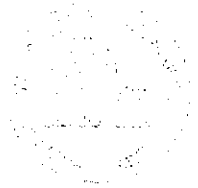
For My Family

Muslim Laws, Politics and Society in Modern Nation States

Dynamic Legal Pluralisms in England, Turkey and Pakistan

IHSAN YILMAZ
SOAS, University of London, UK



ASHGATE

Chapter 5

Muslim Legal Pluralism in Turkey

Secularism or the laicist policies of the Turkish Republic did not emerge through a sudden need to convert Turkish citizens to nationalism. Turkey is one of the very first Muslim countries that encountered the modern west and its civilization and that attempted to respond to the challenges posed by the Western power and civilization. The questions surrounding these challenges, how to respond to them, preventing the collapse of the Ottoman State, modernization and transplantation of western institutions have always been on the agenda of the Turkish intellectuals.

The struggle for a secular state in Turkey neither began nor ended in 1926. The modernization attempts in Turkey had already begun in the seventeenth century when the Ottoman rulers became aware that they were far behind the European powers. Substantial discussions whether to import the European technology only or to take all its way of life, culture, laws and so on occupied the public sphere for many decades. These endless discussions were cut short by the Kemalist elite when the new republic was established: to reach the level of contemporary European civilization western way of life had to be espoused and imported with all kinds of its institutions including laws.

The tradition of secular education that began in the 1850s, and the values promoted by secular education have had a long history in Turkey. The process of disestablishment of Islamic law and the establishment of a non-religious state began in 1839 under the reformist *Tanzimat* government (Starr 1990: 78). Over five generations of families of elite reformers had experienced some of the structures and symbols of secularism, each generation moving slightly farther from immersion in Islamic symbols, rituals and practices, and closer to the symbolic patterning of secularism (Starr 1992: 15).

In the mid-1920s, Commercial Code, Penal Code and Civil Code were transplanted from different Western European countries. After almost eighty years of this revolution, when one looks at the issues from a black-letter point of view and from an armchair perspective, this has been a tremendous success in bringing a completely clean legal sheet. Yet, the socio-legal sphere needs to be analyzed before arriving at ideological conclusions. As one scholar wrote quite recently, '(h)ow much the adoption of European laws affected society remains one of the most difficult questions for sociological and historical studies of the law... One hesitates, therefore, to categorically state that the reception movement was beneficial or detrimental to Turkish society' (Bozkurt 1998: 295). Indeed, when the socio-legal reality is analyzed, it is seen that the Turkish legal transplantation experience is far from an easy-going process.

The empirical reality shows that the uniformity-focused homogenization

expectations of the state and the plurality-centred survived unofficial Muslim family law conflict. This chapter shows that some Turkish Muslims have not totally abandoned their Muslim laws in favour of the transplanted 'secular' Western law, although the secular social engineers have long wished them to do so. Especially, in the issues of marriage, this chapter, based on the empirical data, suggests that some Muslim people in Turkey have not jettisoned their unofficial Muslim laws to the effect of creating 'strong' Muslim legal pluralism. They have actively assimilated to the secular law but on their own terms. They have not discarded their Muslim family laws but have adapted them to the secular milieu. By combining the rules of two different normative orderings, they have been successful in pragmatically meeting the demands of both the secular law and religious law. This phenomenon is very obvious in the realm of family issues.

To analyze this post-modern phenomenon of dynamic legal pluralism in the Turkish context, this chapter provides a historical background of the secularization of the law in Turkey, which reached its peak with the adaptation of the Swiss Civil Code and the total discarding of the Islamic laws in 1926.[1]

Ottoman Reform Attempts and Modernization

The need for reform in the Ottoman State was first recognized in the 17th century when the state began to lose its strength. The Ottoman elite were aware that the army and other state institutions did not show their traditional vigour and that changes were needed. Early reformists' image of a properly-functioning system was the traditional Ottomans systems that had been successful in the past (McCarthy 1997: 174). Thus, reforms of the seventeenth century were generally indigenous attempts which mainly centred on strengthening the authority of the central government. They thought they were still superior to the Europeans. In the seventeenth and eighteenth centuries the Ottoman state was still a super power. Thus, there was too little to learn from Europe. Even the most reformist members of the elite believed that the Ottoman way was superior to what could be achieved in Europe. Decline or loss of territory was still attributed to a failure to apply and use the institutions, techniques and weapons (Starr 1992: 7). The Ottomans did not know of the changes in education and economy in Europe that would ultimately defeat them (McCarthy 1997: 180). As a matter of fact, the world has not waited for Ottomans to get their house in order. It was not enough to return to their strengths of the days of Suleiman. While they were at best remaining as they were, the Europeans were advancing in technology. In short, the worst aspect of traditional reform was that bringing the old Ottoman times back was seen as satisfactory, which hid the real nature of the problems (McCarthy 1997: 180). It took them a while to recognize that they were falling far behind the European powers.

[1] On 27 November 2001, the Turkish Parliament enacted a totally new civil code, replacing the former one. Many legal experts had been working on the draft of this new civil code for the last decade.

After the eighteenth century the reform efforts took on a different tone as the Ottoman state opened its doors to the West. When Sultan Ahmed III took power in 1703, his grand vizier Nevşehirli Damat İbrahim Paşa decided that the Europeans had something to be imitated. Thus, ambassadors were sent to European countries. This led to a kind of superficial westernization. Preferring show to substance, they adopted western – mainly French – dress, etiquette, lifestyle and fashion. Some matters of importance were also copied from the west as well, including the printing press that led to the publication of many scientific books (McCarthy 1997: 184). Ahmed III's successor, Mahmud I made some practical reforms of the Ottoman military.

Rather than risk changing an entire system, they naturally explained away their difficulties. The Ottoman state was only the first of many states who faced the problems of reform. Throughout the twentieth century many so-called Third World (developing or Southern) countries have endeavoured to catch up with the western economic and political power. The terms used to describe these attempts and processes indicate certain confusion. The term 'modernization' is used because all countries would like to be modern, whatever the term means to them. Yet, the word 'modernization' does not give any clue how this modernization is to be brought about. The word 'development' is not descriptive either. On the other hand, the term 'westernization' is more meaningful, precise and descriptive, that is becoming like the western (northern) countries. Yet, commitment to westernization was not an easy task. It required western way of thinking as well which leads to acculturation and adopting ways which seemed inimical to the traditional Ottoman way. Few people would want that. The problem remained how to selectively choose from Western culture, taking only technology and economy but not emulating philosophy and traditions (McCarthy 1997: 287). One can not readily say that this is an impossible endeavour but history has shown that it is one of the most challenging ones. The Ottoman State was one of the first few countries to come to grips with this and the challenges of westernization. As the reforms expanded the country became more and more western in culture. The momentous change started with European education: Students started reading not only engineering books that were necessary for a strong army but also novels, philosophy and political writings (McCarthy 1997: 287-288). Thus, the history of the nineteenth and twentieth century Ottomans became a history of the conflicts and tensions between traditionalists and reformists who defended new ways.

During the 19th century, more and more Ottoman intellectuals and statesmen had come to look at westernization as a precondition of reform in the country. Therefore, a major shift in the understanding of reform came into existence. Indigenous solutions were not taken into account any more. The dilemma of the Ottoman reformers was apparent. On the one hand, an increasing number of them came to believe that the state's salvation rested in the acceptance of Western technology and Western institutional forms. Yet, no one could come up with a formula as to how Western technology and institutions would be adapted to an Islamic society without accepting Western civilization itself. During the nineteenth century, partly under the influence of the spontaneous spread of ideas through personal contact and study, partly under direct political pressure from the Western

powers, the state made periodic attempts to introduce Western political and social institutions by promulgating decrees. Rather than destroying traditional institutions, the 19th century reforms constructed new ones that were to co-exist alongside the traditional ones, which paved the way for the duality of institutions (Ortaylı 1986: 166-168; see also in detail Berkes 1978: 179-190). It was after the Ottoman state's collapse and the subsequent founding of the Turkish Republic in 1923 that this duality was finally resolved in favour of accepting Western civilization in toto (Kazancıgil 1986: 171; Tunçay 1992: 173).

The Kemalist revolution has its roots in the series of reforms and changes which are conventionally said to begin with the new model army, formed by Selim III (1789-1807), because of the serious defeats of Turks. His reform was not radical. All elements of society with the exception of the army and treasury were to be untouched; showing that he though the military reform would be enough. He established a new army called *Nizam-ı Cedid* (New Order) in modified western uniforms. He also opened western-style military schools that taught new military techniques (McCarthy 1997: 289). His successor Mahmud II totally abolished the traditional janissary army in 1826 that had been opposing reforms. Conservatists could still call upon much popular support but the opponents of reform no longer had the military power behind them. As a matter of fact, the army after 1826 became the main tool of reform (McCarthy 1997: 292).

Mahmud II published the first newspaper in the country; founded new secondary schools. He switched the linguistic orientation of the government from Arabic and Persian to French and established a translation office. Each government office was instructed to open training schools in European languages (McCarthy 1997: 295).

He changed the government infrastructure and organized along the western lines with ministers and ministries (McCarthy 1997: 293). Some changes started in the administrative and legal system. Previously the system of making laws was loose, with all laws theoretically coming from the sultan and his divan. Now legislative bodies were appointed (McCarthy 1997: 293).

These years witnessed the emergence of a circle of a protégé in the bureaucracy who shared the vision of reform, who are known as *Tanzimatçılar* (Men of *Tanzimat*, those who put things in order). They faced also certain dilemmas: '(t)he mentality of the *Tanzimat* reformers presented them with unique problems. They saw and respected the European way, but they also respected their own traditions. They had no wish to turn the Ottoman Empire into a pale reflection of Western Europe' (McCarthy 1997: 296).

On 3 November 1839, Sultan Abdulmecid declared an imperial order the '*Hatt-ı Hümayun* of *Gülhane*' by which he proclaimed his intention of reform. For the first time, a sultan had declared that reform was needed. After *Tanzimat*, parallel secular education was established as a solution to avoiding direct challenges to the *ulama*'s authority over primary education. New secular schools were opened beyond the elementary level. With the penetration of European commerce and with increasing Christian missionary activity in Istanbul, a number of foreign schools were opened (Starr 1992: 9).

The existence of the separate parallel educational systems paved the way for

the division of Ottoman society and stimulated dissent (Starr 1992: 10). Reading European political writings and associating with the westerners influenced a new generation of Ottoman elite: Young Ottomans. They were trained in modern secular Ottoman bureaucratic schools, knew one or more European languages, and had lived for years in major European capitals. Thus, they developed a respect for western political institutions and affirmed that the state would never be modernized unless adopting a democratic government and a constitution. Their writings appealed to two groups: those who wanted faster liberalist reforms and those who wanted a renewed Islam to take part in the system denied by *Tanzimat* ruling elite (McCarthy 1997: 302). They had a utopian vision of an Ottoman nationalism: If all ethnic groups were given democratic freedoms, they would submerge their nationalistic feelings and come together in a new Ottoman nationality, abandoning the *millet* system. They were still far from European nationalist ideas.

Young Ottomans were also social engineers like the *Tanzimat* elite: They advocated imposing the reform from the top. Some Young Ottomans, such as Namık Kemal, also underlined that Islam was essentially democratic in nature yet could not convince the conservatists. In short, 'they were democrats in theory, but not necessarily men who understood the people for whom they avowedly spoke' (McCarthy 1997: 303).

Later, a new group of constitutionalists, Young Turks (*Jön Türkler*), like their predecessors Young Ottomans, believed that a turn to democracy was essential for the survival of the state. Unlike their predecessors they were not utopian Ottoman nationalists but Turkish nationalists. They argued that the Turks had been neglected by the Ottoman elite in favour of the non-Turkish minorities (McCarthy 1997: 315).

Nationalism – which later became in line with the *Zeitgeist* one of the major principles of the Republic – has its roots in the nineteenth century Ottoman times as well. Ottoman intellectuals had faced a dilemma: They read European political works and were imbued with western ideas such as nationalism, however, they wanted to retain the multi-ethnic state at the same time. In other words, they were eager to strengthen their 'Turkishness' but also were afraid of alienating non-Turks of the country (McCarthy 1997: 209). Two main factors that paved the way for Turkish nationalism were the emergence of nationalisms of non-Turks who declared Turks to be 'the enemy' and the simmering western interventions of Ottoman internal affairs vis-à-vis Ottoman ethnic minorities. Turkish nationalism is mainly a response to these. They began to think of themselves as a group that had to stand together. Then, they began to look at their own Turkish roots and history. Pre-eminent among the Turkish nationalists was Ziya Gökalp (1876-1924) who translated Emil Durkheim's works into English and wrote extensively on Turkish nationalism. Gökalp and his friends underlined the importance of Turkish folk culture, pre-Islam Turkish history, a pure Turkish uncorrupted by Arabic and Persian, political traditions of the Central Asian Turks, secularism, diminishing the role of Islam in the public sphere and replacing its dominance with nationalistic fervour (McCarthy 1997: 209).

These Young Turks organized the *Ittihad ve Terakki Cemiyeti* (the Committee of Union and Progress, CUP) and soon spread to all advanced schools, including

the military school. In 1908 they, including many who were officers in the army, revolted against the Sultan with a demand for restoring the constitution and calling for elections. Sultan Abdulhamid gave in on 23 July 1908 when after a pause for three decades Ottoman 'democratic' political life began again. Turkish nationalists had triumphed and immediately set upon reform (McCarthy 1997: 316-319). 'The Young Turk revolution was extremely nationalistic, and secret organizations, such as Freemason Lodges in Italy and the Bektashi dervish orders in Anatolia, had played some part in it' (Starr 1992: 12). As these Young Turks were influenced by the nationalistic ideas, they supported nationalist initiatives. Some talked about relinquishing the Ottoman state and creating a Turkish nation, and some among these envisioned that it would be a secular state (Starr 1992: 13). They even attempted to introduce a new Turkish alphabet to replace Arabic characters. They introduced the teaching of Turkish into the school curriculum which was to be applied in even non-Turkish regions of the country (McCarthy 1997: 209). Little consideration was given to how the non-Turk ethnic minorities would fit into their scheme (Starr 1992: 12).

During the period of 1908-1917 when the CUP was in power, religion and nationality, Islam and secularism, freedom and loyalty were debated (Starr 1992: 12). The CUP government took a major step against the duality of Islamic/secular institutions which started with *Tanzimat* by asserting the dominance of state over religion. Islamic judges were made paid officials of the state and their decisions subject to appeal to secular courts. The state started overseeing the training of the members of the religious courts (McCarthy 1997: 324). Turkish nationalism intensified during World War I but it triumphed and took its radical form only after the establishment of the new Republic in 1923.

Secularization of the Ottoman Law and Legal Transplantation

Western law had been in the process of being received into Turkey for a period of about one hundred years before the establishment of the Republic. In fact, although the pace of legal reforms quickened after the formation of the republic in Turkey, the law actually started to be taken up during the times of the Ottoman State, and then commenced being put into written form.

Turkish legal history presents three different aspects. The first, which started in the beginning of the 14th century and ended in 1839, was the period of Islamic law based upon the principles of the *Qur'an* and administered by religious courts throughout the Ottoman State. The second period began in 1839 with the Charter of *Gülhane* and the *Ferman* of Reforms. For the first time, new secular courts were established and compilation of secular laws and transplantation of European laws and regulations began to appear, including the Charter of *Gülhane* and the *Ferman* of Reforms, Ottoman Penal Codes of 1840 and 1858, the Ottoman Commercial Code of 1850 and some other laws and regulations of European origin, especially in the French pattern.

The third phase starts with the declaration of the Republic in 1923 when new ideas of a complete westernization and establishment of a secular state led Turkey

to the enactment of a civil Code adopted from Switzerland with minor modifications; which went into force on October 4, 1926. In the same manner, the Turkish Criminal Code was adopted from the Penal Code of Italy of 1899 and the Turkish Criminal Procedure Code was adopted from the German Criminal Procedure Code. Switzerland became the source of most Turkish laws, including the Turkish Code of Obligations, the Turkish Code of Civil Procedure, and the Turkish Code of Execution and Bankruptcy. With the enactment of these laws, especially the Civil Code, Turkey became and still remains under civil law jurisdiction.

The precedents for the introduction of Western-based systems of law into Ottoman State were in addition to and not a replacement of the Muslim law. There was a dualist legal structure. The development of western-style laws and courts in the nineteenth century reflected a struggle between conservatives and reformers (Starr 1992: 21). The Ottoman reformers dealt with the quasi-legal institutions by creating parallel legal institutions. As trade and commerce increased with the Europeans and ethnic minorities were rebelled, new secular laws and courts were devised. With the exception of family law, secular laws took precedence (Starr 1992: 24).

The legal system of Ottoman law was based on *Shari'a*. In the Ottoman legal system, non-Muslims were subject to their own ethno-religious groups in the field of private law and in public law they were subject to Islamic law as it was applied to *dhimmis* (protected persons, non-Muslim minorities). Islamic law was not applied to non-Muslims except in cases where non-Muslims came into litigation with Muslims or where both parties agreed to be judged by Islamic law when their own religious laws were insufficient. It was left to the non-Muslims to use their own laws and institutions to regulate behaviour and conflicts under the leaders of their religion. Divisions of society into communities along religious lines formed the *millet* (nation) system. Different denominations dealt with the ruling power through their *millet* leaders.

Constitutional movements during the Ottoman period commenced towards the end of the 18th century. In the hope of gaining the loyalty of all the subjects, Ottomans reformists endeavoured to save the state by granting equal rights to Muslim and non-Muslim subjects alike (Bozkurt 1998: 284).

During the period 1789-1808, Sultan Selim III envisaged the formation of an advisory assembly, called the *Meclis-i Meşveret*, within the context of the New System (*Nizam-ı Cedid*) that he wanted to have set up, which is seen as a major step towards a constitutional government system.

The '*Sened-i İttifak*' (Charter of Alliance) is seen as the first important document from the point of view of a constitutional order. Whilst the 1808 charter restricted the Sultan's exercise of power, it also delegated some authorities to a senate body, the *Ayan*. The charter is a significant document as it was also recognized by the Sultan. The *Tanzimat* era commenced with the issue of the decree entitled '*Gülhane Hatt-ı Hümayunu*' in 1839. The subjects of the Ottoman Sultan were assured that their basic rights would be respected. The document is especially significant for its recognition of equal rights in education and in government administration for those of Christian persuasion, exemplifying

egalitarian principles. The Edict of *Islahat* (*Islahat Fermanı*) of 1856 was supplement to the Edict of *Tanzimat*. The Edict of *Islahat* re-declared equality between Muslim and non-Muslims and at the same time reaffirmed the privileges given to non-Muslims (Bozkurt 1998: 284).

Ottomans had already during their reign developed secular law called *qanun* (imperial law) that was 'an independent category of law derived directly from the sovereign will of the ruler' (İnalcık 1964: 57). These directives issued by the ruler were justified as they were not in contradiction with *Shari'a*, they were regarding the new developments in life and they were in most cases secondary rules. From the study of the *fatawa* and the Ottoman law it becomes apparent that many points of law were interpreted by the Turkish jurisconsults (*muftis*) in accordance with secular necessities rather than with the doctrinal principles of the *fiqh* (Ülken 1957: 53).

Early forms of secular law could also be found in the special licences given to European traders and later to non-Muslim Ottomans. A person holding such a licence was exempt from the jurisdiction of religious courts. When disputes occurred, these disputes would be settled by special councils set up by the Ministry of Commerce. These councils later extended their jurisdiction to Muslim/non-Muslim disputes. The concept of secular legal forums to hear commercial disputes was expanded again in 1847 when civil and criminal courts were set up in Istanbul with a regularized system of selecting judges. Rules of evidence were taken from the European Law Merchant rather than the Ottoman law (Starr 1992: 29). The Ottoman Penal Code of 1840 was made under the influence of the French criminal law but was largely still within the framework of the Islamic penal laws. For the first time in history, an Ottoman *qanun* was in the form a secular European code. The Ottoman Penal Code of 1858 was based on the Napoleonic Code of 1810, putting aside Islamic punishments. It established a French-type system of courts, with tribunals of first instance, courts of appeals and a high court of appeals. These were the first distinct hierarchy of a secular court system in the country (Starr 1992: 31). This secular criminal Code and court system remained in operation till 1923.

The government sanctioned traders' courts already established, to the effect of circumventing traditional Islamic law and creating new secular commercial courts. The first Ottoman secular criminal courts were established in the 1840s in police headquarters. They were operating under a new secular penal code. A mixed court of maritime commerce was established in 1850. In these mixed courts, half of the judges were European. Ottoman commercial courts were also established. A new chain of jurisdiction was established that extended upward through the secular provincial governor to the capital, bypassing links with *Shari'a* courts. In 1850, the Ottoman Commercial Code was promulgated, which was an adopted version of the French Commercial Code. This is the first clear example of legal transplantation in Turkey (Starr 1992: 29). The Ottoman Land Code of 1858 was inspired by the French freehold farming system.

The 1839 decree gave the *Meclis-i- Vala-yı Ahkamı Adliyye* (the Supreme Council of Judicial Ordinances) impetus to become a serious legislative council. The 1839 decree declared that this council should be increased in size and made

more representative. The Sultan promised to accept its recommendations if a majority vote of its members concurred (Starr 1992: 25). *Meclis-i Vala* was given the responsibility of discussing legislative matters. The new legislation was to be recommended to the Sultan. In most cases, with his power decreased, the sultan had to rubberstamp these decisions. This council successfully operated for 15 years. Later, a new generation of Ottoman reformers wanted to weaken the power of the older generation so they divided the *Meclis-i Vala*'s functions in to two, making *Meclis-i Vala* only a judicial organ under the name then *Encümen-i Ali* (High Council) and creating a council of ministers (*Meclis-i Vukela*). The High Council's main task was to complete and extend the reforms of *Tanzimat*. It was also mandated to study all existing regulations for all state organs and was empowered to change these regulations in order to meet new conditions (Starr 1992: 27).

Even though secular commercial and criminal courts were established earlier, the true beginning of the secular legal system can be said to start in 1868 at the division of *Meclis-i Vala* into two organs: the Council of State (*Şuray-ı Devlet*, today's *Danıştay*), a legislative body and a court of appeal (the *Divan-ı Ahkam-ı Adliyye*) which was divided into civil and criminal sections. The *Divan-ı Ahkam-ı Adliyye*'s name was later changed to *Adliyye Nezareti* (Ministry of Justice).

During the entire *Tanzimat* period, the *Majalla* (the Ottoman Civil Code) was one of the most characteristic achievements. It was felt that a Civil Code was greatly needed and its preparation appeared on the agenda. Ali Pasha proposed the adoption of the French Civil Code but was opposed by Ahmet Cevdet Pasha who supported a Civil Code compatible with Islamic law; his view was accepted and he prepared the *Majalla* (Bozkurt 1998: 292).

The new secular courts often had to resolve by recourse to commercial law, but the judges were rarely knowledgeable about the *fiqh*. Initially, this problem was tried to be solved by the president of the religious court becoming the president of the secular court as well but this proved unsatisfactory, and a decision was made to codify the Islamic law of obligations (Starr 1992: 34). Thus, for the first time in the Muslim history, Islamic law was codified, which was developed between 1867 and 1876. It codified the *Hanafi fiqh* on transactions, contracts, and obligations, leaving the family law out. The *Majalla* was applied in both religious (*Shari'a*) and secular (*nizamiye*) courts. The Penal Code and Commercial Code were the predecessors of the Ottoman Civil Code but they were largely based upon or inspired by European codes. The *Majalla* was purely Islamic in content but European in form, it is a joint venture between conservatists and reformers, exemplifying the negotiation and compromise between these groups (Ostrorog 1927: 79).

Reformers in 1876 took advantage of the chaos in the country and pressed for a constitutional government. Young Ottomans endeavoured to put their ideas into practice and the first Ottoman constitution (*Kanun-i Esasi*) was promulgated on 23 December 1876, which also started the period known as the First *Meşrutiyet*, or First Constitutional Period, a period of a liberal constitutional monarchy. The 1876 Constitution was a document that resembled written western constitutions. It was modelled on the Belgian Constitution of 1931 and the Prussian Constitution of 1851 (Bozkurt 1998: 285). It is the first constitution of an Islamic state in history.

Islam remained the official religion of the state. For the first time in history, all subjects were declared to be Ottomans regardless of their religion. All subjects were equal; all were to enjoy liberty; a person's home was declared inviolable.

In addition to defining the main organizational structure of the state, it also set forth basic rights and liberties of Ottoman subjects and stipulated that the courts and the judges be secure from all external interventions; such a written principle thus took place in this Constitution for the first time. The basic concept in the 1876 constitution is that, although somewhat restrictive in the exercise of powers, it nevertheless, for the first time, recognized a legislative assembly partially elected by the people. This parliament was divided into two chambers, an elected *Meclis-i Mebusan* (Chamber of Deputies) and *Meclis-i Ayan* (Chamber of Notables), appointed directly by the Sultan. A grand vizier would perform the duties of a prime minister with his ministers. The *Şuray-i Devlet* (Council of State) was retained as the supreme court of appeal for administrative law cases and was to continue its legislative function. A new high court (*Divan-ı Ali*) was also established to hear cases against members of the government. *Meclis-i Mebusan* 'was granted certain powers to enact certain laws and to exercise control over the executive' (Özbudun 1978: 24). The entire secular court system evolved during the *Tanzimat* period was incorporated into the constitution. This constitution has provisions covering basic rights and privileges, the independence of courts and the safety of judges, among other aspects. Concepts such as equality, personal immunity, commercial freedom, freedom of press, freedom of education, right of petition, right to work in public services, sanctity of property, prohibition of angaria and torture and collection of taxes by means of codes are introduced (Güven 1996: 143). The judges were to be appointed for life, courts to be organized by law, and no outside interference was allowed. Religious courts were retained in matters of religion.

The first secular law school, the Istanbul Law Faculty, was established in 1875 to train judges, advocates and public prosecutors for the non-Islamic courts (Bozkurt 1998: 290). After the promulgation of the 1876 constitution, a system of public prosecutors and of judicial inspectors was established. The Constitution regulated the 'security for judges' and introduced the institutions of attorney and notary public. The ministries of Justice and Religious Affairs were united under the one ministry: the Ministry of Justice and Religious Affairs (*Adliyye and Mezahib Nezareti*) that had the mandate of jurisdiction of the secular *nizamiye* courts, regulated by written laws. In 1879, the French Criminal Procedure Code was transplanted that was the basis for the establishment of modern criminal courts and for the public prosecutors. In the same year, the Civil Procedure Code was enacted which was also modelled on the French law. In 1911, nearly 70 articles from the Italian Zanardelli Criminal Code were transplanted into the Ottoman Criminal Code (Bozkurt 1998: 288).

However, Sultan Abdulhamid dissolved the parliament in 1878 and ended this period. But, the influence of liberalism continued and eventually the Sultan was forced to restore the Constitution in 1908 and the Second *Meşrutiyet* period started (Özbudun 1978: 24). In 1909, the 1876 Constitution was substantially amended to the effect of increasing the power of the legislature and restricting those of the

Sultan. As a result, a truly constitutional system was established. But this system did not last long as the ruling *İttihad ve Terakki Party* quickly transformed the system into a dictatorship of the dominant party. With the defeat of the Ottomans in WWI, the government collapsed and maintained only a shaky existence under the control of the occupying Allied forces whilst the nationalist resistance movement to the occupation established a new governmental structure in Ankara under the leadership of Mustafa Kemal (Atatürk) (Özbudun 1978: 24-25).

Ottoman law was developing not only through reception of Western Codes, but also through doctrine, following the prevailing mode of western jurisprudence. But his reform process was not without problems. It was not only conservatists who opposed the law reform but also European powers who worried that they could not interfere in the internal affairs of the Ottomans. 'One of the interesting problems that emerged from this development was the objection of foreigners to the application of this procedural law to Muslims and non-Muslims alike' (Bozkurt 1998: 288). These European powers demanded a return to the previous system arguing that new reforms 'undermined the Capitulations and privileges of non-Muslims. Ironically, the Ottoman State was compelled to defend its reception of Western laws against Western critics who preferred to see the old system (which they criticized) maintained' (Bozkurt 1998: 290).

Despite secularization in several fields of law after the *Tanzimat*, the laws of marriage, divorce, inheritance, and custody of children for Muslims continued as before. The *Majalla* was meant to express law common to all Ottoman subjects, whatever their religion. Thus, it left out the family law and laws of inheritance and wills, and laws of foundations (*waqfs*) as the separate non-Muslim minorities had different and autonomous laws in the *millet* system (Ostrorog 1927: 79). Some reformists objected to this situation arguing for a total reform. A number of Western civil codes were translated into Turkish. Some scholars even published articles comparing the French Civil Code and *Majalla* article by article (Bozkurt 1998: 292-293). Without knowing that it would become the Civil Code of Turkey 14 years later, another scholar translated the Swiss Civil Code into Turkish in 1912. The German Civil Code was translated in 1916 (Bozkurt 1998: 293).

In 1916, the state established a committee to draft a civil code. This committee studied Roman, British, French, German, Swiss, American, Austrian and Hungarian laws (Bozkurt 1998: 293). On 25 October 1917, the Ottoman Family Laws Ordinance (OFLO) (*Hukuk-u Aile Kararnamesi*) was enacted. It was the first codification of Muslim family law in history.

This was a revolutionary law in the sense that it eclectically reflected and amalgamated the views of different juristic schools of Islam. The law tried to give marriage a more official character by stating that the unilateral *talaq* in the presence of two witnesses did not suffice to terminate a marriage. The presence of a judge or a deputy was required by the law. Moreover, every marriage and divorce had to be legally organized according to state procedures. The law also granted a wife two new grounds of divorce. For the first time, age limits for marriage were set. The new law also allowed women, at the time of betrothal, to incorporate into the marriage contract a condition that a second marriage by the husband whilst still married to the first wife would automatically make the second marriage null and

void (see in detail Tucker 1999: 6-10). With this law, for the first time, religious courts were placed under the authority of the Ministry of Justice (Starr 1992: 40). This law 'grouped separately the rules related to marriage and divorce for Muslims, Jews, and Christians, but authorized the *qadi* courts to handle cases related to the marriage and divorce, and dowry and trousseau claims for non-Muslims. This drew sharp criticism from the diplomats of great powers' (Bozkurt 1998: 293). After WWI, the British occupied Istanbul and forced the government to repeal this law in 1919.

Republican Era: Continuity and Change

Turkish nationalism became the driving principle of the Republican elite. During World War I and especially the War of Independence (1919-1922), the popular will changed and they started identifying themselves as Turks as they were forced to stand together against invaders. Turkish nationalism was directed at raising the prestige of Turkey by efficient Westernization rather than by an attempt to recover the Empire (Stirling 1965: 5).

Mustafa Kemal Atatürk emerged from the war as a great war hero who saved the nation. With this great prestige and popularity he drew on the new national identity and feeling to create a new government, radically changing the Ottoman way and creating the Turkish Republic on 29 October 1923. In creating new symbols and institutions for the republic, Atatürk drew on the ideas, programmes, and leaders of the Young Turks, paving the way for a remarkable degree of continuity in both the core members of bureaucracies and in the political elites (Starr 1992: 13).

The Republican elite's passion for modernization, seen as an escape from backwardness, translated itself into a total dislike and distrust of all things associated with the ancient regime and the old way of life. Topping the long list of suspect establishments were religion and the religious institutions. The culture associated with religion and religiosity, such as dress code, was also deemed antithetical to contemporary civilization (Barkey 2000: 88). Thus, to the Kemalist élite, the question was no longer that of finding some means to integrate Islamic institutions with the Western ones. They categorically decided to destroy the former (Yazıcıoğlu 1993: 180; Toprak 1981: 33).

The Turkish state under the reins of the Kemalist elite assumed that cultural change and modernization could be imposed from above through the force of law. One of the major expected changes was the secularization of the society.

From the ruins of the Ottoman era the Turks, under the leadership of Mustafa Kemal Atatürk, managed to found a new modern nation-state. The territory encompassed and concentrated on ancient Turkish land, with Anatolia at its centre. This state was proclaimed to be a Republic in 1923 with a president and a parliament and thereby abolished the Sultanate. The urgent aim of the founders of the state was to transform the 'backward', traditional, and religious society into a modern, secular and 'civilized' one. They already had their model for this transformation in the form of European civilization and wanted Turkey to be as

much of an exact copy of this civilization as was humanly and physically possible.

For the Kemalist elite, to reach the level of contemporary civilization, i.e. the European civilization, the modern, Western way of life had to be espoused and imported with all that it included and entailed; the package was non-negotiable and if you wanted a part you had to get the lot. However, it is no real myth that the Kemalist elite not only wanted to import everything European for the sake of modernizing Turkey, but that equally and maybe even more so they wanted to transplant the whole European lifestyle to get rid off all the remaining and existing remnants of the Ottoman history, time and values. They asserted that '(t)raditions are to be respected as long as they do not jeopardize the interests of a society and prevent the community from reaching a certain level of civilization' (Timur 1957: 36).

In other words, whether the European lifestyle was transplanted to Turkey for the sake of modernizing it, or for the sake of what the Kemalist elite saw as ugly and repugnant is a question that has yet to be conclusively settled. A quick scan in Turkish dailies will show that the simmering tensions between the officials who enthusiastically aim to secularize the society from above and some people who stick to the neo-traditional Muslim culture still continue, showing that the two sides have not yet given up. The head scarf issue at the Turkish universities is only one of such tensions.

Secularism was implemented through a series of decisive steps taken to disestablish Islam from a role in law and education, and as the official religion of the state (Weiker 1981: 105). Founders of the Republic believed that there was not enough time to wait for 'the slow process of evolution; people must use their energy and will to force every material element of life through modern moulds and modern patterns' (Saeed 1994: 162; see also Göle 1994: 66-70).

Toprak (1981: 40) distinguishes four phases of secularization in Republican Turkey: Symbolic secularization, institutional secularization, functional secularization and legal secularization. Secularization of the first phase enforced changes in aspects of national culture or social life which had a symbolic identification with Islam. This includes a transformation in the connotations of a set of symbols from the sacred to the profane. Concepts of dress, time, the uses of public spaces, the calendar, the written language, its script, and the numerical system were changed from what they were in Ottoman times (Starr 1992: 503; Toprak 1981: 40). The reformers imagined a new community of loyal citizens inhabiting a new world – that of secularism where the Islamic cognitive framework was replaced by a secular one that would change individuals' very notions of themselves. Their concept of time and calendar, their conception of self and other, the work world, family relationships, dress, names, language, script, alphabet, numerical system, neighbourhoods, education, public behaviour, and especially 'mentalities' would be changed (Starr 1992: 89).

The easiest cultural symbol to identify people by is through their language (Toprak 1981: 40). Thus, the Kemalist government launched some radical reforms with the language of the Turks. The first phase was the change of the alphabet from the Arabic to the Latin script in 1928. This was followed by a concerted effort to change the vocabulary by substituting new words derived from Turkish roots in

place of the Arabic and Persian derivatives that had been integrated and evolved into the language over the centuries through cultural contacts. The second phase of cultural reform was the attempt to substitute the pre-Islamic history of the Central Asian Turks with the Ottoman past so that a common basis for national identity other than religion could be established. In this reading of the new Turkish history, the Turks, who until then had been identified with Islam, are presented as a nation of people who have great innate cultural characteristics that shines through them throughout their history regardless of the religion they adopted subsequently, whether that be Shamanism or Islam. In search of a unifying myth to replace Islam, which was the language of society, long forgotten roots of the pre-Islamic era were introduced. Yet this process of re-writing history to build a nation was construed not as scientific endeavour but as ideological glue for national cohesion (Ergil 2000: 50). Disregarding the Islamic view of Turkish history, the new historiography declared the Islamic period to be only one of the episodes in the national and civilization aspects of Turkish history. All subjects of the state became equal citizens regardless of their religion. The abrogation of the Caliphate in 1924 was another radical and crucial act of symbolic secularization (Starr 1992: 14).

Second, institutional secularization covered the changes in organizational arrangements designed to destroy the institutional strength of Islam. It was claimed that Turkey must be freed from the backward-looking institutions of Islam. In the eyes of the Kemalist elite, Islam was 'responsible for Turkey's backwardness' (Allen 1968: 173).

The source of all evil was the unity of state and religion. The Kemalist élite proceeded to disestablish the *ulama* and tried to destroy the sources of power of the Islamic hierarchy (Starr 1989: 502). The abolition of the Caliphate in 1924, in addition to its symbolic significance, was the first step in the deinstitutionalization of religious involvement in politics. This was followed by the abolition of the Office of the *Şeyhü-l-İslam* (the highest Islamic authority in the state) and the Ministry of Religious Affairs and Pious Foundations (*Şeriye ve Evkaf Vekaleti*) on the same date. These steps together with the recognition, in both the 1921 and the 1924 Constitutions, of the principle that political authority derived its legitimacy from the concept of national sovereignty, rather than divine will, constituted major stages in the direction of releasing the religious hold and influence from the state mechanics. This movement reached its high water mark in 1928: The second article of the 1924 Constitution which recognized Islam as the state religion was abrogated. After the abolition of institutions of the past, new but official institutions were established with a view of controlling religious activity, and concerted efforts were made to destroy the institutional strength of local Islam (see in detail Toprak 1981: 40; Heper 1986a: 373).

The third type of secularization is one which includes changes in the functional specificity of religious and governmental institutions (Toprak 1981: 40). In the *Tanzimat* era, an effort was made to codify the law for the first time in Turkish history. Although such codification was based on the Muslim law, it was nevertheless an important step towards the secularization of law in that it was the first recognition of the necessity to establish legal codes that were written and

distinguishable from religious provisions. During the *Tanzimat* and the following periods, a number of secular codes were enacted in the fields of commercial, penal, and civil law that supplemented the religious ones. At the same time, a parallel effort was made to establish secular courts, in which the new codes would be applied. The abolition of the *Shari'a* courts as the final secularization of the court system was accomplished in 1924, with the subsequent unification of the court system under the jurisdiction of the Ministry of Justice and the enactment of distinctly secular codes. As a result, the religious institutions officially lost their former judicial functions (Toprak 1981: 48).

Symbolic, institutional and functional secularization in the Republican era paved the way for the legal secularization that needs more detailed elaboration.

Speeding up the Legal Reforms and Total Secularization

Symbolic, institutional, and functional secularization were reinforced by a legal framework which attempted to eliminate the religiously-sanctioned provisions of law. According to Hooker (1975: 306), Turkey's experience 'is an excellent example of a state undertaking the process of legal importation as a result of fundamental revolution, and under the impetus of that upheaval, attempting to establish a completely clean legal sheet' (Hooker 1975: 306). The Kemalist élite espoused a legal modernist discourse that – they believed – has conferred legitimacy on them as this modernist and revolutionist legal discourse 'sketch pictures of widely shared, wistful, inchoate visions of an ideal' (Gordon 1986: 16). Thus, the minister of Justice of the time, Mahmut Esat Bozkurt, 'declared that what he desired was not reform but a revolution of Law' (Bozkurt 1944: 7 cited in Bozkurt 1998: 294).

Transformation of society would start with the very smallest unit, the family. Thus, after the proclamation of the Republic in 1923, radical reforms were introduced in family law matters as well. In the field of family law, all earlier reforms, however extensive they seemed, had not affected the traditional Muslim law which governed family life. Family law had been one of the last bastions of Islamic law and the most resistant area of the legal system to secularization. The attempt to change the Muslim family laws is one of the most daring experiments for the modernizing élite in Muslim societies. However, such an attempt was perceived as necessary by the Kemalists since the family plays an important role in transmitting dominant cultural values to younger generations, and the aim of the Kemalist nationalists was the cultural transformation of society (Toprak 1981: 54). They thought that starting with individual males and females, new selfhoods would flourish within ancient shrouded bodies. To enhance the status of all women law was selected as one of the instruments of change (Starr 1992: 89-90). The purposeful action by the Kemalist elite in supplanting Muslim family law with secular laws was meant to create a more egalitarian relationship within the domestic household (Starr 1992: 112).

Atatürk expressed his revolutionist tendency in his speech during the inauguration of the National Assembly in 1924: '(t)he direction to be followed in

civil law and family law should be nothing but that of Western civilization. Following the road of half measures and attachment to age-old superstitions is the gravest nightmare that impedes the awakening of nations. The Turkish nation cannot tolerate this nightmare' (cited in Berkes 1964: 469-70).

To Bozkurt, the European model was essential; he told Leon Ostrorog in 1925 when they met in Ankara that '(w)e are badly in want of a good scientific code. Why waste our time trying to produce something new when quite good codes are to be found ready made? ...The only thing to do is to take a good ready-made Code to which good commentaries exist, and to translate them wholesale. The Swiss Code is a good Code; I am going to have it adopted' (Ostrorog 1927: 87-88).

The Kemalists made their first attempt to change the legal system by the appointment of special committees of the Ministry of Justice to prepare the framework for a new set of secular codes in 1924 (see in detail Aydın 1995: 167-172; see also Berkes 1978: 519). However, the results of the reports showed the heavy influence of the traditional Muslim law in the proposed changes.[2] The project was thus dropped and the government decided to adopt the Swiss Civil Code, the Italian Criminal Code, and the German Commercial Code (Güriz 1996: 9-10).

By 1926 an entirely secular legal system was put in place. Law was precisely aimed at behaviour, in the hope that attitudes would follow (Boulding 1986: 4). As a result, in attempting to build a new national identity for Turkey, the secular legal system became the very foundation of the modern Turkish state (Starr 1992: 169).

The legal culture has become an amalgam of predominantly Swiss, German, Italian and French legal cultures, and the legal system is based totally on large-scale eclectic receptions from Western models. As a part of the secularization of the legal system 'a new law school was opened in Ankara in 1925 to train judges and lawyers in the new secular law' (Starr 1992: 16).

With regards to the transplantation of the Swiss Civil Code, in addition to the above elaborated ideological reasons, there is also a political dimension. Turkey having secured the need of the Capitulations concessions with the Lausanne Treaty praised her sovereignty very highly (Postacıoğlu 1957: 54). The rights of ethnic minorities were debated during the Lausanne treaty. This treaty imposed heavy restrictions and obligations upon Turkey 'to provide for non-Turkish minorities an adequate modern legal system. A general reform fulfilled this obligation without appearing as a slavish compliance with the Treaty' (Lipstein 1957: 73). Aydın (1995: 171-172) concurs: the heavy pressures regarding this matter led the Kemalist elite to adopt a Western law to accommodate the demands of Western powers to prevent lingering interference. The western powers renounced their privileges under the Capitulations regime conditionally on minorities in Turkey being exempted as regards to personal law from the provisions of Turkish law which was based on Islamic law. Under article 42 of the treaty, it was conceded that each minority should be governed by its own customary/religious law in matters of personal status, the rules of which were to be established by *ad hoc*

[2] See for details and comments in the press about the mentioned proposal. Abadan-Unat (1986: 130-131). See also Aydin (1995: 168-169).

commissions. Turkey perceived this as a breach of its sovereignty and its intended uniform legal system. Thus, to render the privileges of minorities pointless, the Swiss Civil Code was transplanted (Postacıoğlu 1957: 54).

Secular law was alien for both Muslim citizens and non-Muslim minorities. Under Ottoman rule, the denominational groups called *millet* had the right to choose their own leader, practise their own religion, and follow their own family laws. After the acceptance of the Civil Code, the non-Muslim minorities, to whom article 42 of the Treaty of Lausanne had recognized legal autonomy in family and personal matters, decided to give up that prerogative. All the members of the *millets* lost their separate status and became individual citizens of the Turkish Republic. Their religious courts were also replaced by secular ones.

The Civil Code differs fundamentally from the provisions of the Muslim law (Aydın 1995: 172). The new secular law was meant to change the core structure of Turkish domestic life to bring it closer to Western models (Starr 1992: 91). As Berkes (1978: 522) points out, the Civil Code was perceived by the élite as an instrument of achieving what ought to be rather than regulating what in reality exists.

When the new secular Turkish Civil Code became effective on October 4th 1926, it caused an anomaly. Family law in Turkey was now governed by non-Islamic secular laws for the first time in its history, whilst the citizens of this new Republic remained and continued to be Muslims. Those parts of the new legal 'system which conflicted most with the former order of things, in particular with established institutions and practices in family relations, land-holding and the law of succession, exposed both the new legal order and society to strains and stresses which raised the problem whether the Civil Code or society was to prevail in the end' (Lipstein 1957: 73).

Expected Legal Secularization, State Islam versus Muslim Local Law

In the Republican epistemology, religion is imprisoned into the conscience of the individual and places of worship in the society and is not allowed to mix with and interfere in public life (Mardin 1982: 180). On the other hand, the application of laicism in Turkey has taken on a slightly different form, in that religious affairs in Turkey have been placed under the auspices of the state and justification for doing so have been explained in reference to Turkey's 'special and unique' circumstances (Sarıbay 1986: 200). As Laicism as a concept espouses the idea that religion and state are kept distinct and separate, the Turkish version of laicism would appear to be self-contradictory. The Kemalist élite however, thought that if religion and state are non-separable components in Islam, then the best way of keeping Islam out of the public and political life would be to place it under the control and supervision of the state. As a result, religious institutions were linked to state bureaucracy. Then, the state started to interfere in religious affairs during the Republican era. A Directorate of Religious Affairs was established in 1923 at the instigation of the members of the Grand National Assembly as a replacement for the Ottoman Ministry of Religion. Later constitutions that were prepared after