principle of legality and dual trial procedure in adherence to state-enacted codes, delimited the imposition of capital punishment. Therefore, the death sentence became infrequent in the Ottoman Empire from the 1840s onwards until the end.[21] By dual trial system she means the Supreme Council of Judicial Ordinances's revision and the *Fetvâhâne*'s approval or corrections in the cases of crime committed against the state and individual rights. By avoiding far-reaching arguments, she explains the sensitivity of government toward executions through analyzing legal cases such as Ömer Lütfi Pasha's execution of bandits and the Sublime Porte's decision to alter the judgement of a court in Yanya from the execution of twenty-three bandits to a hard-labor sentence.[22] By looking at such examples, Türker argues that:

> By the mid-nineteenth century, the death penalty became a delicate issue: a necessary yet generally avoidable evil to be handled out very prudently. All this at a time when the Ottoman subject's right to life and right to fair trial were more enshrined than ever before following the proclamation of the Gülhane and Islahat edicts.[23]

The principle of legality and attention to procedural correctness were valid for the criminal trials in Iraq as well, as discussed in the beginning of this chapter in the comparison of two separate execution cases of bandits. However, these judicial principles did not extinguish the imposition of capital punishment in the Iraqi provinces for the crimes categorized as committed against the state but not to individual rights, especially in the early years of the *Tanzimat.* Unlike *Meclis-i Vâlâ*'s alteration of the court decision from capital punishment to hard labor for bandits as narrated by Ebru Aykut Türker, the brigands in Iraq

21 Türker, "Judicial Reforms, Sharia Law, and the Death Penalty in the Late Ottoman Empire", 10.

22 Ibid., 15.

23 Ibid., 16.

were given death penalty. Comparison of the decisions from Yanya, Mosul and Baghdad as locations where banditry was common in the mid-nineteenth century indicates that the capital punishment continued to be an efficient mean to establish security and order in the provinces of Ottoman Iraq.

When we consider the totality of criminal case records, the death sentence was not predominant in Iraq in compliance with the general acceptance among scholars of Ottoman history regarding the rarity of the death sentence. However, by taking into consideration the severity of the punishment again, even the limited number of cases necessitate more comprehensive evaluation to understand the punitive policy in the case of Iraq. Apart from Ömer Lütfi Pasha's illegal execution of three bandits from Hemavend tribe and the death penalty for Abdullah Kuran and his two friends, we will look at two other instances where capital punishment was approved by the *Meclis-i Vâlâ* for a woman and a *başıbozuk* soldier because of their inappropriate words.

Necla was sentenced to capital punishment by the Council of Mosul in 1853 because of her obscene language toward Prophet which was proved in accordance with the Sharia in the Council by the testimonies of unnamed people.[24] In the document sent by the *Meclis-i Vâlâ* , Necla was defined as *şaki* (bandit) due to her insolence in insulting Prophet Mohammed. The *Meclis-i Vâlâ* approved the death sentence by referring to the decision of the Office of Grand Mufti (*Fetvâhâne)* ordering the infliction of capital punishment without any delay because Necla's repentance wouldn't be acceptable.[25] Unlike other court decisions, there is no reference to the Criminal Code of 1851 to

24 BOA., İ.MVL 269/10322 1 B 1269 (10 April 1853); "*mezbûrenin hâşâ sümme hâşâ sebbü'n-Nebî-i Hazret-i Peygambere cesareti mukaddemce inde'ş-şer' ve'l-meclis sâbit ve mütehakkık olarak ol bâbda edâ-yı şehâdet edenlerin bu kere dahi icrâ-yı tezkiyesiyle mesele-i şer'iyeye tevfîkān tanzim kılınan bir kıt'a i'lâm…*"

25 "*…nefs-i Musul sakinlerinden Necla nâm şakînin ma'âzâllah-i te'âlâ fazîha-i sebbe mücâseret etmiş olduğu …(?) şer' sâbit ve katl-i idâmına hükm-i şerî lâhık olduğu beyân ve inhâ ve cânib-i fetvâhâneden dahi bu surette şakiyye mezbûrenin tevbesi makbûl olmayıp bilâ-te'hîr katli lazım geleceği zuhûr-ı i'lâm mezkûre tahrîr ve imlâ kılınmış olmasıyla keyfîyet hâk-i pây-i hümâyûn hazret-i padişahîden bilâ- istîzân mezbûre Necla'nın fetvâhâne kaydında gösterildiği vechile bilâ-te'hîr katl ve i'lâm olunması bâbında bit kıt'a fermân-ı âli ısdâr ile mahallinde tesyârı lazım geleceği…*"

explain why Necla should be sentenced but the decision to impose capital punishment for Necla was based on Islamic religious law, s*haria.* Although all types of profane statements are considered as improper, insulting to God, prophets, angles and the holy books cause the loss of religion for a Muslim. Islamic jurisprudents depicted such insults as apostasy.[26] According to sharia law, in some cases of the abjuration of religion, criminals could be exempt from the punishment due to their repentance. In the case of crimes that do not violate the rights of men, by showing repentance, the accused person proves that he/she has corrected himself/herself and so the punishment became non-obligatory. However, in the case of Necla, the decision of the F*etvahane* was based on the rule that, repentance can prevent the punishment for apostasy but insulting the Prophet Mohammed is an exception.[27] Therefore, *Fetvahane* did not give an opportunity to Necla to repent but decided to execute her without any delay.

The remarkable point is that although the capital punishment of Necla was based on Islamic law, apostasy consisting in insulting the Prophet Mohammed, there was no reference to either this rule or apostasy in the report of the *Meclis-i Vâlâ*. Rather than describing the profane statements of Necla as apostasy, the Supreme Council perceived her crime in the scope of banditry. The only article regarding the punishment for inappropriate statements in the Criminal Code of 1851 is Article 5, that settled the prison term from one to five years (according to the degree of offense) for troublemakers (*sâî-bil-fesâd*) who incite someone to act against the rules and order of state, and then speak improperly.[28] Because of the absence of any statute for apostates or slanderers in the Criminal Code, the Supreme Council categorized Necla as a bandit like

26 Mehmet Boynukalın, "Sövme" *TDV İslam Ansiklopedisi*, Vol. XXXVII: 397-398.

27 Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (New York: Cambridge University Press 2005), 27.

28 Article 5 of Criminal Code of 1851; *Sâ'î-bil-fesâd olanlar iki nevi sûretten hâli olmayıp birisi kavlen ve diğeri fiilen olacağından mesela, bir adam diğer bir adamı veyahud bir takım adamları Devlet-i Âliyyeye ve kavânin ve nizâmâta mütegayyir harekâta tergîp vadisinde fesâdlı sözler söyleyecek olur ise 1 seneden 5 seneye kadar fesâdının derecesine göre vâz'ı kürek ve prangabent oluna.*

Abdullah Kuran and his friends since the execution of bandits was allowed explicitly by the law.

Similar to Necla, Ahmed among the irregular soldiers in Mosul was given the death penalty by the Council of Mosul in 1847. The reason for the sentence was the same as with Necla, insulting to the Prophet (*sebb-i nebi*) and other kind of disgraceful speech which was not reproduced. Again, it depended on the expressions of anonymous witnesses, whose testimonies were accepted as reliable. The decision taken by the Council was reviewed in the *Meclis-i Vâlâ* and approved by *Fetvâhâne*. Even though Ahmed refused accusations, he was described as bandit (*şakî)* like Necla and *Fetvâhâne* declared that his repentance and retraction was unacceptable too. The report of the *Meclis-i Vâlâ* indicates that Ahmed was summoned and interrogated in the Provincial Council[29], however neither his nor Necla's interrogation reports are available. Therefore, we cannot learn what they said about the Prophet, nor their statements during the trial and the testimonies of people against them. Although these two cases do not give any details regarding the scene of the trial, from the report of the Council of Mosul, we can learn who was available to hear defense of Ahmed and to judge him: the substitute judge (*nâib*), mufti (*müftü*) and ulema of the region.[30] The religious affiliation and the position of these members of court during the trial of Ahmed, as well as the fact that the judgement of these two people was according to the Sharia instead of the Criminal Code, indicate the continuing significance of centuries-long practices of sharia judgement in the reformed judicial system of *Tanzimat* period.

Although Ahmed and Necla did not declare that they had changed their religion, insulting Prophet Mohammed was accepted as a kind of rejection of the main Islamic faith and considered in the scope of *hadd* crime. Therefore, both of them were charged in accordance to one of the most severe punishments for apostates. Apostasy became a political question in the Ottoman Empire during the 1840s with the intervention of foreign actors to protect the lives of converting subjects who reverted to their previous religion, mostly Christianity. An Istanbul Armenian Avakim who had converted to Islam in 1842 and

29 BOA., İ.MVL 100/2155 19 B 1263 (13 July 1847).

30 Ibid.

then reverted to Christianity during his travel in Syria, was executed on 23 August 1843 when he arrived in Istanbul, three years after the announcement of *Gülhane* Edict.[31] As British ambassador at the Sublime Port, Sir Stratford Canning raised his criticism of the execution of Avakim in order to abolish the law settling the execution of apostates. The Ottoman ulema perceived this intervention of an ambassador as an insult to their religiously-based decree. As a solution to this question, Foreign Minister Rıfat Pasha proposed that if an instance of apostasy occur in the future, the case would be dealt at the Porte, and if it occur in the provinces, it would be handled by the provincial governor. Rıfat Pasha promised that in either case the capital punishment would not be inflicted.[32] Ultimately, since it was a religiously binding on political authority according to Sharia rule, Ottoman government intended merely to postpone the execution of apostates rather than change an explicit religious rule.

The tacit regulation regarding the execution of apostates was sent to the provinces in 1844 as a result of the demand of the British embassy.[33] However, since the target was the protection of Christian subjects, it seems that the religious conflicts among the Muslim population of the eastern provinces remained outside of the scope of the regulation. Indeed, insulting the Prophet is to some extent different from the question of apostasy by the non-Muslim subjects of the Ottoman Empire. We do not have any information regarding the religious affiliations of Necla and Ahmed. However, it appears that they were accepted as members of a Muslim community, but could possibly be non-believers, Yezidi or might have embraced creeds of a marginal group. In this sense, the execution of Ahmed and Necla was related to a communal aspect.[34] A Muslim who becomes an apostate does not only reject the religion

31 Selim Deringil, *Conversion and Apostasy in the Late Ottoman Empire* (New York: Cambridge University Press, 2012), 69.

32 Ibid., 70-71.

33 Ibid., 74.

34 Besides the rule of Islamic law regarding sebb-i Nebi, cases of Necla and Ahmed might cause a social reaction among people since Iraq was a region where the religious orders such as Naqshibandiyya and Khalidiyya, and the religious movements were prevalent. For the rise of religious order in Iraq in the nineteenth century see Butrus Abu-Manneh, "Salafiyya and the

itself but disrupts the order on which a Muslim community depends.[35] Also, according to Hanafi school apostates are executed more so than their individual conversion from one religion to another or preferring whatever religion they believe, it was the perceived damage to the social and moral order of a community incurred by their insulting to Prophet.

For that matter, imperial judicial administration expressed the decision to execute Ahmed according to the *hadd* crimes since the main purpose is the deterrence of others from acts that damage to society and violate public interest. Therefore, the crime of apostasy was accepted by Hanafite law school as the violation of a claim of God, which cannot be waived by men.[36] However in his study on apostasy and conversion in the Ottoman Empire, Selim Deringil argues that the death penalty was not widely imposed and was seen as a last resort. Deringil stated that the punishment was less severe for female apostates, who were beaten and imprisoned but rarely inflicted to capital punishment.[37] The reason for the rarity of punishment for the women was that according to Hanafi law school an apostate was perceived as potential belligerent against an Islamic state but since women cannot be combatant, they should be imprisoned only.[38] However, as a woman Necla was charged to death sentence in Mosul which indicates the severity of penal policy against transgressors.

However, unacceptability of the repentance in the case of profanity was not an undisputed issue among the Hanafi scholars. For instance, as a Hanafi scholar from Damascus (1784-1836) Ibn Âbidîn argued that the Islamic law schools accepted the unacceptability of repentance based on the opinions of Maliki Kâdı İyâz and Ibn Taymiyyah. Distinctively, he argues that the penitence of slanderer could be acceptable and one of the most important disciples of Abu Hanifa, Abu Yusuf expressed the same opinion in his book *Kitab al-*

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rise of the Khalidiyya in Baghdad in Early Nineteenth Century", *Die Welt des Islams*, Vol. 43, No. 3, 2003.

35 Selahattin Özçelik, "Osmanlı İç Hukukunda Zorunlu bir Tehir (Mürted Maddesi)" *OTAM II* (2000), 351.

36 Peters, *Crime and Punishment in Islamic Law*, 53.

37 Deringil, *Conversion and Apostasy,* 21.

38 Mehmet A. Aydın, *Türk Hukuk Tarihi* (İstanbul: Hars Yayıncılık, 2005), 208.

Kharaj as well as other references from the books of early Islamic period.[39] Therefore, the application of the capital punishment in such cases was to some extent a preference of Ottoman judicial authority, since there were alternative opinions and Hanefi scholars who criticize this preference in the nineteenth century. This preference indicates the sensitivity of the subject and severe measures taken by the Ottoman state toward the issue. Also, in the context of Iraq, taking into consideration the Ottoman central government's preoccupation with making Sunni Islam predominant, it appears that the logic behind the executions of Necla and Ahmed could be the protection of sacred values of Islam and the *madhab* of the state.

Even though the punishment of apostasy or insulting the Prophet had not been prescribed in the Criminal Code, the provincial council in Mosul proposed execution as a punishment applicable in cases concerning violations of the rights of God. These trials show the flexibility of the court in applying sharia law to the cases where the Code was silent, if the claim of men was not a consideration. When it was a consideration, the provincial council of Baghdad would appeal to Istanbul if they could not find an article in the Criminal Code corresponding to the type of crime committed.[40] In this sense, the execution of Necla and Ahmed indicates the flexible and pragmatic aspects of law enforcement in Iraq. While adherence to the Criminal Code carried utmost importance in the trial of criminal cases, an execution based on the sharia could

39 İbn Âbidîn, *Hanefîlerde Mezhep Usûlü*, trans. Şenol Sayan (İstanbul, Klasik, 2016), 110.

40 The document under the code of BOA., A.MKT.MVL 110/20 22 S 1276 (20 September 1859) exhibits the attitude of provincial council in Baghdad when they could not extract a proper punishment from the Criminal Code in criminal cases. The Council of Baghdad appealed to the Supreme Council in 1859 for a complicated murder case of a baby who found alive in a river by a group of women. However, baby died in a couple of days as a consequence of cruelty he/she was exposed. It was understood that baby was a child of a concubine and was tried to be bury alive by the midwife since she perceived baby as a bastard. However she had to left baby on the river due to arrival of cavalcade. Since she did not kill baby but left him/her to his/her destiny, the Council of Baghdad couldn't find an appropriate punishment from the Criminal Code and asked the *Meclis-i Vâlâ* to decide what they should do. Supreme Council sentenced midwife for five years imprisonment by interpreting article 78 of the Criminal Code, since she had intention to kill baby. But exempted her from paying blood money since she did not wound.

be imposed. It shows that the reformed judicial system in the nineteenth century was not incompatible to the sharia court praxis. Even if it was not stated in the codified law, the reformed courts did not pardon the *hadd* crimes and applied the punishments based on the sharia law.

In the cases of Necla and Ahmed, the local council of Mosul performed the task of Sharia court under the supervision of *Meclis-i Vâlâ* and *Fetvahane*. This coexistence could be seen as contradictory or as a duality however it can also be interpreted as legal pluralism[41]. Since the decision of execution was taken with the approval of the central judicial authority, the praxis of local court in Mosul cannot be conceived as contrary to the *Tanzimat* judicial principles but indicates the plurality apparent in the judicial bodies of the period. Also, in the context of Iraqi provinces it is possible to argue that the possibility of death sentence for the *hadd* crimes did not decrease due to the application of both sharia and the Criminal Code at the same time.

In addition to the examples given by Ebru Aykut Türker in which the decisions of capital punishment were changed to hard labor, in his study on crime and criminals in the Western Anatolian provinces between 1840-1860s, Omri Paz stated that he found only one case in which the Supreme Council requested capital punishment for a convicted criminal, under the pretext of *siyaseten*.[42] However, in the very same period eight people were given death sentence in Mosul and Baghdad which show the distinctive character of the penal policy applied in these provinces.[43] Contrary to the argument regarding the rarity of the death sentences in the nineteenth century, these cases indicate that the provincial and central judicial administration did not hesitate to impose capital punishment in Iraq when convicts had potential to damage social and moral order of society.

41 I borrowed this concept from Avi Rubin. For the discussion of legal pluralism in the Nizamiye and Sharia courts see Rubin, *Ottoman Nizamiye Courts*, especially the chapter 2 "The Ottoman Judicial Mall: A Legally Pluralistic Perspective".

42 Paz, Crime and Criminals, 149.

43 I included three people who were executed by Ömer Lutfi Pasha in Baghdad since not the punishment but Pasha's violation of court procedures was problematized by the central government.

§ 4.3 The Punishment of Incarceration and Fines in the Private Prosecutions

Even though the right to inflict capital punishment was preserved and continued by the Ottoman government for *hadd* crimes in Iraq, depending on both the Criminal Code and Sharia law, most of the court trials regarding homicide and wounding cases resulted with the imprisonment of the convicted people. According to Islamic law, the heirs of the victim have the right to choose the punishment for the murderer or to forgive him/her. The Criminal Code preserved the right for plaintiff to demand retaliation (*kısâs*) or financial compensation for (*diyet*). However, in the hierarchical review system of *Tanzimat* court structure, the central judicial administration might interfere to the decision of heirs for the cases of capital punishment on the behalf of the murderer.

Before the *Tanzimat* period, the state had no legal right to interfere in the choice of the heirs to pardon the convicted person, but in practice even when the plaintiff chose to pardon, the state used to send criminals to the galleys or execute them. However, imprisonment for long periods of time was very rare since incarceration had not been institutionalized yet. Even in the reformed criminal justice system, for the premeditated murder cases, the court gave plaintiff the right to decide on whether the punishment would be the death penalty or blood money. Rudolph Peters describes the principle of private prosecution in Sharia law as:

> The most salient aspect of the Islamic law of homicide and bodily harm is the principle of private prosecution. The claims of the victim or of his next of kin are regarded as claims of men and not as claims of God. This means that the plaintiff is the *dominus litis* and that the prosecution, the continuation of the trial and the execution of the sentence are conditional upon his will. Prior to the execution of the sentence, the prosecutors may pardon the defendant or accept a financial settlement. The judge con not interfere and acts merely as an arbiter who supervises the procedure, assesses the admissibility of evidence, and

> finally pronounces judgement on the basis of the plaintiff's claim and the evidence produced by him.[44]

In the late nineteenth century Ottoman case, besides supervising the procedure, the council (instead of the judge) might tacitly interfere with the decision of plaintiff, in line with Tanzimat penal policy for the cases of death sentence. Distinct from the previous practices of Sharia courts, in the hierarchical review system the function of the Supreme Council to review the decision of plaintiff might have resulted with alteration on the punishment. Unlike the imposition of death sentence for hadd crimes that threatened public order and the well-being of community in its all sense, in the case of private prosecutions, the central judicial administration preferred to avoid inflicting capital punishment. The Supreme Council proposed two punitive options as a response to the question sent by the provincial councils of Iraq for the homicide cases. After the review over the reports and interrogation minutes that give the details of the trial sessions, if it is not stated that the plaintiff pardoned the convicted person and demanded blood money (*diyet*), they have given permission for retaliation according to the law. In these documents, the Supreme Council stated that if the heirs do not pardon the murderer from the death sentence, the convicted person would be executed before the eyes of the plaintiff. However, if the heirs do pardon or come to an agreement (*sulh olurlar ise*), the retribution became invalid and the Supreme Council would have to be informed by the provincial council in order to realize the requirements of Sharia (*icâb-ı şer'î*) and to inflict punishment in accordance with the criminal law (*îfâ-yı mücâzât-ı kānûniy*e).

This raises a question: what happened if the plaintiff insisted on demanding retaliation and refuse to settle an agreement with the murderer? Although it was common practice for Ottoman sharia courts in the previous centuries to act as mediators between claimant and defendant in order to reach a conciliation [45] the examples from Iraq indicates that central judicial administration might attempt to raise procedural questions for the retrial when heir

44 Peters, *Crime and Punishment in Islamic Law*, 39.

45 Boğaç A. Ergene, *Local Court, Provincial Society and Justice in the Ottoman Empire* (Leiden: Brill, 2003), 184.

strongly demanded retribution. The murder case of Celut who was from the Aziziye clan of Shammar tribe is an example of the *Meclis-i Vâlâ* 's critical attitude toward the capital punishment in private prosecutions. According to interrogation reports from the Grand Council of the Baghdad Province from the year of 1864, the uncle of the victim, Abdullah, accused a regular soldier, Mehmed from the Shahrizor tribe. Abdullah argued that he had sent his nephew to another tribe to obtain his money and when Celut was leaving, he was directed to guide a man on the road – Mehmed - who was asking the way to reach the Aziziye tribe. Therefore, Celut and Mehmed began to travel together on horseback. Abdullah accused Mehmed of having shot Celut in the back and having stolen his horse, gun and clothes. He asserted that Mehmed had confessed his crime before they had come to the Grand Council in Baghdad in 1864.

Mehmed had been arrested by gendarmeries on the road, inside the Aziziye district, having become suspicious upon seeing Mehmed with two horses. According to Mehmed's statement in the council, the gendarmeries brought him to the district governor of Aziziye who interrogated Mehmed to learn why he had two horses. Mehmed could not convince the governor that he had found the second horse unattended in the desert. The interrogation in the district governorship of Aziziye took three days but when Mehmed came into the Council of Baghdad, he asserted that he did not know what he had said in the district due to the influence of torture. Mehmed refused all of Abdullah's accusations, including that he had ever travelled with Celut, and falsified his previous confession to the district governor of Aziziye. Hereupon, a tribal sheikh who had been in the district governorship when Mehmed was brought there, the District Governor Fethullah, and the clerk (*kâtib*) who had heard Mehmed were all interrogated in the Grand Council of Baghdad regarding Mehmed's confession. They all corroborated that Mehmed had accepted and verbalized that he had murdered Celut with a gun on the victim's back and stole his properties, which then were verified to be Celut's by his uncle Abdullah. The judicial member of the Baghdad Council addressed the district governor by name: "Ey Fethullah how did you decide that the murderer is

Mehmed, whom you dispatched to me recently? "[46] After receiving Fethullah's answer, he was then questioned on the issue of torture, but he as well as other two witnesses denied the accusation that any torture had taken place.[47] Besides the retrial of the case, the Council of Baghdad as the highest court in the Iraq tried to verify whether the interrogation procedure had been followed correctly.

After narrating the arrest and interrogation process of Mehmed, *Katib* stated that Mehmed was imprisoned since the district governor was unconvinced by his justification. After the news of Celut's murder reached the governorship and one of the horses seen beside Mehmed was recognized by the victim's uncle, Mehmed was interrogated once again and this time he confessed his guilt. After the confession, the gabardine (*abâ*) of the victim (which had been taken by Mehmed) was examined and a bullet mark was recognized. Also, according to the testimony of the convicted Mehmed, gendarmerie

46 BOA., İ.MVL 555/24933 20 S 1283 (4 July 1866). Although we do not know who directed the questions in the Council of Baghdad, the addressing of questioner to the district governor by merely his name indicates that the questioner was higher in the ranking than the governor. Therefore it can be argued that questioner couldn't be an ordinary interrogator but should be a high ranking official, most probably a judge or a substitute judge of the Grand Council. In this regard, this dialog gave us clues regarding to the composition of provincial court members in a trial session.

47 Criminal cases occurred in the countryside of the Iraqi cities were send to the provincial center after the initial interrogation in the districts, therefore in most of the cases accused persons were interrogated two times. Although they might accept the offense in the first instance, they argue that they had to confess because of torture. Since district governors and their officials denied the accusations of torture in the provincial centers, the convicted persons lacked any other chance to prove their claim of torture. Except the governors' statements there is no proof regarding to torture issues due to the fact that provincial councils were contented with the interrogating to officials only. Not only Mehmed but also Kazım, who was from the Harnabad district of Baghdad was sued by his wife with the accusation of murdering his 8 years old stepchild Hamis and sentenced to 15 years of imprisonment together with 10.000 dirham blood money to mother Fatıma in 1861 as a result of several testimonies against him. Kazım asserted that he confessed in the district due to the birch upon him but he couldn't prove his claim in Baghdad. The Grand Council of Baghdad interrogated the District Governor of Horasan Süleyman Bey, but he also refused accusation of torture similar to other governors. See the murder case of Hamis: BOA., İ.MVL 457/20486 11 Ca 1278 (14 December 1861).

forces were sent to the location where Mehmed shot Celut and his body was brought to the district.[48] From the summary part under the name of *fezleke* at the end of the interrogation report, we learn that the re-interrogation of Mehmed was done in the provincial district council (*Meclis-i Livâ*) of Baghdad while he was already imprisoned. Therefore, we can identify five steps in the procedures of a criminal case in Iraq in the 1860s: the arrest of the suspect by the patrolling gendarmerie forces, first interrogation and precautionary imprisonment in the district governorship, second interrogation in the Council of Provincial District (*Meclis-i Livâ*), followed by the interrogation of all parties in the grand Council of Baghdad (*Eyâlet-i Bağdad Meclis-i Kebîri)* and as a last resort, the decision of the Supreme Council in Istanbul (*Meclis-i Vâlâ)*.

The Governor of Baghdad Mehmed Namık Pasha wrote a letter to Istanbul on 1 February 1865 to demand the decision of the Sultan regarding Mehmed. Although the document containing the answer of *Meclis-i Vâlâ* does not exist, the report written by the Grand Council of Baghdad on 5 February 1866, almost one year after the Namık Pasha's letter, indicates that the *Meclis-i Vâlâ* wrote two reports: first on 18 November 1865, and then on 22 July 1865. These demanded the retrial of this murder case since the Supreme Council had found the procedure improper to the sharia. However, we cannot say which aspect of the court procedure was perceived to contradict the sharia since neither of these two reports is available. The Council of Baghdad sent another report on 5 February 1866 in accordance with the demand of the Supreme Council which stated that the trial of Mehmed had been repeated[49] and the records of this new session had been sent to the imperial center. The documents reached the *Meclis-i Vâlâ* on 8 March 1866, according to the last report written by the Council regarding to this case. This time, the central judicial administration found Mehmed's second trial to be in accordance with the sharia, but yet again sent the murder case back with the demand of a third trial. The *Meclis-i Vâlâ* accepted the legality of witnesses and their testimonies regarding Mehmed's confession that he had murdered Celut, in a manner that requires retaliation. However, relying on the report of Office of the Grand

48 BOA., İ.MVL 555/24933 20 S 1283 (4 July 1866).

49 "…*mezbûr Mehmedin bi't-tekrar mürâfa'â-i şer'iyeleri icrâ olunmuş ve bu bâbda Bağdad hükümet-i şer'iyesinden verilen i'lâm-ı şer'i aynen ve leffen takdîm kılınmış…*"

Mufti, the Council proposed that the case should be reheard in Baghdad due to the fact that the judge (*kadı*) who tried this legal case had retired from his office. Since he was the one who had approved the demand of retaliation and had his signature on this decision, the central judicial court proposed the change in the judge's status as a reason to invalidate the decree even though there was no mistake in the trial.[50] For the third trial of the case, the *Meclis-i Vâlâ* did not request the court records but left the decision to the heir of the victim. If Celut's mother *Şeyale Hatun* (represented by his uncle Abdullah) would not pardon the murderer, the Council allowed the execution of Mehmed in the presence of heir, but if they would accept or reached an agreement, Mehmed would be charged in accordance to the Criminal law.

This legal case indicates that even though the Sharia and criminal law gave right to demand retaliation in private prosecutions, central judicial administration was hesitant to approve executions and chose to prevent this outcome by laying extra stress on the evaluation of the procedure. The order for a retrial for the third time by giving the replacement of judge as the reason is noteworthy, since the Supreme Council had approved the second trial in terms of legal procedure. It is worth asking whether the change of judge could have invalidated a legal decision which had already been accepted as appropriate by a higher court. Also, in its last report, the Supreme Council's proposition to Celut's heir to pardon Mehmed indicates that the heir of Celut had remained persistent on retaliation for the murder in both of the previous trials. Therefore, it seems that *Meclis-i Vâlâ* was purposefully trying to render the legal case abortive one more time for the reconsideration, even when there was no procedural incorrectness. Ebru Aykut Türker narrates a similar murder case in which the Supreme Council sent the case back to interrogate the heir again

50 "*…dâire-i muhâkematta mutâla'a olunduğu meâllerine nazaran merkûm Mehmed mezbûr celûtu mûcib-i kısâs olan katl ile katl eylediğini tayi'an ikrar etmiş olduğu şâhidan şehâdetleriyle sâbit ve kısâsına hükm-i şer'î lâhık olmuş ise de cânib-i fetvâhâneden zuhr-ı i'lâm-ı mezkûre tahrîr ve işârât kılındığı vechile bu mürâfa'â-yı icrâ eden kadının kazâ-yı mezkûrdan infisâli vûkû' bulduğuna ve emr-i kısâsda imzâ-yı kudât-ı kazâdan bulunduğuna binâen husûs-ı mezkûrun tekrar muhâkemesi icrâ ve i'âde-i şuhûd-ı huzurda fasl-ı hükm-i şer'i lâhık olduktan sonra muhâkeme-i ahıra için hükm-i şer'iye hâvî olacak i'lâmın takdîmine hâcet messetmeyeceğinden…*"

to make sure that she was persistent on the retaliation or not, since "taking life is a matter which deserves serious attention".[51] In the case of Celut and Mehmed, the Supreme Council did not express such an intention explicitly but preferred to repeat the trial more than twice which would provide the heirs a possibility to reconsider their decision of retribution.

In the cases of private prosecutions, the following statement was recurrent in many reports by the Supreme Council, that the "murderer would be executed unless the heir pardons or makes an amicable agreement". This statement was added at the end of each report written by the *Meclis-i Vâlâ* that gives heir the right to decide on the punishment. Although the decision taken by the plaintiff mostly are unavailable among the archival documents, there are some exceptions which shows that directing the above-mentioned statement to heirs as a question might have resulted with the preference of financial compensation (*diyet*) instead of retaliation (*kısas*). The decision of the heirs of Şume, who was killed en route in 15 August 1860 in Mosul by Selim among a Yezidi group, is an example on how plaintiff might change their decision. According to the report sent by the Council of the Mosul to the Supreme Council, the heir of Şume demanded retaliation on 11 December 1860 [52] for the murder of their father by Selim, who had stabbed Şume several times. Similar to other murder cases, after detecting the offense of Selim, the Supreme Council delivered the right to decide on the punishment to the heirs on 18 February 1861, 6 months after their initial appeal. The central judicial court's report was read to the plaintiff at the Council of Mosul in June of the same year and they declared that they were pardoning Selim from the death penalty but agreed to take blood money.[53] The decision of pardon was sent to Istanbul and the Council approved the amount of *diyet* together with 15 years of penal servitude

51 Türker, "Judicial Reforms, Sharia Law, and the Death Penalty", 16.

52 BOA., İ.MVL 444/19754 14 Ş 1277 (23 February 1861) According to the report of the Council of Mosul the plaintiff came to the Council with a fetva which allowed the execution of Selim and defined the execution as the fair decision according to Sharia (hükm-i adil-i şeri'). Bringing a fetva to the Council was not a frequent practice in Baghdad during the Tanzimat period. Before appealing to the Council, heirs might went on to the kadı court or they could get a fetva from a *mufti* to strengthen their demand in the provincial council which was an old practice of Ottoman people before they applied to the kadı court.

53 BOA., İ.MVL 451/20161 5 S 1278 (12 August 1861).

in Baghdad after he was displayed to the community in accordance to the Article 172 of the Criminal Code of 1858 on 5 August 1861.

This case indicates that although a plaintiff might originally demand the death penalty for the murderer, in the time between the correspondences of the Supreme and the Provincial Council, they were prone to changing their mind and forgiving the convicted. The case of Şume is a rare example in that all the documents exchanged between the courts are available today. In the provinces of Iraq, it is not possible to follow such a procedure because most of the criminal cases came to an end with the Supreme Council's report that directed a question to the plaintiff regarding the punishment. Therefore, in most cases, the decision of the heirs regarding the type of punishment remains uncertain for historians. However, taking into consideration the severity of the death sentence and Şume's heirs' decision to pardon Selim even though they had been demanding retaliation in the first instance, one might argue that even in other murder cases as well, heirs might have pardoned the convicted criminals during the procedural correspondence.[54] The one year that elapsed between Şume's heirs' appeal to the court in Mosul and the first report of the Supreme Council which approved the offense and asked the plaintiff to choose retaliation or an agreement, was a long period of time easily sufficient for their reconsideration. In this sense, the requirement of the review system whereby the provincial government had to wait for the approval from the central administration seems to have decreased the probability of the execution of the convicted criminals. Therefore, besides the Supreme Council's direct influence in the cases where demands for retaliation were being made (as in the case of Celut), the hierarchical review system itself influenced the application of the death penalty by extending the time for the decision.

54 Even though the records are not detailed as in the murder case of Şume, there are records of the trials in which the heirs reach agreements with the alleged criminals. As a result they were inflicted both imprisonment and the blood money compensation. See: BOA., A.MKT 196/1 16 C 1265 (9 May 1849); BOA., A.MKT.MVL 101/78 25 S 1275 (4 October 1858); BOA. A.MKT.MVL 117/57 6 Z 1276 (28 March 1860); BOA., A.MKT.MVL 102/10 1 Ra 1275 (9 October 1858).

§ 4.4 Diversification of Tanzimat Penal Policy from the Sharia Judicial Practices

As components of a reformed criminal justice system, criminal codes, criminal investigations by the police or regular/irregular soldiers, the interrogation process and review system by the Supreme Council all consolidated the functioning of justice by making it more punitive. Correspondence between central and provincial courts and *Ayniyat* registers concerning Iraq indicates that prosecution, adjudication and retribution became much more effective and rigid in Iraq, similar to other parts of the Empire. Besides the adherence to state-produced normative criminal law, the centuries-old Islamic criminal law was also applied in the sentencing of criminal perpetrators. Since maintaining public order was the cornerstone of expanding authority in a region, the judicial administration preferred Islamic law in some cases where Criminal Code remained silent and vice versa when the plaintiff failed to fulfill the strict evidential requirements of Islamic law. Therefore punishments based on multiple sources of legal practices made judicial administration more vigorous and retributive in Iraq.

As an expert on Ottoman prisons in the late Ottoman Empire, Kent Schull argues that Ottoman reformers did not intend to make Islamic criminal law more punitive but when the centralized state apparatus attempted to adopt codified and standardized criminal code, the application of punishment turned out to be severe.[55] Since the rigidity in punishment broadened social control and strengthened public order which both consolidate administrative power, it is possible to argue that provincial administration of Iraq took advantage of the application of Tanzimat penal policy to "pacify" the region. Examples regarding the retrials of criminal cases in which guilt could not be proven according to Sharia criminal procedure, indicates how provincial governance in Iraq utilized the *nizâmiye* rule in order to charge the accused people.

The governor of Baghdad, Ahmet Tevfik Pasha, sent a letter to the central administration in 1861 in order to re-imprison three criminal perpetrators

55 Schull, *Prisons in the late Ottoman Empire*, 35.

who had been released due to lack of evidence. Celib, Sultan and Kuduri, infantrymen of the Army of Iraq and Hejaz, had been charged with the murderer of a woman named Tamaşo in the Kazımiye district of Baghdad. While they were at the house of their friend Hamid with Tamaşo Hatun for fun, Hamid's father arrived home and kicked all of them except his son out. In a garden near the house, Celib and Tamaşo went away from the others for fornication, and in their interrogations Sultan and Kuduri stated that they had heard a scream and what sounded like someone being beaten. Upon their interrogation, all of them were released with the order of *Fetvahane* since there was no reliable evidence to punish them. The testimonies of Sultan and Kuduri were insufficient because they lacked eye-witnesses for the murder of Tamaşo Hatun and had just heard uncertain sounds. However, upon the demand of Ahmet Tevfik Pasha they were re-imprisoned even it was not possible to charge them according to the law. Based on unsubstantiated knowledge that Celib murdered Tamaşo, the Council ordered that the required investigations be conducted in order to find evidence that would enable the judicial authority to punish Celib in accordance with the procedure.[56]

Clearly, even if provincial judicial authority was unable to fulfill the evidential requirements of Sharia justice, the decision from the Ministry of Grand Mufti could be subjected to reconsideration by referring to *nizâmî* order of investigation. The ultimate decision regarding the punishment of Celib is unknown, however, another legal case indicates that a convicted person could be punished even if the witnessing requirement is found to be void in terms of Sharia law. The heir of a Jewish saloon keeper, Esla from Baghdad, accused a man named Hamis of having killed Esla with a knife in a fight that had occurred between them in 1858. Hamis escaped from the tavern but was

56 BOA., AMK.MVL 125/87 28 Ş 1277 (11 March 1861) "*…merkûmların hakkında şer'an bir şey lazım gelmediği cihetle mahallince tahliye olunmuş ise de bunların tekrar habs olunmaları o tarafa yazılmış olduğu serasker müşârun-ileyh hazretlerinin mezkûr tezkere meâllerinden anlaşılmış olup siyâk-ı iş'âra göre mezbûreyi merkûm celibin katl eylediği maznûn ise de bu bâbda bilâ-beyyine ve ikrâr şer'an bir şey lazım gelmediği şahs-ı merkûmanın yalnız bu ifâdeleriyle merkûm hakkında hükm-i kānûnun icrâsı dahi kābil olmayacağından nizâmen lazım gelen her türlü tahkîkāt ve tedfikatın icrâ ve ifâsıyla medâr-ı hükm olur bir emâre ve serrişte bulunabildiği halde keyfîyetin bimazbata ve îzâhen ve sarîhan bu tarafa bildirilmesi…*"

seized by the army units of *Asâkir-i Nizâmiye* in a mansion where he hid. There are only two eyewitnesses of the murder case which is adequate for the Sharia rule in principle. However, since both witnesses Mehmed and Ahmed were drinking alcohol in the tavern of the victim, their eyewitness accounts were declared invalid. The record sent to the Governor of Baghdad stated that the murder case could not be tried in accordance to Sharia but the convicted murderer was chained for 5 years based on the punishment defined in the Criminal Code of 1851 since the crime had been committed before the announcement of the Code in 1858.[57] We can find multiple other cases where the central judicial administration sentenced murderers to imprisonment even though testimonies against them were considered invalid according to the Sharia law.

57 BOA., AMKT.MVL 109/95 12 S 1276 (10 September 1859).

Table 4.1 Title Criminal Prosecutions[58]

The criminal case	The offensive weapon	*Şer'i* prosecution	The court outcome
Habib from Baghdad confessed that he killed his sister Feriha due to her inappropriate behaviors	Dagger	No prosecution since parents did not complain about their son	Habib was sentenced to hard labor for 5 years according to Criminal Code of 1851
Ali murdered İlyas who was among the Yezidi population of Mosul	Dagger	Testimonies were not accepted since witnesses could not name İlyas's father	Ali was convicted to 7 years of hard labor since he was a habitual criminal
Cellab Davud murdered a Jewish man in Baghdad	Gun	No heir to file a lawsuit	Davud was imprisoned in Baghdad
Şüreyde killed Halef in Baghdad	Not stated	Şer'i case interrupted because plaintiff gave up from the retaliation and pardoned Şüreyde during the execution	She was convicted to 15 years hard labor based on the article 172 of the 1858 Criminal Code.

Looking at the information regarding the legal cases in Table 1, it is worth noting that when compared to the requirements of the rules of Sharia, the reformed judicial system was less stringent on the principle of adducing proof in the criminal prosecutions as soon as judicial authority became convinced on the certainty of the culpability. The witnesses' imperfect knowledge about the victims' identity, the heirs' decision to pardon, and even the lack of an allegation did not prevent the judicial authorities from charging the convicted persons. Similar to the criminal prosecutions that were indicated by Milen Petrov from the vilayet of Danube (created as a pilot province in 1864)[59], the courts in Iraq punished criminals "more vigorously" comparing to the Sharia

58 Respectively, the sources of the legal cases summarized in the table are: BOA., A.MKT. MVL 110/24 22 S 1276 (20 September 1859); BOA., A.MKT.MVL 107/32 7 L 1275 (10 May 1859); BOA., A.MKT 146 26 7 L 1264 (6 September 1848); BOA., A.MKT.MVL 123/57 10 C 1277 (24 December 1860).

59 Petrov, "Everday Forms of Compliance", 737-740.

court procedures. These cases indicate that even before the regulations of 1864 which was accepted as the beginning of Nizamiye courts, the local councils in the provinces of Iraq were implementing the Nizamiye court practices regarding to trial and the punishment.

Besides the lack of eyewitnesses and the drinkers' void testimonies in two of the murder cases, the examples in the table above indicate the range of issues on which prosecution according to sharia law and Tanzimat penal policies diverged in practice. Convicted persons, who probably would not be sentenced in a *kadı* court due to the legal procedures of sharia law, were prosecuted and charged in the reformed criminal courts of Iraq. The increase in the rate of imprisonment in the region does not mean that people in the Iraqi provinces were committing more crime comparing to the previous periods. But the Ottoman government's policy toward the crime and criminals evolved into a more stringent and punitive form in a period when central government aimed to consolidate its authority in the distant provinces.

§ 4.5 The Crime-Detection Function of *Zaptiye* Forces in Iraq

The history of Ottoman Zaptiye forces can be traced back to the centralization efforts of the Ottoman government in the provinces. After the abolishment of Janissary forces in 1826 by Sultan Mahmud II, there was a vacuum in the policing of the cities since the Janissaries had been performing these tasks. A civilian police organization (*Polis Teşkilâtı*) was created in the Ottoman Empire in 1845 and the Directorate of Police and Gendarmerie *(Zaptiye Müşiriyeti*) that brought all police forces (both civil and paramilitary) under a single command was formed in 1846. Composed of mostly irregular forces, the *Asâkir-i Zaptiye* was first created in 1840. The foremost function of the *zaptiye* forces was to strengthen the provincial administration by collecting taxes and recruiting male subjects as soldiers under the command of the provincial governor. The crime-detecting role of the gendarmerie forces is mentioned less often. However, since the centralization of the provinces was dependent on

the pacification of the rural regions, gendarmerie forces performed crime-fighting and law enforcement aspects as well.[60]

Evaluating the functioning of Ottoman *zaptiye* forces from the 1840s to the 1860s in the context of the reformed justice system, Omri Paz argues that since the penal system evolved and the criminal court system developed, the *zaptiye* forces had no choice but to develop crime-detecting capabilities.[61] Although the histories of Ottoman police forces and gendarmerie are beyond the scope of this thesis[62], the functioning of security forces in tandem with the criminal courts of Iraqi provinces requires a closer look in order to see the effort to control the region by maintaining law and order.

One of the prominent scholars of the social history of gendarmes in Europe, Clive Emsley compares the role of soldiers and gendarmes by arguing that although soldiers were important in the initial period of expansion and unification of the states, gendarmerie forces could provide permanent manifestations of state power since they were empowered with use of physical violence in day-to-day dealings with people. In this sense, gendarmerie forces manifested state power as well as the threat of violence.[63] Also, they had the important function of enforcing new forms of discipline within society and expanding the bureaucratic surveillance capacity of the state.[64] The criminal court records from Iraq which were covered in the beginning of this chapter and others which will be elaborated in the following pages, all verify Clive

60 Omri Paz, "The Policeman and State Policy: Police Accountability, Civilian Entitlements, and Ottoman Modernism 1840-1860s" in *Society, Law and Culture in the Middle East:"Modernities" in the Making* ed. Dror Ze'evi and ehud R. Toledano (Warsaw and Berlin: De Gruyter Open, 2015), 104-120.

61 Paz, *Crime, Criminals and the Ottoman State*, 197.

62 For the history of Ottoman police units in Istanbul during the reign of Abdulhamid II see Noemi Levy Aksu, *Osmanlı İstanbul'unda Asayiş 1879-1909* (İstanbul: İletişim, 2017). For the countryside of the empire Nadir Özbek's article on Ottoman gendermerie indicates their functioning in the everyday practices for the same period "Policing the Countryside: Gendarmes of the Late 19th Century Ottoman Empire" *IJMES* 40 (2008):47-67.

63 Clive Emsley, *Gendarmes and the State in Nineteenth Century Europe* (New York: Oxford University Press, 1999), 7.

64 Ibid., 8.

Emsley's argument regarding the intermingling of state power and violence in the everyday life in Ottoman Iraq.

The Zaptiye forces operating in the provinces of Iraq consisted of both members of the army and irregulars who were perceived as empty-headed (*başıbozuk*) and corrupt. Even in the army of Iraq, irregulars were recruited as soldiers as a practical solution to the local people's resistance to conscription. Since the Ottoman conscription system for the *Nizâmiye* army was based on the drawing of lots (*kur'a*) among the eligible on the basis of sex, health and age[65], the population census was a requirement which was not welcomed by the tribal and rural population of Iraq. Therefore, the recruitment of *başıbozuks* was seen as a more practical and faster way to establish a new army due to the difficulties faced in completing the population census and implementing the practice of *kur'a*.[66] These *başıbozuk* soldiers were responsible from the policing of the places where they located. After the organization of the Army of Iraq and Hejaz, the matter of the *başıbozuk* groups in Iraq was discussed among the bureaucrats and their abolishment was proposed. However, the Sublime Port refused this proposition since it was well aware that these irregular forces had crucial function in the establishment of order and in the realization of administrative tasks. Also, central government found it unlawful to give additional responsibilities to regular soldiers rather than their official tasks which were; being present in the police stations, patrolling in the streets, fighting against the brigands and other trouble-making groups, and punishing people who resisted conscription and tax collection.[67]

In his doctoral dissertation on the Army of Iraq, Fatih Akyüz argues that the army itself was in the form of a gendarmerie force.[68] This is corroborated by the officially stated tasks of the regular soldiers. In the court records of Iraq as well, members of the army appear frequently as filling in the role of policing for the crime-detection procedure of legal prosecutions. The Army of Iraq, as

65 Eric Jan Zürcher, "The Ottoman Conscription System in Theory and Practice" *International Review of Social History* 43, no.3 (1998): 440.

66 Fatih Akyüz, "Osmanlı Ordusunun Modernizasyonu: Irak ve Hicaz Ordusu Örneği (1848-1876)" (Ph.D diss., Marmara University, 2015), 105.

67 Ibid., 40.

68 Ibid., 233.

the sixth army in the Ottoman Empire, was organized not as an additional unit for battles with "foreign" opponents but rather for pacifying the tribal population in the region by implementing Tanzimat reforms. Thus, in addition to irregulars in the *Zaptiye* forces, members of the Army of Iraq also performed the crime-prevention and crime-detection function in collaboration with the provincial judicial administration. As the effective functioning of the *Zaptiye* was a necessary component of the reformed criminal courts, the proper functioning of the criminal justice system in turn depended on the crime-detecting capabilities of the gendarmeries. However, despite their vital contributions, the court records indicated that the very existence of these internal security forces was another source of the trouble and violence in the region.

The murder issue in Ninova district (discussed earlier) is reflective of the dual role of the irregular forces. Ebu Nişan Mustafa, who was entrusted as a spy to search for the issue and was send first to Kirkuk and then to Cizre, is an example of the crime-detection function by expediting the unveiling of a homicide case.[69] On the other hand, in the same murder case, Ömer Çavuş (one of the death-watch) was taken into custody when he was holding office in the *Zaptiye* forces of Siirt. As contrary to the role of Ebu Nişan Mustafa, Ömer Çavuş and Hüseyin Çavuş expressed how they were misusing their position of being "*zabıta*" in order to travel in the mountains of Mosul freely to rob passengers. Despite numerous examples of crime-detection by the Zaptiye forces, examples like Ömer and Hüseyin Çavuş indicates that in some cases being brigand and gendarmerie intertwined and this increased the violence in the region. In this sense, the social profile of the gendarmes and the soldiers who were also performing the functions of gendarmerie forces are seem to be influential. The report, send by the Governor of Edirne İsmail Rahmi regarding to employment of thefts and brigands of his region in the armies of Baghdad and Tripoli exhibits how the composition of the army in Iraq was trivialized. The Governor prepared a very detailed report that propose to transfer the habitual criminals who continued to do highway robbery in Edirne even

69 BOA., İ.MVL 582/26160 19 Ş 1284 (13 February 1868).

though they were sentenced to hard labor before. He chose Baghdad and Tripoli for these bandits as the regions for the reformation.[70] Although we do not know whether the demand of Governor was approved or not, this example gave idea for the social profile of people send from the other parts of the Empire when the army in Iraq was establishing in 1840s.

If we turn back to the case in Ninova, Ebu Nişan Mustafa was not a soldier or a police officer but hired as irregular to trace a habitual criminal. In this sense, the practicability of recruiting irregulars becomes understandable since these were local men who were familiar with the region and knowledgeable regarding the social profile of people. Therefore, they were eligible for ad hoc operations to support the judicial procedures or to quell a socio-political uprising. However, to some extent Ebu Nişan is not a representative example for a *zaptiye* or a gendarmerie official since he was entrusted as a spy for a special legal case. Although such a task facilitated the operation of the criminal court, the practices of *zaptiye* forces that reflected into the court records are more crucial to see the extent of social control performed by the security forces. In this sense, their operation and the way they were perceived by people in the everyday life are significant since police forces were the most explicit physical representatives of the abstract terms of law and order. As one of the components of the ever-developing criminal justice system in Iraq, understanding the role that the zaptiye forces played in the legal cases and their perception in the eyes of Iraqi people provides significant indicators for the legitimacy of the legal system.

Patrolling in the cities and crime-scene investigations were the most salient policing services of *Zaptiye* forces mentioned in the criminal case records. Depending on the place where a crime occurred, the *Zaptiye* forces were charged with investigating and collecting evidence regarding the alleged criminals. The murder case of Half is an illustrative example of the significance of patrolling for the arresting of suspects. Two men Hasan and Necm, had murdered a man named Half who was found as stabbed in his home in Baghdad. These two men were caught by *Zaptiye* officers while they were walking around during the daytime and were brought to the government (*cânib-i*

70 BOA., A.MKT 212/72 19 Ş 1262 (12 August 1846).

hükümet). Although they were taken into custody upon suspicion of larceny, they became suspects for the murder of Half when a piece of cloth that was found in Half's house by the police officers matched with the gaberdine that Hasan and Necmi owned. Upon the examination of their knives, bloodstains were revealed. Based on this evidence and a complaint by the victim's relative, both Hasan and Necmi along with five other people from Half's neighborhood were interrogated in the Council of Baghdad. Similar to the arrest of Mehmed who had murdered Celut (and stolen his belongings)[71] in the desert by Zaptiye forces, Hasan and Necmi were arrested by the patrolling *Zaptiye* forces and charged based on the proof collected from the crime scene.[72]

In addition to the Zaptiye's crime-detecting functions on patrols, the criminal court records indicate that (as in the murder case of Half) the people of Baghdad and Mosul appealed to the police forces by requesting their help or informing them regarding alleged criminals in their neighborhood. In this sense, Khaled Fahmy questions the relation between people and the police in Egypt during the nineteenth century, asking whether they were perceived as oppressive forces serving the state's interests at the expense of people or as an institution that could be manipulated to serve for the common or public interest.[73] In order to reach the answers of these questions in the context of Iraq, not only the appeals of people but also the conditions of *Zaptiye* forces are significant as well. The accessibility people had to the policing forces and their public representation by the police stations should be taken into consideration to have a better understanding of the perception amongst people.

In the case of Iraq, besides the evaluation of legal cases where *Zaptiye* forces and people came into contact, from the beginning of the implication of Tanzimat in Iraq, the correspondences show that the provincial and central

71 BOA., İ.MVL 555/24933 20 S 1283 (4 July 1866).

72 Similar to to investigation of Half's house, the Head Clerk of Mosul Osman Efendi's house was robbed and his chef was murdered in the year 1862. The police officers were send to Osman Efendi's house for the investigation and through evidences gathered there and the testimonies in interrogations of more than 20 people, the house of the suspect's was searched and the crime was detected. BOA., İ.MVL 468/ 21206 12 M 1279 (10 July 1862).

73 Khaled Fahmy, "The Police and the People in Nineteenth Century-Egypt" *Die Welts des Islams* 39, no.3 (1999): 346.

governments came to agree on the necessity to build new police stations and to renovate the old ones. For instance, to replace a police station that had burned down in a district of Mosul, the new one was planned in 1844 as a response to the petition sent from people to the central administration for "the comfort and security of the neighborhoods" (*mahallâtın âsâyiş-i istirâhat ve emniyetler*i).[74] There was already a police station before 1844, but what was notable was the increased capacity. A coffeehouse was chosen as the new police station and was designed with a capacity for housing 200 soldiers (*nefer*) since the province is big and its people are quarrelsome.[75] The large capacity of the police station gives us an idea regarding the extent of policing that was proposed by the administrators for suppressing the conflicts among the populace.

While the people of Mosul were described as litigious, the people of Baghdad were characterized with more pejorative and essentializing descriptions arguably in order to indicate the need for building police stations. The stereotypes regarding the inhabitants of Baghdad range from them being portrayed as rude, to troublemakers and evil-doers. While all these stereotypes were attributed to the disposition of population, the ethnic identities were mentioned as Arabs and Kurds. Similar to the Mosul, the most common conflicts among the inhabitants was referred again but detailed as the examples of theft, homicide and injury for Baghdad.[76] Unlike the plans for a high-capacity police station in Mosul, the provincial government aimed to build 8-10 police offices and station eight men from the army in each, for the year 1848. The introduction of police stations into the provinces or the rebuilding of old ones with major changes with reference to the crime-rates and criminal "disposition" of the regional people indicates the growing attention towards the policing of the Iraqi provinces. Although Omri Paz gives the mid-1850s as the beginning of

74 İ.DH. 91/4566 27 Ş 1260 (11 September 1844).

75 Ibid.

76 BOA., İ.MVL 118/2930 3 Ca 1264 (7 April 1848) "*Mukaddemce bâb-ı âliye arz-ı inhâ olunduğu üzere bağdad ahâlisi ru'ûnet ve huşûnet mizâc ile müsellem ve muhtelif'üt-tâb' ve'l-mezheb kürd ve arabdan mürekkeb olarak müfsedât ve mazarrat ifâ'ına meyl-i tabii'leri olmasıyla leylen ve nehâren sirkat ve yekdiğeriyle münâza'a ve bazen katl ve cerh gibi fezahâtları zuhûra gelmekte olup…*"

the large-scale construction of police stations in the provincial urban centers,[77] the police stations in Mosul and Baghdad date back to the mid-1840s. The appearance of these police stations roughly a decade before they were built anywhere else suggests that the policing of Iraqi provinces was given greater importance, in spite of all the financial constraints.

The construction of police stations made the *zaptiye* forces more influential, visible and accessible. While *zaptiye* forces or soldiers stationed in the police offices had the opportunity to interfere in the crime-scene or detect crime more easily, people also gained easier access to the agents of the government. The criminal court records indicate that if gendarmerie forces were available in the districts or provincial centers, when a crime or an alleged criminal occurred in their hometown, Iraqi people preferred to collaborate with the security agencies regardless of their religion. In 1861, a Jewish father appealed to the Council of Baghdad to proceed against his co-religionist Yakup on the grounds that his son Moşi had been injured by Yakup, and had died as a result of beating. Plaintiff stated that after he received information from two apprentices of Yakup that he was beating Moşi, father went to Yakup's workplace where he found Moşi injured. Thereupon they informed the headmen of the Jews who did the first interrogation of Yakup and then called the *Zaptiye* officers from the nearest police station (*kolluk*). Yakup was accused of injuring Moşi's sexual organ, which caused his death in the following days.

The *Zaptiye* officers were interrogated in the court too, and stated that when they arrived at the scene, Moşi was lying on the floor and expressed his pain to the officers. Upon Moşi's statement at the time, the *Zaptiye* officers examined Moşi's genitalia and became as eye-witnesses of injury and later appeared in the court. After the examination (*keşfü'l-mu'âyene*), the *Zaptiye* forces carried Moşi to his home and took Yakup into the police station.[78] The Council of Baghdad wrote that they couldn't reach a decision since there was no eye-witness when the fatal injury had occurred. The apprentices had left the workplace to call Moşi's father when the fight began, and the plaintiff was unable to produce any additional evidence. As a reason for indecision, the

77 Paz, *Crime, Criminal and the Ottoman State*, 207.

78 BOA., İ.MVL 455/20416 22 R 1278 (27 October 1861).

Council of Baghdad referred to Sharia which does not allow a murder suspect to be punished in the absence of any witnesses. However, the Supreme Council sentenced Yakup to 15 years of hard labor according to the article 174 of Criminal Code 1858 by evaluating the police officers' witnessing of Moşi at the scene of the crime and the testimonies in the provincial Council as reliable and adequate.

The injury which resulted in the death of Moşi indicates that the people of Baghdad appealed to both their local leaders and the *Zaptiye* forces by going to the police stations when a crime occurred. Another legal case in 1862 shows how people of Baghdad accustomed to inform to government officers when an attack or a suspicious issue occurred.[79] Jewish İsrail was murdered and his brother in-law was injured in their houses which located in the Jewish neighborhood of Baghdad, named as Suku'l-Hanun. Their neighbors Jewish İbrahim was accused to break into their house and attack the wife of İsrail which resulted with murder and injury. Similar to the case of Moşi, both Rabbis of Jewish community and the police forces came to the criminal scene for the investigation, but the accused İbrahim had already escaped. What makes this case significant is that according to interrogation reports, when İbrahim escaped from his neighborhood, he demanded accommodation from several Muslims by telling that he was attacked during his travel. Those men who saw wounds in the face of İbrahim, asked him why he did not go to the government if he was attacked by the brigands. Upon their suspicion from the disconnection of this stranger with the government and their information regarding to a murder case occurred between Jews in the center of Baghdad, Muslim inhabitants informed officers and they came to arrest İbrahim. The attitude of people in the countryside of Baghdad toward İbrahim indicates that people know that one should first go to the government agents if he was exposed to the violence.

All these legal cases indicate that the *Zaptiye* forces operating in the provinces of Iraq and their patrolling in the day and the night-time facilitated the crime-detection in the region. Also, upon the information by Iraqi people, police forces fulfilled the crime-scene investigations which provide proofs and

79 BOA., İ.MVL 485/21985 17 Z 1279 (8 March 1863).

eye witnessing for the trials in the courts of Iraq. Also, as the murder case of Moşi indicates that the existence of a police station enabled police forces to reach the scene of a crime just after it was committed. By means of immediate access to the police agents, the plaintiff could prove their allegation since the testimonies of police forces allowed the sentencing of the alleged criminals. Based on the murder case of Moşi and the attitude of peasants toward İbrahim, it can be argued that the people of Iraq cooperated with security forces and appealed to the officers due to the existence of stations near to their neighborhood. By this way the judicial body and security agencies could work together, which facilitated the arrest and the punishment of alleged criminals in compliance with the Criminal Code.

5

Conclusion

The goal of this thesis is to understand and analyze the initiation of Ottoman reformed criminal procedures into the provinces of Iraq between the 1840s and 1860s. It covers the time period from the beginning of judicial transformation under the *Tanzimat* reforms, until the reorganization of provincial administration by Midhat Pasha in 1869 which paved the way for the *Nizamiye* court system. I tried to evaluate Ottoman government's efforts to gain monopoly over dispensing justice in Iraq with the dynamics of the region and the population residing there. The establishment of legal authority over the adjudication of conflicts among the Iraqi people was perceived by the central Ottoman administration as one of the most crucial ways for the diffusion of governmental power in the region. From the beginning of the reassertion of authority in the region in the nineteenth century, the application of *Tanzimat* criminal procedures and the Ottoman statecraft became interlinked. The central authority viewed the establishment of an efficient, standardized and centrally controlled criminal justice system as the primary condition for the governance of an uneasy region where the administration was diffused among the different authorities.

The tribal structure of the region, unsettled population groups and Shiite expansionism were the questions on the agenda of the Ottoman government as obstacles for the consolidation of provincial administration and the estab-

lishment of order in the region. However, besides these problematics, the inhabitants of Iraq composed of various ethnic, religious and sectarian groups were among the preoccupations of Ottoman central administration. The concern over the populations of Mosul and Baghdad, were reflected in the correspondences between the Ottoman central government and the provincial administrative units of Iraq with descriptions such as "trouble-makers", "rude people" and "uncivilized nomads". Therefore, for the pacification of the population and the stabilization of the region, the suppression of crime and the adjudication of criminals by the appointed officials came to be crucial.

The Ottoman government introduced the reformed judicial system into the provinces of Iraq through its administrative units and tried to control the process within the hierarchical review system under the supervision of the Supreme Council in Istanbul. The centralization of the operation of justice in the Ottoman provinces aimed to curtail the power of local actors in legal cases and to expand the rules of the Ottoman central judicial authority. For this reason, the central judicial administration ordered the appointment of *naibs* among the regional people, who were also tasked with religious missions, to all of the districts of the provinces in order to eliminate the role of the local ulema over the adjudication. In addition to the appointment of officials, the procedural requirements of the reformed judicial system became another means of centralizing the adjudication and checking the legal transactions. The court records between 1840s and 1860s in Iraq indicate that, adherence to the criminal procedures and to the Criminal Code was an all-important matter for the establishment of justice in the region. In accordance with the procedural requirements, the provincial Council of Baghdad and Mosul would sent the documents and interrogation reports to İstanbul for the decision of the Supreme Council before the infliction of punishments. Otherwise, the central government would interfere and questioned the provincial government. Also, the decrees sent by the Supreme Council which demanded the retrial of cases demonstrates that the central judicial authority was sensitive toward any inconsistencies in the reports such as the confusions of dates, names or the contradictory statements of witnesses.

In addition to procedural requirements of the criminal justice system, the punishment of the alleged criminals were significant in establishing law and

order in the provinces of Iraq. The central authority tried to solve the criminal disputes of the people through legitimate means and lawful punishments. Ottoman governors were aware that the effectiveness of the criminal courts depended on the proper functioning of police forces and the prison system for the detection and the prevention of crimes in the region. A well-functioning criminal judicial system and an effective police force were seen as the most proper way to have social control without damaging the image of Ottoman governance in the eyes of regional people. Therefore, similar to the Ottoman penal policy in other provinces of the Empire, the function of gendarmerie forces was extended and the capacity of the prisons were increased to meet the need of punitive policies.

The penal policy in Iraq has both common and unique characteristics compared to the transformation of punishments in the Ottoman Empire during the modernization period. The adjudication of homicide cases was among the primary issues that the central judicial authority planned to bring under its control due to its frequency in the everyday lives of people in Iraq. In this sense, types of punishments toward murder suspects and alleged criminals in the general sense had potential to indicate the penal policy implemented in Iraq.

In most homicide cases, the murderers were sentenced to prison or hard labor together with fines. Even if the heirs persisted in the demanding retaliation against the murderer, the central judicial authority asserted several procedural errors for retrial, which could enable the litigants to change their preferences. However, while the judicial authorities preferred the incarceration of criminals in the private prosecutions, the penal policy toward accused people who committed acts that were perceived to be in the scope of *hadd* crimes is quite different. The difference between the decisions toward the people who violate the rights of people and who threatened the public order exhibits the dynamics of the punitive policy adopted in Iraq. However, in both types of crimes, the trials and the punishments were mostly realized within the hierarchical review system in accordance with the procedural requirements of the reformed criminal justice system.

Those people who committed highway robbery and murder, plundering and apostasy by insulting the Prophet were given the death penalty with the

approval of the Supreme Council. Therefore, these cases indicate that, unlike the general acceptance regarding the decrease in capital punishment, the judicial authority did not hesitate to give people of Iraq a death sentence if they damaged the public and moral order of society. The sentencing to death of a Mosuli woman clarifies the severity of penal policy implemented in Iraq for the sake of the social order, considering that the usual punishment in the Ottoman Empire differentiated by the punishment by gender. Also by looking at the decisions of the capital punishment, it can be argued that there was a legal pluralism in the courts of Iraq due to the application of Sharia law side by side with the codified criminal law. As in the case of insulting Prophet, if the crime was not stated in the Criminal Code, Sharia law was put into practice for the sentencing to capital punishment. On the other hand, even though the evidential or procedural requirements of the Sharia could not be realized in the provincial courts, still the alleged criminals were sentenced according to *nizamî* rule. Therefore, these court decisions show that depending on the case, judicial authorities benefitted from both the Sharia and the Criminal Code for effective penal sanctioning in Iraq.

The process of the establishment of the *Tanzimat* criminal justice system in Iraq was not unilateral, not did it depend solely on the will of the Ottoman central authority. Instead, the participation of the people in the courts of Iraq played a key role in the consolidation of new judicial organization. The preferences of people in the Iraqi provinces toward Ottoman law enforcement could shed light on their attitudes regarding Ottoman expansionism and interventionism into Iraq. Although the Ottoman state strived for the centralization of the provincial administration and the de-tribalization of the region, the tribal structure in the Iraqi provinces did not dissolve completely: the tribal sheikhs emerged as big landowners as a consequence of the registration of the lands through the implementation of the Ottoman Land Code in Iraq.[1] Unlike the goal of the central government, this situation strengthened their position in society. However, it was not only the economic or political role of the tribal sheikhs that was a significant problem for the Ottoman government's effort for centralization, but also their legal authority for the resolution

1 Ceylan, *The Ottoman Origins of Modern Iraq*, 173.

of conflicts among people. The central government expressed its concerns in correspondences about the people's preference for tribal leaders, especially in the cases of bloody conflicts. Therefore, the Ottoman central authority aimed to eliminate all alternative legal powers and to attract people to apply to the Ottoman courts for the trial of their legal disputes.

The legal autonomy of tribes was not only stated in the official documents but also emphasized by scholars of the literature on Iraq to describe how people were distant to the Ottoman administration. However, the court records in the Ottoman archive indicates that unlike the complaints of the central government and assumptions of the scholars, people did not refrain from applying to the Ottoman courts, although tribal leaders preserved their powerful position in society. On the contrary, people from various social groups as well as the tribes went to the local councils to complain against offenders and to demand their rights. Many of these people who belonged to various tribal organizations preferred to seek their rights in the courts instead of applying to their tribal leaders and sheikhs. For instance, Celut who was murdered by a passenger in the desert, belonged to a branch of the Shammar tribe which was one of the leading and the troublesome confederations of the region. As the heir of Celut, his 70 year-old uncle came to the provincial center from the Aziziye district of Baghdad and litigated to the Grand Council of Baghdad to demand retaliation for his nephew.[2] Although they belonged to a strong tribal confederation, the heirs sought their rights in the provincial government's Council where the trial was repeated three times as a result of the Supreme Council's decree.

Another example of people's participation to the reformed judicial system of Iraq is the litigation of a women who brought her father's murder case to the court in Baghdad in 1865. The daughter came to the Grand Council of Baghdad from the district of Hilla to proceed against the murderers of her father, the paramount sheikh (*şeyhü'l meşayih*) of their village. The paramount sheikhs had authority to rule large tribal federations. They usually had tribal charisma and had highly-esteemed ancestors which were necessary to have

2 BOA., İ.MVL 555/24933 20 S 1283 (4 July 1866).

legitimacy in the tribes.[3] The district of Hilla was one of the regions where the tribal system persisted and sheikhs continued their authority.[4] The litigant's father Casim was murdered in a rivalry for the paramount sheikhship by two men from his own tribe who were instigated by the former *şeyhü'l meşâyih* of the district. Even though the tribal confederation was persistent in the region, the daughter of the victim brought the matter to the court in Baghdad.[5]

Compared to the example of Yemen, where the Ottoman state faced resistance, it seems that people in Iraq accepted and participated in the Ottoman-reformed judicial system in the nineteenth century despite the fact that a well-developed system of customary law and tribal confederations existed in Iraq.[6] Similar to the legal function of tribal sheikhs in Iraq, Yemeni people were applying to the local fuqaha for the settlement of criminal cases. However, unlike the Iraqi people's adaptation, people in Yemen protested the government courts and held back from applying to the official authorities.[7] Although Ottoman governors tried to implement the new judicial organization gradually, people found this new legal system unsuitable to their customs and traditions. The procedural requirements of the new criminal justice system were seen especially impracticable. For instance, in the cases of homicide, since bringing the accused to the courts took time, the delay could cause hostilities and havoc between tribes.[8] As a result of the these problems, the Ottoman government had to modify the *Nizamiye* judicial organization and moved back the civil and criminal legal responsibilities to the Sharia courts with some regulations according to the new legal system.

The Ottoman government did not experience such difficulties and resistance to the new judicial procedures in Iraq, and quite the contrary, court records indicate that people participated and benefitted from the courts for

3 Ceylan, *The Ottoman Origins of Modern Iraq*, 132.

4 Çetinsaya, *The Ottoman Administration of Iraq*, 86

5 BOA., İ.MVL 570/25634 8 Z 1283 (13 April 1867).

6 Frank H. Stewart, "The Tribal Law in the Arab World: A Review of the Literature" *International Journal of Middle East* 19, no.4 (1987): 481.

7 Hümeyra Bostan, "Institutionalizing Justice in a Distant Province: Ottoman Judicial Reform in Yemen (1872-1918)" (Master 's thesis, İstanbul Şehir University, 2013), 66.

8 Ibid., 58.

the resolution of their issues. Unlike the abolition of the new court organization in Yemen, court records from Iraqi provinces indicate that the new judicial organization became gradually consolidated and strengthened through the 1860s. The above two examples from the courts of Iraq represent the litigation by people who had strong tribal affiliations, but there are many other cases that demonstrate the applications of ordinary persons. For instance, a widow proceed against her ex-husband for the murder of her 6 years old son from her first husband.[9] Also a woman could litigate against her husband who killed their own child and have him sentenced to hard labor.[10] In addition to Muslims, the heirs of non-Muslim inhabitants of Baghdad were applying to the court for the bloody conflicts among their coreligionists.[11] The Yezidi population of Iraq also did not refrain from bringing their legal issues to the court of the Ottoman government.[12] Also, similar to people of strong tribal confederations of Baghdad, the members of nomadic and smaller tribes like Herki and Hartucu in Mosul, would also go to the court for homicide cases.[13]

To conclude, Ottoman central government introduced judicial reforms and criminal procedures of the *Tanzimat* into the provinces of Iraq as the parts of centralization policies in the region. The preoccupation of the administrators toward the proper implementation of criminal procedures and the standardized adjudication of alleged criminals indicates the significance given to the penal policies for the establishment of law and order in Iraq. However, court records demonstrate that people were not passive subjects of the punitive policies but that they participated in the criminal justice system of Iraq and cooperated with police forces in pursuit of their rights. Therefore, while the government struggled to gain the monopoly over adjudication and tried to pacify an unstable region, the people of Iraq also utilized the criminal procedures for their benefit.

9 BOA., İ.MVL 467/21147 30 Za 1278 (29 May 1862).

10 BOA., A.MKT.MVL 102/10 1 Ra 1275 (9 October 1858).

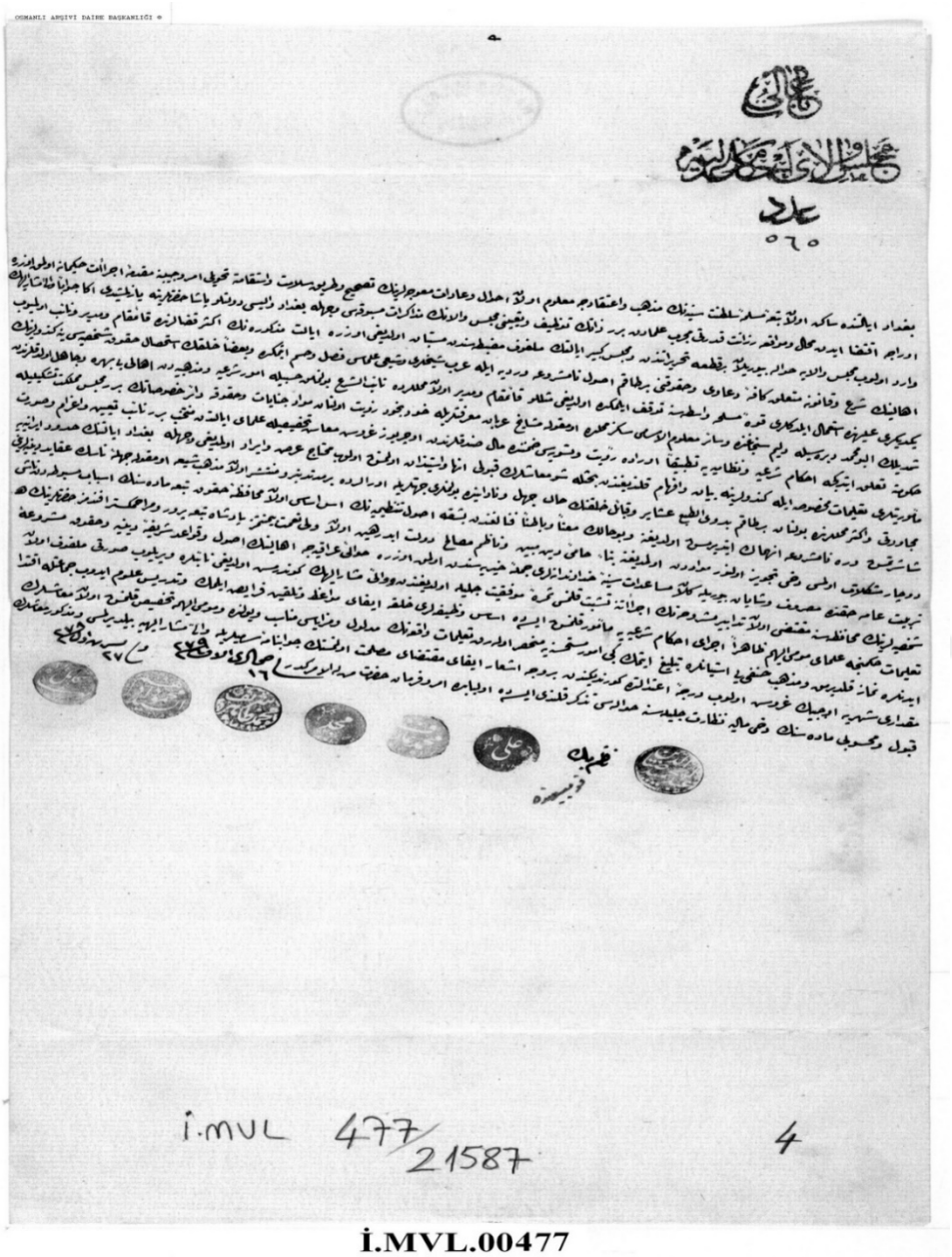
11 BOA., İ.MVL 399/17368 21 Z 1274 (2 August 1858).

12 BOA., A.MKT.MVL 107/32 07 L 1275 (10 May 1859).

13 BOA., İ.MVL 309 12864 11 L 1270 (7 July 1854).

Appendix A

Bağdad eyaletinde sakin Osmanlı tebaası Müslüman ahalinin İran hududuna yakın bölgelerde birtakım Şii ve cahil Araplardan etkilenmemesi için bölgeye halkı irşad edecek din adamları gönderilmesi



İ.MVL.00477

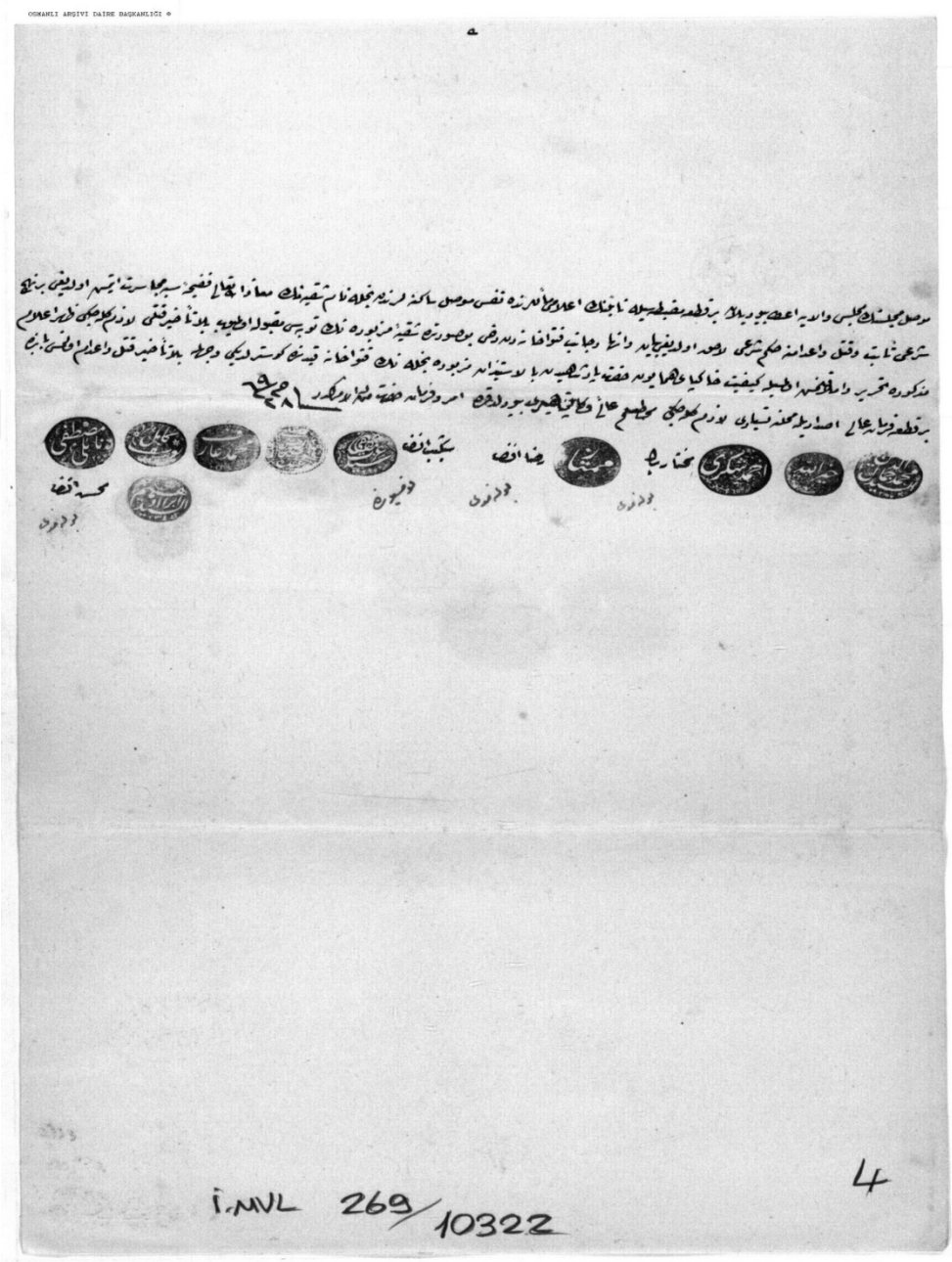
BOA., İ.MVL, 477/21587. 12 Rebiu'l-ahir 1279 (7 October 1862).

Bağdad eyaletinde sakin olan tebâ'-i müslimîn-i saltanatı seniyyenin mezheb ve itikatça ma'lum olan ahvâl ve adât-ı muavvecelerinin tashih ve tarîk-i selâmet ve istikamete tahvîli emr-i celbine mukaddema icraât-ı hakîmane olmak üzere oraca iktiza eden mahal ve mevakia' rezanet kudreti mücerreb ulemadan birer zâtın tavzif ve ta'yini Meclis-i Vâlâ'nın müzakerat-ı mesbukası vechle Bağdad valisi devletlü paşa hazretlerine yazılmıştı ana cevâben vali müşarünileyh vârid olup Meclis-i Vâlâ'ya havale buyurulan bir kıt'a tahrîrattan meclis-i kebir-i eyaletin melkuf mazbatasından müstebân olduğu üzere eyalet-i mezkurenin ekseri kazalarında kaymakam ve müdür ve nâib olmayıp ahalinin şeri ve kanuna müteallık kaffe-i deâ'vî ve hukukunu bir takım usul-u nameşru' …(?) ile arap şeyhleri ve şii uleması fasl-ı hısm etmekde ve bazen halkın istihsal-i hukuku şahsiyesine kendilerinin yekdiğeri aleyhinde isti'mal eyledikleri kuvve-i müsellehe vasıtasına tevakkuf eylemekde olduğu misilli kaymakan ve müdür olan mahallerde naib-üş şeri bulunmak hasbıyla umur-ı şeriye ve mezhebiyeden ahali bî behre ve cahil olduklarından şimdilik Albu Muhammed diyeresiyle Dim sancağında ve saire ma'lum'ul-sâmi sekiz mahalde o makule meşâyih-i arab marifetiyle hodbehot rüyet olunan mevâd-i cinayat ve hukuka dair hususâtın birer meclis-i memleket teşkiliyle hükümete tealluk ettikçe ahkâm-ı şeriye ve nizamiyeye tatbikan orada rüyet ve tesviyesi zımnında mal sandıklarından üçer beşer yüz kuruş maaş tahikikiyle ulema-i eyaletten müntehib birer naib ta'yin ve irâm ve suret-i memuriyetleri talimât-ı mahsusa ile kendilerine beyan-ı ifham kılındığından bahisle şu maaşların kabul-ı inhâ ve istizân olunmak olup muhtaç-ı arz ve irade olmadığı vechle bağdad eyaletinin hudud-u iraniyeye mücavereti ekseri mahallerinde bulunan bir takım bedevi'ut-tab' aşair ve kabail halkının hal-i cehl ve nadanide bulunmaları cihetleriyle oralarda bir müdetten beri münteşir olan mezheb-i şiiye o makule cehl-i nasın akaid-i diniyelerini şaşırtmak ve de nameşrua inhâk ettirmiş olduğuna ve bu halin ma'nen ve batınen fenalığından başka usul-ı tanzimiyenin ess-i esası olan muhafaza-i hukuk-ı teba' maddesinin esbab-ı mesbutadan naşi düçar müşkilat olması dahi tecviz olunur mevaddan olmadığına binaen ham-i din-i mübin ve nazım-ı mesalih devlet ebed'ur-rehin olan velinimetimiz teba' pürûr … (?) efendimiz hazretlerinin tertîb-i a'me hakkında masruf ve şayan buyurula gelen müsaadat-i seniyye hüdavendaneleri cümle-i hayriyesinden olmak üzere havali-i ırakiyece ahalisinin usul ve kavaid-i şerife-

i diniye ve hukuk-u meşrua'-i şahsiyelerinin muhafazasına muktezi olan tedabir-i meşruhanın icraatına teşebbüs kılınması emete-i muvaffakiyet-i celîle olduğundan ve vali-i müşarünileyh göndermiş olduğu naiblere verilip suret-i melfuf olan talimat-ı hükmünce ulema-i mumaileyh zahiren icra-i ahkâm-ı şeriyeye memur kılınmış ise de esas vazifeleri halka ifâ-i mevaiz ve telkin-i feraiz eylemek ve tedris-i ulûm edip cemaatle iktida edenlere namaz kıldırmak ve mezheb-i hanefiyi isteyenlere tebliğ etmek gibi umur-u müstahseneye münhasır olarak talimat-ı vakıanın medlul ve mezayası menasib ve yolunda ve mumaileyhe tahfis kılınmış olan maaşları mikdarı şehriye üç bin kuruş olup derece-i i'tidalinde göründüğünden buraca işa'r-ı ifâ- mukteza-i maslahat olunmasının cevabname-i samileriyle vali müşarünileyhe bildirilmesi ve mezkûr maaşların kabul ve mahsubu maddesinin dahi maliye nezaret-i celilesine havalesi tezekkür kılındı ise de ol babda emru ferman hazreti men lehü'l-emrindir.

Appendix B

The punishment of Necla among the inhabitants of Mosul



İ.MVL.00269

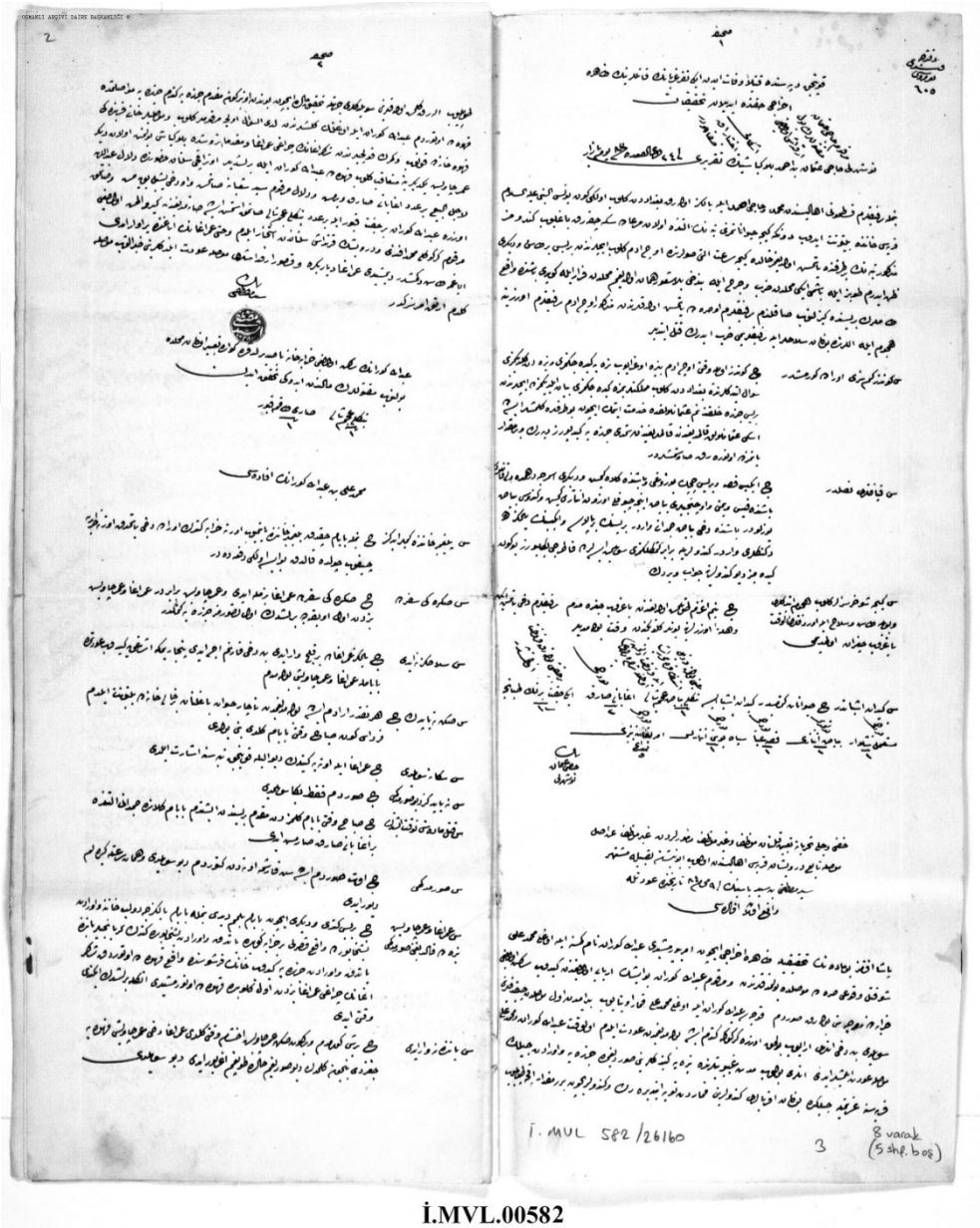
BOA., İ.MVL 269/10322. 1 Receb 1269 (10 April 1853).

Musul Sakinlerinden Necla'nın Cezalandırılmasına Dair

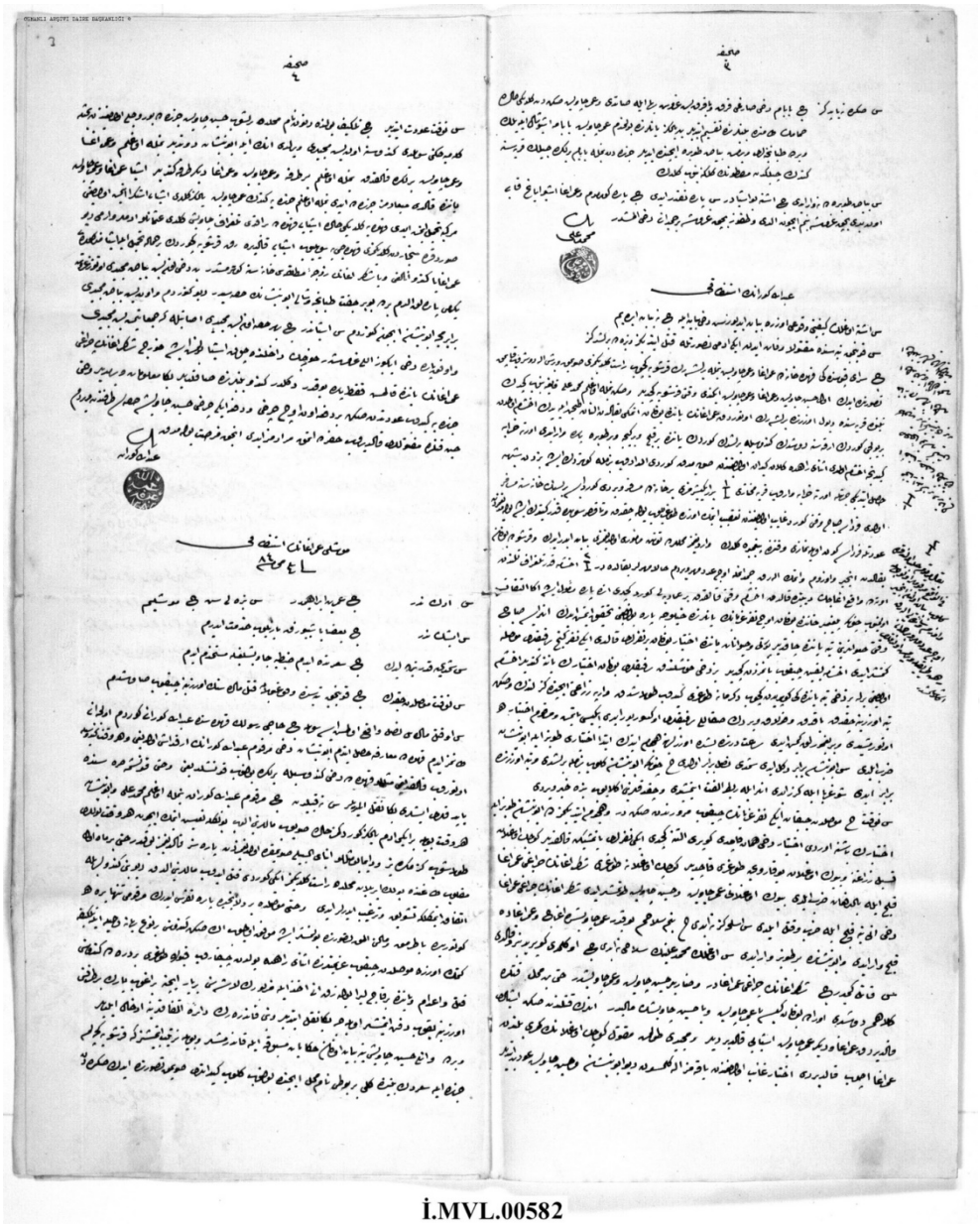
Musul meclisinin Meclis-i Vâlâya ita buyurulan bir kıt'a mazbatasıyla naibinin ilamı meallerinde nefs-i Musul sakinlerinden Necla nâm şakiyyenin maazallah-ı teala fazîha-i sebbe mücaseret etmiş olduğu birinci şeri sabit ve katl-i idamına hükm-i şer'i lâhık olduğu beyan ve inha ve cânib-i fetvahaneden dahi bu surette şakiyye mezburenin tövbesi makbul olmayıp bila tehir katli lazım geleceği zahr-ı ilam mezkure tahrir ve imla kılınmış olmasıyla keyfiyet hakpây-ı hümayûn hazret-i padişahiden bil'-istizan mezbure neclanın fetvahane kaydında gösterildiği vechle bila tehir katl-ı idam olunması babında bir kıt'a ferman-ı ali ısdarıyla mahallinde tesyarı lazım geleceği ...(?) ali-i vekaletpenahileri buyuruldukta emr ü fermân hazret-i men lehü'l-emrindir.

Appendix C

Interrogation reports of Nevşehirli Hacı Osman bin Ahmed, Seyyid Mustafa bin Seyyid, Mehmed Ali and Abdullah Kuran



İ.MVL.00582



İ.MVL.00582

BOA., İ.MVL 582/26160. 19 Şa'ban 1284 (13 February 1868).

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A.MKT 225/37. 29 Şevval 1265 (17 September 1849).

A.MKT 196/1. 16 Cemaziye'l-ahir 1265 (9 May 1849).

A.MKT 146/26. 7 Şevval 1264 (6 September 1848).

A.MKT 212/72. 19 Şa'ban 1262 (12 August 1846).

A.MKT.MVL 46/1. 3 Zilhicce 1267 (29 September 1851).

A.AMKT.MVL 63/50. 6 Ramazan 1269 (13 June 1853).

A.MKT.MVL 43/60. 21 Ramazan 1267 (20 July 1851).

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A.MKT.MVL 38/80. 30 Rebiu'l-evvel 1267 (2 February 1851).

A.MKT.MVL 110/20. 22 Safer 1276 (20 September 1859).

A.MKT.MVL 101/78 25 Safer 1275 (4 October 1858).

A.MKT.MVL 117/57 6 Zilhicce 1276 (28 March 1860).

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A.MKT. MVL 110/24. 22 Safer 1276 (20 September 1859).

A.MKT.MVL 107/32. 7 Şevval 1275 (10 May 1859).

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A.MKT.UM 217/80. 29 Recep 1272 (19 July 1859).

A.MKT.UM 118/15. 07 Rebiu'l-evvel 1269 (19 December 1852).

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