TANZIMAT AND PENAL MODERNITY: THE ABOLITION OF TORTURE IN THE MID-NINETEENTH CENTURY

TUNA BAŞIBEK

BOGAZİÇİ UNIVERSITY

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TANZIMAT AND PENAL MODERNITY: THE ABOLITION OF TORTURE IN THE MID-NINETEENTH CENTURY

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Tuna Başıbek

Boğaziçi University

Tanzimat and Penal Modernity: The Abolition of Torture in the Mid-Nineteenth Century

The thesis of Tuna Başıbek has been

approved by

Assoc. Prof Cengiz Kırlı _____
(Thesis advisor)

Prof. Dr. Nadir Özbek _____

Assoc. Prof. Gültekin Yıldız _____

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ABSTRACT

This thesis studies the abolition of torture in the Ottoman Empire from 1840s up until the mid-1860s as a component of newly-raised *Tanzimat* legislation and, more generally, the Ottoman judicial transformation in the nineteenth century. It will be investigated the context in which the anti-torture law took place in this period and how this official policy came into practice after relevant laws and regulations were issued by the Sublime Porte.

It will be argued that the anti-torture law was an outcome of global legislative wave against body-oriented punitive methods in penal proceedings, whose origins could be traced back to the mid-eighteenth century. Since this law was a part of penal modernity, which first occurred in Europe, this thesis tries to concentrate on its utilization in everyday court practices. It explores how ordinary Ottoman subjects made use of this *Tanzimat* novelty when they were encountering with legal discourse. Moreover, this thesis reevaluates foreign, mostly British, diplomatic pressure on the *Tanzimat* statesmen about ongoing practice of unlawful torture through the nineteenth century diplomatic environment. Intentionally, I establish a bond between a global legislative trend and simple judicial strategies of Ottomans. Broadly, the Ottoman judicial transformation in the first two decades of the *Tanzimat* era is examined by relying on archival documents, official correspondences, consular reports, and most importantly penal court records and interrogation procedures.

ÖZET

Bu tez 1840'lardan 1860'ların ortasına kadar yükselen *Tanzimat* yasama sürecinin ve on dokuzuncu yüzyıl Osmanlı hukuki dönüşümünün bir bileşeni olan.işkencenin yasal olarak lağv edilmesini incelemektedir. İşkence karşıtı yasanın bu dönemde ne tür bir bağlam içerisinde yer aldığını ve resmi bir politika olarak Bab-ı Ali tarafından ilgili yasalar ve kararnameler yürürlüğe girdikten sonra nasıl uygulandığı incelenecektir.

Kökeni 1850'lerin ortalarına kadar götürelibilecek olan *Tanzimat* dönemi işkence karşıtı yasa bedene yönelik cezai pratiklere karşı gündeme gelen küresel yasayapım dalgasının bir parçasıdır. Bu yasa ilk olarak Avrupa'da ortaya çıkan cezai modernitenin bir parçası olduğundan bu tez yasanın gündelik mahkeme pratiklerinde kullanımına odaklanıyor. Sıradan Osmanlı tebaasının devletin hukuki söylemiyle karşılaştıklarında bir *Tanzimat* yeniliği olan bu yasadan nasıl faydalandığını inceliyor. Dahası bu tezde genellikle Britanya kaynaklı diplomatik baskının, süregelen yasa dışı işkence pratikleri hakkında, *Tanzimat* devlet adamları üzerinde nasıl bir etki bıraktığını yeniden gözden geçiriyor. Tez boyunca, taammüden, küresel yasayapım trendleriyle sıradan Osmanlıların basit hukuki stratejileri arasında bir bağ kurmaya çalışılacak. En geniş çerçevede, Osmanlı İmparatorluğu'nun *Tanzimat*'ın ilk yirmi yılında geçirdiği hukuki dönüşümü arşiv belgeleri, resmi yazışmalar, konsolosluk raporları ve en önemlisi cezai mahkeme kayıtları ve soruşturma tutanaklarına dayanarak inceliyorum.

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CHAPTER 1

INTRODUCTION

In 2003 when Iraq was under United States occupation, international community has been shaken with a group photography that includes torturing of detainees in Abu Ghraib prison in Baghdad. Before the occupation, Saddam Hussein's regime had also been reported for using torture methods on prisoners for a long time. After several months of regime's collapse, these photos which would become publicly known in April 2004 shows US prison guards in Abu Ghraib torturing, humiliating and abusing prisoners in different ways. Degrading punishments and sexual abuse, according to survivors of Abu Ghraib prison, has become systematically-applied procedure.[1]

This story, on the one hand, is opposed to what has been told about the abolition of torture. Accordingly, torture had been legally banned from the eighteenth century onwards in Europe initially. Beginning from the mid-nineteenth century, non-Western Empires had witnessed an abolitionist wave. It has been argued that the application of torture had shifted to colonial zone of the world in the second half of the nineteenth century. On the other hand, autocratic regimes of the twentieth century, mainly Nazi Germany and Soviet Union and so-called third world despotic regimes during the Cold War, has often been mentioned with cruel torturing methods.[2]

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[1] Amnesty International, *Iraq: A Decade of Abuses* (London: Amnesty International, International Secretariat, 2013), 12-4: A famous photo shows a prisoner hooded and forced to stand on a box with electirc wives attached to his fingers.

[2] Talal Asad, "Reflections on Cruelty and Torture," in *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), 100.

There are globally approved conventions against torture. One of the most famous of them, Article 5 of the Universal Declaration of Human Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…" Avoiding from being too prejudicial towards universal values, this principle as well has been widely appropriated by the westerners. Post-cold War era has also witnessed a raising discourse that ascribes violent practices to Middle Eastern and North African dictatorships. Apparently, nobody would have expected torturing spectacles in the twenty-first century in a region that is supposed to be saved from an atrocious regime by the representatives of the modern democracies since these methods had been carried out by US soldiers.

The question raises then how torturing spectacles could be frequently seen in contemporary agenda since these methods are regarded to have lost their place in judicial and penal proceedings. One among the possible answers that has been given to the occurrences of these practices is that criminologist has been observing that civilian punishments methods have undergone a process of "decivilization" since the 1970s. Expanded prison populations, harsh penal regimes and degrading punishments has rendered modern penal systems more aggressive than ever.[3] Theoretically, however, modern penality[4] must have excluded body-oriented punitive methods from the repertoire.

[3] Carolyne Strange, "The 'Shock' of Torture: A Historiographical Challenge," *History Workshop Journal* 61, no. 1 (January 1, 2006), 138.

[4] With his words David Garland defines penality as "the whole process of criminalizing and penalizing ...the complex of laws, processes, discourses, and institutions which are involved in this sphere.." Ottoman David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: Chicago University Press, 1993), 10-2. I am going to use this uconventional word frequently without the "modern" adjective. Instead, I prefer "penal modernity" in order to emphasize "being modern" as it is used in the Ottoman historiography.

Torture in the era of penal modernity (roughly from mid-eighteenth century up until now) therefore causes another reaction in society and scholarly works. As the practices has been illegal globally, Carolyn Strange states that these images have caused a kind of "shock" effect on governments who charges "lower ranking" and "irresponsible officers." The circulation of these images have sickened public opinion, so politicians lay the blame on lower rank officials. Moreover, she criticizes historiographical neglect of bodily punishment techniques of recent decades as if these practice solely had taken place before the eighteenth century.[5] Either way, presence of torture seems to be taken incoherent politically or scholarly in the modern era.

In scholarly studies on crime and punishment, the main theoretical device has been the Foucaldian approach towards the relation between the body and punitive methods for three decades or so. Accordingly, Foucault's theory expresses that aggression against the body as a punitive practice needs to belong to the pre-eighteenth century period. This is what Foucault called "classical" era when the main aim of punitive methods was retribution of the sovereign rather than disciplining the delinquent as in the modern era.

Therefore, studies on violence carried out by state officials[6] from the nineteenth century onwards has not been supported theoretically in a way that Foucault-based studies have succeeded to do. Moreover, there is not much of that Foucaldian theories could offer for violent practices of state over citizens in the nineteenth and twentieth centuries, in other words, the modern era. Thus, Giorgio

[5] Strange, "The 'Shock' of Torture: A Historiographical Challenge." 139

[6] I use these terms (state and officials) ahisorically since this thesis does not deal with institutional transformations in the modern era. However, it could be argued that this denomination does practically intend to define only nineteenth-century "state" and its officials who creates bureaucratic body per se. Further parts of this thesis, I generally use these terms along with state servants and military officials.

Agamben has reviewed the Foucaldian biopower which, according to him, has "never dwelt on the exemplary places of modern biopolitics: the concentration camp and the structure of the great totalitarian states of the twentieth century."[7] He would instead argue that, in the modern era, there is a place for torture as a practice "that reflect an increased preoccupation with the role of human life and the body,"[8] which Agamben would call bare life.

More than Agamben's critique of Foucaldian way of thought on violence and torture, Darius Rejali thinks that modernity (and democracy in his book) has only prevented torture to be visible and kept going to carry out the practice surreptitiously. As opposed to the idea that modernity and civilization from the eighteenth century onwards has technically abolished legally-made-possible torture before the eighteenth century, Rejali comes up with another review that torture has been intrinsic to modernity. Modern states, according to him, has always been using torture to discipline their subjects' minds with "clean" and behind-closed-doors torture methods instead of allowing a public exposure of punishment of their tormented bodies.[9]

Talal Asad, on the other hand, righteously criticizes Rejali's statements and claims that inflicting pain to the body is regarded differently by the public discourse in modern and premodern eras.[10] According to Assad, Rejali's statements does not falsify Foucault's thoughts on torture, which Assad states that Foucault's argument

[7] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 2-3.
[8] Teresa Macias, "'Tortured Bodies': The Biopolitics of Torture and Truth in Chile," *The International Journal of Human Rights* 17, no. 1 (January 2013), 118: Macias provides great account on torture in the twentieth century from an "Agambenian" perspectives in her article that dwells on torture occurances in Chile after Pinochet *coup d'etat.*
[9] Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007), 1-11 and 34-35
[10] When one use both of them together, these terms might represent a too ambitious interruption in time. It needs to be stated that I just use them in order to make easier to clarify what reforms and transformations I want to underlie.

on torture in the classical ages was a matter of display not of exposure to reveal sovereign's will. He states that in modern societies however, "when torture carried out in secret is intimately connected with the extraction of information, it becomes and aspect of policing."[11] However, what Rejali manages to underline in his study is actually another and quite meritorious insights that severity toward the body could be sustainable in the modern era in an ongoing way.

Apparently, he claims that state officials who resorted to violent practices, particularly torture, has not totally disappeared after the judicial reforms in the eighteenth and nineteenth centuries. On the one hand, though, this thesis will not make an argumentation from Rejali's point of view that torture does necessarily converge on what penal modernity constitute. Torture will not be construed as a category that is implicitly presumed by the penal modernity. On the other hand, it needs to be clarified that this thesis will develop through the very presence of torture in the modern era. It will investigate how torture and anti-torture law could thoroughly, and jointly, continue to exist in an era when the practice was formally abolished.

The *Tanzimat* era seems to be quite suitable example in this dilemma, in which torture events had frequently came up in this era. Furthermore, the anti-torture laws that had been issued by the Ottoman legislative body in the mid-nineteenth century constitute the core of this thesis. This thesis therefore is going to put emphasize on the *Tanzimat* era and is will define the era as the period of "constructing modernity," particularly penal modernity as stated above. The abolition of torture, generally speaking, preventing unlicensed forceful practices against

[11] Asad, "Reflections on Cruelty and Torture," 104

Ottoman subjects (*Muamele-i gadriyye* or *kuvve-i cebriye*[12]) by the security guards or the other officials, had been one of the primary attempts of the *Tanzimat* statesmen in their legislative agenda throughout the era.

It could generally be argued that Ottoman central bureaucracy in the *Tanzimat* era had been standing against punishments "inflicting physical pain" (*cismen eza verecek surette*) to the body. More specifically, in the *Tanzimat* penality, torture (*işkence* or *eziyyet*) and body-oriented punishments (*darb,* or in more general form *mücazat-ı cismaniyye*) were taken great interest from Istanbul. From the earliest years of Ottoman penal modernity, the penal codes and several statutes would put violence out of judicial field. Yet, many practices to which the state officials resorted actually, and unlawfully, continued. The narration in this study will be expressed from within this ambiguous zone.

This thesis limits itself with the first two decades (and the first few years of the 1860s) of the *Tanzimat* era. Since the abolition of torture in the Ottoman Empire belongs to the legal field, the first two decades of the *Tanzimat* era up until the mid-1860s is able to offer highly broad context for studies on legality and punitive methods. During this period, a dynamic codification movement could be seen in the Sublime Porte. Three new penal code and a land code would be issued in less than twenty years. One could claim that the main law texts had been created in this period for the further century of the Ottomans. This period therefore has been mentioned with the narration of an ongoing transformation of the Empire by the scholars of Ottoman nineteenth-century historiography.

[12] A methodolgy for torture and other body-oriented methods in Ottoman law books could be discerned and will be underlined in further part of this thesis. Here, there will be general descriptions for terms to represent these practices.

Torture cases, which will be examined in this thesis, were selected from this period. It will be argued that, in this period of the *Tanzimat* era, the anti-torture law had been institutionalized by the initiatives of the Sublime Porte. That's why the dualism between the abolition of torture and actual continuity of the practice could be discerned very clearly. In other words, these were the formative years of the anti-torture law which had still been witnessing old practices, like torture obviously, in penal proceedings and legally "immature" agents who were not yet engaged with the new *Tanzimat* legal paradigms.

The *Tanzimat* era was the time of many novelties in penal arrangements. Not only new codes were published, but also new legal structures and engagements in penal field were established. Public police forces were established in every districts after the mid-1840s. Prison system had undergone a huge reform and these structures had become the main punishment as the new penal codes proposed. Medicine has become a part of judiciary that autopsy reports, forensic medicine and other technologies would be in service of civil and criminal issues.

This era could be also be celebrated as two preliminary decades of expanding bureaucracy which would embark to reach to the every corner of the Empire. As one needs to keep in mind that the Sublime Porte and the new legislative and administrative bodies in Istanbul, which would make the reform initiations and be carrying out the whole process had a specific intention over provinces. Since vast majority of the Ottoman history scholar marks late seventeenth and the whole eighteenth centuries as a kind of decentralization of the Empire, there is an agreement that the nineteenth century had been the era of claiming (or reclaiming) central authority over the provinces.

Evolvement of the Ottoman bureaucracy in the nineteenth century will be more widely examined in further parts of this thesis. Nevertheless, expanding bureaucracy is one of the significant items of a thesis which will deal with the formative two decades of the Ottoman penal modernity. On the one hand, the Porte had been at the middle of legislative dynamism and productivity as it is said above. On the other hand, the Empire had such a vast territories that it must be very tough to intervene every provincial issues. Central bureaucracy, however, would attempt since this is what a modern (in Weberian sense) bureaucratic body do. The Sublime Porte coped with provincial matters throughout the nineteenth century as never before.

Throughout the *Tanzimat* era, specific regulations on various subjects would be sent to provinces. In their copious memorials, Ottoman reformist cadre reminded the requirements from provincial administrations or warned local officials against any violation of law. Torture in penal proceedings had often been one of the main subjects of these memorials. Since this old practice had not been "forgotten" yet in ordinary course of provincial affairs in the eyes reformist cadre, they would be actively involved in torture events in the provinces. In the most general sense, the Sublime Porte wanted to get through discretionary initiatives of provincial bodies, especially in penal arrangements. Every action must be done according to the standard in a centrally-predetermined way.

This thesis will approach unlawful torture applications and anti-torture law in the midst of these novelties that took place in the Ottoman Empire. As these novelties were at their formative years, this two decades were apt to many discrepancies in the proceedings. Torture cases will be examined through the new penal arrangements, and practically, deviations from the rule will not be stay

unnoticed. The abolition and its day-to-day application could be seen in the *Tanzimat* era as well.

In the next chapter, I am going to make a kind of legal history on the institutional base of the Ottoman reforms. Before that, torture will be defined theoretically and further commentaries on body-oriented punitive methods will be examined according to the definition of torture. Then, the abolitionist wave will be evaluated. After pre-*Tanzimat* law on torture will be briefly told, I will dwell on *Tanzimat* legality and new penal codes by concentrating on articles on torture in these legal texts.

Chapter 3 will go towards another direction and will be devoted to diplomatic aspect of the abolition of torture. The abolition of torture will be taken as a part of global legislative wave and as an outcome of nineteenth-century liberalism. Since the nineteenth century was the peak point of the Great Powers, especially the global hegemony of British Empire, diplomatic pressure over the Sublime Porte in the matter of torture will be investigated. I will discuss that to what extent foreign diplomatic pressure shaped by liberal principles of the nineteenth century had impacted on the abolition and whether this discourse was shared by the Ottomans.

In the last chapter, I will bring the anti-torture law to the court rooms. This chapter will be interested in ordinary Ottomans who had to get involved in the penal field. Because this era is called penal modernity, everyday experiences of non-elite people will provide essential instruments to comprehend how the outcome of modern reforms was brought to practice. I will argue that since the *Tanzimat* legislation provided new legal opportunities to ordinary Ottomans, the way they made use of this law in their own cases will provide an understanding of how a penal culture has been created by actions and judicial narrations of these people. Lastly, I need to state

that this thesis will use archival sources from several catalogues which could be reached in The Prime Ministry Ottoman Archives.

CHAPTER 2

THEORETICAL ELABORATION AND A HISTORICAL BACKGROUND OF TORTURE AND ITS USE AND ABOLITION IN THE OTTOMAN JUDICIAL SYSTEM

Defining Torture and Its Application before the Mid-Eighteenth Century

Theoretical Considerations on Torture

Torture is a category that is used to explain various actions. It has been widely employed to cover any brutal deed directed against living beings and could be replaced by the some other terms such as cruelty, torment, violent, or atrocity. Therefore, by its own and without an agent, it fails to be a historical category, which has any relevance to time and space. Although it has often been ascribed to the state or any other political entity within a territory and applied by its servants or officers, its field of application might stay indefinite. In this study, however, the term "torture" as a practice will be taken as an action that belongs to the criminal field.

Judicially speaking, what this study means by "torture" is cruel implementations during penal proceedings; that, this practice could be seen any time in the proceeding. Moreover, this practice is not an excessive behavior conducted by officers or servants of the state; but a legal procedure accepted within the boundaries of penal law roughly before the mid-eighteenth century. Hence,

torture as a legal procedure is a punitive practice oriented to the bodies of suspects who might have a relation with an alleged offense.

This type of apprehension of torture locates this practice under the all-inclusive title of "corporal punishment." The term of "corporal" etymologically derives from the Latin "*corporalis*," which means "pertaining to the body," more specifically, "corpus," the body.[13] Therefore, any punitive practice oriented to the human body as the very target of the punishment is corporal punishment. In other words, not only torturing culprits in order to inflict pain to the body, but also capital punishment is a corporally-executed punishment as well. But, obviously, all other methods do not have to result in death

Within this context of punishment, though, the suffering of the body will appear as the measure of the punitive practice particularly. Namely, many other punitive practices ranging from beating, bastinado, flogging, branding to forcing to remain standing, preventing sleep and several amputation techniques (like the amputation of hand or ear) are different types of cruelty that fall into the scope of corporal punishment. Moreover, as the main measure of these practices is the suffering of the body, a certain capital punishment could be conducted with additional pain infliction to the body. Crucifixion, breaking on the wheel, impaling are examples of this type of capital punishment along with, supposedly, more painless ones like hanging. All in all, what needs to be underlined is that battered, tormented or irrevocably spoiled bodies were the outcome of all corporal punishment methods before the eighteenth century in Europe and elsewhere.[14]

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[13] Online Etymology Dictionary, *Corporal* http://www.etymonline.com/index.php?allowed_in_frame=0&search=corporal&searchmode=none [21 March 2015]

[14] In general, on the practice of torture before its abolition and its unlawful application after the abolition, there is extensive number of scholarly works. For example George Ryley Scott, *History of*

In this study, punitive practices which are not meant to end in death will be examined. Body-oriented violence during penal proceedings in the Ottoman Empire will constitute the primary concern of this study. More importantly, the abolitionist wave toward torture and other body-oriented severity, beginning from the mid-eighteenth century in Europe, will be main subject of this study. Specifically, torture during investigation process of an alleged offense, namely, the procedures used to elicit confessions and testimonial statements from suspects will be evaluated and exemplified under the title of corporal punishment; and to a certain degree, body-oriented torture techniques on prisoners whose punishments were already fixed and on the course in prison will be given additional interest. The former, the one in order to elicit confession will be called "judicial torture"; and the letter is maltreatment of prisoners as excessive punishments. Also, other components of the penal field like prisons and medicine will be dismissed, because these categories are essential components of the field since the abolitionist wave was launched.

A recently published dissertation on the abolition of torture in the Ottoman Empire was submitted to NYU by İbrahim Halil Kalkan in January 2015. Since there is very few scholarly works on torture in the Ottoman Empire, it would be necessary to mention here. Even though Kalkan studies the abolition of torture by linking it to the *Tanzimat*, primary concern of his thesis is equality before law and the rule of law as a *Tanzimat* principle. As this thesis will also reflect on these novelties, the main argument will dwell on new legal opportunities with the anti-torture law which would be presented to ordinary Ottomans and their actions in court rooms. Another different point between these two theses is the diplomatic aspect of the anti-torture

Torture (London: Studio Editions, 1995); Rejali, *Torture and Democracy*; Christopher J. Einolf, "The Fall and Rise of Torture: A Comparative Historical Analysis,'' *Sociological Theory* 25, no. 2 (Jun., 2007): 102-104; Erwand Abrahamian, *Tortured Confessions: Prisons and Public Recantations in Modern Iran* (Berkeley; Los Angeles; London: University of California Press, 1999).

law. Since this thesis devotes a chapter to diplomacy on torture in first two decades of the *Tanzimat* era, Kalkan is not interested in the nineteenth century interstate relations. Rather, he choose to engage with the Ottoman administration in terms of the abolition and discusses how the anti-torture law was carried out by the *Tanzimat* statesmen as a way of sustaining authority over turbulent principalities like Serbia against nationalist rise.[15]

This thesis on the abolition of torture in the Ottoman Empire evidently falls into the highly established scope of the history of crime and punishment, which has yielded many products since the late 1930s. Before the so-called cultural turn in the early 1980s, however, the grand theories had their distinctive account on crime and punishment. In late nineteenth century, Emile Durkheim was the forerunner of this genre, in his studies, the category of crime was defined as a practice that targeted the core of society, and punishment as the response of the collective consciousness.[16]

Beginning from the mid-twentieth century, Marxist historians dealt with the class dimension of crime and prison systems as labor force.[17] More precisely, since the 1960s, the category of crime and punishment has been deeply investigated by British-Marxist historians, who argued that towards the turn of the nineteenth century, the rule of law and crime as deeply class-oriented categories. Crime and the criminal had been read through their reflection in the legal field.[18]

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[15]. İbrahim Halil Kalkan, "Torture, Law, and Politics in the Late Ottoman Empire (1840-1918)," (*PhD.Diss*., NYU, 2015).

[16] For Durkheim on crime and punishment, Garland, *Punishment and Modern Society: A Study in Social Theory*, Chapter 2 and 3.

[17] For the most famous example of this genre, George Rusche and Otto Kircheimer, *Punishment and Social Structure* (New York: Columbia University Press, 1939).

[18] Since there is extremely large literature of British Marxist historians on crime and punishment, it is worthwhile to mention a couple of them: E.P Thompson, *Whigs and Hunters: The Origin of Black Act* (London: Allan Lane, 1975); Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, eds. Douglas Hay, et.al. (London: Allen Lane, 1975)

Normally, changing habits in history-writing must be echoed in the history of crime and punishment as would be expected. In the 1980s, then, the history discipline witnessed a so-called cultural turn as the subjects of interest moving away from ones based on meta-narratives to small-scale investigations that generally concentrated on the marginal and the irrational, studies on violent and extraordinary circumstances (like riots, massacres etc.) became more popular. Since then, crime and punishment have become a field of attention more than ever for historians. Many of them owe to social theorists and philosophers for their theoretical schema and conceptual tools. On torture, too, as a practice oriented to the body and as a punishment, various theoretical devices have been extensively used by historians.

On body-oriented severity, more specifically torture, there have been two main theoretical perspectives the influence of which has been profoundly felt. One of them is obviously the Foucaldian reading of punishment that offers its shift from the body to incarceration since the prison reforms in the eighteenth century. According to Foucault, the aim of punishment up until the eighteenth century was, on the one hand, retribution claimed by the sovereign which left marks on the body because categorically crime was taken as an offense against the sovereign himself; and, on the other hand, deterrence which was supposed to discourage the onlookers of spectacle from committing offenses.

After the turn of the eighteenth century, however, the aim of punishment became to discipline the delinquent in order to create docile and tamed bodies.[19] The Foucaldian understanding of punishment has been frequently borrowed by social historians concerning social control and disciplining methods within the context of body politics. Also, historians have turned to prison reforms and other disciplining

[19] Michel Foucault, *Discipline and Punish The Birth of the Prison* (New York: Vintage, 1984).

institutions as forms of social control rather than all-inclusive categories like social classes after the Foucaldian critique of social disciplines. [20]

The other mainstream approach toward torture which has been held by historians is anthropological readings that give precedence to the perception of pain and sensitivity toward suffering. In general, since the mid-1980s, scholarly works on crime and punishment have been deeply engaged with culturally-oriented approaches which have been rather popular among historians.[21] According to these studies in general, after the eighteenth century, brutal scenes have been left out the social arena as social psychology has reached a certain degree of empathy toward the sufferer. Rather than the sufferer on the scaffold, the audience, which was exposed to spectacle of suffering, has appeared as the main agent in these studies. Norbert Elias' "Civilizing Process" provides a substantial basis for cultural studies on the abolition of torture. In this view, torture was banned because of diffusion of civilized norms which would no longer allow onlookers to stand against the brutal practice. The very reason for the abolition, then, was the spectacle of torture which was not appropriate for the eighteenth century society.[22]

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[20] For the aspect of social control, Michael Ignatieff, *A Just Measure of Pain: Penitentiaries in the Industrial Revolution, 1750-1850* (New York: Pantheon Books, 1978). For reform and transformation of penal institutions, Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany 1600-1987* (Oxford and New York: Oxford University Press, 1996); Bruce F. Adams, *The Politics of Punishment: Prison Reform in Russia 1863-1917* (Northern Illinois University Press, 1996) ; J.M Beattie, *Crime and the Courts in England 1660-1800* (New Jersey: Princeton, 1986); For the prison reform in the Ottoman Empire, Kent Schull, *Prisons in the Late Ottoman Empire: Microcosmos of Modernity* (Edinburgh: Edinburgh University Press, 2014); Gültekin Yıldız, *Mapusane: Osmanlı Hapisanelerinin Kuruluş Serüveni (1839-1908)* (İstanbul: Kitabevi, 2012)

[21] For scholarly literature on crime deeply engaged with culture, Martin J. Wiener, *Restructuring the Criminal: Culture, Law, and Policy in England, 1830-1914* (New York: Cambridge University Press, 1994); Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France* (Chicago: University of Chicago Press, 2001). For a culturally-oriented reading of Ottoman Law, Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: SUNY Press, 1994).

[22] Norbert Elias, *The Civilizing Process* (New York: Urizen Books, 1978); As a colleague of Elias, also Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience* (Cambridge: Cambridge University Press, 1984).

Theoretically, how torture is defined in particular has also been subject of discussion as well. According to Jeremy Bentham, who wrote rather frequently on the categories of legislation and punishments in the late eighteenth century,[23] two types of torturing exist as a procedure with respect to their time of implementation as well as their very aim, and the exact criminal status of the sufferer to whom it is applied. Bentham states that torture is a two-tiered procedure that, one of them is past-directed torture and the other one is future-directed.[24] In other words, past-directed torture appears as an output at the end of the investigation process as opposed to future-directed torture, which has a distinctive aim during the investigation process.

The former's aim, past-directed torture, is a retaliation that renders the practice a punishment by inflicting pain on the body. For instance, bastinado, whipping and flogging (or more severe examples, such as amputation), are applied on a convicted person after an investigation. Up to a point, these practices do not differ from imprisonment since the suspects are incarcerated after a conviction as well. On the other hand, future-directed torture has a more concrete aim. It is a procedure that is used during interrogations in order to elicit confession from the culprit when there is strong suspicion; or else to force anyone, who may or may not be associated with the crime, to extract information about an allegation. Assumingly as John Langbein points out, apart from being a punishment, judicial torture becomes a procedure to obtain legal proof that differentiated it from other types of body-oriented punitive

[23] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Kitchener: Batoche Books, 2000) 134-139; *The Panopticon Writings* (London; New York: Verso, 1995).
[24] W.L Twining and P.E Twining, Bentham on Torture, *Northern Ireland Law Quarterly* 305, (1973) as cited in Malise Ruthven, *Torture: The Grand Conspiracy* (London : Weidenfeld & Nicolson, 1978), 19.

practices before the mid-eighteenth century.[25] Therefore, in this way, this practice is reduced to the status of a legal tool of the investigation process and its connection to penality disappeared.

The reason lies behind this motivation to acquire a confession is the place of confessions within the hierarchy of legal proofs. Up until late seventeenth and the mid-eighteenth centuries, confessions held first rank status among possible legal proofs over testimonies and circumstantial evidences as an indication of crime. They were described as the queen of proofs, or proof of proofs, and full proof on its own.[26] Accordingly, judicial torture became an indispensable part of penal systems until the mid-eighteenth century.

This argumentation of the difference between past-directed and future-directed torture depends on the understanding of crime phenomenon. As stated above, when one talks about future-directed torture, the connection of that practice to penality has been cut off; this kind of torture seems to precede the crime which is proven, irrevocable, thereby, the conviction is sealed and the body is ready for execution. The body, nevertheless, is still subjected to the great torture and might be battered, as if a severe corporal method were applied.[27] However, the condition of the body after the investigation is, the pain inflicted to the body and the remnants of practice, like scars, are not regarded as the results of punishment as if this practice is solely a part of the regular running of the penal process.

[25] John H. Langbein, *Torture and the Law of Proof* (Chicago and London: University of Chicago Press, 1977), 3.
[26] John H. Langbein, "Torture and Plea Bargaining," *The University of Chicago Law Review* 46, no. 1 (1978): 14.
[27] Ruthven, *Torture: The Grand Conspiracy*, 18.

As Talal Asad also defines "two histories of torture,[28] both types of torture as described above, will be acknowledged as inseparable components of the penal field in this study as well; that, the Foucaldian definition of torture is going to be taken as essential arguing that judicial torture is a punishment on its own. First, it needs to be noted that, in Europe, only *ius civile* states, mostly the one which follows Roman law tradition, permit judicial torture in their legislation, not states like Britain, Denmark and Sweden.[29] Since the thirteenth century, the practice has been a part of penal proceedings. As opposed to the distinction between the two types, in his path-breaking study, *Discipline and Punish*, Foucault starts the chapter on torture with the 1670 French Ordinance in which judicial torture pending proof holds second rank after capital punishments in the hierarchy of punitive practices, those consisting of many other physical punishment.

As body-oriented severity appears to have been a common phenomenon in penal systems up until the eighteenth century almost globally, crime was also differently conceptualized in comparison to the current understanding. First of all, having any knowledge about an offense "was the absolute privilege of the prosecution."[30] The truth about crime was already possessed by the prosecution before the conviction as well. In other words, the suspect did not necessarily know of what he/she was accused of during the interrogation; further, entire penal process remained as secret until the time of full conviction. The suspect was constructed as the culprit through accusations to the degree which the prosecution would decide.

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[28] Talal Asad, ''On Torture, or Cruel, Inhuman, and Degrading Treatment,'' in *Social Suffering*, eds. Arthur Kleinman, Veena Das, and Margaret Lock (Berkeley: University of California Press, 1997), 286.

[29] Helle Vogt, "'Likewise No One Shall Be Tortured,'" *Scandinavian Journal of History* 39, no. 1 (January 2014), 79; Heikki Pihlajamäki, "The Painful Question: The Fate of Judicial Torture in Early Modern Sweden," *Law and History Review* 25, no. 3 (2014)

[30] Ibid., 35.

Accordingly, as Foucault writes, "the magistrate constituted, in solitary omnipotence, a truth by which he invested the accused."[31] The prosecution and the magistrate, thus, were intertwined during the process against the body. In other words, the investigation continued as a process in which the truth had already been produced.

What was missing in the pre-modern penal systems was the principle of "presumption of innocence" which is one of the main principles of modern law.[32] In modern law, theoretically, no one can be charged with a crime and punished accordingly until the suspicion of an offense is supported by evidences. For modern penality, the process of punishing starts "after" the allegations are totally proven. Also, the suspect does not have to prove his/her innocence; the prosecution must prove guilt. Henceforth, the crime and its punishment reflect each other at the end of the investigation process as the suspect becomes the culprit. The punishment is necessary when the prosecution is able to find the way from the allegation through the evidences to the crime. It is a deduction.

As opposed to this perception of crime, the penal systems before the eighteenth century approached category of crime differently. As stated above, the confession came forward as full proof. With respect to its fullness, there could also be quarter, half or half of a quarter proofs during the investigation. This arithmetic organization of the legal proof system put the confession on top.[33] Therefore, when the magistrate determined the truth and created allegations in this way right before the investigation process, the judge aims to receive the confession in the form of a

[31] Ibid., 35.
[32] Rona Aybay, *An Introduction to Law* (İstanbul: İstanbul Bilgi University Press, 2011), 45.
[33] Foucault, *Discipline and Punish The Birth of the Prison*, 36-7.

certain proof from the culprit; the truth, then, had to be revealed in the form of confession as a fully-proven allegation.[34]

In the absence of a confession, though, there might be two testimonies to constitute full proof or one testimony with two pieces of strong circumstantial evidences could result in the same end. This organization of the proof system paved the way to punishment which also preceded the (quarter, half or etc.) guilt. This, apparently, was an induction. On the other hand, legally-speaking, judicial torture could not be performed out of nothing, according to Langbein. There needed to be strong suspicion against the culprit and he/she has to utter a confession of which only a guilty person could have that knowledge.[35]

Islamic Law had used similar type of legal proof system when it came to the arithmetic organization between confessions and testimonies. As a commonly-known phenomenon, the testimonies of two Muslim male witnesses; or, one Muslim male and two Muslim women was accepted as full proof. [36] In addition, jurists of Sharia ascribed further responsibility to *kadi*s (the Chief Judge) when proof was not enough to constitute full proof. For instance, at the absence of one of them or both of them but with strong suspicion or circumstantial evidences, different procedures occurred like discretionary punishment (*tazir*, chastisement*)* conducted by provincial authorities with the initiation of *kadi*. [37] Assumingly, the Ottoman legal system as well could punish before full conviction. Therefore, in both systems, judicial torture and further severe methods will not be taken different and both of them need to be categorized torture as punishment.

[34] Ibid., 37-8.
[35] Langbein, *Torture and the Law of Proof*, 5.
[36] Langbein, *Torture and the Law of Proof*, 5; Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (New York: Cambridge University Press, 2005), 12.
[37] Peters, Ibid., 65-6.

In the end, for an era in which the prosecution system had not matured plus collecting circumstantial evidences was more harder than today (there were no various techniques for acquiring evidence like today such as identification) and because of the distinctive comprehension of the category of crime, judicial torture maintained its place as a tool and as a punitive practice during the investigation, until the abolitionist wave, which would begin in the second half of the eighteenth century along with the above-mentioned corporal punishment methods. Before that period, torture had been legitimate part of Ottoman penality as well as of Continental Law. In the following parts of this chapter, the application and the abolition of body-oriented severity, mostly in the Ottoman Empire, will be explained by giving additional reference to its European counterpart.

Torture on the Course

As a legal system in which the effect of Islamic jurisprudence was dominantly felt, corporal punishment methods had a central place within the Ottoman legal system before the *Tanzimat* era. Punitive practices generally were oriented to the body. Theoretically speaking, scholars who studied the pre-*Tanzimat* Ottoman penal system generally create accounts of possible corporal punishments that include very cruel methods. Both the Islamic Law (*sharia*) and the State Law (*kanun*) proposed body-oriented punishments. As Uriel Heyd and Rudolph Peters, in their studies on the Ottoman Criminal Law respectively, write in these methods, both capital punishments and severe corporal punishments for which the term of *siyasa* will be explanatory, were applied with great cruelty.

Initially, flogging, severe beating, and bastinado were among the mainstream methods. According to Peters, for severe corporal punishment, several amputation methods and retaliation for injuries (ones in which the punishment is carried out by the sufferer or a representative of the sufferer) are prevalent in Islamic Law. Assumingly, the most common methods are castration for sexual offences and amputation of hand (or another limb) for theft, since the former is cited in the criminal regulations and the latter is a *hadd* offense (offenses mentioned in the Koran).[38] The other violent methods were rarely seen in records.

More than these practices, Heyd states that a few writings mention hanging, impaling, decapitating and "cutting the criminal into two" as among body-oriented severe punitive methods of the Ottoman penal repertoire, along with severe corporal methods like castration, branding of the forehead (vulva for women), and slitting of the nose, which are rarely mentioned. Hence, Heyd argues that these severe corporal methods were replaced by some milder ones (i.e. strokes) or harsher and more absolute one – capital punishment.[39]

Judicial records, however, do not reveal so much of these imaginative methods, like cutting into two or stoning to death. Practically, this degree of violence is rarely found in the court registrations. Therefore, the presence of theoretically available punishments should not be overemphasized while considering the Ottoman penal system. According to Marc Baer, between the sixteenth and eighteenth centuries, the legal authorities generally preferred milder punishments like fines and other payments to severe corporal punishments. He states that it would be difficult to find examples of these cruel methods (stoning to death, as his example)

[38] Uriel Heyd, *Studies in Old Ottoman Criminal Law* (Oxford: Oxford University Press, 1973), 111 and 136.
[39] Ibid., 262-6.

except for a couple of instances.[40] Therefore, the actual practice needs to be distinguished from punitive theories on Ottoman Law. It would be difficult to claim that the Ottoman penal system was atrociously cruel before the *Tanzimat* era.

Aside from these punitive methods, judicial torture in order to elicit a confession from the culprit had a place within the Islamic jurisdiction (*fiqh*) after certain period of time. According to Baber Johansen, mainstream schools of Islamic jurisprudence (except the Maliki School) forbid judicial torture. Up to a point, in the *kadi*'s court, torture was unacceptable since the utterance of the sufferer could become controversial. Plus, performing torture in the court might put *kadi* in guilty status as well. The classical doctrines of Islamic law, thus, do not have specific reference to torture up until the last quarter of the thirteenth century when judicial torture was officially recognized by European "*ius civile*" as a necessary instrument.[41] The jurists regarded judicial torture as an inconceivable way of gaining legal proof.

After first three centuries of Islamic jurisprudence, however, the status of judicial torture had changed. From the late thirteenth and early fourteenth centuries, jurists of Islamic Law attempted to find a legal ground for judicial torture. In this way, the law gives an opportunity to the authorities when there is strong suspicion against the accused. According to Johansen, this shift would rationalize the legal proof system as testimonies lost their dominance during the earlier centuries of Islamic jurisprudence.[42]

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[40] Marc Baer, "Death in the Hippodrome: Sexual Politics and Legal Culture in the Reign of Mehmet IV," *Past and Present* 210 (2011): 61-2; also Uriel Heyd mentions the same stoning event in the hippodrome in Heyd, Ibid., 263.

[41] Baber Johansen, "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim Al-Jawziyya (d. 1351) on Proof," *Islamic Law and Society* 9, no. 2 (2002): 170-1 and 178: According to Johansen, If capital or corporal punishment had executed depending on the confession elicited under torture from the culprit, the *kadi* should be condemned to or subjected to corporal punishment.

[42] Ibid., 193.

In Ottoman law, as a further example of Islamic jurisprudence, judicial torture had a place within the legal field. On the one hand, the difference between Islamic Law and the State Law should not be ignored as the latter must conform to the former. On the one hand, what is meant by law will mostly be State Law since Sharia did cover a highly restricted number of offenses. As stated above, judicial torture did not belong to the classical doctrine, but it would be seen in later interpretations of Islamic jurisprudence, mostly under influence of administrative authorities.[43] Therefore, Haim Gerber describes judicial torture as "one of the most typical *kanun* innovations"[44] since related items were frequently cited in the Ottoman law-books (*kanunname*).

Heyd and Peters refer to an Ottoman criminal law in their studies on the Ottoman penal system (precedes the *Tanzimat* era, when the codification movement peaked). Several articles about the law mention judicial torture during penal proceedings. Even though what they mean by "criminal law" or "criminal code" seem like a statute or instruction procuring most-demanded facts, which were sent from the Porte irregularly, rather than a penal code, torturing culprits in order to elicit a confession appears on a regular basis. Different sources use the term of *örf* for the method in question.

In what Heyd describes as the Ottoman Criminal Code, there are specific articles on torturing culprits. Accordingly, in the study on Ottoman Criminal Law of Peters who refers to Heyd's abovementioned Code, the role of executive officers, "who routinely involved torture to extract confession"[45] is underlined. The Code approves judicial torture when necessary in a couple of articles. For instance, Article

[43] Ibid., 191-2.
[44] Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*, 68.
[45] Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, 82.

89 states that confession under torture would be valid when there are signs indicating guilt while Article 90 requires a bad reputation for torturing of a culprit, who is alleged to an accomplice by a criminal.[46] However, circumstantial evidence is required for legally-approved torture. In the code, Article 82 states:

> If something stolen is found in a person's possession or in his house (…) he shall be compelled to find the person who sold [it to him] (…) he [himself] is a suspicious [character] he shall be tortured…" Torturing in order to elicit a confession was legal along with the argument that the suspicion needs to be supported by further indicative facts. Also, the law renders *kadi* responsible of torturing and calls for carefulness not to let "[the suspect] does not perish before [his guilt] is proved (Article 82).

The Abolition of Torture and Corporal Punishment

Until the *Tanzimat* era, to what degree body-oriented punitive practices during penal proceedings were used and the level of their severity are questionable in reference to the gap between penal theories and lenient actual practice. Evidently, the body came forward as the very target of punishments, but with deviations to financial and other type of milder punishments. On the other hand, the promulgation of the *Tanzimat* was a concrete rupture for punitive practices within the Empire. Generally, during the era, body-oriented severity as punishment gradually declined and incarceration emerged as the main penalty. Also, as the Sublime Porte became involved more than ever in the penal proceedings in the provinces.

The abolition of body-oriented severity during penal proceedings, on the one hand, has to be taken as a global phenomenon by the mid-eighteenth century. The above-mentioned developments in the *Tanzimat* era actually were on the course in Europe as an intellectual debate on penality and real alterations. In various studies on

[46] Heyd, *Studies in Old Ottoman Criminal Law*, 118-9.

torturing criminals, the book of Cesare Beccaria *An Essay on Crimes and Punishments* was one of the milestones of the abolitionist wave. The book seems to have deeply affected the attitudes of European intellectuals towards torture in a path-breaking way. Then, intellectual advocates of the abolition of these practices, which would start to take place in the last quarter of the eighteenth century, are widely acknowledged to have been first Beccaria and then Voltaire. [47] As opposed to their role in the abolition story, John Langbein challenges this common acceptance and calls the effect of Beccaria a "fairytale". According to him, the gradual decline of torture had begun in the second part of the seventeenth century as part of transformation of the legal proof system which brought rise of circumstantial evidence. [48]

During the late nineteenth century, when the debates on torture continued, a gradual decline of body-oriented punishments occurred. In England, where judicial torture had been traditionally out of the scope of courts, the corporal punishment methods had been fallen from grace in the late eighteenth century when incarceration and banishment emerged as alternatives. For instance, the transportation of convicted individuals (generally to North America) replaced capital and severe corporal punishment to some degree towards the third quarter of the eighteenth century when the widest debates on crime and punishment would occur in England.[49] Even though public whipping was restricted to specific statutory in as late as 1872,

[47] Cesare Beccaria, *An Essay on Crimes and Punishments, Translated from the Italian, with a Commentary Attributed to Mons. de Voltaire, Translated from the French, 4th edn.* (London: F. Newberry, 1775) quotes from iii and xli. as cited in Lynn Hunt, "The Eighteenth-Century Body and the Origins of Human Rights," *Diogenes* 51, no. 3 (August 1, 2004), 47-8; In addition, Jeremy Bentham would be no less than Beccaria and Voltaire against severity in judicial field but also found judicial torture very instrumental in order to acquire quicker answers during interrogations. "Bentham on Torture" in *Bentham and Legal Theory* ed. M.H James (Belfast, 1973), 45 as cited in Asad, "Reflections on Cruelty and Torture,"108

[48] Langbein, *Torture and the Law of Proof*, 10

[49] Beattie*, Crime and the Courts in England 1660-1800*, 470.

the abolition had always been on the agenda throughout the eighteenth century.[50] Joshua Fitzsimmonds argues that punishments like branding or whipping might be very properly changed to hard labor and imprisonment in 1751, while an adjustment would be requested for punishments which could be more proportional by Sir William Meredith in 1770.[51] Correspondingly, aside from a formal abolition of body-oriented punishments, as argued by J.M Beattie, corporal punishments especially for petty offences fell into disfavor by 1800.[52]

In the Continent, though, it is fair to say that judicial torture was a more established practice than *ius civile* countries. The Continental jurisdiction was deeply affected by Roman statutory law, which proposed full proof for conviction, thereby, legitimizing torturing culprits during interrogation.[53] Therefore, from the late Middle Ages to the late early modern era, judicial torture was widely used in the Continent.

The late eighteenth century, then, witnessed the formal abolition of the practice along with other corporally-sanctioned methods, including capital punishment. In most German towns, according to Richard Evans, executions were already declining from about mid-seventeenth century and would decrease further in the eighteenth century as well.[54] Correspondingly, judicial torture was a controversial subject in the penal field from about the mid-eighteenth century and its formal abolition would be realized almost all German states in the second half of the eighteenth century. While in Prussia under Friedrich II, judicial torture was removed from the penal field in 1754, towards the first quarter of the eighteenth century, its use had disappeared. [55]

[50] Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England 1830-1914*, 94.
[51] Beattie, *Crime and Courts in England 1660-1800,* 554 and 558.
[52] Ibid., 613.
[53] Langbein, *Torture and the Law of Proof*, 3-4 and 47.
[54] Evans, *Rituals of Retribution: Capital Punishment in Germany 1600-1987*, 42.
[55] Ibid., 115.

Seemingly, a major turning-point of the practice in Europe was the last quarter of the century when torture was also banned in France in 1788.[56]

The abolition of torture and gradual decline of corporal punishment methods took place in the Ottoman Empire with the promulgation of the *Tanzimat* edict. On the one hand, the abolition was part of the sequential judicial transformation at the global level as stated above. Throughout the one and a half centuries up to the mid-nineteenth century, torture lost its place in the penal field. On the other hand, the *Tanzimat* edict was a milestone of complete re-organization of the judicial field of the Empire. Beginning from the early 1840s up to the 1860s, the judicial branch of the Empire had come across earlier instances of a group of novelty.[57]

First of all, three new Penal codes were authorized respectively in 1840, 1851 and 1858. Secular courts (*Nizamiye Mahkemeleri*) were established in 1864. Their origins can be traced back to early 1840s when local courts (first *Muhassıl Meclisleri*, then *Memleket Meclisleri* and *Eyalet Meclisleri* or *Meclis-i Kebir*) were established at the expense of traditional Sharia courts, which had lost its monopoly in the judicial branch.

It needs to be stated that the reforms were carried out by a clique (led by Mustafa Reşit Paşa who also announced the edict officially) in the Sublime Porte and the reforms were prompted from their initiatives. As the *Tanzimat*, on the one hand, was an attempt at standardization which organized by the Sublime Porte, it would difficult to define the attempts of the reformist cadre with a single term.[58] On the

[56] Silverman, *Tortured Subjects: Pain Truth and the Body in Early Modern France*, 10.
[57] The judicial transformation of the Empire has been studied by a few works which are worth to mention: Fatmagül Demirel, *Adliye Nezareti Kuruluşu ve Faaliyetleri 1876-1914* (Istanbul: Boğaziçi Üniversitesi Yayınevi, 2007); Sedat Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu Nizamiye Mahkemelerinin Kuruluşu ve İşleyişi 1840-1876* (Eskişehir: Anadolu Üniversitesi Yayınları, 2004); Avi Rubin, *Ottoman Nizamiye Courts Law and Modernity* (New York: Palgrave Macmillan, 2011).
[58] On the other hand, Agmon, in her great essay on the recording procedures of Jaffa and Haifa *kadi* courts, emphasizes the local initiatives of the transformation of habitual attitudes; Iris Agmon,

other hand, it is obvious that the *Tanzimat* era witnessed internal (re)claiming of sovereignty assumed by the central bureaucracy.[59] Apparently, certain terms can be used to summarize the reformist perspective of the *Tanzimat* era (which included standardization, proceduralization, and etc.) given with the fact that the *Tanzimat* reforms would end up with an unprecedented transformation in every aspect of the Ottoman administration as well as in the judicial branch.

The judicial transformation of the Empire, however, is not necessarily taken as a radical transition from pre-modern law to modern law; or more precisely from arbitrariness to a rational law system. As Haim Gerber points out, the Sharia courts were also consistent and predictable in their jurisdiction for a certain period.[60] Yet, what was lacking before the *Tanzimat* era could be summarized as so-called legal formalism, which presupposes routinization and proceduralization of judicial practices.[61] In other words, standard procedures were determinative for civil and criminal proceedings in the Empire as the central bureaucracy got involved in the judicial field more than ever.

Aside from secular courts, for instance, the Sharia courts were also subjected several alterations in the era, which were initiated by the Sublime Porte as well. Before the reform attempt of the mid-1840s, judgeship in localities was performed by *naib*s (the judge), which the post in the center was held by one of the members of traditional *ilmiye* (Educational Class) families and delegated to certain *naib*s in return of share in the annual income. After the *Tanzimat*, though, the center had appeared as

"Recording Procedures and Legal Culture in the Late Ottoman Sharia Court of Jaffa, 1865-1890," *Islamic Law and Society* 11, no. 3 (2004).

[59] Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (New York: Routledge, 2005), 2-3.

[60] Gerber, *State, Society and Law in Islam Ottoman Law in Comparative Perspective*, 28.

[61] Rubin, *Ottoman Nizamiye Courts Law and Modernity*, 15-6.

a third party in the appointments of judges. With the reform of 1855 that aimed at Sharia courts, *naib*s would be appointed by the Head of the Judges (*Kazasker*). [62]

The transformation in the judicial field, thus, can not be explained by looking at the secular courts; what is more, the appointment procedure and general mechanism of the Sharia courts were bureaucratized too. Hence, above all, the *Tanzimat* is going to be taken as first and foremost efforts at initiating reforms, which presupposes bureaucratized and standardized procedure within the territory.
As stated above, during the first two decades of the *Tanzimat* era, torturing Ottoman subjects during penal proceedings was an item which was dealt with by the above-mentioned penal codes, instructions sent from the Sublime Porte to the provinces, and certain regulations. These sources of anti-torture law are differentiated from each other from their overall, definition of torture and its place in the penal literature like the earlier two penal codes seem more basic and ambivalent about torture, namely its exact definition. The regulations would become more inclusionary up to the 1860s.

In this thesis, the abolition of torture in penal proceedings will be regarded as one of the results of an Empire that bureaucratized internally, and secularized jurisdictionally. The former refers to the central bureaucracy, which took more initiative than before in the administrative branch. Especially for criminal law, according to Talal Asad, "the state's appropriation of the domain of criminal law" and "its monopolization of the definition of categories of crimes" could explain the bureaucratic organization of the state led by the central authority. In the case of the latter, secularization refers to a certain abandonment of religious rites within the judicial branch of the Empire. Yet, the fact needs to be underlined is that *Tanzimat*

[62] Jun Akiba, "From *Kadi* to *Naib*: Reorganization of the Ottoman Sharia Judiciary in the *Tanzimat* Period," in *Frontiers of Ottoman Studies: State, Province, and the West,* eds. C. Imber and K. Kiyotaki (London: I.B. Tauris, 2005), 45-8.

law was deeply entangled with the reformulation of Islamic jurisprudence in the nineteenth century.[63] As an example of the relation between secularism and nineteenth century Islamic jurisprudence is that all the penal codes which were issued in the *Tanzimat* era reveals, at the introduction part of the law texts, which any issued law could not be in conflict with Sharia.

As a beginning, the 1840 Penal Code (literally, *Ceza Kanunname-i Humayunu*) consists of thirteen chapters (*fasıl*) and forty-two articles (*madde*) in which the scope of the articles is narrow and points out a few main offenses without giving great detail. More generally, the Code specifies the obligations and responsibilities of the Ottoman officials whose jobs were cautiously defined. The widest coverage of the code is devoted to bribery and fraud. The anti-torture law also falls into this scope, the law warns the officers about unlawful practices. Actually, though in the law text, the term of torture (*işkence*) is not literally stated but several articles make the definition of the practice.

There is a pair of articles that deals with atrocities by Ottoman officials in the Code. Article 1 in Chapter 3, while poorly organized and lacking details, states that military officers and security guards shall not beat or abuse any one and, since their duty is restricted to capturing criminals and delivering them to the office in charge. As specifically mentioned in the code, if this offense is committed in İstanbul, the guilty officer shall be prisoned from five to twenty-five days. More, if the guilty person belongs to *ilmiye*, his case will be adjudicated in the Supreme Council.[64]

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[63] Talal Asad, "Reconfigurations of Law and Ethics in Colonial Egypt" in *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

[64] Ahmet Akagündüz, *Mukayeseli İslâm ve Osmanli Hukuku Külliyati* (Diyarbakır: Dicle Üni. Hukuk Fakültesi Yayınları, 1986), 812-3: "*...bundan böyle zâbıtan-ı askeriye ve neferât ve kavas ve sair umûr-u zaptiye ve raptiye memurları hod be hod kimseyi döğemeyip de kimseye bed lakırdı söyleyemeyip, fakat onların memuriyetleri sokaklarda kavga ve niza vukuunda ve bazı erbab-ı töhmetin zuhurunda tutup hiçbir şey yapmaksızın doğruca iktiza eden zâbıt mahalline götürüp teslim etmekten ibaret olacağından (...) faraza bu keyfiyet Dersaadet'de vuku bulup da (...) ashab-ı*

Evidently, the article on torture is not well-organized and lacks of details. Yet, the Sublime Porte seems to have sent several instructions on torture practices since the earliest torture cases started to be seen in the archival documents in the mid-1840s.

There are few sources from which to extract a narrative of the anti-torture movement. An undated (but possibly belonging to the first decade of the *Tanzimat* era) instruction on torture, which bears the title "Instructions Issued to the Provincial Councils" (*Taşra Mecalisine Verilen Ta'limat*) takes place in *Düstur*, an edited and published series of Ottoman Law collections. There are two articles which deal with the atrocities committed by the Ottoman officials. The third article of the instruction in the first chapter named "About the Manner of the *Tanzimat* and Reform in the Country" (*Usül-ü Tanzimat-ı Hayriyye ve Islahat-ı Mülkiye*), looks like a general notice directed at the provincial officials. The article states that the officials should avoid compulsive behaviors (*muamele-i gadriyye*) toward all Ottoman subjects. The latter, however, forthrightly addresses the practice of torture. Article 37 in the instruction booklet in *Düstur* states that:

> Since torture is forbidden according to Sharia and the State Law, the local council shall be careful and monitor continually for torture does not occur. If the unlawful practice is occurred, the council is responsible of setting a trial in which torturers to be adjudicated.[65]

The second decade of the *Tanzimat* era was rather busy for the legislative branch. In 1851, a new penal code (*Kanun-ı Cedid*) was authorized. This Code consists of three chapters and 42 articles. Actually, the 1851 Penal Code was a modified version of the previous one, the 1840 Code, which had undergone a few

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merâtibinden veyahut ulemadan olur ise davası mutlaka Meclis-i Ahkâm-ı Adliyede görülerek(...)beş günden yirmi beş günekadar mahbus..."

[65] *Düstur,* Ser. 1. Volume 1 (Ankara: Başbakanlık Basımevi, Date Not Specified), 881*: "Otuz yedinci maddedir: Şer'en ve kanunen her halde memnu' olan işkence ve eziyet ve tazyikat keyfiyetleri vuku' bulmamasına âliyyül-devam meclis dikkat ve nezaret edecektir. O misillü muamele-i na-meşru'iye vuku'u takdirinde kimden südur etmiş ise meclis-i muhakeme-i lazımesinin icrasına memur olduğu..."*

changes. Also, the code lacked depth since very limited number of deeds relevant to the penal field were mentioned. About the abolition of torture, Article 4 in the second chapter repeats what was written in the 1840 Code word for word. On judicial torture then the 1851 Penal Code represents no new advancement. [66]

So although regarding torture the 1851 code was identical to the one of a decade earlier, in terms of judicial punishment, there are differences between the two laws. The 1840 Code proposes imprisonment, banishment, capital punishment and penal servitude in galleys (*kürek cezası*, hard labor) as punishments for certain offenses. There was not one body-oriented punitive practice suggested by the 1840 code. So, the very old punitive term, *tazir* (chastisement or bastinado or flogging) is never mentioned in the earliest penal code of the *Tanzimat* era.

The practice is present in 1851 Penal Code as a punishment which is supposed to be used for ones who beats or abuses someone. Article 2 in the second chapter of the Code states that the one who committed the abovementioned (beating and abusing) offenses shall be punished by three to 79 strokes of stick (*değnek cezası*). Similarly, Article 5 and 7 suggest, respectively, the same punishment for drunks who make improper remarks or overtures to women, the ones who yell, and gamblers; and those who use knives or other dangerous weapons. [67] The code also underlines that grocers, butchers and bakers who come up with deficient products or

[66] Akagündüz, *Mukayeseli İslâm ve Osmanli Hukuku Külliyati*, 825.
[67] Ibid., 825-6. Article 2*:"... âhâd-ı makûlesi kezâlik ihzar ve haps ve nefiyden başka vech-işer'î üzere üçden nihayet yetmiş dokuz adede kadar değenek darbıyla tedip kılına...."; Article 5:"... mahâll-i sairede şunabuna sarkıntılık eden sekrânın (...)fakat na'rezen olan edepsizlere ve alametiyle tutulan kumarbazlara dahi cünhalarına göre mesâğ-ı şer'î olduğu veçhile öldüresiye olmayarak kâimen üçten nihayetün nihaye 79 adede kadar değenek..." Article 7:"... Âlet-i cârihadan madud olmayan şeyler ile birbirlerini darba cesaret edenlerin (...)derece-i cünhasına göre üçten 79 adede kadar değenek darbıyla..."*

sell their products over the officially fixed price (*narh*) should be punished with the same method according to the degree of the offense.[68]

Chastisement of criminals is not intended to end culprit's life or even wreak irrevocable damage to the body as the abovementioned theoretically-available severe corporal methods like castration or amputation. Yet, punishments oriented to the body had been sustained by the earlier *Tanzimat* penal codes as these practices could be acknowledged as mere revelation to pre-*Tanzimat* Islamic jurisprudence. The later punishments, though, proposed by the *Tanzimat* legislation does not have the impression of a retributive aspect. Rather, the aim of chastisement is explicitly specified as disciplining or taming the criminal (*te'dib* or *te'dip'ül darb*) this is frequently mentioned in the penal codes as well as in the pre-*Tanzimat* era. Practically, chastisement (mentioned as *tazir*) also appears in the archival sources occasionally up until the mid-1870s.

Technical inadequacy must have caused the re-birth of chastisement in the 1851 Code. One has to keep in mind that, especially for petty offences, there were numerically few alternatives which could replace chastisement since the prison-system was inadequate up until the first two decades in the twentieth century. Inadequacy of the Ottoman penal system was probably among one of the reasons why body-oriented punitive practices would hold its place during the era.[69] However, as Yıldız and Schull points out in their studies during the *Tanzimat* era, the Ottoman Empire headed toward a penal system that prioritized incarceration and hardlabor

[68] Ibid., 830. Article 19 in Chapter 3:" *Bakkal ve kasap ve habbaz ve sair bu misillû esnafdan dirhemi noksan olanlar veyahut narhdan ziyade füruhat edenlerin (...)derece-i cünhasına göre kâimen üçden 79 adede kadar*
hapishane önünde değenek darbıyla..."

[69] Yıldız, *Mapusane: Osmanlı Hapishanelerinin Kuruluş Serüveni, 1839-1908*, 75: Yıldız mentions one of the reports of Stratford Canning, the British ambassador to the Ottoman Empire, who reveals the inadequacy of the Ottoman penal system.

rather than body-oriented methods. Therefore, it could be argued that novelties and abandonments in penal practices were closely linked with the improvements of prison system in the Ottoman nineteenth century and in particular the prison reform of the Empire which was launched in the mid-1850s.

Nonetheless, the Sublime Porte did not disapprove chastisement for petty crimes, which could be harmful to the body in a period when similar methods were on decline. Apparently, even though 1840 Penal Code does not literally mention severe beating or flogging, these practices seems to have continued in the first decade of the *Tanzimat* era. On the other hand, the central bureaucracy tried to find a way to regulate body-oriented severity during penal proceedings and prevent excessive punishments as they determined the number of strokes according to the extent of the offense. In other words, one could see the effect of the central bureaucracy more clearly than before in various aspects of routine proceedings as well as in the penal field. Still, yet the first two penal codes of the *Tanzimat* era did not cut off their connection to the old *kanun* in the practical sense altogether.

An official memorandum which was sent to the provinces in 1845 more precisely specifies the regulation of chastisement and also reminds that severe beating and bastinado were unlawful in the Empire for thieves and the other criminals. The regulation further states that the officers who applied chastisement for above-mentioned petty offenses must conform to several rules. Accordingly, the strokes should not aim at the head, stomach, chest and, if the culprit is a woman, genitals. In addition, women were to be sitting down and men standing at the time of

the punishment in question. Also, the stick which will be used for strokes should be without knots since knots would inflict more pain to the body.[70]

As Gabriel Baer points out, the earlier Penal Codes did not adopt the punishments of the old system, chastisement (*tazir*) continued as an exemption of this principle.[71] The number of strokes, nevertheless, was a principle of the pre-*Tanzimat kanun* as well, thereby, being in accordance with the writings of the Hanefi jurists as Heyd states in his classic work on Ottoman law.[72] The Sublime Porte, then, repeated the recent penal repertoire on the subject of chastisement for petty offences given the fact that lesser, or more frankly, regulated pain inflicted to the body was an aim. As stated above, the reformist bureaucracy of the *Tanzimat* stepped in the penal field even for petty offenses as their very purpose was to limit and regulate the infliction and preventing excessive sanctions on criminals

The Reform Edict (*Islahat Fermanı*) is another text which was important for the abolition of torture since the Edict openly declares its abolition. In the edict, the term of torture (*işkence*) is officially mentioned along with the prevention of body-oriented punishments. The edict states that:

> …corporal punishment shall not be administered, even in the prisons, except in conformity with the disciplinary regulations established by my Sublime Porte, and everything that resembles torture shall be entirely abolished. (…) the officials who orders torture and the ones who applies torture in person will be

[70] BOA: C.ADL 35/2081 13 Safer1261: *"...darb-u değnek maddesinin ekser mahalde dikkat olunarak ve tecahül ile mugayir-i şer-i şerif-i hal vuku'a gelmekde olduğuna ve sarik misillü eşhasın darb-ı değnek olunması külliyen memnu' olduğu misllü müttehem olan eşhasın dahi arkası üzerine yatırılarak falak ile değnek-ü darb olunması şer'en ve külliyen bulunduğuna binaen (...) (erkek) ise ayak üzerinde durduğu ve (kadin ise)oturduğu halde budaksız değnek ile baş ve karın ve göğüs ve avrat yerinden maa'da ahir yerlere tazyik olarak ve memur olan kimesne değneği baş hizasında kaldırarak bervech-i itidal şahs-ı müttehemin derece-i cünhasına göre cismane…*"

[71] Gabriel Baer, "The Transition from Traditional to Western Criminal Law in Turkey and Egypt," *Studia Islamica* 45, no. 45 (1977): 147-8.

[72] Heyd, *Studies in Old Ottoman Criminal Law*, 272-4.

> censured and disciplined according to penal code requirements…[73]

As the edict was a mere manifestation of the principles of the *Tanzimat* era, certain guarantees and regulations were rendered more specific and to the point including the abolition of torture. Further codes would follow the edict in manners and principles.

Arguably, after the Reform Edict, the codification movements became more prevalent and handled more thoroughly since, in addition to the 1858 Penal Code, the Ottoman Land Code was issued at the same year. Aside from hurry in the legislative field, the new codes were qualitatively different from the products of Ottoman legal tradition up until the mid-1850s; rather, the new codes resemble their European counterparts. They contained more articles numerically and the definitions of offenses and punishments were remarkably explained in detail.

The 1858 Penal Code (*Ceza Kanunname-i Hümayunu*), issued on August 9, 1858, consists of an introduction part (*mukaddime*), three parts (*bab*) and 264 articles in which there are many judicial novelties for the Empire. For instance, at the beginning, the offenses were classified according to their rank; respectively, felony (*cinayet*), petty offences (*cünha*) and misdeeds (*kabahat*) and their punishments were imposed accordingly.[74] In comparison with the preceding penal codes, the 1858 Penal Code was more inclusive and well-established lawtext. The code overall was a translated version of the French Penal Code of 1810 (originally *Code d'Napoleon*) for its organization, to which several additions and subtractions had been made.

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[73] *"...herhalde hapishânelerde bile cânib-i saltanat-ı seniyemden vaz'ı kılınan nizamât-ı inzibatiyeye muvafık olan muamelâttan maada hiçbir gûna mücazaât-ı cismaniye ve eziyet ve işkenceye müşabih kâffe-i muamele dahi kâmilen lağv ve iptal kılınması (...) bunun icrâsını emreden memurîn ile bi-l-fiil icrâ eyleyen kesanın dahi ceza kanûnnâmesi iktizasınca tekdir ve tedip olunması..."*

[74] Akagündüz, *Mukayeseli İslâm ve Osmanli Hukuku Külliyati*, 835: Article 2-5.

On the concept of punishment and penal proceedings, the 1858 Code marginalized body-oriented methods as opposed to the previous code. In other words, *tazir* (chastisement) is no longer mentioned in the new code among the punitive practices.[75] Judicial torture, however, could take attention from the *Tanzimat* legislators. Chapter (*fasıl*) 6 in the first book deals with the maltreatment of individuals by the Ottoman officials. Article 103 on judicial torture states that:

> Every public officer acting as a member of a Court or Council, or any other public servant, who shall order to be put, or shall himself put, to the torture any person charged with an offence, shall be punished with incarceration for from three to fifteen years, and shall be declared forever incapable of holding any rank or public office. Where the act has been done by a public servant of a lower class under superior orders, the penalty shall only be enforced against the superior officer who has given such order. Where by reason of the torture the sufferer shall have died or lost the use of a limb, the officer who is guilty thereof shall be punished with the penalties inflicted on persons causing death or wounding.[76]

Unlike the previous codes, the new one describes the practice of torture as an unlawful act and explicitly utters the term in a penal code for the first time. Also, the code warns Ottoman officials not to apply excessive punishments which go beyond the one fixed by the court. So, all corporal methods were removed from the Ottoman penal field once for all. Article 104 states,

> Every public servant being a member of any Court or Council or any other public officer who shall punish or order to be punished any convicted person with a punishment more severe than that ordered by law, shall be punished with imprisonment for from six months to three years, and dismissed from his employment,

[75] Baer, "The Transition from Traditional to Western Criminal Law in Turkey and Egypt," 148.
[76] *The Ottoman Penal Code 28 Zilhiceh 1274*, trans. C.G. Walpole (London: William Clowes and Sons, 1888), 46; also Akagündüz, *Mukayeseli İslâm ve Osmanli Hukuku Külliyati*, 858.

> and shall be forever incapable of performing any public duty whatever in any Court or Council.[77]

Practically, the new legislation and procedures of the *Tanzimat* belong to a certain transformation that one can roughly equate the era with the term "secularism." Throughout the era, bureaucratization and standardization occurred on the one hand, and the secularization of the old Ottoman practices can be discerned. One of the instances of this process was obviously the establishment of secular courts in which the torture trials were adjudicated. Interestingly, though, the anti-torture law in the 1858 Penal Code is found in the book under the title of "Of Offences against the State and the Punishment of the Same." As a practice oriented to the individual, it could be expected that the articles about the abolition of torture should have taken its place in the second book of the code called "Of Offences against the Person and the Punishment of the Same," assumingly, one of the new and unprecedented features of after-Reform Edict codification.

Rather than the individual, it could be said that torturing suspects and criminals was taken as an offense against the procedures of the *Tanzimat*. The welfare of the bureaucratic organization of the penal field must be crucial for the *Tanzimat* statesmen as Ruth Miller states that bureaucratic purity had become an aim in itself.[78] Deviations from the judicial proceedings, apparently, were taken as an offensive against the state. Torture as a practice stayed out of contention in the *Tanzimat* procedures claimed by the *Tanzimat* bureaucracy.

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[77] Walpole, ibid, 46-7; also Akagündüz, *Mukayeseli İslâm ve Osmanli Hukuku Külliyati*, 851-2 *Article 103:"... eşhasa cürümlerini söyletmek için ezivet ve işkence etmeyi hüküm veyahut icra eder ise..."; Article 104: "...memurîn-i devletten biri, mücrimiyete kanunen tayin olunan mücâzattan ziyade ve ağır suretle muamele eylemeyi hüküm veya icra eder ise, altı aydan üç seneye kadar hapis..."*

[78] More than that, the reform itself, according to Miller, became self-evident and furthermore was conducted by the reformist cadre for the sake of the reform: Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*, 2-3.

Nevertheless, the reforms acknowledged the individual as a target of possible offenses including torture carried out by state officials. *Tanzimat* law, in one sense, was the protector of public order as the expression "offenses against the state" reveals this principle. In another sense, the concept of law in the *Tanzimat* era was also a guarantee of justice and individual rights that the suffering of the body would not be appropriate for the era. Therefore, the very basis of the abolition of torture could be located within the context of secularism which transformed various practices in the Empire.

Talal Asad states that ending earthly cruelties was a primary motive for secularism. Correspondingly, "the deliberate infliction of pain to the living body of others"[79] conflicted with the principles of the *Tanzimat* era that supposed secular operation of administrative affairs. Not only the abolition of torture, but several fields of administrative and judicial branches of the Empire were secularized. Selim Deringil, for instance, argues that one of the features of the *Tanzimat* era was the secularization and bureaucratization of the conversion process that apostates used to be punished with death penalty.[80] As a principle of secularism, however, freedom of religion could have no more permitted the law tormenting bodies and the execution of apostates. Religious violence and intolerance toward religious minorities could only be eradicated with secular reforms.[81] Similarly, in the era, individual ownership of his/her body, slavery was an item in the reform agenda. Apparently, the body in the *Tanzimat* era was set free and released from all torturous treatments, particularly bodily pain in penal proceedings was restrained in the era by the secular initiations of the *Tanzimat* reforms

[79] Asad, "Reflections on Cruelty and Torture," 100.
[80] Selim Deringil, *Conversion and Apostasy in the Late Ottoman Empire* (New York: Cambridge University Press, 2012), 6-7.
[81] Asad, "Reflections on Cruelty and Torture," 100.

CHAPTER 3

THE TORTURED BODIES OF OTTOMAN SUBJECTS AND NINETEENTH CENTURY LIBERALISM

The writings of nineteenth century orientalists or the scholarly productions of eighteenth and nineteenth century European thinkers have their distinctive accounts on the discrepancies between the Orient and themselves. In the penal repertoire, as well as daily routine, the like "Asiatic barbarity," "cruelty," "severity," "harshness" were the determinative vocabulary of nineteenth century scholars. What is more, the obedient population of the Orient, who were subjected to the despotic state, were the very target of these practices. Consequently the human body in the Orient was suffering and harmed in the views of Westerners.[82] Punitive practices, by their own, received great deal of interest because punishments were directly oriented to the body. Severe corporal punishments, or more generally, harshness during penal proceedings was the synonymous with the Oriental penality, as the above stereotypical definitions were attached to the Ottoman punitive practices as well by the Westerners along with misery of prisoners and torture they were suffered in the nineteenth century.

Henceforth, once the nineteenth century has been labelled the century of the Great Powers, for the Westerners, the abolition of this violence must be undertaken through some amendments in non-Western regions. Correspondingly, the Ottoman penal organization, in the eyes of Westerners, was one of the areas of this severity. The battered bodies of Ottoman subjects were a problem for the "enlightened world"

[82]For a detailed account on this subject, Michael Curtis, *Orientalism and Islam European Thinkers on Oriental Despotism in the Middle East and India* (Cambridge: Cambridge University, 2009).

and one of the very impediments against the progress. After the promulgation of the *Tanzimat*, the formal abolition of judicial torture and decline of body-oriented punishments took its place by which, through the abolition, these practices were rendered illegal.

Diplomatically speaking, during the reformist era, Ottoman subjects under torture became an important item for the relation of the Sublime Porte with the Great Powers within diplomatic circles. The battered, harmed, or injured bodies of Ottoman subjects left their mark in the reform agenda, which was kept by the foreign representatives not only to consider, but also to intervene in that reform process. Therefore, in this chapter, the diplomatic aspect of the abolition will be examined by mostly using archival sources of the Foreign Ministry (*Hariciye Nezareti*) and imperial decrees (*İrade*). Also, several novelties, were affiliated with the penal reforms in the nineteenth century, like forensic medicine and prison reforms will be discussed below.

By the time of the promulgation of the *Tanzimat* edict in 1839, the abolition of body-oriented harsh punishments had been a part of legislative agenda of many European countries, including Britain, France and German states, for more than half a century. As was stated above, since the second part of the eighteenth century, the application of corporal methods to prisoners and judicial torture had been declining gradually. In the same direction, the complete abolition of judicial torture was part of the Ottoman reform programme along with the gradual decrease of lighter corporal punishment methods, which were restricted to rare occasions in the Penal Code of 1851, until its eradication in the Penal Code of 1858.

The Anti-Torture Law in *Tanzimat* Diplomacy

One of the most influential participants in the torture cases in the *Tanzimat* era were the members of foreign embassy or consulates who frequently appear in the archival documents related to torture. Beside the fact that there was pretty dense diplomacy in İstanbul during the *Tanzimat* era, the only participant was not the ambassador himself in the centre but other representatives, consuls or translators from the provincial networks as well. In the process, their efforts are frequently visible in the archival documents. They wrote letters and sent them to the provincial center or the Porte or they might try to find a way to intervene to the interrogation process. They were informed about the abolition of torture by the Ottoman officials or they "reminded" the promise given by the Ottoman Sultan about the prevention of torture. What one can see is the presence of the foreign representatives of the Great Powers, especially the British Empire, in, around or behind many torture incidences. Consequently, "foreign diplomatic pressure" on the Ottoman statesmen during the *Tanzimat* era appeared after the official abolition of torture.

Since the abolition of torture was part of the reform programme, the context in which the abolition of torture took place needs to be reconsidered. Once the inquiry on the very base of the *Tanzimat* reform -imported or home-made- started, the answer likely would shape with respect to some consideration on the Western world at that time. Namely, the place of the so-called westernization paradigm within the Ottoman reform programme has always been a controversial and two-tiered for the subject in question. About the abolition of body-oriented severity, the same argumentation could be made. On the one hand, it had to be dealt within the global context for the late eighteenth and nineteenth centuries; a context that could be

shaped by the rising modernity as Giddens writes "emerged in Europe from about the seventeenth century onwards and which subsequently became more or less worldwide in their influence."[83] Therefore, the decline of body-oriented severity during penal proceedings in the Ottoman Empire belonged to the correlative legislative wave of the nineteenth century modernity which sought humanitarian and rational principles in the penal system, including the abolition in question.[84] This wave, which is described as "penal modernity" in thesis, reached different areas of the world in the long nineteenth century when liberalism was at its peak. On the other hand, aside from a colonialist perspective, the Great Powers were active in the judicial branch of the non-Western states in a way that provides these powers dominance over non-Western empires.

The Ottoman Empire was not unique as a target of legal intervention by the Great Powers. Arguably, China and Russia or Japan as well underwent several legislative transformation in which the effect or direct involvement of westerners is discernible.[85] What was expected from these states is as Kayaoğlu writes was "to meet the requirement of civilization," which regarded mostly Western concepts and values. The practices in the rest of the world including torture were seen as the remaining obstacles to the progress of humanitarian values and principles.[86] For instance, the prohibition of polygamy or slavery was also among these ends.[87] Besides the abolition of torture, for the Ottoman Empire, the execution of Christian

[83] Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990), 1
[84] Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire 1815-1914* (Princeton: Princeton University Press, 2012), 5.
[85] Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (New York: Cambridge University Press, 2010); Nancy Park, "Imperial Chinese Justice and the Law of Torture," *Late Imperial China* 29, no. 2 (2008), 56-8; Adams, *The Politics of Punishment: Prison Reform in Russia, 1863-1917*, 12-20.
[86] E. J. Hobsbawm, *The Age of Revolution 1789-1848* (New York: Vintage, 2006), 21.
[87] Gerrit Gong, *The Standard of "Civilization" in International Society* .(Oxford : Clarendon Press, 1984) as cited in Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*, 60.

apostates who converted from Islam was one of the most important items at the agenda of the Great Powers along with the abolition of torture.[88] In this era, according to Yıldız, Ottoman prisons and penal system became a matter of diplomacy between western diplomats and *Tanzimat* statesmen. Seemingly, not only the abolition of torture, the other components of the penal field were not ignored by the foreign diplomats in the mid-nineteenth century.[89]

In this chapter, what the Ottoman judicial reform meant in terms of the transformations in legislation and judiciary that will be evaluated with respect to their relevance to the Western law. Benton writes that the Ottoman legislative reforms, the adoption of Western model laws "seem merely to follow pervasive pressures to facilitate interstate bargaining."[90] On the course of the reform, this argument could be acknowledged as a weak extraterritoriality that the Western powers did not claim the political control like a colonizer but they were still involved in the judicial processes, especially, in those of the non-Muslim Ottomans.[91] In addition, the category of torture both as a part of the reform programme and an item of foreign diplomacy will be discussed.

One might not conclude that foreign diplomats during the era were not "segregationist" in their interventionist activities. Specifically, the representatives of the Great Powers, mostly British and French diplomats, were interested in the conditions of non-Muslim Ottomans in penal proceedings. The tortured non-Muslim Ottoman suspects and criminals was indeed a matter of concern for the foreign

[88] Deringil, *Conversion and Apostasy in the Late Ottoman Empire*; Selahattin Özçelik, "Osmanlı İç Hukukunda Zorunlu Bir Tehir," *Ankara Üniversitesi Osmanlı Tarihi Araştırma ve Uygulama Merkezi Dergisi* 11 (2000).
[89] Yıldız, *Mapusane: Osmanlı Hapishanelerinin Kuruluş Serüveni, 1839-1908*, 172
[90] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900* (Cambridge: Cambridge University Press, 2004), 210.
[91] Ibid., 245.

diplomats. There were very few examples of cases in which consulate members raised their voice for tortured Muslims.[92] For non-Muslim Ottomans, however, the representatives did intervene even for individual cases. Hence, there were a diplomatic transactions over the battered bodies of Ottoman non-Muslims. More importantly, the diplomatic transaction on torture between the Sublime Porte and foreign representatives in Istanbul and the provinces were not less than an issue that had transformative potential for Ottoman internal affairs. Afterward, the internal policies of the Ottoman were shaped accordingly.

This chapter argues that the influential role of the Great Powers in the legal transformations of the nineteenth century including the *Tanzimat* attempt is clear and could be discernible from different aspects of the whole reform agenda and particularly torture. Correspondingly, the writings of the *Tanzimat* statesmen would not be in conflict this argument. The example below will show the relevant argumentation of European and Ottoman statesmen on the course of the abolition of body-oriented severity in penal proceedings.

Beginning from the first decade of the *Tanzimat* era, the relation between two parties on the abolition of body-oriented severity were conducted through diplomatic transactions. In an official letter (*tahrirat*) dated December 31, 1843, which was probably sent to the British government from the Ottoman Embassy in London,[93] the diplomatic transaction is evident. Even though the letter in question is unsigned, it was written in the time of Ahmed Muhtar Paşa, the Ottoman ambassador to Britain.

[92] BOA: HR.TO 252/17 02 April 1877: This notice sent by the British consulate is about a rumor that a certain Hacı Ahmed, a wealthy merchant from Aleppo, was tortured by the security forces on the accusation of theft. Since this account is one of the rare examples, assumingly, this man was a kind of middleman who worked with foreign merchants.

[93] The document found in the HR.SFR.3 catalogue, which contains the correspondences between the Ottoman Embassy in London and the British government in the Prime Ministry Ottoman Archives (BOA).

The contents of the letter look like an answer to the recent rumours that some suspects might had been tortured in the empire during penal proceedings. The author of the letter, an employee of the Ottoman embassy instructed by a higher-rank official or the Paşa himself, states it is illegal to torture suspects who were held in prison for offenses like murder, rape or theft; and, the punishment of such offences did not go beyond the punishment determined after the investigation process. He means both the judicial torture and corporal punishments. Then, the author gives an example about a torture event that had occurred in Konya. The alleged murderers were tortured in order to elicit a confession. The torturers would be charged with using unlawful methods against the suspects and summoned to İstanbul, along with the alleged criminals, the case to be adjudicated before the Supreme Council (*Meclis-i Vala*). At the end, he wrote that the regulation on the abolition of torture had been sent to the provinces which had informed the governors about the instructions for the further occurrences of torture, that the alleged torturers should be punished according to law by the governor in the province, and the necessary elucidation would be provided by the Sublime Porte.[94]

The embassy of the Ottoman Empire in London gave an assurance to the British government on the subject of the abolition of torture as the latter seemed to be guaranteed previously by the Sublime Porte. The author, speaking on behalf of the

[94] BOA: HR.SFR.3 6/56 31 December1843: "*Beyandan müstağni olduğu vechle katl-i nefs ve hatk-i ırz ve namus ve sirkat-i emval misillü ifal-i kabahatiye ve harekat-ı ba-maraziyenin vuku'unda mahbes olan eşhasın cünha-ı vaka'ası bade'l-tahakkuk derece-i cürm ve kabahatlerine göre haklarında terettüb edecek fakt- mücazat-ı şeriye ve kanuninin icrasıyla hilaf-ı şer ve kanun birgune eziyet ve işkence olunmaması(…)bu defa' Konya tarafında vuku' bulan bir katl maddesi badehu kesana azv ile güya kendülerine ikrar ettirmek üzere hilaf-ı şer' ve kanun haklarında eziyet ve işkence olunmuş idüğü istihbar olunmuşdur (…)şerire-i gayrimeşruiye cesaret eden kesanın bade'l-tahakkuk lüzum gelecek teadibi icra olunmak üzere mar'l-zikr Konya canibinde vuku' bulan katl maddesinden dolayı eziyet olunan kesan ile buna cesaret edenlerin Dersaadet'e celbleriyle Meclis-i Vala'ya bi'l-havale icra-ı usül-ü muhakemeleri derdest bulunmuş (…)zir-i idare-i müşirlerinde bulunan mahallerde o makule-i mücrimenin zuhurunda keyfiyet-i cünhaları şer'i sabit olduktan sonra içlerinden mücazat-ı şeri'ye ve kanuniyelerinin taraf-ı valalarılndan icrası lazım gelenlerin müşirlerin nizamı mucibince mahalinde icra ve bu tarafdan istizana muhtaç olanlarının kendülerini habs ve tevkif ile keyfiyet-i cünhaları bir tahsil-i beyan ve inha olunub…"*

Ottoman Empire, shows their awareness of the situation and underlines that torture is also against "their" law as well. Yet, all in all, considering the official letter, Ottoman officials were concerned with what the British government thought of the subject of the *Tanzimat* era and on the course of the reform.

Such rumours naturally echoed within the Ottoman administrative branch. Seemingly, the Sublime Porte did reinvestigate the rumours to reassure the guarantees given to the representatives of the Great Powers, as in the example above. The Ottoman embassy in London provided an inside account to the British government, which means the participation of British representatives in Ottoman internal affairs was acceptable to the *Tanzimat* statesman, Ahmed Muhtar Paşa as if the below letter was triggered by the above one. Therefore, as will be seen below, another official letter was sent by the Ministry of Internal Affairs (*Dahiliye Nezareti*) to Erzurum, Trabzon, Adana, Muğla, Kuşadası and the place in the above letter, Konya, dated three months after the above one.

In the letter, although using torture is forbidden by law, the British embassy states in an official letter that this method is still in use. According to author of the letter, even though the claim made by the British embassy is the only one on this issue and there was any other specific declaration sent to the Sublime Porte from the Ottoman officials in the above-mentioned regions about any torture event, it still needed to be checked out; because it couldn't be said that "torture never happens" though British reports could not be taken as totally valid.[95] Presumably, these two

[95] BOA: C.DH 18/1872 28 Rebiülahir 1260: "*Konya ve Erzurum ve Trabzon ve Adana ve Muğla ve Kuşadası taraflarında memnu' olan işkence ve eziyet vukuuna dair mahal-i merkumeden tevarüd edip İngiltere sefareti canibinden takdim olunmuş olan çend kıta' tahrirat tercümeleri Meclis-i Vala'ya ita' buyrulmuş olmağla lede'l-mütalaa işbu işkence maddesi bi'l-vücuh şer-i şerif ve kanun (?) mugayir olduğundan bunun bir çaresine bakılmak lazımeden olub ancak mevadd-ı mezkure yalnız sefaret-i mumaileyha tarafına gelen evarak-ı meallerinden müstebak olarak mahallerden buna dair memuriyet-i Devlet-i Aliyye caniblerinden bürgüne işarat vuku bulmamış olmasıyla pek de tamamı tamamına sahih olmak nazaryıla bakılamaz ise de hiç aslı yoktur denilemeyeceğinden…"*

official letters could be imagined as relative to one another, as the second one must be written for the possible investigation of the rumour in the first one.

Yet, the attitude of the Sublime Porte towards rumour originated by the British government seems to have been sceptical. Thus, they underlined that their own officials would have informed the center if the rumour had been true. On the one hand, the Porte tried to express its trust to its own officials. On the other hand, they were aware of the fact that the selective application of instructions sent from center, as Avi Rubin rightly points out, was one of the biggest impediments during the reformist era.[96] Nevertheless, the goal was the same in the end. It could be assumed that, in a way underlying both of the official letters which was written by the reformist faction of the *Tanzimat* cadres was the vitality of the abolition and importance of the *Tanzimat* legislation.

In the above correspondences, the involvement of the representatives of the British government is obvious. But, still the limits of the foreign involvement in the *Tanzimat* era need to be clarified, even if they can't be completely secured without any doubt. Foreign diplomatic pressure in the *Tanzimat* era is a fact which can be discerned from various concepts that were part of the reform program including the abolition of torture. However, the problem was putting forward a generalized and frozen diplomatic pressure as Deringil calls an "ubiquitous catch-all category"[97] for the whole reformist era since 1839. On the contrary, it can be argued that foreign diplomatic pressure on the Ottoman Empire had shaped over time and according to conditions; and certainly, it depended on different components of the Ottoman reform agenda. This is a commonly-made abstraction that gives foreign diplomatic

[96] Avi Rubin, "Legal Borrowing and Its Impact on Ottoman Legal Culture in the Late Nineteenth Century," *Continuity and Change* 22, no. 2 (August 13, 2007): 290-1.
[97] Deringil, *Conversion and Apostasy in the Late Ottoman Empire*, 65.

pressure an ever-present and never changing role in the Ottoman nineteenth century for an almost 80 year period. Even though the Ottoman legal reform can be seen as the most salient manifestation of legal borrowing (a borrowing from the western law), it would be incorrect to identify the whole the Ottoman nineteenth century as a campaign of westernization purpose of the empire.[98]

The reform agenda as a westernization campaign has occupied wide range of literature on the Ottoman reform for many decades.[99] Until the 1970s, scholars of the Ottoman nineteenth century raised the notion of westernization, or as Rubin writes "its alternative phrasing, the impact-of-the-West,"[100] as the champion category to explain the Ottoman social and political transformations that ensued in the reformist era. According to this view, the impulse behind the inauguration of the reform occurred because of such impact, furthermore, during the course of the reform foreign diplomatic pressure would stand as a watchdog over the reform program.

These reductionist explanations of the Ottoman reform programme could be, by referring to Brubaker and Cooper, "subjecting categories of analysis to categories of practice"[101] to reproduce same sort of generalizations. That is to say, western-inspired institutions as the outcome of the initiations of the reform-minded central bureaucracy could be taken as a category of analysis of the nineteenth century. In other words, the transformations can be seen in the nineteenth century to have shaped

[98] Rubin, "Legal Borrowing and Its Impact on Ottoman Legal Culture in the Late Nineteenth Century," 282.
[99] For instance, Bernard Lewis, *The Emergence of Modern Turkey* (New York: Oxford University Press, 2002); Stanford J. Shaw; Ezel Kural Shaw, *History of the Ottoman Empire and Modern Turkey Volume II: Reform, Revoluiton and Republic: The Rise of Modern Turkey, 1808-1975* (New York: Cambridge University Press, 1977).
[100] Rubin, *Ottoman Nizamiye Courts Law and Modernity*, 2
[101] R.Brubaker and F.Cooper, "Beyond "Identity"", *Theory and Society* 29, no.1 (2000) as cited in Avi Rubin, "Ottoman Judicial Change in the Age of Modernity: A Reappraisal," *History Compass* 7, no. 1 (January 2009): 123.

the course of the reform, unless it is acknowledged as a unique aspect of the Ottoman reform agenda.

As opposed to this point of view, undervaluing the western sphere of influence by giving all the credit to insiders (both for the participation of the representatives of western states in the reform process, and the image of westernization as in the minds of the reformist cadre) within the reform agenda would not be correct. It should not be a must to select only one explanation above all others. Rather, a more discreet approach needs to be developed while considering the international environment of the nineteenth century and the shared discourse of modernity as a global phenomenon. The following cases will provide helpful evidence.

On 19 March 1853, an official letter addressed the Ottoman Sultan, signed by British Colonel Hugh Rose, a military adviser to the Ottoman Army, was sent to the Sublime Porte which included news from the district (*sancak*) of Herzegovina in the province of Bosnia. Roughly, Rose reported that many Ottoman Christians had been exposed to torture by local officials in a prison under the command of district authorities.[102] Obviously, this was incompatible with the principles of the *Tanzimat* law. All in all, this might have been usual notice since many letters could have been sent to the Sublime Porte signed by foreign representatives. However, what came after the letter is interesting along with the discourse which the Colonel made use. While he was speaking to the Ottoman Sultan, what was emphasized in the letter was explanatory:

[102] BOA: HR.TO 218/52 8 C 1269, 19 Mart 1853: "Prince Meundiloff and M. De Klecl informed me today, to my deep regret, that atrocities most afflicting to humanity had been perpetrated now several Christians in Herzegovina, that even helpless children had been subjected to most cruel torture…"

> I feel convinced that His Majesty the Sultan, known for his kindness of heart, as well as his ministers, will learn these most deplorable outrages with same degree of horror and indignation which everyone who has a heart and whose mind is enlightened by the ways of civilization must feel. (…) The authorities in Herzegovina violate every principle of humanity and justice and in doing so they destroy the popularity, and influence, and willity (?) the benevolent intentions of their Sovereign (…)[103]

In this case, Colonel Rose used the terminology of the nineteenth century liberal discourse within the context of "civilization." He said the Ottoman state officials in Herzegovina were using cruel methods against the Ottoman Christians in that area. The methods in question were considered to be torture.

The keywords in the quoted part of the letter reveal the attitude taken by foreign representatives towards the Ottoman Empire and the *Tanzimat* reforms. Rose thought that anybody "whose mind enlightened by the ways of civilization" would be disturbed by the violation of "principle of humanity." The enlightenment, civilization and the principle of humanity could be taken as one of the most determinative components of dominant discourse of the nineteenth century. What is more, those three words were in service of Colonel Rose while he was playing the role of "bearer of civilization." Even though Rose is likely to have instructed rather than to command; depending on the his discourse, as a representative of one the Great Powers, he put forward the arguments specifying the requirements of being civilized and reminding the Sublime Porte of the principles of the civilized world. The letter went on:

> An instruction from me to you respecting the misrule of the Governor of Salonica had been, I understand, lying for some time before the Grand council. Perhaps if Youssef Pasha of

[103] Ibid.

> Salonica had met with the retribution which he deserves, the example might have produced a wholesome effect on the authorities in Manastir and Thessaly and in Herzegovina…[104]

Assumingly, this sort of tension between the Sublime Porte and the representatives of the Great Powers was usual on the matters of *Tanzimat* reforms. A retroactive statement made by Colonel Rose indicates that he had warned the Sublime Porte previously about alleged occurrences of torture in a group of provinces. He underlined the fact that "the Sublime Porte should have listened to him" for the sake of the reform.

The manner of the letter in question can often be found in the statements of nineteenth century British representatives who charged themselves with a global task, the so-called "Civilizing Mission." One of them, Stratford Canning, the British Ambassador to the Ottoman Empire at the time of the *Tanzimat*, defined in the following words: "Our duty, our vacation is not to enslave but to set free… Our task is to lead the way and to direct the march of other nations."[105] According to him, civilized governments could not be indifferent to violent actions, like torture, to prevent crime supposedly.[106] Thus, "Civilizing the Ottoman Empire" was among these tasks. The statements of the representatives of the Great Powers express how the Ottoman Empire would be amended by making reforms in the root of civilization of the Western world.

Personally, Canning was engaged with the Ottoman penal reform in the mid-nineteenth century. For instance, he prepared a report named "Improvements of

[104] BOA: HR.TO 218/52 8 Cemaziyelahir 1269.
[105] Allan Cunningham, *Eastern Question in the Nineteenth Century – Collected Essays: Volume Two* (London: Frank Cass, 1993), 125.
[106] FO, 195/364, "Memorandum on Improvent of Prisons in Turkey," 2 as cited in Yıldız, *Mapusane: Osmanlı Hapishanelerinin Kuruluş Serüveni 1839-1908,* 132

Prisons in Turkey."[107]According to his statements, who has been reputed one of the most influential individuals on the *Tanzimat*, the only hope for the future would be "proportioned to the advancement of Turkey in European civilization."[108] Plus, for many of the nineteenth century reformers, there is a direct connection between punitive practices and the level of civilization. Penal arrangements had either to be justified or condemned according to the concept of civilization.[109] Necessarily, penal codes that contained violence against human body in their repertoire belonged to "backward" regimes. For the nineteenth century concept, arguably, brutality toward the human body, more specifically severity in punitive practices was intrinsic to autocratic regimes.[110] Hence, there were specific tasks to deal with brutality against the body during penal proceedings. One of them was obviously the abolition of torture.

At the same time, one could find similar examples in the Ottoman way of looking at the provinces about the course of the reform. Colonel Rose was not the only one who used the discourse of humanitarianism. The following example shows the attitude of the Sublime Porte toward the abolition of torture which was also in accordance with the practices of the Great Powers. Two years before the letter of Colonel Rose, two official letters (*tahrirat)* were sent to the Principalities of Moldavia and Wallachia, and the Principality of Serbia. In July 1851, in the letter which was sent to former, it was stated that torturing criminals and suspects was

[107] Ibid., 112
[108] Ibid., 125.
[109] John Pratt, *Punishment and Civilization* (London: SAGE, 2002), 1.
[110] Scott, *The History of Torture Throughout the Ages*, 1-4.

banned due to the requirement "principle of humanity" (*insaniyet beremr*) in the Ottoman Empire.[111]

Similarly, another letter was sent to the Principality of Serbia two months before the above letter which was sent to Moldavia and Wallachia. In this second letter, the same warning was made to the Serbian authorities about the abolition of torture with a milder tongue, probably because of the critical situation that might occur in Serbia. The Porte stated that "they deplore to hear some rumours about torturing culprits in Serbia under the administration of Aleksandar Karađorđević, a highly skilled governor under whose leadership these rumours are quite regretful more than ever."[112]

The Porte, seemingly, spoke the same language with the Great Powers, who were assumed to be the "bearers of civilization." In this era, prevention of torture appeared as a determinative principle of trans-national legal order into which the Ottoman Empire was incorporated. Accordingly, what the representatives of the Great Powers raised about the abolition of torture became an item for the agenda of Ottoman reform programme as the Sublime Porte undertook "the Civilizing Mission" and bore it, not only in nearby provinces, but also to the far principalities.

On the one hand, when one makes an argumentation about international environment of the era mostly shaped by the Great Powers in the nineteenth century, it must be stated that so-called Civilizing Mission did shape the global standards of

[111] BOA: İ.HR 77/3761 1 Şaban 1267: "*Eflak ve Boğdan eyaletlerinde işkence ve eziyet usullerinin hala cereyan etmekde olduğuna dair bu kere rivayeti kesire vuku bulmuşdur. Halbuki (…) tarif-i hacet olduğu vechle bu usul ve adet mugaiyir-i insaniyet beremr memnu' ve mekruh olub…*"
[112] BOA: A.MKT.UM 55/26 8 Cemaziyelahir 1267: "*İşkencenin memnuat-ı icrası hususuna dair taşra mahallere tasti kılınmış olan talimat-ı umumiye (…) Hal böyle iken bazı rivayete göre Sırbistan'da ahaliden erbab-ı cürm ve cinayet deyyu tutulan adamlar hakkında işkence ve eziyet muameleleri icra olunmakda olub (…) Sırbistan'da ve hususen Ratislav(?) Aleksander Bey gibi dirayetli bir beyin zaman-ı idaresinde cari olması dahlen teessüf olunacak mevaddan…*"

legal regimes.[113] As Benton states, it "provided a global institutional order even in the absence of cross-national authorities and before the formal recognition of international law."[114] The abolition of torture in the Ottoman Empire could be taken as a part of dominantly-felt discourse of international jurisdiction. That leading discourse in question fit the main arguments of the "civilization" and humanitarian principles of the nineteenth century.[115] Consequently the question of "whose right to intervene" could be answered by referring to the justification of "Civilizing Mission," one of those was as Wallerstein writes apparently "ending practices violates universal values and the defense of innocent."[116]

"Civilizing the Empire" in its passivity, however, during the process would be an extravagant argument for the Ottoman nineteenth century. The term "Civilizing Mission" is an explicitly colonialist discourse into which the Ottoman Empire could not properly be placed. Aside from a colonialist or imperialist perspective (which could not be rejected completely regarding the nineteenth century), however, the interventionist foreign policy of the Great Powers needs to be ascribed to the nineteenth century when "anthropocentricism" as a part of the Enlightenment in which what Hobsbawm describes as "progressive, rationalist and humanist ideologies are implicit, and indeed came out of it"[117] had started.

As the nineteenth century witnessed the ideologies of liberalism and humanitarianism, these categories were the basis of campaign against unnecessary suffering of human beings. The liberal ideas on humanity pervaded various contexts. According to Wallerstein, liberalism intruded the logic within all social institutions

[113] Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900*, 324.
[114] Ibid., 3.
[115] Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire*, 12.
[116] Immanuel Wallerstein, *European Universalism The Rhetoric of Power* (New York and London: The New Press, 2007), 6.
[117] Hobsbawm, *The Age of Revolution 1789-1848*, 22.

and claims universality.[118] Therefore, the legal interventions of the Great Powers could not only have been the result of a so-called "Civilizing Mission" that the Great Powers of Europe undertook to civilize the Earth in the nineteenth century. Rather, the triumph of liberalism, as he writes "as the basis of the world-system's geoculture"[119] in the nineteenth century draws the boundaries of the Ottoman context about the abolition of torture.

The above cases on humanitarian discourse neither prove the absence of foreign diplomatic pressure nor equate the Ottoman diplomatic capability to that of the Great Powers. What can be argued in this case is, according to statements and the common choice of terms of both sides, the bureaucrats at the Sublime Porte and representatives of the Great Powers shared an understanding about torture. Principles of humanity rose as a distinctive category in the agenda of European and Ottoman diplomacy in 1840s and 1850s which overlapped in the early decades of the *Tanzimat* era.

Because of the shared discourses then one can not end up with the idea that the *Tanzimat* statesmen were only transmitters who delivered what they learnt from the Great Powers to the provinces and principalities. Benton argues that, for the *Tanzimat* statesmen, the foreign impact on the Ottoman reform was "an attack on state sovereignty presupposed, however, the embrace of state sovereignty as a political goal above others."[120] Although the quotation reveals the presence of foreign diplomatic pressure, it does not invalidate the agency of the *Tanzimat* statesmen as well. The reforms were presently the revelation of a sort of conflict

[118] Immanuel Wallerstein, *The Modern World-System IV: Centrist Liberalism Triumphant, 1789–1914* (London: University of California Press, 2011), 5.
[119] Ibid., 219.
[120] Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900*, 245.

among Ottoman elites.[121] The transactions between the center and the provinces on the sustainability of the *Tanzimat* reforms needs to be emphasized to avoid a non-monolithic reading of the reform. Thus, the reform was a way of (re)claiming state authority over the provinces. Moreover, aside from an idealistic beliefs of the reformers in the *Tanzimat,* which was imported from abroad as a cure for the deteriorating state of affairs for more than two centuries, the statesmen were rather active within the regions in which the instructions of *Tanzimat* were applied, and used different aspects of it to establish central authority over the provinces.

As Ruth Miller point out, the reaction of the center against the "local authority's irregular threat" to the standardized procedure of the state of affairs.[122] For most parts of the Empire, the activities of the localities did not fit the requirements demanded by the central authority. The standardized internal policy was one of the crucial schemes of the *Tanzimat* and a goal to reach for the *Tanzimat* statesmen.[123] Hence, the Supreme Council made the standardization for the state of affair of the internal policies and the bureaucratic control over the provinces. For instance, the earliest Penal Law required an approval for death sentences from Istanbul before execution.[124] This approach towards penality not only decreased the number of executions, but also underlined the bureaucratic superiority of the Sublime Porte over the provinces. Thus, it would be senseless to omit the active agency of the *Tanzimat* statesmen; and, in result, the transaction occurred between the Sublime Porte and the provinces also as a part of the discussion about the reform programme.

[121] Ibid., 245.
[122] Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*, 51.
[123] Deringil, *Conversion and Apostasy in the Late Ottoman Empire*, 7.
[124] Akagündüz, *Mukayeseli İslâm ve Osmanli Hukuku Külliyati*, 811: 1840 Penal Law, Chapter 1, Article 3.

Other categories of the reform agenda which were also subjects of diplomacy during the era could contribute to dimensions of foreign pressure. Deringil, in his work on conversion and apostasy in the late Ottoman Empire, states that the *Tanzimat* reforms were mostly home-grown albeit the result of foreign pressure.[125] Accordingly, it could be said that the different components of the reform, without ignoring that such pressure, "came to be upheld because the Ottoman elite sincerely believed that such executions were not in keeping with the spirit of the *Tanzimat* state. "[126] Arguably, the abolition of torture in penal proceedings also can be located in the same place. Thus, it would be incorrect to point to foreign diplomatic impact and westernization the sole and only cause to whole reform. On the contrary, the abolition of torture needs to be evaluated by putting emphasize on the tension and transaction between the *Tanzimat* statesmen and the representatives of British Empire within the context of the nineteenth century.

In one sense, even though foreign diplomatic pressure was a fact during the early years of *Tanzimat* period, no written agreement guaranteed the different pens of the reform and not such officially binding declarations made by the Porte. Generally, as mentioned above, the relation between Ottoman statesmen and foreign diplomatic circles concerning reforms depended on promises given by the Ottoman Sultan to representatives of foreign states to assuage their pressure. On the one hand, there is discernible diplomatic pressure on cadres carrying out the *Tanzimat* reforms and this pressure had the ability to affect and transform the course of the reform. On the other hand, the Ottoman bureaucrats seem to have fended off these pressures. While endorsing the reforms sincerely, they had the tendency to protect "home rule" within the empire.

[125] Deringil, *Conversion and Apostasy in the Late Ottoman Empire*, 24.
[126] Ibid., 24. For Deringil's book it is execution of apostates.

The immediate aftermath of the proclamation of the *Tanzimat*, according to Deringil, witnessed efforts of the Ottoman cadres to neutralize diplomatic pressure.[127] Deringil, describes pressure as an "imperial headache" concerning "overbearing diplomats going on about the 'promises of the Turks.'"[128] By saying "promises" Deringil means the prevention of the execution of apostates. However, the abolition of torture could also be taken as one of those promises given the fact that there was no written agreement between the parties about it and any binding declaration which the Ottoman Empire took on the responsibility of its abolition and further sanctions for the occurrence of any torture event. Since the debate between the Ottoman and foreign diplomats on the subject of torture seems to have been made through diplomatic transaction and correspondences, diplomatic pressure on the *Tanzimat* statesmen might not have been solely discernible from the above letters. However, the following examples emphasize the transformative effect of foreign diplomatic pressure on the internal policies of the Empire.

Diplomatic Intervention and Its Immediate Results in the Provinces

In the further parts of his above-mentioned latter, Colonel Hugh Rose continued his complaints about the local authorities. Even though his name is not mentioned in the letter, Colonel Rose meant the governor of Herzegovina, İsmail Paşa, who violated the law of the Sultan and "principles of humanity." (İsmail Paşa had been the governor of Herzegovina for two years at the time of the Rose's letter;

[127] Deringil, *Conversion and Apostasy in the Late Ottoman Empire*, 39.
[128] Ibid., 39.

and, had been appointed to office at 29 May 1851[129] in the position of executed Ali Paşa, just after Herzegovina had lost its province status and was reduced to a district.) Clearly, torture rumour under his administration had preceded the letter of Colonel Rose. A group of villagers from Kosniç (today's Konjic) gave a petition (which could not be found; only cited in another document, the earliest document mentions torture in Kosniç) claiming that many among them had been tortured by the brother of the governor in order to force them to leave their lands.[130] Who had owned the land before the appointment of İsmail Paşa and why the villagers had been forced to flee are not perceptible in the document. But, aside from the aforementioned petition given by the villagers, there was any other document the date of which preceded the letter of Colonel Rose which might be related to the foreign intervention in this issue or, at least, say any other instruction like the above one.

Nevertheless, nine days after from the Colonel's letter, on 27 March 1853, a reply was sent by the Sublime Porte. It says that İsmail Paşa had been dismissed from his office and former Adana governor Mustafa Paşa had been appointed as the new Herzegovina governor.[131]

Colonel Rose must have been in İstanbul because the date on the letter and the arrival of the letter to the Translation Office of Foreign Ministry (*Hariciye Tercüme Odası*) are same. So, beside the above-mentioned letter, it could be argued that Colonel Rose had power to organize a lobby within the circles of the Sublime Porte against the Herzegovina governor Ismail Paşa. It had been less than ten days

[129] BOA: A.MKT.NZD 55/63 28 Receb 1267: *"...Hersek valiliğinin Üsküb valisi bulunan devletlü İsmail Paşa hazretlerine..."*
[130] BOA: A.MKT.MHM 38/93 3 Muharrem 1268: *"...Kosniç karyeleri dahilinde ta'in biraderzadeleri müştereken uhdelerinde bulunan emlak ve arazi-i karye olduğundan M'den kurtarmak ve haklarında bazı mertebe-i işkence yolları vuku' bulmakta olan muamelat-ı atika'nın menni hususu zikr olunan karyeler reayası tarafından (...) arzuhal takdimiyle beyan ve istida' olunmuş..."*
[131] BOA: A.AMD 43/15 17 Cemaziyelahir 1269.

that the decision to dismissal of the Paşa had been made after more-than-one-year old torture rumours in Herzegovina under his governorship. What we learn next is that the two governors, Mustafa Paşa and İsmail Paşa changed offices. One month later, another notification declared that İsmail Paşa would succeed in the governorship again taking the office of Mustafa Paşa as the new Adana governor.[132]

So, the question then arises that why the Sublime Porte would pull back his governor. As was claimed above the foreign diplomatic pressure on the Ottoman Empire was shaped in time and according to conditions. Seemingly, the *Tanzimat* statesmen within different circles of the Sublime Porte took a milder approach towards foreign diplomatic pressure. On the one hand, "avoiding imperial headache"[133] looks like the general policy in order to ward off any possible foreign intervention concerning torture events within the scope of the *Tanzimat* reforms. Also, the dismissal of İsmail Paşa occurred at the eve of Crimean War. Thus, this move could be seen as an appeasement policy to stall the initiations of foreign representatives. Presumably, the Sublime Porte did not wish to fall out with the Great Powers at this critical time when they would be badly in need of foreign support from Britain and France against the Russian threats within a couple of months. So, the foreign impact in question might have changed accordingly.

In another sense, one might argue that the Sublime Porte lacked competent administrators during earlier years of the *Tanzimat*. They did not want to lose a governor at a time when there was not so many capable administrators around. Even though they immediately reacted to the memorandum-like-letter of Colonel Rose and dismissed İsmail Paşa, they actually pulled back their governor in order to relieve the

[132] BOA: A.DVN 88/53 18 Receb 1269.
[133] Deringil, *Conversion and Apostasy in the Late Ottoman Empire*., 39: *"...tasdî-i Âliyi mucib olmamak..."*

tension. As Adana was an Ottoman province and Herzegovina a former province, İsmail Paşa must have been one of the major statesmen in the *Tanzimat* era. Finally, they sent him to Adana where he could be secluded. Plus, apparently, the Supreme Council did not seem annoyed by the accusations against İsmail Paşa; over and above, the Council seems to have been quite pleased with his effort in Herzegovina.[134]

Torture rumours could cause a dismissal of a governor by the attempts of the foreign diplomats, but, internally, these rumours could be assimilated within the Sublime Porte by exchanging offices between the members of Ottoman administrative cadre. The latest indication about İsmail Paşa in an archival document is that he would be called to the Supreme Council in September of 1853 when no serious conversation or any warning does not seem to have occurred. Probably, on the eve of the Crimean War, the Council did not wish to prolong the issue.

The Herzegovina story explained above, on the question of "being civilized" provides the argumentation on diplomatic pressure. From further reports on this issue, it was declared that three Christians from the village of Kosniç in Herzegovina had been found death in prison and one of them died on the road. Other Christian villagers wrote another petition (two months after the arrival of İsmail Paşa to Istanbul) in which they repeated the accusations. They wrote that the Christian villagers had been killed by torture in the prison by the atrocities of local authorities who confiscated their land and sending the resistant villagers to prison.[135]

[134] BOA: İ.DH 275/17250 20 Şevval 69: *"...Hersek valiliği müddette hüsn-ü usül ve harekatına ve halefinin vusulüyle devr-ü teslim kaidesini bi'l-icra Dersaadet'e azimet etmiş olduğuna…"*
[135] BOA: MVL 143/38 1 Zilhicce 1269: *"...mülk ve arazilerimizi fuzuli zabt etmek iddialarında bulunduklarına mebni bir karye ahalisini sefil ve perişan ettiklerinden bunca fetri kullarınızı mahbushanede çürüttürüb bir gece de çend-i asgae reaya kullarınızı telef ettirüb…"*

Ottoman officials in the region, however, denied the claims. In the mandate sent to İstanbul from the province, they said the villagers in the prison died of typhus.[136] Furthermore, they supported their argumentation by adding several patterns which were based on a medical discourse along with the typhus disease in question. What is more, provincial officials, who were held responsible for the four deceased Christian villagers in Kosniç, first depicted the poor conditions of the prison. They stated that the place they called prison was a kind of pit with terrible air condition. According to them, obviously, it seemed likely that the conditions of the prison triggered the outbreak of typhus amongst the prisoners. In addition, according to mandate, the Christian prisoners had not been alone in the prison; there were both Muslim and Christian prisoners; they had been together in the prison at the time of the outbreak of typhus. The Muslims prisoners had become ill as well.[137]

The conditions of mid-nineteenth century prisons were terrible all around the world by today's standards. The Europeans, however, especially emphasized the inhumane conditions of non-Western prisons in their notifications as a sort of orientalistic behaviour that underlies the brutality of the other world. This included Russian and Egyptian prisons as well. As opposed to this argument, for instance, Bruce Adams states that the European prisons were as brutal and had conditions as bad as the Russian prisons in the nineteenth century. Moreover, depending on individual observations, the conditions of French prisons were worse than those of the Russian prison, while English, German, and Austrian prisons were the worst

[136] BOA: İ.MVL 264/10633 24 Şaban 1269: *"...Kosniç çiftliği ve emlak-ı saireden dolayı celb ile habs olunarak vefat eden reayanın üç neferi birden hapishanede hastalanub ispitalyede ve bir neferi dahi yolda helak olduğu ve bunlara kimesne tarafında birgune işkence ve eziyet olunmadığı (...)ekserisi tifüs illetine mübtela olduklarını müşahede ederek gelüb beyan…*"
[137] BOA: İ.MVL 264/10633 24 Şaban 1269: *"...ve bab-ı mutasarrıfda kat habishane gayet cenk ve havaalmaz cukur bir mahal olub reaya-ı mersumenin habsleri tarihinde İslam ve reayadan hayli kimesne habs bulunduğuna mebni habslerden üç beş nefer habes…*"

examples.[138] On the contrary, Rudolph Peters compares the average Egyptian prison with French prison with highest mortality rates. He found out that Egyptian prisons were almost two times worse than the French ones.[139] Consequently, though, there is no reason to imagine an appropriate prison life in the nineteenth century either in the Ottoman Empire, Russia, France, or Britain.

Ottoman prisons and the penal culture were no exception in this period. As Yıldız pointed out in his study on Ottoman prisons, writing on the same Kosniç events, the conditions of Ottoman prison were sometimes worse than torture. Another outbreak story also finds place in his study that 48 prisoners died of overpopulation in prison of Bosnia. Similarly, the governor, Veliyüddin Rıfat Paşa, reported back to Istanbul and he argued that deaths were not out of torture but poor conditions.[140] The depictions of the Ottoman prisons of the early 1850s, therefore, actually, do fit this definition in the archival document as referred above. Kent Schull cites the statement of Stratford Canning, British Ambassador to the Empire from 1842 to 1858, that in the prisons of the Ottoman Empire "health and living condition were dreadful. Most prisoners had little access to fresh air, adequate food, or medical treatment. Prisons were makeshift structures usually located in local military compounds…"[141] This is the same depiction seen in the archival document above.

A typhus outbreak would be very likely under such circumstances. The depiction on the conditions supports the statements of the local officials; but,

[138] Adams, *The Politics of Punishment: Prison Reform in Russia, 1863-1917*, 5.
[139] Rudolph Peters, "Controlled Suffering: Mortality and Living Conditions in Nineteenth-Century Egypt Prisons," *International Journal of Middle East Studies* 36 (2004), 391.
[140] Yıldız, *Mapusane: Osmanlı Hapishanelerinin Kuruluş Serüveni, 1839-1908*, 97 and 146
[141] Schull, *Prisons in the Late Ottoman Empire*, 44: Accordingly, that would result with the prison reform in the Empire of the late 1850s; Demirel, *Adliye Nezareti Kuruluşu ve Faaliyetleri 1876-1914*, 290: Even 1870's onward, hygienic conditions of prisons does not seem adequate for prisoners.

seemingly they tried to push the responsibility of their deaths out of their domain by claiming that the deaths of the Christian villagers had been from natural causes. It is not surprising to hear that commanding officials come up with the argument, "the prisoners in their domain has died of illness," while denying charges against them.[142] They seem to have tried to avoid all charges by claiming that they could have nothing to do to improve the conditions. However, the way in which they deal with the situation is an example of the merging of the medical and judicial branches.[143]

At the end of the mandate, they stated that, after the outbreak, the necessary attention had been given to the sick people by the authorities; and, accordingly Muslim prisoners had been taken away from the prison, which must have been near the military compound, and carried off to a rented house around the residence of the district governor (*bab-ı mutasarrıfi*) after they had been treated by the military physician, Mustafa Bey, and the other doctors. They said that the Christian prisoners had denied the invitation of the Ottoman officials and they would rather choose their own communal hospital for treatment.[144] As a result, according to Ottoman authorities, the three Christian villager had died in the hospital because of the ill-treatment and the negligence of the medical doctor in the communal hospital, who would be held responsible for their death. On the contrary, the Muslim prisoners had survived in the Muslim hospital.[145]

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[142] Asad, "Reflections on Cruelty and Torture," 105.
[143] Foucault, *Discipline and Punish The Birth of the Prison,* 306.
[144] *İspitalye* they say; Muslim hospital is called *hastahane* in the archival document.
[145] BOA: İ.MVL 264/10633 24 Şaban 1269: *"...hastalandığı anda mutasarrıf-ı mümaileyh bendeleri tarafından taraf-ı çakeriye haber verilmesi ve Rumili ordu-u hümayunu ser tabibi İstav Mustafa Bey bendeleri ve etba-ı saire ağram olunarak muayene ettirildik de (...)bab-ı mutasarrıfı civarında bir hane istikra olunarak mahbuslar ol haneye nalkl ettirilmiş ve o makule-i aleni düçar olan ehl-i İslam-asakir-i Şahane hastahanesine gönderildiği misillü reayalar dahi hastalarını kendü ispitalyelerine göndermiş ve hastahaneye gönderilen ehl-i İslamlar müdavat-ı lazımeleri icra olunarak ekserisi sıhhitab olmuş ve reaya ispitalyesinde olan hekime mukaddemce izin verdiklerinden ispitalyenin tabibi olub layıkıyla bakılmadığından reayanın bazıları vefat etmiş..."*

What is necessary to emphasize in this story is not the excuse which the local authority gave as an explanation for the deaths of the Christian villagers. Whether they died because of the irrevocable typhus brought on by the conditions of the prison or from the negligence of the doctor in the Christian hospital or from torture of the Ottoman officials will remain unknown. What matters is, clearly, the diplomatic trade-off between foreign diplomats and the Sublime Porte, which actualized over the corpses of the Christian villagers. The humanitarian discourse of Colonel Rose targeted the maltreatment of provincial officials as an indicator of the politicized bodies that had become the very subject of confrontation between two parties, Britain and the Ottoman Empire in the international arena in the early years of the mid-nineteenth century.

The attitude taken by the local authority on the death of the villagers was a very important example of the newly raising medical discourse. According to Khaled Fahmy in his essay on forensic medicine, by the early 1850s the close connection between medicine and law was established.[146] Therefore, that medicine could play a role during the process and this would not be surprising in this event. Yet, the local authorities cited the survival of the Muslim villagers who had been treated by the military doctors of the Ottoman army as medical proof against the torture accusations. The unhealthy conditions of the Christian hospital had been the cause of their deaths.

Aside from the above-mentioned petitions and the letter of Colonel Rose, there was any other counter-argumentation made by the villagers. At the end, apparently, this evidence would be enough for the Supreme Council in Istanbul to

[146] Khaled Fahmy, "The Anatomy of Justice: Forensic Medicine and Criminal Law in Nineteenth-Century Egypt," *Islamic Law and Society* 6 (1999): 236.

prove the innocent status of the officials in Kosniç.[147] The case must have ended with the acquittals of the local officials in the prison after the investigations. A petition written by the villagers two months after the arrival of İsmail Paşa to İstanbul did not seem to be helpful to the claimant villagers.[148]

One might expect that there would be some medical reports regarding the deceased Christian villagers rather than simple declarations in official language for such an event in which the governor was dismissed and British diplomats were involved. The practice of conducting autopsy on death bodies as a penal proceeding had begun in the early years of the *Tanzimat* era. As early as 1841, the syllabus of the Imperial School of Medicine (*Mekteb-i Tıbbiye-i Şahane*) offered a course on Legal Medicine (*Tıbbiye-i Kanuni*).[149]

The first recorded autopsy in Istanbul was conducted in 1843 by an Austrian physician, Charles A. Bernard, on a construction worker.[150] With the judicial reform in the Empire dated from early 1840s, the security guards in Istanbul were instructed to bring a physician to the site of every death event in order to find out the cause of the death. Accordingly, in 1846, a regulation for security guards indicates that a chemical expert, a physician and a surgeon should be called to examine on dead body upon a claim if there was a necessity.[151]

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[147] BOA: İ.MVL 264/10633 24 Şaban 1269: *"...sair bazı mahbusin ile bağteten kendü ispitalyelerinde mehmusen vefat olmuş olub o makule-i hastahanede olanların (...) ve öyle işkence eziyet vuku'unun aslı olmadığının..."*

[148] BOA: MVL 143/38 1 Z 1269 see fn. 33.

[149] Şemsi Gök and Cahit Özen, *Adli Tıbbın Tarihçesi ve Teşkilatlanması*, (İstanbul: Adalet Bakanlığı Adli Tıp Kurumu,1982), 1 as cited in Sedat Bingöl, "*Tanzimat* İlkeleri Işığında Osmanlı ' Da Adli Tababete Dair Notlar," *AÜ DTCF Tarih Bölümü - Tarih Araştırmaları Dergisi* 26, no. 42 (2007): 39.

[150] Sadi Çağdır MD, Osman Celbis MD, Nasuhi Aydın Engin MD and Zeki Soysal MD. "Evolution of Forensic Autopsy and Current Legal Procedures in Turkey," *American Journal of Forensic Medicine & Pathology* 25, no. 1 (March 2004): 59.

[151] Bingöl, "*Tanzimat* İlkeleri Işığında Osmanlı'da Adli Tababete Dair Notlar," 40: *"...fakat meyyitin hâl-i hazırı görebilip sebeb-i mevti ne olduğunu mücerredd etibbâ muayenesine muhtaç olduğu..."; "...icabında bir kimsenin mevti esbâb-ı adide-i âcâlden hangi sebebden vuku bulmuştur (...) Nezâret-i mezküre için fenninde mahir bir nefer kimyager ve bir nefer tabib ve bir cerrahın eşedd-i lüzumu olmağla..."*

Administrative inadequacies were among the reasons why the principles of *Tanzimat* did not reach a far province like Herzegovina. It could be argued that Herzegovina is too far and the Sublime Porte were having difficulties to reach the every corner of the Empire. Also, local powers from relatively remote areas might obstruct the application of the *Tanzimat* law. For instance, in Vranje (*Ivranya*), similar events occurred. The Ottoman subjects from the district wrote an illustrated petition against the Vranje governor, Hüseyin Paşa. The illustrations in the petition drawn by the villagers are scenes of tortured, hanged or decapitated villagers. The authors of the petition claimed that they faced with atrocities at the hands of Hüseyin Paşa's men. In this event, the Sublime Porte kept quiet about the accusations and Hüseyin Paşa stayed in the office.[152] More than what Ismail Paşa had gained from the Sublime Porte (he was congratulated for his good service[153]), when he arrived İstanbul after dismissal, Hüseyin Paşa, as one of the Albanian Paşas known for their vicious administration, was rewarded with a jewellery box for his loyalty to the State.[154] As this example shows, the reach of the central authority over the local powers in far provinces,[155] the Supreme Council eventually intervened in the situation in the district of Herzegovina, though more than a year had passed since the first petition sent to the Supreme Council.

It is not clear from the document whether the bodies of the deceased Christian villagers underwent post-mortem examination to establish the cause of death. On the one hand, there were medical doctors present in the region, who must have conducted a post-mortem examination could be imagined even though there was no mention at all of these documents. On the other hand, the local officials who were

[152] Cengiz Kırlı, "İvranyalılar, Hüseyin Paşa ve Tasvir-I Zulüm," *Toplumsal Tarih* 195 (2010).
[153] See fn. 45.
[154] Kırlı, "İvranyalılar, Hüseyin Paşa ve Tasvir-i Zulüm." 19.
[155] Ibid., 21.

accused of torture might have prevented the autopsies to cover up their crimes. Moreover, the autopsy records might have been concealed instead of sending to the Supreme Council. All in all, what is obvious is, by1853, post-mortem examination had been a part of penal proceedings in several regions of the Empire for more than a decade. Therefore, it is reasonable to expect to find an autopsy document about the event in which foreign representative were involved.

Whether a post-mortem examination conducted after the torture accusations at Kosniç will remain as a mystery. Two years before the Kosniç event, another series of events happened in İzmir, the capital city of Aydın province, providing definite example of the new medical discourse along with the involvement of the representatives of the Great Powers in the Ottoman adjudication in the city. The story presents an explicit example of the overlapping presence of foreign diplomats behind the accusations and emphasizes on the medical discourse. Similarly, the more often Ottoman officials were in conflict with foreign (a British one too in this case like the previous case) diplomats for administrative and judicial issues, the more likely they were to orient themselves to the same discourse as in the events in İzmir. Since the story is long and because of the relevance to the content of this and the next chapters, the first part of the story is presented in this chapter, and, then the second part is explained in the following chapter.

A letter sent with a group of documents that indicates frequent torture and atrocity evidences, which was signed by Richard William Brant, the British consul at İzmir,[156] was sent to Stratford Canning, dated March 27, 1851. It could be argued that, Canning was able to establish a surveillance network among British consuls in

[156] "19th Century British Newspapers," http://levantineheritage.com/pdf/Smyrna_BMD_19th_century_British_Newspapers.pdf [28 February 2015]: "At the Consular House, Smyrna, beloved and esteemed by all who knew him, Richard William Brant Esq. Her Majesty's Consul at that place for nearly 25 years."

provinces on Ottoman penal system. The reports of consuls from provinces also underlined ill-organized conditions of Ottoman prisons.[157] Therefore, these report-like-letters seems usual for mid-nineteenth century diplomacy and effective way of diplomatic pressure for British ambassador.

More or less three weeks passed between the date of the letter was written and delivery to the Ottoman authorities in İstanbul. Presumably, the whole package was delivered by Canning to the Ottoman Foreign Ministry, then to the Translation Office by the Ministry. The letter and other documents were about the death event of an Ottoman Greek named Panayot[158] who had died approximately one month before the letter. The British Consul at İzmir, W.Brant started his long letter in which he made some serious accusations against the Ottoman administration in the city:

> Sir,
>
> In some of the communications which I have recently had the honor of addressing to 4. H. (?), I had occasion to advent incidentally to the fact that torture was inflicted in January last by an official of Halil Paşa on the persons of various individuals whom he had arrested, various opinion of being connected with the robbers, who have so long infected this neighbourhood, in order to obtain by this means of confession of their complicity in a robbery of some opium, which was committed last autumn to, elucidate (?) some clue to the haunts of these malefactors whereby their apprehension might be effected…[159]

The accusations directed at an Ottoman sergeant, a certain Bekir Ağa, involved a high-ranking office. According to Brant, Ismet Paşa, who had been employed as the chief inspector of Anatolia,[160] had forwarded his report to the Supreme Council.

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[157] Yıldız, *Mapusane: Osmanlı Hapishanelerinin Kuruluş Serüveni 1839-1908*, 113-7
[158] Mentioned as Panayotti in the letter of the Consul.
[159] BOA: HR.TO 215/34 17 April 1851.
[160] BOA: İ.MVL 225/7651 20 Muharrem 1268*: "... müfettiş-i mümaileyh'in zikrolunan işarı üzerine...*"

Obviously, the Porte did not wish to witness torture accusations against his officers, thus, surveillance against torture was carried out by a commission established under the Council. The appointment of Ismet Paşa as Anatolian inspector was a clear revelation of this attitude.[161] He had made a far-reaching investigation that had included 14 different cases, according to Brant.[162] His letter goes on:

> I am told that few of the charges preferred against Bekir Ağa, the çavuş bashi of Halil Paşa, (by whose orders and whose superior tendency the delinquencies, of which he was accused, had been committed) were proved according to the Turkish law, (…), but there were sufficient ground in the opinion of İsmet Pasha to incriminate that functionary most deeply. (…) Bekir Ağa, the unfading perpetrator of these cruelties, has experienced the greatest indulgence at the hands of Halil Paşa, who set him at liberty very soon after Ismet Paşa (by whose orders he had been imprisoned) left the town…[163]

Afterward, Brant made similar statements in his letter while speaking to Canning, who were appeared as "an able advocate" and "efficient protector" of suffering humanity; and "will not permit the oppression of the innocent to triumph in his inequality."

Clearly, the duty of defending principles of civilized world had been transferred among the representatives of British Empire. Brant seems to have been convinced that "one ease death ensued from the maltreatment of sufferer; in the two of them, the barbarities (?) were equally atrocious, but the victims have fortunately survived." Finally, he expressed his concern over the reform process. At the end of

[161] Yıldız, *Mapusane: Osmanlı Hapishanelerinin Kuruluş Serüveni 1839-1908*,146
[162] BOA: HR.TO 215/34 17 April 1851: "... İsmet Paşa on being informed that a rumor on this subject was in circulation, set on fact an enquiry, and was employed during the greater part of his stay in the investigation of this matter,.."
[163] Ibid.

the letter, he stated that "of this affair be allowed by the Porte to keep unnoticed, Reform in Turkey may be considered henceforward as completely at an end."

Brant, who seems to have been very active in this case, had not only informed the Embassy about the torture event, he also had collected a highly comprehensive bulk of evidence, in his words, "convincing proofs that the assertion I made on the occasion list referred to was well founded."[164] Pursuing a way to ground his accusations against first Bekir Ağa individually and Halil Paşa as the commander, he had contacted many people who had witnessed the condition of Panayot.

Revealed in English and Italian, some of the statements made by these people were about the medical condition of Panayot before he had been arrested by Bekir Ağa on the charge of being an accomplice of opium robbers. For instance, in one of them the witnesses said that "on the 5th of January last I saw Panayotti the Gardener (…) he was then in the enjoyment of good health."[165]

These statements provide circumstantial evidences based on individual testimony. Three reports were given by two different medical doctors who had been involved in the process. One of them had been written by James McGrath, MD, on 15 January. He wrote that he visited Panayot and noted the medical condition of the sufferer:

> I hereby certify that I saw a man named Panayotti at the Greek hospital on February 8th. He was then suffering from inflammation of the right lung. He has external marks of violence corresponding to the seat of the disease. He asserted that he had brought blood by the mouth and… Under such circumstances I have no hesitation in asserting his disease to violence.[166]

[164] Ibid.
[165] Ibid., Report no. 16.
[166] Ibid., Report no. 8.

However, after the death event, which must have happened on 8 or 9 February, a post-mortem examination had been conducted at the Greek hospital. Chris Wood, the surgeon to the British hospital, had assisted the autopsy and revealed some of his observations to the Consular in his report:

> In the region of the right breast was a large integumental ecchymosis or bruise, the undoubted effect or one or more blows received in that past during life – on the left side, in a level with the left breast but more externally situated were several lesser ecchymosed sports, equally the effects of violence, but lesser severely inflicted." (…)On remaining the sternum and the exposing the cavity of the chest were observed, 1st effusion of the right pleura, and of sternum alone in the pericardium. 2nd, the right pleuritic cavity highly injected in the whole extent (…)The condition of the right pleura and lung, sufficiently accounted for the death of the Panayotti .[167]

This complicated medical terminology simply stated that Panayot the Gardener who had been accused of being an accomplice of opium robbers had died after he had been beaten under torture. Apparently, the upper side of his body, particularly his chest had been irrevocably harmed, as the second physician, Wood had asserted. He uses a distinctive medical discourse (includes statements like "*pleura, and of sternum alone in the pericardium"*) after the opening of the body; a discourse that the Consular must have read with difficulty. With his statements he tried to prove that Panayot had been exposed to violent treatment by the Ottoman security personnel in İzmir prison. As the concentration of blood in the right lung had been exact cause of death, this evidence provided an important ground on which Brant could establish his claims.

[167] Ibid., Report no. 12.

As a result, this story explains how the post-mortem examination of an Ottoman Greek had become an item of interstate bargaining in the two decades after the promulgation of the *Tanzimat*. The death of Panayot was highlighted by a foreign representative as an indication of how the reform was being carried out by Ottoman officials.

The British diplomats in this story utilized a medical discourse as an instrument at the diplomatic level. The autopsy report of Panayot must have been delivered to the Supreme Council as soon as Canning had received the letter from İzmir. Yet, Grant was not the only one who had collected medical reports in İzmir. According to him, doctors were also assigned by governor Halil Paşa, the person was accused by the British Consular for his maladministration also investigated the case. The note attached to the post states that:

> …that the medical men sent by Halil Paşa to open the body, have endeavored in their report, to account for his death by gratuitously supposing that it arose from disease existing previous to his apprehension; Mr. Wood and Mr. McGraith's opinions, however, entirelt destroy this ingenious hypothesis.[168]

Seemingly, the Ottoman administration had hired some physicians to establish a counter-argument. On the one hand, these reports (which were not included, only mentioned in the note in the Consular letter) could be taken as the scientific counterpart to those of the British physicians. On the other hand, the Ottomans in İzmir made use of the autopsy reports as a response to the British Consulate who argues the exact opposite in Panayot's death.

[168] Ibid., Note.

The medical evidence as the very basis of Brant's claims was the most significant proof to explain a torture event. Whether there was any body-oriented violence during the penal proceeding is not quite important. A corpse after an investigation had become an item in international diplomacy. Within the diplomatic circles of Istanbul, the transaction between Ottoman government and British Embassy took place over a collection of autopsy reports of a deceased Ottoman Greek, which one falsified one another. Ottoman state was able incorporate itself into the "global" order of the law of legal proofs. Halil Paşa did care what a foreign representative claimed in his scope of authority, which led him collect similar type of evidence.

There were also some alterations in the administrative branch as happened in the above case. This time Halil Paşa, who was accused of ordering the torture, was dismissed from his office two months after Canning delivered the post, to the Supreme Council. Ragıp Paşa, the governor of Dodecanese Islands (*On İki Ada*) changed places with Halil Paşa.[169] Presumably, the Council had decided to exchange the offices of two Paşas in order to neutralize the tension.

As torture was rendered illegal by *Tanzimat* law and although Ahmed Muhtar stated, in the very first latter of this chapter which was sent by the Ottoman Embassy to Britain, that anyone whether a governor or a security guard who had committed torture would stand trial before the Supreme Council, there was no signs of a trial of Halil Paşa like in the case of Ismail Paşa of Herzegovina. A couple of months after the dismissal, the trial of Bekir Ağa and his men began and last about a year. The reason behind the reopening of the case was explicitly cited as the reports of the physician which had "conflicted with each other" along with the testimonies of 18

[169] BOA: A.MKT.NZD 39/10 20 Şaban 1267.

Christian and the involvement of the British Consul.[170] This is an example of how the abolition of torture, a foreign diplomacy, which was apt to foreign intervention, and the medicalized literature of penality overlapped each other; and did have direct influence on Ottoman internal administration.

[170] BOA: İ.MVL 225/7651 20 Muharrem 1268*: "... İzmir'de mukim İngiltere konsolosunun tahrirat ve layihası mealleri ise mersumun vuku'ı vefatı mutlaka Bekir Ağa'nın işkence ve darbi eserinden olduğu ve olbabda bazı mesmuat ile Hıristiyandan 18 nefer kesanın ma'raz-ı şahadette olan ifade ve ihbaratı keyfiyatını muhtemel bulunmuş olmağla…meclis-i mezbura lede'l-havale tedkik ve mütalaa olundukda zikrolunan raport ve şahadetnamelerin ibareleri ekser mahallerinde yekdiğerine muhalif ve mubayin görünmüş..."*

CHAPTER 4

THE SOCIAL CONTENT OF ANTI-TORTURE LAW AND POPULER DISCOURSES OF *TANZIMAT* LAW

In the late eighteenth and early nineteenth centuries, torturing detainees during criminal interrogations was abolished and recognized as an illegal act against the law in many parts of the world including the Ottoman Empire. Before the abolition movements, torture was frequently used to extract information from persons related to a certain crime or forcing the culprit to make a confession. Ottoman penal system was like other countries in using judicial torture in criminal investigations before the *Tanzimat* era. Thus, one should not think of using torture as an excessive behaviour of violent officials or a mere brutality of them but a procedure used by officials who also had to respect the legal boundaries which was drawn to regulate and control judicial torture. At least in Europe, during the Middle Ages and early modern era, specific regulations for judicial torture were published within the jurisdictional sphere.[171] Starting from the mid-eighteenth century, however, many countries abrogated judicial torture one by one. In the nineteenth century, torture was abolished with the *Tanzimat* reforms in the Ottoman Empire.

The Anti-Torture Law in Ottoman Daily Life

Aside from its formal abolition in the legal regulations of the *Tanzimat* era, torture seems to have continued as unlawful but concrete reality of penal proceedings

[171] Evans, *Rituals of Retribution*: *Capital Punishment in Germany 1600-1987*, 109-115.

in the Ottoman Empire after 1839. There are many examples of the tortured suspects during interrogation or using excessive corporal punishment methods on prisoners whose punishments were already on the course. Several Ottoman penal officials continued to use it in the *Tanzimat* era to extract confession even if the legislators of the *Tanzimat* era authorized that "this action is against the *Tanzimat*" (*harekat-ı mugayir-i Tanzimat*). In fact, some other exceeding punitive practices as torture could be seen in day-to-day running of prisons. As Yıldız writes in his study, for instance, prisoners who were fettered from their neck or waists were hoisted to be hanged in the air; or their legs or entire bodies might be locked in logs (*tomruk*).[172]

As a part of anti-torture movement, however, torturers were to be punished according to the law. Theoretically, once the upper administrative body gained the knowledge of illegal torture, a further trial was brought in action against the alleged torturers whose cases were to be adjudicated before the second trial. Hence, generally, newly-established legislation of the *Tanzimat* as an un-preceded transformation caused many alterations in daily lives and judicial practices of elite and average Ottomans.

First of all, the legal substantiality of the *Tanzimat* policies could be apprehended with this argument. A *Paşa* or the head of a province as an elite Ottoman could be summoned to İstanbul to give evidence about a judicial event or their case to be adjudicated before the Supreme Council, which was previously unthinkable.[173] The *Tanzimat* law rendered the elite Ottomans punitively liable before the law. An ordinary Ottoman in the trial room could lodge an accusation

[172] Yıldız, *Mapusane: Osmanlı Hapishanelerinin Kuruluş Serüveni 1839-1908,* 126-7
[173] Cengiz Kırlı, "Yolsuzlugun Icadi 1840 Ceza Kanunu, İktidar ve Bürokrasi," *Tarih ve Toplum Yeni Yaklaşımlar* 4 (2006): Three important Paşas of pre-*Tanzimat* era, Akif Paşa, Nafiz Paşa and Hüsrev Paşa stand on a trial before the Supreme Council.

against a *Paşa*, who was accused of using torture against a suspect. Now, the latter could become the new litigant against a *Paşa* with an accusation of torture.

As was stated in the previous chapter, the Ottoman ambassador in London, Ahmed Muhtar Paşa repeated the guarantee about the abolition and underlined the fact that, whatever their rank, torturers would be brought before the court and punished according to the law. The implementation of this anti-torture act, however, must be more effectively applied in the provinces; those were within the scope of the *Tanzimat*. In the previous chapter, the jurisdictional limit of central authority was elaborated by examples of events in Herzegovina and Vranje, which were regions distant from Istanbul.

An interesting case occurred in the early years of the *Tanzimat* in Konya, as mentioned. Hasan Hakkı Paşa, the governor of Konya in the province of Karaman, was first dismissed from the office for a proper investigation,[174] and then, was convicted of having torture and exiled to Tokat. His rank as a *Paşa* was reduced to the lowest rank.[175] Arguably, the central authority did apply the law in the provinces where it shows upper-hand. The jurisdictional limits of the *Tanzimat* drew the line of the newly-raised legislative aspect of the reform.

Second, the social context of the anti-torture law was affected deeply. Within the judicial sphere, there was an increase of alternatives for ordinary Ottomans with the *Tanzimat* legislation. With the establishment of secular courts in 1840, "forum shopping," which means "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favourable judgment or verdict,"[176] became available for Muslim subjects. (Non-Muslims had their own communal courts before

[174] BOA: MVL 26/58 16 Receb 1264.
[175] BOA: İ.DH 203/11700 28 Zilhicce 1265.
[176] "Forum Shopping Reconsidered," *Harvard Law Review* 103 (1990) (author not specified) as cited in Rubin, *Ottoman Nizamiye Courts Law and Modernity*, 61.

the *Tanzimat* movement as well along with the *kadi* courts.) The Commercial Courts (*Ticaret Mahkemeleri*) were established in Istanbul in 1847 in order to resolve the disputes of Ottoman and foreign merchants.[177] The secular courts were established in localities. As the criminal issues were solved in the latter or in İstanbul in the Supreme Council, new litigation opportunities were presented to ordinary Ottomans within this system of legal plurality.[178]

Particularly, in torture trials, the recently-convicted criminals (or their relatives) now became litigants who retracted their confessions and accused the alleged torturers, seemingly, in order to be acquitted. They, generally, claimed that the confession, as a legal proof for their first conviction, be taken null and void because it had been extracted under torture and the case needed to be reopened because of the torture allegations.

In Sharia courts, on the other hand, the place of confession under torture as a legal proof was not so certain before the *Tanzimat*. Therefore, the abatement of conviction, because of inadequate legal proof, was not unprecedented. The convictions caused by "forced confessions" sometimes was withdrawn by the *kadi* court as well before the *Tanzimat* era.[179] However, this practice seems to have become more widespread in the *Tanzimat* era after the formal abolition of torture.[180]

As a reference to how ordinary Ottomans utilized the new litigation opportunities during the *Tanzimat* era, the following will provide a good example of the subject. In the first decade of the *Tanzimat*, in 1846, in Balıkesir, Anatolia two

[177] Rubin, *Ottoman Nizamiye Courts Law and Modernity*, 26; also, for a detailed examination of the commercial courts, Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu*, 110-150.
[178] Rubin, "Legal Borrowing and Its Impact on Ottoman Legal Culture in the Late Nineteenth Century," 279.
[179] Fariba Zarinebaf, *Crime and Punishment in Istanbul, 1700–1800* (London: University of California Press, 2010), 160-1.
[180] Milen Petrov, "Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Reform, 1864–1868," *Comparative Studies in Society and History* 46, no. 4 (2004): 743.

alleged thieves and apparently recidivous persons, Arabgirli Arif (Arif of Arabgir) and Boşnak Ali (Ali the Bosnian) were accused of having set fire to the government office of Balıkesir. It seems that they had committed this crime in order to destroy evidences against them and get rid of the theft accusations. According to report, they left a swaddle (*kundak,* an oiled piece of rag meant to set a fire in a building*)* in the chest room (*sandık odası*) of the government office while they were being held. Additionally, in the report it is expressed as a response to the demand of necessary office construction appears in the next part of the official report that the whole building of the Balıkesir government was vanished. [181]

At the end of the trial, the two men were convicted of arson and it was decided that they had to be disciplined with respect to seriousness of their multiple crimes. As a result, according to the record, they were sentenced to eight years of forced labour at "miserable works."[182] However, what makes this case different from another arson story and arguably subject of this thesis is a piece of paper that is just below the mandate which was sent from Istanbul to the province in question.

After the promulgation of the *Tanzimat*, retraction of confession was highly popular among ordinary Ottomans as an opportunity for acquittal or at least a reopening of the case. Correspondingly, in this case, a petition written three years after the conviction was attached to the mandate and demands that Arabgirli Arif and Boşnak Ali to be released. Fatma, mother of Arabgirli Arif, put her thumbprint on the petition, indicating that the appeal had been made by her. Although there were no

[181] BOA: A.MKT 86/91, 9 Receb 1263: "*Arabgirli Arif ve Boşnak Ali nam kimesnelerin Balıkesirde emval-i hükümeti bi'l-ittifak leylen (...) ictisar ve ser-rişte bırakmamak içün sandık odasına kundak bırakarak kai'makam konağını külliyen ihrak bi-l'tar idenleri ikrarlarıyla sübut bulmuş olu…ve ilka-ı konak-ı mezkurun ol mikdar masrafla inşası hazine-i celilenin …"*

[182] Ibid.: *"…ve sabık-ı anha nazaran merkumların fazahat-ı mezkureye dair ikrarları sabit olmuş ve bunların töhmeti yalnız sirkat maddeleriyle kalmayıp fazihesini dahi irtikab etmiş olmalarına fazahat-ı mezkure pek büyük cünha olduğundan merkumların şediden te'dib ve terbiyelerinin icrasıyla (…)bunların habisleri tarihinden sekiz sene müddet için (…) hidemat-ı sefilede istihdam…*"

other registration or document of the first trial (in which Ali and Arif were found guilty three years earlier) had not saved or never recorded, the petition which attached to next of the mandate.

Petitioning was a traditional practice in the Ottoman judicial branch and deeply rooted in the legal understanding of ordinary Ottomans before the *Tanzimat* era as well. Even though their utility to provide instant account for living conditions and daily practices of ordinary Ottomans was appreciated by many, their appraisal as a historical source for "hearing the voices of ordinary people" has always been controversial among historians, since these documents have stylistic problems.

A petition is not a direct recording of the voices of non-elite Ottomans. Necessarily, the subjects generally speak a kind of official language that is highly standardized and canonical. Therefore, they are not as efficient as other historical documents, say a diary,[183] which could provide first-hand accounts from the original source.[184] On the other hand, James Baldwin states that while petitions were written to conform to these institutions' norms, they nevertheless represent the initiative and agency of Ottoman subjects.[185] The intention of the petitioners is comprehensible from between the lines. Thereby, the petition which will be explained below is convenient for indicating the judicial understanding of an Ottoman woman and her apprehension of *Tanzimat* legal discourse. In addition, there is no recording of the mandates or official reports of the arson crime that had been committed three years before the submission of the petition to the Supreme Council. A further information

[183] For instance, Cemal Kafadar, *Kim var imiş biz burada yoğ iken? Dört Osmanlı: Yeniçeri, Tüccar, Derviş, Hatun* (İstanbul: Metis, 2010); Dana Sajdi, *The Barber of Damascus: Nouveau Literacy in the Eighteen-Century Ottoman Levant* (California: Stanford University Press, 2013)
[184] Lex Heerma Van Voss, "Introduction," *International Review of Social History* 46 (2001), 8.; For petitioning in the Ottoman Empire, Yuval Ben-Bassat, *Petitioning the Sultan: Protests and Justice in Late Ottoman Palestine* (London: I&B Tauris, 2014).
[185] James E. Baldwin, "Petitioning the Sultan in Ottoman Egypt," *Bulletin of the School of Oriental and African Studies* 75, no. 03 (August, 2012), 505.

about responding to the petition is not found. What is only available is the summary of the crime and conviction and the petition of Fatma. Thus, there is no chance to evaluate or anything to say about the first trial in which Arif and Ali were standing.

In the petition, she makes an argumentation about the illegal conviction of her son, which was a sort of retraction from the previous statement made by Ali or Arif. She states that two persons, Hafız, who was in charge of chest room in the government office, and Hacı Yakupzade Hacı Mehmed had tortured Arif and Ali. Fatma states that they had beaten these two suspects and burnt their feet. According to alleged torturers, though, the two famous thieves were responsible for the fire in question that had destroyed the building. Then, they had been forced to make a confession by Hacı Mehmed who had initiated the torture and Hafız. In the petition, Fatma claimed that her son, Arif, had to confess the whole arson crime because of the pain inflicted on his body. As stated in the petition, they had been subjected to ”great torture” (*işkence-i izma)* that the only chance they had had in that situation to alleviate the pain had been to admit the crime and said “we burned the office.”[186]

According to Fatma’s petition, Arif had been in prison for three years under terrible conditions and had suffered the torment of an offense which he had not committed. To her, this was injustice. More importantly, she thought that this practice was contrary to the will of the Sultan and against the principles of the High *Tanzimat*.[187] Moreover, she asked not only for the acquittal of his son and his alleged accomplice; but that Hacı Mehmed and Hafız to stand a trial for torture. She

[186]BOA: A.MKT 86/91 9 Receb 1263: “*61 senesinde Balıkesirde mühterek olan kaimakam konağının sebeb-i malum olan suretiyle sandık emini hafiz ve hacı yakubzade hacı mehmed nam kimesnelerin sille ve fesadlarıyla mühterek olmuş (...)tebaadan ali ağa ve mal müdiri tebaalarından arif bendeleri ihtirak etdi diyerek Ali kullarını sandık emini marifetiyle işkence-i izmadan sonra (...) ve merkum Arif kullarına dahi “konağı biz yakdıkdı” deyyu işkence-i izma iderek ----- kıta-ı ümid itmiş olarak her türü ikrardan gayrı çaresi olmayub…”*

[187] Ibid.: *“...hilaf-ı rıza-ı padi ve mugayir-i Tanzimat-ı Ali ateşi yakub cihet-i işkencede ayaklarını ihtirak dürlü dürlü (...)”*

demanded a council in which Hafız and Hacı Mehmed would be summoned before the governor of the province; and if necessary, they would be sent to Istanbul for the case to be tried before the Supreme Council.[188]

As stated above, petitions are not the instant recording of a subject's personal narrative as other historical documents are. They are generally standardized according to the requirements of the institution to which they would be presented and have their own formal language to be employed in petition writing.[189] Therefore, it could not be asserted that Fatma, mother of Arif, did not actually make the sentences in the petition. Even, though it is essential to avoid being prejudicial towards a nineteenth century woman, Fatma, probably, was an illiterate woman who possibly was supervised during the process. And most probably, she appealed to a professional who wrote the petition for her.

Aside from the existence of professional petition-writers who specialized in authorizing petitions and possessed the knowledge of bureaucratic language,[190] until the early 1870s an institutionalized version of professional attorney-ship was not present.[191] But, assumingly, a group of legal advisors might have appeared with the promulgation of the new penal arrangements in the *Tanzimat* era. A literate middleman who could speak to the authorities in an official language is evident in this story. Thus, we can not "directly" hear the voice of Fatma because of the general structure of the petition. Yet, since the document is a petition which was

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[188] Ibid.: *"töhmeti ihtiyar etmiş bu babda ma'ruz olarak mağdur edilmiş olduğu ve üç seneyi karib telef derecesinde hala merkum arif dahi mahbus olduğundan Allah ve resulü aşkına mumaileyha arif kullarını usül-ü müretteb-i fesad olan hacı yakubzade hacı mehmed kullarını ma'- huzur-ı asafanelerine ihzar-ı müşir'i ta'yin buyrulub bade'l-meclis sandık emini hacı hafiz ve mumaileyh yakub oğlu hacı mehmed birlikde olarak meclis-i vala'yı ahkam-ı adiliyede deva'it ve muhakeme olmayla ihkak-ı hak olmak babıyla emr-ü ferman…"*

[189] Van Voss, "Introduction," 8.

[190] Avi Rubin, "From Legal Representation To Advocacy: Attorneys and Clients in the Ottoman Nizamiye Courts," *International Journal of Middle East Studies* 44, no. 1 (January, 2012): 115.

[191] Rubin, *Ottoman Nizamiye Courts Law and Modernity*, 102-3.

written by a professional and Fatma was probably supervised by a middleman; it would be senseless to claim that it is impossible to comprehend Fatma's goal and tendency. In fact, she perfectly did express her claim and we can sort out "her voice" between the lines.[192] Obviously, the acquittal of his son was Fatma's sole objective.

In the above story, what happened in the aftermath of the petition is a mystery, but generally the alleged torture was a problem for the Ottoman administration. As the Ottoman law abrogated judicial torture, the Ottoman officials who committed torture were considered guilty and theoretically further sanctions would be decided by the upper courts. There are many records in the Ottoman archives of these torture trials.

As an example of a standard torture trial involving Ottoman officials was adjudicated, in one instance, five refugee suspects, who were accused of robbing the Kayseri mail cart in Taraklı, a district of İzmit, were tortured in order to force them to confess their crime and to take back what was stolen. They claimed that the officials had tortured them by hanging from their armpits. Three officials were implicated in this torture event, İbrahim Ağa the mail office headmaster of Taraklı, Süleyman Ağa an officer of İzmid prison and Mustafa Ağa the headmaster of Taraklı district. During the investigation, İbrahim Ağa and Süleyman Ağa were directly accused of having torture against the suspects and Mustafa Ağa was consulted as a witness to the torture allegations and also asked as if he had been involved or not. Moreover, the head of the province of Hüdavendigar, Müşir Rıza Paşa, was interrogated in İstanbul although he proved that he was out of the town at the time of torture event. Süleyman Ağa and Mustafa Ağa were acquitted. İbrahim Ağa,

[192]Van Voss, "Introduction," 9.

however, was found guilty of using torture and dismissed from his office and banished to Konya for three years.[193]

The above case was a simple instance of the use of torture by officials and the common approach taken by the central authority towards torture events in penal proceedings. When torture event took place in a district, there appeared an upper court in the province which would try the lawsuit in contact with Istanbul. If necessary, the suspects and victims would be summoned to Istanbul. Nevertheless, what is clear from the above stories is the continuing use of torture even if it was against the *Tanzimat* law. Yet, the fact that torturers of the era were to be punished according to law did not diminish its role in the penal area. Henceforth, as Talal Asad pointed out the pale space between the legal abolition of torture and its concrete reality draws the lines of any study on torture. [194]

Within this pale space, one can find headmasters of the administrative institutions of the provinces or districts; then interrogators of torture trials,; consulates of European states, especially Britain and France; the battered bodies of tortured people who could be the plaintiffs of the second trial; witnesses of the sights of torture and the lower-rank Ottoman officials who were accused of using torture in person. In this chapter, however, ordinary Ottomans receive the attention. Their statements and argumentations during the penal proceeding will provide the essential components and general picture of the new understanding of penality and particularly what a torture trial looked like.

By the same token, how the victims, the tortured people came up with an accusation in the second trial, dealt with a torture event and legal proceedings, and made an attempt to conceive their new legal discourse after the new anti-torture laws

[193] BOA: İ.MVL 162/4728 14 Rebiülahir 1266.
[194] Asad, "Reflections on Cruelty and Torture," 105.

will be discussed. Also, how the personnel of local security guards (the *zabtiye* bands) who were generally lower-rank Ottoman officials and accused of making torture in person became involved in the procedures of a torture trial and to what degree new understanding of legality in the mid-nineteenth century have any impact on their comprehension of the *Tanzimat* law will be examined. Their comprehension of the *Tanzimat* could give an opportunity to grasp the attainability of *Tanzimat* law and the limits and confinements of the new understanding of legality.

In addition, middle and high-rank officials generally spoke the same discourse at the time of the torture trial. This is a type of predetermined "rhetoric of denial" as Talal Asad rightly points out. As always, during the torture trials in the *Tanzimat* era, the authorities who were not involved in the torture event and were not at or around the place of torturing scene in person physically claims that the torture had happened out of their domain and generally blames an undisciplined officer or security guards.[195]

In 1866, a torture event happened in the district of Tikveş in the province of Edirne.[196] Two low-status security guards were accused of torturing against two suspects, Mito and Petre. During the interrogations, they admitted the charges but added that they had performed whatsoever, it had been ordered by Ismail the Captain and Rahmi Bey the head of the district council. On the contrary, the latter two denied all the charges un-hesitantly under further interrogation. They were likely aware of the situation that the security guards could not prove their statements since there was no written order. However, the upper court was not convinced and realized that the seniors enjoyed the advantages of chain of command which could provide them a

[195] Asad, "Reflections on Cruelty and Torture," 105.
[196] BOA: MVL 1030/18 7 Rebiülahir 1283.

way to be acquitted as they had seen no evil. Their overconfidence stuck out and they were fired.[197]

Legal Stratagems of Ordinary Ottomans: "I Said The First Thing Came To My Mind"

In the previous chapter, the widespread approach taken by the foreign representatives of the Great Powers toward torturing suspects during penal proceedings was examined. Their stake in the abolition itself with the promulgation of the *Tanzimat* and the further diplomacy on the application of torture as an illegal act during the *Tanzimat* era was discussed. However, it is claimed that the role of the foreign diplomats should not be taken as the only base on which the abolition of torture was grounded. On the contrary, it was argued that the process needs to be evaluated in terms of the reciprocal transaction between the foreign representatives of the Great Powers and the *Tanzimat* statesmen regarding the abolition. Briefly, body-oriented violence during penal proceedings was taken as one of the legal aspects of nineteenth century modernity; modernity as a trend that would become globally widespread.[198]

On the one hand, this newly-established legal aspect regarding the abolition of torture was seen in many regions in the nineteenth century legislative processes. Thus, the discourse on the subject of penal regimes was invoked by the global legal regime that became widespread in the century. The abolition of torture in the nineteenth century was one of the exclusive outcomes of the recent legislative process of the era that was to be institutionalized within the boundaries of judicial

[197] Ibid.,: "*fakat her nasıl olsa orada idaresizlik töhmetinden biri alamayacaklarından mücazat-ı müdir ve yüzbaşı-ı mumaileyhanın heman memuriyetlerinden azlleriyle yerine ahirlerinin ta'yini…"*
[198] Giddens, *The Consequences of Modernity*, 1.

formation. On the other hand, as the abolition of body-oriented violence was acknowledged as one of the legal aspects of penal modernity, it is a must to go beyond the textual part of the legislative process. So, the process needs to be examined in the perception of ordinary people. The very question of how penal modernity could be grasped puts emphasize on the judicial practices of the era.

Michel De Certau defines the everyday practice of individuals as a sort of consumption that ended up with secondary production which is called "culture." This practice of the making of culture is carried off by the ordinary people, the consumers, who display their everyday creativity. During the course of everyday life, they select the optimum practice in order to achieve their best interest within the dominant cultural economy.[199]

Arguably, as scholars of judicial and legal history seems apt to use terms of consumption (like *forum shopping*), a newly-authorized law (on the law of legal proof against torture in this study) could be taken as one of the recent items in the legal market. Therefore, the discourse of penal modernity is to be consumed by the ordinary people; in this regard, then what is produced is the penal culture of the era. As a result, what is brought under examination is modernity itself; however, particularly bringing one of the legal aspects of global modernity to the everyday experiences in order to grasp what lies at the core of the process as a global phenomenon of the era through their impacts on the daily lives of non-elite Ottomans.[200]

[199] Michel De Certau, *The Practice of Everyday Life*, *Practice* (Berkeley: University of California Press, 1984), xiii-xiv.
[200] Harry Harootunian, "Ghostly Comparisons." In *Impacts of Modernities*, ed. Thomas Lamarre and Kang Nae-hui (Hong Kong: Hong Kong University Press, 2004), 51 as cited in Rubin, *Ottoman Nizamiye Courts Law and Modernity*, 7.

Henceforth, as was stated above, the anti-torture law, which rendered the confessions of suspects elicited under torture null and void for the upper court, appeared a specific item in the legal market from the early 1840s. Ordinary Ottomans did create a penal culture that was based on an institutional transformation of legal proof system. In the trials which were organized to solve torture cases, the rhetoric of ordinary Ottomans who were related to the event of torture is an important category to comprehend how non-elite individuals dealt with the new judicial and penal understanding of the *Tanzimat* era and in what ways they enjoyed the new legal paradigms and tools in order to achieve their best interest. More generally, their utilization of the anti-torture law is one of the indications of the relation between modernity as a globally apprehended phenomenon and the ordinary people.

The anti-torture law in the Ottoman provinces was clearly a product of the *Tanzimat* era, which also caused a discernible rupture in the minds of the non-elite Ottoman subjects. But, as one can imagine, there is not much of a chance to reach their minds, and since it is hard to hear their voices directly. Especially in penal proceedings, one can hardly understand the claims and arguments of both parts in the trial before the *Tanzimat* era.

With the new penal law, however, the official reports of trial sent by the secular courts to İstanbul provide an opportunity to observe the penal process. Specifically, the attitudes toward the new laws and perceptions of common people are reflected on trial reports. Accordingly, the tangible impact of *Tanzimat* on what Petrov calls "on cognitive and epistemological worlds of the non-elite Ottoman subjects"[201] is discernible through the interrogation protocols (*istintakname)*. These records of interrogations were authorized in localities and sent to the Sublime Porte.

[201] Petrov, "Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Reform, 1864–1868," 733.

Usually, these documents, which were inserted as an appendix to the trial record, were comprised of greater crimes; therefore, lesser ones were rarely covered by them.[202] Yet, the documents are simultaneous recording of the interrogation and verbatim accounts of the suspects.[203] Thus, what makes them significant is that these are first-person narratives which reveal the moral and intellectual world of Ottoman subjects at the specific time of confrontation with the state discourse. Unlike the *kadi* court records which contain the summary of the case abstracted by the court clerk, the lesser-manipulated voices of the ordinary Ottomans can be heard more fluently through the interrogations documents.[204]

These documents contain numerous examples of how the ordinary Ottomans handled the charges, accusations, and challenges within the legal branch of the *Tanzimat* novelties. The above-mentioned penal culture that emerged out of the interchange between the law and its subjects can be grasped through these documents since the records reveal the sudden reactions of the ordinary Ottomans who came into contact with the legal authority against the incriminating rhetoric of the assigned interrogator.

In the previous chapter, it was stated that the torture case in İzmir was reopened by the initiatives of the British Consulate in İzmir after Panayot (the alleged accomplice of opium robbers) had died in the hospital. Supposedly, the reason for his death had been the maltreatment of Bekir Ağa (the inspector) and his men, according to claimants. There are two imperial decrees (*İrade*) about this event, dated November 1851/Muharrem 1268 and September 1851/Zilkade 1268. The first

[202] Sedat Bingöl, *Hirsova Kaza Deavi Meclisi Tutanaklari: Nizamiye Mahkemesi Tutanaklarindan Bir Örnek* (Eskişehir: Anadolu Üniversitesi Yayinlari, 2002), 19.
[203] Ibid., 21.
[204] Petrov, "Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Reform, 1864–1868," 733-5.

one contains three mandates and the summary of first interrogations (the documents of interrogation are not present), which must have been held in Istanbul. The second one consists of three long registers of interrogation protocols along with the mandates about the trial in Izmir.

The death event seems to have triggered the judicial branch of the Empire. Further, when the case lasted more than a year, then new accusations appeared against the alleged torturers to the effect that the security guards, led by Bekir Ağa had used torture against a group of detainees in Buca, including the another alleged accomplice of the opium robbers, Lefter (a gardener, like Panayot) . Also, allegedly, two other persons, Mihal of Manastır and Anastaş, had been tortured in the Tire government office on the orders of Deli Ahmed Çavuş of Kayseri (a police sergeant, man of Bekir Ağa) and by Zincirci Mustafa (the prison attendant in Tire), while pursuing the robbery case in Tire.[205] So, first the alleged torturers, Bekir Ağa and his men, stood on a trial before the Supreme Council in Istanbul. Then they were sent back to Izmir in order to continue the case in its place with the appointment of "cognoscente officer" from Istanbul, who was Ali Nahit Efendi from the Translation Bureau.[206]

The first register is shorter and devoted to the torture rumour in Tire. The two men, Mihal and Anastaş, were captured in Tire, possibly because of their vagrant-like imprint assumed by Ahmed Çavuş. More likely, the security guards were looking for opium robbers and Mihal and Anastaş seemed suspicious persons. The

[205] BOA: İ.MVL 225/7651 20 Muharrem 1268*: "... medhalleri olduğu istincar olunan bahçivan Panayot ile Lefter nam şahıslar Bekir Ağa marifetiyle ahz ve girift olunarak (...) İzmir süvari zabtiye çavuşlarından Kayserili Ahmed Tire'de müdürkonağı mahbesinde Manastırlı Mihal ile pabuççu Antaş'ı işkence ettiği şahidler ihbariyle muhakkak olduğu işar olunmuş...*"
[206] İbid.: "*... fakat buraca tahkikat-ı hale vüsul-u yüsr olamayacağından ve İzmir'de meclis-i cinayet teşkil kılındığından husus-ı mezkurun mahaline havalesiyle hariciye nezaret-i celilesi (?) bir münasib mübaşir tayin olunarak merkum Bekir Ağa ve bu tarafda bulunan...*"

lack of passage certificate (*mürur tezkeresi*) of these men was another reason for their arrest.[207] Afterward, Mihal stated that he was tortured by "being tied up his feet and arms by a rope, banging a type of nail to his head (*'aşk*) four times, compressing his arms after bringing to front, forced to stand until morning in Istanbul" [208] Then, in İzmir, he only mentioned the beating event during his custody in Tire.[209] Apparently, Ahmed Çavuş had been in prison for such a long time that he complained about this situation.[210] At the end of this (sub-)trial, (even though he claimed that torturing Mihal had been ordered by Ahmed Çavuş,[211] Zincirci Mustafa was convicted of using torture because he could not prove the order.[212]

In the second part of the trial which was held in İzmir, Lefter, the other alleged accomplices of opium robbers and Bekir Ağa were interrogated. Assumingly, Lefter had changed his attitude toward Bekir Ağa during the sessions in Istanbul. While, in his first statement, he had said that "he does not know whether Bekir Ağa was involved in the torture event," even he was caught by his orders; in the second one, however, he agreed that his torturing had been ordered by Bekir Ağa and carried out

[207] BOA: İ.MVL 245/8884 18 Zilkade 1268, Mihal: *"...ne vakit geldiğimi ve nereden geldiğimi sualler etdi. Cevab verdim. Alın şunu götürün dedi..."*; also ses Sedat Bingöl, "Osmanlı Devleti'nde *Tanzimat*tan Sonra Kriminal Kimlik Tespit Yöntemlerine Dair Notlar ve Belgeler," *Belleten* 75, no. 274 (2011): 848-51: Bingöl underlines the importance of passage certificate for criminal identification. Also, "being a vagrant (*serseri*)"could be the very reason of an arrest.

[208] BOA: İ.MVL 225/7651 20 Muharrem 1268: *"... tezkeresinin kayıtsız bulunduğu beyana mebni Bekir Ağa tarafından ahz ve girift olunarak kendüsüne Bekir Ağa'nın emriyle iki nefer sekban tarafından kolları ve parmakları ip ile bağlanmak ve başına dört defa' aşk çakmak ve kolları önüne getürülüb sıkılmak ve sabah kadar ayak üzerinde durdurulmak..*"

[209] BOA: İ.MVL 245/8884 18 Zilkade 1268:*"... Bana vurdular tekme ile. Ağzımdan, burnumdan kan geldi..."*

[210] Ibid.: *Ahmed Çavuş: "Hayır efendim, bu bana isnaddır. İsmet Paşa efendimizin zamanında çağırdılar bana böyle sualleri, cevab etmeksizin beni habse kaldırdılar... böyle sormadılar. Alın aşağı, vurun ayağına demiri dediler. ... Bir iki üç ay konakta durdum. İslamboldan istediler..."*; When thinking this case lasts one year, the complains seem right. As Fatmagül Demirel argues that even in the late 1870's the trial process were too long and the culprits had been suffering in prison while waiting for the trial in Demirel, *Adliye Nezareti Kuruluşu ve Faaliyetleri 1876-1914*, 291.

[211] BOA: İ.MVL 245/8884 18 Zilkade 1268: *"... Koydum habse, zincire vurdum (...) Ahmed Ağa bana kasdır deyyu emr etti. Ben emr kuluyum, kasdım...*"

[212] Ibid.: "*merkum Zincirci makam-ı şahadette Deli Ahmed'in emriyle kendüsü icra etmiş olduğunu ikrar etmiş ve merkum Deli Ahmed tarafından o misillü emir verilmiş olduğu (...) isbat olunamamış ve merkum zincirci ise ol tazyikatı kendüsü icra etmiş olduğunu itiraf etmiş olmasıyla makam-ı şahadetten düşerek müttehem hükmüne girmiş...*"

by a couple of security guards.[213] After, he had would claim that he said the first thing came to his mind under torture like "I was with the robbers."[214] Lefter, while he was being held in Istanbul, he had changed his strategy to push forward against Bekir Ağa in order to reopen the case; and probably on the advice of an informant who had knowledge about the anti-torture law.

The first pages of the protocol belong to the interrogation of Bekir Ağa. According to his statements, Lefter had been arrested together with Panayot because of "aiding and abetting" (*yardım* ve *yataklık*) after one of the robbers had given their name. Then, Bekir Ağa states that Lefter had denied the charges during their very first arrest; on the contrary, Panayot had confessed that he had made some provisions to the robbers. However, Lefter did not agree and said that he had only sold a gun to the robbers and had had nothing to do with opium robbery [215]

Later, the son of Lefter appears in the statements of Bekir Ağa. After Bekir Ağa had arrested these two men and delivered them to the Izmir prison, he had set out to reveal the stolen opium. Meanwhile, Lefter's son had come to him in order to rescue his father from imprisonment in return for giving information about the stolen opium. The son had said that the opium had been in the possession of a British merchant whose mansion, also, was the hiding place of three robbers.[216] During the

[213] BOA: İ.MVL 225/7651 20 Muharrem1268: "*... sekbanlar tarafından hakkında vuku' bulan muamelede (Bekir Ağa'nın) medhalini bilemediğini (...)Mersum ikinci defa' icra olunan istintakında (...)kendüsünün Buca'ya götürüldüğünde Bekir Ağa tarafından doğru söyle yollu vaki' olan ifadeye ben bir şey bilmem cevabını verdiğinden birkaç düğümlü bir ip başına geçirilüb sıkılmış olduğu cihetle...*"

[214] Ibid.: "*götürülüb yine ip takub eziyet ettiklerinden o da afyonları gasb edenlerle beraber idim bir takım ağzına geleni söylemiş olduğundan bahsle…"*

[215]Ibid.: "*Bekir Ağa: Panayot'u derdest ettiğim ahşam Lefter'i de tutdum. Orada tanıdım. Mübaşir: Panayot'u neden dolayı derdest ettin? BA: Arabderesinde mecruhen derdest olan sariki istintak ettim. Bu bağçivan Panayot'un kendüsüne yatak ve maiyet olduğunu haber verdi (...) BA: mecruh hırsızı ve Panayot'un çocuğunu Panayot hazır olduğu halde muvacehe idüp… ne dersin deyyu sual ildiğimde geldi beni çocuk çağırdı inkarım korkduğumdandır… ben para ile tüfenk satdım…*"

[216] Ibid.: "*BA:… tercüman gittikten sonra mersumların jurnallerini yabub hükümete takdim ildim… bunları istintak etmek üzere kapualtına indim… Bir çocuk geldi sana ifadesi var dediler, Lefter'in*

interrogation of the son, also, Bekir Ağa discovered that Lefter had not only harboured the robbers but also had taken an active part in the opium robbery in return for some stake in the stolen opium. Therefore, Lefter had been called to the district of Buca as if he had the knowledge about the case. Lefter's condition during the road from Buca to İzmir, however, seems to have been a concern for the interrogator. While has been taking to Buca by the security guards, there was an iron leash around his neck to avoid his runaway:

> Bekir Ağa (BA): Some three or four security guards… applying the iron leash…They applied the iron leash because, if they tied their arms, he cannot walk… It is obviously a culprit… The Interrogator (I): Where did you put Lefter? BA: There is a place just outside of our place…. The room for servants.. They sat him down there. I: In what condition did they make him sit down? BA: With his iron leash… There was no harm of the iron leash I: An iron leash does harm a body.

Afterward, according to Bekir Ağa's statements, Lefter had been interrogated by him. First, he had denied the accusation of taking part in crime in person and he had claimed that he had only sold the guns to them. Then he had been confronted with his son and confessed the opium robbery.

The story of the opposite party, though, is quite different from that of Bekir Ağa. During interrogation, Lefter had denied the accusation that implied his active participation in the robbery; and, he had insisted on the gun story. Then he described the torture scene in Buca:

> I: O Lefter! During your earlier interrogations, you and your son admitted that you took part in the opium robbery in return of some stake from the stolen opium. Declare the truth here too.

çocuğu imiş…. Sual ildim… babamı kurtarırsan asl hırsızların yerini sana haber vereyim… Buca'da bacı-bezirganın konağında üç sarik var… bacı kimdir deyyu sual ildiğimde İngiliz deyorlar dedi…"

> Lefter (L): Three people came to my house, asked for bread and I gave to them. Then, they promised me 1000 kuruş... I: Say, how did the robbery take place? L: As soon as they left my home, I heard the story of robbery from without... I: In Buca, where did they put you after Bekir Ağa called you to the room? L: After I state the robbery... they brought me in a ruined house and sit me down beside the water tank of the site... they tied me with edging wood and compressed my head with a rope. I: By the orders of Bekir Ağa? L: Yes, sir.

During the interrogation of Lefter, Bekir Ağa must have been nearby to face off with Lefter; and, when he was asked about the torture accusations that Lefter had made, he stated that: "Since he is a culprit, Lefter is casting torture aspersion on me in order to rescue himself. This is fourth time… It was decided in the Council that no conviction was recognized.[217]" For Bekir Ağa, it was clear that Panayot and Lefter had taken part in the robbery; and, now Lefter tried to find a way to get rid of the accusations. On the one hand, Bekir Ağa's allegations seem logical while concerning the fact that Lefter would run away during the investigation process; thus, in the eyes of Ali Nahit Efendi, his deed was the clearest proof of his guiltiness.[218]

The registers, on the other hand, may have been manipulated in favour of the security guards. However, the impression gained from the protocols which implied that Lefter behaved intentionally during the process and instrument-alized the anti-torture law. He might have been trying to gain some time for a possible escape or to mislead the authorities by changing his statement frequently. Yet, no one could conclude that Lefter was guilty and Bekir Ağa was utterly right and never tortured these people. Quite the contrary, one has to assume that Lefter, either guilty or not, was devoid of the necessary means in a trial like legal knowledge, an attorney or

[217] Ibid.: "*BA:... kendü müttehem olduğundan nefsinin halası için mukaddemce dahi böyle bir eziyet olmuş iftirasını eylemişdi... Ve bu husus dördüncü defadır... ahkam-ı aliyyede sekiz mah tahkik olundu. Bir şey tahakkuk etmedi…*"
[218] Ibid.: *"... davası netice vermeyeceğini ve bütün bütün kabahtli olacağını anladığından firar etmiş ve artık Lefter'in şu iddiası vahi olarak…*"

circumstantial evidences against the security guards. While Lefter seemed unstable and ambivalent during the interrogation; Bekir Ağa gave a sense of self confidence. Only Panayot's death was an indication to be in doubt about Bekir Ağa.

Unlike Lefter, Bekir Ağa could provide a good account during the interrogation which indicates that he had knowledge about the abolition.[219] Nonetheless, what is important about this case is the positioning of Lefter within the jurisdictional circle. He tried to utilize from the new litigation opportunities, against the state authorities in their language. The exchange with Bekir Ağa was an explicit instance of confrontation between the power and the people, and a conflict over the legal discourse.

In another instance that occurred in Cebel, a district of the province of Trablusgarb in 1865-6, a certain Mesud was accused of having broken into the mansion of the district governor (*kaymakam*) Ali Paşa, and stealing some money and silver goods in the possession of district *naib*. Whoever stole the money and the goods; Mesud was arrested for the offense and put in prison. Beside the crime of theft, an upper court organized after an alleged torture event would see the accusation of torture made by Mesud against a group of officials in the district. Also, two other suspect, Halife bin Ömer and Said bin Süleyman, came up with the same accusation against the security guards. A couple of security guards of the district, other inmates at the prison and nearly all of the members of the Cebel district council, including the clerk and *naib*, were interrogated. Accordingly, the governor of the district, who was appointed to another district at the time of interrogations and trial, was questioned via correspondence. Finally, the foreman (*kolbaşı*) of the security guards Hacı Mehmed, was convicted torturing the suspects. Another

[219] Ibid.: "…*merkum celb ile istintak olunduk da bu makule-i işkence maddesinin memnua'sını bildiğinden ne tarafından ve ne de maiyetinde…*"

Mehmed Ağa, Hasan Zeybek, and Azabi Musa, were convicted of being associated with Hacı Mehmed. Also, the *naib* of the district and clerk of Cebel council were fired.[220]

At the beginning, this story looks like a usual case of torture event that happened after the theft offence that preceded the second trial. The high ranking state officials in Istanbul or in the provinces worked to prevent transgression of officials throughout the *Tanzimat* era including torture. However, in this case, what can be seen that how suspects, guilty or non-guilty, got involved in the new legal discourse. During the interrogation of the torture accusations, the main suspect, Mesud denied all the charges to which he had admitted at the beginning of the case and retracted all his confessions related to the offense. More importantly, he claimed that he had confessed the alleged theft because the security guards had tortured him and forced him to confess. According to his own statement, Mesud might have said something about the theft offense, but he could not remember what he said, exactly, because of the excessive pain inflicted by Kolbaşı Hacı Mustafa during the first interrogation, just after he had been in the district of Cebel.

For a while, during the interrogation conducted by the official who was assigned for the torture case, Mesud insists that he could not remember whether he had confessed the crime.[221] Yet the interrogator did not seem to be convinced that Mesud could not ever have recalled what he had said before, even he had been subjected to excessive pain as he claimed. Thus the interrogator asks for the detail of

[220] BOA: MVL 1064/12 25 Rebiülevvel 1283
[221] Ibid.: "*Mesud (M): Paşa dedi ki 'doğrusunu söyle. Oğlumun başı üzerine sebilini tahliye ederim. İşte keyfiyeti ikrar ildiğine dair mazbata yaptık.' İkrar eyle deyyu pek çok azab ildiler. Ol vakit ne söylediğimi bilmem… M: Bir şey yaptılar. Şu kadar ki beni beş gün hapis edip ve bura çıkarıp eziyet ildiler. Ahranın üzerine ağzımdan bir şey çıktı ise bilmem."*

his confession, specifically to ”what offense” he had confessed.[222] Similarly, Mesud puts forward his fear of the authorities again as he explained his ambiguous attitudes, but as a response he was guaranteed by the justice of the *Tanzimat* state.

> Mesud: … I am telling the truth. But I am afraid of being treated like I was in Cebel. The Interrogator (I): Here is the representation of the Sultan. Here, justice is difference. Declare the truth.[223]

The rhetoric of the interrogator underlines what Petrov describes as “the *Tanzimat* concept of law as a guarantee not only of public of order, but also of justice and individual rights.”[224] Then, he reluctantly admits that under excessive pain inflicted to his body, “I guess I might have confessed that I am the thief.”[225]

Arguably, one could easily relate the ambiguity of that statement to the excessive pain assumed by Mesud as the very reason for his confessions. Therefore, the very ground on which his previous statements were justified by his unconsciousness now appeared as a judicial tool for him.

As these interrogation protocols gave a chance to recognize the minds of the Ottoman subjects and to find out what attitudes and behaviours shapes their positioning against the accusations made by Ottoman official in charge of any case. What one find in these interrogation sheets is what Petrov calls the “legal stratagems and exculpatory stories”[226] of suspects and interrogators which indicate their

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[222] Ibid.: “*I: Ol vakit --- azab-ı halas için söylediğini unutmamışsın. Söylediğin kelamı niçin unuttun?*”
[223] Ibid.: “*M: ...Ben doğrusunu söylerim. Lakin korkarım ki Celeb'de gördüğüm muamele gibi burada dahi görürüm. I: Saya-ı seniyye-i vekaletpenahi de burada hakkaniyet başka şey ona sen hakikat-i hali beyan et.*”
[224] Petrov, “Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Reform, 1864–1868,” 743.
[225] BOA: MVL 1064/12 25 Rebiülevvel 1283: “*I: ...Ali Paşa'nın cebren söylettiği ikrarını tekrar et... M: ...Galiba sarik olduğumu ikrar ildim.*”
[226] Petrov, “Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Reform, 1864–1868.” 734

concrete awareness of the current policies were able to incorporate themselves into the legal discourse. Thus, as could be seen in the above story, non-elite Ottomans as Petrov writes "turn out to have been much better attuned to the dominant state discourse,"[227] Particularly in this case, Mesud displays his creativity while choosing the best tool in order to serve his interest.

However, even Mesud was a real thief is not so important, the further statements made by him cause a suspicion. In this case, one of the stolen objects was silver goods with a sum of money as the *naib* of the district proclaimed. Interestingly, for the first interrogation under torture according to Mesud's statement, he confessed that what he had stolen was a group of silver goods and he was right. As it is not known how the theft case ended but if he knew what had been stolen he was presumably related to the crime even if he had confessed under torture. While the interrogator seems to have associated Mesud with the theft event, he used the pain argument to ward off this attempt:

> I: When you confessed the crime of theft, didn't they ask that what are the stolen objects? M: At that time, because of the intensity of the pain; because I didn't know what I said, I said silver unwittingly.[228]

Evidently, his statement was in accordance with the way he chose to deal with the court and the new legal discourse of the *Tanzimat*. This is the very "legal stratagem" that could give Mesud a chance of acquittal. When he said "unwittingly," it sounds like that he attempted to be free himself of responsibility of his previous confession. In the archival document, he also stated that his confession was like a daydream

[227] Ibid.
[228] Ibid.: "*I: Sirkati ikrar eylediğin vakit eşya-ı mesrukenin ta'dadını sual etmediler mi? M: Ol vakit şiddet-i azabdan kelamımı bilmeyerek hayal ile gümüş vardır demiş idim*."

(*hayal*), which was the basis of his legal stratagem as an indication of his unconsciousness during the first interrogation under the alleged torture of the security guards in question.

On the one hand, obviously it is out of question that an alleged thief could have known what had been stolen unless he was not related to the crime. Therefore, anyone could easily judge that Mesud was quite possibly associated with the offense one way or another. Yet he continued to insist on the torture accusation that had forced him to confess. He argued that because of the pain inflicted on his body he had made a statement unconsciously and he should not be judged based on this statement. He simply demanded that this statement needs to be counted as null and void; the pain had occurred out of illegal techniques used by the security guards against him. Torture was the basis of his defence in the second trial.

On the other hand, what one could hear from the interrogation protocols is the voice of a subaltern who was not able to express himself without a mediator. In a way that Mesud could prove their existence in time and space was the narration in question which had been recorded by elite Ottomans. Therefore, the sole indicator of the existence of a subaltern (like Mesud in this story) is restricted to an ambiguous position in the trial documents. There is not much chance of straight expression for the subalterns. Hence, according to Gyan Prakash, this state of affairs renders the very appearance of non-elites dominated by the narration itself. Their identities were shaped according to their appearance in the document. Thus, the judgment was made through the official apprehension of a subaltern, and naturally, that apprehension is

determined with respect to what Prakash terms as "the degree of their acknowledged or unacknowledged identification with the official point of view."[229]

Accordingly, the same approach seems valid for this case as well. During the interrogations, the statements of Mesud, who was most probably an illiterate man, were recorded by a clerk. He probably had no way to know what was written in the interrogation protocol. Also, there was not much role of Mesud in the preparation of the documents during the interrogations besides his thumbprint at the end of every interrogation. Thus, this makes the interrogation protocol an "official" piece of paper which was prepared by an Ottoman official, the provincial council of Trablusgarb, to transmit the offence to another official institution, the Supreme Council. Consequently, the official documentation argued that Mesud was a recidivous thief whose words did not have to be taken serious in the eyes of the elites.

First of all, the interrogation protocol need be taken as a fabricated text rather than canonical truth. Thus, the very appearance of Mesud in time is restricted to the official document which contains negative arguments about an alleged thief. Therefore, the statements of Mesud could simply have been manipulated or purposefully cited in order to demonstrate that the previous charges made against him was right in spite of the presence of alleged torture. Or else, this simple detail was implicitly tucked to between the lines that could clinch the case in favour of the security guards, at least, reduce the accusations to a less serious level.

Hence, what one needs to do is take the document as a written outcome of an interrogation with its all discrepancies and complications that were produced by the "official" representation of an ordinary Ottoman rather than a smooth and plain record of an interrogation which was not violated by the author of the text. It has to

[229] Gyan Prakash, "Subaltern Studies as Postcolonial Criticism," *The American Historical Review* 99, no. 5 (2013), 1479

be recognized as a given fact that Mesud was a form of existence in the official record that was "constituted by dominant discourses."[230]

Second, there are some other difficulties of these texts because of their format. Namely, as these documents are comprised of questions and answers arranged one after the other in a symmetrical and highly standardized way, one has a right to be doubtful about their reliability as a historical source. There must have been a bureaucratic regulation for these interrogation protocols. However, they could be either too convenient to conform to the requirements of standardization or sometimes improperly-designated, which could cause suspicion about their utilization. As an example for the latter, some of the documents only cover short questions and long answers that might indicate the document is just the summary of the interrogation.[231] On the contrary, Omri Paz comes up with a more technical critique of the studies based on the interrogation protocols. According to Paz, these documents "are very neat which may indicate that they were written after the fact, and perhaps edited."[232]

However, one can still discern the adequacy of Mesud in the use of *Tanzimat* law. After the pain argument, Mesud declared his confidence that the court would not discriminate between social position of himself and the local authorities, and demanded his right even if the transgressor was the butler (*kahya*) or the governor.[233] Evidently, this saying is unprecedented, an example of commoner accusing the governor of the district, thereby certainly provided by the *Tanzimat*. Even it could be

[230] Prakash, "Subaltern Studies as Postcolonial Criticism," 1480.
[231] For instance, BOA: MVL 746/1 14 Cemaziyelevvel 1283.
[232] Omri Paz, "Crime, Criminals, and the Ottoman State: Anatolia Between the Late 1830s and the Late 1860s," (*PhD Diss.,* Tel Aviv University, 2011), 120.
[233] Ibid.: *"M: Samed olsun. Böyle erbab-ı hakkaniyet meclisine geldim. Hakkımı siz alınız. … Bana eziyet edenlerden (?) hakkımı isterim kahya mıdır, paşa mıdır her kim ise ondan alınız. … Asıl hakkım kahyadadır, eşyam çalındı diyerek bana iftira attı…"*

said that the discourse of Mesud, claiming his right, was the slogan of the *Tanzimat* legal discourse, which proposes equality before the law; "even if a Minister of the state were to kill a shepherd, he will be punished according to the law."[234] As a reflection of this principle, Mesud showed his awareness that he was equal to the governor of the district, at least before the law and the high ranking official who conducted the process of trial .

It seems very likely that Mesud tried to gain some time and stalled the accusations of the claimant during his first interrogation under torture after he was caught. Because this document is not in my possession, I could only find out what people said in the first interrogation. Nevertheless, the retroactive sayings of certain council members in the second trial could shed light on it. In a usual torture trial, the members of the district council were also questioned about their responsibility in the torture event. As usual, in this case, the interrogator of the second trial mostly tried to understand why they had not attempted to prevent the suspects being tortured; and in addition, why they had not denounced the torture event to the upper court in the province.[235] In one instance, one of the members of the council, a certain Salim talked about Mesud's irrational statements about his further confessions after he admitted the theft. Apparently, Mesud had changed his statement about his accomplices three times while he was being held in Cebel prison:

> …the council told to him that at the first meeting of the council you said that your accomplices are Hanife and Mehmed and at

[234] Cengiz Kırlı, *Sultan ve Kamuoyu Osmanlı Modernleşme Sürecinde "Havadis Jurnalleri"* (Istanbul: İş Bankası Yayınları, 2009), 74 and Takvim-i Vekâyi, def'a 187 (15 Ramazan 1255/22 Kasım 1839): "*…çünki bir âdemin şer'an ve kanûnen da'vası âlenen görülüb hükm olunmadıkca, taraf-ı şâhânemden kimse hakkında bir şey yapılmayacağından vüzerâdan tâ çobana kadar sâir nâsdan dahî kimse kimsenin bi-gayr-i hakkın fuzulî can ve malına ve ırz ve namusuna sakınıb el uzatmasın…*"

[235] Ibid.: "*I*: *Madem ki Mesud'dan bu azab lakırdısını işitmişsiniz. Bu keyfiyetin tahkiki sizin vazifeniz idi. Niçin tahkik etmediniz*?"

> the second meeting of the council Amberim Mesud and Krandasioğlu. Now, you are totally denying. What is it like that? And Mesud answered: I made the previous confession because of the pain…[236]

Mesud seemingly used the pain argument to fend off any type of accusations. Along with the pain argument as the very reason of the confession, Mesud apparently gave different names as his accomplices to manoeuvre in his stratagem during the first interrogation. As long as the pain argument was the basis on which he justified his previous statements, different names could easily be associated with torture as well.

According to Natalie Zemon Davis, there are some disadvantages to these interrogation protocols. They represent nothing but the "unadulterated voice of the 'people' they present is actually guided and directed at every step by the interrogator."[237] Above, it was argued that the appearance of Mesud "the thief" was stuck between the lines of the document which might have been manipulated by the court clerk. On the contrary, the previous instance demonstrates that Mesud's statements caused confusion among the council members. Therefore, Petrov argues that, as opposed to Zemon-Davis, the activity of "'guiding' tends to cut both ways."[238] As if interrogators guide and direct people, concomitantly people under interrogation could do the same.

The double-play between the interrogator and Mesud the culprit reveals the specific legal discourse of the *Tanzimat* era which provided different negotiation techniques to both parts. Clearly, the retraction of confession was one of the

[236] Ibid.: "*…sen evvelki mecliste sirkat refakatini Halife ve Mehmed ve ikinci mecliste Amrebim Mesud ve Krandasi oğluna ettin. Ve şimdi bütün bütün inkar ediyorsun. Bun nasıl şeydir. Ve Mesud dahi cevab verdi: 'Ben evvel ki ikrarı azaptan ettim' dedi…*"
[237] Natalie Z. Davis, *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth-Century France* (Stanford: Stanford University Press, 1987), 5–6.
[238] Petrov, "Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Reform, 1864–1868," 735.

techniques used by interrogated and very common as a confession was made under torture would not be valid. Petrov claims that for the Ottoman officials, "governments don't trick criminals into confessing by the use of force," but "judging by the numerous instances in which suspects attempted to reverse their previous confessions by claiming that they been "cheated" into providing them."[239] Whether Mesud was the thief that the authorities were chasing after, his attitude during the torture investigation is a type of self-confident denial by which he hoped to be acquitted from the accusations. He justified himself and retracted his confession.

The story of the opposite party is also quite interesting. The alleged torturer, Kolbaşı Hacı Mehmed, was interrogated by unknown high-status official about his role in the torture event. Surprisingly, his job was very easy. During the short interrogation, Hacı Mehmed had admitted all the accusations about torture without hesitation and explained what torture techniques he had applied to Mesud in details; he had tortured Mesud by tucking boiled eggs in Mesud's armpits. After, his understanding of law emerges as a way that was not expected by the *Tanzimat* reformers. Kolbaşı Mehmed unexpectedly did not defend himself, blaming any senior official who gave the order in his first interrogation. During the confrontation with Mesud, he admitted that "I have done it all"[240] at the beginning without any enforcement or persuasion of the interrogator.

> I: As you tuck eggs between his armpits, didn't you chain his hands? Hacı Mehmed (H): Paşa shows what we will do and we did; I: Don't you know that the Sultan outlaws this act? H: Sir, we serve you. You are bigger than us. I am just a servant. I will do what I am ordered to do. I: Isn't the order of the Sultan bigger? H: He is the governor, think, he ordered me. He knows

[239] Ibid., 743.
[240] Ibid.: "*H: ...cümlesini yaptım*."

> the law, I don't. (…) I: Everybody knows that chain is illegal. Haven't you heard it? H: I haven't, the governor knows.[241]

Seemingly, the foreman of the security guards of the district did not know what he had to do according to the announced law and regulations. It seems that for Hacı Mehmed, the order of the Paşa was still more effective than the rule of law and particularly the anti-torture regulations. Unlike Mesud, the foreman did not take advantage of the new *Tanzimat* legal discourse. Still, what the law meant to him is the governor himself.

In his further interrogation, Hacı Mehmet followed a different path in order to acquit himself from the torture accusations. Unlike the first interrogation in which he admitted all the accusations with a sense of dutifulness; in the second one he stated that had not had the knowledge of how to torture a suspect and had never done before the governor showed how it needed to be done:

> I: Don't you know that torture was forbidden? How did you dare? H: I didn't know how to torture. Ali Paşa described me.[242]

Assumingly, during the first encountering with the interrogator, he was not aware of the abolition of torture or his responsibility to obey the bureaucratic regulation rather than the unlawful order of the governor. But, then he seems to have learned that torture is illegal even if it was ordered by the district governor. So, he retracted his confession and tried to accuse the governor. From this point on, he built

[241] Ibid.: "*I: Yumurtayı koltuklarına sıkıştırdınız da ellerini bağlamadınız mı? H: Paşa kollarını tutup böyle yap dedi, biz dahi öyle yaptık. I: Padişahımız böyle şeyleri men' ildi, sen bilmez misin? H: Efendim biz sana hizmet ediyoruz. Sen bizden büyüksün. Ben hizmetkarım. Bana ne emir olursa öyle yaparım. I: Padişahın emri daha büyük değil midir? H: Kaymakam düşünün bana o emretti. Kanun hükmünü o bilir, ben o kanunu bilmem. (...) I: Zincirinin memnu' olduğunu herkes bilir. Bunu işitmedin mi? H: İşitmedim onu kaymakam bilir ben bilmem.*"

[242] Ibid.: "*I: İşkencenin memnuasını bilmez misin? Bunları ne cesaretle yaptın? H: İşkence yapmayı bilmez idim. Bana Ali Paşa tarif etti*."

his defense on the fact that he was just an aide who had to do what he was ordered. He based his opposite argumentation on the organization of the chain of command that unfortunately made him to commit the torture crime.

The very first conclusion to be grasped from this story is Mesud's situation; that he was aware of his rights and knew what he needed to do in order to get rid of the accusations and to take back his innocent status which he had lost after the previous confession. He knew that a confession extracted under torture would not be legally approved proof in the eyes of upper court officials. Therefore, he put forward the torture story. It shows, with reference to Petrov, that he was attuned to new legal discourse and uses it in order to achieve his best interest.[243] In contrast, one can easily realize that the torturer, Kolbaşı Hacı Mehmed, did not comprehend how to defend himself before the law. Even though Mehmed was a security guard, apparently he did not know the law that was actually above the arbitrary orders of the governor.

On the other hand, the *Tanzimat* state outlawed torture in the early stages of the era. As torture had been illegal for 28 years at the time of this interrogation, it sounds weird that a state official was completely unaware of the facts. To me, this story shows the diffusiveness of the *Tanzimat* laws into the state ranks. But interrogation sheets do not give any information about how and under what conditions investigations run. Nevertheless, even if we don't know the environment of the interrogation process, presumably though, between his first and second interrogations, Kolbaşı Hacı Mehmed was quite possibly coached or at least

[243] Petrov, "Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Reform, 1864–1868," 734; Since there is very few studies on the reception of *Tanzimat* Law by the orinary people, it is worth to mention following books: Iris Agmon, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine* (New York: Syracuse University Press, 2006); M.S. Saracoğlu, "Letter from Vidin: A Study of Ottoman Governmentality and Politics of Local Administration, 1864–1877,"(unpublished *PhD.Diss.*, Ohio State University, 2007).

informed by someone who was aware of the law; and, that made him to change his strategy.

An ordinary Ottoman, namely Mesud in the above story, could grasp the understandings and judicial principles of the era. What we don't know is how the upper court in the province was informed about the torture event in Cebel district and who denounced it and in what ways. We only know that Mesud was held in prison for seven months, five months in Cebel and two months in the province. During this period, Mesud perhaps knew what he was doing and could handle the situation. Yet, it does not seem likely that Mesud had the chance to transmit a petition which contained his complaints about the maltreatment and torture. More importantly, it is not so sure that any complaint could immediately trigger the upper court to organize a second trial. Also, the father of Halife the alleged accomplice of Mesud, Tayyip bin Emir stated that "we did not dare to complain."[244] In this story, it can be concluded that Halife or his relatives did not inform the province.

However, the medical reports about the conditions of Mesud and his alleged accomplices might play an important role in the torture trial. During the interrogation of the members of the district council, the unknown interrogator frequently asked that the members whether they had seen the condition of Mesud and his wounds. After he made a statement intended for all members. He says that;

> O, members of the council! You said that we haven't seen and heard it after that Mesud the alleged thief and Halife and Seyid alleged sufferers were tortured. But according to reports given by the hospital and their own statements, their wounds; Mesud's and Halife's wounds were cured in forty days and Seyid's, in a month. More, Seyid and Halife, even if they were sufferers were let go after fifteen days of the torture event. Their wounds were

[244] Ibid.: "*I: Sen niçün gelip şikayet etmedin? A: …korkmakdan gelemedik."*

> cured outside. How can one believe that your sayings? Declare the truth. Here, Mesud declares that he showed his wounds of his armpits and head in the Cebel council.[245]

During their interrogation, the members generally admitted that Mesud's statements ("I made the previous confession because of pain") but they all denied that Mesud had shown them his wounds, so they had not seen any scar. Arguably, they were aware of their statements could not stand against the medical discourse which said that one could not miss to notice the wounds of Mesud, which are unquestionable proof of he was tortured.[246] Thus, the upper court interrogator insisted on the presence of medical reports as circumstantial evidence of the torturing event.

As the use of circumstantial evidence was not new within the judicial branch of the Ottoman Empire, his attitude puts emphasizes on the newly-acquired place of medical discourse within the legal procedure. As stated above, medicine and penal proceedings engaged in early the 1850's.[247] The medical discourse which was brought forward by the interrogator would not be unexpected, as happened in the story in question occurred in the 1860s. Mesud's wounds and the interest of the interrogator in them could be taken as proof for the connection between medicine and law.

Even though medical reports appear to have been as very significant in the torture trial, it is still a mystery who gave a petition to or informed the central province about the torture event in the first investigation. According to Mesud's

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[245] Ibid.: *"Bunların yaraları ise hastahaneden verilen raport hükmünce ve kendi ifadelerince Mesud ve Halife'nin yaraları 40'ar günde ve Seyit'in yarası ise ayda iyi olmuş. Ve Seyit ile Halife mazlum olduğu halde tarih-i cesaretten 15 gün sonra çıkmışlar. Yaraları dışarıda iyileşmiş. Ve sizin görmedik dediğinize inanılır mı? Doğrusunu söyleyin. İşte Mesud muvacehenizde olarak koltuklarının ve başının yarasını ve gözünün sakatlığını Cebel meclisinde size gösterdiğini beyan ediyor."*

[246] Ibid.: "*Meclis: ...Mesud meclise geldiğinde yaralarını ve gözünü göstermedi lakin evvelki ikrarım havftandır dedi.*"

[247] Fahmy, "The Anatomy of Justice: Forensic Medicine and Criminal Law in Nineteenth-Century Egypt," 236.

statements, he had been in prison for five months in Cebel district. The district council had let his relatives see Mesud, thereby he had had a chance to inform any relative about the torture. Above it was mentioned the visit of Hanefi's father, so this kind of visit seems allowable while a relative was being held in prison. Therefore, one can say that Mesud's relatives did inform the officials in the province center and gave a petition just as in the case of Fatma and his son Arif. Unfortunately, no further information could be gathered from the archival source in this case. The archival document is restricted to interrogation sheets which cover about five days of the second trial. Thus, it is not clear that what caused the upper court to organize the second trial.

As a deeply rooted habit in Ottoman studies, particularly studies on the reform of the nineteenth century until the 1970s, the reforms undertaken by the *Tanzimat* cadres were unpopular either among the Muslim population (and popular among the non-Muslim population) or among the whole Ottoman society.[248] Especially, the argument in question (the reforms were not appreciated popularly by the ordinary Ottomans) was one of the main arguments of the studies on the reform and transformation century of the Ottoman Empire in the 1960s.

One of these studies, for instance, that by Roderic Davison, puts forward the unpopularity paradigm to explain why the reform attempts in the nineteenth century were insufficient.[249]According to him, the reforms did not meet with popular support and espousal during the last century of the Empire. This was one of the important reasons "why the Ottoman reform attempts were not successful. On the one hand, it

[248] Contrary to both two approach, Kemal Karpat thinks that *Tanzimat* did have positive impact on the political culture of Ottoman Muslims. Kemal Karpat, "The Ottoman Rule in Europe from the Perspective of 1994," in his *Studies on Ottoman Social and Economic History: Selected Articles and Essays* (Leiden: Brill, 2002), 504.
[249] Roderic H. Davison, *Reform in the Ottoman Empire 1856-1876* (Princeton: Princeton University Press, 1963), 404.

can easily be accepted that several aspects of the *Tanzimat* reforms were really unpopular among society, especially for the Muslim population, who thought that the reforms caused a general lawlessness.[250]

Nevertheless, one cannot totally be in agreement with the unpopularity paradigm considering how many ordinary Ottomans, could speak the new discourse of the reform, the *Tanzimat* language, in order to achieve their best interest. The first three decades of the *Tanzimat* era, which are discussed in this study could be acknowledged as the earliest period of the transformation in which the ordinary Ottomans took active roles. The above-mentioned cases cited in this chapter attempted to find a way to reveal to what degree the anti-torture law had been prevalent in the Ottoman society of the nineteenth century and how ordinary Ottomans engaged with the products of the *Tanzimat* reforms. In this chapter, emphasis was laid on the compliance process of the new *Tanzimat* legislation by Ottomans society; those processes, more generally, would end up with the creation of penal culture.

[250] Cengiz Kırlı, "Balkan Nationalims and the Ottoman Empire: Views from Istanbul Streets" in Antonis Anastasopoulos and Elias Kolovos eds. *Ottoman Rule and the Balkans, 1760-1850: Conflict, Transformation and Adaptation*, (İstanbul: ISIS, 2007)

CHAPTER 5

CONCLUSION

This study stands between the abolition of torture and its day-to-day application in the Ottoman mid-nineteenth century when the Empire underwent unprecedented transformation in many fields in the state affairs. On the one hand, torturing criminals during penal proceedings was legally abolished and, as a result, the Ottoman officials who resorted to torture became criminally responsible for their own illegal actions. On the other hand, the practical sustainability of anti-torture procedures in courts sometimes come across various difficulties that reverberated jurisdictional limits of the Ottoman administration.

As alleged torturers, ranging from governors to security guards, must had to stand on a trial, the procedure occasionally deviated from the law "as it should be." The cases of Herzegovina and Izmir in the third chapter are examples of these deviations since even the names of the alleged torturers were never mentioned in any further trials. On the contrary, there were many incidents in which torture cases were adjudicated before the upper courts, generally in provincial councils. One might conclude that then the Sublime Porte had genuine tendency to overcome illegal applications, whatever the motivation was, considering many cases which were lawfully dealt with. Even, it could be argued that "torture" became a kind of "redline" for the Porte. For instance, as Yıldız points out, certain types of

incarcerations were taken "sort of torture" (*işkence kabilinden*).[251] Arguably, the central bureaucracy had pursued a way to extinguish the illegal practice in the provinces as intervening more than before in provincial arrangements on torture.

Since this thesis defines the whole nineteenth century after the promulgation of the *Tanzimat* edict and early twentieth century as the reformist period of the Empire, reforms to construct penal modernity, these earlier alterations provided an infrastructural basis for the further reforms that took place towards the twentieth century. Moreover, the *Tanzimat* era and the novelties on the judicial and administrative fields were inherited by the Turkish Republic. That's why it could be claimed that penal culture which passed down through generations first emerged in the *Tanzimat* era.

The main concern of this thesis then was the newly-established judicial institutions of the *Tanzimat* era, especially, the first two decades of the period when the reforms had just taken root in the Ottoman Empire. Reforms in the criminal field was included in the Ottoman reform agenda. Therefore, this thesis is about "constructing penal modernity," which was centered on reintegrative penal practices, for both Foucault and Durkheim at the expense of *ancient* practices which were mostly oriented to the body.[252] To sum up, scope of this thesis could be portrayed as the Ottoman experience with penal modernity in the mid-nineteenth century at its apex.

At first glance, however, this thesis might be acknowledged as a typical example of legal history studies. They mostly concentrates on legislative and judicial

[251] Yıldız, *Mapusane: Osmanlı Hapishanelerinin Kuruluş Serüveni 1839-1908*, 237
[252] Claire Grant, *Crime and Punishment in Contemporary Culture* (New York: Routledge, 2007), 7

transformations within a political body. In these studies, the narrative on the reforms was generally restricted to the so-called "superstructure", or more precisely the legal framework of a political entity. On the one hand, the history of legal structures is an indispensable component of anything written on the judicial field. A part of the second chapter of this thesis, therefore, was devoted to a brief legal history of the *Tanzimat* era. On the other hand, alterations in the legal framework must necessarily be reflected on judicial processes in which deeds and reactions of ordinary people constitute the greatest majority of total actions. So, one has to keep in mind how the alterations in judicial field "transformed" the routine practices of the ordinary people in the courts to be able to illustrate the grey tones of institutional reforms from top to down. By this way, primary concern of this thesis is to reflect on Ottoman penal modernity as seen in everyday practices.

The fourth chapter of this thesis, therefore, has dwelled on lives in courts of the ordinary Ottomans. With the new penal codes, the anti-torture law was utilized by them who were given new legal opportunities either for their current trials or their previous ones. That is why this thesis maintained considerable distance to numerically extensive studies on body politics. Because Foucaldian impact on history studies is easily discernible, prison reforms and disciplinary methods in the era of penal modernity and retributive penality before the mid-eighteenth century could offer prosperous area for history studies. On the other hand, rather than exemplifying several torture methods before the mid-eighteenth century and more positive relation between body and punishment with the abolitionist wave, the aim of this thesis was concrete appearances of ordinary Ottomans in the legal field.

The motivation, briefly, was to grasp the reactions and legal strategies of the ordinary people when they were in confrontation with the state discourse. Since it would be impossible to understand, or even speculate, what they had thought in their routine, criminal narratives could provide actual living beings. By utilizing the anti-torture law, ordinary people made themselves accessible. Therefore, it was argued that this thesis has, in one sense, an explicit tendency to constitute a bridge to the subaltern historiography.

It was argued throughout the thesis that the abolitionist wave had been an international phenomenon from the eighteenth-century onward. The nineteenth century, when humanitarian principles and globally-outspread laws were on the peak, therefore is categorically crucial for this thesis. The general utilization of the anti-torture law in the Ottoman Empire and elsewhere reveals how modern law codes was consumed practically in localities. For a period in which how the public circulation of legal knowledge could be achieved is not surely grasped, the utilization of this law then correlates to an output of nineteenth-century liberalism to the everyday experiences of the ordinary people. Consequently, these ordinary people had engaged with the global construction of penal modernity within the context of the Ottoman experience of penal modernity.

Engagement with global construction is on the one hand, ordinary Ottomans in courts who utilized the anti-torture law during penal proceedings managed to prove something significant for social history of the Ottoman Empire. These people, the subalterns as it is claimed above in Chapter 4, seems very adequate in using the law for their own interests. They, seemingly, not only possessed legal knowledge, but also they were actively involved in penal proceedings.

Since scholars who wrote on the Ottoman nineteenth century had an habit to ignore Ottoman subjects in reformist era and reject accessibility of reforms to their life experiences up until the mid-1970s, the above study on anti-torture law contributes to an historiography which ascribes agency to ordinary Ottomans. Around the novelties which come up with the anti-torture law, it could be argued that Ottomans were able to adapt themselves to the new prerequisites of mid-nineteenth century and appear as the agents of the *Tanzimat* era.

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