From Plurality to Unity: Codification and Jurisprudence in the Late Ottoman Empire

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The politics and ideology of the nineteenth century were styled mainly by the French. World politics between 1789 and 1914 were largely a matter of contending for and against the tenets of 1789. As the channels of transmission became broader and more versatile, the new ideas that disseminated all over Europe changed the very foundations of group cohesion in the emerging nation-states. New patterns of identity and loyalty crystallized. New national aspirations were formulated and realized.

France pioneered the revolution against the *ancien régimes* and gave the emerging nations their libertarian ideas. The vocabulary and the issues of liberal and radical-democratic politics for most of the nation-states were dictated by the French Revolution. France became the first great example of national identity, and the concept of nationalism in the wake of revolution was disseminated throughout the world. Codes of law, models of scientific and technical organization, the metric system of measurement in most countries emulated that of the French. And, finally, through French printed words the ideology of the modern world began to penetrate non-European civilizations, that until then had resisted European ideas.

French libertarian ideas did not only revolutionize the whole European continent but also spread into its marginal territories, including Ottoman lands. The French Revolution was *the* revolution of its time, and the Ottoman Empire, in its encounter with Europe, followed the path it laid out. However, both the widening of outlook and the withering of traditionalism in Ottoman society had started long before the outbreak of the French Revolution. The growth of what one might call a materialistic or deistic spirit was evident from the early eighteenth century onwards. To begin with, it was the French style and manners rather than French ideas that found a favourable milieu in the Empire. Thereafter, increasing contacts with Frenchmen contributed to a broader mental outlook and to a better realization that the Western world had superior knowledge, technology, industry and economic power.

The material world of the *ancien régime* exerted an unprecedented influence on the Ottoman Empire and on the population in the urban centres.

Then, following the Revolution, libertarian principles and revolutionary ideas found an echo among Ottoman intellectuals, particularly the non-Muslims. Greeks and Serbs led the way. The *Tanzimat* reformists followed, although slowly, as the Empire integrated itself into the global process of capitalism in the wake of the Napoleonic Wars. Intellectuals and savants welcomed the centralizing impact of the nation-state and adapted the French style to Ottoman realities. The intellectual vistas of *Tanzimat* reformers from Mahmud II onwards, then of the Young Ottomans in the second half of the nineteenth century, and finally of the Young Turks in the early twentieth century were all imbued with the ideas of the French Revolution or, at least, the philosophy of the Enlightenment. The heretic and to some extent atheistic ideas of many Ottoman intellectuals were a reflection of the radical perspectives of French thought.

Ottoman jurisprudence was one of the realms where the legal concerns of revolutionary France could thrive. French concepts of justice spread throughout Europe and entered the Ottoman lands. Although the French Revolution heralded a radical reversal of previously established ideas, the Napoleonic codes were in fact the product of lawyers who had lived, worked, and been generally respected under Louis XV and Louis XVI. They did, however, pay something more than lip-service to the ideals of the Revolution, and it was this that accounted for their subsequent influence during the nineteenth century. From the second quarter of the new century onwards, contact between the Ottoman Empire and Europe became increasingly close, and henceforth legal development was conditioned almost exclusively by the novel influences to which this exposed Ottoman society: the rule and order shaped by new institutions, legal codes, and cultural practices in the nineteenth century were inspired mainly by France.

This meant a shift from the multi-centric, vernacular system of law of the classical Ottoman State to state-centred law, with tradition giving way to modernity based on the model of a nascent interactive state. The modern state required universality as well as direct contact with the future citizen, unmediated by and circumventing the religious-ethnic communities. From the French Revolution onwards, direct contact with the emerging citizen prepared the ground for an interactive modern state based on the rule of law.[1] At least in rudimentary stage, the new state enjoyed not merely politico-administrative superiority in the form of greater ability to utilize a given tax base, but it also seemed to be better at nourishing and developing the source of its revenues.

From the very start of the reform movement in the Ottoman Empire, the *Porte* strengthened the centre at the expense of ethnic and religious communities, put the individual rather than the community at the focus of its attention and tax revenues, and tried to create a new identity of

Ottomanism that would replace community identity. This novel formulation reflected the nineteenth-century concept of the modern state.

The influence of the *Code Civil* and of associated codes was wide-reaching as a result of their introduction into much of Europe following Napoleonic conquests and their use in the French colonies. The *Code Civil* was also widely imitated or borrowed thanks to its quality as a piece of legislation and its spirit that expressed more generally the ideals of the codification movement throughout the nineteenth century. It was imposed on Belgium and the Netherlands, on those Italian states which fell to the French, on Baden and the Rhineland. The Dutch code of 1838 was much indebted to it. The Italian codification movement, which was finally successful after Italy had been unified, was based on it. In Egypt, Syria and the Lebanon, in Algeria, Tunisia and Morocco, and in Indo-China it was the law of the colonial settlers and in most cases affected profoundly their legal systems after independence. In Louisiana and Quebec, the *Code Civil* exerted an indirect influence. In Spain and Spanish America, in Portugal and most of the Portuguese colonies, and in the Balkans the *Code Civil* was admired and largely absorbed.[2] The Ottomans translated and published it in book form. Midhat Paşa, the renowned constitutionalist, worked hard to get it implemented in the Ottoman Empire.

The Rule of Law and Constitutional Law

The interactive state forms direct contacts with citizens through universal rule of law, predictable administration, and in responsive feedback in the formation of state policies. The strength of the interactive state lies in its capacity to govern on the basis of cooperation and consent. The institutions that make this model possible provide at the same time the ground for economic development and endow the state with a favourable resource base. It was the introduction of this model at an early stage, and its continuation in certain countries, which contributed to the unique dynamism that characterized the European state system.

The rudimentary interactive state initiated in the Ottoman Empire with the *Tanzimat* reforms provided an improved environment for economic progress in line with the libertarian atmosphere of the nineteenth century. *Tanzimat* men believed that the patterns and structures that made up the interactive state with uniform legislation would enhance economic prosperity by opening considerable space for autonomous civic and economic activity, thus promoting market relations. The *Tanzimat* era heralded the end of the command economy and prepared the ground for a consent society.

This relationship between the interactive state and economic growth is not wholly symmetrical, however. Prosperity came as a result of the prime achievement of the interactive state, the rule of law, which itself was composed of three elements, namely, constitutional, administrative and civil law.[3] Constitutional law concerned the rights of citizen *vis-à-vis* the state,

and the distribution of power within it. It was on the basis of constitutionalism, which involved the separation of power and the maintenance of civil liberty, that the interactive concept developed. Constitutionalism came to the Ottoman realm with the Edict of 1838 promulgated by *Tanzimat* reformers.

The first moves for constitutionalism in the Ottoman period were made towards the end of the eighteenth century. Between 1789 and 1808, Sultan Selim III envisaged the formation of an Advisory Assembly (the *Meclis-i Meşveret*) within the context of the New System (-the *Nizam-i Cedid*). Students of constitutional law in Turkey interpret the establishment of the advisory assembly as a major step towards a constitutional system of government. The Charter of Alliance (*Sened-i Ittifak*) of 1808 was the first important document from the point of view of a constitutional order. It restricted the Sultan's exercise of power, and also delegated some authority to a senate body-, (the *Ayan*).

The first impact of French ideas was reflected in the Tanzimat edict of 1839 entitled *Gülhane Hatt-ı Humayunu*. This was in no way an Ottoman constitution for the purpose of limiting the powers of the Sultan. The Sultan himself issued it and could abrogate it at will. However, it can be considered as a proto-constitutional document, as it included a promise by the Sultan to abide by any law enacted by the legislative machinery. At the same time the edict formalized the new interpretation of the scope and responsibility of the state, including the protection of security of life, honour, and property, and the proviso of equal justice for all subjects regardless of religion. All the subjects 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 Muslim as well as non-Muslim subjects, thereby adopting egalitarian principles.[4] The *Tanzimat* edict of 1839, although devised in the context of Ottoman tradition and expressing particular goals rather than abstract principles, encompassed many of the ideals contained in the *Declaration of the Rights of Man and the Citizen* of 1789.[5]

From the time of the first printing-house established in 1727 by Müteferrika to that of the *Tanzimat*, translations from European languages had been largely confined to scientific and technical fields. In the *Tanzimat*, interest broadened out into literary, philosophical, and legal works. This new trend reflected the search for new modes of thinking with a bearing on cultural and then judicial values. Translations were made of almost all of the French literature that had provided the intellectual background for the French Revolution. The works of Voltaire, Montesquieu, Rousseau, Fénélon, Fontenelle, and Volney enjoyed particular attention, and were the favourite Western writers of the *Tanzimat* intellectuals.

Texts with legal connotations were not ignored. The French *Code Civil* was translated and published in the same period. The Turkish translation of *Télémaque* appeared in 1862. Its popularity seems to have been due to the

fact that the political theme of this famous utopian-political novel was the maxim, "Kings exist for the sake of their subjects, and not subjects for the sake of kings". *Télémaque*'s dictum for kings was, "Change the state and habits of the whole people and rebuild anew from the very foundations." This eighteenth-century belief in paternalistic government was in harmony with the expectations of the Ottoman intelligentsia in the second half of the nineteenth century.

The second crucial document reflecting French ideas, the Reform Edict (*Islahat Fermanı*) of 1856 in the wake of the Crimean War, constituted a most comprehensive set of rules securing equal rights to non-Muslims in various social and juridical fields.[6] It officially prohibited the use of degrading expressions and terms that denoted discrimination on the grounds of sect, religion, or ethnicity. It opened up the public schools to students of all communities, with competence and capability replacing religious differences as criteria for entrance. Non-Muslims were now admitted to the military service and to official posts. This document also provided for equal treatment in procedures of buying, selling, and paying taxes.

Then, in 1875, the Imperial Edict on Justice (*Ferman-ı Adalet*) provided for independence of the judicial courts, ensured the safety of judges, and reiterated once more that state positions and services were open to all subjects of the Empire. The most important step along the road to the rule of law came with the introduction of the 1876 Constitution (*Kanun-ı Esasi*) which also started the era known as the First Constitutional Period.[7] The basic concept in the 1876 Constitution was that it for the first time recognized a parliamentary system, although the powers it accorded to the parliament were somewhat limited. Among other things, the provisions of this constitution covered basic rights and privileges, the independence of courts and the safety of judges. Although it was in effect for a short period, its amended version was to be the legal basis of the Second Constitutional period in 1908 that laid the foundations for a constitutional monarchy.

The Interactive State and Administrative Law

Less obvious but still of importance in the interactive-state system was administrative law, which concerned the exercise of authority by the state apparatus. Administration on the basis of rules facilitated interaction with society in that it contributed to a high degree of procedural legitimacy. There are few phenomena so demoralizing and detrimental to popular consent as widespread corruption, nepotism, and public kleptomania. Such practices violate the virtually universal conception of fairness. The administration becoming subject to legal rules had another positive effect as well: it meant that state organs remained impartial in their operations *vis-à-vis* the various special interests in civil society instead of exacerbating conflicts of interest between different population groups. In consequence the state, as a neutral regulator of conflict, could assist co-operation between

various social segments. The effect was to strengthen society's capacity for coordination as well as that of the state for governance. This meant that the state then had a strong partner with which to interact.

The *Tanzimat* reforms paved the way for secular administrative legislation and the renewal of the Ottoman state's social and political structures along Western lines. Students of Ottoman administration point out that *Tanzimat* is the watershed in the full-fledged transformation of Ottoman institutions. New, mainly administrative and economic institutions, necessitated legal changes. The *Tanzimat* era was in fact a period of some decades of legal innovations and inaugurated a process of transformation in the rule of law marked by intense codification. In most cases the *Tanzimat* men adopted Western, mainly French codes. As *Şeriat*, or Muslim law, had been the legal apparatus for so many centuries, initial attempts at reforms were directed to the public sphere, which could be considered a marginal area.

Throughout the classical era, the structure of the Ottoman State and society had remained more or less static and unchanged, and Muslim law had been able to accommodate itself successfully to such internal requirements that were needed from time to time. The non-Muslim communities had their own legal regimes and *Şeriat* allowed them to practice their religio-communitarian pursuits. The pressures which now arose from both within and without confronted the Ottoman Empire with an entirely new situation. Communities of different creeds became intermingled as the emergence of a capitalistic market created common denominators and obliged them to share the same space. Furthermore, the internal market became integrated into the world at large, and required procedures common to all participants. The Ottoman society made up of juridical enclaves was passing away, to be replaced by more universal practices, at least in terms of economic pursuits.

Politically, socially, and economically, European civilization was based on concepts and institutions fundamentally alien to Islamic tradition and to the Islamic law in Ottoman Turkey which expressed that tradition. Because of the essential rigidity of *Şeriat* and the dominance of the theory of *taklid*, or strict adherence to established doctrine, an apparently irreconcilable conflict now arose between traditional law and the needs of Ottoman society in so far as it aspired to organize itself by Western standards and values.

There seemed, at any rate initially, no alternative but to simply abandon Muslim law and replace it with laws of Western inspiration in those spheres where Ottoman jurisprudence felt it particularly urgent to adapt itself to modern conditions of market economy and life styles. Any understanding, therefore, of the nature of modern Ottoman legal practice first requires an appreciation of the extent to which and how laws of European origin came to be adopted by the Ottoman realm.

The *Tanzimat* had already heralded secular trends within the field of law; legal transformation had started, continued at a rapid pace, and there was

large-scale reception of European law. The process began under Mahmud II (1808-1839). One of the advances in government during his reign was the transformation of the Supreme Council of Judicial Ordinances (*Meclis-i Vâlâ-i Ahkâm-ı Adliyye*) into a judiciary body.[8] The system of courts (*adliye*) based on the principle of justice (*adalet*) was a novelty. The new concept of justice was distinct from that of the *Şeriat* and sultanic law (*kanun*). Just as the innovations under Mahmud II had introduced the concept of *maarif* not only as a way of learning unfamiliar things but also as a vehicle of modernization, so did the concept of *adalet* bring the sense of administering justice as well as legislating rules for establishing a new order.

Under the *Tanzimat* reforms, each of the ministerial departments (except that for foreign affairs) came to have a permanent council for the preparation of projects and regulations. These organs became increasingly divorced from both Muslim and Sultanic law as their old constituent members began to be replaced by a new type of educated man - the product of the secular schools of higher learning that had been copied from France.

These councils constituted the legislative organs of the Tanzimat. The Supreme Council of Judicial Ordinances continued to function as the supreme body. In 1868 it was divided into the Board of Judicial Ordinances (*Divan-ı Ahkam-ı Adliye*) and the Council of State (*Şura-yı Devlet*). The former became the highest judicial organ and evolved into the courts; it was presided over by the conservative jurist Cevdet Paşa. The Council of State was presided over by the liberal administrator Midhat Paşa and became the source of the constitutional movement that resulted in the drafting of the Constitution of 1876.

The *Tanzimat* brought law codification rather than parliamentary legislation as its distinctive feature. Its attempts at codification constituted the first such experiment in a Muslim country in modern times. The Supreme Council of Judicial Ordinances formed by Mahmud II, referred above, became under the Tanzimat the organ to undertake the job of judicial codification according to *adalet*, which was expressed in 1839 as the *Tanzimat*'s organic law.

The *Tanzimat* Charter declared itself loyal to Muslim law (the *Şeriat*) in line with the custom and the rhetoric of the time. It also declared with even greater emphasis the necessity of framing new laws. It stated that the major cause of misrule, injustice, and disorder was the lack of written laws as official instruments accessible to the public. Neither Muslim nor Sultanic laws fulfilled these conditions. *Şeriat* was not a codified or written law comprising civil, commercial, and penal provisions. The *kanuns* were written and promulgated, but they were not accessible; neither were they judicial in a real sense because, by definition, they were subject to the separate will of each ruler. For the first time the need was felt for laws framed on the basis of a superior kind of justice. Codification was, therefore, the first attempt to differentiate between law and religion and, after deliberation and

selection, to promulgate legislation based on available sources and on certain rational or secular criteria.

Codification in itself is an unmistakable sign of secularization in a Muslim society, given that it is a planned, concerted human effort to formulate the *Şeriat* provisions as positive laws. Even though the result may be based on Muslim law, the process makes it a code easily distinguishable from religious practices and relating only to legal action. Regardless of whether codification is accomplished through the acts of a legislator representing the will of the people or by a competent person or body, it is simply another step in the process of secularization involving selection and deviation from tradition as set by either religion or the state or both. Selection means screening the provisions of the religious schools (*fiqh*), or choosing between provisions of Muslim law and the Western codes, or making eclectic combinations of the two. Above all, doing this implies the existence of absolute criteria different from those of Muslim law and tradition and, as such, secular *par excellence*.

From Muslim Law to Civil Law

To function, the interactive state required a uniform code of civil law. By contributing to integration and imperial/national cohesion this code would strengthen both the state and civil society. It was understood that a people with a common identity was easier to govern through consent than through coercion, that despotic regimes maintained their power through strategies of "divide and rule", and that regimes basing their statecraft on legitimacy worked instead to achieve integration. A tool for realizing this objective was legal standardization.

Civil law was a precondition for economic growth. Entrepreneurship and productive investments could come about only within a framework of fixed and predictable legislation that could uphold contracts and ownership. When economic actors try to arrange this on their own, the risks and transaction costs become so large as to preclude productive economic investment. It was only the state that could furnish the legal infrastructure necessary for entrepreneurship.

In the relationship between the Ottoman Empire and Europe it was the fields of public law (i.e. constitutional and criminal law) and of civil and commercial transactions which were particularly prominent, and it was precisely here that the deficiencies of the outdated classical Ottoman system were most apparent. The law of civil obligation was all too obviously inadequate to cater to modern systems of trade and economic development. Equally insupportable to the modernist view was the traditional form of criminal jurisdiction. Although alien to actual Ottoman practice, the existence in Muslim law of penalties such as amputation of the hand for theft and stoning to death for adultery were, of course, offensive to humanitarian principles, and the notion of homicide as a civil injury, acceptable though it might be to a tribal society, was unsuited to a modern

state. The main reason for a new criminal law was that modern ideas of government could not tolerate the wide arbitrary powers vested in the political sovereign under the *Şeriat* doctrine of deterrence (*ta'zir*).

European jurisprudence was not totally unknown to Ottoman Turkey. Both criminal and commercial laws had a foothold in the Empire through the system of capitulatory privileges, by which the Western powers ensured that their subjects, while resident in the Ottoman realm, would be governed by their own laws. This had brought about a growing familiarity with European laws particularly when, as in the sphere of commercial transactions, they were applied to mixed cases involving European and Ottoman Muslim traders. Naturally, therefore, it was to the laws applied under the capitulatory system that the Ottoman authorities turned when the desire for efficiency and progress appeared to necessitate a replacement of their traditional law. At the same time it was hoped that the adoption of these European laws might mean that the foreign powers might agree to abolish the capitulatory privileges, which were becoming increasingly irksome as growing emphasis was placed on national sovereignty.

Secularization of the law began with the formulation of the first completely secular code in an area that was traditionally outside the scope of Muslim law, and that code was the result of commercial relations with outsiders. The expansion of these relations after the Commercial Treaty of 1838 led to the codification of a commercial law, and to the organization of the first tribunal independent of both the *Şeriat* and Christian ecclesiastical courts.

From the early nineteenth century onwards Ottoman and foreign traders began to form mixed traders' councils to adjudicate between them. European customs and practices were applied in the settlement of disputes in these councils, which were formally recognized after 1840, under the title of Commercial Board (*Ticaret Meclisi*). Negotiations between the government and the European powers holding capitulatory privileges resulted in 1847 in the formal recognition of mixed tribunals composed of ten foreign, ten Ottoman Muslim, and ten Ottoman non-Muslim subjects. The recognition of these bodies and their manner of procedure was implicitly sanctioned by traditional Muslim law which recognized the right of disputants to choose their own arbiters. These tribunals did not utilize any formally codified law or procedure, and their members were not judges in the real sense. They acted entirely on the basis of established commercial precedent.[9]

The creation of these purely secular courts led to the promulgation of the first secular code in 1850. The Commercial Code was in part a direct translation of the French Commercial Code of 1807, and included provisions for the payment of interest. The *Code de Commerce*, made up of four books, dealt with commerce in general, with maritime law, bankruptcy, and mercantile jurisdiction. It drew heavily on the royal ordinances which had been the work of Colbert, the *Code Marchand* of 1673 and the *Ordonnance de la Marine* of 1681. It defined the status of merchant and dealt, for example,

with the duty to keep books, with companies and partnerships and bills of exchange. It did not innovate but produced a clear and rational statement of existing merchant law.

A second version of the code, again emulating French legislation, was enacted as an addendum in 1860. It stipulated that the commercial tribunals were responsible to the Ministry of Commerce. They therefore became the first official secular courts outside the jurisdiction of the Şeyhülislam, the highest religious authority. There followed a Code of Commercial Procedure in 1861, and a Code of Maritime Commerce in 1863, both of which were again basically French law.[10]

To apply these codes a new system of secular courts (*nizamiye*) was established. Civil jurisdiction, except cases of personal status, now fell within the competence of these courts. The basic law of obligations was codified between 1869 and 1876 in the corpus known as the *Mecelle*. Although the substance of this owed nothing to European sources but was derived entirely from the Muslim *Hanefi* jurisdiction, the secular courts could now refer to an authoritative manual. The first deviation from traditional Muslim-law procedure occurred in these courts as they began to accept non-Muslim witnesses testifying against Muslims. Allowing all subjects to take the oath according to the faith to which they belonged was seen as a liberal measure that contrasted with the civil and political vulnerability of Jews in England. When this practice was extended to the statutory secular courts as soon as they were established, it did not arouse any opposition.

Codification and New Jurisprudence

Acts of codification involved basic changes in Ottoman jurisdiction. The new courts began to expand their jurisdiction at the expense of those of the *Şeriat*. The need began to be felt for reorganizing the entire judicial system so as to separate the functions of the secular from those of the religious courts and demarcating their areas of jurisdiction. Efforts were made towards the codification of legal areas previously covered entirely by Muslim law.[11]

The first test in modernizing the *Şeriat* came with the attempt to draw up a penal code. It was inevitable that this would be the first step, since it was the very essence of the *Tanzimat* Charter to ensure "life, property, and honour." Penal law was a field of legislation that had been subject traditionally to the *kanun* enactments of the rulers, to Sultanic law. While *kanuns* on penal offences had not abrogated he penal provisions of the Muslim law, they had made obsolete such provisions as retaliation (*kısas*) and blood-money (*diyet*).

The Supreme Council prepared a new penal code for promulgation in 1840, which was a marked improvement over the one drawn up in Mahmud II's time. It was both the first legal expression of the *Tanzimat* Charter and the first expression of the *Tanzimat* duality, in that it contained legal provisions taken from modern secular criminal codes side by side with others

from the *Şeriat*. It confirmed the principle of equality, and decreed that no one would be punished without a trial and court sentence, that trials would be public, and that impartiality of the judges was essential. On the other hand, it revived the Muslim law provisions on retaliation and blood-money. The code was also defective in nomenclature, and several offences were omitted altogether in the definition and classification of criminal acts. Above all, it maintained the character of medieval law books, being a collection of precepts rather than a precise digest of acts, procedures, and penalties. These shortcomings of the 1840 code led to another code in 1851, not substantially different from the first. Both were attempts to modernize the penal provisions of Muslim and well as Sultanic law by producing a kind of digest rather than a new penal code.

The situation changed radically following the promulgation of the Edict of 1856, and with the entirely new Imperial Penal Code (*Ceza Kanunname-i Hümayunu*) enacted in 1858 and in force until 1926. This was an adaptation or translation of the French penal code and the first introduction of Western legal formulation in the field of public law. The French *Code Pénal* had been a revision of an earlier code of 1791 dealing with serious crimes and based on the idea that crimes and penalties should both be precisely defined by law without leaving room for judicial interpretation. Its successor, promulgated in 1810, was rather more flexible but retained the principle that crimes and punishments must be clearly defined in advance; however, its penalties were as severe as they were inflexible.

Under Ottoman penal legislation, the defined penalties of the traditional *Şeriat* law (*hadd*) were all abolished, except that of the death penalty for apostasy which remained in force longer than any other, with marked revisions in 1911 and 1914. The new Imperial Penal Code of 1858 introduced the legal principles that had been declared in the *Tanzimat* Charter of 1839 and in the Edict of 1856: the principle that no one could be punished for an act that was unspecified, and the principle of individual responsibility.

The Penal Code of 1858 was incomparably modern in form and substance. Its provisions were predominantly secular. However, it was not entirely free from certain *Şeriat* provisions in its original form. The first Article stated that the Code did not abrogate the penal provisions of Muslim law, that it was enacted merely to codify the limits of the rights of the chief executive (i.e. the ruler), and that it would not infringe on claims for cases of retaliation, blood-money, or on personal rights as determined by Muslim law. The code, in fact, contained specific articles on these issues and was an example of the effort to draw up secular legislation in the belief that it could be modern in form and content although based on traditional Muslim law. However, the co-existence of secular and Muslim law within the same code gave rise to several unexpected clashes in the field of judicial administration.

The new code was applied in the statutory secular courts (*nizamiye* or *adliye*) under the jurisdiction of the Ministry of Justice. As a result of the

policy of separating the secular from the religious, these operated side by side with the Muslim courts that were left to the jurisdiction of the highest religious authority, the *Şeyhülislam*, until World War I.[12] In 1916, the *Şeyhülislam* was removed from the cabinet and his jurisdiction much reduced as the religious courts came under the aegis of the secular Ministry of Justice. The religious seminaries that had been teaching religious jurisprudence for centuries lost their autonomy and were brought under the Ministry of Education. Finally, their curricula were modernized and the teaching of European languages became mandatory.

The Final Analysis: Uniformity and Secularism

The continental European countries codified much of their law, both public and private, in the last quarter of the eighteenth and at the beginning of the nineteenth centuries. In the Anglo-Saxon countries the notion of uncodified law prevailed and is still predominant, and the majority of legal rulings are derived from customary principles and judicial precedents.[13] Ottoman and later republican Turkey followed the continental pattern, and with the reception and codification of many European laws, legislation has become the most important source of law. Customary law and case law or judicial precedent are also considered valid sources in Turkish practice, but they are considered subsidiary. For example, in cases under the Civil Code or the Code of Obligations, judges are allowed to apply customary principles when the statutes are silent. In reality, judges will usually consult experts to ascertain the precise content of customary rules. Custom, contrary to statutory law, is not legally valid. It is axiomatic that statutory law is superior to custom, and that judges are bound by statutes passed by the legislature and in line with the Constitution.

The dichotomy between Muslim law and secular legislation lasted for almost a century in the Ottoman-Turkish case. In most instances *Şeriat* represented customs, as religious precepts generally were not codified. Attempts to remove the conflict between the two systems of law and of courts continued throughout the *Tanzimat* and succeeding periods. Stage by stage, increasing areas of life had to undergo legal redefinition and even reorientation, removed from the sphere designated as "religious", and brought under state law.

Codifications both in Ottoman and republican Turkey intended to achieve uniformity in the application of the law, a consideration that was of some moment in view of the widespread divergences of juristic opinion (as recorded in the *Şer'i* texts). The process of legal secularization encountered serious difficulties in defining the boundaries between the secular and religious when it reached the stage of codifying civil law and especially family law. The secular outlook of the French Third Republic during the Second Constitutional Period in the Ottoman Empire gave a further spurt to the Young Turks, and a radical family by-law was enacted in 1917.[14] However,

communitarian concerns were still valid in this piece of legislation. After the proclamation of the republic, the second wave in favour of modernization swept away all concerns on religious grounds and radical legal reforms could be introduced.

In the twentieth century the French *Code Civil* lost its earlier dominance for reasons either ideological or political. Brazil and Turkey have preferred to take the more modern German or Swiss code as a model while others, like Italy and the Netherlands, have produced new codes of their own. The adoption of the Swiss Civil Code and Code of Obligations (which contain the law of persons, family law, succession, property, contracts, torts and unjust enrichment), both of which were adopted in 1926 with some minor alterations, represented a profound change in the social life of Turkey. The Swiss lawyer and scholar Sauser-Hall noted that such a radical and rapid change was unknown to history.[15]

The process of legal codification beginning with the *Tanzimat* era opened the way to the gradual emerging of an interactive modern state. In its most inclusive form, the interactive state is democratically founded. Its structure – marked by power division, law-abiding governance, and an autonomous civil sphere –lays the foundation for a growing pool of collective capacities in society. This, in turn, stimulates both economic prosperity and democratic vitality. The evolution of civil society and democratic citizenship requires, above all, an institutional framework and jurisprudence to reinforce the preconditions for their existence. Herein lay the relative strength of the Ottoman movement of legal codification and administrative reform which republican Turkey inherited.

NOTES

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