

1. THE STRUCTURE OF THE OTTOMAN LEGAL PROCESS IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES

IN THIS CHAPTER I attempt to analyze the main features of the central Ottoman judicial process in the seventeenth and eighteenth centuries, in light of the comparative and theoretical questions raised in the introduction. I shall first investigate the validity of Weber's famous concept of *kadi* justice and then proceed to look at this legal system more closely from the point of view of legal anthropology.

THE VIABILITY OF THE CONCEPT OF *KADI* JUSTICE

Recent years have witnessed a sort of Max Weber renaissance. However, most of this voluminous output seems to be concerned with ever-recurrent interpretations of Weber's views. Almost entirely lacking are studies that subject Weber's ideas to critical examination in light of data bases left untapped by him or that were unknown in his time.¹ Such fresh examinations may yield new insights on the validity and usefulness of Weber's theories in general, and may deepen our awareness of the problems involved in the relation between theory and history.

In this chapter, I propose to confront Weber's sociology of law with Ottoman Islamic law as it was lived and practiced in the

central area of that state between the early seventeenth and the mid-nineteenth centuries, in order to check the viability of Weber's famous concept of *kadi* justice.² I cannot emphasize strongly enough that my aim in undertaking this study was not a mission to refute Weber or to establish the supremacy of empirical history (raw facts, narrative, and the like) over theory. On the contrary, this study arose from my interest in exploring the relations between theory and history. It is true that along the way I make some critical comments on Weber's opinions of Islamic law, but I found the theoretical framework Weber suggested to be crucial for a comparative study such as the present one.

The Islamic law of the Ottoman Empire seems to be particularly suited to the task of weighing the adequacy of Weber's concept of *kadi* justice (1) because from no other Muslim country has such an abundance of sources survived, and (2) because Weber had in mind to explain, by analyzing the law, something wider and deeper. He was interested in the law because he held the notion that rational, predictable, and dependable law was a root cause of the rise of capitalism in the West from the sixteenth century on. That this was also the period of the heyday and decline of the Ottoman Empire makes this case study a particularly pertinent one. It should also be borne in mind that the Weber thesis (about law) is best investigated in a pre-twentieth-century context, because the massive reforms carried out in almost all Islamic legal systems in the world left this law totally mutilated in comparison to its former self. In most countries it was reduced to dealing merely with family law (marriage, divorce, and the like). If we want to observe Islamic law at work in real-life situations, we have to go back in time—although such an exercise may reveal a great deal about present Islamic societies as well as past ones.

An initial problem with Weber's concept of *kadi* justice is its assumption that Islamic law everywhere is the same, or that differences are negligible. One place where this assumption is taken to task (though not explicitly) is Geertz's study of legal sociology, based partly on Islamic case studies.

Geertz sets out to demonstrate that law is different not only from one culture to another but even within one culture, broadly conceived, because law is an expression of the internal logic and structure of a culture. In this sense it might be said that law is an outgrowth of both the "great" tradition and the "small" tradition, and that what makes its study interesting is tracing the relations between these traditions in different places and periods. To

demonstrate the intellectual profit to be gained from such a comparison, Geertz analyzes in this way three societies, two of which—Morocco and Indonesia—are Muslim although the two societies live by legal systems that have only a little in common.³

But to come back to Weber, he approached analysis of the world's legal systems by proposing a fourfold classification based on two basic variables: rationality versus irrationality, and formalism versus substantiveness.⁴ A legal system was said to be rational when judicial decisions were reached through a process of intellectual reasoning of some sort. When the process was based on some irrational mode of thinking (ordeals by fire and the like), the system as a whole was said to be irrational. Within the rational category Weber differentiated between formal and substantive rationality. The only known exemplar of formal rational law is the Western legal system. In Weber's crucial sentence characterizing this law, formal rational law is found "where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied."⁵ The key concept in this somewhat elusive rendering is, of course, the logical analysis of meaning. According to David Trubek, this concept means simply that in Western law special attention was given to the intent of those involved in the judicial process. And he adds: "In contract law, this means looking at the intent of the contracting parties; in criminal law, it means deciding whether the accused had the requisite criminal intent."⁶ A second major point in the previously-cited sentence from Weber is the far-reaching predictability (and hence, by implication, also fairness and liberality) inherent in Western law, born of the fact that Western law was based on the application of well-known preexisting rules to specific cases, which were applied in a logical manner and without reference to special circumstances.

The substantive rational legal system on the other hand is characterized by the fact that the judge is not bound by any fixed rules but acts arbitrarily and intuitively. While one can think of many examples of this kind of legal system, Weber himself dubbed it *kadi* justice, probably seeing Islamic law as its clearest manifestation.⁷ Weber held that the *kadi*'s decisions were purely emotional, entirely unconnected to any rules besides a vague reference to broadly conceived Islamic ethics. Brian Turner is right in asserting that Weber actually had in mind a wider comparison—between East and West, rather than just a comparison between legal sys-

tems in the narrow sense.⁸ The fact that *kadi* justice was not based on fixed rules of decision also meant that this legal system did not afford any measure of predictability or reliability as far as human rights were concerned. According to Turner, this situation was typical of a patrimonial political system like the Ottoman Empire, characterized as it was by overwhelming state power versus supine societal institutions.

Law in patrimonial systems is glossed as "substantive lawfinding, an amalgamation of sacred and secular law, and arbitrary intervention by the ruler in legal processes."⁹ When Weber probes deeper into the problems afflicting the Islamic legal system, we find that targeted for indictment first and foremost is the famous closing of the gates of individual legal interpretation in the twelfth century, which obstructed the further free development of the law. The outcome of this event was progressively fewer fixed rules to direct *kadis*, their work thus becoming ever less governed by preexisting rules and more by arbitrariness and subjectivity.¹⁰ This naturally remained the situation in the Ottoman Empire, to which was added the problem already noted: that due to the state's patrimonial nature, its legal system was afflicted by heavy state intervention in legal affairs.¹¹ We thus get a legal system characterized by two main features: arbitrariness and excessive individualism on the part of the *kadi*; and heavy intervention by the state in the legal process.

In the foregoing paragraphs I have taken the liberty of expanding Weber's theory of Islamic law by incorporating into it Turner's views. I will now go a step further and bring in as well Lawrence Rosen's study of Morocco, which expressly adopts the Weberian conceptual framework.¹² Some differences between Turner and Rosen must, however, be noted. Whereas Turner follows Weber in seeing Islamic law in unquestionably dark colors, as oppressive and antiliberal, anthropologist Rosen underscores in the Weberian analysis a line that is to my mind pretty much hidden from sight: the plainly positive proclivity of the Muslim *kadi* to seek substantial social justice well suited to the needs of the community. Put simply, where Turner sees the danger in near total judicial discretion and lack of rules, Rosen sees the potential social benefit and strength of this legal system. Yet they both follow Weber in seeing Islamic law as characterized by mild rules governing the judicial process.

In principle, the Moroccan *kadi* has to go by the 1958 family law. But he can also go by local custom, by analogy, by precedent,

and ultimately by what he sees as the public good. One example that is brought forward to demonstrate how these divergent principles work in real life is the suit launched by a woman who asked the court to divorce her from her jailed husband. No article of the family law formally upheld her case, but the *kadi* nevertheless granted the divorce after extensive consultation with social leaders from the area. Especially important in his decision were the uprightness and suffering of the woman, a lady from a good family, as opposed to the lowly origin of the defendant and his despicable character (he was a convicted thief). Thus, the *kadi* decided against the letter of the law and went by what he viewed as the well-being of the community. It is in this way that the Moroccan legal system was said to be suffused by Moroccan culture and ethical preferences, and it was in this sense that the Moroccan legal system was said to be based on substantive rather than formal rationality.

Also pertinent in exactly this context are Clifford Geertz's views on Islamic law, partially based as they are on Lawrence Rosen's field work in Morocco. Geertz accords special importance to the institution of "normative witnessing." In fact, he views it as the most typical institution of Islamic law.¹³ The reference is to those permanent witnesses sitting beside the *kadi*, both in classical Islam and in modern Morocco. These witnesses do not have firsthand information concerning judicial cases brought before the court, but they are nevertheless so upright and so intimately involved in the affairs of the community that they are considered qualified to assess the truth of statements made before them.

From the foregoing discussion, one can extract five main features that can be used as a further basis for empirical study: (1) a lack of predictability and reliability due to the absence of a rigorous system of prior laws and rules; (2) arbitrariness on the part of the *kadi* (also resulting mainly from the absence of rules), at times resulting in a violation of rights, even rights that may be considered sacred by the Islamic society (such as property rights); (3) the prevalence, or at least strong involvement, of ethical considerations over strictly legal ones; (4) a strong proclivity on the part of government officials to intervene in the judicial process; and (5) normative witnessing as a paramount feature of the legal system.

On the basis of a substantial number of original Ottoman legal documents originating from the courts of the Bursa/ Istanbul region, I have investigated the Weber thesis and found it wanting on each of the counts enumerated above. In every respect the Islamic law of this region was drastically different from what

Weber suggested it must have been. Therefore, the argument of this study will show that either Weber was completely on the wrong track, or there were substantial differences in the structure of law within Islamdom, or both.

Regarding the issue of predictability, I have chosen three major areas of law and probed the records to find out whether decisions were arbitrary, erratic, and shapeless or whether a consistent pattern could nevertheless be discovered. These areas were family law, criminal law, and civil and commercial law.

It might have been desirable at this point to analyze the actual court scene that unfolded in front of the *kadi*. Unfortunately, it is impossible to reconstruct much of this from the documents currently at hand. No firsthand descriptions of what was said are available, only summaries of the proceedings. A typical case started with a claim (*da`wa*) of one person against another. The defendant either admitted the accusation (*ikrar*), thereby ending the suit, or denied it (*inkar*) and demanded proof (*bayyina*). When the plaintiff could produce evidence, it consisted in almost all the cases I examined of witnesses (I shall speak later of documentary evidence). If no evidence was presented, the defendant was usually offered the oath, which if he took it, cleared him of the charge. In many cases no such oath was necessary, and lack of incriminating evidence was enough to establish innocence. Two important questions come to mind: why was the court following one procedure rather than another? And was the court applying a certain code? These questions are pertinent because I rarely found a case in the area of study where a specific law code or law book was invoked. But on investigation it turns out that the court was applying the *shari`a* procedure, and was following the available *shari`a* manuals. In fact, one *shari`a* manual in particular came to hold sway (entirely through social consensus, of course) in the Ottoman *madrassa* (religious school) and the Ottoman court, a sixteenth-century *shari`a* compilation of Ibrahim al-Halabi entitled *Multaqa al-Abhur*.¹⁴ While the compilation does not mention specific Ottoman innovations in Islamic law (to be detailed later in this chapter), it does constitute a faithful and convenient rendering of the classical Hanafi version of the *shari`a*. Much of this was living law in the area under study; as recent documentary discoveries in Jerusalem have made clear, Ottoman law was partly following here in the footsteps of pre-Ottoman Near Eastern law.¹⁵

The family law current in the Bursa/Istanbul region in the seventeenth and eighteenth centuries was basically the *shari`a*—

that is, the Islamic law rather than customary law or any other type of law. This is true not only in the sense that the law employed in the court was the Muslim law of family, but also in the sense that on the whole there was no other law in use in the area. The methodological problem referred to here is rendered apparent by looking at Richard Antoun's study on the working of the *shari`a* court among the village population in contemporary Jordan. We are shown how the *shari`a* court often forced on those coming before it family law that was at variance with the family law in use by this society. The reference here is to the contradiction between the widespread Middle Eastern custom, whereby the bride's father collects the bride price, and the *shari`a* law, whereby that money goes to the bride herself.¹⁶ The prevalence of the custom is widely reflected in the work of the court. For example, women often used the denial of the bride price as a legal pretext to achieve an annulment of the marriage or a divorce.

I sought to investigate this point in the documents from the Istanbul region and found that the situation was quite different. Although women in this region often requested and received legal divorce by a wide variety of pretexts, they never, not even once, used the argument of nonpayment of bride price in this context.

By the same token, we should rule out the possibility that this information was not brought to the court because of its illegality; the *kadi* court records abound with information that was indecent, immoral, and illegal—which did not prevent it from being freely discussed and recorded. Also noteworthy is the fact that in many documents we come across the phenomenon of marriage agreements' being brought to the court to be recorded without there being any particular complication about them.¹⁷ Neither Islamic law nor any other legal system necessitated that kind of procedure, so it seems it might have been the outcome of an awareness on that society's part of the use to which the court might be put in time of death or divorce (when the deferred part of the bride price would fall due and be collected). This enhances the impression that cases violating *shari`a* regulations would find expression in the *kadi* records.

It seems likely, then, that the *shari`a* governed the family law prevalent in the area of study; yet it seems preferable to proceed by analyzing the case material in the records rather than by summarizing law books. And the major family issue in the records is divorce—more specifically, suits brought by women against their husbands in connection with divorce cases.

One of the most widespread types of cases involving family law that appear in the records is *khul`* divorce—that is, divorce initiated by the wife, whether of her own free will or as a consequence of a prior agreement between her and her husband. Such an initiative on the part of the woman would entail the automatic waiver of her financial privileges. In most of the cases cited in the records, the reason adduced for the request is quarrelsome relations.¹⁸ In some cases women even paid sums out of their own pockets to obtain the divorce.¹⁹ No cases were found where the court tried to dissuade women from pursuing their effort to obtain a divorce. By way of comparison, from Paul Stirling's study of two villages in central Anatolia in the 1950s it transpires that such an act on the part of a wife was out of the question: wives who wished for divorce had to run away to their family of origin.²⁰

In other cases wives sued husbands and claimed that the latter had made a conditional divorce (in this form: "If so and so happens, my wife is divorced"), and the condition had been fulfilled. Women often seized such opportunities to demand a divorce.²¹ In other cases the husband, probably in the context of a familial quarrel, gave his wife permission to divorce herself if she so wished—or at least the wife thought he had, and hence there were a number of lawsuits brought against husbands.²²

Another ground for divorce was connected with the *shari`a* regulation called *khiyar al-bulugh*—that is, the option given to a girl married off by her guardian when still under age to annul the marriage upon reaching maturity. Again, this option was quite often resorted to.²³ In all these matters, the *shari`a* seems to be the law that prevailed in actual life, not just in theory.

Another area of law worth analyzing in this context is what is called in modern jargon *penal law*. It is well known that the autochthonous categorization was somewhat different than from what it is today, even in Islamic countries. But that matters little for the purposes of the present study. The documents examined indicate quite clearly that in the legal system under consideration a large measure of consistency, and hence predictability, permeated the working of the court. In this area as well, the *shari`a* seems on the whole to be the most important source of law, although, in cases of murder, there was a substantial convergence between the *shari`a* and the *kanun*.

For murder cases to be heard, both the murderer and the legal inheritors of the murdered person had to be present in court. Murder cases being within the confines of the *shari`a* "law of

humans," or *huquq al-ibad*, the inheritors served as the plaintiffs, there not being any other authority to fulfill that function. In principle, killing could be either by mistake or premeditated; in the latter case it was murder. In case of murder the *shari`a* gave the plaintiff the right to decide whether the defendant should be put to death through the principle of *kisas* (retaliation) or be liable instead to *diyet* (blood money).²⁴ This sum was fixed already in classical Islam at ten thousand *dirham* (equivalent to 3.8 grams of silver), the money value of a healthy man as set by the *shari`a*. If the killing was proven to be unintended, the killer was liable only for blood money, which was an equal sum of money. It is noteworthy that the *kanun* here adopted exactly the classical *shari`a* regulation.

The available documents from the Istanbul/Bursa area show that courts usually behaved according to these rules. Thus in one case a woman was brought to court and charged with doping and then strangling to death another woman, whose husband served as the plaintiff.²⁵ The husband demanded the death penalty, and it was granted. To a degree, at least, the same kind of legal approach to murder cases transpired in cases relating to regions of the empire that were further afield.²⁶

In real life this basic rule concerning murder was manifested in several nuances. One such was when the deceased had no legal heirs. The rule then was that the sultan stood in place of the heirs. In one such case from eighteenth-century Istanbul, the case was actually referred to the sultan, whose verdict was death.²⁷

If murder was not duly proven, the plaintiff could force the defendant to take an oath. Doing so would establish his innocence. If he refused—which often happened—the plaintiff's case was thereby established. In one case of murder in which a defendant refused to take the oath, the *kadi's* decision was that he would remain in jail until he was willing to take such an oath.²⁸ Again, this was entirely in keeping with the *shari`a*. Demands for *diyet* instead of *kisas* were found, too, but they seem less frequent. When such punishments were imposed, they were based on calculation of the present-day equivalent (in Ottoman money) of the aforementioned sum of ten thousand *dirham*.²⁹ A rare case in this context is one in which a man was sued for murder by the father of the deceased. After the charge was duly proven, the plaintiff demanded blood money, but the defendant retorted that he was unable to pay that kind of money and suggested that the plaintiff

demand execution. The *kadi's* decision was that in such a situation the defendant is liable for neither *kisas* nor *diyet*.³⁰

In a case of unintended killing the killer was liable to pay indemnity equivalent to *diyet*.³¹ It would be extremely interesting to have examples with detailed debates over the question of whether a certain case was or was not a case of murder. But such cases were not found, other than one, that for technical reasons was not concluded in the account we have of it.³² Also, negligent homicide is not often at issue. In a rare case we find an Istanbul coachman who beat his horses and made them run so furiously that they killed a small child.³³ The coachman denied he had behaved unreasonably, although a number of witnesses claimed that he had. This case bears out the claim made by some anthropologists that the concept of the reasonable man may well exist in all cultures;³⁴ but it is noteworthy that traditional Islamic law did not attribute much practical importance to this difference: negligent or not, unintended killing entailed payment of full *diyet*—that is, an amount equivalent to ten thousand *dirham*.

An important area within the Islamic penal law concerned the question of discovered corpses. The *shari'a*, and following it also the *kanun*, ruled that if no individual responsibility for murder could be established, the owner of the house or the inhabitants of the village or quarter were liable for blood money. A large number of documents in our records indicate that this was indeed the situation in the area under study. In an apparently typical case, a man was found dead in a house in Tophane, Istanbul, and no killer was discovered. It was demanded that the owner of the house swear fifty times that he was not the killer. Only then could he pay the blood money.³⁵ A similar law was at work in the countryside. In one case the body of a man without heirs was discovered in the area of a village belonging to a religious endowment. The manager of the endowment sued the villagers for murder; and after he was unable to prove this accusation, he picked fifty from among their number and demanded the oath from them.³⁶ In another case, when the body of a man was found at some distance from the built-up area of a village, the heirs requested blood money from the villagers. However, in view of the distance from the village, the following procedure was employed: a *müezzin* (prayer leader) was summoned and instructed to read the call to prayer while witnesses stood on the edge of the village to establish whether the call could be heard. As it could not be heard, the court ruled that the village was not liable for compensation.³⁷

Another area of the criminal law had to do with grave bodily injury. A great many documents dealt with this problem, and they all convey a certain consistent and detectable logic. Grave harm done to the hand, the leg, or the eye was considered equal to half the value of a fully grown man and entailed the payment of half blood money.³⁸ Less vital organs entailed smaller amounts of compensation. But again, a very consistent logic prevailed. Thus, knocking out a tooth—a very common grievance—entailed compensation of 5 percent of full blood money (and half that in the case of a woman).³⁹ In one rare case, though, half blood money was decided for a knocked-out tooth.⁴⁰

Sometimes the bodily harm done to a person was not clear-cut but even here it is evident that compensation was not decided on arbitrarily. It was decided in an ingenious manner: experts were summoned to assess the damage done to the person. The most common type of experts were slave traders, who were asked to look upon the injured person as if he were a slave and to assess the money value of the damage done to him.⁴¹

Fornication (*zina*) was also an important area of Ottoman law. Offenses committed by women did not turn up at all in the documents, but I found quite a few committed by men. The punishment meted out was consistent—the *shari* punishment of one hundred strokes because all the culprits in these cases were unmarried men. It is noteworthy that rape came under the same heading.⁴² An unfounded accusation of fornication was also considered a severe offense and was punishable by eighty lashes. A related example from Istanbul is the suit initiated by one Ahmed Ağa b. Abd el-Baki, a *zaim* (fiefholder), against his neighbor, another fiefholder, who cursed him and called him *kafir* (non-Muslim), *kizil baş* (heretic) and *zani* (fornicator). Because witnesses attested that he was innocent of all these charges, the defendant was condemned to eighty lashes.⁴³

Cases of theft were mainly punishable by *shari`a* regulations; however, it must be emphasized that the penal law of Süleyman did not really supersede the *shari`a* but was merely added to it. Basically, it accepted the cutting off of the hand as the standard punishment for theft of a certain gravity, but it added some fines for minor thefts.⁴⁴ A number of cases of hand amputation as a punishment for theft were indeed found.⁴⁵ In a few rare cases, we do find custom-linked types of punishment, such as lengthy imprisonment.⁴⁶

The third area of law I deemed it advisable to review was civil and commercial law. Prevailing opinion once held that this was the one area in which the classical *shari`a* had always been merely theoretical and was not even intended to be carried out in practice. Possibly this was indeed the case in some places. But as a generalization it is certainly belied by the Ottoman case. Thus, as I have shown in another study, the classical Islamic law of partnerships was in full use in Ottoman society.⁴⁷ The exact Islamic terms for various types of partnerships are used, and the documents show that these partnerships took the same form as is outlined in the classical law manuals. Needless to say, such use was entirely voluntary; no legal or political authority in Bursa seemed in the least interested in the types of transactions that took place among merchants or artisans.

A broader look at the Bursa and Istanbul records reveals quite clearly that it was not just partnership law that was in use but the entire civil law part of the *shari`a*. An example is the law of bankruptcy. The *shari`a* manuals lay down that anyone unable to pay his or her debt is to be sent to jail pending payment or sufficient proof that he is sincerely unable to pay. A large number of documents from the Bursa/Istanbul area attest that this was exactly the law in use there. Another typical Islamic law of business lays down that a person is entitled to buy an object without seeing it and has the right of rescission immediately after first seeing it. Again, this law was in full use.

These examples could be multiplied. Except in the area of credit relations, where the society in question was truly inventive (see the next chapter), there is a very close match between the *shari`a* and the civil law in use in the area of study. This indicates that the element of consistency, and therefore of predictability, in the judicial process of the *kadi* was very high indeed.

Let us turn now to the internal logic of the process of adjudication and, more specifically, to the question of judicial discretion vested in the *kadi*. If there is one single feature characterizing "*kadi* justice," it is that of the *kadi*'s unlimited judicial discretion. For Weber, this represented arbitrariness; the *kadi* adjudicates strongly, but no one knows what guidelines he uses. For Rosen, the *kadi* mediates leniently rather than adjudicates sternly, which accords well with the social structure. As far as the area under the present study is concerned, both interpretations are, in fact, wide of the mark. In Ottoman society the *kadi* was seen as a strong judge, but he was certainly not adjudicating off the top of his head.

No less than 75 percent of the material he was dealing with was inscribed in *shari`a* manuals, and the rest was equally well known to the parties and to the witnesses present in each and every case. All of the people present endorsed the entire process with their signatures.

Weber was wrong in assuming that Islamic law was incapable of development after the tenth century. A substantial amount of change did take place, as I will demonstrate later. But he was partly on the right track in asserting that Islamic law was constrained in its development by the sacredness of the *shari`a*. That does not mean, however, that this law necessarily lost touch with reality. In the first place, reality was not changing at such a pace that the law could easily become out of touch with it. Moreover, Islamic law contains various built-in mechanisms of adaptation. One example is the concept of *tazir*, an unspecified type of punishment to be decided on by the *kadi* according to the severity of the offense. What emerges from the area under study is that the role of the *kadi* in the process of adjudication seems much closer to the European model than has been suggested by either Weber or Rosen.

According to Geertz, the most important feature of the Islamic legal system was the place in it of normative witnessing. Do the documents at our disposal indicate whether this was also the situation in the area under study? Let me say straight away that the central Ottoman area seems in this respect quite different from, for example, Morocco. The first distinct fact in this regard is the place of documents in the legal process. Though clearly secondary to the role of witnesses, documents were nevertheless very important. Thus, in thousands of estates in seventeenth-century Bursa, countless numbers of people are recorded as owing sums of money to the deceased person. There is no question that this vast credit institution rested solely on witnesses. Inheritors would otherwise have had to summon scores if not hundreds of people in order to collect their debts. This was not only unlikely, but there is also no evidence that inheritors were in the habit of doing this. There is not the slightest doubt that the recorded evidence was rarely contested, simply because the court accepted written evidence as a matter of routine.

Additional documentary evidence supports this conclusion. Thus, in one document we find a lawsuit between two parties, one of whom has in hand a document attesting that the other borrowed money from him.⁴⁸ The defendant says he actually did not

borrow anything and signed the document without really meaning it (*muvazaatan*). He lost the case. In another document, a man refused to repay a loan of 1,200 piasters denying he had ever borrowed the sum even though the plaintiff produced a genuine-looking document to that effect.⁴⁹ Nevertheless, despite the foregoing examples, there is a plethora of documents showing that disputed documents had to be backed by witnesses and were definitely superseded by them. There are no cases of conflict between documents and witnesses; it is simply the case that witnessing was the most widespread kind of evidence.

However, our main issue here is normative witnessing and not witnessing in general. In seventeenth-century Bursa, normative witnessing was used mainly in the context of combating famous and professional robbers. On the whole, it can be stated that this was true for the entire region: normative witnessing did exist, but it was not nearly as important as it had been in classical Islam or is in Morocco. Thus, in a relevant example from Edirne, we read that government officials in that city captured two men who were brought to court and described as "fomentors of evil in the world." A large number of Muslims then declared: "The said two are robbers, day and night they stroll in the said city with weapons, break into the houses of many respectable people, whom they beat and tie up, and then kidnap their wives and carry off their property. That sort of oppression is their permanent habit."⁵⁰ The two were condemned to death, although no specific charge was brought against them in the cited document. The case of the city of Bursa may hint at one possible reason that made the society in question particularly sensitive to such a problem.⁵¹ Highway robbery of all sorts was endemic and widespread, while gangs of robbers roamed the countryside—and even the city—entirely unmolested. No wonder that in such a situation the attitude toward robbers was tougher than toward other criminals.

Though most of the extant cases of normative witnessing are of that type, some other cases are worth mentioning. In one, a large group of people, including some religious personages, summoned an individual to court and claimed he was a *müteşayyikh* (self-styled *şeyh*). This probably meant a popular religious preacher without formal education or a post. The specific accusation was that he molested people in the city. No decision was given in the case, and it was referred to the central government.⁵² Normative witnessing is likewise found in a case where the people of the Yeni Köy quarter of Istanbul launched a complaint against someone

from the quarter who was accused of molesting and cursing the people of the quarter, as well as bringing to his house morally suspicious characters. The people of the quarter demanded a verdict of expulsion of the defendant from the quarter. Before this could be done, however, the man undertook to remove himself without a formal verdict.⁵³

Many of the normative witnessing cases in the records are against allegedly immoral women, whom the citizens wish to remove from the quarter⁵⁴—a very widespread occurrence in seventeenth-century Bursa.

An extremely interesting case of semilegal involvement of the community is evinced in matters relating to psychiatric institutionalization. In a relevant case from late eighteenth-century Istanbul, a large body of citizens from a certain quarter came to court and claimed against a certain Çokadar Ibrahim that he was crazy (*macnun*): he used to assault the people of the quarter with weapons, injuring and frightening them. He had been formerly locked away in the Süleymaniye hospital, but he had got out through some mistake and should be returned there. The *kadi* agreed but had to apply to the sultan to issue the order.⁵⁵

While all these cases evince a certain similarity between the legal system at hand and the Moroccan system as depicted by Rosen and Geertz, there is nevertheless a big difference between normative witnessing here and there. In the Ottoman case, normative witnessing seems to have been used only in cases of habitual offenders; no instance was found of a regular case being decided by this procedure. It might be said that in the Ottoman case normative witnessing served mainly as a functional substitute for modern police records.

That the Ottoman legal system was not based on the social-communal context of the parties to the trial is attested to by the role of the institution of *fetva* in that legal system. A *fetva* is a legal question addressed to a *mufti*—a religious-legal expert especially qualified to provide legally authoritative answers. Such written answers would be presented in court as part of a trial and would be taken into account by the *kadi*. The relevance of this issue to our topic is that a *fetva* is a specially drawn-up document worded in such a way as to eliminate all personal and contextual details. Evidently, this is done to prevent the *mufti* from being influenced in his decision by acquaintance with one or both parties to the case.

The *kadi* court records of the area under study abound with such *fetvas*, which makes the institution an important part of the legal system in question. It should also be borne in mind that the chief *mufti* of the capital, the *şeyhülislam*, was also the foremost religious officeholder in the empire.⁵⁶ It may be partly due to this fact that the *kadi* records in Bursa and Istanbul contain *fetvas* in such abundance and that these *fetvas* were taken so seriously by the *kadis*—so much so, indeed, that the party with the *fetva* always won the case. All this indicates quite clearly that far from the communal context being essential to the decision in controversies, the Ottomans saw the opposite as the ideal—that is, neutralizing that effect as much as possible. More important, they also put this ideal into practice.

Brian Turner has observed that the patrimonial nature of Ottoman law consisted of frequent intervention on the part of state officials in the judicial process. Whatever the status of that argument in other areas of Islam, it seems to be completely unfounded in the area being studied here.⁵⁷ No single case recorded contains hints to that effect; if such intervention took place secretly, it is doubtful that Turner or any other researcher could know about it, and it is doubly doubtful that anybody could show that other systems—the modern democratic one, for example—are less vulnerable in this regard.

But beyond this exercise in speculation there is some direct evidence that intervention was lacking even in cases where it might have been expected. There is, for example, no shortage of cases where government officials themselves were involved in court cases with ordinary citizens and lost them. One such case concerns a conflict between the citizens of a village in the Istanbul area and the manager of the religious endowment to which the village belonged as well as a number of other state officials connected with state properties in the area. The villagers, the plaintiffs in the case, claim that a large piece of land that formerly had been a pasture area for their village was occupied by the defendants five years earlier and used for the benefit of the sultan's court. Thirty-five villagers from the surrounding areas attest for the plaintiffs, and they win the case in defiance of high state officials in the service of the sultan.⁵⁸ There is no hint in this document of any official intervention in the judicial process.

Two cases of murder are also relevant in the present context. One deals with a claim made by ordinary citizens against a fiefholder, who is eventually convicted and condemned to death.⁵⁹

In the second case some youngsters are accused of murdering Feyzullah Paşa, governor of the province of Sivas. The case seems to proceed along quite the usual lines, although a harsher and less orderly procedure might have been expected here.⁶⁰

The issue of official intervention brings us to the wider issue of the judicial system as a reflection of the society's class structure, a topic not really part of Weber's interest. The truth is that it is extremely difficult to show that the Ottoman legal system was used as a tool in class control (see also the special section following). A comparative look at England during this period might be helpful at this point. England is a well-known example of a society in which law, mainly penal law, of course, was a tool in the hands of the upper class to keep the lower classes in their place. A quick look at the criminal law of this period shows what this class difference meant in reality. The available literature⁶¹ shows that throughout the eighteenth century legislation relating to matters of offenses against property was so intensively enacted that by the end of the period about two hundred offenses entailed the death penalty. Theft of property of even trifling value was punishable by hanging. In actuality, the system was a little less harsh than in theory, for one function of this heavy-handed legislation was to augment the possibility of pardon—thus supplying a most powerful leverage of patronage to be used by the aristocracy in controlling the other 97 percent of the population.

The Ottoman Empire presents us with a completely different kind of model. In the legal system in the area under study, there was only one substantial offense against property, punishable in the main by hand cutting. The *kanun*—that is, the Ottoman addition to the field of law—contains nothing really new here. Neither from the *shari`a* nor from the *kanun* is it possible to obtain an idea about the prevailing class structure in this state. If, by definition, the law of a state bears some relation to the prevailing class structure—which seems incontestable to a certain extent—then our conclusion ought to be that Ottoman society was based on a very minor degree of class crystallization. One would be hard put to point to any social layer that could qualify as a ruling class. What is fully apparent is an unquestioned superiority of the sultan, who in turn strives to maintain a loose balance between the various elite groups and the populace. In any event, state intervention in the process of adjudication seems to be completely missing.

In conclusion, I have tried in this section to weigh the value of Max Weber's theory of law, especially with reference to its

implications for Islam and Islamic law. But I have tried to go beyond that point, to treat the topic at what seems a more appropriate level: relating the law to the polity of which it constituted a part. What, then, is the connection in the present case study? The answer can be summarized under the title of predictability. We have seen that contrary to Weber's suggestion *kadi* justice in the area under study was characterized by a great deal of predictability and internal consistency. As Turner has claimed, the supposed unpredictability of Ottoman law was an expression of a patrimonial political system, one in which the government was all-powerful and the citizens totally powerless. The extent to which this legal system was predictable would seem to indicate that the Ottoman political system was, in fact, much less harsh than is usually supposed. Patrimonial it may have been, but as such it was rather temperate.⁶² A close look at the Ottoman urban scene reveals a society living in quite a "democratic" atmosphere. I shall have much more to say later on this topic.⁶³

THE LEGAL ANTHROPOLOGY OF OTTOMAN LAW

In this section I apply to the Ottoman case some of the research categories isolated in the general literature on legal anthropology. For example, a survey of this literature, including the material on Morocco, reveals that the legal system of most of these societies dealt principally with litigation among close blood relatives and tended to treat cases in a highly holistic way. They related lavishly to the past history of the relations among the individuals, trying to mediate between the parties rather than decide sharply without regard to the future relations of the litigants. In a slightly reduced form, this last feature can also be said to apply to the judicial process even among strangers. The primary task of the legal process in these societies was to reach a compromise of some sort between the parties. Consequently, in most of these cases, though not in all, rules were rarely invoked, and cases were not reduced to a skeletal form so that clear and specific rules could be applied. Most of these legal systems did not use written documents or expert witnesses.

Reviewing the Ottoman case in general, I feel strongly that it was much closer to the legalistic-positivist pole than were those above mentioned societies. Gluckman's finding was that most of the cases in his material were intrafamilial; in the case study

undertaken here, the opposite was true. Of the thousands of cases that I have reviewed, only a very small fraction revolved around intrafamilial relations; and the proportion is further reduced if we exclude the cases involving excouples.

Unfortunately, our case material falls short of verbatim statements in court, either by litigants, witnesses, or judges. What we have are only summaries. This does create some problems of interpretation, though to my mind the legal value of these documents is still considerable. To assess some of the problems involved, let us look at three verbatim translations of cases in the form in which they have come down to us.

Case 1

Presented to your highness by your well-wisher.

Mehmed Ağa b. Abubekir, resident of Üsküdar, who had submitted the present petition, claimed in court against Bustani Ibrahim b. Yusuf, mentioned in the petition: "The said Ibrahim struck my son, Süleyman, of whom I am the sole heir, one afternoon five days before the date of this document, at the lower part of his neck, an event that took place at the plain of Haydar Paşa [a neighborhood in Istanbul]. He hit and wounded him intentionally and without any justification, a wound of which he later died. As heir, I demand that the said Ibrahim be executed in retaliation (*kisas*)." After the claim and the denial, the claim of the said plaintiff was confirmed by the witness of Mehmed Ağa b. Abdallah and Mehmed Efendi b. Khayrallah, residents of Üsküdar, whose qualification to give witness (*adalet*) was checked and found acceptable. Consequently, in the presence of the said plaintiff, the said Bustani Ibrahim b. Yusuf was legally found deserving to be executed in retaliation. From the court of Üsküdar to your excellency.⁶⁴

COMMENTS

1. As the first and last sentences of the document show, the custom or the rule in this period, the eighteenth century, must have been to present summaries of cases to the central government. This was not so in earlier periods, and there is no hint that it meant much in legal practical terms (such as the need of local courts to secure approval of verdicts meted out).

2. We get some idea here of the disadvantages inherent in having only summaries of cases. We could surely have made more of the exact words of the litigants and the witnesses. What were

the biases of the judge? Was he influenced by the external appearance of the litigants? Was he influenced by the difference in the social standing of the litigants? All these crucially important questions cannot be discussed because they were not recorded. Nevertheless, there is much that can be done with these summaries.

3. An important example of something that can be done with these summaries is simply to find out the source of law in the judicial decisions reached. Can it be traced to a certain code of law, or is it something the *kadi* made up in an ad hoc fashion? In this particular case, a quick check shows that the *kadi* was quite literally implementing the *shari`a* law relating to murder. The *kadi* does not seem to be looking for a compromise solution or for any special circumstances that might warrant a reduction in the penalty. Perhaps in actuality there was some talk on this point. But the crucial point is that the decision was molded to fit exact, well-known legal categories that are directly derived from the code of the *shari`a*.

4. We do not know what was said about the intention to kill, a crucial element in such a case. It is evident that the witnesses talked only about the act itself. So the intention is decided according to what we would call circumstantial evidence. The thought process of the *kadi* in this case was evidently directed by common sense—what else might the accused in this case have had in mind other than to kill?

5. We do not know who the witnesses were and what exactly they saw. It is possible that the *kadi* questioned them on this point and decided in a way we might consider suspicious, opening the door to the conclusion that the *kadi* had his biases. This is unquestionably a flaw in this source that I see no way of correcting. The same applies to the question of screening the witnesses for Islamic uprightness; we do not know exactly how this was done and whether it reflected hidden biases.

Case 2

Abdulkadir b. Hac Mustafa, citizen of Bursa, concerning whom there is a notification from the head surgeon of the palace (*Ser-i Cerrahan-i Hassa*) that his leg is paralyzed, a claim found correct when checked by the present court, claimed in court against Hüseyin b. Ahmed Kassaboğlu from Bursa: "On Monday, the sixth of Ramazan 1179, sometime after sunset, the said Hüseyin shot me with a rifle near the mosque of Veled-i Habib quarter, hit and