

## From Fiqh to Legislation: Structural Changes in Law at the End of the Ottoman Period\*

Ömer Faruk Ocakoęlu<sup>1</sup>

**Abstract:** The most distinctive characteristic related to the diversification in the legal systems may need to be sought in the lawmaking methods because the characteristics of a legal system related to lawmaking methods include their most basic structural elements. The source, relation to the source, and the set of structural problems related to how the system's integrity and coherence are provided are in fact directly related to lawmaking methods. In particular, institutionalizing a legal system within the functional framework of providing social order and producing a legal tradition within this institutionalization are meaningful and important. Watson (year) mentioned four methods in this context: customs and practices, legal precedents, jurist opinions, and legislation. Tradition and commitment to it are the most fundamental attributes that distinguish these methods from each other. In this context, method of legislation has been shown as the weakest method in regard to having and remaining adhered to a tradition. Therefore, the legal changes experienced directly in modern continental European law, which is the most concrete example –although not exactly overlapping– of legislating other than fiqh that can be shown within precedent law included in these methods at the end of the Ottoman period, gains importance. This study attempts to address the basic dynamics of the process of legal change experienced at the end of the Ottoman period with motion from this basic distinction.

**Keywords:** Ottoman • fiqh • legal amendments • lawmaking • legislation

\* This is an extended abstract of the paper entitled “Fıkıhtan kanuna: Osmanlı son döneminde hukuktaki yapısal deęişmeler” published in *Toplumsal Deęişim*.

1 **Correspondence:** Ömer Faruk Ocakoęlu (PhD.), Department of Sociology, Kırklareli University, Kırklareli 39000 Turkey. Email: ocakoluomer@gmail.com

**To cite this article:** Ocakoęlu, Ö. F. (2019). Fıkıhtan kanuna: Osmanlı son döneminde hukuktaki yapısal deęişmeler [From fiqh to legislation: Structural changes in law at the end of the Ottoman period]. *Toplumsal Deęişim*, 1, 141–164.

Perhaps the most distinctive attribute of the relationship to the diversification in legal systems needs to be sought in lawmaking methods because the characteristics that legal systems possess related to lawmaking methods contain their most basic structural elements. The source, relation to the source, and the set of structural problems related to how the system's integrity and coherence are provided are in fact directly related to lawmaking methods. In particular, institutionalizing a legal system within the functional framework of providing social order and producing a legal tradition within this institutionalization are meaningful and important. In this context, Watson (2011) spoke about four types of lawmaking methods: (1) customs and practices, (2) legal precedent, (3) jurist opinion, and (4) legislation. Tradition and commitment to it are the most basic attributes distinguishing these methods from each other. Watson is of the opinion that, on the issue of having and adhering to a tradition in this context, the weakest method is the legislative method. Therefore, the legal changes directly experienced in modern continental European law, which are the most concrete examples of legislating apart from fiqh –although not exactly overlapping– that can be shown inside precedent laws within these methods at the end of the Ottoman period, gain importance. This study has attempted to address the basic dynamics of the process of legal change experienced at the end of the Ottoman period with motion from these basic distinctions.

The types of lawmaking developed within the classical fiqh tradition at the end of the Ottoman period and whose dimensions of method have been addressed through the distinctions of various denominations in fiqh procedural works are seen to have undergone a radical change. We see basic issues related to its original structure to have undergone radical changes during this period, as well as related to the method of ascertaining verdicts from the dimension of sources, which was conceptualized as jurisprudence within the classical fiqh method, and to the issues of being legally binding from the application dimension. Changes related to lawmaking methods have given the principle characteristic to this period. According to Bedir (2011), after the formation of fiqh within the early-period indoctrination process, another radical change can be mentioned on the amount of change in lawmaking methods that advanced legislative processes in the 19th century. Evaluating changes related to the lawmaking process and methods that began particularly through councils in the pre-Tanzimat era is important within the framework of the change's dimensions of attribute, orientation, and motivation. How the situation that emerged in the form of diversifying legal regulations, particularly about administrative works within a process, gradually led the transformation that was directly experienced from fiqh to law will endeavor to be shown.

Aside from diversification being one of the most basic areas where legal systems are distinct from one another and accommodate their own unique structures,

lawmaking also comes across as a most crucial area on the point of comparing legal systems. The four categories that Watson developed according to lawmaking formats, which we mentioned above, can also be used at the same time to make a comparison. We can also mention that evaluations exist amounting to a double standard, albeit in ambivalent and specific amounts on this issue. According to Watson (2011, p. 232):

Legislation is different. It can break entirely with the existing tradition, and even, in theory, with any legal tradition. It can remake the whole of a legal system. It can be the work of parliamentarians, dictators, or kings who need have no knowledge of, or no respect for, the legal tradition. . . Creativity can exist, as indeed can coercion. Legislation can also best be used to direct society along particular economic, religious, or political lines. Society or sections of it can bring greater pressure for change on legislation than on other means of lawmaking.

In the above quote on the method of legislating, Watson uses ambiguous language without the historical distinction of mentioning the economic-political impact. The attribute of creativity is immediately mentioned in its continuance by being done unilaterally in the attribute unbound to legal tradition, namely arbitrariness. Immediately following the detection that legislative methods are much more accessible to social oppression than other methods, legislation is stated to be the best method for social control. The ambiguous language Watson used here is seen as a functional equivalent in the continuation of the article. Namely, Watson mentions the limited impact of legislation for the West, even though legislation provides the most opportunities within its methods for social and legal changes, and provides positive examples for the non-Western world. The legislative method is nearly discussed in this distinction over examples where revolutionary and innovative steps would be taken for non-Western societies while proceeding with a highly recorded practice on the issue of adherence to legal traditions for the West. One of these examples is the enactment of the Turkish Civil Code of 1926 under the leadership of Atatürk. Here the legislative method has undergone analysis by separating from analyses that carry more detections of being connected with valid legal traditions for the West and by separating from general evaluations as an innovative step aimed at democracy for Turkey, which is seen as a non-Western society. Here, possessing *tradition* and adhering to it are moved before a pre-acceptance as an attribute belonging to the West nearly with capital letters in Watson's mind. Consequently the legislative method, which also has adherence to legal tradition as the weakest method, is the one most suitable for getting rid of the legal mechanisms that carry the attributes of deficiency and irrationality that exist and for taking a progressive step in the field of law in non-Western societies.

This and similar styles of study make revealing in more detail the motivations, actors, and mechanisms of the historical process experienced in the field of lawmaking essential for our society. This article will attempt to touch upon the direction, format,

and basic dynamics of the situation experienced, particularly in the Ottoman State, which had entered into an intense process of legal transformation in the 19th century. The primary objective is to show how a transformation was experienced in the lawmaking processes in terms of method, and this will be an effort to determine what the motivating elements were regarding the actors. The basic problem areas in the study attempt to determine the transformational dynamics in the lawmaking method at the end of the Ottoman period, and the results will uncover this both in terms of the legal system and in the context of the relationship between law and society.

### Acknowledgements

- This article is based on a doctoral dissertation written by the author and submitted in partial fulfillment of the requirements for the PhD degree at Istanbul University, Istanbul, Turkey.
- The author declares no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.
- The author received no financial support for the research, authorship, and/or publication of this article.

### Kaynakça/References

- Ahmed Cevdet Paşa. (1991). *Tezâkir* (C. 13-20, C. Baysun, yay. haz.). Ankara: TTK Basımevi.
- Akarlı, E. D. (1978). *Belgelerle Tanzimat: Osmanlı sadrazamlarından Ali ve Fuad Paşaların siyasi vasiyyetnameleri*. İstanbul: Boğaziçi Üniversitesi Yayınları.
- Akyıldız, A. (2003). Meclis-i Meşveret. *TDV İslam ansiklopedisi* içinde (C. 28, s. 248-249). İstanbul: TDV İslâm Araştırmaları Merkezi.
- Akyıldız, A. (2003). Meclis-i Vâlâ-yı Ahkâm-ı Adliyye. *TDV İslam Ansiklopedisi* içinde (C. 28, s. 250-251). İstanbul: TDV İslâm Araştırmaları Merkezi.
- Ali Haydar Efendi. (1330). *Durerü'l-Hükkâm Şerhu Mecelleti'l-Ahkâm* (C. 1). İstanbul.
- Anderson, J. N. D. (1957). Law as a social force in Islamic culture and history. *Bulletin of the School of Oriental and African Studies*, 20(1/3), 13–40.
- Apaydın, Y. (2000). İctihad. *TDV İslam Ansiklopedisi* içinde (C. 21, s. 432–445). İstanbul: TDV İslâm Araştırmaları Merkezi.
- Aydın, M. A. (2006). İslam Hukuku'nun Osmanlı Devleti'nde kanun hukukuna doğru geçirdiği evrim. *Türk Hukuk Tarihi Araştırmaları*, 1, 11–21.
- Bedir, M. (2004). *Fıkıh, mezhep ve sünnet: Hanefî fıkıh teorisinde Peygamber'in otoritesi*. İstanbul: Ensar Neşriyat.
- Bedir, M. (2005). Osmanlı öncesi Türk hukuk tarihi yazıcılığı. *TALİD*, 3(5), 27–84.
- Bedir, M. (2011). Fıkıh'tan hukuk'a: Eğitim programı yoluyla laikleşme. *Rıhle Dergisi*, 13, 17–32.
- Bergel, J. L. (1987-1988). Principal features and methods of codification. *Louisiana Law Review*, C. 48, 1071–1097.

- Berkes, N. (2008). *Türkiye 'de çağdaşlaşma* (A. Kuyas, Çev.). İstanbul: Yapı Kredi Yayınları.
- Bozkurt, G. (2010). *Batı hukukunun Türkiye 'de benimsenmesi: Osmanlı Devleti 'nden Türkiye Cumhuriyeti 'ne resepsiyon süreci (1839-1939)*. Ankara: Türk Tarih Kurumu Basımevi.
- Cevdet Paşa. (1991). *Tezâkir* (C. I). Ankara: TTK Yayınları.
- Ceylan, A. (1998). *Türk hukuk tarihinde meşveret düşüncesi ve uygulaması* (Yüksek lisans tezi, İstanbul üniversitesi, Sosyal Bilimler Enstitüsü). <https://tez.yok.gov.tr/UlusalTezMerkezi/> adresinden edinilmiştir.
- Ceylan, A. (2005). Osmanlı Meşrutiyet öncesi merkezi meclisler literatürü [Türk Hukuk Tarihi Özel Sayısı]. *TALİD*, 623–646.
- Davison, R. H. (2005). *Osmanlı İmparatorluğu 'nda reform, 1856-1876* (O. Akınhay, Çev.). İstanbul: Agora Kitaplığı.
- Ebul'ula Mardin. (2012). *Medeni hukuk cephesinden Ahmet Cevdet Paşa*. İstanbul: Türkiye Diyanet Vakfı Yayınları.
- Ekinci, E. B. (2004). *Tanzimat ve sonrası Osmanlı mahkemeleri*. İstanbul: Arı Sanat Yayınları.
- Gencer, B. (2011). *Hikmet kavşağında Edmund Burke ile Ahmed Cevdet*. İstanbul: Kapı Yayınları.
- Hallaq, W. B. (1984). Was the gate of ijtihad closed. *International Journal of Middle East Studies*, 16(1), 3–41.
- Hallaq, W. B. (2001). The author-jurist and legal change in traditional Islamic law. *Recht van de Islam*, 18, 31–75.
- Hallaq, W. B. (2004). Bir Osmanlı reform öncüsü: Örf ve hukukî değişim üzerine İbn Âbidîn (Ö. F. Ocakoglu, Çev.). *Usûl Dergisi*, 3, 159–189.
- Hallaq, W. B. (2019). *İmkânsız devlet modern çağda bir İslam devleti niçin mümkün değildir?* İstanbul: Babil Kitap.
- Hassan, A. (1999). İlk dönem İslam hukuk ilminin oluşumu (H. Songür, Çev.). İstanbul: .
- Karal, E. Z. (2003). *Osmanlı tarihi* (C. 7). Ankara: TTK Yayınları.
- Kaşıkcı, O. (1997). *İslam ve Osmanlı hukukunda mecelle*. İstanbul: OSAV Yayınları.
- Kaya, E. S. (2001). *Mezheplerin teşekkülünden sonra fıkhi istidlal* (Doktora tezi, Marmara Üniversitesi Sosyal Bilimler Enstitüsü). <https://tez.yok.gov.tr/UlusalTezMerkezi/> adresinden edinilmiştir.
- Kenanoğlu, M. (2012). *Osmanlı millet sistemi mit ve gerçek*. İstanbul: Klasik Yayınları.
- Koca, F. (2004). Mezhep (Fıkıh). *TDV İslam Ansiklopedisi* içinde (C. 29, s. 537–542). İstanbul: TDV İslâm Araştırmaları Merkezi.
- Koçu, R. E. (1934). *Osmanlı muahedeleri ve kapitülasyonlar 1300-1920 ve Lozan Muahedesi 24 Temmuz 1923*. İstanbul: Muallim Ahmet Halit Kitaphanesi.
- Köprülü, M. F. (1983). *İslam ve Türk hukuk tarihi araştırmaları ve vakıf müessesesi*. İstanbul: Ötüken Yayınevi.
- Liebesny, H. J. (1972). Comparative legal history: Its role in the analysis of Islamic and modern Near Eastern legal institutions. *American Journal of Comparative Law*, 20, 38–52.
- Mesud, M. H. (1997). *İslam hukuk teorisi* (M. Kılıç, Çev.). İstanbul: İz Yayıncılık.
- Mumcu, A. (1994). Hukukçu gözüyle Mustafa Reşit Paşa. *Mustafa Reşit Paşa ve Dönemi Semineri Bildirileri* içinde (s. 39–48). Ankara: Türk Tarih Kurumu Yayınları.
- Ortaylı, İ. (2005). *İmparatorluğun en uzun yüzyılı*. İstanbul: İletişim Yayınları.

- Schacht, J. (1977). *İslam hukukuna giriş* (M. Daę ve A. Şener, Çev.). Ankara: Ankara Üniversitesi İlahiyat Fakültesi Yayınları.
- Schacht, J. (1986). *İslam hukukuna giriş* (M. Daę ve A. Şener, Çev.). Ankara: Ankara Üniversitesi İlahiyat Fakültesi Yayınları.
- Sevig, V. R. (1951). Fıkıh ve medeni kanun. *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 5(8), 210–235.
- Seyitdanlıoęlu, M. V. (1999). *Divan-ı Hümayûn'dan Meclis-i Meb'usan'a Osmanlı İmparatorluğu'nda yasama*. G. Eren (Ed.), *Osmanlı içinde* (C. 6, s. 17–23). Ankara: Yeni Türkiye Yayınları.
- Suavi, A. (1870). İlm-i usulü'l-hukuk. *Ulüm*, 30 Nisan, 1065–1071.
- Sungu, İ. (1940). Tanzimat ve yeni Osmanlılar. *Tanzimat I içinde* (s. 800–803). İstanbul: Maarif Matbaası.
- Şentop, M. (2005). Tanzimat dönemi kanunlaştırma faaliyetleri literatürü [Türk Hukuk Tarihi Özel Sayısı]. *TALİD*, 3(5), 647–672.
- Takvim-i Vekâyi. 163, 11 Muharrem 1254.
- Tanör, B. (2002). *Osmanlı-Türk anayasal gelişmeleri*. İstanbul: YKY.
- Tarih-i Osmanî Encümeni Mecmuası. 8. sene, no. 47.
- Türcan, T. (2005). Fıkıhtan İslam hukukuna. *İslam Hukuku Araştırmaları Dergisi*, 6, 11–22.
- Türkgeldi, A. F. (1928). *Rical-i Mühimme-i Siyasiye*. İstanbul.
- Velidedeoęlu, H. V. (1940). Kanunlaştırma hareketleri ve Tanzimat. *Tanzimat I içinde* (s. 139-209). İstanbul: Maarif Matbaası.
- Watson, A. (2011). Hukuksal evrim ve kanun yapma (A. E. Akyazan, Çev.). *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, 67(1-2), 231–253.
- Weber, M. (2012). *Ekonomi ve toplum* (C. 2, L. Boyacı, Çev.). İstanbul: Yarın.