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Events leading to the compilation of the first ottoman civil code

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As we shall see later, in the second half of the nineteenth century, the Islamic Ottoman State was obliged to make some legal reforms to appease the Europeans. Thus, a number of European codes were laid down, such as, the Commercial Code of 1850, and the Land, as well as the Criminal Codes, of 1858, which afterwards followed by the Code of Commercial Procedure of 1861 and the Commercial Maritime Code of 1864. But the more significantly than all of these was the enactment of the first Ottoman Civil Code entitled *Mecelle-i Ahkâm-ı Adliyye* (Code of the Judicial Regulations), in short, *Mecelle*, or the Madjallah as it appears in western literature.

Although it was compiled, from among the views of the jurists of Hanefi School of Law, by a commission under the presidency of Ahmed Cevdet Paşa (1822-1895), the real architect of the *Mecelle* was Cevdet Paşa himself, a distinguished Islamic scholar and a great historian as well as a lawyer¹. In fact the *Mecelle*, eventually became necessary when the Council of Judicial Regulations (*Divân-ı Ahkâm-ı Adliyye*), a kind of secular court and the basis of modern Turkish courts, had been established in 1868. That is why the complete title of the *Mecelle* bears the name of the Judicial Regulations. In another words, if that Council had not been established, the *Mecelle* would never have been enacted. Therefore, in the following paper we will throw light on the background of the Council and give the speech of Cevdet Paşa by which, in the face

1 Further information about him is in H. Yavuz, «Ahmed Cevdet Paşa and the Ulema of his time», *İslâm Tetkikleri Enstitüsü Dergisi*, VII : 3-4 (1979), pp. 177-198.

of the Sharî'ah courts, he justified it, and finally will show the rejection of the French *code civil* and formation of the Mecelle Commission.

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After the proclamation of the *Ḥatt-ı Hümayûn of Gülhâne* in 1839, the Supreme Council of Judicial Ordinances (*Meclis-i Vâlâ-yı Ahkâm-ı 'Adliyye*) which had been set up by Mahmud II On Zilhicce 1253/March 1838 with the idea of discussing and enacting the new regulations, was given the special function of enacting those reforms promised in the *Ḥat*. The general principles of these laws were expressed in the *Ḥat*. The Supreme Council possessed a set of internal rules resembling those of western parliamentary procedures. In March 1840, a new imperial rescript gave details of the reorganization of the Supreme Council of the Judicial Ordinances which in various forms played a central role throughout the period of *Tanzîmât*. Early in 1854, the legislative function of the Supreme Council had largely been transferred to the *Tanzîmât* Council which emerged from the parent body to work out the reform measures. But seven years later, on 4Rebiulevvel 1278/9 September 1861, these two councils were again united under the title of the Supreme Council of Judicial Ordinances, in short, *Meclis-i Ahkâm-ı 'Adliyye*². The last fusion of the councils came into being after the reform project of Sir H. Bulwer, the British ambassador at Istanbul³. The fusion was intended to carry out, to a certain extent, the suggestions of the project. Sir Bulwer's proposal were based on the answers of the British consuls in the Ottoman dominions. In his circular of June 11, 1860, which was addressed to them, he enclosed a number of questions about the conditions of the Christians in their areas. Amongst many other questions were :

2 For a general account of the councils, see, Cevdet Paşa, *Tezâkir*, 1-12, vol. i. ed. C. Baysun, Ankara 1953, p. 36; ii. Ankara 1960, p. 153; iv. Ankara 1967, pp. 72, 82; *idem.*, «Ma'rûzât», *Türk Tarih Encümeni Mecmu'ası*, XVI: (93) 16 (July 1926), p. 226-7; E. Mardin, *Medenî Hukuk Cephesinden Ahmet Cevdet Paşa (1822-1895)*, İstanbul 1946, p. 53. Further see, E. Engelhardt, *Türkiye ve Tanzîmât*, transl. Ali Reşâd, İstanbul 1328/1910, p. 233; A. Lütfî, *Târîh-i Lütfî*, 8 vols., İstanbul 1291-1328, v.p. 106f; Roderic H. Davison, *Reform in the Ottoman Empire 1856-1876*, Princeton 1963, p. 239; B. Lewis, *The Emergence of Modern Turkey*, London 1968, p. 108; S.J. Shaw, «The Central Legislative Councils in the nineteenth Century Ottoman Reform Movement Before 1876», *International Journal of Middle East Studies*, I (1970), pp. 51-84; E.Z. Karal, *Osmanlı Tarihi*, vi, Ankara 1954, pp. 120-3; vii, 151.

3 Engelhardt, *Türkiye ve Tanzîmât*, p. 233.

«Is Christian evidence admitted in courts of justice; and if not, point the cases where it has been refused?

Are there any inequalities dependent on religion now, and if so what are those inequalities?

Are Christians admitted into the Medjlis or local councils?

What is your opinion as to withdrawing from said Medjlis their judicial functions and creating tribunals apart from them; and in such case how would you want the tribunals to be composed?

What is your opinion on the possibility of establishing schools for all religions and classes and as to the effect that would be produced by these schools?

What measures do you think would best attain the end of equal justice, with the more simple and least expensive forms?»⁴.

The consuls, too, on thier part suggested among many other things that : a) local councils should be improved, and their judicial function must be removed, eventually they should be left only with the administrative power; b) for cases of civil rights, commercial and criminal questions, new courts should be established respectively; c) Muslims and Christians have to go to their own courts; d) all the courts should be administered by the ministry of justice, into which Eoropean codes must be put into effect⁵.

Sir Bulwer was inspired by the reports, although he did not sitricly bind himself to them. In the project, he especially pointed out that a single council should be set up instead of the two present councils, the Supreme Council of Judicial Ordinances and the *Tanzîmât* Council. It would have executive, judicial, and advisory functions. Its main concern should be to supervise the application of the proposed reforms, or suggest new ones. Accordingly, the Supreme Council remained as it was and absorbed the *Tanzîmât* Council. The new Supreme Council of Judicial Ordinances had a legislative division. Previously, the *Tanzîmât* Council used to have legislative as well as judicial and administrative functions. But now, after being fused in one body, the first function of it was given to the legislative division. The second function that of possessing the authority to hear cases about the ministers, was passed to the whole

4 Great Britain, *Parliamentary Papers*, 1861, vol. 67. *Accounts and Papers*, vol. 31, «Reparts... Conditions of Christians in Turkey, 1860», pp. 511-2.

5 Engelhardt, *Türkiye ve Tanzîmât*, p. 151.

body of the Supreme Council. The third function was to inspect the application of the laws, was abolished⁶.

Finally, when the Supreme Council of Judicial Ordinance was abolished on *Zilkâde* 1284/5 March 1868, then it was replaced by the Council of Judicial Regulations and the Council of State. It is believed that the foundation of these two top government offices was stimulated by following three factors : i) French influence, ii) the memorandum of 'Âlî Paşa sent back from Crete late in 1867 while he was restoring order in the agitated island, and his impressions there, iii) and the advent of the Young Ottomans in 1865'. It seems certain, however, that the French impact on these was stronger than the Young Ottomans and memorandum of 'Âlî Paşa.

In fact, from 1867 onwards France had exercised a great influence over many reforms of the Empire, among which were the establishment of the Council of State together with the Council of *Judicial Regulations* and consequently, over the codification of part of the civil law. Âlî and Fuad had not a French programme forced on them, but their natural inclination went in that direction. Âlî Paşa, nevertheless, according to the evidence of Cevdet Paşa, had long been feeling a pressure from without to reform the law courts. The hearing of cases involving foreigners became more difficult consequent upon an increasing number of them coming to Turkey day by day. According to Cevdet, in the Paris Peace Conference of 1856, 'Âlî Paşa was even told by the representatives of the Powers :

«If you could put your courts of justice in a position of inspiring confidence and security, then we would ban the interference of the European dragomans with the Turkish court affairs».

Cevdet Paşa gave the preceding information while he was explaining the reasons of the establishment of the Council of Judicial Regulations which it was to be his job to constitute, and continued :

6 Cevdet Paşa, *Tezâkir*, 13-20, ii. Ankara 1960, p. 153; *idem.*, «Ma'rûzât», *Türk Târih Encümeni Mecmu'ası*, XVI: (93) 16 (July 1926), p. 226-27; E. Mardin, *Medeni Hukuk Cephesinden Ahmet Cevdet Paşa*, p. 53, n 84, quoting from the *Tezâkir*.

7 A detailed study about these points is in H. Yavuz, «Western Influence upon the Ottoman Institutions», *İslâm Medeniyeti*, IV : 4 (August 1980), pp. 41-50; V : 1 (January 1981), pp. 71-80.

«Nothing had been done concerning the reformation of courts of justice until 1868 when it was decided by the Government to establish new courts following their French model, as well as to separate the judicial and executive powers. Eventually, the Council of State and the Council of Judicial Regulations were set up with the members of two-third Muslim, and one-third non-Muslim»⁸.

On 11 Zilkâde 1284/5 March 1868, the order was issued to replace the old Supreme Council of Judicial Ordinances with the two new bodies, the Council of State and the Council of Judicial Regulations, in short, Judicial Council⁹. The latter was an independent council to scrutinize and to take cognizance of cases in the statutory (*niẓâmî*) courts and of lawsuits which used to be referred to the Supreme Council. Its president was Ahmed Cevdet Paşa who was then the governor of Aleppo. Presidency of the Council of State, too, was given to Mithat Paşa, the governor of Denube. This council was to discuss and draft all projects of law and regulations which needed to be applied in the Judicial Council¹⁰. Each man «exercised considerable influence in drawing up their respective statutes»¹¹, and ever since they have become known as the founders of modern Turkey's legal institutions.

The *règlement organique* setting up the Juicial Council as a supreme court of statutory lawsuits in the country, was promulgated on 8 Zilhicce 1284/1 April 1868¹². Thereafter a new era began in the lalal history of

8 Cevdet Paşa, «Ma'rûzât», *İstanbul Belediye Kütüphânesi*, (hereafter cited as BK), Cevdet Paşa'nın yazmaları, MS. 24, Beşinci Cüzdan, f. 12.

9 The text of the order is in İbnülemin Mahmud Kemal İnal, *Osmanlı Devrinde Son Sadrazamlar*, İstanbul 1964, p. 320/6.

10 *Ibid.* Further on the new councils, see, Cevdet Paşa, *Tezâkir*, 21-39, iii. Ankara 1963, pp. 226, 239; iv. p. 84; E. Mardin, *Medenî Hukuk... Cevdet Paşa*, pp. 58-60; Âli Ölmezoğlu, *Cevdet Paşa : Hayatı ve Eserleri*, (unpublished BA. thesis), İstanbul University, Edebiyat Fakültesi, Türkiyât Enstitüsü, No : 9, p. 44; Ahmet Mithat, *Üss-i İnkılâp*, i. İstanbul 1294, p. 107; Ali Haydar Mithat, *Tabsıra-i İbret*, i. İstanbul 1325/1907, p. 61; E. Engelhardt, *Türkiye ve Tanzimat*, pp. 237-39; Abdurrahmân Şeref, *Devlet-i 'Osmaniyye Târîhi*, ii. İstanbul 1315, pp. 410-17; Cevat Eren, «Tanzimat», *Art. İslâm Ansiklopedisi* (hereafter cited as İA); Sıddık Sami Onar, «Les transformations de la structure administrative et juridique de la Turquie en son état actuel», *Revue Internationale des Sciences Administrative*, XXI (1955), pp. 775-76.

11 R.H. Davison, *Reform in the Ottoman Empire*, p. 240.

12 Davison op. cit. 240. The text is in *Düstûr*, i. İstanbul 1289, pp. 325-27; Baron I. de Testa, *Recueil des traités de la Porte Ottomane*, vii. Paris 1892, pp. 514-16.

the country because the Islamic tradition was to be replaced by the western models and because «the council was to take cognizance of cases that arose under the new westernized law - criminal, and commercial and civil - but not of cases under the şeriat or those which would be handled by the *millet* courts or by the new mixed commercial tribunals»¹³. The council, under the authority of a minister as its president, was divided into civil and penal departments. A vice-president was appointed for each department with, at least, five and at the most ten members, besides a chief clerk and six examining clerks for the council.

The president, vice-president, members and the examining clerks were not elected but appointed by the Sultan. They occupied their post for an unlimited time since «the members, once appointed, were irremovable except if regularly tried and convicted; the executive authority was specifically to interfere in the court's functions»¹⁴. The council needed procedural codes for civil and penal cases; regulations to classify its relevant suits, and to set forth the verdicts. These would be deliberated by the Council of State before being enacted by an imperial rescript. Finally, «thirteen members were appointed» to the Judicial Council «in addition to Cevdet Paşa, its president. Of these, two were Armenian Catholics, one Gregorian Armenian, one a Greek, and one a Bulgar. Among the Muslim members were several of the 'ulemâ»¹⁵, such as Kara Hâlîl Efendi, and Ahmed Hilmî Efendi, both of whom were well versed in the *Fıkıh*, and with whom Cevdet Paşa was quite pleased to be a colleague¹⁶.

The *hukuk* establishing the Council of State was also issued on the same day, April 1, 1868¹⁷. This council was apparently modelled on the French

13 R.H. Davison, *Reform*, pp. 240-241. Tribunals with functions analogous to the *Shari'ah* courts existed within the non-Muslim *millets* for their own members. On this see, E. Ziya Karal, *Osmanlı Tarihi*, vi. p. 148; Savvas-Pacha, *Le Tribunal Musulman*, (Paris 1902), pp. 159-167; Ahmed Lufti, *Tarih-i Lufti*, viii. p. 364; E. Mardin, *IA Art. «Kadı»*; Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Ménage, (Oxford 1973), pp. 221-224. On court development in general, see, A. Heidborn, *Droit public et administratif de l'Empire ottoman*, (Vienne-Leipzig 1908), I. pp. 216-228. For a review of the courts before 1854, see, J.H.A. Ubcini, *Letters on Turkey*, i. pp. London 1856, 47-49, 168-185; U. Heyd, *op. cit.*, pp. 208-234; cf. Halil Inalcık, *IA Art. «Mahkeme»*.

14 R.H. Davison, *Reform*, p. 241.

15 R.H. Davison, *Reform*, p. 241.

16 Cevdet, *Tezâkir*, iv. p. 84.

17 The text is in *Düstûr*, i. pp. 703-706. Translations can be found in Young, *Corps de droit*, i. Oxford pp. 314; Testa, *Recueil*, vii. pp. 517-521. On the date further

Conseil d'État¹⁸. The Council of State «was to discuss and draft all projects of law regulations, to keep a general watch on administration and report deficiencies, to act as a court to judge cases of administrative conflict or of individual officials, and to give general advice whenever asked by the sultan or the ministers»¹⁹. To perform these functions, the Council of State was divided into five departments: administration, police, and army; finance and endowments; legislation; public works, commerce and agriculture; and education. Each of the departments was to have its own president. The presidency of the council would be filled by one of the ministers who would be assisted by five vice-presidents and a chief clerk. Members were not elected but appointed by the Sultan. The council had no initiative in legislation, but would discuss only matters laid before it by the Grand Vizier, and no power to interfere in the affairs of the executive.

On 17 *Muharrem* 1285/10 May 1868, Sultan Abdülazîz formally inaugurated the Council of State together with the *Judicial Council*, at the Sublime Porte. In his speech the Sultan proclaimed the separation of the judicial from the executive authority, and the need for good administration to promote prosperity and equal Europe's development. It condemned dictatorial government and supported individual liberty within the proper limits of society's welfare. The old *kânûns* and regulations, he said, were in longer sufficient²⁰. He made no mention of the observance of the *Sharî'ah*²¹. On the contrary there was «a hint of secularism in his speech, since he mentioned the separation of executive from judicial, religious, and legislative authority»²².

Ever since his appointment to the presidency of the *Judicial Council*, Cevdet Paşa had been preoccupied with its internal regulations. At last

see, Davison, *op. cit.*, p. 241, n 32; S.J. Shaw, «The Central Legislative Councils...», p. 75, n 6. English translation is in *The Levant Herald* of 8 May 1868 (see, *ibid.*).

18 Lewis, *Emergence*, p. 122; Davison, *op. cit.*, p. 241.

19 Davison, p. 241.

20 See, «Discours prononcé par S.M. le Sultan Abdul-Aziz, le jour de sa visite à la Sublime Porte, à l'occasion de la formation du Conseil d'État et de la Haute Cour de justice, en présence des membres de ces deux corps, le 10 mai 1868 (17 mouharrem 1285)», in Testa, *Recueil*, vii. pp. 521-523. Turkish version of the speech is in Hâyru'd-Din, *Vesâik-i Tarihiyye ve Siyâsiyye Tetebbu'âtı*, v. (İstanbul 1326/1908), pp. 82-85.

21 Therefore the speech was criticised by Nâmîk Kemâl in the first issue of the *Hürriyet*, 29 June 1868, in London. On the extract from Kemâl, see, İhsan Sungu, «Tanzimat ve Yeni Osmanlılar», in *Tanzimat I*, (Istanbul 1940), p. 807.

22 R.H. Davison, *Reform*, p. 243.

it came into force on 13 *Zilkâde* 1286/14 February 1870²³. This elaborated its previous *règlement organique*. As Cevdet himself claims, he built the new institution on his solid experiments around the country during his missions²⁴.

The regulation constituted the statutory court system on four levels. Of these the first was the Councils of Civil Cases (*De'âvî Meclisleri*) in the *kazas*; the second was the Courts of Appeal (*Temyîz-i Hukûk Meclisleri*) in the *sancaks* (or *livas*); the third was the *Divâns* of Appeal (*Temyîz Divânları*) in the *vilâyets*; and the fourth was the Judicial Council (*Divân-ı Ahkâm-ı Adliyye*) in İstanbul. The first would work as a court of instance. Both the second and the third level courts were the courts of appeal for cases heard in the former, and would take cognizance of suits incumbent upon them by their regulation. Finally the Judicial Council as the highest level of the system was a court of cassation.

The *Judicial Council* consisted of two statutory courts: *Temyîz* (cassation) and *Nizâmiye* (statutory). Firstly, the Court of Cassation which was divided into penal and civil departments, would make close examination of the verdict forwarded by the lower statutory courts and against the verdict if necessary. Secondly, the Court of Statute would be the head of the lower courts of its kind. It was secular in nature, and functioned to take cognizance of civil and penal cases as the final court of appeal.

The presidency of the *Judicial Council* was transferred to a ministry. The minister would take charge of the functioning of both the court of Cassation and the Courts of Statutes. There would be two vice-presidents for the penal and civil departments of the Court of Cassation, respectively. But it was decided that there should be a president for the Court of Statutes. As the head of the both Courts, the minister would preside over the first Court and inspect the second. The regulation gave further explanation of some legal terms. Among them were the terms of *bidâyeten rü'yet* which meant the hearing of a civil case in the first instance; of *nakz-ı da'vâ* which meant the ruling out or endorsement of a verdict if it was in conformity with the *kânûns* (regulations); and lastly, of *istînâf-ı da'vâ* which was to appeal for a new trial. The internal regulations of the *Judicial Council* proceeded to explain the functions of

23 The text is in *Dustûr*, i. pp. 328-342.

24 Cevdet, *Tezâkir*, iv. p. 84.

the Court of Cassation, and of the Court of Statute and their procedures. As a matter of fact, the former Court was not a court of justice where a hearing took place. Its functions mainly were : to oversee the application of the regulations in court proceedings; upon an appeal of a plaintiff or a defendant to scrutinize the decision given by a court of appeal which itself could not ask for a re-trial; to rule on a lawsuit which was litigated by a plaintiff or a defendant against the members of the statutory courts, or between the members themselves; to settle disputes that occurred between the law courts concerning the appropriate court for a case to be heard, and thus to direct it to the court concerned; to transfer a case from one court to another when a strong suspicion arose that the decision was biased or malicious, or when the hearing would cause a disruption of public security; and finally, to supervise the judges of the statutory courts as to whether or not they behaved according to professional standards, and if not, to reprimand and punish them. Cevdet Paşa explained these functions further, and illustrated them with many examples in his, so far, unpublished document²⁵. The document, also conveys his source of inspiration in codification, as well as his arguments and simplified legal language for which he deserved praise as a pioneer²⁶.

The functions of the Court of Statute, on the other hand, were as follows : to hear those cases which had already been ruled out by the Court of Cassation and referred to the Court of Statute; to hear the cases which appealed for a new trial from the lower courts; upon an important litigation to hear a first instance case as well.

As has already been indicated the establishment of these courts was initiated under French influence²⁷. Therefore, there was a similarity between the French court structure and the body of the *Judicial Council*²⁸. Cevdet Paşa, however, was proud of having built the *Judicial Council*

25 «Mahkeme-i Temyiz'in Vazifelerine Dâir», in *BK*, «Cevdet Paşa'nın Evrakı : M. Cevdet Yazmalarından», MS. O. 6.

26 Cf. M. Cevdet, «Dâru'l-Mu'allimîn'in Yetmiş Birinci Sene-i Devriyesi vesilesiyle mü'essesenin ilk müdiri Cevdet Paşa'nın Hayat-ı İlmiyesi üzerine verilen konferans», *Tedrisat Mecmu'ası*, VII : 39 (Haziran 1333), p. 437.

27 Cevdet, «Ma'rûzât : Beşinci Cüzdan», *BK*. MS. 24, f. 12.

28 Further see, Yusuf Ziya Özer, *Adalet Teşkilâtının Tarihi Tekâmülü*, (Ankara 1936), p. 7f.

on his experience, and having chosen some of its members from amongst the *fakîhs*²⁹.

The statutory court system began to be introduced in the country by the Commercial tribunal of 1860³⁰. Later, it became more identifiable by the *Vilâyet* Law of 1864³¹. Then the functions of the traditional *Sharî'ah* courts were reduced. The new *statutory* courts, at first, were called *Tribunaux réguliers* in the West. Afterwards they were called *Tribunaux réglementaires*, in order to please the Muslim people who might have resented the former name³². The latter corresponds to the term (statutory) that is, operating on regulations or sets of laws and distinguished from the traditional courts³³.

A confusion, however arose concerning the spheres encompassed by both the *Sharî'ah* and statutory courts³⁴. Although the séparation of their limits was, at least, outwardly made clear by the establishment of the *Judicial Council* in 1868, the confusion around the two separate courts' function and competence continued for another ten years or so, until a new regulation was made for the statutory courts on 17 *Cemaziye-lâhır* 1296/24 June 1879³⁵.

In *Muharrem* 1285/May 1868, the title of presidency of the *Judicial Council* was transferred to the Ministry of Justice³⁶. Cevdet Paşa, thus, became the Minister of Justice. While still constructing the *Judicial Council*, he was immediately faced by the two problems. One of these was to find a justification for the existence of the statutory (*nizâmî*) courts beside the *Sharî'ah* courts, and the other was to prepare a code to replace the existing Commercial Code of 1850 which had proved to be too crude and impractical³⁷.

«Why was it necessary to establish new tribunals and statutory courts (*mecâlis-i nizâmîyye*) while the traditional *Sharî'ah* courts are

29 Cevdet, *Tezâkir*, iv. p. 84.

30 Hıfzı Veldet, «Kanunlaştırma Hareketleri ve Tanzimat», in *Tanzimat I*, p. 202.

31 Cf. Ahmed Lütfi, *Mir'ât-ı 'Adâlet yâhûd Târihçe-i 'Adliyye-i Devlet-i 'Aliyye*, (Istanbul 1304/1886), p. 178f.

32 Engelhardt, *Türkiye ve Tanzimât*, p. 238.

33 N. Berkes *The Development of Secularism in Turkey*, Montreal 1964, p. 166, n 17.

34 A. Lütfi, *Mir'ât-ı 'Adâlet*, p. 180; H. Veldet, *op. cit.*, 202.

35 H. Veldet, *loc. cit.*; the text is in *Dustûr*, iv. İstanbul 1296, pp. 245-260.

36 İbnü'l-Emîn M. Kemâl, *Evkâf-ı Humâyûn Nezâreti*, İstanbul 1335, p. 164.

37 Şerif Mardin, «Some Explanatory Notes on the Origins of the «Mecelle», *The Muslim World*, vol. 51 (October 1961), p. 277; A. Lütfi, *Mir'ât-ı 'Adâlet*, p. 180; B. Lewis, *The Emergence*, p. 123.

functioning?», some of the 'ulema were reported to have said when the *Judicial Council* was established³⁸. Inevitably, Cevdet was obliged to answer this charge. He tried to find justification in the Islamic institution of the *Mezâlim* courts. He declared that the adjudication of the new statutory courts and the *Judicial Council* in particular, were in conformity with the *Sharî'ah*. In a meeting of the general assembly of the *Judicial Council*, Cevdet Paşa delivered a lengthy speech in which he included his translation of Celâlu'd-Dîn Devvânî's treatise on the *Divân-ı Mezâlim*.

Devvânî's work, was based on the *el-Ahkâmû's-Sultânîyye* of el-Mâverdi. Ebu'l-Hasan 'Alî b. Muhammed b. Habîb el-Başrî el-Mâverdi (d. 450/1058), was *Şâfi'î fakîh*. His works are believed to have been collected and edited only after his death by one his pupils. Among other books is the well-known *Kitâbu'l-Ahkâmî's-Sultânîyye*, the most authoritative exposition of political principles in *Sunnî* Islam. It was based upon the traditional bases of Islamic Law, that is, *Kur'ân*, *Hadîs İcma'* and *Kıyâs*, as well as historical and political deductions from the formative period of Islam supported by the views of the *selef* (the early Muslims). Here, Mâverdi also discusses the views of other jurists, not necessarily belonging to his own *Şâfi'î* school of law.

Chapter VII of the *Ahkâmû's-Sultânîyye* deals with the administration of justice under the title of tribunals for appeals (*Divânû'l-Mezâlim*, or *en-Nazar fi'l-Mezâlim*)³⁹. The *Divânû'l-Mezâlim* is an institution which works under the authority of those men who are competent forcibly to take political and administrative measures against some crimes, wrongdoings and injustices occurring amongst the people⁴⁰. It is composed

38 Cevdet, *Tezâkir*, iv. p. 85.

39 On El-Mâverdi, see, C. Brockelmann, *Encyclopaedia of Islam*, first edition (hereafter cited as *EI*), Art. «Al-Mawardi»; *idem.*, *Geschichte der Arabischen Literatur*, (hereafter cited as *GAL*), i. (1898), p. 386; Ibn Hallikân, *Vefiyâtü'l-A'yân*, iii. (1970), pp. 282-283; Subkî, *Tabakâtü's-Şâfi'îyye*, iii. pp. 303-304; Baron Carra de Vaux, *Penseurs de l'Islam*, i. (Paris 1924), pp. 273-277, discusses him as a Muslim thinker. Several editions and translations are available of the *Ahkâmû's-Sultânîyye*. Of these one was edited by Maximianus Enger, *Mâwardî, Constitutiones politicae...* (Bonn 1853), and the other by M. Bedru'd-Dîn Na'sânî, *El-Mâverdi, Kitâbu'l-Ahkâmî's-Sultânîyye*, (Cairo 1327/1909). For the translations, see, C. Léon Ostrorog, *Traité de droit public musulman*, two vols., (Paris 1901-1906); E. Fagnan, *Les status gouvernementaux ou règles droit public et administratif*, (Alger 1915), based on Enger's edition and an Algiers MS., accompanied by valuable notes; Ali Şafak, *El-Ahkâmû's-Sultânîyye : İslâm'da Hilâfet ve Devlet Hukuku*, İstanbul 1976.

40 Ömer Nasuhi Bilmen, *Hukukî İslâmîyye ve İstilahatı Fıkhîyye Kamusu*, iii. (İstanbul 1967-1970), p. 12.

of the following figures : protectors, or police, and court ushers; *kādīs* and *hākims*; *faḳīhs*; clerks; and witnesses⁴¹. The main reason for the existence of this tribunal was the curbing of wrong⁴². It has been described in the following words :

«The purpose of the institution was defined as compelling those who would do each other wrong to mutual justice and restraining litigants from repudiating claims by inspiring fear and awe in them. The incumbent of this office is to combine vigilance with firmness. Al-Māwardī specifies matters proper for the cognizance of these tribunals under the following ten headings : (1) acts of injustice in the levying of taxes, to be remedied on the just principles which governed the administration of the early caliphs; (2) acts of injustice and tyranny committed against people by governors; (3) supervising the acts of the secretaries of government offices, since they are in a judiciary position toward Moslems, in respect of what they receive and disburse from their property; (4) claims by regular troops in respect of reduction in, or withholding of, their pay; (5) restoring property taken by force; (6) care for pious foundations, whether public or private (the former should be supervised even in the absence of a complaint); (7) enforcement of decisions given by the *qādi*; (8) restraint of open evil-doing, in accordance with sacred law; (9) care for public worship and religious practices in general; (10) hearing and decision of disputes : the decision must be proceeded with in accordance with the law, as administered by the ordinary judges, for it often happens that the tribunals for appeals misconceive their jurisdiction and overstep proper limits»⁴³.

We have described the *Divānu'l-Mezālīm* as a court of appeal. But it is more than that. The following words of el-Māverdi, in which he enumerates ten points on which it differed from the *kādi*'s court, will suffice to illustrate this point :

41 El-Māverdi, *El-Ahkāmu's-Sultāniyye*, (Cairo 1327/1909), p. 67; cf. H.F. Amedroz, «The Mazālīm jurisdiction in the Ahkam Sultaniyya of Mawardi», *The Journal of the Royal Asiatic Society*, (1911), p. 637.

42 Edward J. Jurji, «Islamic Law in Operation», *The American Journal of Semitic Languages and Literatures*, LVII, (January-October 1940), p. 46.

43 Edward J. Jurji, «Islamic Law in Operation», *The American Journal of Semitic Languages*, LVII (January-October 1940), pp. 45-46.

«(1) Superiority in dignity and power, enabling it to check groundless denials on the part of litigants and restitutive acts of violence on the part of wrongdoers. (2) A jurisdiction wider and more unfettered, both in scope of action and in sentence. (3) Greater power of intimidation and of eliciting and getting at the facts of the cause, a task which judges find difficult, and of thus arriving at the truth. (5) Power of deliberation, by recalling the litigants to attend when a case is doubtful and making searching inquiry into the facts, whereas a *Ḳāḍī* by a litigant without any such delay. (6) Power to refer the litigants, if they be obstinate, to an *amîn*, as referee, to settle dispute without the need of any consent, whereas the *Ḳāḍī* can do this only by consent of the parties. (7) Full power of securing the attendance of a litigant (*mulâzama*) in cases where an absence of good defence is apparent, and of requiring security when that is admissible, to the furtherance of justice and discouragement of false defences. (8) Power to hear the evidence of persons leading a retired life (*mastûrîn*) on matters beyond the *Ḳāḍī*'s means of knowledge, through approved witnesses. (9) Power of putting the witnesses on oath where they seem to be wanting in their duty from complaisance, or where their number is very great, so as to remove doubt and suspicion. This again a judge (*ḥâkim*) has no power to do. (10) Power, at the outset, to summon the witnesses and to interrogate them as to their knowledge of the dispute, whereas the practice of the *Ḳāḍī* is to require the complainant to bring forward his witnesses, and they are heard only after examined by the complainant.

These are the main points of difference between the two jurisdictions, which in other respects are uniform in their practice. These general differences are then set forth in some detail»⁴⁴.

44 H.F. Amedroz, «The Mazalim Jurisdiction in the Ahkam Sultaniyya of Mawardi», pp. 641-642; cf. El-Mâverdi, *Kitâbu'l-Ahkâmî's-Sulṭâniyye*, (Cairo 1909), pp. 70-71; Imam Ebû'l-Hasan el-Mâverdi, *el-Ahkâmû's-Sulṭâniyye : İslâm'da Hilâfet ve Devlet Hukuku*, transl. Ali Şafak, İstanbul 1976, pp. 79-80. On a brief survey of *el-Ahkâmû's-Sulṭâniyye*'s contents, see, E. J. Jurji, «Islamic Law in Operation», pp. 40-43. A full study of the *Mezâlîm* institution is to be found, following el-Mâverdi, in H.F. Amedroz, op. cit., pp. 635-674; see also, Emile Tyan, *Histoire de l'Organisation judiciaire en Pays d'Islam*, (Leiden 1960), pp. 433-525; Farhat J. Ziadeh, «Urf and Law in Islam», in James Kritzeck and R. Bayly Winder, eds., *The World of Islam : studies in honour of Philip K. Hitti*, (London, 1959), p. 65.

Celâlu'd-Dîn Muhammed b. Es'ad el Devvânî, an Iranian scholar, was born in 830/1427 at Devvân, a village of the district of Kâzarûn in which his father Sa'du'd-Dîn Es'ad was *kâdî*. He claimed descent from the Caliph Ebûbekir, therefore, he was also called Siddîkî. The name Devvân is very often spelt as Devvân. We shall call him Celâlu'd-Dîn Devvânî as Cevdet Paşa did.

Celâlu'd-Dîn Devvânî received his early education from his father who was then teaching *Hadîs* at Câmi'u'l-Murşîd in Kâzarûn. Devvânî later went to Shiraz to complete his further education in a *medrese*. He ultimately became a *müderris* at the Medresetu'l-Eytâm, in Shiraz, during the reign of Uzun Hasan (872/1467-882/1477), the ruler of the turkoman dynasty of the Akkoyunlu («of the White Sheep»), which covered the areas of eastern Anatolia, Mesopotamia and Persia. While lecturing he was attended by a vast number of students from Transoxiane, Khorosan, and Anatolia.

Uzun Hasan, whom Devvânî calls Hasan Bey Bahadır Hân, died in 882/1477. His eldest son Hâlîl, who during his father's life had been governor of Fârs, succeeded him on the throne, but he was soon overthrown by his brother Ya'kûb Bey. Finally, Celâlu'd-Dîn Devvânî served as *Kâdî* of Fârs during the reigns of Ya'kûb Bey (1478-1490), and his brother Murad (1496-1058), and died in 908/1502 near Kâzarûn⁴⁵.

Celâlî'd-Devvânî has written numerous works in Arabic and Persian, from mathematics to philosophy, and from medicine to *Fıkıh*. Reportedly, Istanbul libraries contain twenty-eight of his Arabic, and seven of his Persian treatises⁴⁶. Of these, for instance, the *Enmûzeci'l-'Ulûm* is a

45 On Celâlî'd-Dîn Devvânî, in general see, Charles Rieu, *Catalogue of the Persian Manuscript in the British Museum*, ii. (1881), p. 442; C. Brockelmann, *ET* Art. «al-Davvânî»; *idem.*, *GAL.*, ii. (1902), p. 217; Hayru'd-Dîn Zirikî, *EL-A'lâm*, vi. p. 257; Muammer Eroğlu, *IA* Art. «Devvânî», shows Devvânî's unpublished works in the Istanbul libraries. Kılıslı Rifat, «Arznâme : Akkoyunlu Hükmüdarı Uzun Hasan Han'ın idârî teşkilâtı hakkında ma'lûmâtı muhtevîdir; müellifi, 'allâme Celâlî'd-Dîn Devvânî, *Millî Tetebbu'lar Mecmu'ası* (hereafter cited as *MTM*), II : 4 (1331), pp. 273-305, reproduces a treatise of Devvânî about the administration of Uzun Hasan, whose original copy is to be found among twenty-one other works of Devvânî which were collected together under the title of *Kulliyât-ı Celâl*, in Murad Molla Library, *Hamidiye Kitapları*, MS. 1438. They were listed in K. Rifat, *op. cit.*, p. 273. The «Arznâme ...» was translated into English by V. Minorsky, «A Civil and Military Review in Fârs in 88/1476», *Bulletin of the School of Oriental and African Studies University of London*, X (1940), pp. 141-78.

46 M. Eroğlu, *op. cit.*

small encyclopaedic book which deals with *Fıkıh*, medicine, *Tefsîr* geometry, astronomy, logic and mathematics⁴⁷. Some of his treatises have been printed, such as his commentary on *el-'Akhâ'idü'l-Adudîye*, the creed of Kâdî 'Aduđî'd-Dîn İyefi (d. 756/1335), published in Istanbul in 1817, and in St. Petersburg 1313 A.H.; his commentary on the *Tehzîbü'l-Mantık ve'l-Kelâm of el-Taftâzânî* (d. 791/1389), printed in Lucknow in 1264/1848, 1293/1876; and his *Risâletü'z-Zevâri'*, a treatise on several philosophical and mystic points, printed in Cairo, in 1326/1908. All these were in Arabic.

In the West, Celalü'd-Dîn Devvânî has become known through his Persian work entitled *Levâmi'ü'l-Eşrâk fî Mekârimi'l-Ahlâk*, or briefly, *Ahlâk-ı Celâlî*, printed in Calcutta in 1810. He drew most of its contents from Nâşiru'd-Dîn Tûsî (d. 672/1273). Tusi's work is called *Ahlâk-ı Nâşirî* which was itself a translation of the *Kitâbu't-Tahâre* of Ibn Miskeveyh (d. 421/1030)⁴⁸. The *Ahlâk-ı Celâlî* is an ethical work, and was translated into English by W.F. Thompson under the title of *Practical Philosophy of the Muhammadan People*, printed in London in 1839⁴⁹. Because of his students, literary and other scholarly works, Devvânî's fame spread far beyond the border of his native land, and received recognition in the Ottoman Court⁵⁰. Beyazid II (d. 1512), the Ottoman Sultan, who favoured scholars, patronized even foreign literary men amongst whom was Celâlü'd-Dîn Devvânî who received yearly five hundred gold pieces according to the rate of currency of the time⁵¹.

It was therefore, one of Celâlü'd-Dîn Devvânî's treatises which helped Cevdet Paşa in persuading the 'ulemâ who objected to the statutory courts and the *Council of Judicial Regulations* in 1868. In his speech, delivered to the members of the *Council* during its general meeting, Cevdet Paşa declared that his action concerning the new tribunals beside the *Sharî'ah* courts, was justifiable since they were the same as the *Divân-ı*

47 M. Erođlu, *IA Art.* «Devvânî».

48 On the preceding information, see, *ibid.*; C. Brockelman, *EI¹ Art.* «al-Dawwânî».

49 Although this is an outdated translation it still remains the only. A modern study on Devvânî's political views, following the *Ahlâk-ı Celâlî* is to be found in Erwin I. J. Rosenthal, *Political Thought in Medieval Islam*, (Cambridge 1858), pp. 210-223, which is based on a private translation of the *Ahlâk-ı Celâlî*.

50 Edward G. Browne, *A Literary History of Persia*, iii. (Cambridge 1956), p. 445.

51 Hammer, *Devlet-i 'Osmâniyye Târîhi*, iv. p. 92. Devvânî received this as a *fakîh*.

Mezâlim which were defended by some of the most eminent Muslim jurists, such as el-Mâverdí, and Celâlü'd-Dîn Devvânî.

Here is Cevdet's speech :

«There are some people who without having any knowledge of the point in question, have begun to talk about the uselessness of the establishment of the Statutory Courts. Now, first of all, I shall speak of the necessity of the establishment of the *Judicial Council*. In order to elucidate the problem I am going to make an abridged translation of a treatise of Celâlü'd-Dîn Devvânî, about the *Dîvân-ı Mezâlim*. He wrote this in Persian, to advise the sultan of his time, when the Lâristân area [south west Iran], was afflicted with a calamitous dearth of food in time of famine. Celâlü'd-Dîn Devvânî starts his introduction with the following words:

««The contents of this treatise has been drawn from one of the most esteemed books, the *Ahkâmü's-Sultânîyye* of the Kâdî Ebu'l-Hasan Mâverdí who was the *Imâm* [i.e. the most authoritative Muslim judge], of his century. The treatise contains some rules as well as some solutions to various problems. It is hoped that governors of Islam and the heads of the administration will read it and act in accordance with them, so that they will deserve praise in this world, and attain a reward in the Hereafter. Since, if they carry out what they have been advised, then the rights of Muslims will not be lost and order in the affairs of the subjects will be secured»».

After these preliminary remarks, Celâlü'd-Dîn Devvânî continued as follows :

««To keep atrocities in check consists of protecting the oppressed and warding off the transgression of oppressors. [The court for this kind of case is called *Dîvân-ı Def-ı Mezâlim* - A Council to abolish atrocities]. Hence, the judge for the *Dîvân-ı Def-ı Mezâlim* should be a person who is superior to the *kâdîs* in being awe-inspiring, and having power in execution. He may even be a sultan, or a prince, or a vizier, because they are more precious to the people and more influential than anyone else. Besides, their decisions and piety are far more effective. If the judge of the *Dîvân-ı Def-ı Mezâlim* is powerful, then the people will stop engaging in malicious misrepresentations and trickery. Consequently, justice would prevail, and Islam could not be blamed for failing to fulfill its obligations. [It is essential to set up a *Dîvân-ı*

Mezâlim] because the *kâdî* is quite likely to be obliged to hear a *Sharî'ah* case which he reckons to be a sound case although deceitful. Under these circumstances the enforcement of the people's rights may be delayed. Further, if the sultan himself is not favourably disposed to hold a *Divân-ı Def-ı Mezâlim*, or he does not encourage anyone to set one up, then he would have failed in the completion of his duty towards his subjects. The Prophet Muhammed, personally, tried to avoid atrocities, and gave a judgement by means of *Divân-ı Mezâlim* when a dispute arose about a water right between Zubeyr Ibnu'l-'Avvâm [a *fakîh*, and one of the first Companions of the Prophet, who died in 36/656], and one of the men of the *Ensâr* [«those inhabitants of Medina who invited the Prophet Muhammed, and his adherents to their city, and were the first to take up arms on behalf of Islam»]. Much earlier than the Prophet, however, it was reported that two women had quarrelled about a child, of whom each mother claimed that he was hers. The case was brought before the Prophet Suleymân [King Solomon], who gave a decision in the following way :

«I would like to divide the child into two parts, and give each a portion of it».

At this the false mother did not become upset while the real mother became terribly anxious and said «give it to her». The child was thereby given to the real mother.

Zuleyha [«wife of the Potiphor»] accused the Prophet Yûsuf [Joseph] of attempting to seduce her, although it was the converse. In order to reach decision, it was therefore, suggested to see whether his shirt was torn from the front, or from behind. The shirt was torn in the back. Hence it was deduced from the accompanying circumstances that she was a liar, and he was an honest man. The resultant judgement was valid. This case has even been mentioned in the *Kur'ân*.

In the time of pre-Islamic Arabian Paganism, the Kureys [«the Prophet's tribe»] in Mecca, had acted in giving judgement in a similar way. 'Abbas [the uncle of the Prophet, died in 32/652], and Ebû Sufyân [the father in law of the Prophet, died in 31/651], together with other chiefs of the Kureys took an oath to set up the *Divân-ı Mezâlim*, in order to prevent people from being able to treat each other unjustly. At the age of twenty-five the Prophet Muhammed, the peace of Allah be upon him, had joined them in the house of a certain 'Abdu'l-lah bin Cud'ân. After the advent of Islam, the Prophet, referring

to that meeting, has said : «Islam only confirms this». That is to say, Islam does not abrogate the custom [of hearing in the *Divân-ı Mezâlim*], but emphasizes its significance.

There was no need to set up a *Divân-ı Mezâlim* in the time of the first four caliphs, because at that time justice was dominant, and a dispute used to be solved by a simple adjudication. But afterwards, wilful misrepresentation, and falsehood came to be dominant; injustice and usurpation prevailed amongst the people. Halife Ibn 'Abdü'l-Melik (d. 86/705), who was one of the Umayyad caliphs, therefore, fixed a day in a week to hear the cases of those who had been oppressed. When the time came that the injustices of the judges and of the tyrants, as well as the deceits of the people increased further, the need was felt for more attention to be directed towards justice. Because of this, 'Omer bin 'Abdü'l-'Azîz (d. 101/720), the Umayyad caliph, personally exercised vigilance over atrocities. He even acted very severely in dealing with, and disclosing the atrocities of the Umayyads. Because of this he was warned : «we fear that at the end of this business something will have happened to you». He retorted : «a day on which I fear is worse than the Day of Judgement». Earlier during his reign he had already said in his *hutbe* [a sermon delivered before the Friday prayer] : «I advise you by the fear of Allah. Since there is no other thing which would be beneficial. Allah would only show mercy to those men and women who are paying serious attention to religious duties. I swear by God that I would not have wanted to live any more, even as much as to milk a camel - that is, as much as to clench one's fist, if I have not endeavoured to revive those customs and practices which were forsaken, although they were good and right, and have not abrogated those customs which had been practised although they were absurd, or if I have not been successful in dispensing justice in people's affairs. You should try to ameliorate your future life in the next world by elevating and improving your present life here».

At a later time, the Abbasid caliphs, Mehdi (d. 169/785), Hârunu'r-Reşid (d. 193/899), and Me'mûn (d. 218/833), also dealt with the *Divân-ı Def-i Mezâlim* during their terms of office. Of these, Me'mûn was reported to have presided over the *Divân* on Sundays. Imâm Fahrü'd-Dîn Râzî (d. 606/1209) has said in his *menâkıb* [«legends»] of Imâm Şâfi'i (d. 204/820), [the founder of Şâfi'i school of law] : «Hârunu'r-Reşid appointed to

the judgeship of the *Divân-ı Mezâlim*, and to the office of *kâdî*, respectively, Muhammed bin Hasani's-Şeybânî (d. 189/805), and Ebû Yûsuf (d. 182/798), both of whom were the disciples of Ebû Hanîfe (80/699 - 150/767), [the founder of Hanefî school of law]». Subsequently, Muhtedî (d. 256/870), another Abbasid caliph, also administered the *Divân-ı Mezâlim*.

On the other hand it was related that the Persian kings had, long before the Abbasid caliphs, regarded this institution as one of the basic principles of justice and sovereignty and had kept it with great care.

With regard to what has been explained so far, the sultan has to assign a day in order to concern himself with the affairs of the *Divân*. If he wants to hand it over to someone then the sultan will have to persevere at this important job every day. Hasan Bey Bahadır Han [Uzun Hasan], may Allah illuminate his proof and whom Allah had supported, was a protector of justice. He gave serious attention to, and persevered constantly in this matter [the affairs of the *Divân-ı Mezâlim*]. Besides, he persuaded the ministers of the state to do the same. He, in fact fixed two days in a week for this important task. It was, therefore, indeed a glorious time during his period and the reigns of his noble successors, notably, that of Ya'kûb Bey Hân [the son of Uzun Hasan], the powerful sultan - may Allah seat him in the paradise. The servants and countries of Allah at large, were in the cradle of safety. The benediction was evident in cultivation and offspring. Thanks to the fortunate nature of these men's hearts, a prosperous life is expected to prevail amongst the Muslims. It is to be hoped that they would be saved from the present grief and cruelty.

Because of its happy consequences, the eminent predecessors of the sultans of Lâristân had been in the practise of being present at the *Divân*, together with the honourable 'ulemâ, ministers, and their assistants, for two days a week.

What the sultan needs to do is to issue a *ferman* giving an order that the transactions of the *Divân's* assembly should be in accordance with the the imperial regulations. In addition, he should also pay great attention to what is being done there. Since, the sultans will be asked by God whether they have done their job [concerning the *Divân-ı Mezâlim*]. Their responsibility will not be lifted by handing it over to some one else. If anything goes wrong with the transactions, the following

will be God's address to them : «*yâ râ'î's-sevr şeribte'l-lebene, ve ekelte'l-laħme velem tuçbiri'l-kesere*», that is to say, «O herdsman, you drunk the milk, ate the meat, but did not bandage the fracture».

There must be an easy way for handling the questions of those who have been complaining of an injustice. The assembly should comprise men from amongst the defenders, ministers, *kâdîs*, *hukukâm* (judges), witnesses, and experts.

It is amongst the duties of the *Dîvân-ı Mezâlim* to take care in preventing the transgressions of civil servants and finance officials; and to hear the cases of those men of obligations and salaries whose oppressions have been the cause of complaint; to be responsible, in general, for the cases about property that has been taken away by violence. The latter case does not need a witness as long as it is understood that the property was registered in the public treasury. If it is at one's disposal it can be proved either by the confession of the possessor, or on evidence, or well-known name. If the judge of the *Dîvân-ı Mezâlim* knows the circumstances of the case there is no need for further proof because his knowledge is sufficient. It is also one of the duties of the *Dîvân-ı Mezâlim*, to put into execution the judgements which the *kâdî* and the *muhtesib* (a municipal officer), are unable to do owing to either weakness, or the strength and arrogance of the possessor. Further, one of the main functions of the *Dîvân* is to take cognizance in accordance with the *Sharî'ah* of some matters upon which the *kâdî* is not able to adjudicate. For instance, when the judge of the *Dîvân* feels some suspicion about the case he might ask the possessor: «where did you get that property from?». This inquiry would lead him to find out the Truth. Then he could punish the man whose injustice was evident and threaten the men who falsified; consequently, he, in spite of the witnesses, would stop the judgement, and bring the Truth to light by means of deductions, and circumstantial evidence, as well as information given by experts.

As for the *kâdî*, he will be a sinner, if he suspends the judgement under such circumstances without having the consent of the parties concerned.

The judge of the *Dîvân*, by intervening between the the plaintiff and the defendant, is able to refer the dispute to mediators; but the *kâdî* is not able to do likewise unless the two sides were contended with this.

If suspicion arises within the judge of the *Dîvân*, he will be able to oblige the witnesses to take an oath. A case,

which has not been registered according to the observed procedure in the tribunals, could be brought directly before the judge of the *Divân*, and he could hear the testimonies of the witnesses straight away; and discover the cause for complaint. But the *kâdî* is not able to do likewise.

When the judge of the *Divân* was asked to conduct a trial, he would start with completing a close examination: he would either, serve a summons on the witnesses, if the plaintiff has competent and disinterested ones, besides a written document both of which could indicate his honesty, or he would try to urge the defendant, by intimidating him, to give up his denial, as well as requiring him to bring a guarantor.

If it deemed necessary, the judge can compel the litigant to bring the controversial property and ask in accordance with the *Mâlikî* school of law: «where did you get this from?». Although this questioning is not permitted by both the *Hanefî* and *Şâfi'î* schools of law, the judge of the *Divân-ı Mezâlim* could, however, act in accordance with the *Mâlikî* law for the sake of a good cause. He is not bound to follow his own school of law (*vâcib üzere iktisâba mecbur degildir*). But the *kâdî* will have to judge according to his own school of law; he cannot as freely as the judge [i.e., the *kâdî* is not allowed to follow other than his own school of law]; if the *kâdî* conducts the trial contrary to his own school's views it will not be lawful according to most sound opinions.

When witnesses are present, the judge of the *Divân* would give an order to verify their conditions and investigate the state of affairs by means of questioning the neighbours and experts. Although the document and the file [of a case] are to be found at the court (*Divân-ı Mezâlim*), the judge could adjudicate upon the writing of the defendant if it is in agreement with the petition of the plaintiff, and if the defendant admits that that writing was his; but if the defendant denies that, then sometimes the judge may give a decision upon the analogy of resemblance between the script and the defendant's own writing, after this fact had been investigated.

The short of it is that many Muslims' rights would be lost without the existence of the *Divân-ı Mezâlim*. Men of deceit would, unjustly, seize the property and the rights of the people. When these men express their state of affairs before the *kâdî* their first attempt is the pretension of being fair, although they are always unfair, therefore it would be desirable to take down in writing a

transcript of the lawsuit. They would sometimes obstruct the progress of a hearing and engage in malicious misrepresentations as well as cheating, for which they put forward an ostensible justification that the judicial decision has long been delayed. After this stage when it comes to the question of witness they would continue in repeating the formula used in testimony and play tricks with it (*sîga-yi şehâdette dolaşır kalırlar*), Further they would try to cause a delay in the proper course by asking whether or not the conjugation of the word of the testimony had been completed. When the procedure is freed from this peril then it might be stuck on the question of *tezkiye* [«pronouncing a witness to be acceptable»]. Next, they hamper the subject by accusing a witness of telling a lie, or bring the trial to a standstill by other means (*cerh ve ta'dîl ile teselsule vardırırlar*). In such a manner an insignificant trial could be long drawn out, and no decision reached even after many years. Finally, the plaintiff and the defendant become vexed and tired. If the trial was a criminal one then it would certainly be an irreparable loss.

Whereas the hostility between the two opponents could be put aside and the Truth would be out in one hearing if there was an honest and a disinterested judge who acted in accordance with the system of the *Divân-ı Mezâlim*. In this respect I myself have observed on many occasions that the case which had long been neglected at the courts, was solved before the awe-inspiring judges in a single moment.

[Therefore the *Divân-ı Mezâlim* is a necessity], because the present time is vicious; most of the people have no fear of God, but they, nevertheless, are afraid of the judge who has power of punishment. As long as they realise that the *judges* have as their aim ascertaining the state of affairs then they would commit fewer frauds and falsehoods, and eventually the Truth would become visible.

The purpose of the preceeding introduction has been to explain the true nature of the judicial judgement of the *Divân-ı Mezâlim* in that it was exactly the same as a Shari'ah court's decision. It is, therefore, an obligatory duty upon the sultan of the age that he, either himself, should attempt to set up a *Divân-ı Mezâlim*, like the caliphs who have done so in the past, or he should hand it over to a just and an unavaricious man from amongst his most able ministers. If he feels contempt for this task he will be a sinner. Whoever says that the judgement

of the *Dîvân* is not a legal one, then it will be regarded as an attribution of a mistake to the great *Imâms*; and thus he will deserve to be sharply reproved, or it may even be that there is a risk of blasphemy. Since as was mentioned above, the judicial decision of that kind was given by our lord, the Prophet (*Peace of Allah be upon him*), and latterly by his successors, the first four caliphs, and by the eminent authorities; its transmission has reached a level of absolute reliability. So, any further attack on the legitimacy of the *Dîvân's* judicial decision, would be considered as heresy; we seek refuge in God from heresy and rebellion.

With regard to this information, the appropriate action to be taken by His Majesty the sultan is to put into practice the requirements of the *Dîvân-ı Mezâlim* whose judicial judgement is entirely in conformity with the *Sharî'ah*». The end.

Cevdet Paşa concluded as follows :

Now, the summary of the research of Celâlu'd-Dîn Devvânî has become known to you. In his time, how indispensable it was, to establish a *Dîvân-ı Mezâlim* beside the *Sharî'ah* courts.

Today, too, trade transactions have increased more than ever. And the Ottoman dominions extend over vast areas. When these reasons are observed and compared with the past, it should be clear why it was essential to set up a *Dîvân* [*-ı Ahkâm-ı 'Adliyye*] in the Ottoman Empire.

The first duty of the Islamic states is to dispense justice in law-courts. The performance of this duty has been carried out with serious attention in every century. In some other towns the clerks and the servants of the *Sharî'ah*, who had been suspected of wrongdoing, used to be asked to seal and sign written documents as well as proofs and verdicts concerning the incidents which took place in the *Sharî'ah* courts. The system of witnessing, however, was already spoilt at that time, and Celâlu'd-Dîn Devvânî, therefore, was complaining of his time, and saying that the majority of witnesses were not reliable.

In its early centuries, the Ottoman State had given more serious attention to the most important matter of the administration of justice, than to any other state affair. As has been related, the Sultan of the time used to attend to the *Huzûr Murâfa'aları*⁵², twice a week, which used to be held in the place of *mu'âyede-yi humâyûn* [«an imperial state levee held at *bayrâm*»] of the Imperial

Palace. This place, which is known as the 'Atîk Divân-hâne, is still used as a gathering hall for the men of 'ilmiyye on the day of *mu'âyede*, at the present time. Later, the *Huzûr Murâfa'aları* began to be held in the Kubbe Altı [«the apartments in Topkapı Sarayı Palace where councils of state and public receptions used to be held»], consequent upon the expansion of the State and its increasing number of affairs. Ever since the Grand Viziers, personally, had attended the *Huzûr Murâfa'aları*, on behalf of the Sultan of the time who had only followed from behind a wall. It is a well-known fact that the *Huzûr Murâfa'aları* continued to be formed in the presence of the Grand Viziers until recently. Subsequently, the *Şeyhü'l-İslâm*s replaced them and it was administered under their directions. Nevertheless, the *Supreme Council of Judicial Ordinances* was established in lieu of the *Divân-ı Mezâîm*, for political and legal affairs. Business transactions and in consequence the State affairs have increased enormously in our century. The extent to which the *Supreme Council of Judicial Ordinances* has been preoccupied with this matter is a well-known fact. Our lord, the Shadow of God (*Zât-ı hazret-i zillu'l-lâhî Efendimiz*), [«a title of the Caliphs»], His Majesty, the Sultan, divided these affairs into sections in accordance with the natural tendency of the time. He, thus, separated the administration of justice from other State affairs and for that purpose he established the *Council of Judicial Regulations*. For this outcome there is nothing to add except to repeat your thanks and the obligatory prayer for the Sultan»⁵³.

52 A council which was convened under the presidency of the *Şeyhü'l-İslâm* to decide important legal questions. When the litigants raised an objection against the judicial decision, of a *Sharî'ah* court they could appeal to the council where a final judgement used to be given. It was held twice a week. The Minister of Cases who later became the Minister of Justice was also in the council (*Huzûr Murâfa'aları*). It was replaced by the *Meclis-i Tetkîkât-ı Şer'iyye* in 1279/1862: M. Zeki Pâkalın, *Osmanlı Tarih Deyinleri ve Terimleri Sözlüğü*, i. (İstanbul 1946), p. 865. İsmail Hakkı Uzunçarşılı, *İlmiye Teşkilâtı*, Ankara 1965, p. 213, confused the *Meclis-i Tetkîkât-ı Şer'iyye* with the *Mecelle* Commission. The latter was to set up six years later. For a comprehensive treatment of the *Huzûr Murâfa'aları*, see, *ibid.*, pp. 211-214; Tevki'i 'Abdu'r-Rahman Paşa Kânünnâmeleri», in *MTM*, vol., 3, pp. 501-503. See also, Uriel Heyd, *Studies in Old Ottoman Criminal Law*, pp. 224-227.

53 Cevdet, *Tezâkir*, iv. pp. 85-90; Ebu'lulâ Mardin, *Medenî Hukuk Cephesinden Ahemî Cevdet Paşa*, (İstanbul 1946), pp. 315-321.

This speech, in which the ideas were almost entirely derived from el-Mâverdi, and Celâlu'd-Dîn Devvânî, made a good impression on the audience who consisted of some of the members of the *Judicial Council* and the 'ulemâ. Endorsing the setting up of the new *statutory* courts they said :

«If a man like Celâlu'd-Dîn Devvânî has said this, nobody can object to it. This must be printed and distributed, so that everyone can know the facts»⁵⁴.

Upon this suggestion, Cevdet Paşa sent a copy of it to the Grand Vizier 'Âlî Paşa. But he did not agree with its publication owing to some private reasons, and kept it to himself⁵⁵.

Although Cevdet Paşa had the approval of the 'ulemâ concerning the new statutory courts, the question of what should be the civil code for the both court systems remained untouched. Then the problem which divided the ministers into two groups, was whether it was going to be an adoption of a Western civil law, or a compilation of a book from the Islamic jurisprudence. Of course, the existence of the two different codes side by side could not be practical. There was a clear choice; either the adoption of the French Civil Code, or a book based on Islamic grounds. The provisions of the Islamic Law, as Cevdet Paşa said, do not accept the testimony of a non-Muslim against a Muslim, or of a foreigner against a non-Muslim subject, in the *Sharî'ah* courts. If the civil code was based on the *Sharî'ah*, then how could the question of testimony would be solved? If the French code was accepted, then would it be workable in a different society?. These were the questions which raised two opposite movements, or opinions, one of which was led by Cevdet Paşa who stood against the French Civil Code, the other was advocated by 'Âlî and Kâbûlî Paşas who favoured the French *code civil*.

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Mâverdi and Celâlu'd-Dîn Devvânî, as is mentioned above, put forward that any kind of testimony could be heard before the *Divân-ı Mezâlim*. It is evident from his expressions that Cevdet Paşa, who knew

54 Cevdet, *Tezâkir*, iv. p. 91. The original text of Devvânî's treatise in Cevdet's script, is in İstanbul *Başbakanlık Arşivi*, Yıldız Esas Evrakı, «Cevdet Paşa Evrakı», MS. 552, K/18, Z/13, Ku/32.

55 Cevdet, *loc. cit.*

the conditions of the time, had to apply the procedures of this court of law for the *Judicial Council*, for the reason of testimony⁵⁶.

It is more likely that the idea of adopting the French Civil Code had prevailed from the beginning of the *Tanzîmât* period in 1839. In 1840, the task of the preparation of a civil code was given to one of the French men of letters⁵⁷. Its result, however, is not known. The Problem had been tackled again in October 1855 by a commission of jurists set up within the *Tanzîmât* Council. The motivation of the work, then, resulted from the increasing commercial contacts with Europe, and the question of whether to accept the French *code civil*. The commission, including Cevdet, had begun to put into one book in Turkish the provisions of the *Fıkıh* on transactions, under the title of *Metn-i Metîn* («Basic Text»). But it remained incomplete.

Along with the Islamic solution to the point in question, the idea of adopting the French civil law had continued to exist until 1867. By the same year, two memoranda, one by the Grand Vizier 'Âli Paşa, and the other by the French government favoured its translation into Turkish and adoption as a civil code. 'Âli paşa, as soon as he had returned from his mission in Crete, on 29 February 1868, ordered Sa'îd Paşa (1838-1914), who later became Grand Vizier several times, to translate the French Civil Code from Arabic. Although 'Âli's proposal in the memorandum was restricted to suggesting that the French Civil Code should be used for the mixed courts in cases involving Muslims and non-Muslims, he saw in its translation a solution for completing the judicial reforms. Eventually, the attempt failed, because the opposite idea superseded it, and Cevdet Paşa was appointed to organize the compilation of the *Mecelle-i Ahkâm-ı Adliyye*⁵⁸. But on the other hand «it is a question as to how far 'Âli wanted to go in applying the French civil law to the Ottoman Empire»⁵⁹. Nevertheless, there is no ambiguity in his feelings that 'Âli, in his memorandum of November 30, 1867⁶⁰, suggested the acceptance of the

56 Cf. Cevdet, «Ma'rûzât : Beşinci Cüzdan», BK, «Cevdet Paşa'nın Yazmaları», MS. 24, f. 8; *idem.*, *Tezâkir*, i.p. 62f.; *idem.*, «Vak'anuvîs Cevdet Paşa'nın Evrakı», *Târîh-i 'Osmânî Encümeni Mecmu'ası*, 47(1334), pp. 282-284. See also, E. Mardin, *Medenî Hukuk... Cevdet Paşa*, p. 61f.

57 Engelhardt, 44; N. Berkes, *Secularism*, 166; O. Ergin, *Maarif Tarihi* i. İstanbul 1939, pp. 229-230; iii. p. 891, gives the report of the *M. Metin* commission.

58 [Sa'îd Paşa], *Sa'îd Paşa'nın Hâvârâtı*, (İstanbul 1328/1910), pp. 5-6.

59 R.H. Davison, *Reform in the Ottoman Empire*, p. 252.

60 Its English translation is in H. Yavuz «Western Influence upon the Ottoman Institutions», *İslâm Medeniyeti*, IV : 4 (August 1980), pp. 45-47.

French Civil Code for political expedience at the time. He was encouraged by French policy. Previously, the French memorandum of February 22, 1867, had pointed out clearly that the French Civil Code was applicable to commercial matters. The provisions which the Ottoman Commercial Code lacked were to be found in the French Civil Code⁶¹.

Apparently it was a year earlier than the *Mecelle* Committee was finally set up that the French political campaign had been intensified. In a letter, dated July 10, 1867, the French chargé d'affaires to Istanbul, wrote the following telegram in which he insisted that the Grand Vizier accepted the French proposal, and at last 'Alî Paşa formed a commission charged with extracting from the Code Napoléon :

«Monsieur le Marquis,

Ainsi que me l'avait recommandé M. Bourée, avant son départ pour Paris, j'ai insisté auprès du grand vizir pour que l'on s'occupât d'une nouvelle rédaction du code de commerce actuel. Ce code, calqué en partie sur le nôtre, manque cependant de base et devrait être complété par les dispositions de notre code civil, relatives aux contrats et obligations. En comblant cette regrettable lacune, on donnerait aux tribunaux de commerce la possibilité de juger, non plus arbitrairement, mais sur un texte de loi, toutes les matières civiles qui leur sont actuellement dévolues.

V. Exc. avait, pendant son séjour à Constantinople, préparé un travail fort étendu sur cette matière. Aali-Pacha en a adopté les idées. Une commission a été chargée par lui d'extraire du code de Napoléon tous les articles qui peuvent être d'une application immédiate en les appropriant aux besoins de la Turquie, c'est-à-dire en les faisant concorder, dans la mesure du possible, avec la loi musulmane du «Cheriat»; ce travail sera soumis ensuite à l'approbation du cheikh-ul-islam avant de recevoir la sanction du Sultan»⁶².

The following year the French Ambassador to Istanbul reported to the French Foreign Minister that after 'Alî Paşa's return from Crete a new cabinet was constituted in which a Christian minister was included

61 Baron I. de Testa, *Recueil des traités de la Porte ottomane*, vii. (Paris 1892), p. 420.

62 Dépêche (extrait) de M. Outrey, chargé d'affaires de France à Constantinople, au marquis de Moustier, en date de Thérapia, le 10 juillet 1867 (8 rébiul-évvel 1284, in Baron I. de Testa, *Recueil des traités de la Porte ottomane*, vii. p. 469.

for the first time since the Empire came into existence. Further he reported : *the Council of Judicial Regulations* became a supreme court under the presidency of Cevdet Paşa who 'Âlî and Fuad Paşas regarded as a distinguished Ottoman jurist, with a liberal spirit, and they were counting on his assistance for putting into action a new legislation which would be the product of the fusion of European law and Turkish law. The French Ambassador also reported that the commission, in charge of extracting from the *code civil* some fifteen hundred or sixteen hundred articles which could conveniently be drawn out of it, had greatly advanced its work. Here are his words :

«Monsieur le marquis,

Le Cabinet a été reconstitué aussitôt après le retour d'Aali-Pacha à Constantinople.

La combinaison nouvelle donne satisfaction à d'importantes nécessités et à des doctrines tutélaires. Pour la première fois depuis que l'Empire existe, un chrétien fait partie du ministère et le Sultan lui confie un des services les plus importants ou tout au moins un des plus difficiles à diriger, celui des travaux publics.

Le conseil supérieur d'administration et de justice devient cour suprême de justice, sous la présidence de Djevdet-Pacha, aujourd'hui gouverneur d'Alep. Aali-Pacha et Fuad-Pacha le tiennent pour un légiste ottoman distingué, d'un esprit libéral, et ils comptent sur son concours pour la mise en vigueur d'une législation nouvelle qui serait le produit de la fusion de la loi européenne et de la loi turque.

A ce propos, je me félicite d'avoir à apprendre à Votre Excellence que la Commission, chargée d'extraire du Code civil les quinze ou seize cents articles qui peuvent lui être empruntés sans inconvénient, a grandement avancé son travail.

Le principe de la création du Conseil d'État est adopté. Midhat-Pacha en aura la présidence. L'organisation en sera d'ailleurs plus ou moins calquée sur la nôtre. Pendant le séjour d'Aali-Pacha en Crète, il était naturel que cette question fût ajournée. Cet ajournement ne devait pas en compromettre le succès, puisqu'elle a été reprise avec une grande activité des son retour à Constantinople»⁶³.

63 Dépêche de M. Bourée au marquis de Moustier, en date de Péra, le 10 mars 1868 (16 zilcadé 1284), in Baron I. de Testa, *Recueil des traités de la Porte ottomane*, vii. p. 511.

Amongst the ministers who vehemently supported the acceptance of the *code civil*, and challenged Cevdet Paşa over the *Mecelle*, was Mehmed Kabûlî paşa (1812-1877). He was one of the disciples of Mustafa Reşid Paşa; a product of the *Tercüme Odası*, and of the *Mekteb-i Ma'ârif-i 'Adliyye*. He worked in the offices of the Foreign Ministry; later became an ambassador to Athens in 1851, and to Vienna in 1873. By 1867, he was the Minister of Cimmerce, and accompanied 'Alî Paşa to Crete⁶⁴.

Sir Henry Layard says of him among other politicians :

«Reshid Pasha had also his ardent followers and disciples, who were imbued with his political ideas, and who were sincere and earnest advocates for the introduction of European constitutional institutions in the administration of the Ottoman Empire. He founded a school of Turkish statesmen, who were destined after his death to take the leading part in the government of the country... Amongst the most remarkable of these rising men were Ali, Fuad and Cabouli Effendies, who each in turn rose to the rank of Pasha...

Cabouli Efendi, the third rising Turkish statesman with whom I was intimate, was perhaps the most truly liberal in his convictions, and the most thoroughly honest of the three... He was like Âli and Fuad, well acquainted with French language, and with the literature of Europe. He gave a proof of his liberal opinions, and of his desire to introduce social as well as political reforms amongst his mussulman fellow-countrymen by having his wife taught French and the piano»⁶⁵.

The French *code civil* is known as the *Code Napoléon*⁶⁶. It was the first modern codification in legal history. It is based largely on customs; contains 2281 articles; is divided into three books, the first of which deals with persons, the second with property and the different kinds of ownership, and the third with the different ways by which ownership may be acquired.

64 Further on him, see, İ.A. Gövsa, *Türk Meşhurları*, p. 201.

65 H. Layard, *Autobiography and Letters*, ii. (London 1903), pp. 92-94.

66 «Originally entitled *Code civil des Français*, the title was changed to *Code Napoléon* by decree of Napoleon III in 1852, and was finally restored to *Code civil* with the beginning of the Third Republic in 1870»: René David and Henry P. de Vries, *The French Legal System: an introduction to civil law systems*, (New York 1958), p. 13, n1.

The effect of the *Code Napoléon* on the countries outside the Anglo-American world, in which it served as the model for similar codes, was enormous⁶⁷. There were three ways by which its expansion was carried out : conquest, direct persuasion, and inspiration⁶⁸. It had no influence on the *Mecelle*, but there are a few «fortuitous similarities»⁶⁹.

Apart from Kâbulî Paşa, Cevdet Paşa singled out in his «Ma'rûzât : Beşinci Cüzdân», the *Şeyhu'l-Islâm* Kezûbî Hasan Efendi, as his opponent in the compilation of the *Mecelle*. Hasan Efendi clashed with Cevdet not over the interpretation of the *Sharî'ah*, but because of personal and self-seeking motivations. He became *Şeyhu'l-Islâm* in 1868 when the new government administrative bodies were constituted. Then, the functions of the *Şeyhu'l-Islâm*'s office were reduced. From his appointment to the office onwards, this is how things developed :

«This was a time when the moderation of the apparatus of government was reducing the jurisdiction and power of the office of the *Sheykh al-Islam*; the creation in particular of new administrative bodies dealing with law and education meant a curtailment of his authority in matters previously regarded as his exclusive concern. Hasan Fehmi tried to resist these encroachments. The first object of his counter-attack was the committee which under the chairmanship of Ahmad Djewdet and the authority of the *Divan-ı Ahkam-ı Adliyye*, was preparing a new Ottoman civil code, the famous *Medjelle*. Djewdet and his committee had successfully resisted the pressure of the extreme Westernizers, egged on by the French ambassador Bourée, for a French-style code, and were preparing a modern statement of Hanefî Muslim law. They now had to face the opposition, on the other side, of the '*ulemâ*', led by the *Shekh al-Islam* who saw in the preparation of this under the department of justice a usurpation of the functions and prerogatives of his own office»⁷⁰.

67 Bernard Schwartz, ed. *The Code Napoleon and the Common-Law World*, (New York 1956), p. viii.

68 Jean Limpens, «Territorial Expansion of the Code», in Bernard Schwartz, *op. cit.* p. 92.

69 *Ibid.*, p. 101; cf. H. Veldet [Velidedeoğlu], «Kanunlaştırma Hareketleri», in *Tanzimat I*, p. 195.

70 Bernard Lewis, EI² Art. «Hasan Fehmi Efendi», is based on E. Mardin, *Medeni Hukuk Cephesinden A. Cevdet Paşa*.

The following passage is very significant in explaining Cevdet's participation in the cadification of the *Sharî'ah*. In the unpublished part of his memoranda which was submitted to the Sultan 'Abdu'l-Hamîd II (1842-1918) upon his verbal decree, in 1892, Cevdet Paşa summarizes what happened over the dispute of the civil code in 1868, and how he had achieved the compilation of the *Mecelle* as a civil code from the *Sharî'ah* sources, as follows :

«The Establishment of the *Mecelle* Commission :

It was necessary to make laws and regulations which would be practised both in the *Council of Judicial Regulations* and the statutory courts of *Bidâyet* and *Istînâf* whose establishment were being decided upon, and in the court of commerce. Whereas the basis of every state's codes and regulations is the civil code, that is to say, the *Hukûk Kânûnnâmesi*, in the Ottoman State it was founded on the *holy Sharî'ah*. So it had been a desire among all those holding sound opinions that the *kânûns* of the *Sharî'ah* should be the foundations of the Ottoman, codes and regulations. Only those *mütefernicîn* who were the followers of European ideas, had the intention of translating the *Code Napoléon* in order to put it in force in the Ottoman State's courts. In this respect, the opinions of the ministers were divided into two parties. Of these the first group was in favour of the composition of a book of the *Sharî'ah* compiled according to the demands of the time from the *Fıkıh* literature on *transaction*. This would be a code of the *Sharî'ah* for the Muslims, and a *kânûn* for the non-Muslims, too.

As has been mentioned above the compilation of the *Metn-i Metîn* had been started but never completed, during the time of Reşid Paşa. That task was revived once again [in 1868]. I myself and Şirvânî-zâde Ruşdî Paşa who had been the Minister of Finance for many years, and Minister of the Interior for some time, had the opinions of the first group.

The other group favoured the translation of the French *code civil* to apply it in the statutory courts. At that time, M. Bourée, the French ambassador to Istanbul, being the most influential figure amongst the ambassadors in the capital, had wished to see the French codes applied in the courts of the Ottoman State, and all those who supported the pro-French policy had the same unsound opinion. The Minister of Commerce, Kabûlî Paşa had insisted upon this view and even tried to pass transla-

tion into Turkish, but he had not been able to achieve his aim, because of our opposition in the Council.

Amongst the senior ministers a private session was held to discuss this question, where it was decided, consequent upon the speeches of Fuad Paşa and the proofs put forward for consideration by Şirvânî-zâde Ruşdi Paşa and by myself, to form a commission from the very learned *fakîhs* under my presidency, in order to compose a book which would be entitled *Mecelle-i Ahkâm-ı Adliyye*, and extracted, according to the needs of the time, from the *Fıkıh* books, on *transactions*.

That was the commission of scholars which has been renowned as the *Mecelle Commission* whose product, the *Mecelle-i Ahkâm-ı Adliyye* is still in use in all the statutory courts. In Cyprus, the British government, too, kept it in force without modification. Further, the Bulgarians, after translating it into their own language, made the *Mecelle* the fundamental basis of their codes when the first Bulgarian Emirate was constituted.

Instead, if the French civil code was translated in the past, the Code Napoléon would still have been in force in the Ottoman courts of justice. The compilation of the *Mecelle*, therefore, was confirmed and admitted to by everyone as a great religious duty. But, at the beginning, the band of opposition had intrigued against it, and tried hard for it to be left incomplete.

All the *mütefernicîn* (i.e., those who pretended to be European), and especially those who followed the pro-French policy, wished to separate the *statutory* courts entirely from the *Sharî'ah* courts, and were antagonistic towards me on account of the commencement of the compilation of the *Mecelle*.

Above all, the *Şeyhu'l-Islâm* Kezûbî Hasan Efendi who had been deceived by Kâbulî Paşa, and with him a number of ignorants who were in the costume of *'ulemâ*, were also at loggerheads with me for the reasons relating to why such a work of *Fıkıh* was being prepared in the department of justice rather than in the office of the *Şeyhu'l-Islâm*»⁷¹.

The *Mecelle* Commission, after a preliminary report in 1869, completed its work between 1870 and 1876. The outcome was the *Mecelle-i Ahkâm-ı Adliyye*. Like any *Fıkıh* book, the *Mecelle* was divided into

71 Cevdet, «Ma'rûzât : Beşinci Cüzdân», BK, «Cevdet Paşa'nın Yazmaları», MS. 24, f. 13-f. 15.

sixteen books of the law of transactions derived from the Shari'ah. Each book took some time to prepare, and came into force as soon as its text was completed. According to procedure of the time the books were in turn passed by a cabinet and ratified by the sultan through the grand vizier. Thus the *Mecelle* which contains 1851 articles, became a civil code of the Ottoman State, and satisfactorily served the needs of the country for fifty seven years⁷². After the demise of the Ottoman State, the Government of Ankara replaced the *Mecelle* by the Swiss Civil Code in 1926⁷³. Until recently, however, it remained in force in the territories which were part of the State. Of these Lebanon repealed it in 1932, Syria in 1949⁷⁴, and Iraq in 1953⁷⁵. The *Mecelle* is still the basis of the «civil law» of Cyprus, Israel and Jordan⁷⁶.

The *Mecelle* was not a complete civil code, and infact, as the Commission's preliminary report pointed out, was not so intended. For this reason it did not deal with delicate matters of personal status, like marriage, divorce and adoption. There were also no rules in it concerning inheritance, will, *wakufs* and other similar matters which might be found in modern civil codes. And «the reason for these gaps is attributed to several factors, one of which is the considerable divergence in the interpretation of these questions by jurists. Another factor was the existence of several ethnic groups and religious denominations in the Ottoman Empire, and the policy of toleration which the Ottomans pursued in those days with the non-Muslim elements, giving them a free hand in dominational matters and problems of personal status»⁷⁷.

As far as its limited scope is concerned the *Mecelle* stands as a masterpiece of the Islamic jurisprudence. It is an excellent example for the codification of the Islamic law. A lot of work, still remains to be done about it.

72 S. Sami Onar, «The Majalla», in M. Khadduri and H.J. Liebesny, eds., *Law in the Middle East I*, Washington 1955, p. 307; *idem.*, «İslam Hukukunun Codification'u : Mecelle», *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, XX : 1-4 (1955), p. 84; *idem.*, «La codification d'une partie du droit Musulman dans l'Empire ottoman (le Médjéllé)», *Annales de la Faculté de Droit d'Istanbul* IV (1954), p. 126.

73 S. Sami Onar, «The Majalla», p. 308; M. Şakir Ülkütaşır, *Cevdet Paşa*, Ankara 1954, p. 20; C.L. Ostrorog, *The Angora Reform*, London 1927, p. 89 f.

74 S. Mahmassani, *Falsafat al-Tashri fi al-Islâm*, Leiden 1961, p. 56f; J. Schacht *Introduction to Islamic law*, Oxford 1966, p. 93; Hulûsi Yavuz, «Osmanlı devletinde İslâm Hukuku», *Diyanet Dergisi*, XVII : 5 (September-October 1978), p. 270-71.

75 J. Schacht, 93; S. Mahmassani, 48.

76 J. Schacht, 93.

77 S. Mahmassani, p. 44.

Ö Z E T

İlk Osmanlı Medenî Kânûnu, Mecelle-i Ahkâm-ı adliyye'dir. Kısaca, Mecelle diye bilinmektedir. Mecelle, meşhur târihçi ve hukukçu Ahmed Cevdet Paşa (1822-1895)'nin başkanlığında, devrin mümtaz ulemâsından meydana gelen bir ilmî hey'et tarafından, 1868 ilâ 1876 yılları arasında, onaltı kitap ve 1851 madde hâlinde, Hanefî fıkhnın muâmelât kısmından seçilerek meydana getirildi.

Osmanlı Devleti'nde ilk defa böyle bir Medenî Kânun hazırlama teşebbüsünün sebebi, ülkede mevcut Şer'î mahkemelerin yanında 1868 yılında Dîvân-ı Ahkâm-ı Adliyye şemsiyesi altında yeni nizâmî mahkemelerin kurulup buralarada tatbik edilmek üzere Code Napolyon'un yürürlüğe konmak istenmesidir. Bu istek, dışta Fransa, içte de sadriâzam Âlî Paşa'nın te'siriyle ortaya çıktı. Bunlara, Fuad Paşa ile Cevdet Paşa karşı durdular; neticede Mecelle meydana getirildi.

Mecelle'nin hazırlanmasında, Code Napolyon'un tatbik edilmek isteşi kadar önemli bir sebep olan Dîvân-ı Ahkâm-ı Adliyye'nin kurulması ise, daha ziyâde Fransız ve İngiliz baskıları ile oldu.

Dîvân-ı Ahkâm-ı Adliyye'nin nizâmını yapan ve memleket çapında teşkilâtlanmasını sağlayan Ahmed Cevdet Paşa idi. Paşa bu sefer, Şer'î mahkemeler yanında nizâmî mahkemelere ne lüzum var, diye itirazlarla karşılaşınca, şöhretli İslâm âlimlerinden Mâverdi ile Celâlüddin Devvânî'den iktibaslar yaparak hazırladığı uzun bir hitâbesini, Dîvân-ı Ahkâm-ı Adliyye'nin bir toplantısında okudu. Hristiyân şehâdetinin kabul edilmediği Şer'î mahkemelerden başka, bu şehâdetin kabul edildiği bir başka mahkemenin İslâm ülkelerinde geçmişte mevcut bulunduğunu, Dîvân-ı Mezâlim ve Huzur Murâfaalarının böyle davalara bakan müesseseler olduğunu ispat ederek itiraz edenleri iknâ ve iskât etti.

Dîvân-ı Ahkâm-ı Adliyye'nin kurulmasını, burada tatbik edilecek kânûnun ne olacağı münâkaşaları tâkip etti. Âlî Paşa ile Ticâret Nâzırı Kabûlî Paşa'nın ısrarlarına rağmen Code Napolyon'un tercüme ve tatbiki reddedildi, ve Mecelle'nin tedvinine böylece başlanmış oldu. Mecelle, modern Medenî Kânunların muhteviyâtı ile aynı olmayıp mahdut bir sâhaya inhisâr etmiş bulunmasına rağmen, 1926 senesinde İsviçre Medenî Kânununun kabûlüne kadar 57 yıl ihtiyâca hakkıyla cevap verdi. Osmanlı Devleti'nin vaktiyle idâresinde olan Yugoslavya, Arnavutluk, Irak, Suriye, Filistin ve Kıbrıs'ta bu devletin yıkılmasından sonra da mer'î olmakta devam etti.