Avi Rubin: *Ottoman Nizamiye Courts. Law and Modernity* (New York: Palgrave Macmillan, 2011), xii + 212 pages. Review by Selçuk Akşin Somel (Sabancı University)

This study on Ottoman judicial history concentrates on the modernization of Ottoman court system during the late Tanzimat period and the reign of Abdülhamid II. (1856-1909). The research focuses on the institution of the *nizamiye* courts as well as its relationship with the *şeriat* courts through analyzing the official periodical *Ceride-i Mehakim* ("Journal of the Courts") as a source of discourse and praxis. In this work the time-honored notion of the dichotomy of secular-modern state courts versus traditional Islamic kadi courts, which was thought to reflect the indecisiveness and weakness of Ottoman reformist elites vis-à-vis traditional institutions in general, has been refuted by Avi Rubin.

This revised doctoral thesis consists of seven parts. "Introduction" (1-17) revisits historiographical issues in regard to Ottoman modernity. The first chapter ("The *Nizamiye* Court System: An Overview, " 19-54) concentrates on the administrative evolution of the *nizamiye* courts, while the second ("The Ottoman Judicial Mall: A Legally Pluralistic Perspective," 55-81) points to the intertwined relationship between *nizamiye* and *şeriat* courts. The third part ("The Age of Procedure," 83-111), on the other hand, discusses the domination of legal formalism in the Ottoman judicial system. "The Age of Accountability: Judges on Trial" (113-132), constituting the fourth chapter, focuses on the enforcement of official discipline upon judges, while the following chapter titled "The Age of Centralization: The Public Prosecution" (133-152) underlines the role of public prosecutors as agents of central authority in the courts. The final part ("Concluding Remarks," 153-158) points to the future research vista in the field of Ottoman judicial history.

In the "Introduction" Avi Rubin discusses the issue of Ottoman modernization by questioning the first generation of English-speaking scholars who attributed the Ottoman reforms exclusively to European pressure and applying the decline thesis. This approach, supported by nationalist historiographies of the Balkan and Middle Eastern states and aggravated by the image of Sultan Abdülhamid as a reactionary despot, was questioned in the 1970s and 80s both by Postcolonialist approaches and by the world-system perspective, whereby the global and plural character of modernization was underlined. The notion of Westernization has been even further questioned by approaches such as "translational histories" and "daily experience of modernity", where the conventional hierarchical notion of Western countries at the apex of a linear evolution and non-Western societies at a lower evolutionary level has been rejected. According to Rubin the phenomenon of *nizamiye* courts should be understood in the latter sense, whereby these new courts were a product of an amalgamation of Islamic and French judicial traditions instead of a replication of the French judicial system.

The main source of this research is the official periodical *Ceride-i Mehakim* ("Journal of the Courts") which was published by the Ministry of Justice from 1873 onwards on a weekly basis and included reports of civil and criminal cases from across the empire as well as the decisions issued by the Court of Cassation in İstanbul. The author justifies this choice of source by showing that this journal served "the purpose of reconstructing daily praxis" through advancing "a certain agenda regarding the proper administration of justice," addressing to a closed audience of an imagined professional community of judges, prosecutors and lawyers, and operated as "a working tool for the use of judicial officials" through issuing reports on judicial wrongdoings, notifications and warnings. Using his own wording, the autor "treat[s] the *ceride* as a *kind* of archive that allows reading along and against the grain, being a source for both discourse and praxis."(13-14).

In Chapter 1 Rubin shows the extent of which French Napoleonic law was adapted in the course of the nineteenth century in various parts of the globe which, however, did not mean worldwide Westernization, since these legal borrowings resulted in hybrid legal systems. Therefore, the Ottoman case of legal borrowing and the emergence of legal amalgamation was not something anomalous, as had been suggested by scholars assuming an inherent incongruity between Islamic and Western law, but a typical case.

According to the author, the process of legal modernization, which commenced with the Edict of Gülhane of 1839, aimed at first the government officials as a means of creating a rational and professional bureaucracy. The criminal code of 1840 and 1851 as well as the foundation of the Sublime Council of Judicial Ordinances reflected this tendency. Between 1840 and 1864 judicial experimentation continued at the central as well as provincial level by founding a variety of councils which included Islamic judges as well as non-Muslim members. However, it was the Provincal Law of 1864 which established the administrative context for the development of *nizamiye* courts. Accordingly, there would be three judicial bodies at the provincial level, namely the *şeriat* court, the criminal tribune and the commercial court. While the principle of the separation between judicial and the administrative powers was underlined, the judicial system as a whole remained under the control of the *Şeyhülislam*. Another evidence of the amalgam character of the Ottoman judicial modernization reflected itself in the legal area: Whereas criminal and commercial laws were selective adaptations of French laws, the Islamic law itself became enforced in the realm of civil code through the publication of the *Mecelle*, being a codification of Hanafite legal tradition.

Finally, in 1879, the *Code of Civil Procedure*, the *Code of Criminal Procedure* and the *Law of the Nizamiye Judicial Organization* were promulgated, which again were hybrid texts based on Islamic law and French legal texts. With the latter codifications the *nizamiye* court system acquired its final shape. Accordingly court system was structured at three levels; the courts of the first instance (*bidayet mahkemesi*), the courts of appeal (*istinaf mahkemesi*) and the Court of Cassation (*Mahkeme-i Temyiz*). Meanwhile, the professional backgrounds of the judicial personnel of the *nizamiye* courts increased in variety; while judges were originally of *ilmiye*

origin, a Law School was founded in 1878, which gradually supplied the *nizamiye* system with a secular type of judicial personnel.

The author underlines that the principle of the separation between the judicial and the administrative powers was fully applied only in 1879. On the basis of a careful and critical evaluation of British consular reports, Rubin is able to show that *nizamiye* courts after 1879, despite all unfavourable conditions following the Russo-Ottoman War, acted independent of administrative authorities at a reasonable degree. Another issue was the expensive character of the *nizamiye* courts; it were the rather high court fees which to some extent provided the partial financing of the expanding court system.

While discussing judicial effectiveness of the *nizamiye* courts, Rubin states that the quantitative data of a total of 195.122 cases representing the whole empire for the year 1897, consisting of 162.182 criminal, 2.5572 civil and 7.368 commercial cases itself is indicative of the administrative efficiency and sophistication of the judicial system. After using the Statistical Yearbook of 1897, the author then examines the data on decisions by the lower court that was subject to appeal at the Court of Cassation, published at the *Ceride-i Mehakim*. Rubin concludes for the year 1900 that it took an average of nine months from the date of issuance of the original ruling until the Court of Cassation reached a decision, which indicates a clear indication of efficiency. The author undertakes a similar exercise for the subprovince of Menteşe for the period of 1887-1888 to examine the efficiency of provincial courts, and concludes that only a small minority of cases were postponed to the following period.

In Chapter 2 Rubin takes issue with the conventional historiographical notion of the Tanzimat dualities and suggests legal pluralism as an alternative framework for understanding sociolegal changes throughout the nineteenth century. He also argues that the *nizamiye* courts and the Islamic courts were not rival judicial systems, but rather complementary structures. The author discusses the time-honored duality/secularization approach by looking first at the historiographically established notion of *kanun/şeriat* divide and shows that the distinction between the two was an issue of doctrine than of praxis. Indeed, the *kanun*, issued by worldly authority, was not a secular law, but often replicated Islamic legal principles, and was originally formulated by members of the ulema. In spite of this fact, a supposed duality of secular and religious law, even though nonexistent in the sixteenth century, was used by modernist scholarship as a means of explaining nineteenth century reforms. As Rubin cites Talal Asad in regard to nineteenth century Egyptian legal reforms, new legal configurations did not mean a marginalization of the Islamic law in favor of secularization, but "a complex arrangement to secure governance."

Instead of a dichotomy of *nizamiye* versus *şeriat* courts, the author offers the analytical frame of legal pluralism, which entails legal borrowings from France as well as the possibility of litigants to practice forum shopping, i.e. the ability to select *nizamiye* or a *şeriat* court according to the interest of the litigant. Despite the fact that the *Code of Civil Procedure* formulated a clear

division of labor between various judicial forums, in everyday life *şeriat* courts often dealt with issues which theoretically should have belonged to *nizamiye* courts. However, forum shopping was restricted mainly to grey areas of law, where the boundaries between the civil and the Islamic domains were blurred. For example, issues related to pious endowments belonged to such grey areas. According to Rubin forum shopping could also be observed in issues related to commerce or public order, and in these cases the litigant either chose between courts of commerce and *nizamiye* courts, or between *nizamiye* courts and administrative councils. The author underlines that though imperial decrees and regulations were issued after 1879 to clarify division of labor between the *nizamiye* and *şeriat* courts, they at the same time "legitimized forum shopping by allowing litigants to take their civil cases to the *şeriat* courts under the consent of both parties."

Another issue which weakens the argument supporting legal dualism was related to the composition of the professional manpower forming the *nizamiye* courts. We learn from Rubin that until 1908 the majority of judges presiding over *nizamiye* courts were *naib*s, belonging to the ulema class, and were under the jurisdiction of the *Şeyhülislam*. Looking at the curricula of the Law School, which supplied *nizamiye* courts with secular judicial personnel, even here the courses were based on a combination of topics related to classical Islamic jurisprudence and adapted French law.

Chapter 3 focuses on the issue of procedure; the author stresses that the transition of Ottoman legal system from premodern structure to a modern form was accompanied by legal formalism. This development displayed itself in the shape of an accelerated "proceduralization" of judicial praxis. Legal formalism served both as a means of administrative centralization of judicial praxis and as an instrument of decreasing the factor of human discretion in verdicts. The *nizamiye* courts represented the main judicial forum where legal formalism was applied to a major extent by means of applying procedural rules in an uncompromising way. As a consequence *nizamiye* courts turned into judicial bodies with a relatively high degree of procedural standardization.

The standardization of judicial praxis involved documentation, registration and classification of documents, which enabled central administration to monitor judicial processes. A circular, dated 1879, required courts to register documents by using both Muslim (*Arabî*) and civil (*Rumî*) calendars. However, as we learn from Rubin, it took the Ministry of Justice decades to enforce procedural standardization on provincial courts. Those judicial officials not complying with any formal requirement of standardization were forced to pay considerable fines.

According to the author, another instrument for the enforcement of procedural standardization was statistical data. From the early 1880s onwards *nizamiye* courts and other judicial departments were required to send statistical reports in accordance with detailed instructions and sample documents. It again took some time to accustome provincial courts with this requirement, but toward the turn of the century Ministry of Justice was receiving reliable data from most of the *nizamiye* courts throughout the empire. The Statistical Yearbook of 1897 included quantitative judicial data such as the sex and numbers of individuals convicted of felony, crimes, and offenses,

the sort and amount of crimes tried by the courts, distribution of convicted individuals in terms of age, religion and national community.

While the Ministry of Justice issued the rules for procedural standardization, it was the Court of the Cassation which enforced the large body of procedural rules in the field of adjudication. This court consisted of criminal and civil sections as well as of the Petitions Department. The latter department, being responsible for reviewing the procedural aspects of appellate petitions, adjudicated criminal and civil cases only on the basis of proper documentation and rejected petitions that did not meet the procedural requirements of the cassation phase. By means of exhibiting a stringent approach to technical flaws and applying pedantic control on petitions, the ministry tried to reach a uniform simplification. However, the presence of a legally pluralistic environment combined with a strict policy of procedural standardization created a procedural convolution which produced a series of challenges to the Court of Cassation. In an age where Ottoman Empire became integrated into world economy and numerous Ottoman-born individuals obtained foreign citizenship in order to benefit from the capitulations, commercial cases became even more complicated. In his study Rubin provides us striking examples of complex judicial cases related to these developments.

A crucial consequence of proceduralization was the growing need for litigants to employ well-informed professional attorneys. The fact that *nizamiye* courts required certain fees for basic procedures, combined with the need to pay for attorneys, rendered *nizamiye* court operations a rather expensive public service. Since it was not possible for average Ottoman subjects to pay for these services, they tended to resort to Islamic courts, which provided *ad hoc* attorneys (*musahhar*) free of charge. The author underlines that the presence of a legally pluralistic environment and the opportunity for forum shopping, therefore, ensured a certain degree of opportunity for the modest classes to enjoy legal protection.

The following chapter deals with the accountability of the judges, which is an issue intertwined with the policy of procedural standardization. The close monitoring of regular reports and statistics by the ministry served also as a means of preventing official misconducts. Despite the fact that the criminal codes of 1840, 1851 and 1858 dealt with transgressions of state officials, it was only with the *Code of Criminal Procedure* that a thorough modus operandi was established for juducial officials suspected of transgression. *Naibs* acting at a *şeriat* court were supervised by the Office of the *Şeyhülislam*, whereas *naibs* presiding over *nizamiye* courts were liable to prosecution by the Ministry of Justice.

According to Rubin it were regular circulars issued by the ministry and sent to the courts which provides us a certain degree of insight about the judicial praxis in *nizamiye* courts. The ministry used these circulars, also published in the *Ceride-i Mehakim*, as routine messages to the courts concerning problems related to regular conduct. Recurring themes in these circulars were delays, irregularities in appointment procedures, and issues related to the principle of the independence of courts. One issue recurring in circulars was about the qualifications of the *naibs* who presided

over the *nizamiye* courts. In 1879 and then in 1894 *naib*s were required to take exams to test their knowledge on the *Mecelle* and Islamic jurisprudence in general.

Circulars also revealed numerous cases of corruption such as bribery, fabrication of trials, misuse of court's seal, charge of illegal fees from litigants etc. The author provides interesting case examples in this study. Some of the *Ceride-i Mehakim* issues published reports about charges against corrupt judges as well as trial reports of some of the officials. If the accused was a judge in a court of first instance, his case was deliberated and tried in the provincial court of appeal. In cases of corruption involving judges at the level of the court of appeal, the authoritative body was the Court of Cassation. Rubin concludes this chapter by stating that from a comparative perspective there is no evidence to suggest a higher level of corruption among Ottoman judges than any other contemporary judicial system.

The final chapter elaborates on the novel judicial practice of public prosecution as a means of ministerial supervision over the *nizamiye* courts. Though officials comparable to public prosecutors already existed before judicial reforms, public prosecutors in the modern sense were instituted in 1879. Rubin points to the fact that the appointment and dismissal of public prosecutors in provincial centers and assistant public prosecutors in counties were subject to imperial decrees, which in itself reveals the importance central administration attributed on these offices. According to the author the role of public prosecutors in the civil sections of the *nizamiye* courts differed from those acting in their usual functions in the criminal sections. Namely, public prosecutors could intervene in civil proceedings when judicial situations emerged that concerned the public order, the realm of the state, a community as a whole, public establishments, the poor, as well as in cases where judicial regulations were violated by the court personnel or judicial situations pertaining to incompetence of a judicial instance. Otherwise public prosecutors only expressed their views which *nizamiye* court judges were obliged to hear but were not expected to follow.

The author, inspired by the Ottoman jurist Ali Şehbaz Efendi, compares Ottoman public prosecutors (*müdde-i umumî*) with Islamic muftis; traditionally Islamic courts could receive the legal opinion of muftis for judicial cases, but were also not required to accept or to follow. However, while it were the litigants who asked for the opinion of the muftis, the public prosecutors, being the representatives of the central authority, declared their legal opinions independent of the litigants. Rubin underlines the selective nature of the Ottoman adaptation of the judicial practice of public prosecution from the French model; in the latter case public prosecutors were acting as active participants in civil litigations.

Rubin points to the fact that in spite the abovementioned role of public prosecutors, *nizamiye* judges seemed to be reluctant to have the presence of public prosecutors in their courts. The author stresses that the position of the public prosecutor as a representative of state authority gave a special weight to his legal opinion in court cases, whereas the *nizamiye* judge was often a *naib* of ulema origins and belonging to an Islamic juridical tradition. Thus we encounter a series of

examples where the *naib* apparently tried to avoid the presence of a public prosecutor in his court particularly in cases which legally did not require the attendance of that official.

We also learn further that public prosecutors as representatives of state authority had administrative supervisory duties over courts such as taking action in cases of complaints about the incompetences of judges or supervising the execution of the decisions of the *nizamiye* courts. It is striking that in all administrative matters the Ministry of Justice communicated with the courts through the public prosecutors, and court presidents were required to communicate with the Ministry of Justice only through the public prosecutors. Public prosecutors' involvement in administrative matters also included issues related to human resources. For example, qualifying exams for *naibs* were administered under the supervision of public prosecutors. It were the public prosecutors in the provincial centers who gave travel permissions to judicial officials for health-related reasons. Public prosecutors also supervised the allowance of pension funds.

As Rubin clearly shows, the development of the *nizamiye* court system was not established from scratch, and the new judicial structure therefore had to rely on the existing manpower, which were mainly *naib*s. Thus the *naib*s played a dual role in both the *şeriat* courts and in the civil sections of the expanding *nizamiye* courts. The Ministry of Justice, instead getting rid of the *naib*s, utilized them, but at the same time employed public prosecutors as overseers of the central authority to monitor them.

Basic conclusions of this study could be summarized as follows: The adaptation of French legal system was a selective transplantation where elements of Islamic judicial structure were preserved. If conditions such as chronic financial shortcomings and resistance of local officials to radical changes are considered, this legal transplantation proved to be rather successful. The coexistence of *nizamiye* and *şeriat* courts as well as legal grey zones enabled legal pluralism and forum shopping for litigants, and the attitude of the Ministry of Justice was pragmatic, keeping judicial requirements in tandem with reality in the field. At the same time, procedural standardization was applied as a tool to simplify judicial operations and make them fully legible for central supervision. Any deviation from the legal standard was immediately considered to be unlawful. Another point is related to the nature of judicial modernization, where a new court system was introduced alongside an already existing *şeriat* court tradition, and the *nizamiye* courts being staffed to a major extent by Islamic judges, who were also present in the *şeriat* courts and subject to the Office of the *Şeyhülislam*. Under such circumstances the newly introduced office of public prosecutor served the immediate administrative interests of the Ministry of Justice and ascertained state presence at the court level. The overall impression the reader derives from this work questions the former historiographical notion of the existence of an institutional dichotomy of secular/Western versus Islamic or modern versus traditional judicial bodies. It is suggested, on the contrary, a certain level of integration of traditionalism and modernity both at the level of legal texts as well as at the level of courts and personnel. Tanzimat judicial reforms entailed an evolutionary modernization without abrupt discontinuities.

Rubin's work constitutes a significant contribution in Ottoman judicial and legal history. It needs to be mentioned that the conventional approach of the secular/Western versus Islamic binary opposition has been already questioned for at least twenty years also for other areas of nineteenth century Ottoman history. Since the early 1990s by Butrus Abu-Manneh has underlined the Islamic background of the Gülhane Edict and pointed to Islamic political continuities throughout the Tanzimat era. Similarly, educational historians like Benjamin Fortna and Selçuk Akşin Somel have shown that educational modernization did involve the incorporation of instructors of *ulema* origin into the teaching body of modern rüşdiye- and idadi-schools. This study on *nizamiye* courts, therefore, represents another proof of the weakness of the conventional modernist historiography insisting on binary oppositions.

There are some issues which the professional audience would have expected to be addressed. The author is basing his research to a major extent on the *Ceride-i Mehakim*. It would have been valuable to have some information on the editors, i.e. their backgrounds, administrative careers etc. Since the role of individual editors in determining the content of periodicals could be noteworthy, it might be asked whether possible changes in the *ceride* editorship might have altered the content of the issues. For example, while discussing charges against court officials, Rubin observes that while some *ceride* issues contain numerous reports on charges, other issues are completely devoid of them (122). A systematic study focusing on the changes in editorship of the *ceride* might establish a possible correlation between editorship and changes in the periodical content.

Though Rubin clearly delineates the boundaries of his research in terms of institutional modernization of Ottoman court system, memoirs of *naib*s (such as of Hüseyin Kâmil Ertur) would have provided some degree of insight about the attitudes of judges toward judicial and legal changes as well as the Ministry of Justice.

As the author also states in the concluding section, future microhistories of specific *nizamiye* courts in various provincial localities will enable us to understand better the dynamics of Ottoman sociolegal change. Through such studies historians will gain a more differentiated understanding of interactions between center and periphery, the spread of legal knowledge as well as the influence of local power relations on the judicial proceedings.