T.C.

IBN HALDUN UNIVERSITY

ALLIANCE OF CIVILISATIONS INSTITUTE

DEPARTMENT OF CIVILISATION STUDIES

MASTER'S THESIS

RELIGIOUS LEGITIMACY OR POLITICAL EXPEDIENCY?: THE JURISPRUDENTIAL FOUNDATIONS OF HUMAN RIGHTS PROTECTION IN THE LATE OTTOMAN CONSTITUTIONAL DOCUMENTS

Muhammed Said BİLAL

Thesis Advisor: Prof. Dr. Recep ŞENTÜRK

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DECLARATION

I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

Muhammed Said BİLAL

……..……..

ÖZET

Son dönem Osmanlı anayasal reformları siyasi bir takım manevralar mıdır, yoksa dönemin hukuk doktrinine uygun bir şekilde köklü bir hukuksal reform girişimi midir? Bu tezin temel amacı 19. Yüzyıl anayasal belgelerinde öngörülen insan hakları koruma rejimini bu soru etrafında incelemektir.

Osmanlı devleti 19. Yüzyıl'da dikkate şayan bir anayasallaşma hareketi içerisine girmiştir. Tanzimat dönemi olarak da adlandırılan 1808-1875 yılları arasında, birçok anayasal belge ortaya çıkmış ve bu belgelere bağlı olarak bir çok uyum yasası hayata geçirilmiştir. Bu belgeler Müslüman ve gayrimüslim bütün Osmanlı tebaasının hak ve hürriyetlerini garanti altına alan ilk yazılı resmi beyanlar olması açısından anayasa tarihimiz için büyük önem arz etmektedirler.

Bu belgelerle garanti altına alınan haklar klasik İslam hukukuna göre mi şekillendi, yoksa batılılaşma hareketlerinin etkisiyle mi ortaya çıktı meselesi doktrinde uzun zamandan beri tartışmalı bir konudur. Meseleyi hukuk tarihi ve İslam'da insan hakları tartışmaları içerisinde ele alarak, disiplinler arası bir çalışmayla, anayasal belgelerde garanti altına alınan haklarının doktrinsel temellerini ortaya koymaya çalışacağım.

İsmet terimi fıkhın teşekkül döneminden beri bireylerin hak ve hürriyetlerini korumak için İslam hukuku literatüründe kullanılmakta olan bir kavramdır. Ben de, tezimde, anayasal belgeler ile oluşturulan insan hakları koruma rejimi üzerinde *ismet* kavramının etkisini araştırarak dönemin hukuk doktrininin anayasallaşma hareketleri üzerindeki etkisini ortaya koymaya çalışacağım.

Anayasal reformların batı etkisiyle gerçekleştiği iddiası döneme ilişkin araştırmaların çıktıları sınırlandırabilecek ve yanlış yönlendirebilecek indirgemeci bir yaklaşımdır. Bu tezin temel iddiası, Tanzimat reformlarının (i) İmparatorluğun tam anlamıyla modern bir devlete dönüşmesinin sonucu olarak, (ii) dikkat çekici bir şekilde bürokrasi lehine, (iii) batılı devletlerin talepleri de dikkate alınarak, (iv) ve dönemin hukuk doktrinine uygun bir şekilde yürütüldüğüdür.

ABSTRACT

I will attempt to examine whether the constitutional reforms in the late Ottoman Empire were indicative of political expediencies or religious legitimacies in this thesis. The subject matter of this thesis is the human rights protection of the late Ottoman constitutional documents.

The Ottoman Empire underwent remarkable constitutional movements in the nineteenth-century. Throughout the century, numerous constitutional documents appeared between 1808 and 1875, which is characterized as "the Tanzimat period" in literature. These documents were the very first written official charts that guaranteed fundamental rights of all Ottoman subjects for both Muslims and non-Muslims.

The question whether the rights, which these documents guaranteed, were shaped in conformity with classical Islamic jurisprudence or appeared under the influence of western institutions has been controversial in academic circles for a number of decades. Situating the discussion in the context of human rights in Islam and the history of law, in an interdisciplinary approach, I will attempt to reveal the Islamic jurisprudential foundations of the constitutional documents in terms of fundamental rights.

The concept of *`iṣmah* has been utilized to protect and guarantee fundamental rights in Islamic jurisprudence since the very beginning of fiqh. In my thesis, I will examine the influence of the concept of *`iṣmah* on the human rights protection of the Constitutional documents in an attempt to illustrate Islamic jurisprudential foundations of the protection.

The contention of this thesis is substantiated by the fact that the constitutional reforms were carried out (i) as a consequence of the metamorphosis of the state into a modern state, (ii) considerably in favor of the bureaucratic class, (iii) paying regard to the expectations of the Western states, and (iv) in conformity with Islamic jurisprudence in the Tanzimat era.

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LIST OF ABBREVIATIONS

Art.	: article
AÜHFD	: Ankara Üniversitesi Hukuk Fakültesi Dergisi
AÜSBFD	: Ankara Üniversitesi Sosyal Bilimler Fakültesi Dergisi
ÇTTAD	: Çağdaş Türkiye Tarihi Araştırmaları Dergisi
d.	: date of death
Diss.	: dissertation
DTCFD	: Dil Tarih Coğrafya Fakültesi Dergisi
DÜHFD	: Dicle Üniversitesi Hukuk Fakültesi Dergisi
DÜSBED	: Dicle Üniversitesi Sosyal Bilimler Enstitüsü Dergisi
Ed.	: editor
Eds.	: editors
ff.	: and the following pages
GÜHFD	: Gazi Üniversitesi Hukuk Fakültesi Dergisi
h.	: hegira calendar
HÜİFD	: Harran Üniversitesi İlahiyat Fakültesi Dergisi
Ibid	: in the same source
İÜHFM	: Istanbul Üniversitesi Hukuk Fakültesi Mecmuası
MÜİFY	: Marmara Üniversitesi İlahiyat Fakültesi Dergisi
No.	: number
OMÜİFD	: Ondokuz Mayıs Üniversitesi İlahiyat Fakültesi Dergisi
OSAV	: Osmanlı Araştırmaları Vakfı
Pg.	: page
pp.	: between pages
SCJO	: Supreme Council of Judicial Ordinances
Trns.	: translator
Vol.	: volume

ACKNOWLEDGMENT

I am grateful to my thesis advisor Professor Dr. Recep Şentürk of the Alliance of Civilizations Institute at Ibn Haldun University. He always consulted me whenever I encountered some troubles while carring out this study. He kindly guided and supported me academically as well as spiritually to keep my high motivation.

I would like to thank my thesis committee members Professor Dr. Refik Korkusuz and Asst. Professor Mehmet Akif Poroy. They notably contributed to my thesis in the thesis defence. I would also like to thank Professor Dr. Abdurrahman Eren. He kindly guided my to situate my thesis in the context of constitutional law.

A very special gratitude goes out to all down at the lecturers, colleagues, administrative staffs, and librarians of the Alliance of Civilizations Institute, so-called MEDIT family. They highly interested in my research topic and always gave great advice and support to me for its progress.

Most importantly, I would like to thank my family, and my lovely wife, who was always a pillar of strength to me during this tough time.

Muhammed Said BİLAL

INTODUCTION

In this thesis, I deal with the issue of "human rights in Islam" in practice over constitutional documents of Ottoman Empire in the 19th century. In theorizing the philosophical background of the thesis, I appropriate the theory of *iṣmah* that assets the fact that universalistic notions of Islamic jurisprudence-mainly Scholars of Hanafi School- grounds legal capacity (*al-ahliyyah*) with being human instead of being Muslim. In that sense, Ottoman practice and the 19th century are quite relevant to study for my thesis interest. This is because the theory of *iṣmah* mostly depends on Hanafi School of fiqh and the Ottoman legal system was officially operating on Hanafi School. The 19th century, on the other hand, was a modern age with the rooted transformations in the Ottoman institutes, administration and legal system in which modern state sovereignty has begun to appear. Nevertheless, it did not transform into a solely secular system which still based on Islamic principles. This transitional age, therefore, provides us a perfect pilot environment to conduct comparative studies between Human Rights Law and Islamic Law.

The 19th century is an era that Ottoman Empire has undergone deeper transformations towards a modern state in the judicial system, along with many other administrative systems. Metamorphosis of the state, which had begun at the begging of the century in Sultan Mahmud II reign (1808-1839), has brought about a necessity of radical transformations in jurisdiction and legislation in the 19th century.

At the beginning of the 19th century, the Ottoman Empire with its multinational structure affected adversely from some contemporary movements such as nationalism and its integrity was threatened. The Empire was struggling with riots for independence in Egypt and the Balkans. Serbians were able to gain their independence in 1815 and encouraged Greeks to rebel in 1821.

Statesmen–especially the ones sent to Europe- offered to reconstruct a new system to rule the state. They tried to adopt notions such as rights, liberties, state of law, and equality into Ottoman judicial system. In this context, constitutional movements of Tanzimat have begun to appear as a mixture of such Modern notions and Islamic jurisprudence since 1839. On one hand, constitutional documents can be

seen as a precaution of disintegration, and on the other hand, it can be understood as an inevitable outcome of the modernization process in its own right that had begun at the beginning of the century.

Mehmet Sadık Rıfat Pasha, who was the contemporary ambassador of Vienna, noted in his "*Risala* on the Conditions of Europa" in 1836 that;

> According to the current civilization of Europe, development of social welfare relays on population increase, development (*imar*) of the realm and state, providing public security and order; whereby it (the civilization of Europe) managed to develop in all spheres and surpass others. For this essential matter, providing a full-guarantee of live, property, personal chastity (*ırz*), and dignity for all races (*akvam*) and religious groups (*milletler*) in the realm is sine qua non. …. since rulers are only the protectors and inspectors of the development of the realm, they act upon rights of the subjects and laws of the state; whereby neither ill-treatments occur nor the international reputation and respectability of state is damaged by rebellions and irregularity (*serbestiyet*).[1]

This passage is a perfect sample to observe the perception of Ottoman Statements of the Tanzimat reforms. Mehmet Sadık Rıfat Pasha is considered as the intellectual pioneer of the Tanzimat since he verbalized the notions and principles of the Tanzimat in his works before the Imperial Edict of Rose Chamber was proclaimed whereby he intellectually affected the foremost actors of the Tanzimat such as Mustafa Reşit Pasha.[2] According to Mehmet Sadık Pasha, the strength of the state is predicated on three elements i.e. social welfare of the subjects, the abundance of the treasury, and rational bureaucracy with a strong army.

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[1] Original text: *Avrupa'nın şimdiki sivilizasyonu ya'ni usûl-i me'nûsiyyet ve medeniyyeti iktizâsınca menâfi-i mülkiyye-i lâzımelerinin ilerülemesini ancak teksîr-i efrâd-ı millet ve i'mâr-ı memâlik ve devlet ve istihsâl-i âsâyiş ve rahat esbâb-ı adîdesiyle icrâ ve istihsâl itmekde ve bu misüllü menfaat-i külliyye ile ilerüleyüb yek-diğer üzerine halen ve i'tibâren kesb-i meziyyet eylemektedirler. Bu mâdde-i lâzımenin üss-i esâsı dahî her bir akvam ve milletin can ve mal ve ırz ve i'tibârı hakkında emniyyet-i kâmilesinin istihsâline …… hükümdârân-ı cihan ancak hıfz-ı ibâd ve i'mâr-ı bilâda hâmi ve nâzır olmak üzere nâ'il-i lutf-ı yezdân olduklarından idâre-i emr-i hükümetde hukûk-ı millet ve kanûn-ı devlet üzere hareket idüb bir güne bi-vech gadr ü cebr muamelesi vuku' bulmaz ve bu müsâadât ile bir güne itaatsizlik ve serbestiyyet ile dahî i'tibârât-ı düveliyyeye ve t'azîmât-ı lâzımeye halel (zarar) gelmez.* Seyitdanlioglu, Mehmet, "Sadık Rıfat Paşa ve Avrupa Ahvaline Dair Risalesi", *Liberal Düşünce Dergisi*, Vol. 3, Summer 1996, (pp. 115-124), Pg. 121.

[2] Sayarı, Güner, "The Intellectual Carrier of and Ottoman Statement: Sadık Rıfat Pasha and His Economic Ideas", *Revue D'histoire Magrebine*, Vol. 17, 1990, (pp. 225-261), Pg. 227.

Many Tanzimat bureaucrats of the Empire have appropriate Mehmet Sadık Pasha's ideas on reform whereby they attempted to reconstruct the state on following principles i.e. strong bureaucracy, state of law, and equal protection of rights of subjects.[3] In that period, numerous constitutional documents has been issued namely the Charter of Alliance (*Sened-i İttifak*) in 1808, the Imperial Edict of Rose Chamber (*Tanzimat Fermanı*) in 1839, the Edict of Reform (*Islahat Fermanı*) in 1856, and the Imperial Edict on Justice (*Ferman-ı Adalet*) in 1875 in which basic fundamental rights and freedoms have been guaranteed for all subjects of the Empire regardless of status, gender, race, religion or any other ground. Moreover, subsidiary legislation such as criminal codes, land law act, family law act, commercial code, *Vilayet* law, and Majalla-i Ahkam-i Adliyya (*Mecelle)* has been passed into law in accordance with constitutional reforms. Furthermore, new institutions and offices such as the Supreme Council of Judicial Ordinances (*Meclis-i Vâlây-ı Ahkâm-ı Adliye)*, the Supreme Council of Reorganization (*Meclisi Ali-i Tanzimat)*, and *Nizamiye* Courts have been established in the judicial system to legislate subsidiary reform legislation and inspect the implementation of legislation.

Ottoman bureaucratic class has carried out the reforms on fundamental rights without a remarkable social demand. On the contrary to the political history of Europa in 18th and 19th centuries, the history of the Ottoman Empire did not witness rebellions that emerged out of insufficiency of fundamental rights and equality, although there are a number of revolts that arose from the demands of independence. This historical fact gives us a hint to think that before the Tanzimat reform movements, already there might have been a basic protection of fundamental rights of people in accordance with Islamic principles in the Ottoman judicial system.

On the other hand, bureaucracy was a more vulnerable class comparing the subjects of the Empire in terms of enjoying fundamental rights by virtue of administrative praxis such as outlaw execution without trial (arbitrary s*iyaseten qatl)*,

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[3] Mardin, Şerif, *Türk Moderneleşmesi*, Ed. T. Önder, İletişim Publication, Istanbul, 1994, Pg. 87.; Mardin, Şerif, *Yeni Osmanlı Düşüncesinin Doğuşu*, İletişim Publication, Istanbul, 1996, Pg. 57.

kul system, and confiscation of property (*müsadere)*. That is why the bureaucracy has taken an initiative role in carrying out the Tanzimat reforms that equate the protection of fundamental rights in favor of bureaucrats. Indeed, there are many passages in the texts of edicts, stirring the fact that they apparently served to protect bureaucrats' fundamental rights. I treat these passages in more detail below in the chapter of "the abolition of execution without trial".

The contention of my thesis is the fact that the constitutional reforms on fundamental rights and freedoms have been carried out in conformity with Islamic jurisprudence that had been continuously implemented in the Ottoman judicial system for a number of centuries. Majority legislation was a codification of Islamic principles of jurisprudence while some of them were quite new to the system such as legislation on imprisonment and custody. Nevertheless, these new systems were adapted to the Islamic jurisprudence. Moreover, the new regime of the protecting of human rights has brought an innovation to the judicial system concerning bureaucrats' fundamental rights. It was, in fact, an adjustment of the Ottoman administrative practices in proportion to the principles of Islamic jurisprudence.

I expect that this study will help to support and draw attention to the very few studies in this particular field. Furthermore, I suppose that this study would lead other studies on human rights in Islam to consider the consistency between theory and practice. The primary goal of my thesis is raising awareness on practical aspects of the discussion of human rights in Islam, whereby it leads further authentic studies that combine both theoretical and practical aspect of the concept of human rights in human rights in Islam studies.

Literature Review

The existence of a universal human rights concept has been questioned in social, political and academic circles for a number of decades. Some argue that the setting up of a global human rights system is possible with the help of the globalism

trend in the New World Order[4] while others who represent the idea of regional human rights find these discourses utopian as the social, cultural and political diversities of the different regions in the world do not allow establishing such a system.[5]

Human Rights issue has become an essential subject matter in Islamic studies for a couple of decades in both Muslim and non-Muslim scholars. From orientalist viewpoint[6] to traditional approach[7], discussions of human rights in Islam keep going on in a wide range of scale.

The academic discussions mostly have been taken up over the comparisons of international human rights frameworks or declarations and the regional human rights charters or applications. However, it seems that investigating whether or not the regional human rights frameworks are reconcilable with "so-called" universal human rights frameworks pushes the regional systems, including Islamic regions to become a party in the vicious circle of universalism and cultural relativism discussion.

In that sense, I believe that, instead of asking whether or not a regional system complies with the universal human rights principles, questioning "how much the regional systems` own human rights definitions are universal?" is more likely to

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[4] See for further discussion on universality of human rights: Donnelly, Jack, *Universal Human Rights In Theory And Practice*, 3rd Edition, Cornell University Press, New York, 2013.; Goodman, Ryan, "Promoting Human Rights Through International Law", *The American Journal of International La*w, Vol. 108, No. 3, July 2014, (pp. 576-582).

[5] See for further information on cultural relativism in human rights: Milne, A. J. M., *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights*, State University of New York Press, Albny, 1986; Otto, Dianne, "Rethinking the Universality of Human Rights Law", *Columbia Human Rights Law Review*, Vol. 29, No. 1, Fall 1997, (pp. 1-35).

[6] See: Rehman, Javaid, "The Shariah, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*" International Journal of Law, Policy and the Family*, Vol. 21, No. 1, 1 April 2007, (pp. 108–127).; Mayer, A. Elizabeth, *Islam and Human Rights: Tradition And Politics,* 5th Edition, Westview Press, Philadelphia, 2013.; Donna E. Artz, "The Application of International Human Rights Law in Islamic States", *Human Rights Quarterly*,Vol. 12, No. 2, May, 1990, (pp. 202-230), Pg. 225.

[7] See: Mawdudi, Abul A'la, *Human Rights In Islam*, Islamic Publications, Lahore, 1997.; An-Na'im, Abdullahi A. (1997), "The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts" in *Islam and Human Rights: Selected Essays of Abdullahi An-Na'im*, Ed. Mashood A. Baderin, Ashgate Publishing Co., London, 2010, (pp 60-87).; Berween, Mohamed, "International Bill Of Human Rights: An Islamic Critique", *the International Journal of Human Rights*, Vol. 7 , No. 4, 2003, (pp.129-142), Pg. 132.

enable the discussions to be more productive and constructive. In the specific case of Islamic studies, instead of arguing the compatibility of Islamic rules with the universal human right norms, exploring whether or not a universal human rights concept exists in Islamic jurisprudence may naturally let the regional systems adapt to the international system more easily; whereby it motivates them to establish *an area of common ground between regional Law and International Human Rights*.[8] However, those who deal with the issue of universality of human rights in Islam in its own rights are quite rare in Islamic studies.[9]

These relatively rare studies, on the other hand, do not resonate in legal doctrine and operative actors of global and regional human rights regimes since these studies are not regarded among the legal theory. One reason why these studies are considered as studies of the philosophy of religion instead of studies of legal theory is the fact that these studies do not sufficiently pay attention to the praxis of human rights.[10]

In my opinion, the studies that attempt to address human rights issues in the sense of universalism and relativism must take both practical and philosophical aspects of human rights into consideration in order to avoid distorting from the sphere of legal theory. This is because on one hand, law is a normative social science that determines "what ought to be"; on the other hand, it must be applicable to the social reality by which it always pays regard to the practical, social and political

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[8] Baderin, Mashood, "Establishing Areas of Common Ground Between Islamic Law and International Human Rights", *The International Journal of Human Rights*, Vol. 5, No. 2, 2001, (pp. 72-113).

[9] See for further information on universality of human rights in Islam: Senturk, Recep, "Sociology of Rights: I Am Therefore I Have Rights, Human Rights in Islam Between Universalistic and Communalistic Perspectives", *Muslim World Journal of Human Rights*, Vol. 2, No. 1, 2005, (pp. 1-30).; Baderin, Mashood A. Baderin, "Islam and The Realization Of Human Rights In The Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives" *Muslim World Journal of Human Rights*, Vol. 4, No. 1, 2007.; Fadel, Mohammad H., "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law", *Chicago Journal of International Law*, Vol. 8, No. 1, Jannuary 2007, (pp. 1-20), Available At: Http://Chicagounbound.Uchicago.Edu/Cjil/Vol8/Iss1/3 (Accesed In 23.08.2017) Pg. 4 ff.

[10] See for Bielefeldt's Critics on Maududi's Statement of Human Rights in Islam: Bielefeldt, Heiner, "Western versus Islamic Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights", Political Theory, Vol. 28, No. 1, Feb. 2000, (pp. 90-121), (available at: Http://Www.Jstor.Org/Stable/192285, accessed: 02.09.2008), Pg. 115 ff.

context that is the nuance which separates doctrine of legal theory from the philosophy. In that sense, in the context of human rights in Islam, I deal with constitutional documents in the 19th century Ottoman Empire, which allows me combining both practical and philosophical aspects in the discussion of protection of human rights in Islamic law.

The subject matter of human rights in the late-Ottoman period is hardly ever seen in English academic literature. Of a few, one is Berdal Aral's work on Human Rights in Ottoman Empire. He deals with the issue in the context of political theory. He states that the Ottoman sultans did not intervene the public sphere unless it is related to political issues until the Tanzimat reform era when the Ottoman Empire has influenced by the European ideology of the state.[11]

Avi Rubin's study on *Nizamiya* courts is a perfect work in the context of my thesis. He states that the Ottoman Empire never intended to replicate western legal institution; rather it tried to establish an authentic modern legal system.

Ramazan Günay's study is also a noteworthy work in the field of human rights in Ottoman Empire in English academic literature. Günay, who concentrate on millet system, deals with the reasons why minority groups were allegiant to the Ottoman State over archival sources such as Shariah court records (*şeriyye sicilleri*) and historical official reports. Günay states that millet system provided a sapphire of freedom for religious minority groups in which they enjoyed their freedoms of religion, education, fair taxation as well as economic freedoms.[12]

Parallel to Günay's study, Akif Tögel focuses on the pluralist feature of Ottoman Empire's classical legal system. He claims that minority groups could have freely enjoyed their own traditions in their education system, marriage and other

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[11] Aral, Berdal, "The Idea of Human Rights as Perceived in the Ottoman Empire", *Human Rights Quarterly*, Vol. 26, No. 2, May 2004, (pp. 454-482).
[12] Günay, Ramazan, "Reason Behind Non-Muslims' Allegiance to the Ottoman State", *Turkish Studies- International Periodical for the Languages*, *Literature and History of Turkish of Turkic*, Vol. 7, No. 4, Fall 2012, (pp. 1875-1891).

areas of indigenous life by means of Ottoman legal pluralism that allows them establishing their own minority courts in their cases related to civil law.[13]

The major contribution to the field, however, has been made by Baki Tezcan in his book "The Second Ottoman Empire: Political and Social Transformation in the Early Modern World" of which some chapters quite relevant to my thesis in terms of protection of fundamental rights of Ottoman subjects by the virtue of the limitation of the Ottoman political power.

Tezcan, first of all rejects the recession paradigm in Ottoman historiography which assets the fact that Ottoman Empire did not adapt to the industrial revolution and capitalist system and eventually declined because of (i) a despotic central authority which did not allow to improve civil society and (ii) a bureaucratic central structure which avoided the development of private ownership. Tezcan, however, notes that Sultans, presented as the shadow of God in the world, would not have over-thoned easily. Nevertheless, nine Ottoman Sultans acceded to the throne and six of them over-throned between 1603 and 1703. He states, therefore, that there was an unwritten constitutional order in which it was determined "what Sultan ought to do or ought not to do", "the conditions enabling dethronement of a Sultan", and "the methods of the dethronements." In that sense, the Ulama and the guild of janissaries, which is considered as the responsible for everything have gone wrong since the 16th century by Ottoman historiography, played an essential role in the instances of dethronement as an important political actor. Some contemporary western observers regarded the guild of janissaries as the protector of the rights of the people against the destruction of the absolute power of Sultan thereby they drew a correspondence with dethronements of English dynasty in the 16th century although mainstream historians insist to consider these actions of janissaries as "bereft of a constitutional background", "disorder of soldier-like outlaws", and "the sing of recession".[14]

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[13] Tögel, Akif, "Ottoman Human Rights Practice: A Model of Legal Pluralism", *Yıldırım Beyazıt Hukuk Dergisi*, Vol. 2, No. 1, 2016, (pp. 201-220), Pg. 218.
[14] Tezcan, Baki, *The Second Ottoman Empire: Political and Social Transformation in The Early Modern World*, Cambridge University Press, Cambridge, 2010.

On contrary to the English literature, the subject matter of "Human Rights in Ottoman Empire in the Tanzimat reform" has been comprehensively treated in Turkish academic literature for a number of decades. In the literature of legal doctrine, there is a dominant genre postulating the fact that Ottoman Empire has not a concept of human rights before the constitutional movements of the Tanzimat have begun. Along with constitutional movement, Ottoman Empire has modernized its legal system in conformity with human rights, freedoms, and equality by means of the influence of the European enlightenment ideologies.[15] Although there are clear references to Shariah in constitutional documents, they tend to interpret the fact that these references were given in order to avoid objects of sectarian religious groups to the modern reformist movements.[16]

On the other hand, there are some academicians in legal doctrine who state that the constitutional movements of Ottoman Empire, including fundamental rights reforms, has been conducted in conformity with Islamic Sunni Jurisprudence that had been operated in the Ottoman legal system for a number of centuries.[17]

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[15] They state that the imperial edict of gülhane is the first step to the acknowledgement of human rights in the Ottoman Empire. See; Kapani, Münci, *Kamu Hürriyetleri*, 7th Edition, Yetkin Publication, Ankara, 1993, Pg. 93.; Akad, Mehmet, *Genel Kamu Hukuku*, 2nd Edition, Filiz Publication, İstanbul, 1997, Pg. 167.; Akın, İlhan F., *Kamu Hukuku*, Beta Publications, 5th Edition, İstanbul, 1987; Akın, İlhan F., *Türk Devrim Tarihi*, Fakülteler Press, Istanbul, 1983; Gözler, Kemal, *Türk Anayasa Hukuku Dersleri*, 2nd Edition, Ekin Publication, Bursa, 2004.; Gözübüyük, A. Şeref, *Anayasa Hukuku*, 4th Edition, Turhan Publication, Ankara, 1993.; Özbudun, Ergun, *Türk Anayasa Hukuku*, 3rd Edition Yetkin Publication, Ankara, 1993.; Teziç, Erdoğan, *Anayasa Hukuku*, 5th Edition, Beta Press, Istanbul, 1998; Tanör, Bülent, *Osmanlı-Türk Anayasal Gelişmeleri* (1789 – 1980), 22th Edition, Yapı Kredi Yayınları, No:12334, Istanbul, 2012.; Tunaya, Tarık Zafer, *Siyasal Kurumlar ve Anayasa Hukuku*, 4th Edition, Istanbul University Press, Istanbul, 1980.; Kili, Suna, Gözübüyük, Şeref, *Türk Anayasa Metinleri (Sened-i İttifaktan Günümüze)*, 2nd Edition, Türkiye İş Bankası Kültür Publication, Istanbul, 2000.; Herbert, J. Liebesny, *The Law Of The Near And Middle East: Readings, Cases, and Materials*, State University of New York Press, Albany, 1975, Pg. 46–49.

[16] Yavuz Abadan claims that, in topkapi archive, he found a rough draft edition of the imperial edict of rose chamber in which there were no references to shariah as there was in the declared edition. See; Abadan, Yavuz, "Tanzimat Fermanının Tahlili", in *Tanzimat I Maarif Vekâleti*, Istanbul, 1940, Pg. 48-50; Özdemir, Yavuz, Çiydem, Erol, Aktaş, Elif, "Tanzimat Fermanı'nın Arka Planı", *Kastamonu Eğitim Dergisi*, January 2014, Vol. 22, No. 1, (pp. 321-338), Pg. 323.

[17] Aydın, M. Akif, *Türk Hukuk Tarihi,* 14th Edition, Beta Publication, Istanbul, 2017; Üçok, Coşkun, Mumcu, Ahmet, Bozkurt, Gülnihal, *Türk Hukuk Tarihi*, 16th Edition, Turhan Publications, Ankara, 2016.; Ekinci, E. Buğra, *Osmanlı Hukuku,* 4th Edition, Arı Sanat Publications, Istanbul, 2016.; Akgündüz, Ahmet, Cin, Halil, *Türk Hukuk Tarihi: Kamu Hukuku*, 1st Edition, OSAV, Istanbul, 2011.; Armağan, Servet, *Türk Esas Teşkilat Hukuku*, İÜHFM, No. 2584, Istanbul, 1979.

For several reasons, I appropriate the second opinion with minor reservations that I explain through the thesis in patches. First of all, the Tanzimat reforms did not encounter a remarkable socio-political resistance. Reforms effected, altered and abolished many delicate social dynamics such as legal status of Muslims and non-Muslims, slavery, and taxation and recruiting system in society. Such major transformations in social parameters would not have settled down without remarkable social resistance unless the society was already in a condition the fact that it was able to affirm the reforms. As Bin Wong states, in the context of Chinese historiography, the linguistic absence of a certain notion does not prove their historical absence.[18] In that sense, the literal absence of the notions of "freedom", "rights", and "equality" in official documents does not prove the absence of the concept of freedom, rights, and equality in the legal system. Instead, the social affirmation of the reforms gives us a hint to think that there was a protection of freedom, rights, and equality of people before the Tanzimat reforms, in its own rights, in different terms and notions, in the ottoman legal system.

Moreover, constitutional documents set their *ratio legis* as promoting the Shariah in addition to their clear references to Shariah in their texts. In addition to the issue of reference, the government agents who carried out the reforms generally attempted to associate outcomes of the reforms with classical jurisprudential implementations. For example, when Ahmet Cevdet Pasha address an speech, in the opening ceremony of *Nizamiye* Courts in 1840, he stated that *Nizamiye* Courts were correspondent with Classical Islamic jurisprudence by which he adduced pieces of evidence from Celaleddin Dewwani's one Parisian *Risale* on *Mezalim* Courts in the 15th century in support of his claim the fact that *Nizamiye* Courts complied with Islamic jurisprudence.[19]

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[18] Wong, R. Bin, *China Transformed: Historical Change And The Limits Of European Experience*, Cornell University Press, Ithaca, 1997, Pg. 5; Tezcan, Baki, *The Second Ottoman Empire*, Pg. 48.
[19] Ahmet Cevdet Pasha, *Tezakir*, Ed. Cavid Baysun, Türk Tarih Kurumu, Ankara, 1953, Pg. 84-85; Brown, Jonathan, "Reaching Into The Obscure Past: The Islamic Legal Heritage and Legal Reform In The Modern Period," in *Reclaiming Islamic Tradition: Modern Interpretations of The Classical Heritage*, Eds. Elisebeth Kendell, Ahmad Khan, Edinburgh University Press, 2016.

Furthermore, subsidiary reform legislation, which constitutional documents prescribed to enact in order to guarantee the rights and freedoms, was enacted in the control of the office of sheikh al-Islam in order to provide conformity of the legislation with Islamic jurisprudence. The Supreme Council of Judicial Ordinances (*Meclis-i Ahkâm-ı Vâlây-ı Adliye)* was founded to pass reform legislation and inspect the implementation of the legislation. Some of the members of the SCJO were from Ulama class whose missions were to ensure that legislation were produced in keeping with Islamic jurisprudence. Nevertheless, once a code was written by the SCJO, it was sent to the office of sheikh al-Islam. After the office confirms that it complies with Islamic jurisprudence, the code was ready to pass into the law. Ahmet Cevdet Pasha report in his *Tezakir* that since correspondences between the SCJO and Office of Sheikh al-Islam lasted too much, Mustafa Rehsit Pasha, who was the ministry of justice of current period, required a scholar from Ulama to write law texts of reform legislation. As a result, Ahmet Cevdet Pasha, who was contemporary Istanbul qadi, was assigned to the membership of the SCJO in 1861.[20]

Methodology and Sources

In the thesis, I deal with the 19th century Ottoman Tanzimat movement in an attempt to illustrate the influence of Islamic jurisprudence on human rights which established by the constitutional documents, subsidiary legislation, collections of jurisprudence, official gazettes and journals.

Upon doing so, I am aware that one must be very conscious about the contamination of his cultural background and contemporary conceptions in order to avoid from the discourses that omit, distort and exaggerate the historical facts. Nevertheless, dealing with an issue throughout one's own viewpoint and background information is in fact very human. It is even impossible, for Derrida, to think without postulates.[21] Even so, one's generalizations and interpretations must be continuously

[20] Ahmet Cevdet Pasha, *Tezakir*, Pg. 63
[21] Derrida, J., *Margins of Philosphy*, University of Chicago Press, Chicago, 1985, Pg. 23.

subject to a conscious review and a strong self-control at least.[22]

I deal with the concept of human rights, constitution and constitutional documents in the chapter of the conceptual framework while I treat theoretical background of human rights in Islam in the following chapter.

Regarding theoretical background, I appropriate a "reflective"[23] viewpoint of epistemology. In keeping with this, I believe that human rights regimes, no matter they are local, regional, or international, determine fundamental rights in conformity with their social paradigm that brings about variations in case of (i) practicing rights and freedoms, (ii) determining their scopes, and (iii) enlarging the list of rights. In that sense, the concept of rights has been grounded in various modern and classical theories by means of different concepts in Islamic jurisprudence since the very beginning of fiqh. Of these theories and concepts, the concept of *iṣmah* has been employed as an essential concept in order to empower a theoretical ground for fundamental rights in Islamic jurisprudence. In my thesis, I mainly appropriate the theory of *iṣmah* in the theoretical background of my thesis since it is more comprehensive, consistent and correspondent to my thesis.

Despite the existence of different classifications, there is a consensus among almost all jurisdictions that Islamic Law cumulates the fundamental rights (*iṣmah*) in six categories and guaranteed them i.e. *iṣmah 'l-nefs*, *iṣmah 'l-aql*, *iṣmah 'l-din*, *iṣmah 'l-ird*, *iṣmah 'l-mal* and *iṣmah 'l- nasl*.[24] However, in order to consider those rights as human rights, it is necessary to indicate the fact that "who does enjoy the protection of Law?" That is to say, "what is the scale of the concept of person who is addressed in front of Law?" If the answer is citizens or a determined special group, it cannot be charactraized as human rights.

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[22] Hogdson, Marshall G. S., *Rethingking World History*, Cambiridge University Press, Cambridge, 2002, Pg. 80.

[23] I utilize the term, "reflective", in a meaning of burawoy's "extended case study method" as a critique of reductive positivist approach. See, Burawoy, Michael, *The Extended Case Method*, University of California Press, London, 2009, Pg.12.

[24] Johansen, Baber, "The Relationship Between the Constitution, the Sharīʿa and the Fiqh: The Jurisprudence of Egypt's Supreme Constitutional Court.", *Heidelberg Journal of International Law*, Vol. 64, No. 4, 2004, (pp. 881–896), Pg. 885.

In that case, first of all, it is crucially important to determine the concept of the person according to the different schools in Islamic law by considering not only Muslim, non-Muslim components but also the other elements of the society such as children, women, slaves, and minorities. In the chapter of "theory of human rights in Islam", therefore, I try to explore the concept of person in the light of the concept of *iṣmah* by using the primary and secondary sources. In doing so, I look for the answer to these questions i.e. "Is it possible to mention a universalistic human rights paradigm in Islamic jurisprudence?" "How the universalistic paradigm found their principles in the sources of the Islamic legal system?" and "How the universalistic paradigm defines the person who is addressed before the law?"

In the third section of the thesis, I deal with the constitutional documents in the context of fundamental rights and their historical backgrounds. In the fourth section, which is the main body of the thesis, I deal with the basic parameters of the constitutional movements as well as the jurisprudential foundations and groundings of the documents over the documents, subsidiary legislation, official gazettes, and the writings of the contemporary Muslim thinkers. I situate the discussion in the context of human rights in Islam by which I track the trace of Islamic principles of Human Rights that appears in (i) constitutional documents, (ii) contemporary literature of jurisprudence, (iii) subsidiary legislations, (iv) official gazettes and journals on legislation, (v) official circulars, (vi) Shariahh court records (*şeriyye sicilleri*), and reactions and opinions of contemporary Muslim scholars in the 19th century ottoman empire literature. By doing so, I seek answers for the questions the fact that "was the concept of *iṣmah*- or its synonyms such as *haqn, hurma, men'*- employed in an attempt to ground the protection of fundamental rights?" and "what is the manifestations of Islamic principles that appeared in the contemporary legal literature?"

I do not treat all freedoms and rights one by one since it exceeds the limited scope of my thesis, instead, I deal with (i) rights to live, (ii) right of physical integrity, (iii) right of liberty, and (iv) right of equality. This is because the contention of the thesis is the fact that the constitutional reforms were carried out (i) as a consequences of the metamorphosis of the state into a modern state, (ii)

considerably in favor of bureaucracy class, (iii) paying regard to the expectations of the Western states, and (iv) in conformity with Islamic jurisprudence. I examine each right as an example of a foregoing dynamic that affected the Tanzimat reforms in sub-sections. In keeping with this, I examine, in the context of right to live, "the abolition of the execution without trial (*al-qatl siyasatan*)" as an example of the effects of bureaucracy. Moreover, I deal with "the prohibition of forced confession", in the context of right to physical integrity, as an example of the effects of Ulama and superiority of Shariah. Furthermore, I treat "the formation and reformation of the prison system in the Ottoman Empire", in the context of right of liberty, as an example of the effects of international impositions. Finally, I examine "the equality in testimony before the court", in the context of right of equality, as an example of the effects of the modernization of the state.

In each section in which I treat different right, first of all, I illustrate the regulation of the right in the text of constitutional documents. Moreover, I examine the implementations of rights over subsidiary legislation, court decisions, official circulars, and contemporary official gazettes and journals. Secondly, I deal with contemporary Islamic jurisprudential groundings of the right. Furthermore, I investigate whether or not the issue is treated in conjunction with the concept of *iṣmah* or its synonyms in the contemporary canon collections of fiqh and the reactions of contemporary Muslim scholars. Finally, I treat a specific subject matter in each rights related to the basic dinamics of the tanzimat moverments that I mentioned above.

Regarding canon collections of fiqh, I mainly refer to *Radd al-Muhtar ala ad-Dur al-Mukhtar*, written by Ibn 'Abidin (1783-1836) at the beginning of 19th century. *Radd al-Muhtar* is a marginal gloss (*hashiyah*) on `Ala' al-Din al-Haskafi's *ed-Dürrü'l-muħtâr* that is a commentary on Timurtashi's *Tenvîrü'l-Ebśâr*. Ibn Abidin did a comprehensive work over *ed-Dürrü'l-muħtâr*. He indicates reliable, correct, strong, and criticized opinions; investigates the source of the jurisprudential decisions; and attempts to clarify the statements that had been remained unclear to understand. He utilized almost all previous canonized collections of the Hanafi school, including *Mukhtasar Quduri*, *Kanz al-Daqa'iq*, *Wiqaya*, and *Multaqa 'l-*

Abhur. Radd al-Muhtar, which is considered one of the most comprehensive, encyclopedic compilations of the Hanafi school today, has been published many times: the Bulaq edition of 1272 (h) in five volumes and later in 1276 (h) and 1299 (h); the Maymaniyyah edition in 1307 (h); the Istanbul edition of 1307 (h). Once again in 1323 (h), there was a Maymaniyyah Edition; and later in 1323 (h), the Bābi al-Ĥalabī edition and Istanbul edition in eight volumes along with the *Takmilah*, which has been photo-offset a number of times hence.[25]

Regarding subsidiary legislation, a variety of codes and acts on the different subject have been pass into law in the reform period. On one hand, some of them solely consisted of Islamic jurisprudential princibles namely the criminal code of 1840, the new criminal code of 1851, the land act of 1858, the Majjalla al-ahkam al-'Adliyyah in between 1869-1876, the family law act of 1917, and the code of procedure of Shariah courts in 1917. On the other hand, some of them were adopted from foreign judicial systems namely the merchant shipping act of 1840, the code of procedure of commercial courts of 1861, the merchant shipping act of 1863, and the criminal procedure act for *Nizamiye* Courts in 1879. Furthermore, some codes were legislated in a combined manner whereby Islamic jurisprudential princibles were coded by minor editing in accordance with a foreign code namely the criminal code of 1858, the *vilayat* law of 1864, the criminal procedure act of 1879, and the code of procedure of 1880.[26]

Of the legislation, Majjalla al-ahkam al-'Adliyyah is the most remarkable one. Majjalla is a comprehensive codification of Hanafi school in the specific field of jurisprudence such as contract, commerce, and adjective law. Majalla was authored, in between 1868-1876, by a commission of Hanafi scholars included Ibn Abidin's

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[25] Özel, Ahmet, "Ibn Abidin", *İslam Ansiklopedisi*, Turk Diyanet Vakfi, Vol. 19, (pp. 292-293), Istanbul, 1999.; Öztürk, Ali, Ibn Abidin'in H. Reddü'l-Muhtar Adlı Eserinde Ahkamın Değişmesi (Muamelat), MA Diss., Marmara University, Institute Of Social Science, Istanbul, 2013, Pg. 93.; Özel, Ahmet, *Hanefî Fıkıh Âlimleri*, Diyanet Vakfı Yayınları, Ankara, 2013, Pg. 145-149.; Kenneth, M. Cuno, "Was The Land Of Ottoman Syria Miri or Milk? An Examination of Juridical Differences within the Hanafi School", *Studia Islamca*, Vol. 81, No. 1, June 1995, (pp. 137-142.), Pg. 142.

[26] See: Gümüş, Musa, "Osmanlı Devleti'nde Kanunlaştırma Hareketleri", *The History School*, No. 14, Spring-Summer 2013, (pp. 163-200), pg. 174.

son, Ala' al-Din Abidin, and Amin al-Jundi, author of "*Islah Ilm al-Hal*", of a commission headed by Ahmet Cevdet Pasha. The first a hundred articles of Majallah are the universal legal principles called "*kavaid-i kulliyye*" indicating the general mentality of Islamic jurisprudence on how to establish jurisprudential decisions (*ahkam*) and how to interpret them. Majalla, which is enacted basically in an attempt to use in *Nizamiya* Courts, was utilized by other courts for the matters of civil status on account of its general principles and the regulations on the adjective law. Although Majalla was repealed in the Republic of Turkey in 1926, it remained in force in many judicial systems such as Yemen (repealed in 1992), Lebanon (1934), Jordan (1974), Syria (1949), Iraq (1951) for a long while. It is currently utilized in Israel to implement to Muslims in Shariah Courts.[27]

Regarding official gazettes and journals, I mainly utilize *ceride-i mehakim,* the official journal of the ministry of justice. *Ceride-i Mehakim* was published between 1873-1901. The name of the journal was changed as *Ceride-i Mehakim-i Adliyye* in 1883, and it has begun to publish twice in a week while it had been published weekly before. By the new name, *Ceride-i Mehakim-i Adliyye* has published 1154 issues between 1883-1901. Purpose of *ceride-i mehakim* is expressed as follows; (i) explaining the intentions and provisions of codes, (ii) clarifying the complicated and detailed legal issues, (iii) showing the implementations of codes, (iv) and publishing appeal court decisions. *Ceride-i mehakim* successfully served as a legal guide for judges of Nizmiye Courts that have established after the Tanzimat. While there were two parts in *Ceride-i Mehakim* i.e. official part and unofficial part, the unofficial part has removed in *Ceride-i Mehakim-i Adliyye.* It is very hard to find the complement of the journey in libraries.[28] Abdurrahman Hakkı has published an index of the articles that took place in the first 435 issues of the second period of the

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[27] Şimsirgil, Ahmet, Ekinci, E. Buğra, *Ahmet Cevdet Paşa ve Mecelle*, Ktb Publications, 2nd Edition, Istanbul, 2009, Pg. 55

[28] Yavuz, Hulusi, "Ceride-i Mehakim", *İslam Ansiklopedisi*, Turk Diyanet Vakfı, Vol. 7, (pp. 408-409), Istanbul, 1993.

journey that published between 1883-1901.[29]

Regarding late Ottoman scholars, I mainly deal with the writings of Namık Kemal, İzmirli İsmail Hakkı, Said Nursi, Ahmet Cevdet Pasha, Bereketzade Cemalettin Abdullah, Shahabuddin al-Ālūsī, Abdulaziz Çaviş, Mehmet Seyyid Bey and Hüseyin Kazım Kadri.

[29] Hakki, Abdurrahman, *Rehber-i Kavânîn Lâhikası: Cerîde-i Mehâkim Fihristi, Istanbul: 1301-1305*, Eski Harfli Türkçe Süreli Yayınlar Toplu Kataloğu, Kültür ve Turizm Bakanlığı, Ankara, 1987, (Available at Isam Library, Istanbul).

CHAPTER ONE: CONCEPTUAL FRAMEWORK

A. The Concept of Human Rights

The term, human rights, can be defined, in the widest sense, as "the rights that a person possesses them just because he is a human-begin."[30] Yet there is an abundance of definitions and notions on the philosophical foundation of human rights in academic literature. I believe that the term, human rights, is not an absolute concept that bears a definite and distinct content; dispute the fact that list of fundamental rights which almost each legal system guarantees as human rights are more or less the same in theory today. Instead, human rights regimes; no matter they are local, regional, or international; determine fundamental rights in conformity with their social paradigm that brings about variations in case of practicing rights and freedoms, restricting their scopes, and enlarging the list of rights.

The violent instances of World Wars in which fundamental rights of people were violated by their own states in the frame of national law have triggered to arise the modern concept of human rights in national and international legal systems. Especially international human rights law have emerged out of a necessity to hold the axis countries accountable for war crimes acted against their own citizens. This is because the Nuremberg trials could sue members of the axis states for the war crimes only acted against other states but not their own citizens thereof as an international trial.

The international community has needed to developed supra-state precautions to protect fundamental rights of people after the first war by which Universal Declaration of Human Rights has been framed by the League of Nations before the second war. However, the consequence of the second war accelerated endeavors of human rights since the current principles of international law did not allow adjudicating those who violate the rights of their own citizens.

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[30] Donelly, Jack, *Universal Human Rigts in Theory And Practice*, 3rd Edition, Cornell University Press, New York, 2013, Pg. 19.

Of the foremost contemporary jurists, Raphel Lemkin, has proposed before the second war that national political powers should be liable for their violent actions; including social, political, cultural, biological, physical, religious or moral acts of violence; against the individuals of a religious, ethnic or social group[31]. His proposal, which has not received a wide acceptance in international community before the war, has had a chance to be approved under the term of "genocide"[32] owing to mass violation of Nazi Germany against ethnic, religious and cultural groups[33].

The Nuremberg Trials, which was established to adjudicate the responsibles of the war, was an international court of which the subject matter was only the international matters. Jurisdiction of the court, therefore, covered only the crimes that were committed against countries. However, the crimes committed against their own citizens of those prosecuted were not in the jurisdiction of the court since, matter in dispute, criminal activities were excluded from the frame of international laws. The number trial has brought in a verdict of guilty by referring to Lempkin's concept of genocide.

After the second war, liabilities of national political powers in the international law have undergone a paradigm shift. National political powers has become liable for their actions against "individuals" in international law while they had been liable only for their actions against minority groups according to humanitarian law before the second war. This new perception of liability of state enables the modern concept of human rights to flourish by which individuals have an opportunity to demand directly from the state to guarantee and protect their fundamental rights.

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[31] Lemkin, Raphael, "Genocide as a Crime under International Law," *American Journal of International Law*, Vol. 41, No. 1, January 1947, (pp. 145-151), Pg. 146.
[32] Lemkin, Raphael, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, The Lawbook Exchange Ltd., Washington, 2008, Pg. 79.
[33] Değer, Ozan, "Soykırım Suçu ve Devletin Sorumluluğu: Uluslararası Adalet Divanı'nın Bosna-Hersek v. Sırbistan-Karadağ Kararı", *Uluslararası İlişkiler*, Vol. 6, No. 22, Summer 2009, (pp. 61-95.), Pg. 63.

Human rights law has made a remarkable progress in such a short period, in that it has become an integral part of the international and national law. The list and scope of fundamental rights have been extended since then owing to international conventions on human rights and the jurisprudence of international courts of human rights.

Many contemporary jurists have dealt with the philosophical grounds of human rights in doctrine in an attempt to consolidate legitimacy of human rights in the presence of national and international legal systems. In almost all groundings of human rights, it is noted that the concept of human rights is directly associated with the concept of "the restriction of political power". This is because the philosophy of human rights demands to restrict the political power in favor of fundamental rights of people.

In my thesis, I deal with the concept of human rights in regards with the restriction of political power in an attempt to avoid anachronism when I use the concept of human rights, which is a modern concept, to describe the protection of fundamental rights of people in Ottoman legal system which operates in accordance with Islamic law.

1. The Restriction of Political Authority as an Instance of Protection of Human Rights

Human Rights are deontological rights, which have not been bestowed by a State. That is why, in contrary to ordinary rights, the state has an obligation to provide and protect fundamental human rights for all. In that sense, balancing the power of the state against people's fundamental rights is crucially essential for putting the idea of human rights into practice. It is reasonable to say, therefore, that any instances of restrictions of political power in favor of fundamental rights of people, called by different terms and names in pre-modern time, can be regarded as a practice of human rights although the term, human rights, is a modern concept.

a) Definition of Political Authority

Authority is characterized as "a power to influence or comment though, opinion, or behaviour."[34] Authority is a status of dominance which is valid in every layer of a society as well as the state lavel. There would be a relationship of authority even between two people. The political authority, on the other hand, means an exclusive and unique dominance all across the country.

Regarding the limitation of political authority, first of all, one should answer the question the fact that "what is the political authority?" Davit Easton defines the political authority through the social allocation process. The values, sources, fortune, and ranks, are distributed by three basic ways in the society. One is "custom", in that some ranks, values, and sources would pertain to certain people or positions in social costumes. Another is "exchange" in that one can establish his position, rank, value throughout transaction whereby one party give a valued object to another party in return for another object that he needs. The third is "command" in that some offices, ranks, and valued objects can pass into hands by somebody's command. According to Easton, political authority is a structure that has an authority to give legitimate commands, which is able to manage some value allocations otherwise than by costume and exchange.[35]

Schmitt treats the political authority in terms of the question of who determines political decisions. In order to determine distinctive realm of political decisions, it is necessary to find two contrasting terms that remark frontiers of the political sphere. As is the case with the sphere of ethical decision remarked by good/evil, with the sphere of the economic decision by profitable/unprofitable, with the sphere of the juridical decision by legal/illegal. For Schmitt, the frontier of the political realm is defined by the distinction "friend/foe". The ultimate political decision is not normative but existential since it is a response to a condition imposed on "Us" by the Other. The fundamental political decision of a society, in the

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[34] [Online]: Https://Www.Merriam-Webster.Com/Dictionary/Authority, (accessed: 29.12.2017).
[35] Easton, Davit, *The Political System an Inquiry into the State of Political Science*, Alfred A Knopf Publisher, New York, 1953, Chapter 5.; Poggi, Gianfronco, *The Development of the Modern State: A Sogiological Introduction*, Standfort University Press, 1978, Standford, Pg. 3-4.

confrontation of "us" and "other", is a determination of who is fried, which respects our integrity and independence, and who is foe, which carries out activities treating our integrity and independence. For Schmitt, the political authority is the one who gives an executive political decision in that determines the friends/foes of a nation and exceptional circumstances of a state such as declaring a state of emergency.[36]

Gianfranco Poggi states that despite the extreme contrast of Easton and Schmitt's notions, they agree on the fact that political authority must have privileged access to facilities for physical coercion. On the other hand, Poggi criticizes definitions of politics of both Schmitt and Easton. Poggi finds Schmitt's definition inadequate because Schmitt takes the collectivity as a datum that necessitates constant protection of political power. However, the collectivity is a product of politics, which can protect it only after creating it. In creating a collectivity, social allocation process, which Schmitt neglects, is indispensably required. How can a collectivity define friend and foe without comprehending what makes us into us? Poggi also regards Easton's definition insufficient since Easton considers allocation process as politics insofar as they bear upon value allocation. However, primarily, the values must be created to be able to allocate them. The politics surely more than a process of allocating valued objects carried out before greedy ayes by the grasping hands of a multitude of "antagonistic cooperations". Moreover, some created values, especially abstract values such as the right of election, can be possessed collectively; they cannot be allocated between individuals. Poggi states that, in fact, these two notions are complementary.[37]Poggi appropriates, therefore, the theory of institutional differentiation in an attempt to illustrate the formation of politics and political authority in the modern state. The theory of institutional differentiation asserts that the major functional problems of a society bring about a verity of increasingly elaborated and distinctive sets of structural arrangement in the course of time.[38] However, I believe that the theory of institutional differentiation, which emphasizes

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[36] Poggi, Gianfranco, *The Development of the Modern State,* Pg. 5-7.
[37] Ibid, Pg. 9-12.
[38] Ibid, Pg. 13.

transformation of institutions, is a deficient approach since it disregards transformation of perception of concepts in society.

In that sense, Michel Foucault's method of "archaeological analysis" seems more relevant to study the formation of human rights in the Empire regarding limitation of political power. The archaeological analysis is a method, which analyzes the circumstances, practices, and rules that make a discourse or knowledge possible. [39] On contrary to his contemporaries such as structuralists and semiologists, for Foucault, discourse analysis is not a language analysis since discourse is a complement of relations which consists of discursive relations which arises in logic, rhetoric, or linguistic; and non-discursive relations which emerges in institutional relations i.e. in family, army, or school; of a relation formed according to architecture, and spatial structure thereto. According to Foucault, a discourse results from the interception of discursive relations and non-discursive relations.[40] In that sense, in an attempt to analyze, for example, the formation of politics, it is not sufficient to analyze discourses on the politics in historical documents in an archive, instead, one should examine the place where politics materialize, e.g., Places, or Parliaments, of which the transformations, the architecture, the internal regulations, and in which the traditions carried out for a long while.

The fact remains that, Foucault employs the concept of archaeology in a sense Kant used, in that, archeology – derived from the ancient Greek word "*arkhe*", means a body of rules- is the history of a body of rules that necessitate a specific way of thinking. That is to say, a particular period of history obliges "people of the period" to think in a specific way by virtue of body of rules, which Foucault calls them "episteme". Hence, people use the language and conceptualize things by means of an a-priori body of rules, which people have inevitably internalized since childhood. On the contrary to Kant, these a-priori bodies of rules are not universal but historical, in that, in different periods of history, there were various bodies of

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[39] Çelebi, Vedat, "Michel Foucault'da Arkeolojik Çözümleme Ve Arkeolojik Çözümlemenin Süreksizlik Tezi", *ÇKÜSBED*, Vol .7, No.1, (pp. 993-1014), Pg. 998.
[40] Keskin, Ferda, "Söylem, Arkeoloji ve Iktidar", *Doğu Batı*, No. 9, 1999, (pp. 15-22), Pg. 19.

rules in which people of the period consider and conceptualize the word accordingly.[41] In that sense, Foucault's archaeological analysis is an activity of analysis discursive and non-discursive relations of the subject matter (discourse) that obliged people of the period to think in a specific way of thinking which allows emerging the discourse in its current formation. [42]

In the sense of foregoing discussions on political power that result in the conclusion the fact that on one hand authority is shaped in accordance with collectivity and on the other hand authority shapes collectivity, it seems appropriate to treat the formation of human rights as an instance of "archaeological analysis". In that sense, the concept of human rights has formed in keeping with a variety of similar process of discursive and non-discursive differentiation in the course of time.

In order to conduct cooperative study between pre-modern perceptions and modern perceptions of human rights, one should examine the transformation of the perception of human rights over institutional and discursive differentiations in a society. However, it might be extremely challenging since the term, human rights, is a modern concept. Nevertheless, we can trace the transformation of the perception of authority with regards to the limitation of authority.

Indeed, one witness a number of paradigm shifts in the mentality of administration through political history that shapes the perception of authority in the society during the period. I attempt to reveal this process, which requires a wide-scale academic study, over some cornerstone transformations and, of a reflection that reacted vis-a-vis the transformations in western and Islamic political history. I also employ the principle of isomorphism, in that *Plus ça change, plus c'est la meme chose* e.i everything is the same howsoever they have changed: actors change, but

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[41] Keskin, Ferda, Pg. 21.

[42] See for further information: Foucault, Michael, *The Archeology of Knowledge*, Ed. and Trans. R. Sheridan Routledge, London, 1995.; See also Foucault, Michael, "Politics and the Study of Discourse" in *the Foucault Effect: Studies in Governmentality* Ed. Graham Burchell, Colin Gordon, Peter Miller, University Of Chicago Press, Chicago,1991, (pp. 53-72), Pg 59.

the structure remains same.[43]

b) The Restriction of Political Authority

Today, the authority of political power is restricted in favor of fundamental rights by means of instruments such as constitutions, variations of separation of power, and international human rights regimes. Was there a restriction mechanism of political power in the interest of protection of fundamental rights and freedoms of subjects in the time before modern state emerged? Especially, how were the political authorities that appeared in Islamic civilization restricted by means of the practices of Islamic jurisprudence? Is it possible to characterize these practices as human rights practices?

Although the Ottoman Empire has transformed into a modern state in 19th century, answering the foregoing questions is quite relevant to my thesis to comprehend human rights reforms in the 19th century Ottoman Empire since the contention of this thesis is the fact that the Ottoman Empire carried out most of the reforms on fundamental rights and freedom in conformity with Islamic jurisprudence that had been applied for a number of centuries in the Empire. The fact remains that, genre and format of protection of rights and freedoms have changed and the scope of rights and freedoms has extended in terms of both content and subject since the state itself has transform into a new phase in the sense of modernity.

2. The Restriction of Political Authority in Islamic Jurisprudence

In the Islamic societal science, fiqh,[44] on the other hand, the perception of political authority has developed in a different way in its own right. The concept of authority has been profoundly explored by Ibni Khaldun, Ibni Teymiye, Mawardī,

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[43] Galtung, Johan, *Human Rights in Another Key*, Blackwell Publishers & Polity Press, Oxford, 1994, Pg. 14.

[44] Some understand "fiqh" as a societal science of islamic scholarship, comparing western social science, in the literature. See for Further Information: Şentürk, Recep, *Islam Dünyasında Modernleşme ve Toplum Bilim*, 4th Edition, İz Publication, Istanbul, 2017, Pg. 9.

Ibni Cevzi, Ibni Miskevi, Ghazālī, Shatibi, Ibni Rüşt etc. Yet, they dealt with the concept strongly attached to the personal and moral justice of administrators. Overall they describe how a ruler should rule fairly and they advised ruler to stick with Shariahh in their affairs.

Ibn Khaldun states that what really matters in governance is the fact that authority is the religion in that no one forces another to do something. That is to say, authority is a religion, which is unanimously adopted by people with a sincere belief that it is true. People can establish a union of opinion and force without the need for formal agreement or consensus in the case the fact that people follow the religion by virtue of one's own free will instead of an external factor or a power, thereby the religion serves as a basis of this union. [45]

Mawardī requires the presence of a legal system in the administration that aims to provide comprehensive justice principle for the legitimacy of the state[46]. Dureyni states, parallel to Mawardī and many other Muslim scholars, political power is legitimate only if it is the guarantor of the truth, justice, and religion[47]. On contrary to modern law, Islamic jurisprudence is not a state law which is extant with authority of the state, instead, it is a supra-state law, in that all states in Islamic civilization must abide by principles of Islamic jurisprudence. Luis Gardet called this rule based Muslim state system "nomocracy".[48]

Nevertheless, the essential guarantee of the maintenance of justice in a political structure is morality and personal justice of rulers. In other words, since governments have not separate legal entities, agents of government including caliph himself personally responsible to conduct the administrative system in a just manner.

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[45] Ibn Khaldun, *Mukaddima I-II*, Trns: Zakir Kadri Ugan, Meb Publications, Istanbul, 1990, Vol. 1, Pg. 481.
[46] Mawardi, *Teshili 'n-Nazar Ve Tacili 'z-Zafer fi Ahlaki 'l-Melik Ve Siyaset 'l-Mulk*, Ed. Muhyi Hilal Es-Serhan, Daru'n-Nahdati 'l-Arabiyye, Beirut, 1981, Pg. 184; Mawardi, *Edeb'd-Dunya ve 'd-Din*, Ed. Yasin Muhammed Es-Sevas, Dar'l-Ibni Kesir, Beirut, 1995, Pg. 227; Birsin, Mehmet, *Maverdi'nin Devlet Anlayışı*, PhD Diss., Ankara University, Institute of Socilal Science Ankara, 2004, Pg. 86.
[47] Birsin, 2004, Pg. 97.
[48] Gardet, Luis, *Müslüman Site*, Trans. Ahmet Arslan, Ayrıntı Publishing, Istanbul, 2014, Pg. 55.

In keeping with this, the subject matter, politics, has been mainly treated in books of ethics in which deal with the ethics in three categories respectively personal ethics, ethics in the family, and ethics in society and management. Muslim scholars have written in *siyasatnama* books throughout history the fact that rules should govern the state in a just and fair manner. Faroqhi states that the emphasis of fair and just governance in *siyasetnama* literature demonstrates a tendency of extension and consolidation of the sphere of Islamic Law against Sultan's law in Ottoman political history. For him, this tendency has begun in the 16th century and concentrated in the 17th and 18th century in Ottoman Empire.[49]

It is appropriated even by judicial precedence in the western scholarship the fact that "the King can do no wrong".[50] However, in contrast to the western kings, Muslim rulers are not *legibus solutus*. In other words, Islamic Law does not accept faultless kings with almighty authority. Authority of rulers is limited with Islamic law. A Caliph can have a faulty action and he would be responsible for his actions. A Caliph who does not obey the Shariah and behaves arbitrarily loses his legitimacy whereby he is subject to discharge in theory. The history of the Ottoman Empire experienced that numerous Sultans were disenthroned by means of fatawa on a charge of acting against Shariah. Moreover, a ruler cannot behave arbitrarily even in this jurisdiction that Shariah has not regulated. They must pay regards to the public welfare (*maslahat al-'amma*) in governing and making policies. Majalla article 59 indicates this principle as the fact that "The exercise of control over subjects is dependent upon the public welfare (*maslahat al-'amma*)."[51]

a) The Conformity of Ottoman Legal System with Islamic Jurisprudence

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[49] Faroqhi, Suraiya, *Another Mirror for Princes, The Public Image of the Ottoman Sultans and its Reception*, Isis Press, Istanbul, 2008, Pg. 14.
[50] Smith, S.A, Brazier, Rodney, *Constitutional and Administrative Law*, 6th Edition, Penguin Books, London, 1989, Pg. 133.
[51] [Online]: Http://Www.Iium.Edu.My/Deed/Lawbase/Al_Majalle/Al_Majalleintro.Html, (accessed: 15.01.2016).

Regarding limitation of authority in Ottoman Empire, Ottoman political authority was generally attentive to stick in the borders limited by Shariah thereby the authority regards its conformity with Shariah as a source of legitimacy.

Tursun bey, who was a Muslim historian lived in Ottoman Empire in 15th century, in his book *Tarih-i Abu 'l-Feth*, distinguishes politics into two i.e. "Shariah" of which the sources are divine; and "'*Urf"*, legislation of ruler's will (Sultan's law), of which the sources are reason and experience. The issue whether or not Sultan's law (*'urf)* was independent form Shariah, however, has been controversial in academic circles for a number of decades. Some historians believe that there was a duality in Ottoman legal system in which administrative area was legislated independently of Islamic jurisdictional principles.[52] Some historians, on the other hand, criticize to distinguish the Ottoman law as fiqh and *'urf*.[53]

I appropriate, for a number of reasons, the fact that there was no a duality in term of Shari and Sultan's law (*urf*) in Ottoman legal system in which *'urf* was being produced in a strong conformity with Shariah.

First, conceptualization of Tursun bey, *Shariah/Orf*, is a classification of norms, measures, and implementations that existed in the contemporary legal system in terms of their sources. It is not correct to conclude his division as the fact that totally separated two different laws operated in Ottoman legal system.[54]

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[52] See: Köprülü, Fuat, *Islam ve Türk Hukuk Tarihi Araştırmaları ve Vakıf Müessesesi*, Akçağ Publications, Ankara, 2005, Pg. 3-35; Barkan, Ömer Lütfi, *Xv. ve Xvi. Asırlarda Osmanlı Imparatorluğunda Zirai Ekonominin Hukuki ve Mali Esasları*, Istanbul Üniversitesi Publication, Istanbul, 1943, Vol. I, Pg. Xiii-Xv.

[53] Stilt argues that the Shariʿah often encompassed both fiqh and siyāsah. Equating shariʿah with fiqh, and opposing them to a political or secular siyāsah, creates the misperception that rulers did not have religious concerns or influence, and that the jurists did not engage in considerations of public welfare. Stilt, Kristen, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt*, Oxford University Press, New York, 2012, Pg. 96.; See for a compranasive critic: Rapoport, Yossef, "Royal Justice and Religious Law: Siyāsah and Shariʿah Under the Mamluks", *Mamluk Studies Review*, Vol. 16, 2012, (pp. 71-102) Pg. 75.

[54] Köksal, Asım Cüneyt, *Fıkıh ve Siyaset: Osmanlılarda Siyaset-i Şer'iyye*, Klasik Publication, Istanbul, 2016, Pg. 100.

Second, there is a consensus among Ottoman Ulama that Sultan's law is valid as long as it does not violate principles of Shariah.[55] In that sense, *Qanun-name-i Mısır*, issued in the reign of Sultan Suleyman the Magnificent to codify the administrative practice of the province, is a remarkable document in terms of its passages manifesting the contemporary perception of law and legislation of statesmen of the Empire.[56] It is clearly declared the fact that imperial legislation was issued with the permission of the Shariah in the preamble of the kanunnama. Furthermore, it is determined as the criteria of the legitimacy of a legislation to be (i) reasonable (*ma'kul*) and (ii) approvable (*makbul*) along-with to be (iii) constant to Islamic jurisprudential principles. Moreover, let alone conflict between Shariah and Sultan's law, the document notes that legislation must aim to consolidate the Islamic jurisprudence.[57]

Third, the most remarkable justification of the dualist viewpoint is the existence of an enormous literature of '*Urf* which has embodied with the Sultanic regulations. However, as Imber pointed out, the Sultanic regulations did not intended to substitute for the Islamic law, instead, they were proclaimed only in an attempt to consolidate the Islamic jurisprudence and to become a component part of the Shariah in theory.[58] In practice, the Islamic jurisprudence was not a sham method of justification for Ottomans, instead, it was a faith and an even an ideology-a key element of identity which they were affiliated with.[59]

Fourth, the methodology of the Sultan's law (*'urf*) based on a means of *Usul al-Fiqh* (the root of law) to extract secondary norm which is also known as *'urf* . That is to say, jurists can utilize the spatial and temporal costumes to find a solution

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[55] Akman, Mehmet, *Osmanlı Devletinde Ceza Yargılaması*, Eren Publication, Istanbul, 2004, Pg. 5.
[56] See for further analisis: Buzov, Snjezana, *The Lawgiver and His Lawmakers, the Role of Legal Discourse in the Change of Ottoman Imperial Culture*, University of Chicago Press, Chicago, 2005, Pg. 29.
[57] Köksal, Asım Cüneyt, *Fıkıh ve Siyaset*, Pg. 106.
[58] Nallino, Carlo A., "Islam Hukuku", Trns. Akif Ergin Ay, *AÜHFD*, Vol. 11, No. 1-2, Ankara, 1954, Pg. 548-549.
[59] Genç, Mehmet, *Osmanlı Imparatorluğunda Devlet ve Ekonomi*, Ötüken Publications, Istanbul, 2007, Pg. 58.; Zilfi, Madeline, *Dindarlık Siyaseti Osmanlı Uleması*, Trns. Mehmet Faruk Özçınar, Birleşik Publications, Ankara, 2008, Pg. 1-2.

in the condition of the fact that the costume is not against the principles of the Islamic jurisprudence if he is not able to find a solution in the primary sources. In that sense, considering the fact that Sultanic law has been produced by Sheikh al-Islams since the 17th century, it would not be wrong to say that Sultan's law composed the administrative law as a sub-branch of the Shariah in the Ottoman law.

In short, as Imber states, the Ottoman law is a monolithic legal system with composed of a constant union of a divine law and a man-made law.[60]

In that sense, each imperial decision was confirmed by ulema in terms of its conformity with Shariah law in Ottoman legal system. Even, those who over-throne a Sultan should acquire permission from ulema that the sultan was acting against Shariah. Giving that, it is noteworthy to mention the treaty, called *Şer-i Hüccet*, which was signed in the short reign of Mustafa IV (1807-1808), of the treaty prescribing the fact that the state would be governed in conformity with Shariah principle of *"Amr bi 'l-ma'roof; nahy an'l-munkar"* i.e. "command the good; forbid the evil". Some historians consider this treaty as the first written document that restricts the political authority of Ottoman dynasty whereby it established a ground for Charter of Alliance (1808) that is commonly regarded as the first constitutional document of Ottoman Empire.[61]

However, as Baki Tezcan state, one rightfully can argue that there has been an unwritten constitutional tradition that restricts Ottoman political authority for a number of centuries before the 19th century. I deal with this restriction matter in the chapter of formation of human rights in the Ottoman political system.

The fact remains that, time-to-time, the Ottoman Authority pushed its limits drawn by Shariah, especially in the issues regarded as existential, by means of controversial Sultan's laws and practices such as outlaw execution without trial (al-*qatl siyasatan)*, *kul* system (*devshirme* system), and confiscation of property

[60] Imber, Colin, *Ebu's-Su'ud: The Islamic Legal Tradition,* Edinburgh University Press, Edinburgh, 1997, Pg. 30.
[61] Okumuş, Ejder, *Türkiye'nin Laikleşme Serüveninde Tanzimat*, İnsan Publications, Istanbul, 1999, Pg. 201.

(*müsadara)*. Nevertheless, Ottoman rulers got Ulama to confirm even these controversial laws. Afterwards, some of Sultan's laws were abrogated since they were violating Shariah law. Although some assert that these acts of abrogation are a proof of diversity between Sultan law and Shariah,[62] I believe, it illustrates the fact that there was a constant inspection on Sultan's law in the sense of conformity with Shariah.[63]

3. The Formation of Human Rights in Ottoman Empire in terms of the Restriction of Political Authority

a) A Methodology Problem in Ottoman Historiography

According to El-Haj, some important authorities of Ottoman History postulate that Ottoman society and state were different then and inferior to the Western societies and states when they deal with the period of collapse and modernization period of Ottoman History. He claims that they address the political perception of Ottoman society and state in an a-historic manner. That is to say, they consider the fact that the political perception of society and state has never changed throughout the history of the Ottoman Empire whereby they did not make any distinction between the pre-modern period (14^{th}-17^{th} centuries) and modern period. The academic literature evaluates the early modern Ottoman history over some modern sociological standards and concepts such as merit, public service, equality, and modern rational practices. This anachronic approach causes to misunderstand Ottoman society and state.[64]

One can rightfully say that the authority of Ottoman Empire is shaped according to a balance between dynasty, Ulama, military class-formed into bureaucracy later on- and local landed proprietors. Indeed, this balance has

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[62] Heyd, Uriel, *Studies in Old Ottoman Ciriminal Law*, Clarendon Press, Oxford, 1973, Pg. 181.
[63] Köksal, Asım Cüneyt, *Fıkıh ve Siyaset*, Pg. 115.
[64] El-Haj, Rifa'at 'Ali, *Formation of the Modern State, the Ottoman Empire Sixteenth to Eighteenth Centuries*, State University of New York Press, 1991, Pg. 3-8.

undergone a number of paradigm shifts throughout the history of the Ottoman Empire in terms of limitation of political authority.

b) The Phases of the Formation

(1) From Feudalism to Absolutism (16th Century)

The first major paradigm shift in the Ottoman political perception occurred in the 16th century. Indeed, until the era of Sultan Suleyman the Magnificent, the Ottoman Sultans had to mind approval of their viziers, who were generally politically exposed local landed proprietors that serves as a contracted statesman. In the era of Suleyman, Sultan has begun to carry out his authority by virtue of slave-rooted (*devshirme)* statesmen instead of contracted politicians. *Devshirme* system, called also *kul* system, regarded statesmen as the slaves of the Sultan whereby the system provided to the Sultan an authority of full control on statesmen while contracted politicians had an independent feature by which politicians did not show strong loyalty to the state and Sultan. That is to say, *kul* system intended to establish a seemingly more stable political bond between Sultan and statesmen. By virtue of *devshirme* system, Sultan elevated himself upon a supra-political position by which state affairs were conducted by slave statesmen. Tezcan called this system "political slavery" in that, unlike the classic slave, there was a mutual obligation between Sultan and his servants.[65]

This system was interpreted as an instance of despotism[66] by European travelers and ambassadors in 16th centuries. For example, Ogier Ghiselin de Busbecq

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[65] Tezcan, Baki, *The Second Ottoman Empire*, Pg. 44.

[66] The roots of oriental despotism can be traced to Aristotle who played a critical role in formation of the concept of oriental despotism in western scholarship. Aristotle codes the concepts of "despotism" separatedly form the concept of "tyranny" whereby he mainly considers "despotisim" as a concept belonging to the east (the persian empire). Aristotle makes a distintion in terms of climate conditions whereby he states that European people who live in a cold climate possess a lower soul in terms of talent and intelligence, in taht there are relatively free. The people of the east who live in a hot climate, on the other hand, possess talent and intelligence but not soul, in that they are intrinsically slave. The people of the Hellene, however, possess ability, intelligence and soul, in that they are succesfull and free. According to him, the people of the east never rise against despotic governments

(1562 d.), ambassador of Habsburg Empire in Istanbul, stated that the most outstanding example of despotic governance of time was Ottoman Empire. The Sultan was the owner of everything and in which all subjects were slaves of Sultan. For him, similar to Aristotle, the most important reason why despot governances appear in the East was climate.[67] Jesuit monk, Giovanni Botero (1617 d.), also accepted that Ottoman Empire is the most stunning example of despotic governance of time, which was the most devastating terror against Christianity. The western people were superior to the Eastern people in terms of politics and technology. He also claimed that geography and climate were the reasons of despotism in the East. Similarly, Paul Rycaut (1700 d.), ambassador of England in Istanbul, stated that tyranny, irrationality, oppression, and cruelty reign over Ottoman Empire while the sultan, who acts according to manipulations of his girl or boy lovers, is the absolute authority. Many other travelers such as Cardinal Charles Borromeo (1584 d.) and Jean-Batiste Tavernier (1689 d.) characterize the Empire, parallel, as the fact that "its governance relies upon slave statesmen", "its subject has an absolute obedience and submission to the Sultan", "the Sultan kills his family members", "the society is static", "women are oppressed", and "there are abundance, extravagance, corruption, and cruelty".[68] Furthermore, the Venetian ambassadors in Istanbul emphasize the political power of Sultans and his substantial influence on central politics in their reports in the 16th-century. The the 17th-century reports, on the other hand, mentions about arbitrary actions of Sultan, incapability of statesmen, and lawlessness in governance.[69]

The subject matter of authority in Ottoman Empire was mainly treated in the light of foregoing discourses of the travelers and ambassadors in western social

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since the governmets are naturally despotic and the people are intrinsically slave. For him, there is always an arbitrary regime prevailing in despotic governmets. See: Rubies, Joan-Pau, "Oriental Despotism and European Orientalism: Botero to Montesquieu", *Journal of Early Modern History*, Vol. 9, No. 1-2, 2005, (pp. 109-180), Pg. 116-118; Curtis, Michael, *Orientalism and Islam, European Thinkers on Oriental Despotism in Middle East and India*, Cambridge University Press, 2009, Pg. 52.

[67] Rubies, Joan-Pau, *Oriental Despotism*, Pg. 117-127.

[68] Curtis, Michael, *Orentalism and Islam*, Pg. 39-47.

[69] Valensi, Lucette, *The Birth of The Despot: Venice and Sublime Porte*, Trns. Arthur Denner, Cornell University Press, New York, 2009, Pg. 2-77.

science in the 18th century. The scholars such as Baron de Montesquieu[70] (1755 d.), Count Volney (1820 d.)[71], Immanuel Kant (1804 d.)[72], Friedrich Hegel (1831 d.)[73], Karl Marx (1883 d.)[74], and Max Weber (1920 d.)[75], who laid the foundations of oriental discourse in modern social science, made a sociocultural compare and contrast between East and West thereby they gathered fragmentary judgements on the East written before them.[76]

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[70] Montesquieu was the first one dealing with the concept of "oriental despotism" in the context of political philosophy. In his book Persian letters, he stated that Ottoman Empire was a week state in that it was rules by political violence. Statesmen spent all their fortunes to take an office whereby they only thought of exploiting the people when one was assigned to the office. Furthermore, people did not want to cultivate the land because there was no land ownership. In his book, spirit of the laws, he stated that Ottoman Empire was the perfect example of despotic governance because the executive power united in one person's hand. Executive power was either in the hands of sultan or his grandveizeir. The people around him fought each other to ingratiate oneself into sultans favor. Sultans were lazy and ignorance since they were always praised by everyone around them and they think nothing but sex. See: Montesquieu, *İran Mektupları*, Trns. Ahmet Tarcan, Uğur Yönten, Ark Publication, Istanbul, 2004 Pg. 90-91.; Montesquieu, *Kanunların Ruhu Üzerine*, Trns. Şevki Özbilen, Toplumsal Dönüşüm Publication, Istanbul, 1998, Pg. 69-70.

[71] French writer Count Volney states that China, India and the Ottoman Empire were despotic states. For him, especially the Ottoman rule only demolishes but do not constructs. The Ottoman Sultans never cares about his subjects while they spend their life in luxury. The Ottoman Sultans act arbitrary, and Ottoman statesmen are despots. There are no clergy, aristocracy, merchants or landlords. The Sultan lives for nothing but more women, boys, slaves and horses. See: Bryan, S. Turner, "Orientalism and the Problem of Civil Society in Islam, Orientalism", in *Islam and Islamists*, Ed. Asaf Hussain, Robert Olson, Jamil Qureschi, Amana Books, Vermont, 1984, Pg. 31-40.

[72] Kant characterizes Turks as a "generally despotic nation" in his anthropology while he states that there is no freedom in their empire. See: Kula, Bilge O., *Batı Felsefesinde Oryantalizm ve Türk İmgesi*, Türkiye İş Bankası Kültür Publication, Istanbul, 2010, Pg. 16-18.

[73] Hegel argues that owners of the power such as father, king, or sovereign directly represent god in the east. It is natural, therefore, to obey owners of power. For him, there is no an individual indipendatly from public's will in the east in which individuals spend their lives without enjoying their rights and freedoms. The people of east deprive of self-consciousness of the fact that they are naturally free. The sphere of freedom has been left to the one (sultan) who arbitrary exploit of freedoms of all people. See: Kula, Bilge, *Batı Felesefesinde Oryantalizm*, Pg. 104-113.

[74] Marx states that the villages have become introverted microorganism thereby they focused on only their micro scale agriculture and production in the east. Therefore, society has become conservative, dull, and static which bring about the oriental despotism. See: Marx, Karl, *On Colonialism and Modernization*, Anchor Books, New York 1969, Pg. 7-8.

[75] Weber, who invented the concept of "patrimonyalism" in sociology, states that ruling class and military class totally sultan's personal apparatus in sultanism-directly refers to the ottoman sultans-, which is an extreme instance of patrimoyalism. Political authority is his personal right by which he has a beneficial enjoyment of authority. He can enjoy his authory arbitrarly by virtue of power of statements and army that he controls. See: Weber, Max, *Economy and Society*, Ed. Guenther Roth, Claus Wittich, Universtiy of California Press, 2013, Pg. 171.

[76] Hentch, Thierry, *Hayali Doğu, Batı'nın Akdenizli Doğu'ya Politik Bakışı*, Trns. Aysel Bora, Metis Publication, Istanbul, 1996, Pg. 148.

One rightfully can state that it may cause reproduction of the orientalist discourse and bring about a self-orientalist point of view to apply directly this foregoing orientalist conceptual analysis into the studies of the history of the Ottoman Empire without any critical comprehension in native studies of Ottoman history literature. For example, Niyazi Berkes states that all religious or political perceptions in Asia and East are totally an instance of manifestation of oriental despotism[77] Similarly, Halil İnalcık characterizes the Ottoman Empire as a Sultan-centered patrimonial state.[78] In that sense, from Niyazi Berkes to Halil Inalcık and Perry Anderson, the influence of oriental discourse can be clearly detected in many scholars, who are the most influential thinkers on Turkish literature of history and political philosophy.[79] This orientalist genre was directly appropriated by Turkish legal doctrine in constitutional law without any critical and inferential comprehension. Many foremost jurists in constitutional law state that Sultans ruled the Ottoman Empire with an absolute power in which they incorporated legislative, executive, and judiciary power in their hands until the constitution of 1876.[80]

Orientalism, however, has been criticized for its reductionist interpretation that shrinks infinite sophistication of the East into some specific types, models, characters, and institutions whereby it omits, distorts or exaggerates the historical facts.[81] In that sense, according to Turner, conceptualizations such as "Oriental Despotism", "Civil Society", and "Individualism" has been conceptualized by western scholars, from Locke to Mill and Montesquieu, based upon the internal concerns about political freedoms in the West. The East, in that sense, basically

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[77] Berkes, Niyazi, *Türkiye'de Çağdaşlaşma*, Yapı Kredi Publication, Istanbul, 2010, Pg. 26-27.
[78] İnalcık, Halil , *Osmanlı'da Devlet, Hukuk, Adâlet*, Eren Publication, Istanbul, 2000, Pg. 65.
[79] Doğan, Necmettin, "Patrimonyalizm Kavramına Eleştirel Bir Yaklaşım", *Liberal Düşünce*, Vol. 16, No. 64, Fall 2011, (pp. 161-184), Pg. 180.
[80] Aldıkaçtı, Orhan, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası*, 4th Edition, İ.Ü.H.F. Publication, İstanbul, 1982, Pg. 44.; Özbudun, Ergun, *Türk Anayasa Hukuku*, 9th Edition, Yetkin Publication, Ankara, 2008, Pg. 27.; Kemal Gözler extends the date to 1909 when the constitution underwent a masive change to the detriment of the sultan's power; Gözler, Kemal, *Türk Anayasa Hukuku*, Pg. 41.
[81] Doğan, Necmettin, *Patrimonyalizm Kavramına Eleştirel Bir Yaklaşım*, Pg. 174.

served as an image over which the internal concerns of political freedom in the west have become concrete.[82]

On that account, giving the limitation of ottoman political authority in pre-modern period (14th-18th centuries) and modern period (19th century), Karpat criticizes the fact that institutions formed in Ottoman Empire in the 16th century is considered as if they are perpetual whereby 19th century is only taken into consideration as the beginning of change in Ottoman political system in almost all studies on Ottoman history. For him, however, there has been a long period of social and political transformation since the Peace of Zsitvatorok (1606).[83]

(2) From Absolutism to Pre-modern Constitutionalism (17th-18th Century)

The Ottoman perception of political authority has undergone a paradigm shift once again throughout the 17th century. Authority of Ottoman dynasty has weakened in the 16th century by the virtue of socioeconomic transformation, which resulted from the foregoing imperial efforts that the dynasty made in the 16th century to consolidate its central authority. Those whose background was commerce or craftsmanship, characterized by "strangers" *pro rata* slave soldiers of the guild, has begun to enroll the guild of janissaries, which originally consisted of slaves, in the 16th century. The "strangers" have captured increasingly more (more and more) important position in management from slave-soldier rooted statesmen whereby they demilitarize the upper ruling class, and by extension, the politics of the Empire in the course of time.

Karpat states that there are internal factors, which mainly brought about these transformations. Starting with the 16th century, a social class consisting of merchants, craftspeople, and food suppliers has broken through the classical social order and predictable socio-economic wheel. Eventually, this structural transformation has

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[82] Turner, Bryan S., "Islam, Capitalism and the Weber Theses", *The British Journal of Sociology*, Vol. 25, No. 2, Jun., 1974, (pp. 230-243), Pg. 233-240.
[83] Karpat, Kemal H., *Osmanlı Modernleşmesi, Toplum, Kuramsal Değişim ve Nüfus*, İmge Kitabevi, Istanbul, 2002, Pg. 16.

weakened the socio-economic foundation of ruling class and military class whereby it forced to re-form their classic politico-cultural functions. The rise of merchants, craftspeople (*eşraf*) and food suppliers-local landed proprietors- (*âyanlar*) has become the dynamo of internal socio-political transformation. The endeavors of Ottoman dynasty to re-provide central authority in the 19th century was a reaction against this socio-political transformation.[84]

Similarly, Andrew and Kalpaklı note that it is interesting the fact that dis-enthrone of II. Osman is considered as a military coup representing descent and decline in Ottoman historiography while similar historical events are considered as the progression of democracy in the history of Europa. According to Kalpaklı, it also can be considered as constitutionalist action attempting to limit the authority of Sultan as it is considered in that way for the revolt that risen in England in an attempt to restrict absolutist tendency of Tudor dynasty at the end of 16th century.[85] Parallel, Faroqhi states that the emphasis of fair and just governance in *siyasetnama* literature demonstrates a tendency of extension and consolidation of the sphere of Islamic Law against Sultan's law. For him, this tendency has begun in the 16th century and concentrated in 17th and 18th century.[86] To that effect, Tezcan states that although there was no parliament, like England, in Ottoman Empire, there were similar motivations in political attitudes and the stands against the monarchy in the history of England and Ottoman Empire. He notes that some European observers interpreted the abolition of the guild of janissaries in the 19th century as the destruction of the political oppositions that had restricted monarchy for centuries.[87] In that sense, it would not be wrong to say that Ottoman perception of politics has witnessed a dramatic transformation through 16th-18th centuries in terms of limitation of political power.

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[84] Karpat, Kemal H., "Osmanlı Devleti'nin Dönüşümü (1789-1908)", in *Osmanlı'dan Günümüze Asker ve Siyaset*, Timaş Publication, İstanbul, 2010, Pg. 18-19.
[85] Andrew, W. G, Kalpakli, M., *The Age of Beloveds: Love and the Beloved in Early Modern Ottoman and European Culture and Society*, Duke University Press, Durham 2005, Pg. 322.
[86] Faroqhi, Suraiya, Another Mirror for Princes, Pg. 14.
[87] Tezcan, Baki, *The Second Ottoman Empire*, Pg. 6.

The patrimonial political system has begun to decay after a while in conjunction with the intensification of the power of viziers and statesmen in the 16th century. Some historians accept that the central authority of the Empire has been conducted by a check and balance system consisting of viziers, Pasha families, and Ulama since 1656, in which Sultan Mehmet IV. delegated Grand Vizier Köprülü Mehmet Pasha to carry out whole executive power.[88] There was an unwritten consensus among Ottoman political actors on (i) the limits of the authority of dynasty, (ii) the institutive autonomy of the guild of janissaries as a socio-political corporation, and (iii) local authority of local landed proprieties (*ayanlar*) in the country throughout 17th and 18th centuries.

In that sense, Tezcan notes that Ahmet I. did not murder his brother, Mustafa, in 1603 whereby the system of fratricide, the regime of accession to the throne, has been abolished since then. He states that the new regime of accession to the throne was constitutionalized by a fatawa of sheikh al-Islam Sa'deddinzade Es'ad. From this point of view, he claims that fatawas of sheikh al-Islam were a binding legal element in that Sultans never be able to murder his brothers thereafter. Along with this constitutional change, political conflicts in Ottoman Empire has become a struggle for legitimacy, in these candidates of throne tried to persuade Ottoman aristocrats that one is worthy of the throne.[89]

Similarly, according to Quataert, the 18th century Sultans had only a symbolic power in that they only affirmed political actions that were already carried out by other actors in the political sphere. In that sense, the dynasty tried to move capital from Istanbul to Edirne in an attempt to retrieve its political power in 1703. However, this attempt failed as a result of a coup, known as "the Edirne Incidence of 1703". After the coup, the Ottoman Sultans never have gone out of Istanbul for a long while. As a result of the coup, the authority and prestige of the Sultan have been so reduced in that Sultan was officially required to consider and follow the opinions

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[88] Quataert, Donald, *Osmanlı İmparatorluğu 1700-1922*, Trns. Ayşe Berktay, İletişim Publications, İstanbul 2002, Pg. 80-82.
[89] Tezcan, Baki, *The Second Ottoman Empire*, Pg. 50-62.

and advises of other parties.[90] This incidence confirmed and consolidated the shift of authority from Sultan to Viziers, *Ulama* and military class whereby it shaped the 18th century political regime of Ottoman Empire. Ottoman political structure, therefore, formed in a different way by dispossessing Sultan of political power while the political power united in the hand of a Monarch in many states of continental Europe.[91]

Some foreign narratives characterized Ottoman politics in 16th-18th century as democracy or limited monarchy rather than aristocracy or absolute monarchy because of (i) the structure of the Ottoman military system and (ii) the parallelism of the institution of Ulama with National Assembly of France (before the revolution). In the system, upper ruling class, military class, and Ulama had a strong control over Sultan.[92] In that sense, another contemporary foreign narrative considered the modernizing reforms of Mahmud II. and Rashid Pasha in the 19th century as a "subversion of the ancient Turkish constitution" or a "subversion of the liberties of his (Turkish) subjects."[93] Parallel, a Tanzimat thinker, Namık Kemal, states that the guild of janissaries was the armed privy council of Ottoman people before Mahmud the Second demolished it in 1826.[94] Şerif Mardin argues that illegal activities of janissaries and others were a manifestation of a politic culture in terms of legal opposition it the state.[95]

Indeed, the wife of the English ambassador in Istanbul in 1716-18, Lady Mary Montagu, stated that, contrary to expectations, the Ottoman Sultans actually did not possess a full-power, rather, they are a little fraction of the entire army.[96] The

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[90] See for futher infromation: Al-Hajj, Rifa'at Ali, T*he 1703 Rebellion and the Structure of Ottoman Politics*, American Council of Learnd Societies, Leiden, 1984, Pg. 29 ff.
[91] Quataert Donald, Pg. 83.
[92] Tezcan, Baki, *The Second Ottoman Empire*, Pg. 93.
[93] Slade, Adolphus, *Turkey and the Crimean War: A Narrative of Historical Events*, Smith, Elder, Londo, 1867, Pg. 17.; Lewis, Bernard, "Slade on Turkey," in *Social and Economic History of Turkey, 1071–1920*, Ed. Osman Okyar, Halil İnalcık, Meteksan, Ankara,1980, Pg. 220.
[94] Bozkurt, Gülnihal, *Batı Hukukunun Türkiyede Benimsenmesi*, 2dn Edition, Türk Tarih Kurumu, Ankara, 2010, Pg. 53.
[95] Doğan, Necmettin, *Patrimonyalism Kavramı*, Pg. 179.
[96] Ibid, Pg. 181.

French ambassador in Istanbul in 1786, Comte de Choiseul-Gouffier, wrote the transformation of situations in the Ottoman Empire. He stated that the Ottoman Sultans had less authority than French Kings in that Ulama and bureaucracy strongly restricted the authority of Sultan.[97]

According to Tezcan, Sultan's law, which represents contemporary feudal structure, lost prestige while the importance of Shariah and judges (*kudat*) promoted in the 16th century as a result of (i) expansion of east-west trade, (ii) changes in the land management regime, and (iii) the increase of the importance of the common currency.[98] For example, he states that fratricides of the 17th century caused discomfort in popular and bureaucratic circles of the ottoman society whereby judiciary power imposed a restriction to the authority of Sultan in that regard. According to Tezcan, social and economic transformations in the 17th century in Ottoman Empire redounded on the field of law whereby it brought about a constitutionalist tendency against absolutism in that the authority of Sultan was restricted in a legal framework.[99] In short, ottoman Empire transformed into a pre-modern constitutionalism as of the 16th century, which can be characterized by (i) a market-driven economy, (ii) a finance system driven by common currency, (iii) a law system of which the judiciaries have a control over dynasty, (iv) a society of which class barriers weakened, and (v) a constitutional political regime in which voices of different group of society gradually expand and increase.[100]

(3) From Pre-modern Constitutionalism to Modern Constitutionalism (19th Century)

Finally, the Ottoman Empire has undergone a radical change in politics in terms of modernization of state in the 19th century. The endeavors of centralization and modernization decreased the power of merchants, craftspeople (*eşraf*) and food

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[97] Curtis, Michael, *Orientalism and Islam*, Pg. 58-64.
[98] Tezcan, Baki, *The Second Ottoman Empire*, Pg. 18-20.
[99] Ibid, Pg. 70-93.
[100] Ibid, Pg. 10-11.

suppliers-local landed proprietors- (*âyanlar*) while they increased the power of central authority and dynasty. Nevertheless, this time, the authority of Sultan was restricted by written constitutional edicts and legal codes owing to the demands of central bureaucracy and endeavors of modernization in the 19th century.

The existential issues of the Empire forced the political fragments to unite around the dynasty in an attempt to face the external problems with a strong central political power in the 19th century. It was, in fact, a trans-regional attitude, happened all over the world in a different way, to consolidated central authority. Scholars read this cross-regional attitude as a parameter of the modern state. The Sultans of the 19th century was more powerful and influential then their successors owing to the state centralization. However, powerful sultans with no limits did not comply with the constitutional tradition of the Empire. The main concern of the late Ottoman statesmen was, therefore, how to restrict Sultan's authority while keeping the strong central governance. This concern was reflected in politics as the constitutional movements. For example, contemporary German ambassador in Istanbul narrates that the member of Ulama protested Sultan Abdulaziz in 1876 and demanded to restrict the Sultan's authority, which "has increased since the abolishment of the janissary guild".[101] Eventually, Sultan Abdulaziz had to abdicate the throne and the process bringing about the first constitution in a formative sense has begun. That is to say, the traditional concern to limit political power resulted in restricting the Sultan by means of constitutional documents and state of law. The sultan promised to his subjects and servants to protect their fundamental rights and avoid arbitrarily violating them.

I comprehensively deal with the restriction of political power in the late Ottoman Empire under the title of "Basic Parameters of the Constitutional Reform" in the second section.

B. The Concept of Constitutional Document

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[101] Bozkurt, Gülnihal, *Batı Hukukunun Türkiyede Benimsenmesi*, Pg. 55.

1. The Definition of "Constitution"

Hans Kelsen describes the term, constitution, as "the highest level within the national law". In the hierarchical structure of law, its validity depends on a hypothetical "basic norm" (*Groundnorm*) as a norm the validity of which cannot be derived from a superior norm. This basic norm is conceptualized as "constitution in a logical sense" whereas the constitution that is created on its basis is characterized as "constitution in a positive sense".[102]

Furthermore, a constitution in a positive sense is classified in "constitution in a formal sense" and "constitution in a material sense". Constitution in a formal sense is an official document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult. The constitution in the material sense consists of those rules, which regulate the creation of the general legal norms, in particular, the creation of statute.[103]

Constitution in the formal sense of the term is not indispensable whereas the material constitution is an essential element of every legal order. According to Kelsen, a constitution in the formal sense is possible only if there is a written constitution, whereas the constitution in the material sense may be written or unwritten, and have the character of statutory or customary law.[104] In that sense, the constitution of the United States is a specific written document; while the United Kingdom does not have a single document called "the" constitution but instead, its constitutional provisions are scattered over various Acts of Parliament and traditional practices that are generally accepted as governing political matters.

The subject matter of a constitution, that is, for instance, the question the fact

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[102] See: Kelsen, Hans, *Principles Of International Law*, 2nd Edition, Ed. Robert, W. Tucker, Holt/Rinehart/Winston Publications, New York, 1967, Pg. 245.
[103] Kelsen, Hans, *General Theory of Law and State*, Trns. Andres Wedberg, The Lawbook Exchange Ltd., Washington, 2009, Pg. 124-125.
[104] Fassbender, Bardo, *The United Nations Charter as the Constitution of the International Community*, Martinus Nijhoff Publicshers, Boston, 2009, Pg. 15.

that "does it include a guarantee of fundamental rights" is not relevant to Kelsen's system since he defines the constitution in terms of positivist paradigm. The only matter for a constitution in a material sense the fact that it has the highest level of the hierarchy of norms in positive law.[105]

Hermann Heller, on the other hand, emphasizes dynamism of law; by which he classifies constitutions as "constitution in a substantive sense" and "constitution in a formal sense", or "constitutional instrument". He states that no written constitutions ever include all fundamental norms. Therefore, a constitution in a subjective sense is always composed of more than one law in a formal sense and one of those laws is called "the" constitution because of its outstanding importance.[106]

Heller rejected Kelsen's concept of a constitution; whereby he argues that the modern formal state constitution was established as a result of a long historical process of rationalization of the exercise of power. For Heller, development of culture always presupposes an intensification of the division of labor; whereby interdependence of groups, which belongs to different status and background, increases. The division of labor forces those groups to maintain a close contact with each other. A concentrated division of labor and exchange necessitates a higher degree of safety of communication and trade, that is, more or less, what lawyers call legal security, or reliability of the law. This security requires a higher regularity and reliability of societal relations. As soon as the local custom is not sufficient anymore to guarantee such reliability, this higher form of rationality can only be achieved by increasingly subjecting the societal relation in terms of both territory and function to a unified order, which appears as a constitution.[107]

I believe Heller's definition of the constitution is more relevant to the subject matter of my thesis for a couple of reason. First of all, I claim in the thesis that the Ottoman constitutional movements in the 19th century were inevitable outcomes of

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[105] Fassbender, Bardo, *The United Nations Charter*, Pg. 15.
[106] Ibid, Pg. 17.
[107] Ibid, Pg. 18.

the transformation of the state into a solely modern state, which necessitate "a higher degree of safety of communication and trade" as Heller explains how constitutions arise. Nevertheless, on contrary to Heller, I believe that necessity of safety not only results from concentration of labor division; but also steam from a complement of necessitates which compose of (i) stronger bureaucracy, (ii) more global trade, demands to clarification of sphere of the state, and (iii) liberal demands not to intervene the natural circulation of values.

Moreover, in parallel with the Heller's definition of constitution, contemporary Ottoman scholars evaluated reforms on fundamental rights carried out in current time as more powerful protection of fundamental rights which current structure of state necessitated. For example, Beraketzade Cemalettin Abdullah, who produced the last example of Siyasatname books literature in fiqh tradition in the 19th century, *es-Siyasatü'ş-Şer'iyye fi Siyadeti'r-Ra'i ve Sa'adeti'r-Ra'iye* (Shariah Politics in Governance and Welfare of the Subjects), states that protection of fundamental rights of subjects were gradually consolidated through legislation in Ottoman Empire whereby rights of life, property, and personal chastity were guaranteed by law in 19th century through which, no matter how strong or weak they are, all subject of the Empire were accountable in front of law and courts.

Furthermore, Heller's definition is more relevant to my thesis in which I deal with constitutional documents in terms of fundamental rights and restriction of political authority that Kelsen disregards in his definition.

The Turkish constitutional law literature, on the other hand, mainly define constitution in terms its content. The widely accepted definition of the constitution is the fact that a constitution is a set of norms which regulates the "existential quality" and structure of a political entity in addition to the formations and functions of the government bodies and the fundamental rights of people in the entity.[108]

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[108] Gözler, Kemal, *Türk Anayasa Hukuku*, Pg. 11; Armağan, Servet, *Anayasa Hukuku Dersleri*, Imak Press, Istanbul, 2017, Pg. 29; Memiş, Emin, *Anayasa Hukuku Notları*, 6th Edition, Filiz Publication,

Turkish constitutional law doctrine mainly treats the issue of the definition of the constitution in terms of limitation of the power of political authority. According to Mustafa Erdoğan, the ultimate goal of a constitution is promoting the limitation of state since its basic function is to regulate the operations of the authority, preventing its arbitrary actions, protecting the rights of people, and providing constitutional guarantees for individual freedoms.[109] For Mumtaz Soysal, the main purpose of a constitution is subordinating the state to law. The fundamental norms that compose of the constitution are mainly about freedoms and rights of citizens.[110] In this regard, Ergün Özbudun assets that a legal text, which does not effectively restrict the power of political authority, should not be characterized as a constitution in a functional sense even-thought it is seen as a constitution in a formal sense.[111]

According to Recai Galip Okan, however, a constitution must be established by a consensus of the society or the representative of the society.[112] The first constitution of 1876 and the constitutional documents of Ottoman Empire, therefore, are not constitutional since they were established by an imperial edict. Kemal Gözler, on the other hand, objects Okan's definition of constitution whereby he states that most of the constitutions established in 19th and 20th centuries in Europa would not be constitutional if we accepted constitutional only those which are established by a civil initiative of people. For Gözler, a constitution is established, even today, by a "primary constituent power" which possesses an extralegal, de facto, and effectual power to make a constitution.[113]

2. The Definition of "Constitutional Document"

Istanbul, 2011, Pg. 5; Teziç, Erdoğan, *Anayasa Hukuku*, Pg. 6; Turkish Constitutional Court Decision (E. 1973/19, K. 1975/87).

[109] Erdoğan, Mustafa, *Türkiye'de Anayasalar ve Siyaset*, 3rd Edition, Liberte Publications, Ankara, 2001, Pg. 54.; Also see: Gözükübüyük, A. Şeref, *Yönetim Hukuku*, 13th Edition, Turhan Publications, Ankara, 2000, Pg. 4.

[110] Soysal, Mümtaz, *100 Soruda Anayasanın Anlamı*, 8th Edition, Gerçek Publications, Istanbul, 1990, Pg. 8.

[111] Özbudun, Ergun, *Türk Anayasa Hukuku*, 3rd Edition, Yetkin Publications, Ankara, 1993, Pg. 18.

[112] Okandan, Recai G., *Amme Hukukumuzun Anahatları: Türkiye'nin Siyasi Gelişmesi,* İÜHFM, No:496, İstanbul, 1977, Pg. 146.

[113] Gözler, Kemal, *Türk Anayasa Hukuku*, Pg. 24.

The Constitutional document is a solemn text which defines the existence of a political entity and regulates its structure, and balance mechanism of the entity and its members. In the context of constitutional history, the constitutional documents are some historical acts, charters or imperial edicts which contain in itself some constitutional elements, that is, re-defining structure of political entity, re-organizing the balance mechanism, re-regulating the relation between authority and subjects, prescribing limitation or self-limitation of authority, or guaranteeing fundamental freedoms and rights of people.

a) The Features of Constitutional Documents

(1) Constitutional documents contain constitutional matters: In a broad sense, a constitutional document is a text in which some constitutional matters are prescribed. In that sense, constitutional documents vary from the modern concept of constitution. Constitutions, which emerged as the consequences of modern state and rationalization of national law in Europe in the 18th century, are modern phenomena. The constitutional documents, on the other hand, might submerge any time as a result of political actions in history.

(2) Constitutional documents are written: Constitutional matters should not be always written. A de-facto political situation, concerning to existential matters of a political entity, might become sustainable in the course of time whereby it has become a politically and legally binding tradition. For example, the monarchy is one of the most astonishing examples of constitutional traditions, in that the ruler of the political entity is determined according to traditional, un-written practices. A constitutional document appears, on the other hand, in the case the fact that a constitutional practice or a new political situation (balance) agreed by writing

(3) Constitutional documents are solemn: Constitutional documents must be binding. They must be signed or issued by a legitimate political authority. The political authority must be the enactor of the documents or, at least, a side of a constitutional treaty. The provision of the treaty must be imperative. And the authority has to have the power to implement the provisions of the documents.

3. The Legal Characteristic of the Late Ottoman Constitutional Documents

In the nineteenth century, there are numerous documents that can be characterized as a constitutional document namely the Charter of Alliance, the Imperial Edict of Rose Chamber, the Imperial edict of Reform, and the Imperial Edict on Justice. Nevertheless, the question whether or not these documents are conditional has been controversial for a couple of decades in the academic circle of Turkish legal doctrine.

Regarding the charter of alliance in 1808, Bülent Tanör states that charter of alliance cannot be characterized as constitutional documents. This is because the genre of the charter differs from former Ottoman legal documents both the Shariah-based documents such as *the Hüccet-i Şeriyye,* Fatwa, or ecclesiastical documents and the Sultan's law-based documents such as *Kanun*, *Kanunname*, *Ferman* or *Adaletname.* The language of the charter deprives of legal clarity, definiteness, and objectivity of that is written in an imperial tone. Moreover, the commission, *Meşvereti Amme*, who prepared the text of the charter, was not a perpetual institution of the state; instead, it was established as a crisis resolution team. Therefore the commission had no legislative authority. For Tanör, the charter is a pact or treaty in the form of a document of conciliation.[114]

The majority in doctrine regards the charter of alliance as a pact or treaty.[115] Kemal Gözler regards the charter as constitutional documents in a material sense while he accepts that it has a characteristic of a pact or treaty. This is because a constitution in a material sense consists of the norms about the existential of the state, the status of the bodies of the state, the relationship between organs, and fundamental rights of the people of the state. Likewise, the charter of alliance regulates (i) some relationships between bodies of state and (ii) some rights of subjects and local landed proprietors (*ayan*) of the Empire.

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[114] Tanör, Bülent, *Osmanlı-Türk Anayasal Gelişmeleri*, 2012, Pg. 55.
[115] Özçelik, Selçuk, *Esas Teşkilat Hukuku Dersleri*, IÜHFM, Istanbul, 1976, Pg. 21.; Okandan, Recai G., *Amme Hukukumuzun Ana Hatları*, Pg. 57.; Aldıkaçtı, Orhan, *Anayasa Hukukumuzun Gelişmesi*, Pg. 39.

Regarding Tanzimat edicts, Münci Kapani does not accept the fact that Tanzimat documents are constitutional documents. Guarantee of the Sultan for limitation of his authority is not enough to characterize a document as "constitutional" since constitution must be a code in a technical sense. Tanzimat edicts, however, were a hegemonic, independent, "unilateral declaration of imperial intention" of the Sultan. For him, reform edicts were an auto-limitation document of the Sultan.[116]

Kemal Gözler, on the other hand, states that although the edicts are not constitutions in a formal sense, they are constitutional documents in a material sense because they deal with relations between organs of the state and regulates some rights of bureaucracy, local landed proprietors and subjects of the Empire. For him, to characterize a norm as a code in a technical sense, it is fair enough to be declared by one who has a legislative authority. In that sense, a unilateral declaration of intention of a Sultan can be a code, and by extension, a constitutional element if the Sultan has a legislative authority.[117]

[116] Kapani, Münci, *Kamu Hürriyet*, Pg. 96.
[117] Gözler, Kemal, *Anayasa Hukuku*, Pg. 11-15

CHAPTER TWO: THE THEORETICAL GROUNDINGS OF HUMAN RIGHTS IN ISLAM

In this chapter, I deal with the theoretical background of human rights in Islamic law over (i) the contemporary and classic theories of rights and (ii) a number of prominent constitutional documents in Islamic history.

A. The Constitutional Documents in the Early History of Islam

The political history of Islam does not alien to the constitutional documents; instead, it has been quite familiar with these documents since the beginning of the formation of Islamic politics. The prophet himself established the first Islamic state based on a constitutional document, known as the covenant of Madinah. Furthermore, first caliphs maintained the tradition whereby they also issued constitutional documents in the first expansion period. Of the constitutional documents, the pact of Umar is the most prominent one since it has become the basis of the Islamic international law, known as *Kitab 'l-siyar,* and the institution of *dhimma* in Islamic jurisprudence.

I believe that this historical familiarity with constitutional documents would help the public and ecclesiastical circles to appropriate the constitutional document of the late Ottoman Empire. I briefly examine the covenant of Madinah and the Pact of Umar in terms of fundament rights in this chapter.

1. The Covenant of Madina

The prophet Muhammad and his Makkan believers had to move from Makka into Medina in 622 whereby a new community consisted of Makkan Muslims, Madina Muslims, Medina non-believers, and Medina Jewish and Christian communities has emerged. The people of Medina have established a political entity under the leadership of the Prophet. He regulated the existential of the entity and relation of the members of the community in the internal and external affairs by means of a written covenant signed by the representatives of Muslims, Jewish, and the tribes of non-Believers.

The covenant mainly deals with tribal matters such as the organization and leadership of the participating tribal groups, warfare, blood-wit, the ransoming of captives, and war expenditure. The two recensions of the treaty are found in Ibn Ishaq's Biography of Muḥammad (sira) and Abu ʿUbayd's Book of State Finance (Kitāb al-amwāl).

Some believe that the covenant of Madina is the first constitution in history.[118] I do not agree with this opinion since the concept of constitutions is a quite modern concept formatted along with the formation of the modern state. However, I believe that the covenant of Madina is a constitutional document since it bears the conditions I count above for constitutional document. It was written, binding and regulating some existential and fundamental issues in the state and individual relations.

The covenant prescribes Prophet Muhammad as the leader of the entity in executive and judiciary affairs of the community. Moreover, the document includes several important provisions about rights and freedoms of the member of the community. The document guarantees the life, property, personal chastity and honor of all member of the political entity while it assures the freedom of religion and practices of the members of the divine religions.

2. The Pact of Umar

A rapid expansion of the Muslim territory in the 7th century forced Muslims leaders to deal with the issue of Non-Muslims under Muslim domain in which they remained in the majority in many areas for centuries. Muslims solved the issue of non-Muslim under Muslim domain where by they developed the notion of the "dhimma" (protected person). The Dhimmi enjoyed their fundamental rigths and freedoms, and they were exempted from military service but they required to pay an

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[118] Hamidullah, Muhammed, *Islam Peygamberi I-II*, Trns. Salih Tuğ, Yenişafak Publication, Ankara, 2003, Vol. 1, Pg. 121 ff.; Tuğ, Salih, *Islam Ülkelerinde Anayasa Hareketleri*, Irfan Publication, Istanbul, 1970, Pg. 35-40; Akgündüz, Ahmet, Cin, Halil, *Türk Hukuk Tarihi*, Vol. 1, Pg. 148.

extra tax (jizyah). The Pact of Umar was, in fact, the foundation of the dhimma system in Islamic jurisprudence. The Pact of Umar was the peace accord offered by the Caliph Umar to the Christians of Syria. Later on, the pact formed into a patter of later interactions.

The Pact of Umar is a treaty regulating the limitations and privileges between conquering Muslims and conquered non-Muslims. All conqured people including the Jews were subject to the pact although there is no special treaty with the Jews. That is why, treaty provisions for churches, for example applied to synagogues too. It is accepted that the Pact was formed approximately in 637 by Umar the First after the conquest of Christian Syria and Palestine. The provisions of the Pact has extended along with practices and precdents.

The pact was not a single document, instead, it was an Islamic international custom in the raign of Umar in terms of humanitarian law. There are several versions of the pact, differing both in structure and stipulations. In fact the custom of the pact has gained a canonical status in Islamic jurisprudence later on.

Of the pact, the pact of Jerusalem is the most famous one. Many primary historic sources such as Baladhuri (892), Ibn 'l-Athir (1233), and Ibn 'l-Kathir (1373 d.) narrate that Caliph Umar went to Jerusalem to sign a pact with the leader of non-Muslims after the Jarusalem surrender without an angage.[119] Tabari (923 d.), on the other hand, is the one who narrates the longest verision of the pact of Umar in his history book.[120]

The pact gives an assurance of safety to the people of Jerusalem. It gives them an assurance of safety for themselves for their property, their churches, their crosses, the sick and healthy of the city and for all the rituals which belong to their religion. Their churches will not be inhabited by Muslims and will not be destroyed. Neither they, nor the land on which they stand, nor their cross, nor their property will

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[119] Gül, Muammer, "Müslümanların Kudüs'ü Fethi", *HÜİFD*, No. 2, 2001, (pp. 47-58), Pg. 50.
[120] Tabari, Ebu Cafer, *Milletler ve Hükümdarlar Tarihi I-II-II-IV*, Trns. Z. Kadiri Ugan, Ahmet Temir, Maarif Press, Ankara, 1954, Vol. I, Pg. 2405-2406.

be damaged. They will not be forcibly converted. Those of the people of Jerusalem who want to leave with the Byzantines, take their property and abandon their churches and crosses will be safe until they reach their place of refuge. The villagers may remain in the city if they wish but must pay taxes like the citizens. Those who wish may go with the Byzantines and those who wish may return to their families. Nothing is to be taken from them before their harvest is reaped.[121]

B. Theories

The term, human rights, is a modern concept that authorities people to demand protection and immunity for their fundamental rights from a state no matter they are citizens of the state or not. Nevertheless, the question of the fact that "on what grounds people deserve to demand protection and immunity for some of their rights from a state?" has been on debate in academic circles for a number of decades. The answer of this question leads us to the a-historic and philosophical aspects of the concept of human rights. The concept of human rights theorized in terms of natural rights, core rights, rights based on justice, rights based on reactions to injustice, rights based on dignity, rights based on equality, and cultural relativism in western scholarship.[122] In Islamic law literature, on the other hand, theories on human rights are quantitively and qualitatively quite limited. Unfortunately, the number of consistent, authentic, and comprehensive theories is a few in the contemporary Islamicate literature. In this chapter, I attempt to categorize the foremost contemporary theories on human rights in Islam, some of which has not been properly theorized yet.

I categorize the theories as (i) "the theory of rights based on justice and reaction to injustice" and (ii) "the theories of rights based on immunity of rights". The theories of rights based on the immunity of rights are divided into three as (i) "the

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[121] Kennedy, Hugh, *The Great Arab Conquests: How the Spread of Islam Changed the World We Live in*, Da Capo Press, Philadelphia, 2007, Pg. 91-92.
[122] See for a comprahensive study on the philosophical foundations of human rights: Shestack, Jerome J., "The Philosophical Foundations of Human Rights", *Human Rights Quarterly*, Vol. 20, No. 2, May 1998, (pp.201-235).

theory based on *maslaha*", (ii) "the theory based on *ihtisas*", and (iii) "the theory based on *işmah*". Of the theories, I appropriate the theory of *işmah* in my thesis since it was the most consistent, authentic and conformable with my thesis topic among theories.

1. The Theory of Rights Based on Justice and Reaction to Injustice

Some theorize the protection of human rights in Islam in terms of the concept of justice that has been utilized a lot in theory and practice in classical fiqh and Shariah politics since the begging of the fiqh.[123] This theory is based on the deontological and demandable characteristics of human rights. Human rights must be deontological and demandable. That is to say, human rights are a group of rights that people enjoy not because the legal system bestowed but because they deontologically possessed. Moreover, people should be able to demand from the political authority to protect their rights whereby the political authority consolidate or lose its legitimacy according to justice it provides because the rights demanded are not bestowed by political authority.

According to the theory, political authority does not bestow rights, instead, they are rooted in the divine sources of which the obligations bind both rulers and ruled together in Islamic law. In that sense, on contrary to modern state, political power was not a legislator in a true sense but an executor of a supra-state Islamic jurisprudence. People, therefore, possess some deontological rights they obtained independently of the existence of a state. The state, on the other hand, is not the bestower of the rights but the guarantor of the rights.[124]

Regarding demand-ability of rights, the theory emphasizes the institution of

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[123] See: Konan, Belkıs, "İnsan Hakları ve Temel Özgürlükler Açısından Osmanlı Devletine Bakış", *GÜHFD*, Vol. 15, No. 4, 2011, (pp. 253-288), Pg. 261 ff.
[124] Hallaq, Wael, *Impossible State: Islam, Politics, and Modernities Moral Precidament*, Colombia University Press, New York, Pg 43.

complaint in the title of "right to individual application"[125], "right to complain"[126], and "right of petition"[127] in Ottoman Empire and other Islamic states. The complain mechanism was utilized by political power to dispense justice in Islamic states. The complain mechanism was promoted and institutionalized especially in Ottoman Empire.

There is a common acceptance among historians the fact that every individual living in Ottoman Empire has a right to complain about any tort he/she had been exposed by a public agent regardless of rank, status, and position. Many governors, banner-lords and, judges have been complained whereby they were inspected and, if it is necessary, punished. There are many local and central authorities to submit a complaint in the Ottoman territory.[128]

The complain system was the manifestation of the perception of "the circle of justice" in which classic Islamic thought set a premium on justice in term of maintenance of legitimacy and existence of sovereignty.[129] Classical *Siyasetname* books such as *Kabusname* and *Ahlak-ı Alai* prescribed the circle of justice as a pragmatic model of balance between the ruling class, the local landed proprietors (*Ayân*)-as tax collectors-, the military class and productive class, whereby they indicate how to develop a just and fair relationship among social classes.

The discourse of "Circle of Justice" begins with the statement the fact that (i) political sovereignty is obtained by the military power, yet the military power is maintained with financial resources. (ii) These resources can be utilized only through

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[125] See: Özgişi, Tunca, "Osmanlı Adalet Sisteminde Bireysel Başvuru Hakkı", *Yalova Sosyal Bilimler Dergisi*, Vol. 5, No. 8, April 2014, (pp. 52-66), Pg. 62.
[126] Gümrükçüoğlu Okur, Saliha, "Şikâyet Defterlerine Göre Osmanlı Teb'asinin Şikâyetleri", *AUHFD*, Vol. 61, No. 1, 2012, (pp. 175-206), Pg. 178 ff.; Inalcik, Halil, *Şikâyet Hakkı: Arz-i Hâl Ve Arz-i Mahzarlar, Osmanlı'da Devlet, Hukuk, Adalet*, 1st Edition, Eren Publication, Istanbul, 2000, Pg. 15 ff.; Tuğluca, Murat, *Osmanlı Devlet-Toplum İlişkisinde Şikayet Mekanizması ve İşleyiş Biçimi*, Türk Tarih Kurumu Publication, Istanbul, 2016, Pg. 21.
[127] Konan, Belkıs, "İnsan Hakları ve Temel Özgürlükler Açısından Osmanlı Devletine Bakış", 2011, Pg. 268.
[128] Tuğluca, Murat, *Osmanlı Devlet-Toplum İlişkisinde Şikayet Mekanizması*, Pg. 32.
[129] Kömbe, Ilker, "Adalet Dairesinin Teşekkülü ve Temel Kavramları", Phd. Diss., Marmara University, Institute of Social Science, Istanbul, 2014, Pg 82.

collecting taxes, thereby the economic productivity of the subjects is ensured to proceed. (iii) In order to sustain the level of prosperity that can stabilize taxable income, justice must be guaranteed; thereby provincial officials are controlled to prevent from corruption the fact that their vision of justice is contemplated by personal power and rapacity. Hence, (iv) unlawful and greedy officers must be monitored in order to provide public order and social peace and realize justice in society. To achieve all this, (v) political and administrative actions should be carried out in conformity with the Shariah. However, (vi) the Shariah cannot be performed without political sovereignty, and (vii) political sovereignty cannot be obtained without an army. And so, the chain of the Circle is completed.[130]

2. The Theory of Rights Based on Dignity (*Karamah*)

According to some Muslim jurists, Islamic law protects all individuals' (*adam*) basic rights only because they are respect-deserving creatures of God (*adamiyyah)*. The term *ademi* is a derivative noun (*mushtaq ism)* that is derived from the word *Adem* that is used for all children of Adam both male and female. Likewise, Muslim Scholars employ the notion of *Ademiyyah* to indicate all human beings regardless of male, female, Muslim, and non-Muslim.[131]

According to Muslim scholars, basic principles that lay a ground for *ademiyyah*, in other words, what differs human from other creatures, are "intelligence" (*akl*) and "capability" (*dhimma*). Thanks to these two principles, human beings have become capable of carrying responsibilities. "Carrying responsibility", in a sense, indicates his qualification to burden rights and obligations.

The honored trait of human beings (*karamat*) has been properly formulated since the very early age of Islamic jurisprudence by, Hanafi jurist, Dabusi (1039 d.)

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[130] Hallaq, Wael, *İslam Hukukuna Giriş*, Trns. Necmettin Kızılkaya, Ufuk Publication, Istanbul, 2014, Pg. 170.
[131] Şentürk, Recep, *İnsan Hakları ve İslam; Sosyolojik Ve Fıhi Yaklaşımlar*, Etkilesim Publication, Istanbul, 2006, Pg. 39.

in his masterwork, *Taqwim al-Adillh fi Usul al-Fiqh*. He characterizes honored trait of human being as follows:

> A human being (*adami*) is created only and only with this covenant (with God) and the right to personality (*dhimmah*); it is impossible to think he may be created otherwise. A human being is created only and only it has a capability to be accorded with legal/public rights (*huquq al-shari'*): It is impossible to think that he may be created otherwise. Likewise, a human being is created free and with his rights; it cannot be thought that he may be created otherwise. The reason why these honoring gifts (karamat) and legal personality (*dhimmah*) are given to human beings because he is responsible to fulfill the "rights of God" (*huquq Allah*).[132]

In conformity with quotations that cited above, early Hanafi jurists have accepted that when God created human as "the carer of trust (*amanah)*", he bestowed upon him intelligence (aql) and legal personality (*dhimmah*) so he can capable of burdening rights and obligations whereby human beings naturally have inviolability, freedom (*hurriyyah*) and property (*mulkiyah*).[133]

It seems that Hanafi jurists express capability of caring rights and obligation as *aql* and *dhimmah;* responsibilities as *amanat;* and rights as *'işmah*, *hurriyah*, and *mulkiyah*. In that sense, it seems that the fundamentals of *adamiyyah* are the concepts of *aql* (intellect), *dhimmah* (legal capacity*)* and *amanat* (trust). I briefly deal with these two concepts i.e. *aql* and *dhimmah.*

Aql: The intellect is one of the constitutive elements of humanity. In the sense of human rights, what makes intellect important is its ability to distinguish human from other creatures. Whereas the existence of intellects is necessary to enjoy rights, in terms of fundamental rights, the potency of having intellect as being birth as a human is enough to enjoy fundamental rights. That is why; Islamic law protects

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[132] Al-Dabusi, Abu Zaid Abdullah Ibn Umar Ibn Isa, *Taqwim 'l-Adillah fi Usul Al-Fiqh*, Dar Al-Kutub Al- 'l-lmiyyah, Beriut, 2001, Pg. 417; Senturk, Recep, "Human Rights in Islamic Juriprudence", in *The Future of Religious Freedom*, Ed, Allen D. Hertzke, Oxford University Press, 2013, Pg. 296.
[133] Al-Dabusi, *Taqwimu'l-Adillah*, Pg. 417; Al-Sarakhsi, Abu Bakr Muhammad B.Ahmad B.Abi Sahl, *Al-Mabsut*, Çağrı Publication, Istanbul, 1982, Vol. 2, Pg. 334; Taftazani, Sa'duddin Mesu'd Ibn Umar, *Sharhu't-Talvih Ale't-Tavdih*, Daru'l-Kütüb 'l İlmiyye, Beirut, 1996, Vol. 2, Pg. 337.

fundamental rights of those who suffer mental illness. Therefore, not only those who have intellect but also those who potentially have intellect such as embryo, infant, inmate, and insane are included in the scope of the concept of *adamiyyah*.

Dhimmah: Basically *dhimmah* is a legal value that enables to take individual accountable and lay able before law whereby individuals are able to carry responsibilities and rights. Muslim jurists ground this accountability to a contract (*misaq*) that has been made between God and human beings which is indicated in Quran.[134] In that sense, Muslim jurists begin rights of human beings from the primordial covenant (*Qalu Bala)* in which human beings have beard testimony to obey God's commands and divine will.[135]

In terms of human rights, it is defined as a trait that provides a capacity to human beings to reveal rights and obligation to them.[136] *Dhimmah*, therefore, plays a distinguishing role between human beings and other creatures in the sense of caring rights and responsibilities. Dabusi explains this distinction with an example the fact that if a child cause to destroy a property he should compensate it; however, if an animal does the same action, it does not need to compensate.[137]

Muhammed b. Ebi Sehl es-Sarakhsi (1090 d.) who is one of the most remarkable Hanafi scholars describes qualities of human being and fundamental principles of qualities thereto in a similar genre in the following citation:

> Upon creating human beings, God graciously bestowed upon them intelligence and the capability to carry responsibilities and rights (*dhimmah*, personhood) was to make them ready for duties and rights determined by God. He granted them the right to inviolability, freedom, and property to let them continue their lives so that they can perform the duties they have shouldered. Then these rights to carry responsibility and enjoy rights, freedom, and property exist with a

[134] Surah Al-A'raf, 7:172.
[135] Pezdevi, Abu Yusr Muhammad B. Muhammad B. Huseyn, *Kenzu'l Vusul*, Ed. Said Bekdas, Dârü'l- Beşairi'l-İslâmiyye, Beirut, 2014, Pg. 324; Taftazani, *Sherhu't-Telvih*, Vol. 2, Pg. 337.; Buhari, *Keshfu'l-Esrar*, Vol. 4, Pg. 336.
[136] Curcani, Abu Hasan Sayyid Sharif Ali B. Muhammad B. Ali, *At-Ta'rifat*, Dâru'l-Kutubi'l-Ilmiyye, Beirut, 1983, Pg. 142.
[137] Debusi, *Taqwimu'l-Edille*, Pg. 417.

> human being when he is born. The insane/ child and the sane/adult are the same concerning these rights. This is how the proper personhood is given to him when he is born for God to charge him with the rights and duties when he is born. In this regard, the insane/child and sane/adult are equal.[138]

This explanation lays a theoretical ground for basic Hanafi approaches that lead universalistic understanding of Human Rights in fiqh. When one examines this paragraph, he can see human aspect of the Islamic theory of Human Rights. It is seen that human rights paradigm in fiqh appropriates a system of rights and responsibilities that are acquired with being human. In that sense, all human beings have some fundamental rights to (i) Inviolability, (ii) Freedom, and (iii) Property. The key concept to express this principle is, as we explore above, the concept of *ademi* and its adjective version of *ademiyyah* that is employed regardless of sane, insane, male and female or any other kind of discrimination.

Many Hanafi jurists have used this concept as a "grand value" to indicate the basis of many legal issues. They used the concept of *ademiyyah* to lay a philosophical and logical background for the rights and freedoms that is given by God. In that sense, they emphasize the dignity of human being that is indicated in Quran as "supervisor on the earth" (…*fil ardi khaleefatan*)[139] and creation that is created of "the best stature" (*ahsani taqweem*).[140] As it is seen in quotation we cited above, Sarakhsi argues that the divine call has important implications. Being addressed by God gives a special status to human beings. It gives them the right to legal capacity (*al-ahliyyah*) at the universal level. Since God called upon them all, each human being is qualified for equal rights and duties by birth.[141]

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[138] Al-Sarakhsi, Abu Bakr Muhammad B.Ahmad B.Abi Sahl, *Usulal-Sarakhsi*, Ed. Abu Al-Wafa Al-Afghani, Kahraman Publication, Istanbul, 1984, Pg. 333-334; Senturk, Recep, "Unity And Multiplexity; Islam as an Open Civilization", *Journal of The Interdisciplinary Study Of Monotheistic Religions*, No. 7, 2011, (pp. 49-60), Pg. 56.
[139] Quran, Surah Al-Baqarah, 2:30.
[140] Quran, Surah At-Tin, 95:4.
[141] Senturk, Recep, "Human Rights in Islamic Juriprudence", Pg. 297.

According to Sarakhsi, the divine call of God to human beings is the ground of the dignity of human beings which makes them capable of rights and responsibilities. Thus, the basic reason God addressing human beings is to test them in earth. However, those who are called have to have free will and the freedom to exercise in order to realize basics of the testing. That is to say, the action must be chosen by person out of his free will in order to make human being accountable for their action. He states that this is not what God intends the fact that people preform what they are commanded and refrain from what they are prohibited by force without any right of chose since it is not a trial.[142]

In keeping with Sarakhsi, many Hanafi jurists have dealt with the concept of human-hood by using the concept of *adami* or *adamiyyah* as a respect deserving, honoring gifted (*karamat*) trait. For example, in the discussion of the determination of slavery and freedom, Muslim jurists have given primacy to the claim of freedom. They formulate this doctrine as the fact that "Freedom is a principle condition (*asl*) of human beings (*adami*)".[143] Furthermore, in the discussion whether or not human and his tailings are clean, they appropriate the principles of the fact that "regarding human issues, the original state (*asl*) is the fact that he is clean and honored (*sahib u'l-karamat*)".[144] In that sense, they have disapproved the usage of human body and organs in a way that degrading human dignity, whereby they have always privileged human honor in legal discussions.[145] Moreover, in the discussion of indication of religious faith, they state that since all human beings depend on Adam and Ave, all human is born on a Muslim creation *(fitrah)*.[146] In addition to these, Muslim jurists associate legal capacity *(Ahliyyah al-Wujub),* that allows individuals to legally obtain rights and responsibilities, to the birth as human (*adamiyyah*) thereby they state that

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[142] Sarakhsi, Usulal-Sarakhsi, Pg. 327.
[143] Ibn Maze Al Bukhari, Burhan Al-Din Mahmud Ibn Tac Al-Din, *Az-Zahire Muhtasar Al-Muhit Al-Burhan*, Ed. Abd Al-Karim Sami Al Cundi, Daru'l-Kutubi'l-İlmiyye, Beirut, 1996, Vol. 5, Pg. 425.
[144] Ibid, Vol.1, Pg. 101,186.
[145] Ibid, Vol. 5, Pg. 373.
[146] Ibid, Vol. 8, Pg. 414.

one obtains a "capacity of succeeding", "capacity of marriage", and "capacity of having property" *(mulk er-rakabe)* as soon as one is born.[147]

As a result of inviolability that is acquired out of humanity (*adamiyyah*), the burden of proof has been loaded to the claimant. In other words, the claimant has to prove what he claims before the court. Furthermore, in case of the existence of doubt because of an absence of enough witnesses or an existence of unqualified witnessed etc…, defendant regards as innocent because of the doubt. Moreover, the status of innocence is the principle (*asl*) by which an accused one cannot be punished unless there is a final verdict.[148] In addition to this, Hanafi jurists explain the necessity of having blood money (*diyat*) as a punishment of an accidental killing or bodily harm in which a human being (*adami*) created with inviolability (*ismetu'n-nefs*) get damaged. That is why inviolable blood (life and personal integrity) shall be compensated because of the destruction."[149]

3. The Theories of Rights Based on the Immunity of Rights

a) The Theory Based on *Maslaha* (the Theory of *Maslaha*)

Maslaha is characterized as (i) "pleasure" or (ii) "to acquire the interests and avoid the loss" in the lexical meaning. In the jurisprudence, the theory of *Maslaha* based on the idea the fact that law is teleological. The basic teleology of the law is to actualize and guarantee the *maslaha* of the people. Law can guarantee the *maslaha* of people by ensuring their rights. Right itself is a *maslaha* since rights serve to protect the pleasurable status of people. Therefore, the foundation of law and right is the same i.e. *maslaha*. The jurists asked the question the fact that "Does Allah has to act in accordance with the *maslaha* of the people?" in regards with the discussion of the teleology ad *maslaha*. The theory of *maslaha* is appropriate by many jurists from

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[147] Al-Bukhari, Ahmad B. Muhammad Abd Al-Aziz, *Keshfu'l-Esrar*, Ed. Muhammed El-Mu'tasım-Billah El-Bağdadi, Dar 'l-Kutubi'l-Arabiyye, Beriut, 1997, Vol. 4, Pg. 335.
[148] Al-Sarakhsi, *Al-Mabsut*, Vol. 9, Pg. 63.
[149] Ibn Nujaym, Zayn Al-dīn Ibn Ibrāhīm, *El-Bahru'r-Raiq Sharhu Kenzi'd-Dekaik*, Ed. Zekeriyyâ Umeyrat, Dârü'l-Kütübi'l-İlmiyye, Beirut, 1997, Vol. 9, Pg. 75.

different schools in Islamic jurisprudence. They, more or less, argues that Allah does not have to act in accordance with anything but this much is certain that every rule of the Shariah bares a teleology and *maslaha*.[150]

The theory of *maslaha* states that Islamic law has established a hierarchal system that locates five fundamentals (*el-usulu'l-hamse)* to the central office. Since these fundamentals, called *Maqasid'u el-Shari'a -din, nefs, nesl, mal, akl-* (animus of law), are absolutely protected values; the protection measures of the fundamental values, respectively right of worship, life, family, property, freedom of expression are protected as well. All rules and obligations of Shariah, in this regard, are classified according to their functions that they preserve the fundamentals. In this respect, Shatibi claims that purposes of all prohibitions are protecting the fundamentals and the aims of all obligations are promoting the fundamentals of Shariah.[151] In that sense, Shariah is a value based hierarchal legal system that aims to protect certain fundamental values, and by extension, certain fundamental rights in the last instance.

Protection of these fundamental rights has been treated in a different name in classic Fıqh literature such as *el-usulu'l-hamse* (five fundamentals), *darûrât* or *darûriyyât* (irreducible rights), *mesâlihu'l- mursele* (basic functions of law), and *maqâsıdu' el-Shari'a* (animus of law).

In the contemporary legal doctrine, Hasan Tahsin Fendoğlu theorized that fundamental rights and freedoms of all-subjects were protected under the name of *maslaha*. He states that there are three *maslahas* i.e. *darurî maslaha*, *hâcî maslaha*, *tahsînî maslaha*. *Darurî maslaha* protects five fundamentals i.e. religion, life, mind, posterity, and property.[152]

b) The Theory Based on *Ihtisas* (the Theory of *Ihtisas*)

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[150] Hacak, Hasan, "İslam Hukukunun Klasik Kaynaklarında Hak Kavramının Analizi", Phd Diss., Marmara University, Institute Of Social Science, Istanbul, 2000, Pg. 65 ff.
[151] Al-Shatibi, Abu Ishaq, *Al-Muvafakat*, Ed. Ebû Ubeyde Al-I Salman. Dâru Ibn Affan, Huber, 1997, Vol. 2, Pg. 20.
[152] Fendoğlu, Hasan T., "Outlines Of Human Rights In Ottoman Period", *GÜHFD*, Vol. 1, No. 2, 1997, (Pp. 258-261), Pg. 259.

Ihtisas is the quite opposite of "common" and means something in the private area of possession and enjoyment of someone in a lexical meaning. *ihtisas* reflects a private sphere of usage and authority free from the intervention of other. Without an *ihtisas,* rights cannot be enjoyed so the foundation of the right is *ihtisas* according to the theory of *ihtisas*.[153]

Some believe that the theory of *ihtisas* is a contemporary theory established and theorized by Mustafa Ahmet Ez-Zerka (d. 1999), Fethi Düreyni, Abbadi, and Kamali.[154] However, a Tanzimat thinker Seyyid Bey (d. 1925) was a vigorous advocator of the theory of *ihtisas*. And he claims that the jurists have been grounded the right over *ihtisas*. He argues that, in lexical meaning, the *hak* does not mean what determined in any way at all (*ale 'l-ıtlak*), instead, it means what determined all-over (*külli 'l-vücuh*) in a way that it is beyond any shadow of doubts. In parallel to its lexical meaning, it is *characterized* as "what is determined in every aspect for a person in a manner that there is no doubt he does not possess. This phenomenon is termed as *ihtisas* by fiqh in which *hak* is a determination (*ihtisas*) of a situation of a person. In that sense, he argues that Islamic jurisprudence initially determined the right to life under the name of *işmah 'l-nefs*. He argues that all human are born to live. The life is determined in all aspect for human beings. They live in their determined lifespan. They are not born to instantaneously die. Herein the living is a natural and innate right and a necessity (*daruriyyah*) determined by the creation of human. This state of living is a right to live (*hakk-ı hayat*) in fiqh terminology since there is a complete *ihtisas* between life and human in all aspects (*külli'l-vücûh*). What determines the *ihtisas* is nature of human. In that sense, *nefs,* which stemmed from the human nature, is a fundamental right and an irreducible (*darurriyah*) itself. The irreducible of life, which are prerequisites for life (*mevkûfun aleyh*), are also innate and irreducible rights of individuals, known as fundamental rights today. In

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[153] Zerka, Mustafa Ahmet, *El-Medhalü 'l-Fıkhiyyü 'l-'Amm*: *El-Fikhü 'l-Islami Fi Sevbihi 'l-Cedid I-III*, Daru 'L-Fikr, Beriut, 1965, Vol. 3, Pg. 10.
[154] Hacak, Hasan, "İslam Hukukunun Klasik Kaynaklarında Hak Kavramının Analizi", Pg. 74.

that sense, Seyyid bey categories fundamental rights into three i.e. (i) right of *iṣmah*, (ii) right of freedom, and (iii) right of possession.[155]

The theory of ihtisas is criticized as the fact that the theory is established in the influence of the theory of the right of Jean Dabin (d. 1971) which grounds right on the specific and personal sphere of authority.[156]

c) The Theory Based on *Iṣmah* (the Theory of *Iṣmah*)

The word *al-'iṣmah* whose lexical meaning is inerrancy, infallibility, sinlessness, sanctity, prevention, and protection is an Arabic noun nominalized from the root of *asm* (عصم). In Qur'anic verses, the word *'iṣmah* is used in the meaning of "to protect" in different variations. For example, in the verse 5/67 (al-Maide) i.e. "…Allah will protect you from the people", it is used in forms of *mudari' (ya'simuke)* that means to protect; in the verse 11/43 (Hud) i.e. "…There is no protector today from the decree of Allah, except for whom He gives mercy.", it is used in forms of *ismi fail (aasim)* that means protector; in verse 12/32 (Joseph) i.e. "…I did seek to seduce him from his (true) self but he did firmly save himself guiltless…", it is used in forms of *istif'al (ista'same)* that means asking God to save him guiltless.[157]

Furthermore, in Hadith narrations, the word *'iṣmah* used in the meaning of protection, guarding, prevent in conformity with its lexical meaning. For example, in a Hadith i.e. "I have been commanded to fight against people, till they testify to the fact that there is no god but Allah, and believe in me (that) I am the messenger (from the Lord) and in all that I have brought. And when they do it, their blood and riches are guaranteed protection *(asamuu)* on my behalf except where it is justified by law,

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[155] Gedikli, Fethi, "Mehmed Seyyid Bey Ve Hak Kavrami Üzerinden Islâm Hukuk Felsefesi ile Avrupa Hukuk Felsefesi Arasindaki Mukâyesesi", *İÜHFM*, Vol. 72, No. 1, Jun. 2014 (pp. 107-132), Pg. 126.
(available at: Http://Www.Journals.Istanbul.Edu.Tr/Iuhfm/Article/View/5000034645, accessed: 13.12.2017), Pg. 131.
[156] Hacak, Hasan, "İslam Hukukunun Klasik Kaynaklarında Hak Kavramının Analizi", Pg. 79.
[157] See For A Full List, Muhammad Fuad Abdulbaki, *El-Mu'cemu 'l-Mufehres*, Dar Al-Ma'rife, Beirut, 2012, Pg. 463.

and their affairs rest with Allah."[158], it is used in form of *fiil madi' (asamuu)* in the meaning of benefiting a guaranty and protection. In kalam, the word *'işmah* that means "protecting God someone from sins and faults" has been conceptualized as infallibility and sinlessness of prophets.

In Fiqh literature, the term is used in conformity with its lexical meaning as well. It basically means "legal protection or inviolability" in Islamic law. The concept has been expressed as *'işmah, hurmah, hakn* or *men'* the collections of Islamic jurisprudence. But in the study, I employ the term of *'işmah* unless it is referred in a different term such as *hurmah*, *hakn* or *men'* in primary sources.

Despite the existence of different classifications, there is an agreement among the majority of Fıqh scholars that Islamic Law cumulates the fundamental rights (*'işmah*) in six categories and guaranteed them i.e. 'işmah *al-nefs, 'işmah al-aql, 'işmah al-din, 'işmah al-ird, 'işmah al-mal* and *'işmah al-nasl*.[159] Some scholars count 'işmah al-ird 'işmah al nasl together whereby they state that there are five *'işmahs*. That is to say, *'işmah* protects these following fundamental rights i.e. the right to live, right of personal chastity, right of property, right of family, protection of dignity and pudicity of human, and right of religion and expression.

However, in order to consider those fundamental rights as human rights, it is necessary to indicate the fact that "who enjoys the protection of fundamental rights?" If the answer is citizens or a determined special group, it is not possible to speak of a human rights paradigm, rather, civil rights paradigm, in the system. If the answer is all human being, we can talk about human rights paradigm in the legal system.

On the concept of *'işmah,* there are two basic approaches i.e. universalistic and communalistic approaches in Islamic scholarship. The universalistic approach accepts the existence of obligation-free, universal rights while communalistic approach closely intertwines rights with obligation. For example for communalistic

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[158] Muslim, Iman, 32,33.; Bukhari, Jihad, 103.
[159] Şentürk, Recep, "Ismet", *Islam Ansiklopedisi*, Türk Diyanet Vakfı, Vol. 23, Istanbul, 2001, (pp. 137-138).

approach, in order to enjoy rights, one should fulfill his obligation; thereby basically one must convert to Islam or accepts the rule of Islam. However for universalistic approach, one always has some certain basic rights even though one does not fulfill his obligations.

The most detailed study for both paradigms in Islamic legal scholarship, I have discovered so far, has been dealt with by Recep Senturk. Senturk states that according to the Universalistic approaches in Islamic law, especially in Hanafi jurisdiction, it is enough to be human in order to be addressed in front of Law and they do not need to be Muslim to be covered by the legal systems` protection. The natural state between Muslim and non-Muslim society is peace but not war. The treatment of *dhimmah* only indicates these natural states. Principles is formalized by the Islamic scholars as *al-'iṣmah bi 'l-ademiyyah* (freedom and rights are out of human-hood). According to the communalistic approach, on the other hand, the natural state between Muslim society and not-Muslim society is war and they need to be Muslim or sign *dhimmah* treatments and become a citizen in order to be protected by the Law.[160]

For Universalistic approach, rights and obligations are separable. Once an individual does not fulfill his obligation he is subject to the punishment. However, his failure to perform his obligation does not cause to deprive him of his fundamental rights. In that sense, even punishments must be executed having regard to fundamental rights. For the enjoyment of fundamental rights, humanity is the basis of the rights. In addition to the fundamental rights, states can provide additional rights to his subjects. In order to enjoy these rights, some criteria such as citizenship, membership of a religion or group etc. can be set and only those who meet the criteria can enjoy these rights called civil rights.

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[160] Senturk, Recep. "Adamiyyah and Ismah: The Constend Relationship between Humanity and Human Rights in Classical Islamic Law", *Islam Araştırmaları Dergisi*, No. 8, 2002, (pp. 39-69), Pg. 46.

According to communalistic approach, however, rights and obligations are inextricably intertwined. That is to say, in order to enjoy the rights, one should fulfill certain obligations. In the specific case of Islamic law, one should either convert to Islam (*iman*) or get residential permission (*eman*) from state to be protected by law.

C. Rights of Human in Islamic Jurisprudence: *Işmah bi 'l-Ademiyyah*

There is an on-going argument between Hanafi jurists and other fiqh schools on whether inviolability (*'işmah*) is gained with Muslim-hood (*âsım*) or human-hood (*adamiyyah*). Accordingly, this discussion leads the argument whether Islamic fiqh contains a human rights paradigm or a civil rights paradigm. This is because as we discussed above, in order to mention a human rights paradigm, the protection (*'işmah*) must be for all human beings in the system.

Hanafi jurists argue that legal protection of fundamental rights is out of humanity (*adamiyyah*) by which warfare temporarily suspends inviolability against those who fight vis-a-vis Muslims. Yet, after the war ends or they are converted to Islam, inviolability prevails again. Other schools, notably Shafi'i school, on the other hand, states that inviolability is out of Muslim-hood.[161] The variation of precedents can be seen clearly in the discussion of the cause (*illat*) of killing the enemy in a battle. Hanafi jurists, who appropriate the fact that "the cause (*illat*) is war", state that only armed forces can be killed in the battle while Shafi'i jurists, who accept that the cause is infidelity (*kufr*), argue that woman and children can be killed as well in the battle.[162]

Hanafi jurists, however, believe that 'işmah, which is acquired out of humanity, is protected (*mahruz*) by territory whereby they have strongly intertwined consequences of violation of inviolability (*'işmah*) with the territory. Since a strong international law system, which allows prosecuting criminals out of Muslim territory,

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[161] Senturk, Recep, "Minority Rights in Islam: From Dhimmi to Citizen", in *Islam and Human Rights: Advancing a Us-Muslim Dialogue*, Eds. Shireen T. Hunter, Huma Malik, Center for International and Strategic Studies (CSIS), Significant Issues Series, Washington, 2005, (pp.67-99), Pg. 76.
[162] Zuhayli, Vehbe, *Asaru'l-Harb fi'l-Fıkhil-Islami*, 3rd Edition, Daru'l-Fikr, Beirut, 1998, Pg. 419.

has not established yet, Hanafi jurists accept, with a practical reasoning, the fact that "although *'iṣmah* is out of humanity, in order to execute worldly punishments and compensations, *'iṣmah* must be violated in Muslim territory. As a concrete example of this approach, Hanafi jurists states that *'iṣmah* of an apostate (*murtad*) who permanently leaves the Muslim territory (*dar al-Islam*) is removed[163] whereby the property of those, therefore, can be distinguished to their inheritors, and marriage of those terminates by itself.[164]

Association of inviolability (*'iṣmah)* with the territory (*dar*) leads Hanafi jurist to classify *'iṣmah* in two categories i.e. "the measurable and enforceable right to inviolability" (*Al-'iṣmah al-maqawwimah*) and "inviolability whose violators cannot be legally punished but regarded as a sinner" (*Al-'iṣmah al-muaththimah*). In this study, I employ the term of "crime producing inviolability" for *al-'iṣmah al-muqawwimah* since violation of this type of '*iṣmah* produces crime while I use term "sin producing inviolability" for *al-'iṣmah al-muathtimah* since violation of this type of *'iṣmah* produces sin.[165]

Hanafi jurists, Kamaluddin Ibn Humam states in his commentary on the work of al-Marghinani, Fath al-Qadir, that the idea concerning the existence of if *'iṣmah* with personhood is a rational argument (*dalil ma'qul)*. He also explains that the two types of 'iṣmah represent two separated principles. Therefore, it would be wrong to conceive "crime producing inviolability as the perfect form of the "sin producing inviolability". Nor is the sin producing inviolability the less developed form of *'iṣmah*. Iṣmah al-muqawwimah makes punishment by law possible in the form of blood money or other types of penalties. However, violation of the *'iṣmah al-mu'athimah* causes punishment in the Hereafter yet one can be pardoned by God by atonement or expiation (*kaffarah*) unless there is a right due to other human beings.

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[163] Dar al-harb is a territory of a non-Muslim country that they do not have a peace treaty with Muslim country.
[164] Sarakhsi, *El-Mabsut*, Vol. 5, Pg. 51.
[165] See: Şentürk, Recep, *İnsan Hakları ve İslam*, Pg. 55-62.

Religious law has determined the expiation for each sin which is paid on a voluntary basis. [166]

Jurists of other schools along with Hanafi jurists have effectively used this division. However, in regards to the definition and consequences of types of *'iṣmah*, opinions of the schools vary in accordance with their universalistic or communalistic approaches.

This split in opinion, can be seen obviously in the discussion the fact that "what is the legal penalty of a Muslim who, in abode of war, intentionally (*qatl al-amd*) or accidentally (*qatl al-khata*) kills one who has been converted into Islam in abode of war and stayed therein after becoming Muslim?" Hanafi jurists state that both intentional and accidental killing must be punished with "pound of flesh" (*al-Aqilah=kaffarah*). Shafi'i jurists, on the other hand, argue that intentional killing (*qatl al-amad)* requires retaliation (*qisas*) while accidental killing (*qatl al-khata)* requires blood money (*diyat*). Hereinafter, I discuss the reason why they differ in their legal opinion on the punishment of the same crime. By doing so, I examine universalistic and communalistic '*iṣmah* paradigms over a concrete example.

According to Shafi'i jurists, what brings inviolability ('*iṣmah*) is being Muslim (*âsım*). Furthermore, for Shafi'i jurists, the primary inviolability (*'iṣmah*) is "crime producing inviolability" (*al-'iṣmah al-muqawwimah*) because reprobation and enforcement are primarily executed by means of "crime producing inviolability" (*al-'iṣmah al-maqawwimah*). "Sin producing inviolability" (*al-'iṣmah al-muathtimah*), on the other hand, is the perfection of reprobation because high water mark of all inviolabilities (*imtina'*) is obtained by means of "sin producing inviolability" (*al-'iṣmah al-muathtimah*). One, who was converted into Islam in a non-Muslim territory and did not move therefrom to the Muslim territory, possesses "sin producing inviolability" (*al-'iṣmah al-muathtimah*). Even if he does not possess

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[166] Ibn Al-Humam, Kamal Al-Din Muhammad, *Fath Al-Qadir Sharh Al-Hidaya*, Daru'l-Kutubi'l-Ilmiyya, Et-Tab'atu'l-Ula, Beirut, 2003, Vol. 2, Pg. 852; Senturk, Recep, "Adamiyyah and Ismah", Pg. 58.

"crime producing inviolability", those who intentionally kills should be retaliated and those who accidentally kills should pay blood money (*diyat*) because "sin producing inviolability" (*al-'iṣmah al-muathtimah*) is the higher version of "crime producing inviolability."[167] As it is seen, Shafi'i School starts inviolability not being human but being Muslim. Furthermore, Shafi'i School considers "sin producing inviolability" (*al-'iṣmah al-muathtimah*) as perfection phase of "crime producing inviolability" (*al-'iṣmah al-maqawwimah*). In that sense, a violation against one who has "sin producing inviolability" (*al-'iṣmah al-muathtimah*) must be compensated. Non-Muslims, on the other hand, has not neither "sin producing inviolability" (*al-'iṣmah al-muathtimah*) nor "crime producing inviolability" (*al-'iṣmah al-maqawwimah*).

According to Hanafi jurists, *per contra*, "sin producing inviolability" (*al-'iṣmah al-muathtimah*) is obtained by means of being human (*adamiyyah*). This is because human beings are created as an addressee of divine call for a testing (*ibtila*) purpose, which can be actualized only if those who are called have inviolability. This kind of inviolability is peculiar to human beings. Inviolability of property, however, emerges secondarily, interconnected with human-hood, because it is allocated to cater for humanity.

"Crime producing inviolability", on the other hand, pertains to inviolability of property. This type of inviolability is primarily for properties. This is because compensation of damage can be retaliated, only if the loss is an assessable value (*takawwum*). Assessable values are valid for property while they are invalid for life, considering substitutability of property. This is because one basic condition of assessable values is equivalence (*temasul*) that is only possible for property, whereby "life" depends on "property" in terms of "crime producing inviolability". Furthermore, "crime producing inviolability" is protected (*ihraz*) thorough territory

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[167] Al-Marghinani, Burhan Al-Din Ibn Abi Bakr, *Al-Hidayah Sharh Bidayah Al-Mubtadi*, Ed. Talal Yusuf, Daur Ihyai't-Turasi'l-Arabi, Beirut, 1995, Vol. 2, Pg. 397.

(*dar*) for both life and property. This is because sovereignty depends on ability to defense (*min'at*) while there is no ability to defense is without territory.[168]

Ibn Humam states that *'iṣmah al-muaththimah* is applicable primarily to the rights to life, as life cannot be assessed monetarily. In contrast, the primary implementation of the *'iṣmah al-muqawwimah* is for crimes against property, as property loss can be assessed and compensated monetarily. Although their primary usages take place in different fields, both are used concerning the right to life and the rights to property.[169]

Kasani states repeatedly that the inviolability of a human being is due by virtue of his or her own intrinsic value (*hurmah li 'aynihi*) which never falls.[170] In contrast, the inviolability of property is due for exterior reasons (*hurmat li ghayrih*). Ibn 'Abidin states that the inviolability of property rights *('iṣmah al-mal*) is justified by necessity (*darurah*). This is because God created property initially for the benefit of the human family in its entirety, without personal ownership.[171]

According to this Hanafi interpretation, since the Muslim, who is killed in a non-Muslim territory, possesses "sin producing inviolability", murderer (*katil*) should atone for his crime. However, murderer is not subject to retaliation or blood money since he does not possess "crime producing inviolability". This is because "sin producing inviolability" is not a perfection of "crime producing inviolability"; instead, these two are different inviolabilities. The first pertains to life while the second pertains to property. This is because the inviolability (*'iṣmah*) is primary for human life while permission of possessing (*ibaha*) is primary for property.

According to Hanafi jurists, the inviolabilities are hierarchically ordered. The inviolability of life has the highest priority compared to others. This is because if life were not inviolable other rights would have no meaning. The right to the inviolability

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[168] Al-Marghinani, *Al-Hidaya*, Vol. 2, Pg. 398.
[169] Ibn Humam, *Fath Al-Qadir*, Vol. 4, Pg. 356; Senturk, Recep, "Adamiyyah And Ismah", Pg. 60.
[170] Kasani, *Badayi Al-Sanayi'*, Dar Al-Fikr, Beirut, 1996, Vol. 7, Pg. 349; Senturk, Recep, "Adamiyyah and Ismah", Pg. 62.
[171] Senturk, Recep, "Adamiyyah and Ismah", Pg. 60.

of property comes after the rights to the inviolability of life because it is required (*darurah*) to serve to the continuity of human life and progeny. Consequently, in case of a conflict between the two, life is given precedence over the property.[172]

Human rights, for Ibn 'Abidin, are the prerequisites for human beings to lead a prosperous and peaceful life on earth. Social and economic life requires that basic rights shall be granted to all human beings. Without meeting these necessary (*daruri*) conditions, social and economic life becomes impossible. [173]

That is why all human being possess inviolability. Although it is suspended when the attributes of infidelity (*kufr*) is smeared, they re-gain inviolability when they become Muslim or *dhimmi*. [174] Hanafi jurists employ the concept of *kufr*, in this context, in the narrowest sense the fact that only whose inviolability that is fighting against Muslims is suspended. Hanafi jurist, therefore, does not give fatwa to kill non-Muslim children and woman in battle since they do are not capable of fighting.[175]

The difference of opinion on the concept of '*işmah* according to universalistic and communalistic approach can be traced over the opinions on the "legal reasons of jizyah" that is taken from *dhimmis* who are non-Muslim citizens of an Islamic state. Hanafi jurists state that *jizah* that is issued by an authorized state institution shall be removed in case the fact that *hdimmi* individual converts to Islam or dies. Shafi'i jurists, in contrast, argue that *jizyah* is not removed in case of converting into Islam or death.

Hanafi jurist, Kasani deals with the legal reasons of *jizyah* in Hanafi School in companion with Shafi'i School in his masterwork, *Bedaiu's-Senai'*. He states that, for the Shafi'i school, the reason why *jizyah* is issued to *dhimmis* is the fact that *jizyah* is collected from non-Muslims in return for protection of their blood in

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[172] Senturk, Recep, "Human Rights in Islamic Juriprudence", Pg. 301.
[173] Ibid, Pg. 61.
[174] Ibn Al-Humam, *Fath Al-Qadir*, Vol. 6, Pg. 27.
[175] Şentürk, Recep, *Insan Hakları ve Islam*, Pg. 59; Birsin, Mehmet, *Islam Hukukunda Insan Hakları Kuramı*, Düşün Publication, Istanbul, 2012, Pg. 208-209.

Muslim territory. However, for Hanafi School, *jizyah* is not a protection fee. The real reason why *jizyah* is collected is "allowing non-Muslims to meet Islam" and getting them think "I would not pay *jizyah* if I were Muslim".[176]

The reason for protection of inviolability of *dhimmis* must be explained with another principle since the guaranty of the inviolability of *dhimmies* is not a reason of collecting *jizyah* in Hanafi School. That principle is "*al-'işmah bi'l-Adamiyyah*"[177] the fact that those non-Muslims, who have become a citizen of Muslim state after a war, already possess inviolability (*'işmah*) out of his *adamiyyah*, and thus the *jizyah* they paid is not for pardoning their blood.

From the perspective of Hanafi jurists, *dhimma* may be called a birthright or a natural right because the concept of *ahl al-dhimmah* is literally true for all human beings around the globe, thereby all people are born with *dhimmah*. The fact that non-Muslim minorities are conventionally called so means nothing other than reiterating and affirming with a written contract that non-Muslims are equal with Muslims in enjoying this right. [178]

From this perspective, the concept of *dihmmah* is merely an act of acknowledgement by both sides about their rights and duties. This is because non-Muslims are already granted all the rights they may possibly have by virtue of their humanity, and thus signing a treaty with Muslims is not going to bring them new rights. However, the act of *dhimmah* serves as a confirmation of those rights and duties by both parties. It follows from the principles that *dhimmah* cannot be repelled under any condition by any authority, be it either religious or political. [179]

The universalistic school sees no difference between Muslims and non-Muslims as far as human rights are concerned. The same is true between citizens of an Islamic state and others because human rights are not granted on the basis of citizenship. These basic rights include the right to life, property, freedom of religion,

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[176] Kasani, *Bediu's-Senai*, Vol.7, Pg. 112.
[177] Ibn Al-Humam, *Fath Al-Qadir*, Vol.6, Pg. 27.
[178] Senturk, Recep, "Minority Rights in Islam: From Dhimmi To Citizen", Pg. 75.
[179] Ibid, Pg. 75.

and freedom of expression, family, and honor. These rights are granted to all human beings by virtue of their being human. [180]

In contrast with the Hanafi school, the communalist viewpoint of Shafi'i School lacks the abstract concept of human qua human as a possessor of rights. Instead, it relies on the religiously defined categories, such as disbeliever (*kafir*) and believer (*mu'min*). Nor does it support the concept of birthrights or natural rights as the Hanafis do. For the communalist school, all rights are gained and granted by the law. The rights to inviolability is gained by virtue of faith (*iman*) or a treaty of security (*aman*) One is automatically considered a citizen of the Islamic state if one is a Muslim, and consequently his *dhimmah* is respected. The non-Muslim who makes a treaty with the Islamic state can also become a citizen and gain the right to *dhimmah*. Only then can he become accountable and inviolable. [181]

In conclusion, in this chapter, I dealt with the concept of *işmah* in respect of human rights paradigm. I attempt to illustrate that the concept of işmah has been employed in fiqh in conformity with its lexical meaning in order to express rights to inviolability.

Muslim jurists have facilitated the concept of işmah to lay philosophical ground for many legal issues. Even it is considered as fundamentals (*maqasid*) of Shariah which indicates some "grand values" that all prohibitions of Shariah are to protect these values as all obligations are to promote.

As far as human rights are concerned, these inviolability must be valid for all human beings but not for a determined group of system. In that sense, there is a basic division of opinion on the definition of *işmah* and its scope the fact that "is inviolability (*'işmah*) gained with Muslim-hood (*âsım*) or human-hood (adamiyyah)?"

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[180] Ibid, Pg. 75.
[181] Ibid, Pg. 76.

In this chapter, I attempted to demonstrate how classical Muslim jurists grounded the rights to human inviolability (*iṣmah*) over centuries.

According to universalistic approach, all human beings are inviolable because inviolability is prerequisite to fulfill the divine testing purpose for which the universe and humanity were created. However, a fair test cannot be achieved if people are not granted the right to inviolability. People who act without choice cannot be punished or rewarded for their actions.

I attempted to expound this universalistic approach, in comparison with the communalistic approach, over some concrete controversial examples of fiqh.

CHAPTER THREE: CONSTITUTIONAL DOCUMENTS IN THE LATE OTTOMAN EMPIRE

A. Documents

1. The Charter of Alliance (*Sened-i İttifak*) (17 Şaban 1223 H. – 7 October 1808 C.)

The first constitutional document of the Ottoman Empire, the Charter of Alliance[182], is a treaty that was signed between the grand vizier of the Sultan Mahmut the Second and a number of remarkable local landed proprietors (*Ayân*) in an attempt to "rekindle the religion and the state" in 1808.[183] The charter basically regulates the balance of power and relationship between the central power and local *Ayâns*. Additionally, some fundamental rights were regulated in the documents such as fair tax and right to legal remedy.[184]

The treaty, which consists of seven provisions, possessed essential acquisitions for central Ottoman government, local landed proprietors, and general subjects of the realm. The charter served to consolidate central Ottoman government by which the government collaborated with local landed proprietors by acknowledging and guaranteeing their rights in the treaty.[185] The treaty also contained some of the fundamental rights for all subjects of the Empire.

The charter takes an essential place in Ottoman constitutional movements

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[182] See for the full original text of the charter of allience: Ahmet Cevdet Pasha, *Tarih-i Cevdet*, (Ed. Mümin Çevik, Üçdal Publicatons, Istanbul, 1976), Vol. 9, Pg. 278-283; Tanilli, Server, Anayasalar ve Siyasal Belgeler, Pg. 3-8.

[183] The Charter of Allience in Tanilli, Server, loc. cit, Pg. 3-8.

[184] Tanör, Bülent, *Sened-i Ittifak*, Vahri Savcı'ya Armağan, Ankara, 1988, Pg. 473; Tanör, Bülent, *Osmalı-Türk Anayasal Gelişmeleri*, Pg. 21-57; Hazir, Hayati, "Sened-i Ittifakın Kamu Hukuk Bakımından Önemi", *DÜHFD*, 1984, No. 2, (pp. 24-39).

[185] Inalcik, Halil, "Sened-i İttifak Ve Gülhane Hatt-ı Hümayunu, Tanzimat'ın Uygulanması ve Sosyal Tepkileri", Türk Tarih Kurumu Press, *Belleten*, Vol. 28, No. 112, Ankara, 1964, (pp. 604-647); Okadan, Recai G., *Amme Hukukumuzun Anahatları*, Pg. 57; Gözler, Kemal, Türk Anayasa Hukuku Dersleri, Pg. 5; Tanör, Bülent, Osmanlı-Türk Anayasal Gelişmeleri, Pg. 34-35; Aldıkaçtı, Orhan, *Anayasa Hukukumuzun Gelişmes*i, Pg. 35-37; Armağan, Servet, *Türk Esas TeşKilat Hukuku*, Pg.18; Akın, İlhan F., *Kamu Hukuku*, 5th Edition, Beta Publications, Istanbul, 1987, Pg. 299.

since it contains some provisions the fact that on one hand they restrict Sultan's authority and on the other hand they give local landed proprietors authorizations.[186] It is the first solemn document which illustrates the areas that the Sultan cannot interfere.

One rightfully can state that the Charter of Alliance established a ground for the following constitutional documents although the charter has fallen into abeyance when Alemdar Mustafa Pasha abolished the authority of local landed proprietors in the name of central government in 1815.[187]

Rights and Freedoms Protected in the Document

The principles on the fundamental rights and freedoms that appear in the edict can be categorized as follows;

a) In the Context of State of law:

The charter forbids illegal activity of Grand Vizier. It settles a complaint mechanism that allows local landed proprietors to press charge against Grand Vizier in front of the Sultan in case of the fact that Grand vizier has committed a crime. (Provision 4, second sentence)

b) In the Context of Presumption of Innocence:

The charter regulates that if someone brings an accusation against local landed proprietors, accused one shall not be punished without a proper due process. (Prevision 5, last sentence)

c) In the Context of the Right to Live and Property:

The charter predicates that the dynasty and local landed proprietors are

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[186] Gözübüyük, Şeref, *Türk Anayasa Metinleri*, Pg. 91.
[187] İnalcık, Halil, "Sened-i İttifak ve Gülhane Hatt-ı Hümayunu", Pg. 609.

responsible for guaranteeing the safety of the subjects and poor people of the realm. Therefore, dynasty and local landed proprietors are liable to promote stability and avoid inhuman or degrading treatments or torture. (Prevision 7, first sentence)

d) In the Context of the Right of Physical Integrity and Prohibition of Torture:

The charter characterizes its own management philosophy as "the protection of the subjects and poor people"(Provision 7, first sentence). In keeping with this, the charter prescribes to punish those who torture subjects and poor people and act contrary to the supreme law of Shariah. (Prevision 5, last sentence; Prevision 7, first sentence and second sentence)

e) In the Context of the Principle of Proportionality in Tax Farming:

The charter mandates local landed proprietors to keep up with the principles of proportionality in levying taxes from subjects and poor people (Provision 7, first sentence).

2. The Imperial Edict on the Limitation of Confiscation (1826)

In keeping with the metamorphoses of the Empire into a modern state, Sultan Mahmud the Second took many important steps in his reign in an attempt to provide a strong central authority. As I discussed foregoing chapters, the Ottoman Empire had a fragmented structure of authority in which the authority was shared by Ulama, Military class and local landed proprietors in 17th and 18th centuries. First of all, the Sultan eliminated the local landed proprietors by means of the charter of alliance in 1808. Secondly, he broke the power of military class by virtue of abolishing the guild of janissaries in 1826. Finally, he transformed the classic Ottoman bureaucracy based on *kul* system into a civil bureaucracy to break the influence of Grand vizier and

Ulama on the central authority.[188] It was necessary, therefore, to abrogate the practices of confiscation and arbitrary execution without trial for bureaucracy class.

Sultan Mahmud the Second gathered prominent statesmen and members of Ulama in a council to consult about new reforms in 1826 after the abolishment of the guild of janissaries. The council advises to the Sultan to abrogate the practices of confiscation and arbitrary execution without trial.

The Sultan issued an imperial edict on the limitation of confiscation in 1826. The edict admits that the practice of confiscations is not lawful. But it argues that it was a consequence of *kul* system in which the confiscation was necessary to cover overspending of Janissaries from the treasury. The edict assures that no one shall be confiscated after he dies and his estate shall be shared between his hairs.[189]

Moreover, Sultan issued two specific punitive regulations in which he promised that no one would be arbitrarily executed or confiscated unless there is a verdict of a court. No one shall be punished without law and Shariah.[190]

3. The Imperial Edict of Rose Chamber (*Tanzimat Fermanı*) (26 Şaban 1255 H. – 3 October 1839 C.)

The Imperial Edict of the Rose Chamber[191], also known as Imperial Edict of Reorganization, *Hatt-ı Şerif* or Imperial Edict of Rose Chamber, was issued as a proclamation in the reign of Sultan Abdulmecid. The proclamation was announced in 1839 by the reformist Grand Vizier Mustafa Reşid Pasha before Sultan Abdülmecid and an assembled audience of state dignitaries, religious leaders, prominent

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[188] Akyilmaz, Sevgi Gül, "Osmanli Devleti'nde Yönetici Sınıf Açısından Müsadere Uygulamasi", *GÜHFD*, Vol. 12, No. 1-2, 2008, (pp. 389-420), Pg. 416.
[189] Mumcu, Ahmet, *Osmanlı Devletinde Siyaseten Katl*, (3rd Edition), Phoenix Publication, Ankara, 2007, Pg. 171-172.
[190] Ibid, Pg. 173-174.
[191] See for the full original text of the subrime edict of the rose chamber: Collection Of Düstur, 1st Edition, Vol. 1, Pg. 4-7; Tanilli, Server, (1976), Pg. 8-11.

bureaucrats, foreign diplomats, and nobles, including Prince de Joinville, the third son of King Louis Philippe.[192]

The Edict of Rose Chamber is accepted as a constitutional document as it launched a wide range of reform in the judicial system through new subsidiary legislation, institutions, and offices.[193]

Following a preamble citing the neglect of the Qur'ān and the Sharīah as the causes of Ottoman troubles over the last century, the edict prescribes new legislation to guarantee fundamental rights and freedoms, prohibit bribery, and regulate the levying of taxes and the condition of recruitment. It promises to enact legislation that shall prohibit outlaw execution without trial, confiscation of property (*müsadere*), and violations of personal chastity and honor. In addition, it prescribes a fair system of tax farming and an equitable recruitment system. Most significantly, the legal protections cover all Ottoman subjects no matter one is Muslim and non-Muslim.[194]

Rights and Freedoms Protected in the Document

The principles on the fundamental rights and freedoms that appear in the edict can be categorized as follows;

a) In the Context of State of law:

The edict lays stress on the necessity of statutory codes and prescribes to enact new legislation that guarantees rights and freedoms and determines specifications of taxes. It promises to define the conditions of recruitment and duration of the military services in a supplementary act. It also emphasizes the necessity of a special law which shall fix and limit the expenses of the Ottoman land and sea forces. Moreover, the edict declares that a criminal code shall be enacted in

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[192] Hanioglu, M. Şükrü, *A Brif History of The Late Ottoman Empire*, Priston University Press, 2008, New Jersey, Pg. 72; Inalcik, Halil, "Sened-i İTtifak Ve Gülhane Hatt-i Hümâyûn", Pg. 611.
[193] Clewalant, William L, Buton, Martin, *A History of the Modern Middle East*, 4th Edition, Westview Press, Colorado, 2009, Pg. 76-77.
[194] Hanioglu, Şükrü, *A Brif History of The Late Ottoman Empire*, Pg. 73.

accordance with Islamic jurisprudence to apply for all subjects regardless of rank, position, and influence. Furthermore, it announces that a rigorous law shall be passed against the traffic of favoritism and bribery, which the Islamic law has already prohibited. Finally, the Sultan promises not to engage anything contrary to legislation since the object of the legislation solely serves to revivify the religion, government, people, and Empire.

b) In the Context of the Right to Live:

The edict declares that no treatment of poisoning or public and secret execution shall be done unless an accused person is publicly judged in accordance with Shariah in a fair an impartial due process.

c) In the Context of the Right of Personal Integrity:

The edict announced that no one is allowed to attack the personal chastity and honor of any other person.

d) In the Context of the Right of Property and Prohibition of Confiscation:

The edict declares that everyone possesses the right of property including the right of disposition free from the hindrance of any person. Thus, for example, the innocent heirs of a criminal shall not be deprived of their legal rights of succession by which the property of a criminal shall not be confiscated.

e) In the Context of the Fair and Public Trial:

The edict declares that every accused person shall be publicly inquired, examined and judged, as the Shariah requires. No one shall be punished without a fair and open due process.

f) In the Context of the Principle of Individual Criminal Responsibility:

The edict states that the innocent heirs of a criminal shall not be deprived of their legal rights of succession.

g) In the Context of Equality and Prohibition of Discrimination:

The scale of rights and freedoms of the edict covers all ottoman subjects no matter form which religion or sect they may be. They can enjoy their rights without ethnic, religious or any other grounds for discrimination. The Empire declares that it assures a perfect security to the inhabitants of the domain for their honor, fortunes, and lives as they are guaranteed by Islamic jurisprudence.

Furthermore, the edict constitutionalizes that a member of Ulama or a grandee of the empire, or any other person whatsoever who infringe Islamic jurisprudential law shall undergo the punishment corresponding to his crime in the criminal code, without respect of rank, position, and influence. Therefore, a criminal code shall be enacted in an attempt to provide equality before the law.

h) In the Context of the Principle of Proportionality in Tax Farming:

The edict prescribes that each member of Ottoman society should be taxed for a quota of a fixed tax according to his fortune. Therefore, it should be impossible to extract from one more than the limit determined by law.

i) In the Context of Freedom of Expression and Chair Immunity:

The edict ensures that each member of the SCJO which assemble in an attempt to frame laws regulating the security of life and fortune and the assessment of the taxes shall freely express his ideas and give his advice in those assemblies.

In short, the content of the Imperial Edict of Rose Chamber reflects the agenda of the reformist bureaucrats led by Sadik Rifat Pasha and Mustafa Reşit Pasha, both of whom had experience as ambassadors in European capitals. The

bureaucrats wanted to institutionalize and rationalize the reforms, strengthening the scope and legality of the power of bureaucracy.[195]

Implementation of the edict for the next three decades fell short of its intended goals because of the interventions by the European powers to protect the privileges of the Christian minorities prevented the process of their full equality, since they became more privileged than the empire's Muslim subjects. However, as a foundational text, the Imperial Edict of Rose Chamber continued to provide inspiration and legitimacy to the Ottoman reforms throughout the rest of the nineteenth century.[196]

4. The Imperial Edicts on the Prohibition of Slavery and Slave Trade (1847-1856-1867-1869-1891-1909)

There are numerous imperial edicts issued to prohibit any kind of slave trade and commerce of slaves in the Empire. The edict on the prohibition of the slave trade in 1847 declares that the slave trade is prohibited since the slaves are transported in an inhuman condition in which many slaves severely suffers or dies. The slave market in Istanbul was closed down by means of an imperial edict in the same year in combating slavery and slave trade.[197]

The Sultan issued another imperial edict to prohibit slavery of African people and forbid slave trade and commerce in 1857.[198] The edict argues that it seems that previous imperial regulation on the prohibition of the slave trade was breached in some part of the domain and the slave trade continued. However, many African people are severely suffered or died while they transferred from inside to the continental margins which do not comply with humanity. This cruel trade is

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[195] Davison, Roderic, *Reform in the Ottoman Empire 1856–187*6, Princeton University Press, Princeton, 1963, Pg. 37-38; Http://Www.Encyclopedia.Com/Humanities/Encyclopedias-Almanacs-Transcripts-And-Maps/Gulhane-Imperial-Edict-1839, (accessed:15.08.2016)

[196] Shaw, Stanford J., *History of The Ottoman Empire and Modern Turkey*, Cambridge University Press, Cambridge, 1977, Pg. 132.;
Http://Www.Encyclopedia.Com/Humanities/Encyclopedias-Almanacs-Transcripts-And-Maps/Gulhane-Imperial-Edict-1839, (accessed: 15.08.2016).

[197] See for the original text: T.C. Başbakanlık Archive, Irade-i Dâhiliyye, Date: 1263, No: 1858.

[198] See for the original text: Düstur, 1st Edition, Vol. 4, Pg. 368.

definitely prohibited. From the time of edict forward, it is prohibited to export slave form the Tripoli port to anywhere. The commerce of slaves in the province is also prohibited. The government shall take care of the enslaved people since sending back them to their homeland would pose danger to their life. Those who sell or buy slave shall be punished with imprisonment. The ships that contain black slaves shall be confiscated and the captain shall be punished with imprisonment.

Another edict was issued in 1867 and 1869 by Sultan Abdulaziz to prohibit slavery and slave trade of African people.[199] Another one was issued in 1891 by Sultan Abdulhamit to prohibit slave trade of African people.[200] The provisions of edicts were similar to the edict of 1856. The Sultan issued a deed of freedom for the liberated slaves in 1889.

Another edict was issued in 1909 on the prohibition of slavery and slave trade of Circassian slaves and other slaves.[201] The edict has been issued in cooperation with Sheikh 'l-Islam, Şura-ı Devlet, and Ministry of Internal Affairs. The edict prescribes that the freedom is the principal status in the Islamdom. One has to go to the office of Sheikh 'l-Islam to commence a suit if he claims that he has a slave. Circassian never shall be enslaved and sold. One has to go to the office of Sheikh 'l-Islam to commence a suit if he claims that he has a Circassian slave. The Ministry of Internal Affairs shall actively fight against slavery and slave trade.

However, there is no imperial edict totally abolishing slavery since the Islamic jurisprudence is not totally panned the slavery in principle. Nevertheless, the slavery is naturally abrogated in Ottoman society in the course of time.

5. The Imperial Edict on the Re-regulation of *Jizyah* (7 Recep 1271 H. – 26 March 1855)

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[199] See for the original text: [Online]: Armağan, Servet, "Osmanlı Hukukunda Köle Ticaretinin Yasaklanmasına Dair Bazı Belgeler", (available at: Http://Profservetarmagan.Blogcu.Com, accessed: 16.12.2017), Pg. 3.
[200] See for the original text: Düstur, 1st Edition, Appendix, Pg. 132.
[201] See for the original text: [Online]: Armağan, Servet, "Osmanlı Hukukunda Köle Ticaretinin Yasaklanması" Pg. 4.

The imperial edict on the re-regualtion of Jizyah[202] is a quite remarkable document in regards to the fact that it obviously demonstrates the paradigm shift in the subject-ship of the Empire. Along with the metamophesis of the Empire into a modern state, the Empire have appropriated legal status of citizenship in which all subjects regardless of religion, race or language living under Ottoman sovereignty accepted as Ottoman citizens in the Tanzimat era.

This paradigm shift obliged the Empire to re-define the relations of citizen and state in terms of equality in public services and taxation. The imperial edict on re-regulation of *jizyah* played an important role as a corner stone of this shift. The edict was discussed and written by *Majlis al-Mashwara* (Council of Consultation) and affirmed by the Sultan in 28 March 1855. It was, in fact, a fatawa through which ulama finds approvable and necessary to edaqueta the status of non-Muslim citizens according to Islamic jurisprudence. The edict adduces evidence from es-Sarakhsi's *Sharh Kitab 'l-Siyar 'l-Kabir* in which he narrates from al-Shaybani that it is approvable to levy *jizya* from non-Muslims under a different name.

Jizya is a per capita yearly tax historically levied by Islamic states on *dhimmies*. The edict declares that the reason to levy jizya was the exemption of military services. It prescribes that the military services and taxation must be established in an equal groud in conformity with Islimac jurisprudence since a military service pertain to Muslims causes to weaken Muslim society. The edict states that it is important to establish an equal status of subject-ship for all because of the contemporary situation (*asr iktizasınca*) in which the international natural state is not war but peace. The equality of non-Muslims is existential for the Empire since the non-Muslim subjects take offence at their subordinate status in the Empire and excuse it for the rebellions for independence. A necessary measure to maintain an Islamic state is approvable whereby re-regulation of *jizya* in accordance with jurisprudence is approvable.

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[202] See for the original text: Yıldız, Mehmet, *Modernleşme Dönemi Osmanlı Siyasi Metinleri*, Atatürk Araştırma Merkezi, Ankara, 2015, (pp. 31-39).

The edict manifests that the Empire has taken precautions to enhance the status of non-Muslim so far. However, non-Muslim subjects spesificaly desired to change the name of *jizya* tax. Furthermore, this situation would allow foreing states interfaring the internal affairs of the Empire.

In the context of right of equality, the edict prescribes that *jizya* should be renamed as *iane-i askeriyye* (support of army) since it is a reminder of the inferior status of Muslims. Moreover, the edict states that the military services must be reformed in an equal ground. In the context of right of religion and practice, the edict states that non-Muslims shold be allowed establishing and renovating their sanctuaries.

In short, the impreial edict on the re-regulation of *jizya* is an important document in the sense that it manifests the basic motivations of the reform movements. The Empire tended to justify its reforms in accordance with Islamic jurisprudence even in the most critical and radical reforms. Furthermore, the Empire did not carry out the reforms in a westernalization agenda, rather, the Empire conducted the reforms as a consequence of the modanization of the state in its own right.

6. The Imperial Edict of Reform (*Islahat Fermanı*) (11 Cemaziyülahir 1272 H. – 28 February 1856 C.)

The Imperial Edict of Reform[203], known as *Hatt-ı Hümâyun*, was issued by Sultan Abdulmecid I. in February 1856 as a continuum of the Tanzimat reforms. In the edict, Sultan Abdulmecid promised equality in education, government appointments, and administration of justice to all regardless of creed. The edict of reform is often seen as a result of the influence of France and Britain, which assisted

[203] See for the full original text of the imperial edict of reform: Collection Of Düstur, 1st Edition, Vol. I, Pg. 7-14;Tanilli, Server, op. cit, Pg. 11-17.

the Ottoman Empire against the Russians during the Crimean War (1853–1856) and the Treaty of Paris (1856) which ended the war.[204]

In the edict, Sultan promised to be held responsible for the constitution of the "Provincial Councils" and "Communal Councils" and the fairness of this process and the results. In matters concerning all the subjects of the State, the spiritual leader of every congregation, along with its official appointed for one year by the government, shall participate in the negotiations of SCJO. Sultan also promised the freedom of voting in the councils.

Hatt-ı Hümayun did not release the government from its previous obligations; spiritual immunities (Christian millets or other non-Muslim protectorates). Regarding these responsibilities review process established under each millet such that they form a commission composed ad hoc of members of its own body to give formulate (discuss) and submit the reforms required by the progress of Ottoman civilization.

Regarding fundamental rights and freedoms, the edict of reform expressed new rights that had not been expressed in the Edict of Rose Chamber such as the prohibition of torture, right to stand for election, and right to education. It also extended the scope of some rights that had already been expressed in previous documents such as equality, and right of property while it only confirmed and consolidated some rights such as the right to live, and fair taxation.

Rights and Freedoms Protected in the Document

The principles on the fundamental rights and freedoms that appear in the edict of reform can be categorized as follows;

a) In the Context of the Right to Live:

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[204] Çalışır, M. Fatih, "Conversion and Apostasy in the Tanzimat State: Case of Selim Ağa", *Tarih Okulu*, No. 5, Fall 2009, (pp. 111-121), Pg. 113.; Also see: Deringil, Selim, "There is No Compulsion in Religion: On Conversion and Apostasy in the Late Ottoman Empire: 1839-1856", *Comparative Studies in Society and History*, Vol. 42, No. 3, 2000, (pp. 547-575), Pg. 556.

The edict repeats and confirms the guarantees of rights to live for all subject of Ottoman Empire without distinction of classes or of religion. It also prescribes more efficacious measures to be taken in order to have a full and entire effect of the guarantees.

Furthermore, in order to give stronger guarantees for the safety of life and property for all the peaceable subject of empire, the Sultan promises to revise the organization of the police in the capital, in the provincial towns, and in the rural districts.

b) In the Context of Right to Personal Integrity and Prohibition of Torture:

The edict also confirms the guaranties of rights to personal integrity of all subjects. Moreover, the edict entirely abolishes everything that resembles torture. Infractions of the prohibition of torture, of the authorities who may order and of the agents who may commit them in shall be severely punished in conformity with the criminal codes.

Furthermore, It declares that inhuman and degrading conditions of the detention centres as applied to houses of detention, punishment, or correction, and other establishments of like nature shall be enhanced as little delay as possible, so as to reconcile the rights of people with those of justice. This passage is very first passage that verbalize the term, rights of people, in an Ottoman official documents.

Finally, it forbids the administrations of Corporal punishment even in the prisons, except in conformity with the disciplinary regulations established by the imperial decree (*saltanatı seniyye*).

c) In the Context of Right of Property:

The edict also confirms the guaranties of rights of property of all subjects; and promises more efficacious measures to be taken in order to have full and entire effect of the guaranties. The edict also promises to remain the property, real or personal, of the different Christian ecclesiastics intact.

Furthermore, the Sultan promises to revise the organization of the police in order to provide stronger guarantees for the right of property of his all subjects. Moreover, the edict prescribes that it is lawful for foreigners to possess landed property in the Ottoman dominions, in the condition of confirming the law and regulation, and bearing the same charges as the native inhabitants.

d) In the Context of the Fair and Public Trail and Right of Legal Remedies:

The edict confirms that the suits relating to civil affairs shall continue to be publicly tried, according to the laws and regulations.

Moreover, the edict prescribes to translate penal, correctional, and commercial codes, and rules of procedure for the mixed tribunals into several languages that is current used in the Ottoman realm. In the context of right to legal remedies, it is crucially important to publish codes in to the languages that local people speak.

e) In the Context of Equality and Prohibition of Discrimination:

First of all, the edict confirms that the protection of life, chastity, and property is for all subjects regardless of status, gender, race, religion or any other ground.

In addition to this, the edict forbids every distinction or designation tending to make any class whatever of the subjects of the Empire inferior to another class, on account of their religion, language, or race in the Administrative Protocol. It also prescribes to enact the laws against the use of any injurious or offensive term, either among private individuals or on the part of the authorities.

Furthermore, the edict declares that all subjects of the Empire is admissible to public emoluments without distinction of nationality; whereby they shall be assigned according to their capacity and merit, and conformably with rules to be generally applied. Similarly, the edict allows all the subjects of the Empire, without distinction, to be received into the Civil and Military Schools of the Government if they otherwise satisfy the conditions of the schools as to age and examination.

Finally, in the context of the equal protection of law, the edict announces that all short of provision of anti-corruption law shall be resolutely executed to all subjects without respect of rank, position, and influence. The edict, also, confirms that the laws regulation the purchase sale, and disposal of real property are common to all the subjects of the empire.

f) In the Context of Freedom of Religion:

The edict confirms and consolidates to maintain all the privileges and spiritual immunities granted by previous rules, and at subsequent dates, to all Christian communities or other non-Muslim persuasions established in the realm.

Moreover, the Sultan promises that no obstacle shall be offered to the repair, according to their original plan, of buildings set apart for religious worship, for schools, for hospitals, and for cemeteries in the towns, small boroughs, and villages, where the whole population is of the same religion.

He also promises that each sect shall be free from every variety of restrictions in regards to the public exercise of their religion in localities in which there are no other religious denominations. Moreover, the government shall take energetic measures to ensure the freedom of religion and practice of each sect, whatever is the number of its adherents, entire freedom in the exercise of its religion.

Moreover, the edict ensures that no subject of the Empire shall be hindered in the exercise of the religion that he professes, nor shall be in any way annoyed on this account. It also declares that no one shall be compelled to change his or her religion.

g) In the Context of the Principle of Proportionality in Tax Farming:

The edict declares that the taxes are to be levied under the same denomination from all the subjects of the empire, without distinction of class or of religion. Moreover, it promises to take the most prompt and energetic precautions for remedying the abuses in collecting the taxes, and especially the tithes.

Furthermore, considering the principle of proportionality, the edict ensures that the local taxes shall be imposed in a way that they do not affect the sources of production or hinder the progress of internal commerce.

h) In the Context of Freedom of Expression and Chair Immunity:

The edict confirms that all the members of the SCJO, at the ordinary and extraordinary meetings, shall freely give their opinions and their votes. Furthermore, it guarantees that no member of the Council shall be ever subject to a legal proceeding or any other obstacles on this account.

i) In the Context of Minority Rights:

The edict authorizes every community to establish Public Schools of Science, Art, and Industry. However, the method of instruction and the choice of professors in schools of this class shall be under the control of a Mixed Council of Public Instruction, the members of which shall be named by the government.

Moreover, the edict declares that, in order to represent interests of the communities, the heads of each community and a delegate designed by Sultan shall be summoned to take part in the deliberations of the SCJO on all occasions which might interest the generality of the subjects of the Empire.

7. The Imperial Edict on Justice (*Ferman-ı Adalet*)

(13 Zilkade 1292 H. – 11 December 1875 C.)

The Imperial Edict on Justice[205], enacted by Sultan Abdulaziz in December 1875, is the last constitutional document before the first Ottoman constitution, in a formal sense, was released in 1876. The Edict is generally noted for its provision that

[205] See for the full original text of the imperial edict on justice: Collection Of Düstur, 1st Edition, Vol. 3, Pg. 2-9; Tanilli, Server, (1976), Pg. 17-23.

provides for the independence of the judicial courts and ensures the safety of judges.[206]

Rights and Freedoms Protected in the Document

The principles on the fundamental rights and freedoms that appear in the edict of reform can be categorized as follows;

a) In the Context of the Right to Live:

The edict confirms and consolidates the guaranties of rights to live for all subject of Ottoman Empire without distinction of classes or of religion as it was in previous edicts.

b) In the Context of Right of Personal Integrity, Right of Liberty, and Prohibition of Torture:

The edict confirms and consolidates the guarantee of rights to personal integrity and chastity for all subject of Ottoman Empire without any distinction. It also repeats the prohibition of torture; and repeatedly declares that the authorities who may order or committed torture shall be severely punished. Furthermore, the edict prescribes that no one shall be kept in prison without receiving a final sentence from a court.

c) In the Context of the Right of Property:

The edict confirms and consolidates the guarantee of rights of property for all subject of Ottoman Empire. Moreover, edit prescribes to revise and issue the title deeds of all lands in both the capital and provinces whereby all lands shall be registered into the registry of deeds by the ministry of land registry and cadaster (*Defteri Hakani Nezareti*) in an attempt to prevent land conflict. Furthermore, the

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[206] Senturk, Recep, "Minority Rights in Islam: From Dhimmi To Citizen", Pg. 88.

edict confirms that non-Muslim subject can hand down their properties to their inheritresses.

d) In the Context of the Fair Trial and Right of Legal Remedies:

The edict prescribes the fact that executive power should not intervene jurisdiction in order to realize full protection of rights of the subjects. In keeping with, the edict declares that the status of judges must be separated from other officers of the government, whereby the judges shall be independent and impartial. That is why members of jurisdiction must be considered as fully immune from the intervention of executive power in public opinion thereby judges should not be discharged by executive power.

e) In the Context of Prohibition of Forced Labor:

The edict totally prohibits the forced labor in all manners.

f) In the Context of Equality:

The edict confirms and conciliates equality of all Ottoman subjects in the sense of legal protection, public employment, tax farming, and real estate purchase and sales.

g) In the Context of Freedom of Religion:

The edict confirms and conciliates freedom of public excursive of religious duties and freedom of choose sect.

B. An Overview of the Constitutional Documents in terms of Fundamental Rights

The constitutional movements proceed in a manner of the fact that the protection of fundamental rights gradually increased in a formative and material sense in the course of time. Sultans were gradually restricted by more comprehensive and more formative documents respectively charter of alliance, the Imperial Edict of

Rose Chamber, the Imperial Edict of Reform, the constitution of 1876, and the constitutional amendment of 1909. In fact, it might be the natural process of the formation of constitutionalism since the same process is observed in almost entire constitutional history such as Magna Carta before the parliament, The Virginia bill of rights before the constitution of United States, and The French Declaration of the Rights of Man and of the Citizen before the French Constitution of 1791.

The constitutional documents covered variety of rights and freedoms namely right to live, state of law, right of property, right of personal integrity, right to legal remedies, right of equality, freedom of religion, practice, freedom of expression and chair immunity, and minority rights. The constitutional documents have already contained all fundamental rights by comparison with the constitution of 1876. Moreover, they included some rights which did not take place in the constitution such as Minority Rights and chair immunity. Nevertheless, the constitution involved some further rights such as freedom of press, right to vote and stand for election, and freedom of incorporation.

CHAPTER FOUR: THE JURISPRUDENTIAL GROUNDINGS OF THE LATE OTTOMAN REFORMS ON HUMAN RIGHTS

A. Introduction

The Ottoman Empire engaged in a set of dramatic and comprehensive reforms to its bodies of law, legal institutions and the manner in which law was conceptualized within the Empire. This covered protection of fundamental rights, along with commercial, property, criminal, administrative and family law, and involved a restructuring of the Empire's court systems. Scholars mainly emphasized the aims of modernization as well as the secularizing and Europeanizing agendas of the Tanzimat. Many scholars of constitutional law assume that "Islamic" expressions in the reform documents and legislation were superficial by which they served to protect secularizing agendas of reforms form the puritanical objections of ecclesiastic groups. I believe, however, that it is an inadequate and reductive approach to evaluate the Tanzimat reforms solely in the light of secularizing and Europeanizing tenancies. Instead, I state that the Empire re-established his legal system (i) as a consequences of the metamorphosis of the state into a modern state, (ii) considerably in favor of bureaucracy class, (iii) paying regard to the expectations of the Western states, and mainly (iv) in conformity with Islamic jurisprudence in the Tanzimat era.

The late Ottoman legal system was a system that the law (*kavanin*) was re-formalized around the notion of rights (*hukuk*) in accordance with the Islamic jurisprudence (Shariah) perceived as universal, supra-state and a-historic. I entitled this new legal system as "the Tanzimat law" which covered from 1808 in which the Empire has become to transform into a modern state to 1924 in which the state underwent another paradigm shift in terms of legal system.

This second section aims at addressing the questions the fact that "to what extent did the Tanzimat reforms on human rights represent an indigenous and authentic attempt to enable laws and legal institutions to meet the challenges facing the Empire?", "to what extent were they motivated by Islamic concerns?", "what were the reactions of different contemporary ecclesiastical actors Such as Ulama, jurists, Muslim thinkers to the Shariah justifications put forth?"

1. The Basic Parameters of the Constitutional Reforms

Bülent Tanör counts five parameters as the dynamics of political transformation in the late Ottoman Empire i.e. (i) feudal reaction of landlords and local landed proprietors, (ii) public reaction of peasantry and middle-class, (iii) external pressures of foreign states, (iv) liberal-reformist initiatives of Sultan and nobles, and (v) national reactions of ethnic minorities. However, his evaluation of parameters is quite disputable for a number of reasons.

First of all, Tanör appropriates the regression paradigm in Ottoman historiography that is vigorously criticized by many historians today. In keeping with this, he states that the political transformation in the late Ottoman Empire emerged as a consequence of the corruption of the state. However, contemporary discussions on the history of the Ottoman Empire illustrate that regression paradigm is quite controversial and the political transformation of the late Ottoman Empire was highly associated with the contemporary international conjuncture in which individual states necessitated to transform into a modern state.

Secondly, Tanör accuses Ulama of corruption of the state that brought about political transformation in the late Ottoman Empire. However, there is a consensus among foremost historians that Ulama took sides with Sultan in Reform movements such as abolishing janissary guild in 1826. Moreover, Ulama played an essential role in carrying the reforms into practices whereby they actively serve to legislate the reform principles.

Finally, in a self-orientalist manner, Tanör attempts to track the trace of social institutions peculiar to the western history such as bourgeoisie, individualism, liberalism, and accumulation of capital in the Ottoman society. When he naturally does not find these institutions, he concludes the fact that there were not socio-political infrastructures of a constitutional regime such as (i) political power struggles, (ii) legal security (iii) class conflict, and (iv) private ownership in the Ottoman society. He also states that the social superstructures such as the state of

law, politics, restriction of political power, human rights, parliaments, and constitutions did not form in the Ottoman Empire because of the absence of the foregoing infrastructures. However, many studies, I benefit in this thesis, show that Ottoman Empire had social-political infrastructures in its own right.

Moreover, there is a tendency in the literature to associate the constitutional reforms with Western influence on Ottoman bureaucracy. It is a reductionist approach to evaluate the constitutional reform over the Western influence although the existence of a Western influence is undeniable.

It would be, therefore, more appropriate to count the parameters of the -Tanzimat reforms as (i) the effects of bureaucracy, (ii) the effects of Ulama, (iii) the effects of International impositions, and (iv) the effects of the metamorphosis of the Empire into a modern state.

It is crucial to note that my foregoing count does not mean to cover all dynamics of political reformation in the late Ottoman Empire; instead, it illustrates what kind of factors must be taken into consideration in a study of the dynamics of constitutional reforms in the Tanzimat era.

a) Effects of the Metamorphosis of the State into a Modern State

The modern state is a state model that differs from other models with its characteristic features. In the context of this study, the characteristics of the modern state can be named as (i) strong central authority and the monopoly violence, (ii) constitutionalism, and (iii) status of citizenship instead of subject-ship.[207]

Although some trace back roots of Modern state to the 16th centuries[208], I believe that the idea of the modern state came to the existence in the 19th century

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[207] [Online]: Pierson, Christoper, *The Modern State*, 2nd Edition, Taylor & Francis E-Library, 2004, (available at: Http://Psi424.Cankaya.Edu.Tr/Uploads/Files/Pierson,%20the%20modern%20state,%202nd%20ed.Pdf accessed: 28.10.2017). Pg. 6 ff.

[208] Hobsbawm, E. J., *Nations and Nationalism Since 1780: Programme, Myth, Reality*, 2nd Edition, Cambridge University Press, 2004, Pg. 98.

owing to the technological developments, the evolvements in transportation and telecommunication, and the enhancement of international commerce.

According to Foucault, the modern state is a political structure, which utilizes individual as an object of its political strategies. For example, it compulsorily educates people to produce "qualified personnel" in accordance with its political agenda. He considers this phenomenon as a threshold of the modernity through which it can be evaluated whether or not a political structure passes through the modernity.[209]

In that sense, one rightfully can state that the political structure of the Ottoman Empire has switched into a solely modern state since Sultan Mahmut II. era (1808-1839). In this period, ministries and agencies of the central organization of state was founded; central system of education was established; schools to train officials (*mekteb-i maarif-i adli*), and schools to train academic personnel (*mekteb-i ulum-u edebiye*) was opened; central police and mail services was established; primary school education has become compulsory, and students were sent to foreign countries to education for the first time in the history of the Ottoman Empire.

Regarding state centralization and monopoly of violence, only the caliph or one assigned by him can exercise legitimate violence in Islamic jurisprudence. The Sultan, therefore, theoretically has the monopoly of violence in Ottoman Empire. In the fragmented political structure of the pre-Tanzimat period, however, the Sultan did not properly use this authority. However, the Ottoman Empire has undergone a centralization of political authority around the dynasty since the 19th century because of the existential concern of the Empire.[210]

Firstly, the central political power consolidated its authority, and by extension, the monopoly of using legitimate use of material force via charter of alliance in 1808. The Sultan and local landed proprietors (*ayans*) acted a charter that

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[209] Foucault, Michel, *Hapishanenin Doğuşu*, Trns. Mehmet Ali Kılıçbay, Imge Publication, Ankara, 2006, Pg. 27.
[210] Ekinci, Ekrem B., *Tanzimat ve Sonrası Osmanlı Mahkemeleri*, Arısanat Publication, Istanbul, 2011, Pg. 46 ff.

aims at consolidating central political power thereby it clarifies political limits of parties and prescribes the superiority of central power over provinces.[211] By means of this, on one hand, Sultan gained a capability of use the political power, he virtually had not able to use, owing to a solemn constitutional document through which Sultan possesses a "legal legitimacy" along with his "traditional legitimacy", on the other hand, other party acquired a guaranty that the exercising of the power would not be unlimited.

Secondly, the Sultan was able to abolish permanently the guild of janissaries which served as a political actor restricting the political authority of the Sultan in 1826. The guild of janissaries, which had demilitarized since the 17th century, served as an executor of political opposition whereby it played an essential role with Ulama in determining the policy of the state.[212] The janissaries were a considerable opposition against the Sultans who wanted to establish a modern state in the 19th century. The janissaries transformed into a privileged and armed clique from its status of the political opposition in the course of time whereby it lost the Ulama and public support. The Sultan, who received the support of notables and Ulama, gorily demolished janissary guild in 1826. As of this date, the Ottoman Empire rapidly shifted into a modern state.[213]

Thirdly, a new regulation in provincial law was enacted in 1864 and 1871 under the name of *Vilâyet Nizamnamesi* as a consequence of the agenda of state centralization.[214]

Regarding constitutionalism, the metamorphoses of the state into a modern one necessitates more complex and comprehensive system to protect fundamental rights, which brought about a trans-regional legal trend of constitutionalization and

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[211] Rubin, Avi, *Ottoman Nizamiye Courts: Law and Modernity*, Palgrave Macmillan, New York, 2011, Pg. 23.
[212] Kafadar, Cemal. "Janissaries and Other Riffraff in Ottoman Istanbul: Rebels Without A Cause?.", *International Journal of Turkish Studies*, University Of Wisconsin, No:13, 2007, in *Identity and Identity Formation in the Ottoman World: A Volume of Essays in Honour Of Norman Itzkowitz*, Eds. Baki Tezcan, Karl K. Barbir, University Of Wisconsin Press, Madison, 2007, (pp. 113-134), Pg. 121.
[213] Rubin, Avi, *Ottoman Nizamiye Courts*, Pg. 23.
[214] Ibid, Pg. 28.

codification. This is because modern state was a more influential system on the society comparing former versions, which was even able to effect until the thinnest layer of the society and evoked his presence every phase of the social life.[215] More complex political authority necessitated more complex restriction mechanism in favor of fundamental rights.

Furthermore, existential problems such as the riots for indecency, the Ottoman Empire underwent in the 19th century, let bureaucratic elite and Ulama to unite around dynasty to consolidate central power in an attempt to counter these problems. Sultans of the Tanzimat era, therefore, possessed considerably more political power than their ancestors of 17th and 18th centuries since they gained a legal legitimacy through solemn written documents through which they have gained almost an absolute political authority may be the first time since the 16th century.

The main concern of the Tanzimat bureaucracy, therefore, was the fact that "how to restrict the absolute power of the Sultan while maintaining the effective governance?" From Sadık Reshid Pasha to Mithat Pasha, the manifestation of this concern can be obviously observed. The outcome of this concern showed itself as the manner of the fact that they restrict the political authority of the Sultan by means of constitutional documents.

The necessity of protection of rights from state's arbitrary action, by virtue of written documents, increased for a number of reasons in the modern Ottoman Empire in terms of the modern state.

First of all, the judges, who turned into a state officer along with modern transformation, were needed to guide and limit during the proceeding. In the pre-modern period of the history of Islam, judiciary power had a supra-state characteristic. The Ulama, who took part in a self-governing ecclesiastical hierarchy, was performing his jurisdiction not in the name of the state but on behalf of a divine power transcending the state even-though judges and some officials were assigned

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[215] Foucault, Michel, *Hapishanenin Doğuşu*, Pg. 32.

by rules among Ulama.[216] Moreover, Ulama served a crucial function as a spokesman of regulation of the central bureaucracy whereby Ulama legitimized and generalized the regulation countrywide. In that system, there was a unique dialogue between politic structure and ecclesiastical structure by which ecclesiastical structure legitimizes and restrained political power.[217]

The Ulama, however, has gradually become an apparatus of the state along with the transformations in the 19th century. That is to say, politic structure and ecclesiastical structure completely merged whereby the religion has become, simply, a primary source of a uniform state structure in a modern state. Ulama has begun to function in a structure in which only the political ethics is used as a base while ulama had served as an intermediary of religious, social and individual ethics in the society before. Correspondently, the purpose of the trial has gradually switched from protecting individual's rights to ensuring public safety and underlining the presence of the state.[218] Moreover, the enormous centralist Ottoman bureaucracy that emerged in the Tanzimat era as a consequence of modernization emerged a need for regulating and controlling the member of the bureaucracy by means of a standard and codified legislation.[219] That is why the necessity of protection of individuals' rights from (i) incapability of judges[220] and (ii) their arbitrary actions of the bureaucracy in favor of the state by virtue of standard and written legislation has emerged.

Secondly, the Ottoman legal system was influenced by the trans-regional legal trends of codification in the 19th century. I believe that phenomenon of codification must be treated in the light of the "necessity of modernization" although

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[216] Hallaq, Wael, Impossible State, Pg. 77.
[217] Miller, Ruth A., *Fıkıhtan Faşizme, Osmanlıdan Cumhuriyete Günah ve Suç*, Trans. Hamdi Çilingir, Ufuk Publications, Istanbul, 2000, Pg. 37 ff.
[218] Ibid, Pg. 21,22.
[219] Ortaylı, İlber, *Osmanlının En Uzun Yüzyılı*, Timaş Publications, Istanbul, 2016, Pg. 159.
[220] Aydın, Mehmet Akif, "Mecellenin Hazırlanışı", *The Journal of Ottoman Studies*, Vol. 4, Istanbul, 1989, (pp. 31-50), (available at: Http://Www.Isam.Org.Tr/Documents/_Dosyalar/_Pdfler/Osmanli_Arastirmalari_Dergisi/Osmanlı_Sy 9/1989_9_Aydinma.Pdf, accessed: 15.11.2017), Pg. 37.

Mehmet Akif Aydın considers the main motivation of the Ottoman movements of codification as a "Western Influence" since the 19th century was the century of codification in Europa.[221] The Ottoman Empire codified his jurisprudence, as many European states did at the same time in a different manner.[222] That is to say, commercial and social transactions, which are accelerated and expanded and internationalized enormously along with the recent developments in technology necessitates standardization of law in which it has become predictable. Ahmet Cevdet Pasha writes in his *tezakir* that judicial system has undergone change as a consequence of the expansion of international trade between Ottomans and Europeans.[223] Indeed, many studies accept that one of the major reason of codification in Europa and the Ottoman Empire was predictability and economic necessities, which resulted in the monopolization of the authority of legislation by the central political power.[224]

The state, therefore, has begun to codify mainly Islamic legal norms in the codes by its official councils such as the SCJO in the Ottoman Empire. The judge was reduced to a simple official, responsible to apply predetermined codes to subjective cases as if they are objective now although legislation was still determined in the light of Islamic principles. The Islamic jurisprudence, now subjugated by the modern state, lost its flexibility which allowed the judge to determine "what has to be done" according to subjective and unique cases.[225] In that sense, the codified modern codes served to provide unification and predictability of law of the state

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[221] Aydın, Mehmet Akif, "Mecellenin Hazırlanışı", Pg. 39.
[222] Rubin, Avi, *Ottoman Nizamiye Courts*, Pg. 7.
[223] Ahmet Cevdet Paşa, *Tezakir*, Pg. 62–63.
[224] Novak, William, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, 3rd Edition), The University of North Carolina Press, Durham, 1996, Pg. 82.; Ekinci, Ekrem B., *Tanzimat ve Sonrası Osmanlı Mahkemeleri*, Pg. 49 ff.; Stone, Ferdinand Fairfax, "A Primer on Codification", *Tulane Law Review*, Vol. 29 (1954–1955), (pp. 300–310), Pg. 303.; Emon, Enver M., "Codification and Islamic Law: the Ideology Behind a Tragic Narrative", *Middle East Law and Governance*, Vol. 8, 2016, (pp. 275-309), Pg. 279.; İmre, Zahit, *Medeni Hukuka Giriş*, Fakülteler Press, Istanbul, 1980, Pg. 71.; Velidedeoğlu, Hıfzı Veldet, *Kanunlaştırma Hareketleri ve Tanzimat*, Maarif Press, Istanbul, 1940, Pg. 142.; Özsunay, Ergun, "Türkiye'de Yabancı Hukunun Benimsenmesi Hareketi Içerisinde Türk Medeni Kanununun Anlam ve Önemi", *Medeni Kanunun 50. Yılı Sempozyumu*, İstanbul Üniversitesi Mukayesel Hukuk Ensititüsü, Istanbul, 1978, (pp. 400-401).
[225] Hallaq, Wael, *Impossible State*, Pg.51.

whereby each judge implemented the same norm, which is written in the code, to the similar concrete cases.[226]

In short, the endeavors of promoting human rights through constitutional documents in 19th century Ottoman Empire are inexorably intertwined with transformation towards the modern state that requires an effective bureaucracy, predictable written codes and stronger protection of fundamental rights. Indeed, a social demand for constitutional movements is almost zero while bureaucracy has carried out the majority of rights and liberties at that time. I deal with ottoman constitutional documents in more detail below in the chapter of " the Constitutional documents of Ottoman Empire in 19th Century".

Regarding citizenship**,** the modern Ottoman Empire appropriated legal status of citizenship system in which all individuals regardless of religion, race or language living under Ottoman sovereignty accepted as Ottoman citizens in the Tanzimat era.

Modern Ottoman state has begun to directly address itself to its every single citizen no matter they are Armenian, Rum, or Jewish while the pre-modern state had addressed itself to its Armenian subject through Armenian patriarch, Rum subject through Rum patriarch, and Jewish subject through their chief rabbi. A sense of equality in public service and military service in addition to the equality in taxation in Muslim and non-Muslim, therefore, naturally emerged.

b) Effects of Ulama (Shariah Experts)

Ulama were a remarkable political actor in Ottoman politics. Ulama served as a check and balance mechanism in central and local authorities in which they supervised whether or not the Ottoman politics and government were conducted in conformity with Shariah. They were capable of (i) punishing governors and (ii) dethroning Sultans who acted un-Shariah by which they had an ability to mold public opinion in the Empire. Rolin Olivier, who traveled around Ottoman Empire in the

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[226] Ibid, Pg. 163.

late 18th century, states in his travel book that it has not been seen anywhere in the world that public opinion can be so powerful and influential in the eye of State as in the Ottoman Empire.[227] Parallel, Hammer states that Ulama has not been so powerful anywhere except China in the world as in the Ottoman Empire.[228]

Moreover, Ulama has taken an essential place in legislative power since the 17th century. Although it seems that Sultans possessed the legislative power, there is a constitutional tradition prescribing the fact that Sultans must pay regards to the Ulama opinions and Shariah when he legislates.[229] The Kanunnamas (Sultan's regulation) was institutionalized by Sheikh al-Islam, Abu Suud Efendi, in the late 16th century whereby the Kanunnamas has become simply an imperially approved collection of fatawa of Sheikh al-Islam since the 17th century.[230] Some historians may believe that it was an exceptional case the fact that Abu Suud had a significant role in the enactment of the kanunnama of Budin by which Abu Suud Efendi coded his earlier fatawa that he gave in Bodin as a "city clerk" before he had become Sheikh al- Islam[231]. It is widely accepted by historians that there was continuity in legislation mechanism in the pre-modern Ottoman legal system (17th-18th centuries) in which Sheikh al-Islam has a preponderant influence on Kanunnames.[232]

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[227] Rolin, Oliver, *Türkiye Seyahatnamesi*, Trans. Oğuz Gökmen, Ayyıldız Press, Ankara, 1977, Pg. 127.
[228] Hammer, J. Von, *Devlet-i Osmaniye Tarihi, I-X*, Trsn. Mehmet Ata, Kapı Publicaiton, Istanbul, 2008, Vol. 2, Pg. 440.
[229] Akgündüz, Ahmed, *Osmanlı Kanunnâmeleri Ve Hukukî Tahlilleri,* Vol. 1, Istanbul, 1990, Pg. 51; Şen, Murat, "Osmanlı Hukukunun Yapısı", *Yeni Türkiye Yayınları Osmanlı Sayısı*, Vol. 6, Ankara 1999, (pp. 327-339), Pg. 331.
[230] Karagöz, Fatma Gül. "The Evolution of Kânûnnâme Writing in the 16th and 17th Century-Ottoman Empire: A Comparison of Kânûn-i Osmânî of Bayezîd II and Kânûnnâme-i Cedîd." MA Diss., Bilkent University, 2010.
[231] Barkan Ömer Lûtfi, "Osmanlı Imparatorluğu Teşkilat ve Müesseselerinin Şer'îliği Meselesi", *IÜHFM*, Vol. 11, No. 3-4, Istanbul, 1945, (pp. 715-733), Pg. 720-725.; Albayrak, Sadık, *Bodin Kanunamesi ve Osmanlı Toprak Meselesi*, Tercüman Publication, Istanbul, 1974, Pg. 35.; Yakut, Esra, *Şeyhülislamlık: Yenileşme Döneminde Devlet ve Din*, Kitap Publication, Istanbul, 2005, Pg. 35.
[232] Atçil, Abdurrahman, *The Formation of the Ottoman Learned Class and Legal Scholarship, 1300-1600*, University of Chicago Press, Chicago, 2010, Pg 187.; Çavuşoğlu, Semiramis. "The Kadizâdeli Movement: An Attempt of Şeriat-Minded Reform in the Ottoman Empire." Phd Diss., Princeton University, 1990, Pg. 65.; Imber, Colin, Ebu's-Su'ud: The Islamic Legal Tradition, Pg. 98; Heyd, Uriel, Studies in Old Ottoman Criminal Law, Pg. 137.; Neumann, Cristoph K. "Political and Diplomatic Developments." in *Cambridge History Of Turkey: The Later Ottoman Empire 1603-1839*,

Ulama played a crucial role in constitutional reforms. They cooperated with the Sultan in the Auspicious Incidence (*Vakıayı Hayriyye*) through which the guild of janissaries was abolished whereby they have considerably contributed to winning out over the janissaries which let to accelerate the modernization of the State.[233]

However, Ulama has become an apparatus of government as a consequence of modernism in the 19th century. Nevertheless, Ulama effectively served to legislate the Tanzimat codes in conformity with Islamic jurisprudence. Legislative institutions of the Tanzimat such as Meclisi Valayı Ahkamı Adliyye, Council of State (*Şurai Devlet*) Majalla Committee, and *heyet-i umumi,* which prepare the constitution of 1876, considerably consisted of the members of Ulama. Moreover, the office of sheikh al-Islam has a status of regulatory and supervisory authority over judiciary system throughout the Tanzimat period.[234]

The Ulama in provinces, on the other hand, mostly approved the movement of legislation in a condition that the legislation was in conformity with Shariah principles. Bereketzade Cemalettin Abdullah (d. 1901), who is a member of Ulama in Egypt, argues that the regulation (*kanun*) has been issued to protect people from the arbitrary actions of state agents and governors in the Ottoman domain for a long time. Eventually, the modern codifications were enacted to guarantee live, chastity, and property of all people. Nevertheless, he criticizes some regulations since they do not comply with Shariah.

Shahabuddin al-Ālūsī (d. 1854), who was a member of Ulama in Iraq, also, approves most of the modern legislation in principle. He categorizes legislations in terms of their conformity with Islamic jurisprudence and criticizes them accordingly.

Ed. Suraiya N. Faroqhi, Cambridge University Press, Cambridge, 2006, Vol. 3, Pp. 44-64.; Punar, Bünyamin, "Kanun and Sharıa: Ottoman Land Law in Şeyhülislam Fatwas From Kanunname of Budin to the Kanunname-i Cedid", MA Diss., Istanbul Şehir Üniversity, Istanbul, 2015, (available at: Http://Earsiv.Sehir.Edu.Tr:8080/Xmlui/Bitstream/Handle/11498/25100/000110677002.Pdf?Sequence=1, accessed: 15.11.2017), Pg. 115 ff.

[233] Heyd, Uriel, "The Ottoman Ulema and Westernization in the Time of Selim III and Mahmut II", *Scripta Hierosol Mitana*, Studies in Islamic History and Civilization, Jerusalem, Vol. 9, 1961, (pp. 63-96), Pg. 71.

[234] Rubin, Avi, *Ottoman Nizamiye Courts*, Pg. 87.

He argues that it is approvable to set new crimes in *tazir* authority, however, the *tazir* punishments must be balanced whereby an inhuman and cruel punishment is not approvable. He writes that the regulations on land law are also approvable if they comply with the Shariah principles. He also approves the regulation on the judicial system. He argues that the new courts are approvable since they avoid the arbitrary actions of some cruel qadi. It is approvable if a Muslim applies to a new court instead of Shariah court due to the fact that he is afraid of the cruelty of a qadi. Nevertheless, he vigorously criticizes those who respect new regulation more than Shariah principles and deem that new legislation is more beneficial to society in comparison to Shariah principles.

c) Effects of International Impositions

Some Tanzimat statesmen such as Reshit Pasha, Ali Pasha, and Fuat Pasha modeled themselves on West whereby they vigorously advocated westernization and insisted on a direct adaptation of western codes into Ottoman law.[235] Their insistence resulted in the reactionary attitudes of traditionalist statesmen such as Ahmet Cevdet Pasha and accelerated the codification movement of the Tanzimat period. That is to say, Ahmet Cevdet Pasha and the members of Majalla commission knew for sure that the French civil code would be translated and adopted instead of Majjalla if they did not succeed.[236]

Moreover, Western effects were not limited by intellectual influence; rather, they attempted to form the legal reform of the Empire by means of international pressures. It is a well-known historical fact that French empire, which was proud of his civil code, was very insistent on a government policy to market and export his civil code to other countries in the 19th century.[237] Moreover, Ali Pasha complained

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[235] Tunaya, Tarık Zafer, *Türkiye'nin Siyasi Hayatında Batılılaşma Hareketleri*, Istanbul Bilgi Üniversitesi Publications, Istanbul, 1960, Pg. 37.
[236] Aydın, Mehmet Akif, "Mecelle'nin Hazırlanışı", Pg. 39.
[237] Aydın, Mehmet Akif, *Türk Hukuk Tarihi*, Pg. 425.

about the insistence and pressures of Western delegates on the re-regulation of the Ottoman judicial system in the Congress of Paris in 1856.[238]

Some constitutional developments on fundamental rights, in that sense, were conducted by Ottoman statesmen as political maneuvers against international political pressures of western states. We witness that western states utilized the issues of violation of rights, under the cover of the protection of the rights of their national minorities, in an attempt to interfere the internal affairs of Ottoman State whereby they demanded some reformations in a specific range of rights in favor of their national minorities.[239]

d) Effects of Bureaucracy

Ottoman bureaucratic class mainly carried out the reforms of protection of freedoms and fundamental rights without a remarkable social demand. Given kamaralist feature of reforms, one rightfully can state that the bureaucracy demanded to extend the scope of rights in favor of bureaucracy class which is more vulnerable class comparing common people with regards to enjoy fundamental rights because of *kul* system. Classic Ottoman codes of criminal law mainly consist of Kanunnames issued in the period of Fatih, Selim II, Suleyman, and Mehmet IV. The statesmen in the *kul* system, however, were not subject to the provisions of these kanunnames whereby Sultan himself politically punished them.

However, the punishments without trial against bureaucrats such as the arbitrary instance of execution, exile, and confiscation increased in the 18th century since the malfeasance and corruption have increased in the governance of state among bureaucrats. A remarkable demand to protect fundamental rights of ruling class, therefore, has arisen at the end of 18th century.

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[238] Ahmet Cevdet Pasha, *Maruzat*, Ed. Yusuf Halaçoğlu, Çağrı Publication, Istanbul, 1980, Pg. 198.
[239] İnalcık, Halil, "Tanzimat Nedir", *DTCF Yılllık Araştırmaları Dergisi*, Tarih Araştırmaları, 1940-1941, Vol. 1, (pp. 238-263), Pg. 256.

Mahmut II made the first important stride in term of protection of fundamental rights of bureaucrats in 1826 whereby he restricted the confiscation system was. Thus, Sultan gave up using the authorities that violates fundamental rights of his servants while the legal status of bureaucrats who were the most vulnerable class in terms of enjoying fundamental rights promoted. Furthermore, Mahmut II abolished the practice of execution without trial (*al-qatl siyasatan*) in 1838 by virtue of two punitive kanunnames that was issued in an attempt to regulate the criminal status of Ulama and officials. Thus, first time, it is guaranteed for officials the fact that no punishment shall be imposed whit out the crime having been prescribed by a previous penal law. Moreover, along with Imperial Edict of Rose Chamber, the safety of life and property was guaranteed and it was confirmed and consolidated that the system of confiscation was abolished since it was inconsistent with the principle of individual criminal responsibility.

2. Categorization of Rights in terms of Jurisprudential Foundations

The fundamental rights codified through the Tanzimat reforms can be classified into three groups in terms of their Islamic jurisprudential foundations.

a) First Group of Rights:

Some longstanding rights and freedoms have been re-interpreted within the process and re-formulized in the renewed legal system of new modern Ottoman state whereby the scope of some longstanding rights and freedoms extended. The rights and freedoms such as the right to live, the right of property, right of equality, freedom of religion and practice, the right of personal integrity, freedom of travel were considerably based on the principles of Islamic jurisprudence despite the fact that they were re-formulized according to the modern law.

b) Second Group of Rights:

The transformation of the Empire into a modern one brought about a range of new rights and freedoms along with the alternation of perception of some critical concepts such as citizenship, and central bureaucracy. For example, the

transformation from "subject-ship" to "citizen-ship" brought about a sense of equality in public service and military service in addition to the equality in taxation between Muslim and non-Muslim. This is because all "Muslim and non-Muslim subjects of the state" have become uniform "Ottoman citizens" along with transformation into the modern state. The modern state has begun to address itself to its every single citizen no matter they are Armenian, Rum, or Jewish while the pre-modern state had addressed itself to its Armenian subject through Armenian patriarch, Rum subject through Rum patriarch, and Jewish subject through their chief rabbi.

Similarly, bureaucracy class had some promotions in terms of rights to live and right of property because the bureaucracy class has become to the state itself from the status of "slaves of Sultan" along with the modernization. The exercises of execution without trial and confiscation were abolished while the bureaucrats have begun to enjoy principle of no punishment without crime.

Some of these new rights can be considered as a diversion from the classical doctrine of Islamic jurisprudence. Nevertheless, scholars and statesmen of current period attempted to justify the fact that these new rights and freedoms were not contrary to the Shariah. For example, Ahmet Cevdet Pasha states in his *Tezakir* that he adduced pieces of evidence from a Parisian risale of Celaleddin Devvani on *Mezalim* Courts written in 15th century in an attempt to support of his claim the fact that *Nizamiye* Courts comply with Islamic jurisprudence.[240] Furthermore, a member of *Daru'l-Hikmeti'l-Islamiye*[241] (1918-1922), Bediuzzaman Said Nursi, strolled

[240] Ahmet Cevdet Pasha, *Tezakir*, Pg. 84-85; Brown, Jonathan, "Reaching into the Obscure Past: The Islamic Legal Heritage and Legal Reform in The Modern Period," in *Reclaiming Islamic Tradition: Modern Interpretations of the Classical Heritage*, Ed. Elisebeth Kendell and Ahmad Khan, Edinburgh University Press, Edinburg, 2016.

[241] Daru'l-hikmeti'l-islamiye was established in Istanbul in 1918 as a sub-unit of the office of shaykh al Islam in an attemp to answer to the objections addressed to the Islam by other religions and unbelivers. Daru'l hikmeti'l islamiya operated actively especially in answering the objections of the Anglican chuch in 1919. See for further information: Zekeriya, Akman, *Osmanlı Devleti'nin Son Döneminde Bir Üst Kurul Daru'l-Hikmeti'l- İslamiye*, Diyanet İşleri Başkanlığı Publications Ankara, 2009.; Akman, Zekeriya, "Anglikan Kilisesi'nin Meşihat Kurumuna Soruları ve Bunlara Verilen

among Eastern Kurdish tribes in 1910 and 1911 whereby he explained to them that the new regime of equality of Muslims with non-Muslims was not contrary to the Shariah, instead it is required by Shariah.[242] Moreover, the chair of the *Daru'l-Hikmeti'l-Islamiye,* İsmail Hakkı İzmirli, illustrates the opinion of the Islamic law on the right to live, right to freedom, right of property, right of disposition, right to be civilize, right to work, women rights in his report that he prepared for the office of Sheikh al İslam as an answer to the questions of the Anglican Church from the Office of Sheikh al-Islam.[243] Furthermore, another member of *Daru'l-Hikmeti'l-Islamiye,* Abdulaziz Çaviş, deals with "the importance of the women rights in Islamic law" in his book that he wrote in 1919 as an answer of the questions of the Anglican Church from the Office of Sheikh al-Islam.[244]

c) Third Group Rights:

Some constitutional developments on fundamental rights, on the other hand, were conducted by Ottoman statesmen as political maneuvers against international political pressures of western states. We witness that western states utilized the issues of violation of rights, under the cover of the protection of the rights of their national minorities, in an attempt to interfere the internal affairs of Ottoman State whereby they demanded some reformations in a specific range of rights in favor of their national minorities. The most outstanding example of these rights would be "the formation and reformation of the institution of the prison in Ottoman Empire" in the context of right to freedom and security.

The concept of "penalty of imprisonment" is a very modern concept, in that it is a manifestation of the alteration of public perception of punishment as a result of

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Cevaplar", *Hikmet Yurdu*, Vol. 6, No. 11, January – June 2013, (pp. 357-377); Albayrak, Sadık, "Darü'l Hikmeti'l-Islamiyye", *İslam Ansiklopedisi*, Diyanet Vakfı, 1993, Vol. 8, Pg. 506-507.

[242] Nursi, Bediüzzaman Said, "Münazarat", in *Asar-ı Bediiye*, Envar Publication, Istanbul, 2012, Pg. 318.

[243] İzmirli, Ismail Hakkı*, El Cevabu's-Sedid fi Beyan-ı Dini't-Tevhid*, Pg. 8.

[244] Çaviş, Abdulaziz, *Anglikan Kilisesine Cevap*, Trns. Ersoy, M. Akif, Ed. Ateş, Süleyman, İşleri Başkanlığı Publication, Ankara, 1974, Pg. 221-250.

the influence of humanism on legal science in western scholarship. The records and report of current period illustrate that the foreign states showed an overrated interest in the matter of establishment, development and enhancement of the system of the prisons in Ottoman Empire. They continuously audited the prisons. They prepared reports on the conditions of the prisons whereby they exerted pressure on the Ottoman governments to improve the condition of the prisons. Even they were not reluctant to make it into an issue of international relations. Ottoman governments, in return, considered the issue as a sovereignty matter whereby they spread on an effort to take necessary precautions in an attempt to prevent foreign states to interfere their internal affairs. However, they have failed to accomplish the desired goal of bringing the conditions of the prisons into compliance with human rights on account of the fact that (i) the punishment of imprisonment was quite alien to the ottoman legal tradition and (ii) the financial difficulties strangled the reforms of improvement of the condition of the prisons. [245]

I believe that one should take this classification of rights into consideration in the course of study although formation, extension and consolidation of each rights cannot be divided clearly in term of the classification that I made above. For example, on one hand, constitutional codifications on rights to live should be considered in the first group of rights in a general sense because right to live, guarantied in the formulation of *işmah al-hayat* in Islamic jurisprudence, has been enjoyed by the subject of the empire before the Tanzimat reforms. On the other hand, abolishing execution without trail (*al-qatl siyasatan*) should be considered in the second group of rights in the same context of right to live since it promotes the fundamental rights of bureaucracy class.

B. Several Examples of Rights and their Islamic Jurisprudential Groundings

1. Right to Life

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[245] Yıldız, Gültekin, *Mapushane: Osmanlı Hapishanelerinin Kuruluş Serüveni (1839-1908)*, Kitapevi Publication, Istanbul, 2012, Pg. 32.

a) Documents, Subsidiary Legislation and Jurisprudential Practice

The right to live took places in almost all constitutional documents in the late Ottoman Empire. The Sultan assured that all subjects of Ottoman Empire no matter they are Muslim or non-Muslim had the right to live in the constitutional documents.

The charter of alliance (*Sened-i Ittifak*) prescribes that the dynasty and local landed proprietors are responsible for guaranteeing the safety of the subjects and poor people of the realm. Furthermore, the charter appropriates "the presumption of innocence". The charter regulates that if someone brings an accusation against local landed proprietors, accused one shall not be punished without a proper due process.

In the Imperial Edict of the Rose Chamber, it is declared that no treatment of poisoning or public and secret executions is lawful unless an accused person is publicly judged in accordance with Shariah, after inquiry and examination. Furthermore, "individual criminal responsibility" is appropriated in the edict. The edict states that the innocent heirs of a criminal shall not be deprived of their legal rights.

In the Imperial Edict of Reform repeats and confirms the guaranties of rights to live for all subject of Ottoman Empire without distinction of classes or of religion. It also prescribes more efficacious measures to be taken in order to have full and entire measures of the guarantees.

Furthermore, in order to give stronger guarantees for the safety both of life and property of all the peaceable subject of empire, the Sultan promises to revise the organization of the police in the capital, in the provincial towns, and in the rural districts.

The Imperial Edict of Justice confirms and consolidates the guarantees of rights to live for all subject of Ottoman Empire without distinction of classes or of religion as it was in previous edicts.

In addition to the provision of the constitutions documents, the lawmaker enacted subsidiary legislation in accordance with constitutional documents in which the protection of the right to live was detailed.

The first example of the regulation on the right to live in the late Ottoman Empire was a couple kanunnamas of Sultan Mahmut the Second in 1838. These kanunnamas guarantee the right to live of the members of the military class and Ulama. The kanunnamas prescribe that no punishment shall be imposed whit out the crime having been prescribed by a previous penal law.

Of the subsidiary legislation, the Code of Crime of 1840 (*Ceza Kanunname-i Humayunu*)[246] was the first example "common" codification in the late Ottoman Empire that regulates about the rights to live of all subjects of the Empire. This code was a primitive codification of the Islamic norms of criminal law.

The general preamble of the code states that the *ratio legis* of the code was to promote and realize the guaranty of life, property, personal integrity, and the right of liberty which are assured by the Sultan in the Imperial Edict of Rose Chamber six months ago. Furthermore, the Sultan accepts and guarantees the security of life and property, and the immunity of personal integrity and honor for all subject of Ottoman Empire without any exception since all subjects of the Empire have fundamental rights (*hukuk-ı mefruza*) and rightful freedoms (*hurriyet-i şer'iyye*) and all subjects of the Empire are even and equal (*yeksan ve siyyan*) before the law.

Moreover, it stated in the preamble of the code that whosoever, from whichever rank they might have, violates one's right by acting against law and Shariah, he shall be punished according to the punishment prescribed by herein the criminal code. In that sense, on one hand, the code protected the right to live of all subjects against the third party whereby it forbids all to violate the right to live. On the other hand, it limits the political power that political power can execute death penalty in the case the fact that it is prescribed in the code for a crime.

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[246] See for original text: Külliyat-ı Kavanin, Doc. 5, No: 992, TBMM Library, (available at: Https://Acikerisim.Tbmm.Gov.Tr/Xmlui/Handle/11543/67, accessed: 28.11.2017); See for Turkish transcripcition of the code: Akgündüz, Ahmet, *Osmanlı Kamu Hukuku*, Imak Press, Istanbul, 2011, Vol. I, Pg. 603-612.

The section one, article one prescribed that no one shall, secretly or publicly, by means of poison (*tesmimen*) or manslaughter (*katilen*), attempt against anyone's life in the Empire without exception unless there is a death sentence against one.

The capital punishments are regulated in the section one and two in the code. Capital punishments were limited with "armed rebellion against state", "intentional homicide". Moreover, it prescribes one more capital punishment for "the homicide while a Highway Robbery (*qat'al-tariq*)" in section eleven as an aggravation of an offense due to its consequences.

According to the section one, article one; capital punishment cannot be executed unless the crime is doubtlessly lightened by a final, fair and square verdict of a court by means of a necessary, public, and repetitive processes of an investigation, examination, and trail.

Regarding intentional homicide, whosoever committed an intentional homicide against public officers and common people by means of poison (*tesmimen*) or manslaughter (*katilen*), he shall be implemented by the Shariah regulation of *qısas*. The implementation is equal for all, even in the case the fact that a vizier committed an intentional homicide against a shepherd.

According to the section one, article three; a capital punishment was not executed unless the Sultan affirmed the execution if the homicide was committed in the Capital.

According to the section one, article four; a capital punishment was not executed unless the verdict was submitted for the Sultan's appraisal and affirmed by Sheikh al-İslam if the homicide was committed in the country.

Regarding armed rebellion against the Sultan and the state, the code divides the "breach of the peace" (*bağy*) into two i.e. "breach by means of a discourse" and "breach by means of an action" in section two-article one. It prescribes capital punishment for the "breach by means of an action" which includes (i) the abetment of the crime by means of supplying weapon and gunpowder, and (ii) the attempt to a felony. The fact remains that this punishment legislated as an "*al-qatl siyasah* in a technical sense" within the scope of the authority of the rule to regulate "*tazir"*

punishment. That is to say, the code extends the scope of the condition of the capital punishment which regulated by *hadd* crimes in fiqh[247] whereby the code prescribes capital punishments for those who would not be punished according to *hadd* provisions. The code, therefore, prescribes that capital punishments sentenced according to *tazir* conditions (*siyasaten*) are not executed unless the Sultan affirms the sentence.

According to the section two-article three, a sentence of death penalty shall be given by *Meclisi Ahkam-ı Adliye* (the supreme council of justice) after an undoubted trial if the crime is committed in the Capital.

According to the section two, article four; the case must be proceeded by the local court and *Meclisi Ahkam-ı Adliye* (the supreme court) thereby the witnesses are summoned and proceeded in the court in the Capital if the crime is committed in the country.

Regarding homicide while a Highway Robbery (*qat'al-tariq*), according to the section eleven, article three; in a case the fact that a Highway Robbery culminates in a homicide, the robber who caused death he shall be implemented by the Shariah regulation of *qısas* if the crime is doubtlessly lightened by a final, fair and square verdict of a court.

Of the subsidiary legislation, the Code of Crime of 1851 (*Kanun-ı Cedid*)[248] was one the most stunning example the late Ottoman Empire in terms of protection of fundamental rights. This code was a more developed attempt of codification of the Islamic norms of criminal law.

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[247] The punishments sentenced after quashing the rebellion cannot be regarded as hadd punishment. Those who rebelled can be punished after the rebellion is sattled by means of tazir punishments. According to abu hanifa, even the ruler can give death penalty for those who rebelled but this punishment is not a hadd punishment, instead, it is a tazir punishment. For further information See: Heyd, Uriel, *Studies In Old Ottoman Criminal Law*, Pg. 87.

[248] See for original text: Külliyat-ı Kavanin, File No. 7, Doc. No: 997, TBMM Library, (available at: Https://Acikerisim.Tbmm.Gov.Tr/Xmlui/Handle/11543/67, accessed: 28.11.2017); See for Turkish transcripcition of the code: Akgündüz, Ahmet, *Osmanlı Kamu Hukuku*, Imak Press, Istanbul, 2011, Vol. 1, Pg. 613-620.

The general preamble of the code states that the rights to live, property, personal integrity, the Sultan assured to guarantee in the Imperial Edict of Rose Chamber, do not change by time and region since they are based on the Shariah which is beyond the spatial and temporal context. The subsidiary codes (*müteferri kavanin*), on the other hand, which in-generated out of contemporary opinions of jurist on the norms of Shariah, are subject to the temporal and spatial transformation in which provision of a code would be changed, softened or hardened according to the current requirements of the society. It is, therefore, necessitated a new criminal code, in the course of time in the Ottoman jurisprudence which led to legislate herein the criminal code of 1851.

The section one, article one prescribed that no one shall, secretly or publicly, by means of poison or manslaughter, attempt against anyone's life in the Empire without exception unless there is a death sentence doubtlessly lightened by a final, fair and square verdict of a court by means of a necessary, public, and repetitive processes of an investigation, examination, and trail.

The capital punishments are regulated in section one in the code. Capital punishments were limited to "armed rebellion against the state" and "intentional homicide". Moreover, it prescribes some more capital punishment such as "the homicide while a Highway Robbery (*qat'al-tariq*)"(sec.1, art.9) and "the extrajudicial execution" (sec.1, art.10) in the section one as an aggravation of an offense due to its consequences.

Although the regulations on right to live are fundamentally similarly in both codes, the Code of Crime of 1851 (*Kanun-ı Cedid*) regulates issues more detailed. I deal with only detailed further regulations in terms of protection of fundamental rights.

First, the code prescribes that the state can execute capital punishment by itself as an "*al-qatl siyasatan"* even-if hairs' of a victim require blood-money instead

of retaliation (*qısas)* or they pardon the murderer and give up retaliation[249] in a case of the fact that the murderer is a state official no matter he is high-ranking or not. Some interpret this *ex-mera-muto* execution of state as "the reception of public prosecution" in the Ottoman law thereby purifying private law matters from criminal law.[250] However, I do not agree with this opinion. First of all, the matter of *al-qatl siyasah* is common only to the murderer state officials. Secondly, it is a criminal regulation in conformity with Islamic jurisprudence since the regulation of *ex-mera-muto* execution regulated as a *tazir* punishment by referring Islamic jurisprudential term of *al-qatl Siyasatan*.[251]

Second, the code prescribes in the article four that the officials who execute a death sentence without any affirmation of the Sultan shall be punished.

Third, the code prescribes in the article teen that, in a case of "armed rebellion against the State"[252], rebels can be murdered only on the battlefield. Those who survive or surrender shall not be executed after settling the rebellion without due process. Those who executed one without trial shall be implemented by the Shariah regulation of *qısas*.

Fourth, rulers have the right to choice i.e. retaliation or blood-money (to transmit to treasury if the hair of a victim is not found.

Fifth, in case of incitement to murder, those who indicated to murder shall be liable as a real murderer.

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[249] In callasic fiqh, the true hairs of a victim have a righ of cohice i.e. (i) retaliation, (ii) bloodmoney, or (iii) pardon in case of a qısas. Aydın, Mehmet Akif, *Türk Hukuk Tarihi*, Pg. 202 ff.
[250] Üçok, Coşkun, Mumcu, Ahmet, *Türk Hukuk Tarihi*, Sevinç Press, Ankara, 1976, Pg. 322.; Bozkurt, Gülnihal, *Batı Hukukunun Türkiyede Benimsenmesi*, Pg. 100.
[251] Abu hanifa employes the term, "siyasah", for capital punishmens of tazir. See for further information: Aydın, M. Aydın, Türk Hukuk Tarihi, Pg. 208.
[252] Unlike the criminal code of 1840, the code extracted the word, the sultan, form the "armed rebellion against the state".

Sixth, the section three, article seven states that everyone has natural liberties (*imtiyazat-ı tabiiye*) and fundamental rights (*hukuku mefruza*) in the legal system (*kavanin-i cedide*).[253]

The criminal code of 1858 prescribes a totally different regime of criminal law in contrast with previous two criminal codes. It is not a codification of Shariah norms, instead, it was an adaptation of French criminal code of 1810 into the Ottoman legal system thereby French criminal code was translated by excluding the regulations against Shariah and including some Shariah institutions such as *qısas* and *diyet*, polygamy, the age of puberty.

The code does not intend to substitute for Islamic criminal law regime, instead, it regulates "the crimes against public order". The introduction, section one, article one prescribes that herein the code covers (i) the crimes committed directly against the government and (ii) *tazir* crimes committed against an individual which concern the State since they breach public order and the State has authority to regulate and execute them. Moreover, the code assures that it never injures individual rights determined by Shariah. The second book, section one, article 171 prescribes that a criminal trial is tried by Shariah court if there was hair who require so since regulation of herein the code never injures individual rights determined by Shariah. Nevertheless, the murderer shall be punished by at least fifteen years of servitude in a case the fact that hairs' of the victim or the Sultan pardon the murderer according to article 172 since he breached public order once.

The code prescribes a more severe regime of punishment in contrast with previous two criminal codes in terms of the right to live. First of all, the code does not mention the general principle of the inviolability of the right to live as previous codes did. Secondly, the code extends the scope of capital punishments. It regulates capital punishments for (i) espionage (art.49), (ii) assistance to foreign armed forces (art.50, 51), (iii) disclosure of state secret (art.52), (iv) armed rebellion against the

[253] Unlike modern Turkish language, the term, hukuk, is used for rights as the plural of hak; the term, kavanin, is used for law or legal sistem; the term, shariah, is used as the princibles of universal law.

State and the Sultan (art.55), (v) incitement and assistance to rebel (art.56), (vi) sabotage (art.61), (viii) being leader of an armed bandit (art.62), (ix) homicide while a Highway Robbery (addendum), (vii) arson (art.163), (x) homicide in an arson (art.166), (xi) premeditated murder (art.170), (xii) continuous and severe torture (art. 173), (xiii) *dolus subsequent* (art.174).

Moreover, the code notes in article 16 that capital punishments are limited (numerous clauses) with the crimes determined herein the code. No capital punishment shall be executed unless a verdict with the Sultan's affirmation which doubtlessly lightened the crime publicly announced.

It would not be correct to say that the criminal code of 1858 did not bring about a reception of public prosecution since the institution of "public prosecutor", which is the basic constituent of public prosecution, have not established yet in Ottoman criminal law.[254] Nevertheless, we can say that the *ratio legis* of the criminal code evolve into "protection of the continuity of the state" from "protection of the individual rights" along with the criminal code of 1858.[255]

Regarding protection of the right to live in practice, one rightfully can state that the state coddled to abide by the protection of the right to live in practice in the late Ottoman Empire. The official document that I deal with below illustrates how bureaucracy was careful to avoid violations of the right to live.

There is an incidence of indiscipline in the prison of Antalya in 1911. Thirty-five prisoners in Antalya prison were pardoned by the state. However, other prisoners in the prison did not allow setting these pardoned prisoners free and insisted to demand to set all prisoners free from the prison. Prisoner engaged in combat with law enforcement and one officer got injured. Moreover, they attempted to break out of prison thereby they broke the windows of the prison. In response, the

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[254] The institution of public prosecutor has been entered the legal system by means of the vilayet regulation in 1864. The regulation prescribes that a state officer shall be present at the trials of appeal courts in the name of state. See: Üçok, Coşkun "Savcılıkların Avrupa Hukukunda Gelişmesi Ve Türkiye'de Kuruluşu", *Ord.Prof. Sabri Şakir Ansay'ın Hatırasına Armağan*, Ankara, 1964, Pg.46.
[255] Miller, Ruth, *Fıkıhtan Faşizme*, Pg. 35.

law enforcement used guns whereby eight prisoners who were sentenced to death got injured and one of them died. In the report, the officer wrote that the possibility of another incidences of an attempt to break was imminent since the walls of the prison were very weak. But officers were ordered not to use gun in an attempt to avoid any other incidence involving death in the case of an intervention to the prisoners. [256]

b) Islamic Jurisprudential Foundations and Contemporary Groundings

All monotheistic and divine religions appropriate the sacredness of the life. The religion of Islam, on the other hand, has a distinguished position in the right to life in terms of fundamental rights since it determined (i) inviolability of the right, (ii) value of human-hood, (iii) exceptional circumstances, and (iv) liability of political power to guarantee the right to live in a jurisprudence.

(1) The Jurisprudence

Classic Islamic jurisprudence has formalized the scope, content, subject, and exceptions of the fundamental right since the beginning of the fiqh as I dealt with more detailed in the title of "theoretical groundings of human rights in Islam". The fiqh canons of the19th century Islamic jurisprudence also reflect a jurisprudential continuity within their contemporary contexts. I deal with the right to live over the contemporary jurisprudence in this section.

I examine the concept of *işmah 'l-nefs* (inviolability of life, and physical and psychological integrity) as a philosophical ground in *Radd al-Muhtar* by Ibn 'Abidin in an attempt to trace the philosophy which shapes the perception that legislates the norms of protection of the right to live in the Tanzimat law. The concept of *nefs* is

[256] Gönüllü, Ali Rıza, "20. Yüzyılın Başında Alanya Hapishanesi (1906-1919)", in *Zindanlar ve Mahkumlar*, Ed. Emine Gürsoy Naskali, Hilal Oytun Altun, İstanbul, 2006, (pp. 57-64), Pg. 62.

sometimes utilized only in the meaning of "life"[257], sometimes used in the meaning of "life and and physical and psychological integrity" in fiqh literature.

According to *Radd al-Muhtar,* everyone no matter his is Muslim, *dhimmi*, or *mustaʾmīn*[258] naturally have *iṣmah 'l-nefs* (inviolability of life, and physical and psychological integrity)[259]. The inviolability of life is not absolute; instead, in some condition, one can lose his inviolability (*isqat 'l-iṣmah*) in which his life remains unprotected before the law.

First of all, one loses his inviolability if he attempts to murder someone. One loses inviolability when he draws a sword in an attempt to murder someone, whereby those who kill him would be liable.[260] However, there must be no measurement out of killing him to offset the danger, otherwise, they would be liable. The mater is avoiding the harm, not killing.[261] Moreover, the danger of death must be actual. For example, one cannot be killed if he leaves the venue after he drew a sword. Furthermore, the danger of death must be continuing. For example, in the case the fact that one assaults once and retreats that he does not intend to assault once more, he shall re-gain the inviolability of life. Killing him, therefore, is not licit and those who kill him are implemented by *qısas*.[262]

Secondly, one loses his inviolability if he attempts to rebel against a legitimate and Islamic rule (*ahl 'l-haq*). However, the rebels re-gain inviolability of life if they lay down their arms.[263]

In the case the fact that a Muslim without a next of kin (*wali*) or a Mustaʾmīn is involuntarily murdered in a Muslim territory, the ruler must demand blood money

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[257] The crime of injuring an organ without death is entitled as "cinayah 'l-ma dun 'l-nefs". Ibn Âbidîn, Muhammed Emin B. Ömer, *Hâşiyetu Reddü'l-Muhtâr Ale'd-Dürri'l-Muhtâr: Şerh-i Tenvîri'l-Ebsâr*, Darü'l Kütüb'l-Ilmiyye, Beirut, 1994, V.10, Pg. 4.
[258] Mustaʾmīn is an individual granted amān, or protection, a legal status accorded only to non-muslim foreigners living (temporarily, in principle) in the Ottoman Empire.
[259] Ibn Âbidîn, *Hâşiyetu Reddü'l-Muhtâr*, Kitab'l Cinayat, Vol. 10, Pg. 26
[260] Ibid, Kitab'l Cinayat, Vol. 10, Pg. 35.
[261] Ibid, Kitab'l Cinayat, Vol. 10, Pg. 41.
[262] Ibid, Kitab'l Cinayat, Vol. 10, Pg. 32.
[263] Ibid, Kitabu'l-Bugat, Vol.3, Pg. 234.

from the murderer since the murderer murders one with the invisibility of life. The ruler must execute *qısas* if the murderer murders voluntarily. The ruler shall prosecute the process by himself even if there was no complaint since it concerns public interest.[264]

According to *Radd 'l-Mukhtar,* the protection of the right to live is based on two requirements i.e. *iṣmah* (inviolability) and sovereignty (*walayah).*[265]

Iṣmah is the natural ground of the protection. Everyone naturally possesses inviolability of life unless they lose their inviolability thereby violating other's inviolability. *Kafir*, who is technically in an ongoing fight against Muslim in terms of fiqh[266], does not enjoy inviolability of life since he poses an actual danger of life for Muslims. Muslims and *dhimmies*, on the other hand, have inviolability of life since they naturally do not pose an actual danger to others. *Mustaʾmīns* also have inviolability of life. The ruler must provide the safety of his life and properties in Muslim territory. A Mustaʾmīn shall be implemented by *qısas* if he kills another Mustaʾmīn in a Muslim territory. The inviolability of *Mustaʾmīns*, however, is less protected, in contrast with Muslims and *dhimmies*, since there is a strong possibility that a Mustaʾmīn shall fight against Muslims in future.[267] For example, if a Muslim or *dhimmi* kills a Mustaʾmīn, he is not implemented by *qısas*, instead, he must pay blood-money for his murder.[268]

Walayah is a technical requirement for the protection of the right to live. One should be under an Islamic sovereignty in order to enjoy the full protection of the right to live. It is a technical requirement because a ruler can protect the inviolability only in the territory he reigns over. For example, a Muslim, who is a Mustaʾmīn in a non-Muslim territory, enjoys less protection of inviolability. A Muslim is not

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[264] Ibid, Kitabu'l-Jihad, Vol. 3, Pg. 69.
[265] Welayah is a word which empowers an authority/guardianship to a person, community, or country that is under the direction and rule on behalf of another. "Wali" is someone who has "walayah" (authority or guardianship) over somebody else.
[266] Ibid, Kitabu'l-Jihad, Vol.3, Pg. 75
[267] Ibid, Kitabu'l-Jihad, Vol.3, Pg. 53.
[268] Ibid, Kitabu'l-Jihad, Vol. 3, Pg. 63

implemented by *qısas*, but required to pay blood-money if he kills another Muslim in the non-Muslim territory.[269] Similarly, those who rebel against a legitimate ruler do not enjoy the full protection of inviolability since there is no *walahay* of the ruler on the rebels during the rebellion. For example, one is not implemented by *qısas* if he kills a rebel during the rebellion since the *qısas* is possible by means of *walayah*.

(2) The Reactions and Groundings of Contemporary Muslim Thinkers

Many Muslim thinkers in the Tanzimat dealt with the notion of "right" and "freedom" in the context of Islamic principles. Thinkers such as Namık Kemal, İzmirli İsmail Hakkı, Said Nursi, and Seyyit Bey associate the notion of "right" and "freedom" with Islamic jurisprudence. I deal with the discourses of the contemporary Muslim thinkers on the right to live in an attempt to detect consistencies and divergences in terms of classical Islamic jurisprudence.

Namık Kemal is the first outstanding Muslim thinker in the Tanzimat who expressed the notion of rights and freedom. He might be the one who kindled the discourse of human rights in a modern sense in the late Ottoman literature. He argues that everyone naturally has rights and freedoms. People are born even and free in the rights to live, rights of personal chastity, and honor whereby no one is embedded into the domain of anyone. Nevertheless, it is necessary to establish a state or government to protect individual rights and freedoms form violations of others. But the freedom and sovereignty of the state and government only can be the sum total of the freedom and sovereignty that people temporarily delivered from their own freedom in which people did not abdicate their rights and freedom since the government and state have no separated entity independent from the individuals. Every one is the Sultan of his own realm. Neither no one ever takes away this right from an individual nor the individual abdicates it. People have a right to criticize an administration and rise against a cruel and despotic authority, of a right which people can utilize it by means

[269] Ibid, Kitabu'l-Jihad, Vol. 3, Pg. 57.

of a consensus. It is illegal to use forces against people when people utilize their right to rise against authority.[270]

He attempted to base his ideas on Islamic grounds whereby he argues that the Muslim caliph comes to power by virtue of a social contract named as *biat* through which people affirm the caliph and deliver him some authority to govern them. The caliph governs paying regards to the rights, freedoms, and demands of people by means of consultancy (*meşveret*) which is a command of Quran. Nevertheless, it seems that Namık Kemal was influenced by the contemporary English public opinion of freedom and social contract shaped by Locke and his successors.[271] Namık Kemal states that foundations of rights have been already operative in Islamic jurisprudence. The Imperial Edict of Rose Chamber did not bring something new in terms of fundamental rights and freedoms. According to him, the edict only re-presented the Islamic princibles of rights in a new form.[272]

İzmirli İsmail Hakkı is another remarkable Tanzimat thinker who deals with the matter of rights in the context of Islamic jurisprudence. The deals with the concept of right in one of his book, written in 1920 and published in 1922 he wrote as a collection of answers to the questions asked by Anglican Church in 1916. He deals with the concept of the right to live in a modern sense and discusses it in an intellectual work. His groundings on "rights" are quite parallel to the theory of *işmah.* He states that people have right to live, right of freedom, right of possession, right of property, right of women, and right of labor in Islam since the life, personal

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[270] Namık Kemal, *Osmanlı Modernleşmesinin Meseleleri: Siyasi, Hukuk, Din, Iktisat, Matbuat: Bütün Makaleler I*, Eds. Nergis Yılmaz Aydoğdu, Ismail Kara, Dergah Tıp Publication, Istanbul, 2005, Pg. 165 ff.

[271] Locke states that, in natural state, people are equal and free by which they can make their own decisions. However, because of security concerns, people establish a political unity in a mutual content by virtue of a social contract. In this way, people continue to possess and enjoy their natural rights such as right to live, right to freedom and personal integrity, and right of property while a political authority is established. The state is liable to protect natural rights of its subjects. The state loses its legitimacy and authority if it does not meet this liability. See: Locke, John, *The Second Treaty Of Government*, Ed. C. B. Macpherson, Hackett Publishing, 2013, Cambridge, Pg. 55 ff.

[272] Yıldız, Mehmet, "1856 Islahat Fermanının Tatbiki ve Tephileri", PhD Diss., İstabul University, Institute of Social Science, Istanbul, 2003, pg. 296-299.

integrity (*nefs*), personal chastity (*ırd*), though (*akl*), and religion (din) of people are fundamentally protected by Islamic jurisprudence.[273]

Said Nursi is a prominent Tanzimat thinker who deals with the concept of rights and freedoms. He dealt with the concept of freedom, state of law, right of equality before the Second *Meşrutityet* (1909) in his articles. But his famous work on freedom and right of equality is *Münazarat* written in 1910, which consists of questions he encountered when he traveled around the Easterner Kurdish tribes explaining to them what was freedom and equality, and the answers.

Nursi also faced the questions of Anglican Church as a member of *Darul Hiqmah 'l-Islamiye*, such in İzmirli İsmail Hakkı. But he did not answer the questions in a separate book since he found the questions. Nevertheless, he deals with the issue of "right to live in Islam" in his *diwan,* known as *lamaat,* in 1921. His grounding is also quite parallel to the theory of *işmah*. Furthermore, he explains, by means of kalam instruments, why the right to live covers all human being in Islamic jurisprudence. He wrote as follows;

> ... The verse, <If anyone slew a person –unless it be for murder or for spreading mischief in the land– it would be as if he slew the whole people> lays two mighty mysteries before the eyes.
>
> One is pure justice, a sublime principle. As the (God's) mighty power deems equal the individual and the community, the person and mankind; Divine justice sees no difference between them; this is a constant Sunna.
>
> An individual may sacrifice his rights himself, but they cannot be sacrificed otherwise, even for all mankind.
>
> The cancelling of his rights, or the spilling of his blood, or the smearing of his işmah is equal to the cancelling of the rights and işmah of all humanity, or the besmirching of it, and is its equivalent…[274]

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[273] İzmirli, Ismail Hakkı, *Anglikan Kilisesine Cevap: El-Cevabüs-Sedid Fi Beyani Dini'd-Tevhid* (1922), Ed. Fahri Ünan, Türk Diyanet Vakfı Publication, Ankara, 2004, Pg. 213.

[274] Nursi, Bediuzzaman Said, "Gleams" in *The Words*, Trns. Mary Walden, Sözler Publicaiton, Istanbul, 2015, Pg. 731. I quoted the passage direcly form the translation with minor edits. I added some expession which translator exludes in his translation. The Original Text: *Âyet-i* مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ *iki sırr-ı azîmi vaz ediyor nazara. Biri mahz-ı adalet. Bu düstur-u azîmi ki: fert ile cemaat, şahıs ile nev-i beşer, kudret nasıl bir görür; adalet-i ilâhî ikisine bir bakar. Bir sünnet-i daimî. şahs-ı vahid hakkını kendi feda ediyor; lâkin feda edilmez, hattâ umum insana. Onun iptal-i hakkı,*

Nursi employs the expressions of *işmah* and *hak* (right), together as synonyms to describe inviolability of life. He argues that Quran prescribes that every individual has *işmah*. This is because the God's mighty power affects all people and an individual equally and He treats all human being and individuals equally in this world by virtue of his constant Sunna. Moreover, in another part of the *lamaat* he narrates the principle of Hanafi Islamic jurisprudence whereby he argues that non-Muslims have *işmah* unless they are assaulting.[275]

Mehmet Seyyid Bey also deals with the concept of rights in Islam in a conference he addressed in the Istanbul University faculty of law in 1922. Law students who recorded the conference have published the paper later on. He treats the matter of rights in the context of the philosophy of law in a cooperative manner. He compares and contrasts the perception of "human" of the western schools of philosophy and Islamic philosophy of law.[276]

Seyyid bey grounds the concept of right according to the theory of *ihtisas* although he employees the term, *işmah,* in the meaning of "right". That is to say, he argues that, in lexical meaning, the *hak* does not mean what determined in any way at all (*ale 'l-ıtlak*), instead, it means what determined all-over (*külli 'l-vücuh*) in a way that it is beyond any shadow of doubts. In parallel to its lexical meaning, it is *characterized* as "what is determined in every aspect for a person in a manner that there is no doubt he does not possess. This phenomenon is termed as *ihtisas* by fiqh in which *hak* is a determination (*ihtisas*) of a situation of a person.[277]

In that sense, he argues that Islamic jurisprudence initially determined the right to life under the name of *işmah 'l-nefs*. He argues that all human are born to live. The living is determined in all aspect for human beings. They live in their

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hem iraka-i demi, hem zevâl-i ismeti; iptal-i hakk-ı nev'in, hem ismet-i beşerin mislidir, hem naziri. Nursi, Bediuzzaman Said, "Lemaat", in *Sözler*, Envar Publication, 2015, Pg. 727.

[275] Ibid, Pg. 743.

[276] Gedikli, Fethi, "Mehmed Seyyid Bey ve Hak Kavrami Üzerinden İslâm Hukuk Felsefesi ile Avrupa Hukuk Felsefesi Arasındaki Mukâyesesi", *İÜHFM*, Vol. 72, No. 1, Jun. 2014, (Pp. 107-132) (available at: Http://Www.Journals.Istanbul.Edu.Tr/Iuhfm/Article/View/5000034645, accessed: 13.12.2017), Pg. 130.

[277] Ibid, Pg. 113.

determined lifespan. They are not born to instantaneously die. Herein the living is a natural and innate right and a necessity (*daruriyyah*) determined by the creation of human. This state of living is a *hakk-ı hayat* (right to live) in fiqh terminology since there is a complete *ihtisas* between life and human beings in all aspects (*külli'l-vücûh*). What determines the *ihtisas* is nature of human. In that sense, *nefs,* which stemmed from the human innate, is a fundamental right and an indefeasible (*darurriyah*) itself. The irreducible of life, which are prerequisites for life (*mevkûfun aleyh*), are also innate and indefeasible rights of individuals, known as fundamental rights today.[278] In that sense, Seyyid bey categories fundamental rights into three i.e. (i) right of *işmah*, (ii) right of freedom, and (iii) right of possession.[279]

c) The Abolition of Execution without Trial (the Arbitrary *al-Qatl Siyāsatan*): As an Example of the Effects of Bureaucracy

(1) The Concept of *al-Qatl Siyāsatan*

The concept of Siyāsah was characterized by contemporary scholars as "administrative measures the Sultan takes as a matter of public and state welfare".[280] The concept of "*al-qatl siyāsatan*" is characterized today as "an act of punishment for the sake of upholding public order".[281]

I believe that there is a "contradiction in terms" in the matter of *al-qalt siyāsatan* in the Ottoman Empire. This contradiction can be observed obviously in the studies on the formation of human rights in the Ottoman Empire. It is accepted in the literature that the practice of *al-qatl siyasatan* was abolished by a kanunnama (Sultanic regulation) of Sultan Mahmut the second in 1838. However, the institution of *al-qatl siyāsatan* takes a remarkable place in further legislation i.e. the criminal

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[278] Ibid, Pg. 127
[279] Ibid, Pg. 131.
[280] Nizamülmülk, Siyaset-Name, Ed. Mehmet A Köymen, Kültür Bakanlığı Publication, 2nd Edition, Istanbul, 1990, Pg. 57.
[281] Tellenbach, Sılvia, "Islamic Criminal Law", in *The Oxford Handbook Of Criminal Law*, Ed. Markus D. Dubber And Tatjana Hörnle, Oxford University Press, Oxford, 2014, Pg. 262.

code of 1840, the criminal code of 1851, and the criminal code of 1858. I believe that a major reason of this contradiction is the fact that the "arbitrary practices" of execution of Sultans are not disassociated from "the institution" of *al-qatl siyāsatan* in a sense of Islamic jurisprudential institution.

In this section, I attempt to deal with the arbitrary practices of execution of the Sultan, which I entitle as "the execution without trial", independently from the institution of *al-qatl siyāsatan.* But before, I briefly discuss distinction between "the execution without trial" and " institution of *al-qatl siyāsatan"* in terms of human rights.

Some historians who address the Ottoman law as a dualist law system which consists of (i) fiqh and (ii) '*Urf* (the Sultan's law) state that *al-qatl siyāsatan* must be evaluated directly in the context '*Urf*[282]. However, this evaluation avoids them distinguishing the arbitrary executions from the implementations of the institution of *al-qatl siyāsatan* which brings about the foregoing contradiction in term. This is because they deal with all practices of capital punishment of the Sultan in the context of 'Urf in a holistic manner thereby they treated *al-qatl siyāsatan* independently from Islamic jurisprudence.

However, I believe that the Ottoman law was a monolithic law in which Sultan's law formed as a sub-section of the Shariah in conformity with Islamic jurisprudence. I discussed the matter more detailed in the section "Conformity of Ottoman Legal System with Islamic Jurisprudence". Nevertheless, time to time, Sultans diverged from the Shariah. These divergences should not be evaluated as the practices of Sultan's law independently from Islamic jurisprudence but the arbitrary practices of Sultan against Shariah. In that sense, the sultan has two practices in terms of *al-qatl siyāsatan* i.e. (i) the practices complying with the Shariah institution of *al-qatl siyāsatan* and (ii) the arbitrary practices of execution not complying with

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[282] Katgı, Ismail, "Osmanlı Devletinde Siyaseten Katl: Hukuki Mahiyeti, Sebepleri, Usulü, Infazı ve Sonuçları", *The Journal of International Social Reserach*, Vol. 6, No. 24, Winter 2013, (pp.180-211), Pg. 185.; Üçok, Coçkun, Mumcu, Ahmet, *Türk Hukuk Tarihi*, Pg. 183; Mumcu, Ahmet, *Osmanlı Devletinde Siyaseten Katl*, Pg. Xix.

the Shariah institution of *al-qatl siyāsatan.* I entitle arbitrary practice of execution as "arbitrary *al-qatl siyāsatan*" or "the execution without trial" while I entitle *al-qatl siyāsatan* in a technical sense in Islamic jurisprudence as "the institution of *al-qatl siyāsatan"* hereafter.

i. The Jurisprudential Institution of al-Qatl Siyāsatan

In a technical sense, the institution of *al-qatl siyāsatan* is a kind of *tazir* punishments in Islamic criminal law. *Tazir* punishments are the punishments for the crimes, which was not regulated in primary sources before, set and proclaimed by a component authority during the performance of governance of the state.[283]

The matter whether or not it is possible to regulate more severe penalties then hadd punishments has been controversial in Muslim jurists for a long period.[284] Abu Hanifa conceptualizes capital punishment regulated by a head of State as "*siyāsah"*. In that sense, *al-qatl siyāsatan* was not a practice produced by a dualist law system independently form Islamic jurisprudence, instead, it was a legal institution which had been conceptualized and formalized by Islamic jurisprudence since the beginning of fiqh.

The institution of *al-qatl siyāsatan* developed, on the other hand, as a consequence of sociological imperatives. In fact, the Kanunnama of Egypt of 1525 stated in its preamble that Punishments regulated by *hadd* and *qısas* was not sufficient in crime deterrence since the crimes had increased in the society in the course of time. It is necessary, therefore, to set some additional capital punishments.

In Islamic jurisprudence, it is dependent on some conditions to implement *al-qatl siyāsatan* as a *tazir* punishment.

First of all, it is necessary to determine and proclaim in a Sultanic regulation (kanunnama) which crimes in which condition shall be punished by capital

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[283] Erbay, Celal, *İspat Vasıtaları*, Pg. 40.
[284] See for the discussions: Aydın, Mehmet Akif, *Türk Hukuk Tarihi*, Pg. 208.

punishment before the punishment is executed. This is because no one shall be held liable for what he does not know.[285]

The Sultan, therefore, proclaimed which crimes shall be punished in the Sultanic regulations (kanunnama or *siyāsatnama*) from that day forth. It is prescribed by some kannunamas that no punishment or more severe punishment not regulated herein the kanunnama shall be executed by government officers (*ahl 'l-urf*)[286] Moreover, some kanunnama clearly prevents government officers form exceeding the limits determined by kanunnamas thereby it orders current local authorities to complain about them to the central authority.[287]

Some examples *al-qatl siyāsatan* regulated in kanunnamas was as follows; "qualified and repeating theft"[288], "premeditated arson"[289], "qualified adultery"[290], "counterfeiting on the money"[291], "desertion"[292], "highway robbery"[293] "causing a disturbance (*sai bi 'l-fasad*)"[294].

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[285] Akşit, Cevat, *İslam Ceza Hukuku ve İnsani Esasları*, Gümüşev Publication, Istanbul, 2015, Pg. 99-100.

[286] Original Text: *...ve şol cürm ki kanunnamede ne alınacağı tayin olunmuştur, ziyade alınmaya...* The Kanunnama Of Bosna Province of 1516, Art. 11.; The Kanunnama of Bosna Province of 1530, Art. 9.

[287] Original Text: *...ehli örf olanlar kanun-ı muzburdan tecavüz etmeyeler; ederler ise hakimü'l-vakt olanlar yazup der-i devlete arz edeler...* The First Kanunnama of Divriği Province, Art. 17.; The Second Kanunnama of Divriği Province, Art. 21.; The Kanunnama of Malatya Province, Art. 21. in *Osmanlı Kanunnameleri*, Akgündüz, Ahmet.

[288] The General Kanunama of Beyazid The Second, Art. 28.; Siyāsatnama of Manisa Province, Art. 5; The Kanunnama of Niğbolu Province, Art. 134.; The General Kanunnama Of Kanuni (Kanun-i Osmani), Art. 31.; The Second General Kanunnama of Kanunu, Art. 36.

[289] The General Kanunama of Beyazid the Second, Art. 36; The Second General Kanunnama of Kanunu, Art. 36.

[290] The General Kanunama of Beyazid The Second, Art. 26.; The Kanunnama of Ahmet the First, Art. 6.

[291] Serebrinic Maden Yasağı Hükmü Sureti, Art. 8; Zaplina ve Plane Madeni ve Gümüş Yasağı Sureti, Art. 7.; Kratova Madeni ve Gümüş Yasağı Hükmü Sureti, Art. 8.; Gümüş Yasağı Hükmü Sureti (Fatih Reign), Art. 4.

[292] The Kanunnama of Karasi Province (Fatih Reign), Art. 5.; The Kanunnama of Yavuz Sultan Selim, Art. 149.

[293] The Kanunnama of Zülkadiryye Province (Kanuni Reign), Art. 1.

[294] Kanunnama of Bursa Ikizce Province (Fatih Reign), Art. 12.; The Kanunnama of Ahmet the First, Art. 325. "Sai bi 'l- fasad" is an umbrella concept that covers "grand larceny", "highway robbery", "damage to subjects' property", "opression on the subject by means of high taxation", "arbitrary confiscation", "executing arbitrary punishment", "selling with exorbitant price": See: Mumcu, Ahmet, *Osmanlı Devletinde Siyaseten Katl*, Pg. 45.; Mumcu, Ahmet, *Osmanlı Hukukunda Zulüm Kavramı*,

Secondly, *al-qatl siyāsatan* is not executed unless the crime is undoubtedly lighted by means of a due process led by an independent judge. Otherwise, it is against the general principle of Islamic jurisprudence, "freedom from liability is a fundamental principle".

It was necessary, therefore, to exhaust a due process consists of separated investigation and proceeding processes in addition to a final sentence of death before executing *al-qatl siyāsatan* in Ottoman criminal law.[295] The sentence of death was formalized by a fatawa of the Shayhk al-Islam and the affirmation of the Sultan.[296]

Parallel, It is prescribed in some kanunnamas that the crime must be enlightened by a qadi verdict.[297] Some kanunnamas regulate that no capital punishment shall be executed unless crimes of all accused one are lighted before a local qadi or inspector. The opposite behaviors are against Sharai and law.[298]

The institution of "*al-qatl siyāsatan*" in Ottoman law was far beyond the contemporary perception of the right to live in contrast with other legal systems in the world. As I deal with more detailed in the previous sections, the institution of *al-qatl siyāsatan* was utilized in an attempt to re-regulate the Ottoman criminal law in accordance with Islamic jurisprudence in the Tanzimat law.

ii. The Execution without Trial (the Arbitrary *al-Qatl Siyāsatan*)

Phoenix Publication, Ankara, 2007, Pg. 4 ff.; Katgi, Ismail, "Osmanlı Devletinde Siyaseten Katl", Pg. 190.

[295] Heyd, Uriel, *Studies in Old Ottoman Criminal Law*, Pg. 640.

[296] Akman, Mehmet, *Osmanlı Devletinde Ceza Yargılaması*, Pg. 131 ff.

[297] Original Text: *....bulunduğu gibi kadı katina ilede, ol dahi teftiş ede göre. Şer' ile kalbazanlığı sabit olursa hüküm ede...* Serebrinic Maden Yasağı Hükmü Sureti, Art. 8; Zaplina ve Plane Madeni ve Gümüş Yasağı Sureti , Art. 7.; Kratova Madeni ve Gümüş Yasağı Hükmü Sureti, Art. 8.; Gümüş Yasağı Hükmü Sureti (Fatih Reign), Art. 4.; Original Text: *...bir kimsenin hırsızlığı zahir olsa kadıya iledele, kadı dinleye ve ehl-i örfe hüccet vere, ehli örf dahi hüccet mucibince asılmağa müstahak olanı asa...*: The Kanunnama of Niğbolu Province (Selim the First Reign), Art. 134. in *Osmanlı Kanunnameleri*, Akgündüz, Ahmet.

[298] Original Text: *...her mücrimin ve müttehemin cerimesi vilayet kadısı veya müfettiş huzurunda zahir olup ehl-i örf dutup teslim etmeden siyaset etmek şer' ve kanuna muhalif teaddidir...* The Kanunnama of Erzurum and Pasin Province, Art. 56; The Kanunnama of Kemah Province, Art. 42.; Kanuname of Rum Province, Art. 49.

The arbitrary *al-qatl siyāsatan* was an execution of capital punishment the Sultan executed without a previous kanunnama regulation or a trial. In Ottoman Empire, "*al-qatl siyāsatan*" has been implemented in a very broad manner for the member of the bureaucracy class by which many statesmen have been executed by Sultans order without seeking to meet the conditions of legality and trial.

The execution without trial has been mainly executed for the crimes and faults such as "malpractice"[299], "escape the battle"[300], "false claim of imperial lineage"[301], "assault against the Sultan's throne and personality"[302], "lying to the Sultan"[303], and "to criticize the Sultan".[304] Moreover, sometimes, the Sultan was obliged by the force of mutineers to order a statesman to be executed.[305] Furthermore, some Sultans executed valuable statesmen with unreasonable causes.[306]

(2) The Structure of the Ottoman Society in terms their Positions before the Execution without Trial

The structure of the Ottoman Society split into two main classes i.e. (i) ruling class and (ii) subjects (ruled) in term of government. Ruling class was the bureaucratic and military circles, who did not have a tax obligation, which deal with

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[299] See for the execution of the bannerlord of karahisar because of his delay in mobilization: Selanikli Mustafa Efendi, *Tarih I-II*, Ed. Mehmet Ipşirli, Türk Tarih Kurumu Publication, Ankara, 1999, Vol. 2, Pg. 751-752.

[300] See for Sultan Murat the Fourth exacuting by himself of those who escaped the battle in the bagdad campaign: Thevenot, Jean, *1655-1656'da Türkiye*, Trns. Nuray Yıldız, Tercüman Gazetesi 1001 Temel Eser, Istanbul, 1987, Pg.173.

[301] See for the execution of one who claimed that he had an imperial blood in the lineage of the Ottoman dynasty thereby he introduce himself as Sulayman, the son of the sultan Selim the Second in the reign of the sultan murat the third: Selanikli, *Tarih*, Vol. 2, Pg. 779-780.

[302] Solakzade Mehmet Hemdemi, *Tarih, I-II*, Ed. Vahit Çabuk, Kültür Bakanlığı Publication, Ankara, 1989, Vol. 2, Pg. 433, 572.; Selanikli, *Tarih*, V. 2, Pg. 846-847.

[303] See for the execution of Kemankeş Ali Pasha by Sultan Murat the Fourth because he has hidden form the sultan a report about the re-occupation of Bagdad by Iranians": Baysun, Cavit, "Murad IV.", *Islam Ansiklopedisi*, Meb Publication, Istanbul, 1987, Pg. 626.

[304] See for the execution of Yusuf Pasha by Sultan Selim the First since he insulted and criticized the sultan for the mass casualties in the campaign of the Egypt": Solakzade, *Tarih*, Vol. 2, Pg. 84.

[305] Tavernier, Jean-Baptiste, *17. Yüz Yılda Topkapı Sarayı*, Trns. Teoman Tunçdoğan, Kitap Publication, Istanbul, 2007, Pg. 64.

[306] For example, Sultan Ibrahim executed the chief admiral (kaptan-ı derya) Yusuf Pasha because he did not bring enough "fur": Mumucu, Ahmet, *Osmanlı Devletinde Siyaseten Katl*, Pg. 82.

the government of the State.[307] Ruling class also split into three i.e. (i) the dynasty and the Sultan, (ii) the military class, and (iii) Ulama. The Sultan was the head of the Empire and technically the owner of the state. In practice, however, Sultans and the members of the dynasty were subjected to *al-qatl siyāsatan.* Military class and uluma constituted together with the bureaucracy while they had different legal status in terms of fundamental rights. The distinction between ulama and military class has crystallized in the reign of Sultan Fatih. Ulama were allocated to the service of jurisdiction, religion, and education whereby they have not utilized for the services apart from these. These services were conducted by the military class which categorized into sub-catagories in itself such as soldiers and bureaucrats.[308] The military class re-formed under the status of "the slaves of the Sultan" in the reign of the Sultan Suleyman the First.[309] It is seen that the military class and the Sultan were quite vulnerable in term of enjoying the right to live in contrast to the ulama class and the subjects.[310]

i. Subjects

The subjects were the taxpayer ruled class, composing of different group of people with different religious, ethnic, linguistic, sectarian backgrounds, which made a living by agriculture, commerce, and craftsmanship.[311]

The subjects were not subjected to the execution with out trial with a few exceptions. It is recorded only once in the whole Ottoman history that a group of subjects executed without trial in the reign of Sultan Suleyman the First.[312]

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[307] Inalcik, Halil, "Osmanlı Toplum Yapısının Evrimi", in *The Nature of Traditional Society: Turkey, Political Modarnization in Japan and Turkey*, Ed. R.E. Ward, D. Rustov, Princeton University Press, 1964, (P. 42-64), Pg. 53.; Rycaut, Poul, *The History of the Present State of the Ottoman Empire,* London, 1686, (available at: Https://Books.Google.Com.Tr/Books?Id=Kkmutmw98dec&Printsec=Frontcover&Source=Gbs_Ge_Summary_R&Cad=0#V=Onepage&Q&F=False, accessed: 04.12.2017), Pg. 5 ff.
[308] Üçok, Coşkun, Mumcu, Ahmet, *Türk Hukuk Tarihi*, Pg. 172.
[309] Tezcan, Baki, *The Second Ottoman Empire*, Pg. 62.
[310] Mumcu, Ahmet, *Osmanlı Devletinde Siyaseten Katl*, Pg. 49.
[311] Akgündüz, Ahmet, Cin, Halil, *Türk Hukuk Tarihi: Özel Hukuk*, 1st Edition, OSAV, Istanbul, 2011, Pg. 189.

ii. Ruling Class

(a) The Members of the Dynasty and the Sultan

The members of the dynasty were subjected to the execution without trial under the name of "practice of fratricide" (*kardeş katli*). It has become a constitutional practice (*teamül*) that the Member of dynasty acceding to the throne killed his brothers in attempt to the avoid civil wars.[313] It was institutionalized by a provision of Kanunnama in the reign of the Sultan Fatih. Some historians states that the practice of fratricide was not a arbitrary execution without trial, instead, it was performed in conformity with the institution of *al-qatl siyāsatan* in which the member of the dynasty executed as the punishment of the crime of *bağy* in Islamic jurisprudence.[314] Mumcu evaluates the practice of fratricide as an obvious cooperation of Shariah law and *'urf* law since Ulama legitimized the practice of fratricide by their fatawa on the ground of protecting public welfare.[315] I believe, however, the practice of fratricide should be evaluated in the execution with out trial in terms of right to live since majority of innocent shahzada executed without trial. Eventually, the practice of fratricide abolished in the reign of Sultan Ahmet the First whereby the regime of accession to the throne changed into which the oldest member of the dynasty shall accede to the throne.[316]

Sultans also were subjected to the exertion without trial. As I discussed in the section of "formation of human rights in ottoman empire in terms of limitation of political power", the Sultan was under a political and legal inspection in practice in 17th and 18th century although they were accepted as untouchable in theory. The sultan whose actions are against Shariah and public welfare was disenthroned and executed by means of a fatawa of Shaykh al-Islam. Sixteen Sultans acceded to the

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[312] Perçevi Ibrahim Efendi, *Tarih, I-II,* Ed. Bekir Sıtkı Baykal, Kültür Bakanlığı Publication, Ankara, 1992, Vol. 1, Pg.97-98.; Solakzade, *Tarih*, Vol. 2, Pg. 160.
[313] Inalcik, Halil, "Osmanlı Padişahı", *AÜSBFD*, Vol. 13, No. 4, Ankara, 1958, (pp. 68-79), Pg. 73.
[314] Akgündüz, Ahmet, *Osmanlı Kanunnameleri*, Vol. 2, Pg. 7 ff.; Akgündüz Ahmet, Cin, Halil, *Türk Hukuk Tarihi*, Pg. 324.
[315] Mumcu, Ahmet, *Osmalı Devletinde Siyaseten Katl*, Pg. 174.
[316] Alderson, A.P., *Osmanlı Hanedanının Yapısı*, Trns. Şefaettin Severcan, İz Publication, Istanbul, 1998, Pg. 39 ff.

throne in 17th and 18th centuries in Ottoman Empire. Eight or them were disenthroned while four of them were executed after disenthroned.

(b) Ulama Class

Ulama class consists of those who graduated from madrasa, promotes in a self-governing ecclesiastical hierarchy, and serves in the service of law, religion, education and the relevant offices of bureaucracy. The members of Ulama were Muslim and mostly Turk.[317] They had an independent authority of which the legitimacy originated in their charisma in the eyes of people whereby the Sultan respected and refrained from.[318]

Ulama were not subject to the execution without trial in Ottoman Empire.[319] They were immune from all kind of interventions of military class. It is legally impossible to execute a member of Ulama without a permission of a superior member of Ulama.[320]

No member of ulama has been executed in the history of the Ottoman Empire with a few exceptions. A qadi and a shaykh al-Islam has been executed without trial by Sultan Murat the Fourth[321] while some members of ulama have been executed for breaching the public order by means of *al-qatl siyāsatan*.[322]

(c) Military Class

Apart form Ulama class, the most important element of Ottoman bureaucracy was consisted of the members of military class. Military class has been determined according to kul system in the classical period of the Empire (16th-18th centuries). Statesmen of the Empire were consists of those who were collected from the remote

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[317] Lewis, Bernard, *The Emergece of the Modern Turkey*, 3rd Edition, Oxford University Press, Oxford, 2001, Pg. 163.
[318] Rolin, Oliver, *Türkiye Seyahatnamesi*, Pg. 127.
[319] Zilfi, Madeline, *Dindarlık Siyaseti*, Pg. 55.
[320] Mumcu, Ahmet, *Siyaseten Katl*, Pg. 61, 109ff.; Hammer, Vol.7, Pg. 192.
[321] Sencer, Muammer, *Osmanlılarda Din ve Devlet*, Toplumsal Dönüşüm Publication, Istanbul, 1997, Pg. 92.
[322] See for the execution of Bedrettin-i Simavi by means of a fatawa of ulama for a crime of armed rebellion: Oruç Beğ, *Tarih*, Ed. Hüseyin Nihal Atsız, 2nd Edition, Ötüken Publication, 2016, Pg. 74.

regions of the Empire at a children age, called *Devshirme*. *Devshirmes* were grouped according to their ability. Those who are capable of conduction state business were educated hardly from the cradle to become a well-trained statesman in their age of maturity. Those who were not capable of being statesmen, on the other hand, remained soldier. *Kul* system was based on the idea that statesmen and soldiers were slaves of the Sultan whereby the system provided to the Sultan an authority of full control on soldier-rooted statesmen.

The *kul* system has been conducted in a very broad manner by Sultans whereby many statesmen were arbitrarily executed by the order of the Sultan without feeling any need to meet the requirements of the Islamic institution of *al-qatl siyāsatan* i.e. legality and prosecution[323]. The disadvantageous status of the military class in terms of right to live reflected adversely on the competition and the conflict of promotion within the Class. That is to say, assassinations of statesmen against each other regarded as execution without trial whereby they were not firmly prosecuted. Of a hundred eighty three grand-viziers charged in the Ottoman Empire till 1839, forty-three grand-viziers were executed.[324]

(3) The Developments on *al-Qatl Siyāsatan* in the 19th Century

The punishments without trial against bureaucrats such as arbitrary instance of execution, exile, and confiscation increased in 18th century since the malfeasance and corruption has increased in the governance of state among bureaucrats. A remarkable demand to protect fundamental rights of military class, therefore, has arisen at the end of 18th century.

As a result of strong bureaucratic demands, Sultan Mahmut the second abolished the practice of execution without trial in 1838 by virtue of two punitive kanunnames that was issued in an attempt to regulate the criminal status of ulama and officials. Thus, first time, it is guarantied for the member of the military class the

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[323] Taner, Tahir, *Tanzimat Devrinde Ceza Hukuku*, Meb Publication, Istanbul, 1999, Pg. 222.
[324] Üçok, Coşkun, Mumucu, Ahmet, *Türk Hukuk Tarihi*, Pg. 176.

fact that no punishment shall be imposed whit out the crime having been prescribed by a previous penal law. Moreover, along with Imperial Edict of Rose Chamber, the safety of life and property was guaranteed. Furthermore, it was confirmed and consolidated that the system of confiscation was abolished since it was inconsistent with the principle of individual criminal responsibility. It is also worth to mention taht it is obviously forbidden in constitutional document and criminal codes to kill one with "poison" without persecution, which was an instrument of political assassinations.

The institution of *al-qatl siyāsatan*, on the other hand, remained operational in the late Ottoman Empire legal system whereby it was utilized in an attempt to re-regulate the Ottoman criminal law in accordance with Islamic jurisprudence in the Tanzimat law.

In the sense of foregoing discussion on the execution without trial, one can rightfully state that re-formation on the right to live in the Tanzimat era were remarkably in favor of bureaucracy class to adequate the status of military class in conformity with Islamic jurisprudence. This is because the right to live for the subjects of the empire and Ulama has been already guarantied by Islamic jurisprudence in theory and practice.

2. The Right of Personal Integrity: Prohibition of Torture and Degrading Treatments

The right to personal integrity can be described as an immunity of physical and psychological integrity, and personal chastity and honor. The torture, ill treatments, ill-punishments, and inhuman treatments and punishments, on the other hand, are the special kind of violation of right to personal integrity committed by state agents in the exercise of their public duties.[325]

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[325] According to "The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", Art. 1; an action has four constitutional elements in order to be evaluated as "torture" i.e. (i) to contain severe physical or mental pain or suffering, (ii) to be inflicted intentionally, (iii) to be

Violation of personal integrity has been condemned by monotheistic religions and many philosophic systems since the very early times of society. The concept of torture and its subsequent, however, are very modern concepts, which developed and formed along with "the state monopoly on violence" and "the humanitarian legal reform in punishments".

Islamic jurisprudence has recognized the immunity of personal integrity under the name of *iṣmah 'l-nefs* and *iṣmah 'l-ırd* since the very beginning of fiqh. Protection personal integrity has been formed in Islamic jurisprudence in its own rights. Nevertheless, fiqh also deals with the violation of states agents and torture in a different category under the name of *zulm*. The ruler and state agents are liable for their violent action against personal integrity according to Islamic jurisprudence. Eventually, the right of personal integrity and the prohibition of torture and its subsequent were legalized in conformity with Islamic jurisprudence under the name of "right" in the Tanzimat era.

In this section, I deal with Islamic jurisprudence foundations and groundings of right of personal integrity after dealing with the regulations in the Tanzimat law.

a) Documents and Subsidiary Legislation

The protection of the right of personal integrity, chastity and honor took places in almost all constitutional documents in the late Ottoman Empire. The Sultan and other political powers assured in constitutional documents that all subjects of Ottoman Empire no matter they are Muslim or non-Muslim had the right of personal chastity and honor. Furthermore, the Sultan guaranteed that on one would be exposed to torture and degrading treatments.

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acted in the purposes of punishing the subject or obtaining information or confession from him or intimidating him, and (iv) to be inflicted by a public officer or in his information and permission. These elements are essential for "torture" which means that the absence of one of these elements excludes the act from the category of torture and includes it in the category of its subsequents such as ill treatments and punishments, and inhuman treatments and punishments. The thing remains that the fourth element is essential for torture and all kind of. [Online]: (available at: Http://Www.Ohchr.Org/En/Professionalinterest/Pages/Cat.Aspx, accessed: 17.12.2017).

The charter of alliance characterizes its *ratio legis* as "the protection of the subjects and poor people". In keeping with this, the charter prescribes attempting to punish those who torture subjects and poor people and act contrary to the supreme law of Shariah.

The Imperial Edict of Rose Chamber prescribes that no one is allowed to attack the personal chastity and honor of any other person whatever.

The Imperial Edict of Reform also confirms the guarantees of rights to personal integrity of all subjects. Moreover, the edict entirely abolishes every treatment that resembles torture. Infractions of the prohibition of torture, of the authorities who may order any of the agents who may commit them in shall be severely punished in conformity with the criminal codes. Furthermore, the edict forbids the executions of corporal punishment unless it is regulated in a disciplinary regulation.

The Imperial edict of justice confirms and consolidates the guarantees of rights to personal integrity and chastity for all subject of Ottoman Empire without any distinction. It also repeats the prohibition of torture; and repeatedly declares that the authorities which may commit or order to commit torture shall be severely punished.

In addition to provisions of constitutional documents, subsidiary legislation was enacted in accordance with constitutional documents in which the protection of right of personal integrity, chastity and honor were detailed.

The Code of Crime of 1840 (*Ceza Kanunname-i Humayunu*) determines its *raito legis* in the general preamble of the code as to promote and realize the guaranty of life, property, personal integrity, and the right of liberty which are accused by the Sultan in the Imperial Edict of Rose Chamber six months ago. Furthermore, the code confirms and consolidates that the Sultan accepts and guarantees the immunity of personal integrity and honor for all subject of Ottoman Empire without any exception since all subjects of the Empire have fundamental rights (*hukuk-ı mefruza*) and rightful freedoms (*hurriyet-i şer'iyye*) and all subjects of the Empire are even and equal (*yeksan ve siyyan*) before the law.

The section three, article one prescribes that protection of personal chastity and honor is the necessity of "being human" (*mebteğay-ı insaniyet*) since the personal chastity and honor are sacred (*aziz*) and respectable (*muhterem*) as the life is. Moreover, the article describes torture and degrading treatments as "beating", "battery", "degrading and humiliating speech", and "swear". Furthermore, it prevents government officer to beat and swear anyone arbitrarily. Their duties are only to arrest, in case of (i) an incidence of strife and (ii) encounter an accused (*erbab-ı töhmet*), and directly take them to the relevant judicial authority without doing anything further.

According to the article one and article fife, in case of the fact that an officer or a member of ulama, no matter which rank they might have, perform torture or degrading treatment, he shall be persecuted in Supreme Court of Justice (*Meclisi Hakamı Adliye*) and punished with imprisonment for five days to three months according to violation of his crime.

The Code of Crime of 1851 (*Kanun-ı Cedid*), section two, article one confirms that protection of personal chastity and honor is the necessity of "being human" (*mebteğay-ı insaniyet*) since the personal chastity and honor are sacred (*aziz*) and respectable (*muhterem*) such in the life.

The Code of Crime of 1851 (*Kanun-ı Cedid*) regulates issues of protection of right of personal chastity and honor in the section two in analogy to the Code of Crime of 1840. I deal with only differentiated regulations in terms of protection of right of personal chastity.

The section two, article four regulates that the law enforcement officers (*umuru zabitiye memurları*) should use proportionate (*icabı vecih*) force in case the fact that an arrestee cause difficulties in the arrest.

The Criminal code of 1858 (*Kanun-ı Cedid*) regulates the issue of torture and ill-treatments committed by state officers more detailed in a private section. Torture and degrading treatments are regulated under the name of "punishments executed in case of the fact that state offices torture individuals and perform ill- treatments against individuals" in section six.

The article 103 regulates that the judges, members of the supreme council (*meslis erbabı*), or any state officers shall be punished by "removal of public office" and "temporary confinement" if they order or perform torture or ill treatments against an accused to extract a confession. The superior shall be punished in case of the fact that a subordinate officer acts according to an order of his superior.

Moreover, according to article 103, the state officer who causes "death" or "loss of limb" as a consequence of torture shall be punished by "capital punishment" or "qısas" according to consequences.

The article 104 orders that the judges, members of the supreme council (*meslis erbabı*), or any state officers shall be punished by "imprisonment" for six months to three years if they punished one with a more severe punishment than the legally determined punishment or treat one with a more severe treatment then the legally determined treatment.

According to the article 105, a state officer shall be punished by "imprisonment" for six months to three years if the officer break into a private property in the exercise of his duties outside of cases determined by law and outside of the procedure determined by law. The superior shall be punished in case of the fact that a subordinate officer acts according to an order of his superior.

The article 106 declares that a state officer shall be punished by "imprisonment" for one week to one year according to the violence of the crime he committed if he performs an ill treatment in the exercise of his duties outside of procedure determined by law. Moreover, the article defines ill-treatments. According to the article, ill-treatment is an act of state officer (i) violating personal chastity and honor or (ii) causing physical pain and suffering.

The article 110 prescribes that a state officer shall be punished by the "removal of public office" and "imprisonment" for six months to three years if he gratuitously employs one as a "forced labour" for any kind of work unless there is an official order and affirmation of locals that the work must be done as a public services. Moreover, the officer shall pay to the one the price of work he gratuitously employed.

The article 111 regulates that the state officers shall be punished by the "removal of public office" and "imprisonment" for one week to three years if they forcible and gratuitously disease the private properties of local people living in where they transiting.

b) Islamic Jurisprudential foundations and Contemporary Groundings

The physical and psychological integrity, personal chastity and honor of individuals are inviolable in principle according to Islamic jurisprudence. No one can breach the inviolability of physical and psychological integrity of body unless there is an exception determined by Shari. No one can arbitrarily violate personal chastity and honor of anyone no mater one is Muslim or non-Muslim.[326]

(1) The Jurisprudence

I deal with the right of personal integrity in the fiqh canons of the19th century Islamic jurisprudence, Radd al-Mukhtar, in this section.

I examine the concept of *işmah 'l-nefs* (inviolability of life, and physical and psychological integrity) in terms of physical and psychological integrity, *işmah 'l-'ırd* (inviolability of personal chastity and honor), *diyāt* (blood money), *zulm, cevr* (oppression), *ezâ* (ill-treatment)*, ta'zib* (torture) as a philosophical ground in *Radd al-Muhtar* by Ibn 'Abidin in an attempt to trace the philosophy which shapes the perception that regulates the norms of protection of right to live in the Tanzimat law.

The concept of *nefs* is sometimes utilized only in the meaning of "life"[327], while sometimes it is used in the meaning of "life, and "physical and psychological integrity" in fiqh literature. The concept of, *cevr*, *ezâ,* and *ta'zib* are used in the meaning of violation of personal integrity in the literature. The concept of "*zulm",* on the other hand, is generally utilized to describe the acts of violation committed by the

[326] Akşit, Cevat, *Islam Ceza Hukuku*, Pg. 104.
[327] Ibn Âbidîn, *Hâşiyetu Reddü'l-Muhtâr*, Kitab'l-Cinayat, Vol. 10, Pg. 5.

Sultan or the state officers against individual's life, personal integrity, and personal chastity and honor.

Diyāt (blood-money) is characterized by *Ibn abidin* as "the name of the price necessitated as a consequence of a crime against organs". For him, *qısas* and *diyāt* is an instrument of protecting life and body.[328] To violate one's personal integrity, personal chastity and honor is un-Shari (*haram*).[329] He states that those who violate one's "inviolability of life" or "inviolability of personal integrity" (*iṣmah 'l-nefs*) should reattribute by *qısas* or *diyāt.*[330]

Radd al-Muhtar counts some kinds of action as the violence of personal integrity and determines the retributions of these crimes (*jaraim*) in the section of *diyāt.* Damaging of body organs is a violation requiring full *diyāt.* Causing to "lose limp" or "loss of sense" is a violation requiring full *diyāt.* Bodily harm or beating is a violation requiring full *diyāt.*

Diyāt protects also the inviolability of "psychological integrity". For example, causing to lose one's mind is a violation requiring full *diyāt.*

Furthermore, *Diyāt* protects the inviolability of "personal chastity and honor". For example, shaving one's beard or hairs without his consent is a violation and requires *diyāt.* In that sense, "causing to lose one's beauty", "swearing", "degrading speech", "insult", "humiliation" require *diyāt.*

According to *Radd al-Muhtar,* everyone, no matter he is Muslim, *dhimmi*, or musta'mīn, naturally have *iṣmah 'l-nefs* (inviolability of life, and physical and psychological integrity)[331]. Ibn 'Abidin narrates form Sarakhsi that even a degrading *tazir* punishment by means of slapping to heed is not allowed since slapping to head or neck is the most severe violation of personal chastity. *Dhimmies* and Muslims are

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[328] Ibid, Kitab'l-Diyāt, Vol. 10, Pg. 56.
[329] Ibid, Kitab'l-Nehy, Vol. 11, Pg. 78.
[330] Ibid, Kitab'l-Diyāt, Vol. 11, Pg. 67.
[331] Ibid, Kitab'l-Cinayat, Vol. 10, Pg. 22.

equal in terms of *diyāt.*[332] The violation of the inviolability of personal integrity of a *dhimmi* is un-Shari (*haram*) requiring *diyāt.*[333] Moreover, Ibn 'Abidin narrates that it is a degrading treatment if a state officer insults a *dhimmi* by calling him *kafir* (infidel) which requires *ta'zir* punishment.[334]

The source of the inviolability (*işmah*) is not "Muslim-hood" but "humanity". For example, a Muslim going into a *dar 'l-harb* (non-Muslim territory) as a *musta'mīn* cannot violate "live", "property", "personal integrity" and "personal chastity and honor" of any *kafir* even-though they are not Muslim and they do not have *aman.*[335] It is just because they naturally possess inviolability since they are respect-deserving creatures (*zu karamah*). Parallel, no one can violate personal integrity and chastity of a *kafir musta'mīn* in a Muslim territory. Otherwise, it would be an un-Shariah action requiring *diyāt.*[336]

Everyone possesses inviolability of personal integrity and personal chastity unless one is remained out of the protection the law by the "forfeiture of inviolability".[337] The inviolability of physical and psychological integrity is not absolute; instead, in some condition one can lose his inviolability in which his personal integrity remains unprotected before the law. For example, *kuffar* (the plural usage of *kafir)* possess inviolability, however, they lose their inviolability when they declare war against Muslim. The Shariah "left" their inviolability to punish their crimes they committed in the war.[338]

The issue whether or not "an accused with robbery" loses his inviolably to personal integrity has been controversial for a long time among Muslim jurists in Islamic jurisprudence. First of all, It is not Shari' to give fatawa that a thief would be

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[332] Ibid, Kitab 'l-Diyāt, Vol.10, Pg. 79.
[333] Ibid, Kitab'l-Cihad, Vol.3, Pg. 186
[334] Ibid, Kitab'l-Cihad, Vol.3, Pg. 197.
[335] Aman is a guarantee of protection of fundamental rights of non-muslims given by muslim states that no one shall violate their fundamental rights in the muslim territory. Aydın, Mehmet Akif, *Türk Hukuk Tarihi*, Pg. 157 ff.
[336] Ibid, Kitab'l-Cihad, Vol.3, Pg. 195.
[337] Ibid, Kitab'l-Cinayat, Vol.10, Pg. 18.
[338] Ibid, Kitab'l-Cihad, Vol.3, Pg. 187.

tortured and beaten in principle since *zulm* is un-shari' (*haram*) in Islamic jurisprudence. The jurists formalized the principle as "*ikrah 'l-mukrehi batilun*"[339] in the meaning of "the confession of forced one is not valid" in the literature.

The inviolability of the accused with robbery has remained in principles. For example, in case of the fact that an accused one with robbery escapes for the fear of exposing torture and he falls down and injures or dies while he is trying to escape, the complainant shall be subject to the *diyāt* if the accused one is innocent. Moreover, in case of the fact that an accused one with robbery is exposed to torture because of a false statement of the complainant, the complainant shall be subject to the *diyāt.*[340]

The fact remains that some Muslim jurists state that qadi can punish an accused with robbery by *ta'zir* penalty if the accused one is "previously convinced" and there is strong evidence and violent presumption (*zann-ı ghalib*) that he committed the robbery. Some jurists give fatawa the forced confession is valid if an accused one confesses that he committed a crime of robbery. Ibn Abidin narrated from the Fatwa of Bezzaziyya that some jurists, on the other hand, state that the confession cannot be utilized to give a verdict of *hadd* penalty while the confession is valid in term of compensation.[341] Some jurists such Merginani (*Kitab 'l-Tecnis*) , however, totally rejected to use forced confession in prosecution. Ibn Abidin appropriate the opinion the fact that the confession is valid in case of the fact that the truth revealed as a consequence of confession that the accused one is guilty. But the confession cannot use to give a verdict of *hadd* penalty.[342]

The violations of Sultan and state officers against individual's inviolability of personal integrity and personal chastity are entitled as "*zulm*" in fiqh literature. The action of killing, beating, suffering, torment, swearing, and insulting acted by state

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[339] Ibid, Kitab'l-Dava, Vol. 5, Pg. 221.
[340] Ibid, Kitab'l-Sirkat, Vol. 3, Pg. 92.
[341] Ibid, Kitab'l-Sirkat, Vol.3, Pg. 101.
[342] Ibid, Kitab'l-Sirkat, Vol.3, Pg. 105

officers are entitled as *zulm*.[343] In that sense, for example, "to exile a corrupted man into another town" is *zulm* since the exiled man would breach the public order in the town he is exiled into[344]. Moreover, it is *zulm* if "the Sultan executes someone who committed a theft only once".[345] Furthermore, it is *zulm* "if a ruler forces someone to be engaged in farming who wants to be engaged in education".[346]

The *zulm* is not only for Muslims, instead, the violations of the Sultan and state officers against non-Muslim are evaluated as *zulm* in Islamic jurisprudence. For example, "to grand an *aman* (resident permit) for a *kafir mustaʾmīn* in a period in which it is not enough to settle his affairs" is a *zulm*.[347] Furthermore, a Muslim ruler must inform the non-Muslim state if he wants to break the peace. It is *zulm*, therefore, if the ruler attacks to a non-Muslim state without giving any warning. Moreover, it is *zulm* "to assault a castle or a city of non-Muslims without giving enough time to recover their supplies and build the walls" in case of the fact that the Muslim army attacked the city and damaged the walls before.[348] In addition to that, it is *zulm* "to attack a city of non-Muslis without giving any proposal to peacefully deliver the city".[349]

The sultan is liable for his violation of personal integrity and personal chastity. Ibn 'Abidin narrates the opinion of Haniyye that "the sultan shall be disenthroned if he acts in *zulm* and *cevr* in case of the fact that the dethronement shall not cause *fitna* which is worse than the *zulm* of the Sultan".[350] Moreover, the rebels are not regarded as criminals (bağî) if they revolt against the Sultan because of his *zulm*. Furthermore, Ibn 'Abidin narrates the from *Feth'ul-Kadîr* written by Ibn Humam that it is obliged to the Muslims helping to the rebels until the Sultan has

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[343] Ibid, Kitab'l-Bugat, Vol.3, Pg. 243.
[344] Ibid, Kitab'l-Hırabe, Vol. 3, Pg. 127.
[345] Ibid, Kitab'l-Sirkat, Vol. 3, Pg. 112
[346] Ibid, Kitab'l-Cihad, Vol. 3, Pg. 189.
[347] Ibid, Kitab'l-Cihad, Vol.3, Pg. 176.
[348] Ibid, Kitab'l-Cihad, Vol. 3, Pg. 193.
[349] Ibid, Kitab'l-Cihad, Vol. 3, Pg. 179.
[350] Ibid, Kitab'l-Bugat, Vol. 3, Pg. 232.

begun to rule by justice in case of the fact that the rebels revolt against the sultan because of his *zulm*.[351]

The state agents are also liable for their violent acts against the personal integrity and personal chastity. Everyone has a right to complain about a state agent including *wali* and qadi who violate the personal integrity of subjects. The central authority sent an inspector to investigate the complaint whereby the subject of complaint was punished if the complaint was true.[352]

I do not treat the Reactions and Groundings of Contemporary Muslim Thinkers here since I deal with the issue at the end of the following chapter.

c) Torture to Extract Confession (Forced Confession): As an Example of the Effect of Ulama and the Superiority of Shariah

In this section, I attempt to illustrate (i) un-Shari (unlawful) forced confession practices of Sultan's law and (ii) ulama reactions against these practices in the 16th century Ottoman Empire. Furthermore, I compare and contrast the legal status in the 16th century and late Ottoman Empire period in an attempt to speculate about the effects of administrative transformation in the 17th century on the practice of Sultan's law, of a transformation through which the sense of rule shifted from absolutism to a pre- modern constitutionalism.

There is a consensus among Muslim jurist that torture is prohibited in due process of investigation, prosecution, and punishment execution. Despite the fact that it is forbidden in Islami law, Sultan's law ('*urf*) utilized torture as a means of confession in 15th and 16th centuries. Even forced confession was institutionalized by Sultan's law thereby it was regulated and justified in *Kanunnames* in 15th and 16th centuries. Nevertheless, in an attempt to legitimate legislation and executions on forced confession, Sultan's law adduced Dede Cöngi's (d. 1567) narration in his

[351] Ibid, Kitab'l-Bugat, Vol. 3, Pg. 215.
[352] Tuğluca, Murat, *Osmanlı Devlet-Toplum İlişkisinde Şikayet Mekanizması*, Pg. 89. ff.

Shari'a Politics *(Siyasa Shar'iya)* in which he states that some Hanafi jurist allowed torturing a thief to detect the location of stolen goods.

Dede Cöngi's Arabic book, *Siyasa Shar'iya* is regarded as the most famous and influential work in Shari'a Politics literature since it has had a strong influence over the sense of Ottoman Shari'a politics for a long period between16th and 20th centuries. Dede Cöngi's *Siyasa Shar'iya* has an important role in the context of my study as well. The book, which was translated and expounded several times in 17th and 19th centuries according to the contemporary perception of jurisprudence of translators, give us an opportunity to observe the transformation of the status of forced confession in Ottoman law in the course of time.

One rightfully can say that, in 16th century, the Sultanic regulations that allow torture had broadened an exemption that was conditioned and limited by "serious acquisitive crimes" and the presence of a final verdict. Indeed, the ulama believed that Sultan's law misused the exemption of torture whereby it extended the scope of the exemption. The ulama, therefore, attempted to militate against these regulations and executions. They clearly noted in Shariah court records that the confessions had been extracted by torture were unlawful whereby they considered these confessions invalid in term of procedural law. Furthermore, they enunciated in contemporary fatawa literature that forced confession was obviously prohibited in Islamic law. Eventually, prohibition of all kind of torture, including torture to extract a confession, has consolidated its position in Ottoman jurisprudence since 17th century whereby the Sultanic regulations that allowed forced confession were abrogated in later regulations.

Parallel, the 19th-century ulama, Shayh al-Islam Mehmet Ali Efendi (d. 1858), who translated Dede Cöngi's *Siyasa Shar'iya*, expounded the issue of forced confession in his translation according to the contemporary perception of prohibition of torture in the jurisprudence.

In this chapter, I try to illustrate formation of prohibition of forced confession by comparison and contrast between the 16th-century Ottoman law and the Tanzimat

law in an attempt to enlighten the effect of ulama objection on the formation of prohibition of torture in the Ottoman law.

(1) Procedural Law and "Means of Proof" under Islamic Law

A legal procedure is a set of legal transections, which arise from the actions of judicial bodies to settle legal disputes. The field of law that regulates these legal transections is called "procedural law".[353]

Procedural law goes into division as "civil procedure", "criminal procedure", "administrative procedural law", and "constitutional jurisdiction" in modern law today. In Islamic law, on the other hand, there was not a division as "civil procedure" and "criminal procedure" while the cases were divided as civil cases and criminal cases according to their contents. [354]

Means of proof are a set of evidences and material method, which are utilized to prove a fact asserted in due process. In fıqh literature, means of proof were termed as *huccah*, *bayyinah*, or *burhan.* [355] The Muslim jurists generally dealt with the issue of the means of proof in the sections of "*dava* and *bayyinat*" in fiqh cannons. Parallel, the means of proof were regulated in the section of *"Kitabü'l-Beyyinât ve't-Tahlif"* in Majallah. [356]

The concept of *bayyinah* represent the means of proof which sense certainty and reveal the reality, thereby vanishing suspicions and possibilities in the legal dispute in procedural law under Islamic law.[357] The means of proof in Islamic law can be named as *Iqrar* (confession), *shahadat* (testimony), *yemn* (oath), *nuqûl*, *qasâme* (formation of oath), *ilmu'l-kâdî* (professional experiences of judge), *ehl 'l-*

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[353] Kunter, Nurullah, Yenisey, Feridun, Nuhoğlu, Ayşe, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, Beta Publication, İstanbul, 2010, Pg. 5; Toroslu, Nevzat, Feyzioğlu, Metin, *Ceza Muhakemesi Hukuku*, Savaş Publication, Ankara, 2017, Pg.1.
[354] Atar, Fahrettin, *İslam Yargılama Hukukunun Esasları*, İFAV Yayınları, Istanbul, 2013, Pg. 183-184.
[355] Ibid, Pg. 37.
[356] Erbay, Celâl, *İslam Ceza Muhakemesi Hukukunda İspat Vasıtaları*, MÜİFY, İstanbul, 1999, Pg. 57.
[357] Ibid, Pg. 56.

hibra (expert evidence), *karina* (presumption), *keshf* (view) ve *bayyinah maktubah* (written evidences).[358]

(2) The Status of Illegally Obtained Evidences in Due Process in Islamic Law

The purpose of modern procedural law is characterized as revealing the "material fact" thereby investigating the reality in a way that (i) protecting the rights and freedoms of individuals and (ii) minding the public interest.[359] In term of the means of proof, modern law attempted to redress a balance between individual rights and public interest whereby the evidences obtained by violating individual rihgts were considered invalid in due process in the modern procedural law. That is why modern law says, "fruit of a poisonous tree is poisonous".

Islamic law has a distinctive system in terms of the purpose of procedural law of criminal cases. Islamic law divides the crimes as "the crimes that violate Allah's rights" and "the crimes that violate individual's rights". For example *hudud* crimes (crime with a mandatory fixed punishment) are considered as "the crimes that violate Allah's rights" by Islamic law. According to this division, the purpose of procedure is not to reveal the material fact and punish the accused in *hudud* crimes. It is not desired to reveal the material fact and give a *hadd* crime publicity if the crime has not had publicity yet. Therefore, it is left to field of responsibility between Allah and individuals in which there were not crimes but sins. It is also the case in the *tazir* crimes (all crimes out of *hudud* crimes) that violate Allah's rights e.g. drinking alcohol.[360] In that sense, ill-gained evidences of a secretly committed crime that violates Allah's rights cannot be utilized in a criminal case since it is not a crime but a sin. It is not approved a secretly committed sin to gain publicity throughout ill-gained evidences in Islamic law. However, the evidences can be used in criminal

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[358] Atar, Fahrettin, *İslam Yargılama Hukukunun Esasları*, Pg. 38.
[359] Akbaş, Mehmet, "5271 Sayılı Ceza Muhakemesi Kanunu Çerçevesinde Müdafaa Makamının Görev ve Yetkileri Yönünden Hukuki Statüsü", *DÜSBED*, Diyarbakır, 2006, Pg. 22.
[360] Akman, Mehmet, *Osmanlı Devletinde Ceza Yargılaması*, Pg. 20.

procedure if (i) a crime that violates Allah's rights is committed in public and (ii) the evidences were gained in a lawful way. [361]

In the *tazir* crimes that violate individual's rights, on the other hand, the procedural law purposes to reveal the material fact. According to general principle, evidence can be utilized to prove the material fact if an evidence is authentic (*sahih*), precise and correct even-though it is illegally gained. For example, in case of the fact that some stolen goods have been explored as a consequence of an offense of breaking into a house, the offense of breaking into the house is illegal and requires punishment since "spying" (*tacassus*) is forbidden[362] while the evidences that found as a consequence of the offense were not neglected whereby they can be utilized in the criminal procedure of a theft case. In that sense, ill-gained evidences can be based on a verdict if the evidence is authentic, precise and correct while the evidences cannot be utilized to reach a verdict in case of the fact that the illegality corrupts the authenticity, precision and correctness of the evidence. For example, forced confession cannot be based on a verdict of guilty since the authenticity, precision and correctness of the evidence of confession may be corrupted by torture.

(3) The Status of Forced Confession in Due Process under Islamic Law

Confession is an admission of accused person that he committed the accused crime. According to rule of procedural law in Islamic law, the confession must be clear and explicit. One who makes a confession must be sober, conscious and cognizant. One who makes a confession must express the confession in a way the fact that it is undoubtedly clear how one committed the crime. The confession must be made in front of the court and in the course of trial (judicial confession). For Hanafi, an extrajudicial confession is invalid in terms of procedural law. According to other three school, it is required at least two witnesses for the validity of an extrajudicial confession. One who makes a confession can retract his/her confession

[361] See for further information: Akman, Mehmet, *Osmanlı Devletinde Ceza Yargılaması*, Pg. 21.
[362] Ebu Zehra Muhammed, *İslam Hukukunda Suç ve Ceza*, Trns. İbrahim Tüfekçi, Kitabevi Publication, İstanbul, 1994, Pg. 58.

until the execution of the punishment of the crime that one confessed to commit. In case of the fact that one retracts his/her confession, the punishment cannot be executed because of the existence of a doubt. [363]

Many Muslim jurists categorically and absolutely refuse forced confession. All kind of torture and inhuman treatments, which is forced on an accused person who confessed to commit a crime, abuse the validity of the confession.[364] Even a judge cannot force an accused person to confess, rather, it is expected from the judge to inculcate in accused person who confessed to retract his/her confession.[365] Parallel, Dede Cöngi narrates from *Fetava-yı Haniye* that the judge is encumbered to confirm the validity of a confession on which he return a verdict of guilty.[366] In case the fact that a judge forces an accused person to confess and gives a verdict of guilty whereby he causes to execute a corporal punishment to accused person, the judge is obliged to compensate the damages which may be end up with retaliation (*qısas*).[367]

(4) The 16th Century Practices

Some Hanafi jurists make an exeaption of prohibition of forced confession for only the criminal procedures of "serious acquisitive crimes". A 16th-century ulama, Dede Cöngi, narrates that some Hanafi jurist allowed torturing an accused person to learn the location of stolen goods and the names of other participants in a condition of the fact that (i) the committed crime was a serious acquisitive crime, (ii) the accused person was a repeater and (iii) it had been already proven by other

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[363] Erbay, Celal, *İspat Vasıtaları*, Pg. 190-209
[364] Aydın, Hakkı, *İslam ve Modern Hukukta İşkence*, Beyan Publications, Istanbul, 1997, Pg. 225.
[365] Bayindir, Abdülaziz, *Islam Muhakeme Hukuku ve Osmanlı Devri Uygulaması*, Süleymaniye Vakfı Publication, Istanbul, 2015, Pg. 57.
[366] Erel, Zeynep Gül, "Dede Cöngi's Risâletü's-Siyâseti'ş-Şer'iyye: A Context Analysis Through its Translations in the Sixteenth and the Nineteenth Centuries", MA Diss., İhsan Doğramacı Bilkent University, Institute of Social Science, Ankara, 2012.
(available at: Http://Www.Thesis.Bilkent.Edu.Tr/0006740.Pdf, accessed: 17.10.2017), Pg. 87.
[367] Dede Cöngi, "Siyaset-i Şeriiye", Ed. and Trns. Meşrepzade Mehmet Arif, Tercüme-i Siyasetname (1858), in Akgündüz, Ahmet, *Islam ve Osmanlı Hukuku Külliyatı: Kamu Hukuku Vol.1*, Imak Press, Istanbul, 2011, (pp. 556-601), Pg.164; Akman, Mehmet, *Osmanlı Devletinde Ceza Yargılaması*, Pg. 81.

evidences that the accused person committed the accused crime. [368]

Sultan's law ('*urf*), on the other hand, utilized torture as a means of investigation in 15th and 16th century. Torture was termed as "*işkence",* "*örf*" and *örf-i maruf*" in the literature of Sultan's law. The contemporary Shariah court records illustrates that accused people were tortured by Sultan's officers in case of the fact that there were another strong evidences, violent presumptions, and criminal records (*töhmet-i sabıka)*. They also show that, time-to-time, officers tortured those who had no criminal records as well.[369]

'*Urf* tented to break the prohibition of torture whereby sometimes they have arbitrary practices that violate the prohibition of torture. This tendency, even, manifests itself in sultanic regulations (*Kanunnames*) in 15th and 16th centuries such as *Celalzade Kanunama*[370], Beyazıt the Second General *Kanunname*[371], and *Aydıneli Siyasatnama*[372] in which they contain provisions that allow state officers torturing accursed people whereby it legally protect the torturer officers. According to Kanunname regulations, it is possible to torture a thief to learn the location of stolen goods and the places of other participants of the crime if there were another evidences to cause violent presumptions. Furthermore, *kanunname* provisions forbid bringing a suit against a torturer officer who causes death as a consequence of torture.

On contrary to general acceptance, Dede Cöngi's *Siyasa Shar'iya* contains some provisions that allow torturing an accused one in some condition. Dede Cöngi

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[368] The original text: "*darb-ı siyad… ile ikrar-ı müttehem her ne kadar tazmin-i emvalde müteber ise de lakin şübhe ile münderi'e mündefi' olan hudud ve kısasda mutlaka gayr-ı caizdir*." Dede Cöngi Efendi, "Es-Siyasetü'ş-Şer'iyye", Pg. 161.; Tuna, Abdullah Sabit, "Osmanlı Siyasetname Geleneği İçinde Dede Cöngi'nin Yeri ve Eserinin Tahlili", Phd Diss., Istanbul University, Institute Of Social Sciences 2011, Pg. 60.

[369] Akman, Mehmet, *Osmanlı Devletinde Ceza Yargılaması*, Pg. 84.

[370] Original text*;"… ve hırsız taifesi işkencede ikrar etse ikrarından gayrı alaim dahi delalet etse ol ikrar muteber ola.*", Celalzade Kanunnamesi III, (Reign Of Selim the Second), Art. 319 in Akgündüz, Ahmet, *Osmanlı Kanunnameleri*, Vol. 7, Pg. 357.

[371] Beyazid the Second General Ottoman Kanunnama, Art. 32, 39, 40; Akgündüz, Ahmet, *Osmanlı Kanunnameleri*, Vol. 2, Pg. 43,44.

[372] Original text; "…*ve işkencede ölenin davasını sormayalar*", Aydın-Eli Siyasetnamesi (Reign Of Beyazid the Second), Art. 10; Akgündüz, Ahmet, *Osmanlı Kanunnameleri*, Vol. 2, Pg. 170.

narrates from *Mecmu'ul Fatawa* that Hasan bin Ziyad gave a fatawa that a thief can be beaten to confess in a manner the fact that his skin would not deform. Moreover, he narrates from *Hizanet'ül Müftiyyin* that some Hanafi jurists gave fatawa that it is approvable to extract confession from a thief.[373] Nevertheless, Dede Söngi argues that only a thief with criminal record (*tömet-i sabıka*) can be beaten only to extract information about compensation of the stolen goods whereby.[374]

(5) The Reactions of Ulama

Ulama have militated against unlawful and arbitrary actions of Sultan's officers (*ahl 'l-urf*) in terms of the protection of fundamental rights of individuals throughout the history of the Ottoman Empire.[375] The 16th-century Ulama objected regulations and executions of Sultan's officers (*ahl 'l-urf)* that violated the prohibition of torture in their fatawa collections and contemporary Shariah court records whereby they attempted to prevent the unlawful practices of torture of Sultan's officers.

Bannerlord of Akkriman complained to the Sultan about a q*adi* the fact that q*adi* did not accept a forced confession as an evidence in a criminal case and did not punish the accused person. In return, the Sultan acted in conformity with the stand of q*adi* whereby he ordered to treat those who willingly confess his/her crime in accordance with the divine law (*şer-i şerif*).[376] In another similar case, however, the Sultan ordered in a kanuname that q*adi* should not interfere the affairs of Sultan's officers when q*adi* decided that the confession extracted by torture was invalid.[377]

According to a Shariah court record dated 1561, it seems that Sultan's officers

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[373] Tuna, Abdullah Sabit, "Dede Söngi", Pg. 60.
[374] Dede Söngi, "Siyaset-i Şeriiyye", Pg. 591.
[375] See for the instances of disputes between ulama and urf trouhgout the history of the Ottoman empire; Hurgronje, C. Snouck, "On the Nature of Islamic Law", in *Selected Works of C. Snouck Hurgronje*, Ed. G-H, Bousquet &J. Schacht, Leiden, 1957, Pg. 264-267.
[376] Akman, Mehmet, *Osmanlı Devletinde Ceza Yargılaması*, Pg. 158.
[377] Origal text: *işkence ile ikrar edene kadı araya girmeye; ikrar ettüği nesneyi bulduralar veyahud ödede*. Aydın-Eli Siyasetnamesi (1493), Art. 8; Akgündüz, Ahmet, *Osmanlı Kanunnameleri*, Vol. 2, Pg. 170.

tortured an accused person to confess and the accused person reported to the *qadi* that he had been exposed to torture and *qadi* did not accept previous statements and confessions of accused person.[378]

Of prominent jurists of the 16th century, Ebu Suud Efendi (d. 1574) and Çivizade Muhyiddin Mehmet (d. 1547) stated that the forced confession of an accused person was invalid in procedural law in their fatawa collections.[379] Even, Ebu Suud Efendi vigorously criticized the provisions of current *kannunnama* that provided the torturer officers an immunity against legal procedures[380] whereby, contrary to current kanunnama regulation, He gave a verdict of guilty against a banner-lord, who caused a "torture murder", to compensate blood money of the murdered. In another similar case, He sentenced a perjurer (false witness), whose testimony causes an accused person to be exposed torture, to imprisonment (*habs-i medid*) and severe penalty (*ta'zir-i şedit).*[381]

Parallel, in Fatawa-i Ali Efendi, canonized in 17th century fatawa literature, it is clearly stated that forced confession of theft is invalid in procedural law whereby accused person cannot be sentenced according to the forced confession.[382]

(6) The Status of Forced Confession in the *Tanzimat* Law

There is a remarkable decrease in the provisions of Sultanic regulation that allow forced torture in the later centuries of the 16th century along with the increase of the influence of ulama on the Sultanic regulation. it was, even, noted "there is no *urf*, it is wrong", "no one can execute unless his crime is enlightened by Shariah" by writes (*nişancı*) in the corner of the manuscripts whereby the provisions on torture in

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[378] Akman, Mehmet, *Osmanlı Devletinde Ceza Yargılaması*, Pg. 85-86.
[379] Form Menekşe, Ömer, "xvii ve xviii. Yüzyıllarda Osmanlı Devletinde Hırsızlık Suçu ve Cezası", Phd Diss., Marmara University, Institute Of Social Science, Istanbul, 1998, Pg. 100.
[380] Original Text:"*... amma işkencede ihtiyat edeler ki kable'subut telef-i nefs olmaya, eğer işkencede ölür ise dem yokdur, davsı sorulmaya*", Akgündüz, Ahmet, *Osmanlı Kanunnameleri*, Vol. 4, Pg. 369.
[381] Düzdağ, Ertuğrul, *Şeyhülislam Ebu 's-Suud Efendi Fetvaları Işığında 16. Yüzyıl Türk Hayatı*, Enderun Publication, Istanbul, 1983, Pg. 138-139.
[382] Demirtaş, Necati, *Açıklamalı Osmalı Fetvaları*, Kubbealtı Publication, 2012, Istanbul, Pg. 335.

the Sultanic regulations has been abrogated.[383] The distinctive feature of the Sultanic regulations after 16th century is the fact that the regulations has been institutionalized through which the regulations were produced in a system, known as *maruzat,* in which the fatawa of sheikh al-Islam has become a generally binding provisions by means of the affirmation of the Sultan. Some state that, therefore, the Sultanic regulations issued after 16th century were more consistent with the general doctrine of the Islamic jurisprudence.

The prohibition of forced confession consolidated its position in jurisprudence in 19th century along with a gradually increasing emphasize of rights and freedoms. The criminal code of 1858 certainly forbids the forced confession whereby it prescribes punishments for the torturer officers. The article 103 regulates that the judges, members of the supreme council (*meslis erbabı*), or any state officers shall be punished by "removal of public office" and "temporary confinement" if they order or perform torture or ill treatments against an accused to extract confession. The superior shall be punished in case of the fact that a subordinate officer acts according to an order of his superior.

Majalla clearly states that the forced confession is not valid. The article 1575 regulates that the consent is necessary in confession. Therefore, the confession extracted by force is not valid.

Shabuddin Alusi, who was a member of Ulama in Iraq in Tanzimat period, criticizes the execution of punishments. He argues that ruler has a right to determined new punishments in the sphere of *tazir*. But the punishments must be determined in a balance in which neither they should be too much gentle so criminals do not deter nor they should be too severe and inhuman.

Parallel to the developments on forced confession, Mehmet Arif Efendi reconditioned the provisions on the forced confession in Dede Cöngi's *Siyasa Shar'iya* in his translations in 19th century. Mehmet Arif Efedi argues that one should

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[383] Menekşe, Ömer, "Osmanlı Devletinde Hırsızlık Suçu Ve Cezası", Pg. 101.

be very careful when he treats an accused one according to status of evidences, witnesses, presumtions, and consistences of the accusations although ulama is allowed to punish one *siyasatan*. Otherwise it surpasses the limits of the just *siyasah* and causes a cruel and un-Shariah *siyasah*. For example, in a case of theft, the accused one should be jailed for no more than a couple days to explore the situation if there is no criminal record. The accused one who has a criminal record with repetitive theft should be jailed for a long time if he did not confess. An accused one with criminal record can be jailed for a long ride to confess if it is necessary in case of the fact that there is strong evidence that he committed the crime.[384] Nevertheless, Mehmet Arif Efendi does not affirm to torture accused one even-though there are strong evidences and criminal records. He claims that the fatawa of some jurists to torture was only for compensation and there is consensus among jurists that no one can be punished by virtue of forced confession. [385]

3. The Right of Liberty

The right of liberty means an immunity of freedom of individual to enjoy their rights according to their own will, free from any kind of restriction. The right of liberty has been restricted by means of two major institutions in history so far i.e. slavery and imprisonment in regards with my subject matter. The imprisonment is utilized by liberal law systems as a primary punishment today while all kind of slavery has been prevented for a number of decades.

The institution of imprisonment as an "exclusive punishment" is alien to the classic Islamic jurisprudence. The Empire, therefore, encountered a lot of difficulties in establishing the institution of imprisonment in the legal system whereby they cause many violations of rights in prisons while they easily adopted other re-forms of rights which steam form the classic Islamic jurisprudence, which I dealt with a couple of them above.

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[384] Köksal, Cüneyt, *Fıkıh ve Siyaset*, Pg. 218.
[385] Dede Cöngi, "Siyaset-i Şeriiye", Pg. 588 ff.

In this section I deal with the right of freedom in regards with the developments on slavery and imprisonment in Tanzimat law.

a) Documents and Subsidiary Legislation

The right of freedom in regards to "combating slavery and slave trade" takes a special place in the constitutional documents. There are numerous imperial edicts issued to prohibit any kind of slave trade and commerce of slaves in the Empire. The edict on the prohibition of slave trade in 1847 declares that the slave trade is prohibited since the slaves are transported in inhuman condition in which many slaves severely suffers or dies. The slave market in Istanbul was closed down by means of an imperial edict in the same year in combating slavery and slave trade.

However, there is no imperial edict totally abolishing slavery since the Islamic jurisprudence is not totally pan the slavery in principle. Nevertheless, the slavery is naturally abrogated in Ottoman society in the course of time.

The right of freedom in regards to "liberty binding treatments and punishments" does not take a remarkable place in a quantitate sense in the constitutional documents. The quality (importance) of expressions, on the other hand, is essential in terms of the fact that it clearly shows the Western influence on the formation of "liberty binding punishments" in Tanzimat law.

The Imperial Edict of Reform declares that inhuman and degrading conditions of détentions centres shall be enhanced as soon as possible, so as to reconcile the rights of the people. It is noteworthy in terms of the manifestation of Western influence that the expression, "the right of the people" (*hukuk insaniyye*), is the only expression I found in my research in the primary sources of Tanzimat law that is a replica of the expressions used in the western bill of rights.

Another example for the right of freedom in terms of liberty binding punishments is located in the Imperial Edict of Justice. The edict declares that no one shall be kept in prison without receiving a final verdict of guilty.

Regarding subsidiary legislation, on the other hand, "binding the liberty" gradually took more and more places in the codes.

The criminal code of 1840 prescribes some liberty binding punishments in addition to the capital punishments, *qısas*, *diyat,* corporal punishments and pecuniary penalties. Furthermore, The section twelve-article two of the code guaranties that on one shall be kept in prison without receiving a final verdict of guilty before the constitutional guaranty of Imperial Edict of Justice.

The criminal code of 1851 prescribes some measurements for the enhancement of the condition of prisons. The section one-article five-teen regulates that the cost of living and clothing of the female prisoners shall be covered by the state treasure if she has no next of keen that can support her. Moreover, the section three-article sixteen regulates that a prisoner is allowed to spend his period of sickness in his home to rest and recover if he is extremely sick. The period of sickness exclude from his period imprisonment. Furthermore, the section three-article seventeen regulates that the cost of living and clothing of needy prisoners shall be covered by the local treasure if they have no next of keen that can support them.

The criminal code of 1858 prescribes a revolutionary system in punishments whereby it regulates the imprisonment as the principle punishment. Many corporal punishments and pecuniary penalties are replaced with liberty binding punishments such as confinement (*kalabentlik*), penal servitude (*kürek*), and imprisonment.

The unlawful violations of the right of freedom are regulated more detailed then previous criminal codes in the criminal code of 1858. First of all, the code legalizes “the unlawful detention”. The article fourteen regulates that no one shall be taken in to custody unless it is necessary according to law. Secondly, the section four determines the punishments of the crimes against liberty such as “false imprisonment”, “unlawful detention” and “deprivation of liberty”.

The section four-article two hundred three regulates that whomsoever one shall be punished by “imprisonment” for six months to three years if he (i) puts someone in prison or (ii) takes someone in custody or (iii) deprives someone from his freedom officer outside of cases determined by law and outside of the procedure determine by law without an order of state officer. Moreover, the article two hundred

four regulate that one who commits the foregoing crimes by (i) wearing the clothes of state officers or (ii) using fake identity of a state officer or (iii) submitting a false order shall be punished by "temporary penal servitude". Moreover, the article two hundred six regulates that one shall be punished by "imprisonment or penal servitude" if he deprive a child or an adult from her freedom.

b) Islamic Jurisprudential Foundations and Contemporary Groundings

(1) The Jurisprudence

All human being have the right of freedom according to Islamic jurisprudence in terms of humanity. Muslim jurists formalized this principle as the fact that "no one is slave of another as a human".[386]

Freedom is associated with inviolabilities in Islamic jurisprudence since the freedom is acquired with humanity and inviolabilities are the essentials of the human beings. For example, it is noted in Radd 'l-Mukhtar that one shall possess a full inviolability if he has become free from slavery.[387] In that sense, the freedom is "a full control on the enjoyment of inviolabilities" in Islamic jurisprudence.

The freedom is not absolute in Islamic jurisprudence. There are two major cases restricting the freedom i.e. "liberty binding punishments" and "interdiction (*hacr*)" in Shariah.

The liberty binding punishments are not primary punishments in Islamic jurisprudence.[388] Thus, they are categorized under the *tazir* punishments in fiqh.[389]

The liberty binding punishments can be named as imprisonment, penal servitude (forced labor). The punishment of imprisonment is split into two i.e. (i) the imprisonment with duration and (ii) the imprisonment without duration in Islamic

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[386] Ibn Âbidîn, *Hâşiyetu Reddü'l-Muhtâr*, Kitab'l-Hacr, Vol. 7, Pg. 103.
[387] Ibid, Kitab'l-Cihad, Vol. 3, Pg. 176.
[388] Rousental, Franz, "The Muslim Concept of Freedom prior to the Nineteenth Century" in *Man versus Society in Medieval Islam*, Ed. Dimitri Gutas, Brill, Leiden, 2014, Pg. 57.
[389] Ibn Âbidîn, Hâşiyetu Reddü'l-Muhtâr, Kitab'l-Hadd, Vol. 3, Pg. 18.

jurisprudence.[390] The imprisonment with duration is limited with a determined period while the imprisonment without duration is characterized as a period of imprisonment lasting as far as the prisoner repents.[391] It is not allowed to execute a punishment of imprisonment for a long term.[392]

Some punishment of imprisonment in fiqh can be exampled as (i) "imprisonment for live" for intentional homicide, (ii) "imprisonment until repentance" for intentional injury, (iii) "imprisonment without duration" for repeating theft, (iv) "imprisonment" for the crime against public safety, (v) "imprisonment until repentance" for the simple highway robbery, (vi) "imprisonment" for rebellion agains legitimate state (*bağy*)[393]

Imprisonment was generally utilized as a means of detention in which accused people were kept in as percussion or convicts were kept in until the punishment would be executed. It is noteworthy in terms of the right of freedom that the period of detention was determined and limited in Ottoman law. Dede Cöngi regulates in his *Siyasa Shar'iya* that a prosecutor (*wali-i cerayim*) can hold an accused one in confinement as percussion, not more that one month, to investigate the situation and enlighten the doubts. The qadi never engage a sentence of confinement unless Shariah did not prescribes.[394]

"Interdiction" is another exemption of freedom in Islamic law. The issue of interdiction is treated by Islamic jurisprudence under the name of *hacr*. *Hacr* is an inability of benefiting personal properties.[395] In that sense, *hacr* is a temporary status of the restriction of inviolability of property in terms of inviolability. The other inviolabilities of an interdicted person (*mahcur*), on the other hand, remain operational. For example, the inviolability of life, personal integrity, personal

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[390] Akgündüz, Ahmet, *Islam ve Osmanlı Kamu Hukuku Külliyatı*, Vol.1, Pg. 535.
[391] Ibn Âbidîn, *Hâşiyetu Reddü'l-Muhtâr*, Kitab'l-Hadd, Vol. 3, Pg. 12.
[392] Yılmaz, Metin, "Islam Tarihinin Ilk Üç Asrında Hapishanelere ve Mahkumların Durumlarına İnsan Hakları Bağlamında Genel Bir Bakış", *OMIFD*, Vol. 12-13, 2001, Pg. 576.
[393] Avci, Mustafa, *Osmanlı Hukukunda Suç ve Cezalar*, Gökkubbe Publication, Istanbul, 2004, Pg. 95.; Ibn Âbidîn, *Hâşiyetu Reddü'l-Muhtâr*, Kitab'l-Hadd, Vol. 3, Pg. 23.
[394] Dede Cöngi, "Siyaset-i Şeriiye", Pg. 583-582.
[395] Ibn Âbidîn, *Hâşiyetu Reddü'l-Muhtâr*, Kitab'l-Hacr, Vol. 7, Pg. 186.

chastity, inviolability of thought (*ismat 'l-aql*) and inviolability of religion of an interdicted person are protected. The Muslim jurists has a consensus on the following the causes of interdiction; (i) pupillage (*sığar*), (ii) insanity (*cünun*), (iii) senility (*ateh*), (iv) slavery (*rikk*), (v) fatal disease (*marad 'l-mavt*), and maleficence (*darar-i ûmm*).[396]

Slavery is not a natural cause of interdiction while pupillage and insanity are natural causes according to Hanafi jurists.[397] Slavery is, naturally and virtually, not a cause of interdiction. Slavery is an actual de-facto situation in which a slave cannot enjoy property since he and his properties are the property of the owner of the slave in which he cannot use his ability to pay. This is because it is necessary to block the ability to pay of a slave in order to establish an enjoyment of possession over the slave. Ibn 'Abidin narrated from Zaylani that a slave is an amendable human which has inviolability of aql (*sahib 'l-rey'*) and full inviolability to cover his needs in the natural state. Nevertheless, a slave is a interdicted person until he is liberated since he does not have to ability to pay. When he is liberated he re-gains the ability to pay, and by extension a full inviolability.[398] That is to say, a slave is deprived of ability to pay in an attempt to establish a relationship of slavery, which makes possible to benefit from him. He can, on the other hand, enjoy all other fundamental right including a limited right of freedom. Ibn 'Abidin narrates from *Feth'ul-Kadîr* that a slave would gain his liberty whereby he become "a person with full inviolability" when he enters to a non-Muslim territory since the benefit ship over him is canceled. Therefore, no one can take him as a slave.[399]

Slave possesses inviolabilities such as inviolability of life and inviolability of personal integrity. For example, a slave is equal to free one in term of *qısas* and *diyat*

[396] Ibid, Kitab'l-Hacr, Vol. 7, Pg. 175.
[397] Ibid, Kitab'l-Hacr, Vol. 7, Pg. 169.
[398] Ibid, Kitab'l-Hacr, Vol. 7, Pg. 183.
[399] Ibid, Kitab'l-Cihad, Vol. 3, Pg. 165.

since *qısas* and *diyat* are the principle of humanity and a slave is not slave of anyone in terms of his humanity.[400]

(2) The Groundings of Contemporary Muslim Thinker

I deal with the discourses of the contemporary Muslim thinkers on the right of freedom in an attempt to detect consistencies and divergencies in terms of classical Islamic jurisprudence.

Freedom is a motto in the thought of Namık Kemal. He bases his major idea on the concept of freedom. There are two kinds of freedom i.e. individual freedom and social freedom. The individual freedom is provides an individual to utilize and promote his all opportunities in his life, which necessitates justice and equality. The social freedom is independency which related to public sphere and the state. Law guarantees the individual freedom. Individuals have a right and duty to strive for his freedom if his right of freedom is violated. The social freedom is guaranteed by state since the nation and land is in danger when the state is under attack. The restriction of social freedom eventually violates the individual freedom since individuals of an occupied land would not enjoy individual freedom. Therefore, individuals must fight for the social freedom as they did for their individual freedom.

Said Nursi also describes freedom in *Münazarat.* The freedom is a situation in which no one shall violate others aside from legitimate and just law and execution (*kanun-u adalet ve te'dib*), all rights shall be preserved, every one shall be absolutely free in his licit actions (*harekat-ı meşrua*). The argues the the freedom is the command of the Qur'anic verse; "… *O People of the Scripture…not take one another as lords instead of Allah.*"[401] Moreover, for Nursi, the freedom in the meaning being free from every kind of restriction is a half freedom taht the animals of mountain also have. A comprehensive freedom pertain to human being is a freedom adorned with the wisdom (*marifet*) and virtue (*fazilet*). Furthermore, Nursi

[400] Ibid, Kitab'l-Cinayat, Vol. 10, Pg. 25.
[401] Nursi, Bediüzzaman Said, "Münazarat", Pg. 325-326. ; See for the Verse: Surah Âl-i 'Imrân (3:64).

argues that the freedom is an imperative of belief since once a man has become a servant of the Sultan of the Universe, neither he consents to enter into the domain of anyone owing to the dignity of his belief nor he violates rights and freedoms of others thanks to the compassion of his belief.[402]

Mehmet Seyyid Bey, who appropriates the theory of *ihtisas*, approaches the concept of freedom in a very different angle in terms of fundamental rights. He explains his idea by comparing and contrasting with the ideas of "individualist" philosophers.[403] He argues that the individualist theory states, "people are born free" while Muslim jurists states, "people are born to live". Living is an innate situation of people, which makes "life" a right (*hak*) for people. Freedom and possession are also an innate situation for life. People cannot live with out freedom and possession. That is why, freedom is naturally enclosed to life (*ihtisas*) and the freedom is a fundamental right for people since the life is a fundamental rights. These rights are indefeasible rights which no one or state has a right to disentitle these rights since they have not entitled by anyone or state before.[404]

Hüseyin Kazım Kadri is another Muslim thinker who dealt with the issue of human right and İslam in the late Ottoman Empire. He treated the concept of freedom and right in his articles after the Second *Meşrutiyet* whereby he compared and contrasted the idea of right and freedom in İslam and western scholarship. Evatually he compiled his thought in a book under the name of "*Teşri-i İnsani ve İlahi"* in 1933 in which he grounds some fundamental rights with Qur'anic verses and Hadiths. His book is edited by Osman Ergin under the name of "*İnsan Hakları Beyannamesinin İslam Hukukuna Göre İzahı"* on the occasion of the declaration of "International Bill of Human Rights" in 1949.[405]

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[402] Ibid, Pg. 326.
[403] Mehmet Seyyid Bey counts Rousseau and Kant as the individualist philosophers: Gedikli, Fethi, "Mehmet Seyyid Bey", Pg. 117.
[404] Ibid, Pg. 128.
[405] Kadri, Hüseyin Kazım, *İnsan Hakları Beyannamesinin İslam Hukukuna Göre İzahı,* (1933), Ed. from Teşri-i İnsani ve İlahi by Osman Ergin, Sinan Press, Istanbul, 1949, Pg. ıv.

He writes that the purpose of all political entity is the protection of the indefeasible, untouchable, innate and fundament rights of people. The rights are freedom, possibility, safety and standing against cruelty. The political entity is the government and the government is a sacred trust in Islam. The trust never entrusted to cruel and it never utilized to violate and restrict rights and freedoms of people. The sovereignty (*walayah*) is hinged upon the public welfare. The sovereignty must be relied on justice and rights since belief and cruelty never intertwine.[406] The freedom is a right to enjoy one's fundamental rights without any restriction in society. However the freedom is limited with the sphere of fundamental rights. Thus, he does not agree with liberal discourse arguing that people are free to do everything unless they do not intervene in the others' rights.[407]

c) The Formation and Reformation of Prison in the Ottoman Empire: As an Example of International Impositions

The formation and re-formation of the prison system in the late Ottoman Empire is a perfect example to examine how did the Ottoman bureaucracy encounter the International pressures in regards to guarantee of fundamental rights. The imprisonment as a liberty binding punishment has emerged in the west to substitute the corporal punishment along with enlightenment, humanitarianism, and liberalism at the end of 18th century. The Western States utilized the condition of ethnic minorities in detention houses (*mahbes*) in the Ottoman Empire to exert pressure on the Ottoman Empire to establish new prisons, and later on to re-form the condition of prisons. The Ottoman bureaucracy construed the pressures as the intervention in the internal affairs of the State. Thus, they deal with the issue of formation of the system of prison as a superficial political maneuver to keep the Western states away from their internal affairs. However, the contemporary Ottoman legal system based on Islamic jurisprudence was quite alien to the prison system which had steamed from

[406] Ibid, Pg. 46.
[407] Ibid, Pg. 48.

the philosophy of enlightenment. Unfortunately, the Ottoman Empire failed to establish and reform a prison system becase of the absence of philosophical and psychical substructure, and financial bottleneck which let variety of violation of rights in the poor conditions of the prisons.

(1) The Formation of Prison as a Liberty Binding Punishment in the West

The prison is a modern institution that emerged in 19th century. The corporal punishments such as "hanging alive", "burning at the stake", "throwing off cliff", "quartering", "branding", "whipping", "pillory", and "riding backwards on a horse" were the primary punishments in the England until the end of 18th century.[408] The thinkers of enlightenment such as Cesare Beccaria vigorously criticized corporal punishments for the fact that they were brutal and inhuman whereby they offered to rationalize and humanize punishments.[409] Beccaria states what have the most influence on the intellect of people is not the violence of punishment but the duration of punishment. The imprisonment of a criminal for a long time is much more deterrent then executing the criminal.[410]

The institution of imprisonment has been formed in Pennsylvania as an enlightenment project in an attempt to establish a humanist penal method. Two major systems developed i.e. (i) the Pennsylvania system of solitary confinement and (ii) Auburn system. The Pennsylvania system is a penal method in which prisoners were kept in solitary confinement in cells nearly 5 meters high, 4 meters long, and 2 meters wide in an attempt to foster penitence by isolation. Prisoners were not allowed to see no one except officers. A protestant sect, Quakers, established the system. The Auburn system, on the other hand, was a penal method in which prisoners worked during the day and were kept in solitary confinement at night in an absolute silence at all time. The prison structure, cells, and the seating arrangements

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[408] Yıldız, Gültekin, *Mapushane*, Pg. 12.
[409] Beccaria, Cesare, *Suçlar ve Cezalar Hakkında*, Trsn. Sami Selçuk, İmge Publication, Ankara, 2014, Pg. 129 ff.
[410] Ibid, Pg. 137-138.

at meal were specially designed to insure strict silence. The system was the modification of the Pennsylvania system of solitary confinement, established by bourgeois charities.[411]

Gültekin Yıdız associates the formation of prison with "the sanctification of human" in the enlightenment thereby he appropriates Karl Schimdt's theory prescribing the fact that the enlightenment is a secular theology" in which it secularized and rationalize the institution of catholic Christianity. The political power was substituted for the church representing the absolute power of God in the Earth while human was substituted for Jesus Christ who is the image of God in the Earth. It was accepted "cruel" and "inhuman" to violate psychical and psychological integrity of sanctified human by means of punishments. The political power, on the other hand, substitutes itself for God in educating and disciplining people in an attempt to provide obedience, coherence, and loyalty. In that sense, many institutions of modernity is, in fact, secularized version of catholic Christianity. For example, the Pennsylvania systems and Auburn were both based on an idea that criminals need "seclusion" in a quite place to contemplate in an attempt to regret for their crimes.[412]

For Foucault, the birth of prison is directly associated with modernity. The modern political power has a mission to educate, discipline, rehabilitate, and impose some sorts of mindset on people by means of the institutions of penitentiaries such as prisons, asylums, and barracks while pre-modern political powers aimed to "deter" people from criminal activities by means of public executions. He cites the system of "pentonvile" in England characterized by Bentham[413] in which it is aroused to feel that the political power unceasingly observes every action at any moment.[414]

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[411] Foucault, Michel, *Hapishanenin Doğuşu*, Pg. 345-346.
[412] Yıldız, Gültekin, *Mapushane*, Pg. 178.
[413] Bentham, Jeremy, *Panaptikon: Gözün Iktidarı*, Trans. Barış Çoban, Zeynep Özarslan, Su Publication, Istanbul, 2016, Pg. 14 ff.
[414] Foucault, Michael, *Hapishaneni Doğuşu*, Pg. 47.

The institution of imprisonment has spread like a wildfire all across Europa by the mid-19th century.[415]

(2) The Formation of Prison in the Ottoman Empire

The imprisonment was not a primary penal method in the classic ottoman legal system in conformity with Islamic jurisprudence in which the corporal punishments took a remarkable place. The detention centers (*mahbes*) were generally utilized to keep sentenced people before executing their punishments. The detention centers were generally small rooms for three or four people located under government houses in 1850's. The largest detention center in current period was the dungeon of navy yard in *Kasımpasha* in which convinced for severe penalties were generally kept. Yılmaz narrates a memory of the famous English economist, Nassau, who visit the dungeon in 1858 describing it as the fact that people were lying down under the light of sun which is impossible in the England. The dungeons were, in fact, more humanitarian places here.

The Ottoman bureaucracy did not regard the institution of prison as a token of modernity through which they can educate, discipline, and controlle social behaviors of citizens by means of "the environments of disclosure"[416]. The control of the central authority on prisons was quite a little. There was a sub-culture, on the other hand, operated de facto in prisons. Yıldız narrates a memory of Refi Cevat who described prisons in 1870's the fact that the manager of the prison sends a message to prisoners if an inspector is coming for the inspection whereby the gaming materials, cards, dices, and hashish are disappeared. The life maintains as before in the prison after the inspector turns back.[417]

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[415] Yıldız, Gültekin, *Mapushane*, Pg. 165.
[416] Gilles Deleuze characterizes social institutions such as prison, hospital, factory, school, and family as "the environments of disclosure". See for further information: Deleuze, Gilles, *Postscript on the Societies of Control*, Mit Press, No. 59, Winter 1992, Cambridge, (pp. 3-7), (available at: Http://Archtech.Arch.Ntua.Gr/Forum/Del-Control.Htm, accessed: 09.12.2017).
[417] Yıldız, Gültekin, *Mapushane*, Pg. 228.

The impositions of the Western states, on the other hand, had a remarkable effect on the formation and reformation of prison in Ottoman Empire. The British ambassador in Istanbul, Sir Standford Canning, was the first foreign diplomat who made the condition of prisons an issue of international matter in 1850.[418] He ordered consuls to visit around the detention centers all across the Empire and take inventory of the centers. Canning concluded after the inventory conduct that the detention centers were moist, dirty, and crowded; therefore, the Empire needed to build separate prisons if the minorities would stand trial in the jurisdiction of the Empire. Moreover, the British embassy insisted not to deliver the criminals minorities who committed crime and took refuge in the embassy unless the separate prisons would be built.[419]

The Ottoman bureaucracy regarded the attitudes of the British embassy as an intervention to his internal affairs in terms of judicial power. They decided, therefore, to build separate buildings as prisons in an attempt to avoid international interventions. The prisons were bungalow small buildings. The bureaucracy did not intended to establish "a monastery penitentiary" such in the West; instead, they intended to meet demands of foreign states superficially in an attempt to keep them away form their business. Even, they sometimes rented a house as a prison and the landlord has become guardian.[420]

The penal regime of ottoman criminal law has undergone a remarkable transformation along with the criminal code of 1858. The code appropriated "the liberty binding punishments" as the principle punishment. Many corporal punishments and pecuniary penalties such as *diyat* are replaced with the liberty binding punishments such as confinement (*kalabentlik*), penal servitude (*kürek*), and imprisonment.

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[418] Poole, Stanley L., *Lord Stratford Canning'in Türkiye Anıları*, Trns. Can Yücel, Ankara, 1988, Pg. 84.
[419] Yıldız, Gültekin, *Mapushane*, Pg. 102.
[420] Ibid, Pg. 116.

Akgündüz shares a report of a Netherlander jurist on the criminal code of 1858 summited to Sultan Abdulhamid the Second. The report vigorously criticizes the criminal code of 1858 in appropriating the liberty binding punishment as the principal punishment. The report states that it is not beneficial for humanity to replace the corporal punishment and pecuniary penalties such as *diyat* with liberty binding punishment since liberty binding punishments are more severe and violent punishments in contrast with the *hadd* punishments of Shariah. Moreover, the formation and re-formation of the substructure of the liberty binding punishments cost a lot that the state treasure would not afford.[421]

The Netherlander jurist was right about the cost of the prison system that the treasure of the Empire cannot afford it. The number of people in prisons dramatically increased in 1859, the congestion in prisons brought about a poor and fatal condition in which incidences of infectious diseases and death dramatically increased. For example, an infectious disease spread in a prison in Bosnia and three hundreds of prisoner get sick in which two hundreds and fifty of them have not stood trial yet and two hundreds of them dead. Building separate prisons has increased from that day forward. The first pilot prison has built in Sultanahmad in 1870. The prison did not based on solitary confinement such in the West although it was clean, organized, and hygienic.[422]

The number of prisoner in Armenians and Macedonians in prisons dramatically increase in 1880's since the separatist movements spread among them whereby the prisons overflowed. The condition of prisons has become an international matter once more. The ambassadors of foreign states demanded from the Empire to re-form prisons this time. The Empire attempted to reform prisons and enhance the condition of prisons. However, initiatives were mostly failed due to the lack of financial facilities.

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[421] Akgündüz, Ahmet, *Islam ve Osmanlı Hukuku Külliyatı, V.I-II*, OSAV, Imak Press, Istanbul, 2011, Vol. 1, Pg. 620.
[422] Tekin, Saadet, Özkes, Sevilay, "Cumhuriyet Öncesi Türkiye'de Hapishane Sorunu", *ÇTTAD*, Vol. 7, No. 16-17, Spring 2008, (pp. 187-201), Pg. 188.

(3) The Legal Initiatives to Enhance the Condition of Prisons

There are two regulations enacted in 1880 to regulate the conditions of prisons and guardians i.e. (i) the regulation on administration of detention houses and prisons, and (ii) the regulation on the guardians of prisons.[423]

According to article one, a detention house and a prison shall be established in every city center. Moreover, the detention house shall be pertaining to the detainees in investigation and prosecution processes while prisons shall be used pertain to the convicted prisoners.

Furthermore, the article six regulates that every detention house and prison shall have separate sections pertain to women detainees and prisons. In addition to these, the regulation orders to enhance psychical conditions of detention houses and prisons and build them in a standard.

4. The Right of Equality

The right of equality is one of the most common and controversial concepts in the literature today. There are various ideas on equality dealing with it in totally opposite angles such as "Liberal Egalitarianism", "Marxist equality", "Feminist equality", "political equality" and "liberation discourse". Each ideology appropriates a different scope and content of equality in accordance with their philosophical groundings although there is a consensus on the fact that each individual equals before law. The liberal egalitarianism prescribes "equality in opportunity"[424] in a capitalist market, while the Marxist equality seeks for "equality in the means of production"[425]. On one hand, mainstream feminism requires "gender equality against patriarchy"; on the other hand, political equality demands "ethnic and religious

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[423] See for the trascription: Yıldız, Gültekin, Pg. 193-200.; Ed. Levy Neomi and Toumarine, Alexadre, *Osmanlı'da Asayiş Suç ve Ceza 18.-20. Yüzyıllar*, Tarih Vakfı Yurt Publication, Istanbul, 2007, Pg. 186.
[424] Turner, Bryan, *Eşitlik*, Trns. Bahadır Sina Ülner, Dost Publications, Ankara, 1997, Pg. 45 ff.
[425] Callinicos, Alex, *Eşitlik*, Trns. Öncel Sencerman, Bilgesu Publication, Ankara, 2014, Pg. 37 ff.

equality[426]" in politics. Conversely, the liberation discourse totally rejects the state interventions in an attempt to provide equality in society.[427]

Above all, in regards of my thesis, one should ask the question the fact that "why is equality more popular than ever before in the modern times?". The ancient philosophers such as Plato, Socrates, Aristotle, and the mediaeval philosophers such as Avicenna, Ibn Rushd, Maimonides, St. Thomas, and al-Ghazālī speculated on "justice" while the philosophers of the enlightenment such as Hobbes, Locke, Mill, Montesquie, and Roussoe thought on "freedom". The modern thinkers such as Marx, Rawls, Giddens, *per contra*, remarkably dealt with "equality".

I deal with the question in regards to my fields of study. That is to say, I seek answer the questions the fact that "why did the idea of equality gain importance in the late Ottoman Empire?", "what was the status of equality in contemporary Islamic jurisprudence?", "how did the idea of equality resonate in the contemporary Muslim thinkers?".

The thing remains that I mainly deal with "equality before law" and "religion-based equality" since equality was mainly evaluated over ethnicity and religion in the current time. The gender-based equality was, currently, not on debate. The French Bill of Rights of 1789 declared that "men" are born and remain free and equal in rights. The class-based equality was, also, not on debate in Ottoman Empire in which there was no "proletariat" that had emerged as a consequence of industrial

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[426] Griffin, John D., Newman, Brian, *Minority Report: Evaluating Political Equality in America*, The University Of Chicago Press, Chicago, 2008, Pg. 3 ff.

[427] According to libertian discourse, many measures practicing by modern states are illegitimate and mean illicit intervention of liberties. Friedrich A. Hayek (1899-1992) states that every afford aiming to establish comprehensive economic equality is inevitably destined to become oppressive and cause to destroy free society. Hayek, Friedrich A., *The Constitution of Liberty*, University of Chicago Press, Chicago, 1960, Pg. 65.; For Milton Friedman (1912-2006), many widely accepted applications of modern states are illicit interventions of individual freedoms. Friedman, therefore, protests the legislation of minimum wage. He states that government has no right to prevent the taskmasters to pay out over their desired amounts. It is always possible to find the employees approving to work with the amount determined by taskmasters. He also argues that avoiding the governments the taskmasters from employing individuals by discriminating on sex, race, color, religion or any other ground is clearly an illicit intervention to the freedom of contract. Friedman, Milton, *Capitalism and Freedom*, University Of Chicago Press, Chicago, 2002, Pg. 188.

revolution in the Europe. On the other hand, the issue of "equality before law" and "political equality", steamed from religious and ethnic diversity in the Ottoman subjects, was a highly controversial matter in the Tanzimat era. Equality before law prescribes "an equal protection and treatment by law" no matter one is pasha, servant, Muslim, or non-Muslim while political equality projects that ethnic and religious minorities have a right to comment on the governance.

Some researcher tents to regard the developments on equality in the late Ottoman Empire as "the consequences of the pressures of foreign states". I believe, however, that Ottoman bureaucracy and contemporary Muslim thinkers took the matter of equality seriously in an attempt to internalize it as a necessity of modern world. A paradigm shift in the Ottoman administration from subject-ship to citizen-ship, in fact, resulted in the developments on equality in the Tanizmat era in which the Empire has gradually transformed into a solely modern state. I deal with the manifestation of this transformation by means of equality in testimony before *Nizamiye* Courts in the final section.

a) Documents, Subsidiary Legislation and Practice

The issue of equality takes a remarkable place in the constitutional document and legislation in the late Ottoman Empire.

In the context of equality before law, the Imperial Edict of Rose Chamber assures that a criminal code shall be enacted in accordance with Islamic jurisprudence to apply for all subjects regardless of rank, position, and influence. Moreover, the edict declares that the scale of rights and freedoms of the edict extends to all Ottoman subjects, of whatever religion or sect they might be; they can enjoy them without exception. Moreover, the Sultan guaranties that he grants perfect security to the inhabitants of the Empire in their lives, chastity, honor, and fortunes, as they are regarded as inviolable by Islamic jurisprudence. In addition to these, the edict constitutionalizes that a member of ulema or a grandee of the empire, or any other person whatsoever who infringe Islamic jurisprudential law shall undergo the punishment corresponding to his crime in the criminal code, without respect of rank, position, and influence.

The Imperial Edict of Reform confirms that the protection of life, personal integrity and chastity, and property is for all subjects regardless of status, gender, race, religion or any other ground. In addition to this, the edict forbids every distinction or designation tending to make any class whatever of the subjects of the Empire inferior to another class, on account of their religion, language, or race in the Administrative Protocol. It also prescribes to enact the laws against the use of any injurious or offensive term, either among private individuals or on the part of the authorities. Moreover, the edict announces that all short of provision of anti-corruption law shall be resolutely executed to all subjects without respect of rank, position, and influence. The edict, also, confirms that the laws regulation the purchase sale, and disposal of real property are common to all the subjects of the empire. Furthermore, the edict orders to translate legislation into several of the languages that is currently spoken in the Ottoman realm. In the context of right to legal remedies, it is crucially important to publish codes in to the languages that local people speak.

The Imperial Edict of Justice confirms and conciliates equality of all Ottoman subjects in terms of legal protection, public employments, tax farming, and real estate purchase and sales.

The criminal code of 1840 acknowledges and guarantees the right to live, right of property, and the immunity of personal integrity and honor for all subject of Ottoman Empire without any exception since all subjects of the Empire have fundamental rights (*hukuk-ı mefruza*) and sacred freedoms (*hurriyet-i şer'iyye*) and all subjects of the Empire are even and equal (*yeksan ve siyyan*) before the law. Moreover, it stated in the preamble of the code that whosoever, no matter which rank they might have, violates one's right by acting against law and Shariah, he shall be punished according to the punishment prescribed by herein the criminal code.

The criminal code of 1851 declares that everyone has natural liberties (*imtiyazat-ı tabiiye*) and fundamental rights (*hukuku mefruza*) in the legal system *(kavanin-i cedide*) in the section three-article seven.

The thing remains that *dhimmies* were able to be judges and witnesses in the Muslims's cases in the *Nizamiye* courts and Supreme Council (*Divan-ı Adliye*), which has been established to proceed the legal disputes prescribed in the Tanzimat legislation.[428] An ordinance of council of provinces (*vilayet meclisleri*) was issued in 1849. According to the ordinance, a council of provinces empowered to proceed legal disputes out of legislation consist of four Muslim members and one member of each local minority group.[429] Moreover, regulation of provinces (*vilayat nizamnamesi*) was issued in 1864. According to the regulation, the regional *nizamiye* courts of appeals (*vilayet mahkemeleri*) consist of equal number of Muslim and non-Muslim members. The members of the court were elected by people for two years.[430] Finally, The imperial edict of justice constitutionalized that *dhimmis* have a rights to be judge and witness in courts in 1875.

Moreover, the Imperial Edict of Rose Chamber declares that each member of the Empire shall be taxed for a quota of a fixed tax according to his fortune by which it is impossible that anything more could be exacted from them. The imperial edict of reform declares that the taxes are to be levied under the same denomination from all subjects of the empire, without distinction of class or religion. Moreover, it promises to take the most prompt and energetic precautions for remedying the abuses in collecting the taxes.

In the context of political equality, the imperial edict of reform declares that all subjects of the Empire is admissible to public emoluments without distinction of nationality; whereby they shall be assigned according to their capacity and merit, and conformably with rules to be generally applied. Similarly, the edict allows all the subjects of the Empire, without distinction, to be received into the Civil and Military Schools of the Government if they otherwise satisfy the conditions of the schools as to age and examination. Moreover, the edict declares that, in order to represent interests of the communities, the heads of each community and a delegate designed

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[428] Ekinci, Ekrem Buğra, *Osmanlı Mahkemeleri*, Pg. 94 ff.
[429] Ibid, Pg. 140.
[430] Ahmet Cevdet Paşa, *Tezakir*, Pg. 111.

by Sultan shall be summoned to take part in the deliberations of the SCJO on all occasions which might interest the generality of the subjects of the Empire.

The supreme general council (*Meclisi Ali-yı Umumî*) was established to control and re-evalute the decisions of the Supreme Council of Judicial Ordinances (*Meclis-i Ahkâm-ı Vâlây-ı Adliye*) in 1841. The general council consisted of grand vizier, some members of government, high-ranking statesmen, and spiritual leaders of the minority groups.[431]

b) Jurisprudential Foundations and Contemporary Groundings

(1) The Jurisprudence

In the context of equality before law, the Hanafi jurisprudence acknowledges equality of people in terms of protection of inviolability regardless of Rich, Poor, Muslim, non-Muslim, *dhimmi*, or slave. People are equal in inviolability of life, personal integrity personal chastity, property and though. Ibn ‘Abidin states that everyone no matter his is Muslim, *dhimmi*, or *musta’mīn* naturally have *işmah ‘l-nefs* (inviolability of life, and physical and psychological integrity). Moreover, he notes that property is inviolable in regards to the property of both Muslim and non-Muslim. Furthermore, he declares that human is free in the natural state regardless of the fact that he is Muslim or non-Muslim. Finally, people equal before law regardless of their social status in which a governor would be prosecuted and executed with a complaint of *dhimmi* subject.

Nevertheless, Islamic jurisprudence does not pay regard to absolute equality since it is prescribed that Muslims are superior to non-Muslims in terms of dignity, respect, and honor. Non-muslims are disallowed to use the means of dignity in society. This is why, Ibn ‘Abidin narrates from Eshbah that *dhimmies* are despicable before Muslims. They are disallowed to sit if there is a Muslim standing nearby. It is

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[431] Ubucini, Jean-Henri Abdolonyme, *1855’de Türkiye I-II*, Trns. Ayda Düz, Tercüman Publication, Istanbul, 1977, Vol. I, Pg. 57.

un-Shari (haram) to show respect to non-Muslims. Handshaking (*musafaha*) and greeting (*salam*) is detestable (*makrūh*). There are made distinct by Muslims by means of clothes, headwear, mounts, and habitations. Non-muslims cannot ride horses, instead, they ride moles. They cannot wear *sarookh* and other clothes pertain to Ulama. Their homes are sealed by a special sign to distinguish their houses form Muslim's houses.

Ibn 'Abidin approves all treatments while he state that *dhimmies* should be demeaned without arbitrarily exposed an oppressing. He expounds the distinctive treatments as the fact that it is necessary to differentiate non-Muslims from Muslims to know who is who in an attempt to treat him according to his religious obligations in the case of the fact that an unknown person died in the street.

(2) The Reactions of Contemporary Muslim Thinkers

The status of non-Muslim in Muslim in society has undergone a paradigm shift in the Tanzimat period. Some read this shift over international pressures of foreign states in an attempt to protect rights of minorities in the Empire. However, Ubuciny narrates in his memories that Cunning, who had a strong influence on the Ottoman Sultan to accelerate formation of prison in the state, was not able to procure an expectance of the Sultan to adequate status of non-Muslim in Ottoman society. On the other hand, the bureaucracy and many contemporary Muslim thinkers considered the matter of equality as a necessity of time and attempted to legitimize equality by which they find previous examples in Islamic practices that it is approved by Shariah principles. For example, the *nizamiya* courts, which allow equal opportunities to non-Muslims such as judicature and testimony, are illustrated with *mazalim* courts of the classic jurisprudence. Ahmet Cevdet Pasha narrates that he translated the book, *Divan-ı Def-i Mezalim*, written by Celaleddin Dawwani on the *mazalim* courts and presented in a council of Ulama to prove the *Nizamiya* court system is not alien to

Islamic jurisprudence. Ulama affirmed that it must have been published whereby he gave it to Ali Pasha to publish and inform people about the Nizamiya courts.[432]

Namık Kemal argues that people are equal since they are born free, however, they are not born equal. God does not create people even in which He creates one intelligent and one fool, He creates one rich and one poor. There is no an absolute equality in people in every respect. However, people are unconditionally equal before law. Justice and equality actualize the individual freedom.[433]

Said Nursi has a distinctive place in the contemporary Muslim thinkers in terms of grounding the right of equality. He travelled around the Easterner Kurdish tribes to explain why equality was necessary for Muslims and why it was approved by Shariah. Later on, he published his discussions with the Eastern Ulama into a book under the name of "*Munazarat*" in 1911.[434]

Nursi argues that equality is not in respect and virtue but in rights. The sultan and miserable one (*geda*) are equal in terms of rights. He asks to the addressees the fact that "Could you ever have imagined Shariah had ignored rights of humankind, of a Shariah that protect a single ant from the cruelty of human thereby commanding not to step over it?" Furthermore, he narrates the incidences of proceeding between Khalif Hz. Ali and a Jewish, and between Salahaddin Ayuubi and a Christian as an example of equality before law in Islamic tradition.[435]

Nursi also writes about the equality in social status which Islamic jurisprudence regards Muslims and non-Muslims unequal. We are worth of being socially equal to non-Muslims since we did not show them the true justice of Shariah and we have lost our respect before their ayes. Muslims are supposed to be superior

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[432] Mardin, Ebul'ala, *Medeni Hukuk Cephesinden Ahmet Cevdet Paşa*, Diyanet Vakfı Publication, Istanbul, 2012, Pg. 60-61.
[433] Namık Kemal, "Hukuku Ummiye"in *Makaleler*, Pg 228 ff.
[434] Nursi, Bediuzzaman Said, *Münazarat*, Pg. 318.
[435] Ibid, Pg. 326.

to non-Muslims in terms of respect. However respect is not earned by force, instead, respect is earned by intellect, propensity of development, and tendency of justice.[436]

Moreover, Nursi states that we are in need of equality with *dhimmies* such as Armenians. He argues that the welfare and peace of the country is dependent on the alliance and fellowship of *dhimmies*. They have roused up, spread over around the world, gathered the seeds of development. They will plant them in our country. They encourage us to civilize and motivate us to develop.[437]

Furthermore, Nursi answer the question the fact that "how is it possible a fellowship with non-Muslims while there is a prohibition in the Qur'an for the fellowship with non-Muslims." First of all, he comments that the prohibition of Qur'an is not absolute but specific. The Qur'an has levels of meaning addressing differently according to the condition of time. The prohibition of Qur'an for fellowship of Jewish and Christians is in regards with their Jewishness and Christianity. People do not like one because of his innate-self (*zat*), rather, they do like one by virtue of his attributes and abilities. Every attributes of a non-Muslim do not have to be non-Muslim, as every attributes of a Muslim do not have to be Muslim. Therefore, why it is not approvable (*caiz*) to affirm and adapt a Muslim attribute of a non-Muslim? Secondly, He argues that all minds have been focused on the concept of religion since Islam had made a great revolution in the field of religion in the time of Prophet in which all fellowship and hostility were formed in a religious point of view. The fellowship with a non-Muslim resonated in Muslims mind as a discord. Today, on the other hand, we have witnessed a secular (*dünyevi*) revolution in all around the world. All minds focused on the modernity, development, and earthly affairs. Most of the non-Muslims do not rely upon their religion. In that sense, the fellowship with non-Muslims is in regards with modernity,

[436] Ibid, Pg. 327.
[437] Ibid, Pg. 327.

appreciation of their development, providing the public safety. This kind of fellowship is never against the prohibition of Qur'an.[438]

In addition to these, Nursi answers the question the fact that "how is it possible an Armenian be a governor over Muslims. He argues that they can be a governor as they can be a watchmaker, mechanic, or maker of brooms. The governing is not a leadership; instead, it is a service in a constitutional governing (*meşrutiyet*). It is approvable to become a non-Muslim governor, as it is approvable to buy a handicraft from a non-Muslim. A non-muslim cannot be a leader but he can be servant in a Muslim state. Assuming that governing is leadership, we will gain the leadership over three hundred thousand of Muslim all across the world when we co-operate with three hundred non-Muslims in government. One who gains thousand in exchange for one is in profit.[439]

c) Equality in Testimony before the *Nizamiya* Court: As an Example of the Effects of the Modernization of the State

(1) The *Nizamiya* Courts in terms of Modernization of the State: the Courts for the Citizens

Nizamiya Courts are a manifestation of the metamorphosis of the Empire into a modern state that was occurred in variety of different way all around the world in 19th century. Some scholars, however, tent to perceive the formation of *Nizamiye* Courts through the lens of westernization and pressures of foreign states since the *Nizamiya* court was adopted from the French judicial system.[440] Avi Rubin, on the other hand, criticizes labeling the adaptation of the French judicial system as *westernization* since all processes of legal borrowing result in unique hybrid legal regimes that they produced, by the commonalities they shared with other legal

[438] Ibid, Pg. 328.
[439] Ibid, Pg. 328.
[440] Ekinci, E. Buğra, *Osmanlı Mahkemeleri*, Pg. 95.

systems of their time, and by their dynamism.[441] Rubin states that the Ottoman bureaucracy never intended to replicate the French judicial system in their own jurisdictions; instead, they consciously establish their own form of modern law in which French and Shariah legal texts are combined on the level of positive law.[442]

Rubin characterizes The *Nizamiye* court system as one manifestation of "the global modernity" that was experienced in many uneven ways across the world in the nineteenth century.[443] The emergence of the *Nizamiye* court system was a matter of evolution, the outcome of which was determined by the necessities on the ground and pragmatic considerations.[444]

In parallel with Rubin, I believe that the formation of *Nizamiye* courts was the consequence of (i) a vision of state centralization and (ii) the transformation of the status of Ottoman subjects into citizens, which are steamed from the modernization of the state.

"The state centralization" and "modernity" are interconnected phenomena in the 19th century, which means that modernity required centralization. Centralization resulted in more modernity. More modern state required more centralization.

The Ottoman central political power, which re-established around the dynasty, united legislative power and executive power by establishing the SCJO. Moreover, the central authority also attempted to enchain judiciary power thereby *Meclis-i Vâlâ-yı Ahkâm-ı Adliye* was empowered with the status of supreme court of appeal at the very begging of the Tanzimat are. Eventually, the vision of state centralization resulted in a central judicial system hinged on the central authority by a judicial hierarchy between the various judicial bodies i.e. respectively (i) Shariah courts and councils in the province, (ii) Council of Judicial Appeals and Crimes (*meclis-i temyiz-i Hukuk ve Cinayet*) as a lower criminal and civil tribunal, (iii) High Council of Appeal (*Divan-ı Temyiz*) as a provincial tribunal of appeal, (iv) the SCJO

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[441] Rubin, Avi, *Ottoman Nizamiye Courts*, Pg. 20-21.
[442] Ibid, Pg. 7.
[443] Rubin, Avi, *Ottoman Nizamiye Courts*, Pg. 7.
[444] Ibid, Pg. 23.

as a Supreme tribunal of appeal.[445] Above all, the office of Sheikh al-Islam was a regulatory and supervisory authority whereby the office appointed a judicial inspector to preside over the panels.[446] In that sense, *Nizamiye* courts were the centralizing reforms in the provincial administration that formed the immediate context to the emergence of the new judicial system.[447]

Regarding citizenship, the *Nizamiye* courts were established in a way that Muslim and non-Muslim citizens of the Empire were equally represented in the courts and councils. *Nizamiye* courts were empowered to engage civil and criminal disputes of both Muslims and non-Muslims. The panel of court consisted of Muslim and non-Muslim members. It was presided over by the judicial inspector (*müfettiş*), who was appointed by Shaykh al-Islam. Herein, the entire judicial system, including the commercial and criminal courts, was still subordinate to the office of the Shaykh al-Islam.[448] Non-muslims had a right to bring suit against Muslims while they can bring non-Muslim witnesses against Muslims. The criminal jurisdiction of the *Nizamiye* courts is characterized by the criminal code of 1858 as (i) the crimes committed directly against government and (ii) *tazir* crimes committed against an individual that the state obliged to prosecute. In that sense, it is not wrong to say that *Nizamiye* court system was utilized to establish and consolidate "a modern Ottoman public sphere" in which the state equally addressed both Muslims and non-Muslims citizens to guarantee the homogenization of administrative practice across the imperial domains.

Over the years, the composition of the court panels underwent changes, yet the basic concept remained the same: the court consisted of several judges, both Muslim and non-Muslim members from the local community, and was presided over

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[445] Akiba, Jun, "From Kadi To Naib: Reorganization Of The Ottoman Shariah Judiciary In The Tanzimat Period," in *Frontiers Of Ottoman Studies: State, Province, And The West*, Eds. Colin Imber, Keiko Kiyotaki, I.B. Tauris Publicaiton, London, 2005, Pg. 53.
[446] [Online]: Ceride-i Mahakim, Vol. 4, (available at: Http://193.255.3.191/Hukukpdf/Dkyzy00221.Pdf, accessed: 19.09.2017), Pg. 160.
[447] Rubin, Avi, *Ottoman Nizamiye Courts*, Pg. 27.
[448] Ibid, Pg. 29.

by a professional judge appointed by the imperial center. The inclusion of non-Muslims in the administration of justice exhibited the Ottoman commitment to the principle of equality before the law might be regarded as westernization. However, as Rubin notes that, in fact, it was a revolutionary concept in Western legal systems as well.[449]

(2) The *Mazalim* Courts as a Means of Legitimacy in terms of *Nizamiya* Courts

Rubin argues that from the outset of the *Tanzimat* until the demise of the Ottoman state, the *Nizamiye* and the Shariah courts were entwined components of a single judicial system, converging in some aspects and departing in others.[450] Historians have used the concept of *duality* to describe an alleged clash between what *they* perceived as secular and religious legal systems, yet the Ottoman reformers themselves never thought of the *Nizamiye* court system as *secular and divided*.[451] His educational background and worldview reflected a sociocultural environment, partially pervaded by new ideas about religion that were not configured along the European religious/secular divide; and Cevdet Pasha himself never thought in the binary terms of religious/secular.[452]

Quite the contrary, they attempted to legitimize the *Nizamiye* court system thereby they assimilated *Nizamiye* courts to *Mezalim* courts of the classic Islamic jurisprudence. *Mezalim* courts acquire its legitimacy from the authority of the head of state to deputize someone to conduct some state affairs. Deputies authorized with comprehensive powers are termed as *tafwiz* vizier while deputies authorized with particular power are termed as *tanfiz* vizier. Grand viziers were the examples of *tafwiz* viziers in the Ottoman Empire. Grand viziers were able to conduct almost every state affair in the name of the Sultan. The ordinary viziers, on the other hand, were *tanfiz* viziers who were able to conduct only the state affairs that they were

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[449] Ibid, Pg. 25.
[450] Ibid, Pg. 16.
[451] Ibid, Pg. 15.
[452] Ibid, Pg. 30.

charge with. The *tafwiz* viziers should be Muslim since they looked-alike Sultans in terms of authority while *tanfiz* viziers did not have to be Muslim. That is to say, non-Muslims would be *tanfiz* viziers.

A *tanfiz* vizier, however, cannot conduct the authority of *mazalim*. In other words, a non-Muslim *tanfiz* vezeir cannot deliver a judgment in the court. Nevertheless, a *tanfiz* vizier charged with *mazalim* affairs was able to listen parties, investigate the dispute, examine the evidences whereby he were able to render the case available to bring in a verdict. At this stage, a tafwiz vizier gives the final decision on the case.[453]

A *dhimmi* judge was able to hear a case in *mezalim* court in which he could investigate the case, examine the evidences, listen to witnesses and give inconclusive decisions. A professionally qualified Muslim can only conclude a binding and final decision from the case. The *Nizamiya* courts included non-Muslim judges in the panel of the courts and councils while a qadi appointed by the office of Shaykh al-Islam headed the panel. The Ottoman reformists considered *Nizamiye* courts as in conformity with Islamic jurisprudence since the panel of courts was mostly consisted of Muslims and the head of the panel was Ulama.

Regarding testimony of non-Muslim in *Mazalim* court, judge can listen to a witness who was not able to give testimony in Shariah courts if there were a considerable number of witnesses. In that sense, the Tanzimat law prescribed that non-Muslims were able to give testimony before the *Nizamiye* courts.

(3) The Status of Testimony in Due Process in Islamic Jurisprudence and *Mazalim* Courts

In Islamic jurisprudence, the concept of testimony is characterized as an expression about a fact that the witness acquainted it by virtue of aye witnessing. There are mainly to kinds of evidences in terms of admissibility of evidence i.e. (i) "discretionary evidences" and (i) "mandatory evidences". The judge has a power of

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[453] Ekinci, Ekrem Buğra, *Osmanlı Mahkemeleri*, Pg. 59.

discretion whether or not he shall hold discretionary evidence. That is to say, the judge is not obliged to render his decision in accordance with the evidence. He can give a verdict contrary to the evidence. The judge, on the other hand, is compelled to render his decision according to mandatory evidence in case of the existence of mandatory evidence. The judge cannot give a verdict contrary to the evidence.

The testimony is regarded as "doubtful knowledge" (*zannî*) because the testimony of witness is equally possible to be true or false in Islamic kalam. In the fiqh, on the other hand, the testimony is considered as "knowledge beyond reasonable doubt" (*zan al-ghalip*) or "knowledge beyond any shadow of doubt" (*yaqin)* in case of the fact that the testimony meets some necessary conditions of validity. Sarakhsi argues that *qiyas* does not allow to hold testimony to render a verdict since the testimony is a knowledge which is equally possible it is true or false. And the knowledge with doubt cannot be mandatory evidence. Nevertheless, we neglect the *qiyas* since there is verses mandate to render verdict according to testimony. In that sense, a duly sworn legitimate testimony of an eligible witness is regarded as mandatory evidence which the judge has to render his verdict in conformity with the testimony. The judge is subject to dismissal and *tazir* punishment if he does not hold the evidence of testimony in his verdict after he decided that the testimony is valid.[454]

In that sense, a testimony of a non-Muslim against a Muslim is not acceptable while a testimony of a non-Muslim against a non-Muslim is valid under the Islamic procedural law. The fact remains that Ibn 'Abidin explains the meaning of "acceptable" in Radd al-Mukhtar that acceptable means that the testimony has a binding effect on the decision of qadi, it does not means that an unacceptable testimony is inadmissible before court. That is to say, a testimony of a non-Muslim or *fasiq* is admissible before the court whereby qadi can render his decision accordingly; however, qadi is not obliged to hold the testimony in rendering his

[454] Tenger, Feyza, "İslâm Hukukunda Hakimin Takdir Yetkisi Bağlaminda Kendi Bilgisiyle Hüküm Vermesi", MA Diss., Ankara University, Institute of Social Science, Ankara, 2006, Pg. 34-35.

decision. In that sense, it would not be wrong to say that a testimony which does not bare the conditions of acceptability is considered as a "discretionary evidences" although it is not mandatory evidences in Islamic procedural law. Parallel, there is a fatwa of Abu Suud that allows taking a testimony of non-Muslim against a Muslim admissible.[455]

In that sense, Muslims and non-Muslims were equal in admissibility of testimony before *Nizamiye* courts which is already Shariah according to Islamic jurisprudence. That is to say, Nizamiya courts are not obliged to render their decision according to a testimony unless the validity testimony was the level of *al-yaqin* (knowledge beyond any shadow of doubt). Nevertheless, Muslim and non-Muslim were able to give a testimony before the court and the court can hold the testimony if he was convinced that the testimony is correct. Some historians write that *Nizamiye* courts did not take the testimony of non-Muslims into consideration whereby the equality in testimony was not actualized in the legal praxis. It seem that the *Nizamiya* courts maintained his practices to give much credit to the testimony of Muslims in due process in the Tanzimat era.[456]

The generally accepted conditions of the validity of a testimony are as follow; (i) being a Muslim (ii) reaching puberty, (iii) being free, (iv) possessing an ability to speak (*nutk*), (v) being known as just and fair, (vi) not committing a crime of perjury before, and (vii) not being a party of the dispute.[457]

C. The Distinctive Features of the Protection of Human Rights in the Late Ottoman Empire

The notion of "right" gained an importance in the field of law and administration in the late Ottoman Empire. It is hard today to answer the question that "why did the notion of right gain importance in the Ottoman Empire?" Was it an

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[455] Ibn Âbidîn, *Hâşiyetu Reddü'l-Muhtâr*, Kitab'l-Şahada, Vol. 5, 98. ff.
[456] Ekinci, Ekrem Buğra, *Osmanlı Mahmeleri*, Pg. 69.
[457] Tenger, Feyza, "İslâm Hukukunda Hakimin Kendi Bilgisiyle Hüküm Vermesi", Pg. 35.

effect of Western influence? Was it a legitimization instrument that the Sultan utilized to consolidate his central political power? Or just on the contrary, was it empoloyed by the oppositional bureaucracy such as young Turks to establish a body politics against the Sultan? From an external perspective, was it a consequence of the metamorphosis of the state into a modern state that necessitated a specific protection of individual rights?

It is obvious, on the other hand, that the late Ottoman legal system re-formed around the notion of "right" in conformity with Islamic jurisprudence. That is to say, the late Ottoman legal system was a system that the law (*kavanin*) was re-formalized around the notion of rights (*hukuk*) in accordance with the Islamic jurisprudence (Shariah) perceived as universal, supra-state and a-historic. I named this new legal system emerged in the late Ottoman Empire as "the Tanzimat law" which was enforced from 1808, in which the Empire has become to transform into a modern state, to 1924, in which the state has become solely secular. The shariah courts were dismissed and the criminal code and civil code were adopted from the Italian criminal code and the swiss civil code in 1924.

I attempt to evaluate distinctive features of the protection of human rights in the Tanzimat law in the light of foregoing discussions.

1. Depanding on Islamic Jurisprudence

The protection of human rigths in the late Ottoman Empire was mainly based on the Islamic jurisprudence. The reforms on human rights in the late Ottoman Empire were, in fact, an attempt to establish an authentic protection system of fundamental rights in conformity with Islamic jurisprudence. The entire world has undergone a paradigm shift in legal system around the concept of right in the 19th century including Ottoman Empire. The Ottoman legal system had been based upon the concept of justice in which constitutional affairs had been evaluated in regards with the principles of justice in conformity with Islamic jurisprudence before the Tanzimat period.

The Empire necessitated re-regulating its legal system around the principles of the protection of rights in 19th century. The story of the Tanzimat period would be summarized in term of legal reforms as the fact that it was an alternation of Ottoman legal system from a "justice" based legal system to a "right" base legal system in its own right.

The Empire attempted to accomplish the process of reforms in the Islamic jurisprudence. There was an interesting cooperation among the Sultan, Shaykh al-Islam, Statesmen, Jurists, Ulama, Academicians, and Thinkers to ground reforms in the Islamic jurisprudential base. Some might state that it was a political expediency to utilize fiqh in an attempt to legitimize secular reforms. However, I believe that Ottoman bureaucracy, in a general sense, never intended to replicate Western understanding of rights and law. They were attempted to form their own understanding of right in conformity of jurisprudence. Nevertheless, they have a Western example which have already established and fully functional such as new values and concepts steamed from the French revolutions, codes, and institutions in front of them. Moreover, some statesmen found unnecessary to re-produce of modern legal concepts while they could adopt an already functional system.

Re-producing a system, however, requires time which Ottoman Empire did not have much. Nevertheless, the traditionalists made the best effort and produces authentic, modern, and Islamic institutions such as *Majallah*, *Nizamiya* Courts, and the Turkish Republic. The scholarship still bares a tension between "traditionalists" and "adaptationists" in Turkey today although it seems the adaptationists are predominate in doctrine. The increasing number of Islamic law courses in law faculties, popularity of learning the Ottoman scripts among young generation, and the growing complaints about the contemporary legal system encourage me to think that Turkish legal system might undergo a revolutionary revision in the light of the experience that gained throughout the late Ottoman Empire.

Even though we said that it was a political expediency, it would illustrate the fact that Islamic jurisprudence was still a source of legitimacy in the 19th century. I believe that political power generally consider its legitimacy. For example, human rights is a source of legitimacy in which many political authorities pay credits to the

human rights even if it is not sincerely consider it today. Likely, “fundamental rights in conformity with Islamic jurisprudence” would be a source of legitimacy in the eyes of the political sects of the Empire.

In short, sources of rights were based upon a supra-state legal order i.e. Shariah in the Tanzimat law. Therefore, no one, including the state, can violate these rights. The Tanzimat law understands Shariah as a universal and supra-state legal order and a collection of divine principles. This understanding can be observed in the expressions of documents and legislation.

2. Mutual Relationship of Rights and Responsibilities

What I mean by mutual relationship whitin this context is that responsibilities were not separated from rights according to the Tanzimat law. The Tanzimat law approved that individuals have fundamental rights. It manifests fundamental rights under the name of “*hukuk-ı mefruza*”, “*hurriyet-i şer’iyye*”, “*imtiyazat-ı tabiiye”,* and “*hukuk-u insaniyye*” in documents and legislation.

Nevertheless, the Tanzimat law did not totally separate the rights from the responsibilities. Individuals have rights and responsibilities together. The guarantee of a right of an individual depends on providing others to respect theirs responsibilities. In keeping with this, the protection of fundamental rights of all depends on the state to fulfill his responsibility to protect rights and avoid breaching them. This understanding can be observed in especially in the expressions of the Imperial Edict of Rose Chamber. The edict prescribes a contractual relationship between state and citizens in which the state shall be protect people’s fundamental rights, in return, people shall make an effort to promote public welfare and work for the good of the state.

This mutual relationship of responsibilities is also accordant with the classical perception of “the circle of justice” in which, briefly, the maintenance of public welfare depends on the maintenance of the state while the maintenance of the state depends on the maintenance of public welfare. The maintenance of this balance, on the other hand, depends on everyone to fulfill his obligation to realize justice.

The separation of rights from responsibilities, which has formed in the western scholarship, does not take a remarkable place in the Tanzimat law. The reason of the separation is the approach of the Roman law to the natural rights which resulted in the division of (i) the objective natural rights and (ii) the subjective natural rights in the course of time.[458] The natural law under the name of *ius naturale* in the Roman law, which is the origin of the objective natural rights, represents the universal fairness and rightness of a supra-human entity such as God, nature or law which beyond the individual preferences of people. The subjective natural right, on the other hand, is a faculty, power or ability to give an individual a preference over his interests. Of the primary scholars dealing with this division, Michel Villey, argues that the subjective natural rights, which is a source of human rights, is a radical deviation from the classic natural law school. For him, classic natural rights and subjective natural rights are totally disparate. The term, *ius*, he says, an objective phenomena in the classic natural law describing an objective and universal coherence. *Ius* does not mean "rights" in the classic natural law, rather, *ius* depicts a universal restriction over the preferences of the individuals. Therefore, the translation of *ius* as rights is misleading. The idea of subjective natural rights is a liberation of the preferences of the individuals from the restriction of natural law.[459]

Leo Strauss argues that the deviation of the subjective natural rights from the classic natural law has brought about the separation of rights from the responsibilities. He states that the classic natural law deals with the responsibilities of individual and rarely treats the rights. The natural responsibilities transformed into natural rights in 17th and 18th centuries along with the idea of subjective natural rights whereby the rights and responsibilities were separated in terms of fundamental rights.[460]

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[458] Uslu, Cennet, *Doğal Hukuk ve Doğal Haklar: İnsan Haklarının Felsefi Temelleri*, 2nd Edition, Liberte Publication, Ankara, 2011, Pg. 51.
[459] Ibid, Pg. 52.
[460] Strauss, Leo, *Natural Rigts and History*, University of Chicago Press, Chicago, 1971, Pg. 177-180.

In the Islamic jurisprudence, on the other hand, the link between rights and ability of individuals has been established under the name of *dhimmah* since the very beginning of the fiqh. The rights and responsibilities were shaped accordingly. That is why, an understanding to separate rights form responsibilities did not take an important place in the Tanzimat law. Indeed, Mehmet Seyyid Bey observe this differences between the Tanzimat law and western scholarship. He explains it in a conference he addressed in Istanbul University-Faculty of law on the comparison between western philosophy of law and Islamic philosophy of law in terms of the concept of rights in 1922. He argues that individuals have rights and responsibilities in term of fundamental rights in a different level of addressee-ness in Islamic jurisprudence. The Islamic jurisprudences regards rights just like individualist point of view in which fundamental rights are innate, natural, and untouchable and no one can violates them in the level of society. In the level of the relation with God, Islamic jurisprudence does not allow one violating his own rights since the rights were given by God to individual as a trust and individuals have responsibility to avoid violating rights including their own rights.[461]

[461] The original expression in the text: "*Ferd için efrâd-ı saireye karşı, cemiyete karşı hak olan hürriyet, kendi hakkında allah'a karşı bir vazîfedir, onu hüsn-i isti'mâl etmek bir vecîbedir. Binaenaleyh hiçbir kimse, hiçbir hükûmet, bir ferdin hakk-ı hürriyetini elinden alamaz. Buna hiçbir zâtın, hiçbir hey'etin salâhiyeti yokdur. Burası böyle olduğu gibi aynı zamanda o ferd de kendi hakk-ı hürriyetini suistimal edemez. Meselâ kendi rızâsıyla hürriyetini başkasına satamaz*." Gedikli, Fethi, "Mehmet Seyyid Bey", Pg. 129.

CONCLUSION

In this thesis, I sought to answer the question of whether "the constitutional movements in the late Ottoman Empire were political expediencies or religious legitimizations?" In other words, I attempted to illustrate whether the constitutional documents and legal reforms were carried out to replicate western institutions such as natural rights, equality, nationalism, and constitutionalism or to revise the legal system so as to be in conformity with Islamic jurisprudence while taking into account the contemporary conditions of the state in the Tanzimat period.

Thinkers generally tend to address the matter of the constitutional documents and the reforms of the fundamental rights in the light of western influences and in the context of the history of law. Situating the discussion in the context of the history of law, I tried to show that by understanding the constitutional movements from an orientalist point of view is a reductionist and misleading approach. I believe that western influences took a fractional place in the parameters of the constitutional movements.

I also situated the thesis' research question in the context of "human rights in Islam". Scholars mainly either discuss the conformity of Islamic principles with some human rights framework or examine the groundings of human rights in the intellectual history of Islam. I believe that both aspects bear a danger of anachronism. This is because the term "human rights" is a modern concept and scholars have attempted to address a modern concept by means of pre-modern jurisprudential principles. Situating the discussion in the context of human rights in Islam, I attempted to examine the transformation of an Islamic legal system into a modern system around the concept of "rights" in conformity with its traditional jurisprudential background in the nineteenth-century. It provided me with a perfect field of study in which I was able to examine the formation of modern human rights in the praxis of Islamic jurisprudence.

The concept of right has gained importance in the late Ottoman Empire as it re-regulated its legal system around the concept of right in the nineteenth-century. The issue whether the legal system re-gulated in conformity with Islamic

jurisprudence or with western legal institutions has been a point of great debate in the literature for a number of decades. I believe that the reforms were formed (i) as a consequence of the metamorphosis of the state into a modern state, (ii) considerably in favor of the bureaucratic class, (iii) paying regard to the expectations of the Western states, and (iv) in conformity with Islamic jurisprudence in the Tanzimat era.

I dealt with constitutional documents, subsidiary legislation, legal practices, contemporary literature of Islamic jurisprudence, and the reactions of contemporary Muslim thinkers in terms of the reforms on fundamental rights in the late Ottoman Empire in an attempt to examine the basic motivation of the reform movements.

The concept of `iṣmah has served as an inviolability and a guarantee of the individual rights and freedoms in Islamic jurisprudence since the very beginning of fiqh. Contemporary scholars theorized the concept of `iṣmah in the context of human rights in Islam that fundamental rights of all people, whether Muslim, non-Muslim, dhimmi, or musta'min, has been protected in Islamic law under the principle of `iṣmah. I attempted to research the foregoing contemporary sources on the utilization of `iṣmah or its synonyms in an attempt to examine the effect of Islamic jurisprudence on the legal reforms.

I dealt with the concept of human rights in terms of restriction of political power. The major mission of the modern human rights is to restrict political power in favor of the fundamental rights of individuals. The idea of human rights demands political power to restrict its authority in avoiding the violation of the rights of people and providing a suitable environment for people to enjoy their rights. In that sense, an instance of restriction of a political power in favor of the fundament rights of people in a pre-modern context would be characterized as a practice of the protection of human rights. In fact, scholars trace back the roots of the formation of human rights to the Magna Carta in terms of the foregoing viewpoint.

I believe that Islamic political history is quite familiar with the restrictions of political authority. Unlike the western understanding of kingship, the Sultan is not regarded as faultless, irresponsible and untouchable, rather, the Sultan has a political,

criminal and legal responsibility before the law. The Islamic law has a supra-state, independent and liable status over Islamic political powers whereby the Sultan is obliged to observe the principles of the Shariah, even in his political decision in which he must act in accordance with the public welfare in theory. In practice, however, it was not possible always to provide a full control over the ruler in pre-modern times, although the ulama attempted to keep the Sultan within the sphere of the Shariah.

The Ottoman Empire, on the other hand, established a pre-modern constitutional regime in the seventeenth and eighteenth-centuries in which the political power of the Empire was shared by different fragments of authority. The politics of the Empire was formed by the dynasty, ulama, statesmen, and local landed proprietors by virtue of an unwritten constitutional tradition. The scopes of the authority of fragments were constitutionally determined by which even a sultan would have been discharged by means of a due process if he exceeded his scope.

The existential issues of the Empire forced the political fragments to unite around the dynasty in an attempt to face the external problems with a strong central political power in nineteenth-century. It was, in fact, a trans-regional attitude, that occurred all over the world in a different way, in order to consolidate central authority. Scholars read this cross-regional attitude as a parameter of the modern state. The Sultans of the nineteenth-century were more powerful and influential then their successors owing to state centralization. However, powerful sultans with no limits did not comply with the constitutional tradition of the Empire. The main concern of the late Ottoman statesmen was, therefore, how to restrict the Sultan's authority while maintaining a strong central government. This concern was reflected into the politics of the constitutional movements. For example, a contemporary German ambassador in Istanbul narrates that the member of the ulama protested Sultan Abdulaziz in 1876 and demanded to restrict the Sultan's authority, which "has increased since the abolishment of the janissary guild". Eventually, Sultan Abdulaziz had to abdicate the throne and thus the process of bringing about the first constitution, in a formative sense, had begun. That is to say, a traditional concern to limit political power resulted in restricting the Sultan by means of constitutional

documents and state of law. The sultan promised his subjects and servants to protect their fundamental rights and to avoid their arbitrary violation.

The constitutional movements proceeded in a manner that the protection of fundamental rights gradually increased in a formative and material sense in the course of time. Sultans were gradually restricted by more comprehensive and more formative documents which respectively included the charter of alliance, the Imperial Edict of Rose Chamber, the Imperial Edict of Reform, the Constitution of 1876, and the Constitutional amendment of 1909. In fact, this might be the natural process of the formation of constitutionalism considering the same process is observed in almost the entirety of constitutional history of different regions.

The constitutional documents covered a variety of rights and freedoms, namely, the right to live, the state of law, the right of property, the right of personal integrity, the right of legal remedies, the right of equality, freedom of religion and practice, freedom of expression and chair immunity, and minority rights. Moreover, the legal system has been re-established around these rights under the name of kavanin-i cedîde (modern law) by means of subsidiary legislation and the institutions of the Tanzimat such as the SCJO, the Supreme Council of Reorganization (Meclisi Ali-i Tanzimat), and Nizamiye Courts.

Scholars generally attempt to explain constitutional movements in light of western influences on the Empire. Contrary to the popular belief, I believe that western influence and impositions did not play a significant role in human rights movements in the Tanzimat period. As some prominent scholars state, the concepts of equality, rights, and freedoms were quite new for the western states as much as it was for the Ottoman Empire in the current period. Moreover, the Western states had not an agenda to export the notions of human rights to other countries. What they intended was to intervene the internal affairs of the Empire by virtue of the protection of minorities' rights in the Empire.

I believe that the Empire attempted to establish, in its own right, a new legal system in consequence of the contemporary conditions. The constitutional reforms are inexorably intertwined with the transformation of the Empire into a modern state

that requires a uniform bureaucracy, predictable and predetermined written codes and a stronger protection of fundamental rights.

Giving the re-establishing legal system, there were two competing visions in the Empire. The "traditionalist" vision aimed to establish a new system in conformity with classic jurisprudence in its own right, while the "adaptationists" vision argued that the Empire should have immediately translated European codes to survive.

I believe that the Empire newer intended to replicate western codes and legal institutions to the very last moment although the demands of direct adaptation affected this process by accelerating the movements of codification in the Empire. They adopted codes in conformity with classic jurisprudence even in the case of the fact that they translated a western code. For example, they adopted the French criminal code of 1810 in 1858. However, they limited the scope of the code with "the crimes against the state" and "the indictable offences" whereby they preserved the individual's rights of the victims' hair, which the Shariah has determined. Moreover, they exclude provisions against the Shariah while they include new provisions stemming from Islamic jurisprudence. A council that remarkably consisted of the members of ulama enacted the codes. Then, the office of Sheikhs al-Islam affirmed that the code is approvable and the codes came into force. By this way, the Tanzimat codes was produced by a double-check mechanism in conformity with Islamic jurisprudence.

In fact, there is a consistence between (i) the provisions of contemporary Islamic jurisprudence, (ii) the provisions of constitutional documents and subsidiary legislation, and (iii) the groundings of the contemporary Muslim thinkers.

Regarding the influence of the concept of `iṣmah, based on my research of primary sources, I argue that the contemporary sources of Islamic jurisprudence intentionally utilized the concept of `iṣmah, or its synonyms such as hurmah, to ground the protection of the fundamental rights of individuals. The document and subsidiary legislation, on the other hand, does not directly use the term of `iṣmah but they referred to Islamic jurisprudence as the source of fundamental rights. Nevertheless, they utilized the concepts of "*hukuk-ı mefruda*" which is derived from

Islamic jurisprudential terms of *darûrât* or *darûriyyât*. The contemporary thinkers, however, utilized both the concept of "right" and "`*iṣmah*" together to ground constitutional movements of fundamental rights.

I examined only four rights, i.e. (i) the right to live, (ii) the right of personal integrity, (iii) the right of freedom, and (iv) the right of equality, this is because dealing with the entirety of human rights would exceed the limited scope of my thesis. I chose four rights in terms of their ability to manifest the parameters of the constitutional reforms which I counted as: (i) modernism, (ii) bureaucracy, (iii) Ulama, and (iv) international impositions. I dealt with a specific issue related with the parameter at the end of each section on rights. For example, I dealt with "the abolishment of arbitrary execution without trial" in the section on 'the right to live' as an example of the effects of bureaucratic demands while I examined "the formation and re-formation of the prison in the Empire" in the section on 'the right of freedom' as an example of the effects of international impositions.

In short, the concept of human rights is a modern concept which emerged as a consequence of which the features of the modern state necessitated. The Ottoman Empire of the nineteenth-century had attempted to establish an understanding of human rights in an authentic point of view as a fresh Muslim modern state. An Ottoman did not mean what a French understood from "*droits*" or an English from "*right*" when he or she said "*hukuk*" in the Tanzimat period. The Ottoman understanding of human rights can be utilized, in that aspect, as an authentic argument in further discussions on the universality and relativity of human rights.

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