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Bluebook Citation

Mark L. Movsesian, *Elusive Equality: The Armenian Genocide and the Failure of Ottoman Legal Reform*, 4 U. St. Thomas J.L. & Pub. Pol'y 1 (2010).

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ELUSIVE EQUALITY: THE ARMENIAN GENOCIDE AND THE FAILURE OF OTTOMAN LEGAL REFORM

MARK L. MOVSESIAN*

I would like to thank the organizers for inviting me to deliver some remarks this morning. By way of background, I am not a historian or genocide scholar, but a law professor with an interest in comparative law and religion. Comparative law and religion is a relatively new field. It explores how different legal regimes reflect, and influence, the relationships that religious communities have with the state and with each other.¹ My recent work compares Islamic and Christian conceptions of law, a subject that has engaged Muslims and Christians since their first encounters in the seventh century.²

When I approach the Armenian Genocide as a scholar, then, I think in terms of Ottoman law and the status of religious communities in that law. These topics may not seem directly relevant at first, but they are. Changes in the legal status of Ottoman Christians – including, of course, Armenians – in the nineteenth century had a significant impact on the events of 1915. The seeds of the Genocide were sown a generation earlier, in the Hamidian massacres of the 1890s, in which hundreds of thousands of Armenians died.³ And the Hamidian massacres themselves were influenced by dramatic changes in the classical Islamic legal system that had existed in the Ottoman Empire for centuries. The *Tanzimat*, or “reorganization,” granted

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1. For examples of recent scholarship in comparative law and religion, see RELIGION, LAW AND TRADITION: COMPARATIVE STUDIES IN RELIGIOUS LAW (Andrew Huxley ed. 2002); Harold J. Berman, *Comparative Law and Religion*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 739 (Mathias Reimann & Reinhard Zimmerman eds. 2006).

2. Mark L. Movsesian, *Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence*, 40 SETON HALL L. REV. (forthcoming 2010) (symposium contribution).

3. See, e.g., Stephan Astourian, *The Armenian Genocide: An Interpretation*, 23 HIST. TCHR. 111, 125 (1990) (discussing death toll of Hamidian massacres).

legal equality, in theory, for the first time to the Empire's Christian subjects.⁴ Legal equality, even in theory, subverted the classical Islamic hierarchy and shocked Muslim opinion.⁵ In classical jurisprudence, Christians had been *dhimmi* (in Turkish, *zimmi*), parties to a notional contract, known as the *dhimma*, which granted them protection in exchange for a promise to accept subordination.⁶ For Armenians to seek, or even accept, legal equality was to repudiate the *dhimma*. This repudiation caused deep resentment among Ottoman Muslims – so deep, in fact, that the Tanzimat reforms were never fully implemented.⁷ The Tanzimat's failure, and, in particular, the bitterness created by Armenians' attempt to assert equality, forms a significant part of the background of the Hamidian massacres and, ultimately, the Genocide itself.

I am dealing with emotional subjects this morning, and some clarifications may be necessary. First, I am not arguing that efforts at legal reform caused the Armenian Genocide. Like all major historical events, the Genocide resulted from many factors—cultural, economic, military, political, and religious. If one is to understand genocidal conflict, though, one must appreciate the history of the relationship between perpetrator and victim, and the Tanzimat—in fact, the classical Ottoman legal system itself—is an important part of the history that Turks and Armenians shared.⁸ Second, I am not suggesting that Armenians and other Christians brought their troubles on themselves by seeking equality. That would be to blame the victims. Unless one believes that minorities must accept whatever oppressive treatment the majority metes out, Armenians and other Christians had a right to seek justice in Ottoman society.⁹

Third, I understand that the classical Sunni paradigm does not constitute the whole of Islam. Some contemporary Muslim thinkers critique the centrality of law in the classical model, which exists, with the possible exception of Saudi Arabia, nowhere today.¹⁰ I do not mean to

4. See ERIK J. ZÜRCHER, *TURKEY: A MODERN HISTORY* 58–59 (1993); see also ABDULLAHI AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE* 193 (2008) (translating "Tanzimat").

5. See Roderic H. Davison, *Turkish Attitudes Concerning Christian-Muslim Equality in the Nineteenth Century*, 59 *AM. HIST. REV.* 844, 854–59 (1954).

6. See Benjamin Braude & Bernard Lewis, *Introduction*, in 1 *CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE* 1, 5 (Benjamin Braude & Bernard Lewis eds. 1982) [hereinafter *CHRISTIANS AND JEWS*].

7. See, e.g., RONALD GRIGOR SUNY, *ARMENIA IN THE TWENTIETH CENTURY* 13 (1983).

8. Cf. VAHAKN N. DADRIAN, *WARRANT FOR GENOCIDE: KEY ELEMENTS OF TURKO-ARMENIAN CONFLICT* 3 (1999) ("[N]o analysis of the Armenian genocide can be adequate without grasping the origin, elements, evolution, and escalation of the Turko-Armenian conflict. In the final analysis the Armenian genocide is but a cataclysmic by-product of this . . . conflict.").

9. See SUNY, *supra* note 7, at 16.

10. For recent critiques of the classical model, see, for example, AN-NA'IM, *supra* note 4; TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM* (2004); Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in*

suggest that classical Islam represents the religion's only expression or its "true" essence. I simply describe what that model was, in the context of the Ottoman Empire, and in doing so I rely on a standard account. Finally, in short remarks like these, I must leave out many details. Even in outline, though, an understanding of the Tanzimat, and the classical Islamic legal regime it tried to replace, can illuminate the crisis that Ottoman Armenians endured at the start of the twentieth century.

* * *

Before the Tanzimat, the Ottoman state generally conformed to the classical model of Islamic government that had existed for centuries. People sometimes characterize that model as a theocracy, but that is not, strictly speaking, correct. In a theocracy, the clergy form the government, and in classical Islam the clergy did not rule.¹¹ Nonetheless, the classical state had a religious foundation and organized itself along religious lines. In classical thought, the Muslim community, the *umma*, was both a spiritual and political entity, the body of believers that lived, but also governed, by God's law.¹² The *umma*'s supreme leader, the caliph, had ultimate responsibility for ensuring that God's law was enforced.¹³

Muslims believe that God revealed His final law in the form of the Quran, a series of recitations delivered to the Prophet Mohammed, and the Sunna, the example of the Prophet's life.¹⁴ Together, these two sources contain the Sharia (in Turkish, *Şeriat*), the divine law to which Muslims must submit.¹⁵ The Quran and the Sunna often express the Sharia in general terms. During Islam's early centuries, though, in a process called *ijtihad*, legal scholars – the *ulama* (in Turkish, *ulema*), or "learned" – deduced from the Sharia complex bodies of jurisprudence, or *fiqh*, to guide daily life.¹⁶ Over time, various schools of *fiqh*, known as *madhabs*, formed in the Sunni world.¹⁷ The Ottoman Empire favored one such school, the Hanafi madhab,

Islamic Law, 21 CAN. J.L. & JURISPRUDENCE 5, 6–7 (2008). On Saudi Arabia, see NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 10, 92–102 (2008); FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA xiv (2000).

11. See MALISE RUTHVEN, ISLAM IN THE WORLD 142 (3d ed. 2006) (noting that "political and religious institutions remained distinct" in classical Islam); KNUT VIKØR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 185 (2005) (discussing division of labor between state and religious scholars in classical Islam).

12. See HANS KÜNG, ISLAM: PAST, PRESENT AND FUTURE 159 (John Bowden trans. 2007) ("The Islamic commonwealth is both a religious community and a political community."). For the definition of *umma*, see F.E. PETERS, ISLAM: A GUIDE FOR JEWS AND CHRISTIANS 5 (2003).

13. See FELDMAN, *supra* note 10, at 28; VIKØR, *supra* note 11, at 185.

14. VOGEL, *supra* note 10, at 3–4.

15. MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 40–41 (2008).

16. See *id.* at 40–42. For the definitions of *ulama* and *fiqh*, see PETERS, *supra* note 12, at 174.

17. See DAVID WAINES, AN INTRODUCTION TO ISLAM 65–71 (2d ed. 2003).

named for the scholar, Abu Hanifah, who founded it in the eighth century.¹⁸

The scope of classical fiqh was comprehensive, covering both worship (*ibadat*) and civil transactions (*mu'amalat*) – matters like contracts, torts, marriage, and inheritance.¹⁹ In principle, the development of fiqh ended in the tenth century, with the so-called “closing of the door of *ijtihad*.”²⁰ From that time on, the ulama were not to derive new rules, but “instead study the established legal manuals and write their commentaries.”²¹ Not all the ulama agreed with this limitation; today, in particular, a number of Muslim thinkers call for a new era of *ijtihad* to adapt fiqh to current conditions.²² Still, the classical view held that fiqh had achieved perfection in Islam’s early centuries and that innovation, or *bid’a*, was prohibited.²³

The caliph fulfilled his responsibility for enforcing Islamic law in several ways, the most important of which was maintaining a system of fiqh courts, staffed by judges known as *qadis*, whom the caliph chose from among the ulama.²⁴ Except when they received appointment as *qadis*, the ulama remained outside the government;²⁵ over time, a division of labor between them and the official courts became routine.²⁶ Faced with a difficult legal dispute, a *qadi* would refer the matter to a member of the ulama, known as a *mufti*, who would announce the relevant principle of fiqh in an advisory opinion called a *fatwa* (in Turkish, *fetva*).²⁷ The *qadi* would then determine how the *fatwa* applied to the facts of the case and issue a judgment.²⁸ Although a *qadi* did not have to follow a *mufti*’s advice, in practice *qadis* almost always complied.²⁹

Fiqh was not the only law that existed in classical Islam. People understood that practicalities might require a caliph to promulgate regulations for situations that fiqh did not anticipate.³⁰ Classical Islam

18. See *id.* at 66, 74.

19. See KAMALI, *supra* note 15, at 41–42.

20. *Id.* at 94.

21. JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 84 (3d ed. 1998).

22. For example, the Hanbali madhab has never accepted the concept of the closing of the door. MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 490 (3d ed. 2003). For a call for a new era of *ijtihad*, see Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 U. ST. THOMAS L.J. 341 (2004).

23. See ESPOSITO, *supra* note 21, at 84.

24. See VIKØR, *supra* note 11, at 187; see also *id.* at 172 (noting that “*qādīs* were always considered prominent members of the ‘*ulamā*”).

25. See *id.* at 143 (discussing position of *mufti*); *id.* at 187 (distinguishing between *qadis* and *muftis*).

26. See WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 89 (2005) (“common practice”).

27. See, e.g., VIKØR, *supra* note 11, at 8–9, 141; WAINES, *supra* note 17, at 86.

28. See VIKØR, *supra* note 11, at 8–9, 150; VOGEL, *supra* note 10, at 16–20 (contrasting roles of *qadi* and *mufti*).

29. HALLAQ, *supra* note 26, at 89.

30. See VOGEL, *supra* note 10, at 197; see also KAMALI, *supra* note 15, at 225 (explaining that *siyasa* “is generally seen as an instrument of flexibility and pragmatism . . . designed to serve

allowed the caliph to adopt such regulations as a matter of *siyasa* Sharia, or Sharia ““policy.””³¹ Over time, a parallel series of *siyasa* tribunals developed alongside the *fiqh* courts.³² One should not see the *siyasa* courts as an opposing legal system, however. As Knut Vikør explains, “[t]here was no concept that ‘the Sharī’a is not valid here.’”³³ In theory, *siyasa* regulations were subservient to *fiqh* and could only complement it or fill in its details; they could not contradict or override Sharia.³⁴ On this understanding, the ulama accepted *siyasa* regulations, viewing them “as a necessary basis for the political authority that was a prerequisite to the implementation of Shari’a.”³⁵

The Ottoman sultans, who claimed the office of caliph in the sixteenth century,³⁶ basically continued the classical legal system, with three important innovations, all in the direction of greater centralization. First, the sultans issued extensive compilations of *siyasa* regulations, which they called *kanuns*, in areas like administrative, tax, and criminal law.³⁷ The last such compilation, the *Kanunname-i cedit*, appeared in the late seventeenth century; it was still in force at the commencement of the nineteenth-century reform movement.³⁸ Second, the sultans combined the separate *fiqh* and *siyasa* tribunals into a single court system administered by the qadis.³⁹ Finally, the sultans incorporated the traditionally independent muftis into the bureaucracy.⁴⁰ High-ranking muftis became civil servants, appointed by the government on the basis of public examinations.⁴¹ The chief mufti in Istanbul, appointed by the sultan and superior to all the others, had the title of *shaykh al-islam* (in Turkish, *şeyhül-islam*).⁴²

Scholars have written volumes about classical Islamic law and government, and I lack space to do these subjects justice. One aspect is especially relevant here, however: the place of non-Muslims, and

the cause of justice and good government, especially when the rules of *Sharī’ah* fall short of addressing certain situations or developments.”).

31. Asifa Quraishi, *Interpreting the Qur’an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 72 (2006). The word *siyasa* can also be translated as ““administration”” and ““management””). *Id.*

32. *See* VIKØR, *supra* note 11, at 190.

33. *Id.*

34. *See* KAMALI, *supra* note 15, at 225; *see also* VIKØR, *supra* note 11, at 208 (discussing Ottoman *kanuns*).

35. AN NA’IM, *supra* note 4, at 191 (discussing Ottoman *kanuns*).

36. PETERS, *supra* note 12, at 147. On the technical distinction between caliph and sultan, *see id.* at 145–46.

37. *See* VIKØR, *supra* note 11, at 207.

38. *Id.* at 209.

39. *Id.* at 210; *see also* ANTONY BLACK, *THE HISTORY OF ISLAMIC POLITICAL THOUGHT* 212 (2001).

40. *See* JONATHAN P. BERKEY, *THE FORMATION OF ISLAM* 264 (2003).

41. VIKØR, *supra* note 11, at 212.

42. *Id.* at 213.

particularly Christians, in the Islamic state. Classical Islam distinguished between pagans, who had no right of permanent residence, and so-called “people of the book” (*ahl al-kitab*) – groups, like Christians and Jews, who had been the recipients of earlier, though from the Muslim perspective incomplete, revelation.⁴³ As people of the book, Christians could establish permanent residence in Muslim society. Specifically, they could make a notional contract with the umma – the contract was called a dhimma; the non-Muslims who were parties were called dhimmis – whereby the umma granted Christians protection in return for a promise to accept subordination.⁴⁴

The dhimma’s evolution is not entirely understood. A Quranic verse commands Muslims to fight the people of the book “until they pay” the *jizya* (in Turkish, *ciziyeye*), a poll tax I will describe in a moment, and accept a humbled status;⁴⁵ some commentators also point to the so-called “Pact of Umar,” a purported seventh-century agreement between an early caliph and the Christians of Syria, though most scholars believe the Pact to be a later “invention.”⁴⁶ Some scholars maintain that the early caliphs adapted Byzantine and Persian jurisdictional arrangements.⁴⁷ Whatever the history, the contours of the dhimma, and the status of the dhimmis, were systematized as part of fiqh in the eighth and ninth centuries.⁴⁸ In the Ottoman era, dhimmis were further categorized into *millet*s, or nations – the Armenian Apostolic millet, the Greek Orthodox millet, the Jewish millet, and so on. Supposedly, the millet system dated from the time of Mehmed the Conqueror in the fifteenth century, though scholars believe it actually developed later and was projected backwards in time.⁴⁹

43. See ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS* 151–52 (4th ed. 2007). The category eventually extended to groups like Zoroastrians and Hindus as well. WAINES, *supra* note 17, at 52.

44. See Braude & Lewis, *supra* note 6, at 5.

45. “Fight against such of those who have been given the Scripture as believe not in Allah nor the Last Day, and forbid not that which Allah hath forbidden by His messenger, and follow not the religion of truth, until they pay the tribute readily, being brought low.” THE MEANING OF THE GLORIOUS KORAN IX:29, at 195 (Marmaduke Pickthall trans. 1930). For a translation using the phrases “People of the Book” and “*Jizyah*,” see THE MEANING OF THE HOLY QUR’ĀN 9:29, at 445 (‘Abdullah Yūsuf ‘Alī trans.) (10th ed. 1999).

46. Robert Hoyland, *Introduction: Muslims and Others*, in MUSLIMS AND OTHERS IN EARLY ISLAMIC SOCIETY xiii, xvi (Robert Hoyland ed. 2004) [hereinafter MUSLIMS AND OTHERS]; see also C.E. Bosworth, *The Concept of Dhimma in Early Islam*, in 1 CHRISTIANS AND JEWS, *supra* note 6, at 37, 45–47.

47. See, e.g., Néophyte Edelby, *The Legislative Autonomy of Christians in the Islamic World*, in MUSLIMS AND OTHERS, *supra* note 46, at 37, 43–44; Antoine Fattal, *How Dhimmis Were Judged in the Islamic World*, in MUSLIMS AND OTHERS, *supra* note 46, at 83, 83.

48. Françoise Micheau, *Eastern Christianities (eleventh to fourteenth century): Copts, Melkites, Nestorians and Jacobites*, in 5 THE CAMBRIDGE HISTORY OF CHRISTIANITY 373, 380 (Michael Angold ed. 2006) [hereinafter CAMBRIDGE HISTORY].

49. See Benjamin Braude, *Foundation Myths of the Millet System*, in 1 CHRISTIANS AND JEWS, *supra* note 6, at 69, 73; see also BERKEY, *supra* note 40, at 266.

As a formal matter, the dhimma was fairly clear. For its part, the umma granted dhimmis the right to protection, property, some religious freedom, and some communal autonomy.⁵⁰ Millets could govern their internal affairs, subject to general Ottoman oversight.⁵¹ In this regard, millet leaders (*millet-başı*) had considerable prerogatives.⁵² For example, the Armenian Patriarch of Constantinople, whose appointment required the Sultan's confirmation, had authority over "his *millet's* spiritual administration and officials, public instruction, and charitable and religious institutions."⁵³ The Patriarch even operated a prison for disciplining millet members, except in cases "involving 'public security and crime.'"⁵⁴ Millets also had a degree of legal autonomy. Fiqh allowed dhimmi law to govern "matters of a communal nature such as marriage, divorce, and inheritance."⁵⁵ Communal courts had jurisdiction of disputes about such matters between dhimmis, though not disputes between dhimmis and Muslims.⁵⁶

In return for these concessions, dhimmis theoretically agreed to pay a heavy poll tax called the *jizya* – which the millet-*başı* collected on the sultan's behalf – and to accept a second-class status.⁵⁷ For example, dhimmis had to wear identifying clothing, even in bathhouses.⁵⁸ They could not serve in the military or hold high public office.⁵⁹ They could not "ride horses or carry arms."⁶⁰ They could not build new places of worship, but only repair existing ones, which could not be higher than mosques.⁶¹ They could not attract attention during religious ceremonies.⁶² Although Muslims could convert dhimmis, dhimmis could not attempt to convert Muslims.⁶³ (Fiqh made apostasy from Islam a capital offense, which would have limited conversions in any event).⁶⁴ In general, dhimmis had to adopt an attitude of quiescence and submission. As the Quranic verse suggests,

50. See Michaeu, *supra* note 48, at 380.

51. See AN-NA'IM, *supra* note 4, at 187.

52. See Kamel S. Abu Jaber, *The Millet System in the Nineteenth-Century Ottoman Empire*, 57 MUSLIM WORLD 212, 215 (1967) (noting that the Greek Patriarch had "the rank of a vizier and . . . a guard of Janissaries to attend to him").

53. VARTAN ARTINIAN, *THE ARMENIAN CONSTITUTIONAL SYSTEM IN THE OTTOMAN EMPIRE 1839-1863: A STUDY OF ITS HISTORICAL DEVELOPMENT* 15 (1988).

54. *Id.*

55. Kemal Çiçek, *Interpreters of the Court in the Ottoman Empire As Seen from the Sharia Court Records of Cyprus*, 9 ISLAMIC L. & SOC'Y 1, 2 (2001-2002). For an exhaustive discussion of dhimmis' legal autonomy under classical fiqh, see Edelby, *supra* note 47, at 53–82.

56. See Çiçek, *supra* note 55, at 1–2.

57. On the collection of taxes, see, for example, Abu Jaber, *supra* note 52, at 215–16.

58. Braude & Lewis, *supra* note 6, at 5–6.

59. AN-NA'IM, *supra* note 4, at 187.

60. *Id.*

61. Braude & Lewis, *supra* note 6, at 5.

62. *Id.* at 6; PETERS, *supra* note 12, at 195.

63. See BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 149 (1998).

64. See *id.*; Davison, *supra* note 5, at 845; see also MAYER, *supra* note 43, at 167 (discussing "traditional notion that apostates are to be executed").

humiliation was central to the dhimma, a fact both sides understood.⁶⁵ In the Muslim conception, the dhimmis' social inferiority was the price for obstinacy, for their stubborn refusal to acknowledge the superiority of the revelation to Muhammad.⁶⁶ Indeed, the harshness of the restrictions undoubtedly served to create, from the Muslim perspective, a salutary incentive for dhimmis to convert, as many did, over the course of centuries.⁶⁷

Inferiority pervaded the legal system as well. For example, in the qadi courts, the testimony of a Christian was not admissible in any suit in which a Muslim was a party.⁶⁸ The justification was straightforward: How could one trust a person who had refused to accept Islam?⁶⁹ “[T]he word of a dishonest Muslim,” one Hanafi jurist explained, “is more valuable than that of an honest *dhimmī*.”⁷⁰ The opposite restriction did not exist, however: Muslims could testify against non-Muslims.⁷¹

What about the autonomy granted millets? In practice, the concession was not always so valuable. Millet-bašis were “Ottoman official[s],” the “instrument[s] and auxiliar[ies] of the Turkish bureaucracy.”⁷² Because the sultan had to confirm millet-bašis, and because they customarily paid a sizable sum on their appointment, corruption pervaded the selection process and weakened morale.⁷³ Although communal courts could decide actions between millet members, they lacked enforcement authority.⁷⁴ Moreover, because qadi courts “often provided rights to Christians . . . that were unavailable in their own courts,” particularly respecting marriage and inheritance,⁷⁵ many Christians chose to litigate intra-communal disputes in

65. See ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION 89 (1990) (discussing *jizya*).

66. Cf. Braude & Lewis, *supra* note 6, at 4 (“From the point of view of the Muslim, unbelievers were people to whom the truth had been offered in the final and perfect form of God’s revelation, which they had willfully and foolishly refused.”).

67. See PATRICIA CRONE, GOD’S RULE: GOVERNMENT AND ISLAM 372–73 (2004); cf. Elizabeth A. Zachariadou, *The Great Church in captivity 1453–1586*, in 5 CAMBRIDGE HISTORY, *supra* note 48, at 169, 181 (discussing “attractions of conversion to Islam,” including avoidance of the *jizya* and other “humiliations of *dhimmī* status”).

68. Bosworth, *supra* note 46, at 49.

69. See *id.*

70. *Id.*; see also Fattal, *supra* note 47, at 98.

71. Bosworth, *supra* note 46, at 49.

72. See Aristides Papadakis, *The Historical Tradition of Church-State Relations under Orthodoxy*, in 1 EASTERN CHRISTIANITY AND POLITICS IN THE TWENTIETH CENTURY 37, 47 (Pedro Ramet ed. 1988) (discussing Greek patriarch).

73. See *id.* at 48; see also ARTINIAN, *supra* note 53, at 15–20 (discussing Armenian Patriarchate); STEVEN RUNCIMAN, THE ORTHODOX CHURCHES AND THE SECULAR STATE 32–33 (1971) (discussing Greek Patriarchate).

74. See Najwa Al-Qattan, *Dhimmīs in the Muslim Court: Legal Autonomy and Religious Discrimination*, 31 INT’L J. MIDDLE EAST STUD. 429, 429, 433 (1999).

75. DONALD QUATAERT, THE OTTOMAN EMPIRE, 1700–1922, at 178 (2d ed. 2005); see also AN-NA'IM, *supra* note 4, at 190.

the qadi courts.⁷⁶ Christian leaders worried that this exit option weakened communal authority – the medieval Armenian monk Mkhitar Gosh complained that the qadi courts were attracting many of his fellow Christians, for example⁷⁷ – and inveighed against it, but without much success. In fact, as a Christian court could not adjudicate a dispute against a Muslim, a Christian litigant with a losing case had a real incentive to convert to Islam to avoid process; this was apparently not uncommon, even for high-ranking clergy.⁷⁸

Like any contract, the dhimma could be rendered invalid by non-performance. Dhimmi could breach the contract, and forgo its protection, by disregarding the restrictions it placed on them and affecting an air of equality.⁷⁹ In fact, most episodes of violence against dhimmi communities were occasioned by a sense that dhimmis had become uppity, that they had forgotten their place and grown insolent.⁸⁰ Conspicuous displays of wealth, for example, could be perceived as an insult to Islam; violent retribution and plunder could easily follow.⁸¹ Persecution could also result from a belief that dhimmis were cooperating with foreign interests, or from a sultan's need for a target for popular unrest.⁸² Finally, persecution often occurred during "periods of strict and militant Islam," which sought to restore an "authentic" version of the faith.⁸³

All this is not to say that life for dhimmis involved constant strife. Their situation varied from time to time and place to place.⁸⁴ Although the umma always collected the *jizya*, it did not always enforce other dhimmi restrictions,⁸⁵ and individual dhimmis could rise in Ottoman society and even attain high office.⁸⁶ At the time of the Tanzimat, for example, an Armenian was director of the imperial mint.⁸⁷ Muslims and dhimmis interacted socially. They often lived in mixed neighborhoods and joined the same guilds.⁸⁸ In certain periods and places, dhimmi communities found it possible to accumulate wealth and even favor from the sultan. Armenians, in particular, "for a long time . . . managed to establish a symbiotic relationship" with Turkish Muslims; the Ottoman state referred to

76. See Al-Qattan, *supra* note 74, at 430; Çiçek, *supra* note 56, at 2.

77. See THE LAWCODE (*DATASTANAGIRK*) OF MXIT'AR GOŞ 52, 102 (Robert W. Thomson trans. 2000).

78. See Bosworth, *supra* note 46, at 49.

79. See Braude & Lewis, *supra* note 6, at 9.

80. See *id.* at 6–7.

81. *Id.* at 7.

82. *Id.* at 7–8.

83. *Id.* at 8.

84. See PETERS, *supra* note 12, at 195.

85. Braude & Lewis, *supra* note 6, at 6.

86. See AN-NA'IM, *supra* note 4, at 187.

87. RODERIC H. DAVISON, REFORM IN THE OTTOMAN EMPIRE, 1856–1876, at 93 (1963).

88. See QUATAERT, *supra* note 75, at 179–81, 183.

Armenians as “‘the loyal nation’ (*milleti sadıka*).”⁸⁹ Periodically, though, dhimmis suffered brutal repression, and a sense of inferiority and insecurity always existed, even in the best of times.⁹⁰ Indeed, as I have explained, inferiority and insecurity were the essence of the arrangement.

Such were the outlines of relations between the umma and dhimmis throughout most of Ottoman history. The Tanzimat dramatically altered these relations, at least in theory. The word Tanzimat means “reorganization,”⁹¹ and the reforms, initiated in 1839 with the *Gülhane Hatt-i Şerifi* – “‘the Noble Edict of the Rose Garden,’” named for its place of announcement – and continuing for roughly three-and-a-half decades, sought to modernize the Empire and arrest its economic and military decline.⁹² In part, the Tanzimat resulted from a genuine desire for reform on the part of some Ottoman leaders – the *Tanzimatçis*, or “men of the Tanzimat” – who understood that dramatic administrative, economic, and social changes were necessary if the Empire were to survive.⁹³ In part, the Tanzimat resulted from outside pressure. European diplomats pushed the Empire to adopt reforms that would improve the status of dhimmis, for example.⁹⁴ The Europeans had mixed motives for doing so: they desired both to relieve the dhimmis’ plight and, in addition, to identify client groups that could serve as proxies for European influence within the Empire.⁹⁵

The reforms addressed many aspects of Ottoman government: “the army, the central bureaucracy, the provincial administration, taxation, education, and communication.”⁹⁶ Importantly, for our purposes, they also addressed law and the judicial system.⁹⁷ The government adopted new commercial and penal codes based on European models.⁹⁸ It established new secular courts.⁹⁹ At first, these courts consisted of mixed tribunals –

89. Vahakn N. Dadrian, *The Armenian Question and the Wartime Fate of the Armenians As Documented By the Officials of the Ottoman Empire’s World War I Allies: Germany and Austria-Hungary*, 34 INT’L J. MIDDLE EAST STUD. 59, 61 (2002).

90. Cf. Abu Jaber, *supra* note 52, at 216 (noting that dhimmi “privileges were dependent on the whims of the Sultan” and “could be withdrawn at any time”).

91. AN-NA’IM, *supra* note 4, at 193.

92. See ZÜRCHER, *supra* note 4, at 52–53; see also DAVISON, *supra* note 87, at 5–6. Zürcher dates the Tanzimat from 1839–1871. ZÜRCHER, *supra* note 4, at 58. Others date the period from 1839 to the adoption of the Ottoman Constitution in 1876. See Davison, *supra* note 5, at 848. In any event, one can consider the Tanzimat period over when Sultan Abdul Hamid II suspended the constitution in 1878. See *infra* text accompanying note 117.

93. DAVISON, *supra* note 87, at 5–6, 37; see also Davison, *supra* note 5, at 849–52.

94. See ZÜRCHER, *supra* note 4, at 58–59.

95. See *id.* (discussing European motives).

96. *Id.* at 59.

97. For an overview of the Tanzimat reforms, see *id.* at 58–69.

98. *Id.* at 64; see also Paul J. Magnarella, *East Meets West: The Reception of West European Law in the Ottoman Empire and the Modern Turkish Republic*, 2 J. INT’L L. & PRAC. 281, 284 (1993).

99. ZÜRCHER, *supra* note 4, at 64.

containing European, Ottoman Muslim, and dhimmi representatives – that heard commercial disputes between Ottoman and foreign traders.¹⁰⁰ Eventually, the government established a series of statutory, or *nizamiye*, courts to “preside[] over civil and criminal cases involving Muslim and non-Muslim.”¹⁰¹ For the first time, non-Muslim witnesses were allowed to testify against Muslims.¹⁰² The Tanzimat also occasioned the drafting of the famous *Mecelle*, a statute that codified aspects of Hanafi commercial fiqh into positive law.¹⁰³ Notably, fiqh remained operative even under the *Mecelle*; muftis and qadis “used the *Mecelle* as a basis for their verdicts, but could supplement it with other evidence from their understanding of classical Hanafi law whenever they found this necessary.”¹⁰⁴ Fiqh also continued to govern family matters.¹⁰⁵

One aspect of the Tanzimat is especially important for us this morning. The Tanzimat purported to grant dhimmis legal equality.¹⁰⁶ This principle was proclaimed in the Hatt of 1839 and in a more comprehensive edict, the *Hatt-i Humayun*, in 1856.¹⁰⁷ I have already noted how the testimony of non-Muslims became admissible in the newly-established *nizamiye* courts. Equality also extended to education, civil service, taxation, and military service.¹⁰⁸ Apostasy from Islam was no longer a capital offense.¹⁰⁹ The 1856 Hatt included a general anti-discrimination provision, “forbidding ‘every distinction or designation tending to make any class whatever of the subjects of [the] Empire inferior to any other class, on account of their religion, language, or race.’”¹¹⁰ Thus, as Ottomanist Roderic Davison observed, “[e]ven name-calling was forbidden in the name of equality.”¹¹¹

These were progressive reforms, welcomed by Ottoman liberals and by many dhimmis, including Armenians (the *millet-baŝis*, who sensed that legal equality would erode their official position, were not always so enthusiastic).¹¹² And yet, as contemporary observers recognized, the

100. *See id.*; *see also* NIZAYI BERKES, *THE DEVELOPMENT OF SECULARISM IN TURKEY* 161–62 (1964).

101. QUATAERT, *supra* note 75, at 178. For the translation of *nizamiye* as “statutory,” *see* BERKES, *supra* note 100, at 165.

102. *See* BERKES, *supra* note 100, at 162.

103. *See* VIKØR, *supra* note 11, at 230.

104. *Id.* at 231.

105. *Id.* at 230.

106. *See* QUATAERT, *supra* note 75, at 178.

107. Davison, *supra* note 5, at 847.

108. *Id.*

109. ZÜRCHER, *supra* note 4, at 64.

110. Davison, *supra* note 5, at 847.

111. *Id.*

112. On the overall reaction of Armenians to the Tanzimat reforms, *see* DADRIAN, *supra* note 8, at 26. On the resistance of the *millet-baŝis*, *see* Abu Jaber, *supra* note 52, at 221; Davison, *supra* note 5, at 854.

reforms failed in their execution.¹¹³ Particularly in the Anatolian provinces, where most Armenians lived, the Tanzimat had little effect.¹¹⁴ Armenians and other Christians there remained subject to daily depredations and indignities that the government did little to address, and the same social inequalities continued. Here, again, is Davison, describing the situation:

Though by 1860 the condition of the Christians . . . had improved considerably over what it had been only a few years before, they could still complain legitimately about unequal treatment. They still protested the general prohibition of bells on their churches, the frequent rejection of their testimony in Turkish courts, occasional rapes of Christian girls or forced conversions, and other sorts of personal mistreatment. The Armenians of eastern Anatolia had strong complaints about the marauding habits of armed Kurdish bands. There were occasional fanatical outbursts against Christians by local Muslim groups. There was still no equality in opportunity to hold public office.¹¹⁵

By the late 1870s, the Tanzimat had run its course. In 1876, the Empire had adopted a constitution, modeled loosely on the Belgian, which continued to proclaim equality for non-Muslims.¹¹⁶ Less than two years later, however, the new sultan, Abdul Hamid II, suspended the constitution and prorogued the Ottoman parliament.¹¹⁷ He ruled as an absolute monarch for the next 30 years, until the Young Turk revolution overthrew him in 1908.¹¹⁸ Under Abdul Hamid, an anti-Western, anti-secular reaction set in.¹¹⁹ Conservatives forced the dismissal of the committee responsible for the Mecelle and prevented any further codification of mu'amalat rules.¹²⁰ Faced with political, economic, and military chaos, Abdul Hamid "appealed to Muslim solidarity" – to what was known as pan-Islamism – to cement his authority.¹²¹ Indeed, an "outward religiosity" was the "most conspicuous feature" of his reign.¹²² "Perhaps in no other period of Turkish history," Niyazi Berkes writes, "was there . . . so frequent use of the word *şariat*."¹²³ Secularization did not resume in earnest until after World War I, with the

113. See, e.g., DADRIAN, *supra* note 8, at 16–17 (discussing contemporary assessments of British diplomats).

114. See Astourian, *supra* note 3, at 122–23.

115. DAVISON, *supra* note 87, at 115–16.

116. See ZÜRCHER, *supra* note 4, at 78; Davison, *supra* note 5, at 848.

117. See ZÜRCHER, *supra* note 4, at 80.

118. See FELDMAN, *supra* note 10, at 76–78.

119. See BERKES, *supra* note 100, at 261.

120. *Id.* at 172.

121. ZÜRCHER, *supra* note 4, at 83; see also BERKES, *supra* note 100, at 261–70 (discussing "pan-Islamism" of Hamidian period).

122. BERKES, *supra* note 100, at 259.

123. *Id.*

commencement of the Kemalist reforms.¹²⁴

Scholars offer several explanations for the Tanzimat's failure. Some argue that the Ottoman government adopted the reforms only as a pretense to placate European opinion and never really intended to effectuate them,¹²⁵ or that Turkish public opinion resented changes that had resulted from foreign pressure.¹²⁶ Perhaps the reformist impulse simply was unequal to the severe crisis of the 1870s. I would like to focus on a different explanation, however, one that follows from what I have just said about the pan-Islamism of Abdul Hamid's reign. The Tanzimat failed largely because its proposal of equality for non-Muslims subverted the classical Islamic structure that had existed for centuries.¹²⁷ Equality represented *bid'a* – the innovation that was, in the classical mind, deeply suspect.¹²⁸ In Dadrian's words, the Tanzimat's "reforms were a repudiation of fundamental socio-religious traditions deeply enmeshed in the Turkish psyche, and institutionalized throughout the Empire."¹²⁹ In short, equality for non-Muslims sparked a religious backlash.¹³⁰

Evidence of recalcitrance appears in contemporary sources. After the Hatt of 1856, for example, Cevdet Paşa, "a high government official and acute observer of the Ottoman scene," noted that the edict's principle of equality for *dhimmi*s "had a very adverse effect on the Muslims."¹³¹ "Many," he wrote, "began to grumble: 'Today we have lost our sacred national rights, won by the blood of our fathers and forefathers. At a time when the Islamic *millet* was the ruling *millet*, it was deprived of this sacred right. This is a day of weeping and mourning for the people of Islam.'¹³² The edict's anti-defamation clause also caused much bitterness. One popular complaint used the Turkish word for "infidel" – a word "with emotional and quite uncomplimentary overtones"¹³³ – to describe a world turned upside down: "Now we can't call a *gâvur* a *gâvur*."¹³⁴ Muslim soldiers did not wish to serve under Christian officers.¹³⁵ And Muslim

124. On the Kemalist reforms, see ZÜRCHER, *supra* note 4, at 180–81.

125. Davison, *supra* note 5, at 848–49 (discussing this explanation).

126. *Id.* at 857.

127. See DAVISON, *supra* note 87, at 79 ("The proposed reforms of the Tanzimat period . . . represented a threat to the established order, to the Muslim way, and to the integrity and cohesiveness of Turkish society.").

128. Nawaf A. Salam, *The Emergence of Citizenship in Islamdom*, 12 ARAB L.Q. 125, 140 (1997).

129. DADRAN, *supra* note 8, at 20.

130. See BERKES, *supra* note 100, at 267 ("Pan-Islamic ideas were the culmination . . . of a reaction against the Tanzimat doctrine of fusing Muslims and non-Muslims into an Ottoman nation.").

131. Braude & Lewis, *supra* note 6, at 30.

132. *Id.*

133. Davison, *supra* note 5, at 855.

134. *Id.* at 859; see also Abu Jaber, *supra* note 52, at 221–22 (discussing this saying).

135. See Davison, *supra* note 5, at 859.

opinion would not accept the government's decree that Muslims and Christians were now equally free to change religions. Apostasy from Islam could still "easily" provoke "public fury."¹³⁶

For good illustrations of the resentment equality caused, one can examine the retrospective assessments of some leaders of the Young Turk, or *Ittihadist*, regime that eventually succeeded Abdul Hamid.¹³⁷ For example, at a meeting in 1910, Mehmed Talât, the movement's "foremost leader," explained why the Tanzimat had been bound to fail.¹³⁸ Like most *Ittihadists*, Talât was not religious.¹³⁹ He understood the power that classical Islam held in Ottoman society, though. A British diplomat reports his words at the meeting:

You are aware that by the terms of the Constitution equality of Mussulman and Ghiaur was affirmed but you one and all know and feel that this is an unrealizable ideal. The Sheriat, our whole past history and the sentiments of hundreds of thousands of Mussulmans and even the sentiments of the Ghiaurs themselves . . . present an impenetrable barrier to the establishment of real equality . . . There can therefore be no question of equality until we have succeeded in our task of Ottomanizing the Empire.¹⁴⁰

Similarly, the Young Turks' "leading ideologue," Ziya Gökalp, wrote an essay, "The Two Mistakes of Tanzimat," that expressed much the same sentiment.¹⁴¹ Gökalp excoriated the edicts of 1839 and 1856 as "serious mistakes," declaring that "Islam mandates domination"¹⁴² and asserting that dhimmis would have to convert to Islam if they desired legal equality.¹⁴³

In the classical Islamic worldview, then, legal equality for Christians represented a major breach of the dhimma. The enormity of the transgression was heightened by the fact that the dhimmis had sought the support of European powers to achieve this equality. Throughout history, recall, attempts by dhimmis to rise above their station and cooperate with foreigners occasioned violent retribution; the Tanzimat fit the familiar pattern.¹⁴⁴ As early as 1856, one of the Tanzimatçis, Mustafa Reşid, worried about "the possibility of 'a great slaughter' . . . in connection with

136. *Id.* at 860.

137. On the Young Turk movement, see ZÜRCHER, *supra* note 4, at 90–94.

138. Dadrian, *supra* note 89, at 62.

139. See VAHAKN N. DADRIAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* 5 (3d rev. ed. 1997) (discussing *Ittihadist* leadership).

140. *Id.* at 180 (editorial brackets omitted).

141. *Id.*; see also AN-NA'IM, *supra* note 4, at 195 (characterizing Gökalp as "the leading ideologue of the Young Turks").

142. DADRIAN, *supra* note 139, at 180.

143. Dadrian, *supra* note 89, at 62.

144. See DADRIAN, *supra* note 139, at 147.

efforts to establish equality through the enactment of public laws.”¹⁴⁵ The great slaughter came a generation later. Disappointed by the failure of the Tanzimat to improve their bleak situation, particularly with respect to oppression by local Kurds, some Armenians in Anatolia refused to pay the customary taxes to Kurdish *beys* and began to organize in self-defense.¹⁴⁶ In response, Abdul Hamid sided with the Muslim Kurds.¹⁴⁷ He ordered large-scale massacres, carried out by Turkish regulars and Kurdish volunteers known as the *Hamidiye*, which took the lives of one- to two-hundred thousand Armenians between 1894 and 1896.¹⁴⁸ Syrian Orthodox Christians suffered greatly as well; approximately 25,000 of them lost their lives, victims of the general anti-Christian violence in the region.¹⁴⁹

I cannot discuss the Hamidian massacres in depth here. I would like to make two points about them, however. First, as the experience of Syrian Christians confirms, the massacres had an unmistakable religious component.¹⁵⁰ In the understanding of many Muslims, the dhimmis’ assertion of legal equality had constituted a betrayal of the religious and social order that justified a violent state response. Here, for example, is the report of another British diplomat, the Chief Dragoman, or interpreter, at the British Embassy, who relied on information from local Muslim sources, concerning a massacre of Armenians in Urfa in 1895:

[The perpetrators] are guided in their general action by the prescriptions of the Sheri law. That law prescribes that if the “*rayah*” [subject] Christian attempts, by having recourse to foreign powers, to overstep the limits of privileges allowed to them [sic] by their Mussulman masters, and free themselves from their bondage, their lives and property are to be forfeited, and are at the mercy of the Mussulmans. To the Turkish mind the Armenians had tried to overstep those limits by appealing to foreign powers, especially England. They, therefore, considered it their religious duty and a righteous thing to destroy and seize the lives and property of the Armenians¹⁵¹

These sentiments fit the official pan-Islamism of Abdul Hamid’s era. “While foreign observers and members of the Christian communities saw it

145. *Id.* For more on Resid, see *id.* at 33–34; DAVISON, *supra* note 87, at 37; ZÜRCHER, *supra* note 4, at 364.

146. See RONALD GRIGOR SUNY, *LOOKING TOWARD ARARAT: ARMENIA IN MODERN HISTORY* 105 (1993).

147. *Id.*

148. See *id.*; see also Astourian, *supra* note 3, at 124–25.

149. See Anthony O’Mahony, *Syriac Christianity in the modern Middle East*, in 5 *CAMBRIDGE HISTORY*, *supra* note 48, at 511, 512.

150. See DADRIAN, *supra* note 139, at 147–51 (discussing religious component of Hamidian massacres).

151. *Id.* at 147.

as an atavistic return to fanaticism,” Erik Zürcher writes, Abdul Hamid’s “appeal to Islam did strike a chord with Muslims inside and outside the empire, who felt threatened by European imperialism and by the privileged position of the Christians.”¹⁵²

Second, the failure of the Tanzimat had an effect on Armenian aspirations. Most Armenians, recall, had greeted the Tanzimat enthusiastically.¹⁵³ After the Hamidian massacres, however, it was clear that the Ottoman state was not prepared to grant real equality to them or other Christians.¹⁵⁴ The large majority of Armenians – particularly in urban centers, but in Anatolia as well – resigned themselves to the status quo, deciding, no doubt, that prudence required them to accept their lot.¹⁵⁵ A small number, though, in frustration began to organize themselves into revolutionary cells.¹⁵⁶ The revolutionaries, who were “always a tiny minority among Armenians,”¹⁵⁷ occasioned increasingly brutal repression by the government, which in turn provoked more resistance, a “cycle of violence,” Ronald Suny writes, that “produced more and more victims.”¹⁵⁸ Suny describes how the cycle ended:

Finally, strategic considerations motivated the Turkish government to end the perceived Armenian threat to their northeastern frontier. During World War I, faced with the Russian Army, the Young Turks decided to disarm, uproot, transport, and eliminate the Armenians in eastern Anatolia. This policy was equivalent to the murder of a people, to genocide, and at least 600,000 to 1,500,000 Armenians perished in the death marches, executions and battles of 1915.¹⁵⁹

* * *

I will close by returning to Mustafa Reşid, the Ottoman official who worried that granting legal equality to non-Muslims might lead to a great slaughter.¹⁶⁰ Despite being one of the Tanzimatçis, Reşid seems to have had serious doubts about the project. In a memorandum he wrote for the sultan after adoption of the 1856 Hatt-i Humayun, Reşid explained that, in the

152. ZÜRCHER, *supra* note 4, at 83.

153. *See supra* text accompanying note 112.

154. *See* SUNY, *supra* note 7, at 16.

155. *See* SUNY, *supra* note 146, at 105; *see also* QUATAERT, *supra* note 75, at 191 (noting that “the overwhelming majority” of Armenians did not support calls for a separate state but “continued to opt for the Ottoman system”).

156. SUNY, *supra* note 7, at 16.

157. SUNY, *supra* note 146, at 105.

158. SUNY, *supra* note 7, at 16–17.

159. *Id.* at 17. The literature on the Armenian Genocide is voluminous and growing. For a brief but excellent introduction to the events of the Genocide, *see* SUNY, *supra* note 146, at 106–15.

160. *See supra* text accompanying note 145.

public proclamation of the edict, it had been necessary to soft-pedal its true aims.¹⁶¹ One had to avoid alarming Muslims, who could not be expected to welcome the bid'a the Tanzimat represented.¹⁶² In the memorandum, Reşid questioned "whether a six-hundred-year-old empire could transform its inner character into something 'entirely repugnant and contrary'" by means of public law.¹⁶³ Another Tanzimat architect, Ali Paşa, similarly tried to explain to skeptics why the reforms seemed to lack effect. "[B]ut in what country in the world," he asked, "ha[s] it been found practicable to efface in a day the effects of the habits and traditions of ages by a simple change of the law or in the disposition of the Government?"¹⁶⁴

Scholars disagree whether these remarks reflect duplicity or genuine frustration.¹⁶⁵ Whether or not they sincerely desired equality for non-Muslims, though, Reşid and Ali were making a powerful point. As the American legal historian Grant Gilmore famously remarked in another context, law reflects, but does not determine, a society's values.¹⁶⁶ Law that does not reflect the values of its society is bound to fail. If the conflict between law and values is great, and touches a society's core beliefs, significant disorder, including violence against vulnerable communities, can easily occur. By granting dhimmis equality, the Tanzimat completely altered the relationship that had existed between Muslims and non-Muslims for centuries. In erasing the identity of Muslims as the ruling millet, it opened a huge gulf between Ottoman law and Ottoman society's basic values. In retrospect, its failure seems to have been inevitable. The failure of the Tanzimat, and the violent reaction it occasioned, forms a major part of the background to the massacres of the 1890s and the Genocide of 1915.

161. See DADRIAN, *supra* note 139, at 33.

162. *See id.*

163. *Id.*

164. *Id.*

165. Compare *id.* at 32–34 (arguing that Ottoman leaders were engaged in "double-talk" meant to deceive European opinion), with Davison, *supra* note 5, at 848–53 (arguing that the Tanzimat architects genuinely desired reform).

166. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110 (1977).