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A Comment on: "Foreign Law Between "Grand Hazard" and Great Irritation: The Bulgarian Experience After 1878" by Jani Kirov.

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The Ottoman Roots of Bulgarian Legal Experience: A Comment on Jani Kirov, *Foreign Law Between "Grand Hazard" and Great Irritation: The Bulgarian Experience After 1878*

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Negation of their imperial background is a salient feature of the autobiographies of all the nation-states that succeeded the Ottoman Empire in the Balkans and the Middle East, especially during the earlier decades of nation formation.[1] For many years, the official narratives of the post-Ottoman countries presented the Ottoman state as an alien, oppressive regime that had stood in the way of an allegedly primordial development of the nation. In these historical narratives shaped by the powerful spirit of romantic nationalism, the Ottoman centuries are often flattened and reduced to a mere disruption of an otherwise organic progression of the nation along the deterministic path from its "birth" in some mythological ancient past, then stagnation under the Ottoman "yoke," to eventual resurrection in the form of the nation-state. The amazing success of national elites in producing and indoctrinating official historical narratives is evident from the durability of these narratives. Two or three generations had to elapse before Greek, Turkish, Bulgarian, and Israeli historians, to varying degree, could question the historical validity of national narrations of the Ottoman pasts and offer alternative histories of their homelands. Nearly half a century of research on Ottoman history has taught us how fictitious nationalist narratives can be. At this point in time, however,

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1 DONALD QUATAERT, THE OTTOMAN EMPIRE, 1700-1922, at 196 (2005); Ehud R. Toledano, *Forgetting Egypt's Ottoman Past*, *in* 1 CULTURAL HORIZONS: A FESTSCHRIFT IN HONOR OF TALAT S. HALMAN 150 (Jayne L. Warner ed., 2001).

there can be no question as to the remarkable scope of the Ottoman imprint on the cultures and social structures of the Middle East and the Balkans.

As was the case with other successor states of the Ottoman Empire, Bulgaria's denial of its Ottoman legacy extended into the socio-legal sphere as much as it included the cultural sphere (evident in the realms of language, architecture, clothing, food, and so forth). In 1894 the Bulgarian jurist Dimităr Marinov eagerly invested time and energy searching for Bulgarian customary law as a starting point for envisioning a new Bulgarian legal regime. Jani Kirov identifies the nationalist motivations of Marinov's endeavor:

> Thus the study of customary law played much the same role as the study of national history, language, and literature: in this way one became conscious of one's own identity and culture, whose distinctiveness often seemed to be confirmed by the comparison with the "others," be their image positive or negative.[2]

While Kirov rightly equates the search for customary law with the attempt to narrate the nation, he stops short of situating these early representations of the law in the specific nationalist discourse about the Ottoman past. In other words, Marinov's study of customary law was not simply a matter of comparison with "the others." It was a matter of negating the Ottoman past, whose image could not be but negative. In his article, Kirov offers an important analysis of Bulgarian socio-legal experiences after the foundation of the Bulgarian state in 1878. The nature of the transition from an imperial political and legal setting to a nationalist one in the Middle East and the Balkans remains a gap in the histories of these regions. Kirov's discussion is therefore a most welcome contribution. Kirov describes an uneasy process of legal transfer from Western law to Bulgaria during the first decades after the foundation of Bulgaria in 1878. This process, according to the author, was characterized by "the persistence of traditional structures and their irritation through the transfer of foreign law," as well as the pervasiveness of customary law. In the present Comment, I endeavor to add to the discussion a more critical reading of Bulgarian national representations of the Ottoman socio-legal past, and subsequently single out the Ottoman *Tanzimat* as the critical point of departure for the process of legal transfer in the region.

Marinov offered his own contribution to the romantic search for the "pure" essence of the nation, supposedly untouched by generations of

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2 Jani Kirov, *Foreign Law Between "Grand Hazard" and Great Irritation: The Bulgarian Experience After 1878*, 10 THEORETICAL INQUIRIES L. 699, 716 (2009).

foreign rule. Like all romantic nationalists, he surely aspired to resurrect the nation after centuries of alleged cultural coma, while disposing of all "foreign influences." Equally typical was the Middle East or Balkan presentation of the preceding Ottoman legal order in terms of absences or deficiency. But processes of legal change do not accord with nationalist imaginations of the past, mainly because legal praxis is bound by immediate social realities and the pressing need to provide effective solutions to everyday conflicts. Imperial pasts may be marginalized or erased altogether in national textbooks, but social practices and economic patterns do not change overnight, or even over a decade, and they need to be sustained by a more or less functional legal system. That is why legal systems are never erected from scratch. That is why legal borrowing is by definition a dialectical process, always resulting in a syncretic outcome, consisting of indigenous and borrowed law.[3] In the present brief Comment, I hope to draw attention to the fact that the Russian and Bulgarian successors of Ottoman Bulgaria did not initiate a process of judicial change. Rather, they inherited from the Ottomans a legal system that had been undergoing significant modification for quite a while.

The Sharia courts had been the backbone of the Ottoman judicial system until the Ottoman judicial reforms of the second half of the nineteenth century. The positive law that served these courts was an amalgamation of the Sharia (Islamic law) and the *Kanun*-Sultanic law, which contained a solid element of codified customary law. So if there was a critical historical rupture in a *longue durée* process of legal change, it should be identified with the nineteenth century Ottoman reform project known as the *Tanzimat*, rather than the creation of the nation-state. Legal borrowing from Europe did not begin with Bulgarian independence. Rather, it was introduced with the preceding Ottoman judicial reform, which consisted of a large-scale codification in most legal fields (criminal, social, commercial, etc.), as well as the foundation of a new court system.[4] Ottoman judicial reform was embedded in a gradual process of legal borrowing from Napoleonic law in terms of positive law and administrative structure, yet describing this process merely through the prism of legal transplantation would be misleading. The process of borrowing was deliberately selective. The reform did not pass over the Sharia courts, and indigenous law was certainly not in the process of

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3 ALAN WATSON, THE EVOLUTION OF LAW (1985).

4 Avi Rubin, *Legal Borrowing and Its Impact on Ottoman Legal Culture in the Late Nineteenth Century*, 22 CONTINUITY & CHANGE 277 (2007).

fading out. On the contrary, Islamic law maintained its importance in Ottoman reformed law, yet it was reformulated, or adjusted as a statutory law.[5]

Commercial courts, the early precursors of the new court system, were operating in Ottoman Bulgaria and in major urban centers across the Empire since the mid-nineteenth century, and they were further systematized in the early 1860s. These courts adjudicated in accordance with a code of commerce that was an adaptation of the Napoleonic Code of Commerce. The legal procedure that was applied in these courts also derived from the French equivalent. In 1864 judicial reform took a major step forward when the Ottomans formally founded the *Nizamiye* court system, which assumed jurisdiction over civil and criminal litigation, thus leaving the Sharia courts with jurisdiction over matters of personal status and pious endowments (*waqf*). *Nizamiye* courts were instituted Empire-wide, including Ottoman Bulgaria, and further expanded during the 1870s.

Modern legal principles, such as separation of the administrative and judicial powers at the provincial level, were introduced with the judicial reforms of the 1860s and the 1870s, and are evident in numerous official regulations and laws. Putting the principle of separation of powers into practice was not a trouble-free task, however, mainly because the new judicial-administrative bodies were contingent on the participation of local dignitaries through a certain procedure of election. The latter took full advantages of the new political opportunities that came with their participation in the local judicial and administrative councils, and they often served on both. At the same time, full-fledged appellate procedures that had not been known in pre-modern Ottoman law were successfully introduced in Bulgaria and throughout most of the Ottoman provinces during the 1860s and the 1870s.

Kirov suggests that from the viewpoint of the Russians, who controlled the Bulgarian principality after 1878, "the main problem with [the preceding] Ottoman rule . . . was not the law itself, but the failure to apply it."[6] It should be kept in mind that the 1870s formed a transitional and formative phase that concluded with the Ottoman reforms of 1879, which marked a high point in the development of the *Nizamiye* courts. These reforms rationalized the workings of the courts through the introduction of extensive civil and criminal procedural codes, and more effective mechanisms of supervision.

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5 Aharon Layish, *The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World*, 44 DIE WELT DES ISLAMS 85 (2004). For the impact of Ottoman reforms on the Sharia courts, see IRIS AGMON, FAMILY AND COURT: LEGAL CULTURE AND MODERNITY IN LATE OTTOMAN PALESTINE (2005).

6 Kirov, *supra* note 2, at 706.

The impact of the 1879 reform was evident also in the part of Bulgaria that remained under Ottoman rule until 1885 (the province of Eastern Rumelia).[7] The Russian administrators who took over the Bulgarian principality from the Ottomans were pragmatic enough to appreciate the importance of this process and move along with it. The judicial reforms described by Kirov in the aftermath of the Ottoman period in Bulgaria, namely the two last decades of the nineteenth century and the first decade of the twentieth, were very similar to the Ottoman ones during the very same years, thereby attesting to the practical nature of legal borrowing, rather than the unique imprint of Bulgarian or Russian jurists. During these years, both the Ottoman and the Russian ministries of justice — in the Ottoman Empire and in Bulgaria, respectively — took various administrative measures that were meant to accomplish the modern envisioning of judicial praxis. Such measures included an unprecedented emphasis on recording practices in the courts, advancement of uniformity in legal practice, and investment of effort in projecting an image of rationality through publication of court decisions in professional judicial journals.

Kirov seems to agree with the late nineteenth century Bulgarian jurists who identified a widespread customary law in Bulgaria "as well as in the Balkans as a whole."[8] This perception of the judicial order before independence seems to marginalize the impact of the Ottoman judicial reform, which according to Kirov "was a rather late episode in Ottoman history and, at least for Bulgarians, a short one as well."[9] Given the Bulgarian jurists' motivation to portray the pre-independence (Ottoman) era as a period of legal chaos signified by the dominance of customary law, one should read their accounts with a grain of salt. Aside from the specific nationalist tendency to marginalize the Ottoman past already stressed above, Bulgaria's new rulers employed the rhetorical style shared by all new rulers throughout history (Ottomans included), namely portraying the preceding political order as an era of lawlessness. Ottoman law's transition to modernity should be associated with the *Tanzimat*, but this process does not in itself imply that there was no state law or only inconspicuous state law prior to the judicial reform. The provinces that became Bulgaria in the late nineteenth century had been subject to the Ottoman judicial system for centuries. In regions dominated by non-Muslim communities, litigants could often choose to bring their cases before communal courts that were led by local religious authorities,

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7 EKREM BUĞRA EKINCI, OSMANLI MAHKEMELERI 307-09 (2004).

8 Kirov, *supra* note 2, at 713.

9 *Id.* at 710.

yet in Ottoman Bulgaria as well as other provinces, non-Muslims frequently preferred the Sharia courts over the communal courts for practical reasons.[10] In any case, to be valid, any argument about the dominance of customary law and an associated weakness of state law should be supported by extensive socio-legal research, which is hardly the case at this point in time.

Socio-legal research on the Ottoman provinces in the nineteenth century is in its early stages, to be sure. Yet the conclusions of Mehmet S. Saracoğlu's recent study on the important Bulgarian county of Vidin during the last couple of decades of Ottoman rule, based on a careful reading of Ottoman sources, urges us to rethink assertions about the marginality of the Ottoman judicial reforms in Bulgaria. As demonstrated by Saracoğlu, the new judicial-administrative councils that were founded in the 1860s were dynamic sites of local social and political interactions that involved the imperial government, members of the local Ottoman-Bulgarian elite, and the wider Bulgarian population. This interaction cannot be reduced to local "responses" to a superficial imposition of top-down reform. Rather, Saracoğlu describes a socio-political reality characterized by entangled interests and continuous negotiation between local and imperial forces, which constituted an interconnected social space (characterized by Saracoğlu as Ottoman governmentality) shared by the state, the local elite and the local population. These three actors interacted with each other through the language of the state. Language in this sense implied not only an actual command of Ottoman Turkish, the language of the bureaucracy, but also significant degrees of local familiarity with the Ottoman judicial-bureaucratic culture that emerged with the *Tanzimat*.[11]

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10 *See, e.g.*, Rossitsa Gradeva, *Orthodox Christians in the Kadi Courts: The Practice of the Sofia Sheriat Court, Seventeenth Century*, 4 ISLAMIC L. & SOC'Y 37 (1997).

11 Mehmet S. Saracoĝlu, Letters from Vidin: A Study of Ottoman Governmentality and Politics of Local Administration, 1864-1877 (2007) (Unpublished Ph.D. Dissertation, Ohio State University) (on file with author). The remarkable ability of ordinary people to learn what may be called the new grammar of the reforms and perform accordingly in judicial settings is also demonstrated in Milen V. Petrov, *Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Law, 1864-1868*, 46 COMP. STUD. SOC'Y & HIST. 730 (2004).