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**"THE GARDEN OF FORKING PATHS":
ISLAMIC LEGAL TRANSFORMATIONS IN THE OTTOMAN EMPIRE DURING THE
NINETEENTH CENTURY**

By

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HIS 490 History Honors Thesis

Department of History

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INTRODUCTION

When I first conceived of an investigation into Islamic law, my intention was to explore and examine the thesis that Bernard Lewis first set forth in “The Roots of Muslim Rage” and Samuel Huntington later articulated in his seminal work, *The Clash of Civilizations and the Remaking of World Order*. In the “Roots of Muslim Rage,” Lewis writes,

It should by now be clear that we are facing a mood and a movement far transcending the level of issues and policies and the governments that pursue them. This is no less than a clash of civilizations—the perhaps irrational but surely historic reaction of an ancient rival against our Judeo-Christian heritage, our secular present, and the worldwide expansion of both. It is crucially important that we on our side should not be provoked into an equally historic but also equally irrational reaction against that rival.¹

In order to determine the validity of the Clash Thesis, I examined the foundations that compose, undergird, and constitute any civilization, its legal system. If the basic assumptions of Clash Thesis are correct, the legal system of Islamic societies should be relatively monolithic instead of constituting a gradient or continuum from one part of the Islamic world to another as local conditions vary. As my case study, I examined Islamic law in the Ottoman Empire, with a special emphasis upon its reform in the nineteenth century and abolition in the twentieth century.

When I conducted my research, most of the primary source law texts that I could have examined were written in languages that I could not read. As a result, I relied primarily upon

¹ Bernard Lewis, “The Roots of Muslim Rage,” *The Atlantic Monthly* (September 1990), <http://www.theatlantic.com/magazine/archive/1990/09/the-roots-of-muslim-rage/304643/6/> (accessed March 4, 2015).

secondary sources, in particular academic journal articles that analyze different periods of Islamic legal development during the Ottoman Empire's long history, but whose findings had not been integrated into a larger historical survey. The way that this study contributes to the existing literature on Islamic law and the history of the Empire is the way that it links together many existing studies of Islamic law with an emphasis upon the impact of local conditions and interactions with non-Islamic legal traditions. Discovering the extent to which Islamic law reflects an ideal type, as the Clash Thesis would tend to support, or not is tremendously important for future scholarship and contemporary policy debate in a number of different fields.

Through my research, I found that Islamic law has evolved and changed in response to local conditions in a similar manner to most other intellectual and institutional phenomena. Thus, the extent to which one can reliably infer the character of Islamic law in a specific context by calling upon it as an ideal type is much more limited than prior studies and popular opinion would suggest. Islamic law is not a set of universal precepts of understandings that remain unchanged and inviolate across the ages. On a higher level, the contingent nature of Islamic law tends to undermine both traditional Orientalist and modern culturalist understandings about Islamic societies such as the Clash Thesis. Examining Lewis and Huntington's Clash Thesis is not only valuable for its academic dimension, but also for the impact of the findings for forming and implementing policy. On one level, the assumption that Islamic law, and Islam, is as monolithic and unchanging as the Clash Thesis purports it to be worsens the character and quality of intellectual debate.² On another, more immediate level, the assumption helps to emboldens voices who claim that Islam and the West are incompatible and that embracing

² Jorgen S. Nielsen, "Shar'ia: Immutable or Adaptable," in *Shari'a as Discourse: Legal Traditions and the Encounter with Europe*, ed. Jorgen S. Nielsen et al. (Farnham, Surrey, UK: Ashgate Publishing Ltd, 2010), 1.

Western-style modernity necessarily entails the destruction of Islamic heritage and culture. While paradigms like the Clash Thesis possess a type of conceptual and aesthetic power, it is necessary to assess their relation to reality and, if there is disparity, one must reconsider, revise, or reject their base assumptions.

CHAPTER 1: PREVIOUS APPROACHES TOWARD THE STUDY OF ISLAMIC LAW

The Nature of Paradigms

Before delving into the facts, dates, and events that compose this study, it is necessary to analyze the methodological approach that structures it. A brief introduction is especially necessary given the significant degree to which the foundations of the Orientalist paradigm, and its later articulation in the Clash Thesis, are different from those from which this study proceeds. The paradigm that Lewis and Huntington employ traces its intellectual genealogy to a prior paradigm that dominated the study of the Middle-East, Orientalism. While Lewis and Huntington's paradigm is more undoubtedly more sophisticated than that of the previous Orientalists, it still makes many of the assumptions as its predecessor. Thus, it is useful to examine the nature of paradigms and Orientalism to understand the potential inadequacies of the Clash Thesis.

A paradigm is a set of shared commitments regarding the character of individual entities and their relationships with other entities. The formation of a paradigm is necessary for two or more parties to engage in any meaningful, constructive discourse because, if the two parties do not share a minimum number of commitments, they will be unable to communicate and lay the foundations for more advanced inquiry. In the process of paradigm formation, one forms classes of entities and the relationships between them by emphasizing the common attributes of certain entities and de-emphasizing other common attributes. The process is necessary because there is

no class that shares an attribute to the exclusion of all other classes and there are some members of a class that resemble other classes more closely than they do other members of their same class. Once a given community forms or adopts a paradigm, it appears to be the only accurate description of the world. Although the community may change or alter a limited number of the connections within the paradigm, it will always retain a number of base commitments that are inviolable and sacrosanct. If one seeks to dislodge one of the base commitments, it will lead to a transformation in the entire system, rendering something substantially new from what was present before.³ Understanding the constructedness of paradigms helps to expose potential flaws in previous approaches toward Islamic societies and law.

Orientalism as Paradigm

In advancing its central argument, the traditional Orientalist paradigm entails a number of important assumptions about Islamic civilization and its relation to Western civilization. Firstly, it assumes that there are a set of definable and definite criteria that identify an Islamic society as opposed to a non-Islamic society. Secondly, it assumes that Islamic civilization is monolithic. Thirdly, it assumes that Islamic societies are stagnant and unable to develop. Fourthly, it assumes that Islam and Islam alone is the defining aspect of all societies that compose Islamic civilization. Fifthly, it assumes that Islamic civilization is homogenous so that any society it designates as Islamic is essentially equivalent in all substantial aspects to another society that it designates as Islamic. Sixthly, it assumes that Islamic civilization is eternally hostile to other civilizational groups, but especially the West. Lastly and most importantly, Orientalism conceals its discursive nature and purports merely to be an accurate description of what is the case. That is

³ For a full description of this view of paradigms with examples, consult Thomas Kuhn, "Second Thoughts on Paradigms," http://eu.pravo.hr/_download/repository/Second_Thoughts_on_Paradigms.pdf (accessed on March 5, 2015).

not to say that there is not Orientalist scholarship that made important discoveries or was able to break out, to a certain extent, from the paradigm as an ideal type. However, the extent to which some of these empirically-unfounded attitudes have remained in serious scholarship and the public imagination is staggering and cannot be ignored.⁴

The Orientalist paradigm argues that major reason why Islamic civilization lagged behind the West was because its schools of jurisprudence were inflexible and actively hostile to innovation. In particular, the Orientalist paradigm emphasizes that, after the establishment of the main schools of Islamic jurisprudence in the ninth and tenth centuries and the subsequent ‘closing of the gate of ijtihad,’ Islamic jurists could no longer exercise the independent reasoning necessary to respond to innovation.⁵ According to Orientalism, supposed inflexibility and lack of innovation in the legal sphere gave rise to a civilizational character that, in general, denigrated independent thought and innovation.⁶ Furthermore, the Orientalists believe that European civilization possessed an openness, expressed and guaranteed by its positivistic, secular legal tradition, that allowed it to develop the scientific method and worldview.⁷ The scientific worldview gradually empowered Western civilization and made it dominant among all others. However, in line with the analysis of paradigms above, it seems unlikely that, necessarily, Western and Islamic civilization and their legal traditions are as separated and distinct as Orientalism purports. Thus, Orientalism’s claim that the West’s distinct character, and the

⁴ For a full description of Orientalism, consult Edward Said, *Orientalism* (New York: Vintage Books, 1979).

⁵ V. Necla Geyikdagi, *Foreign Investment in the Ottoman Empire* (New York: Tauris Academic Studies, 2011), 13.

⁶ Armando Salvatore, “Tradition and Modernity within Islamic Civilization and the West,” in *Islam and Modernity: Key Issues and Debates*, ed. Muhammad Khalid Masud et al. (Edinburgh, UK: Edinburgh University Press, 2009), 4.

⁷ Ibid.

constituent aspects of that character like its legal tradition, was the cause of its material ascendancy appears dubious.

The Limitations of Orientalism

In line with the nature of paradigms, although one can delineate the elements that compose the class of Islamic civilization, one forms the class not by appealing to a definite set of characteristics that Islamic civilization possess to the exclusion of all other civilizations; rather one forms the class by learning to emphasize and suppress specific characteristics between individual entities that compose classes. For example, certain sects of Islam, particularly Shia Islam, possess a messianic character similar to that present in Christianity. However, in the process of intellectual formation, one learns to suppress the characteristics that Shia Islam shares with Christianity and emphasize the characteristics it shares with other Sunni sects. Whereas, formerly, the observer encountered intersecting, dynamic relationships among a sea of inchoate data, he or she now perceives a series of discrete classes that appear to share little in common with one another and each constitute a world unto themselves. However, the original dynamic, intersecting relationships between individual entities do not actually disappear; they remain hidden beneath the surface of the paradigmatic apparatus and can re-emerge if one chooses to examine and re-order its foundations. The scholar Edward Said raises this point, albeit in a simplified form, in his response to the Clash Thesis, “The Clash of Ignorance.” Said notes, “This is the problem with unifying labels like Islam and the West the [which paradigms like Orientalism and the Clash Thesis propound]: They mislead and confuse the mind, which is trying to make sense of a disorderly reality that won't be pigeonholed or strapped down as easily as all

that.”⁸ Therefore, the perceived and actual points of division between Islamic civilization and Western civilization are more porous and constructed than they may appear upon initial examination.

The inadequacy of Orientalism does not mean that the researcher must succumb to a postmodern interpretation of reality and intellectual progress. Paradigms are necessary for any form of intellectual progress. However, one must always be attentive to what composes a paradigm and seek to modify it in a way that most accurately describes the character of and relationships between classes and their constituent entities. At the very least, the nature of paradigms forces the researcher to acknowledge that it is unlikely that different classes, namely Islamic and Western civilization, are as separated as Orientalism supposes. Some have taken the criticism of the traditional Orientalist paradigm to mean that any attempt to understand Islam as an intellectual system is inherently biased. Others have deferred to rosy declarations that Islam is necessarily a religion of peace rather than a dynamic, living intellectual tradition in which multiple actors participate and claim membership. This study seeks to avoid these unfortunate pitfalls and grapple with the history of Islamic law as it has actually occurred.

Conclusions

The nature of paradigms makes it likely that Islamic law is open to the same process of development, contingency, and differentiation as any other legal tradition. Therefore, paradigms that suppose a stark division between entities, like the Clash Thesis, are potentially dubious. As the following empirical analysis of legal reforms in the Ottoman Empire during the nineteenth and twentieth centuries demonstrates, Islamic law does not actually possess the characteristics

⁸ Edward Said, “The Clash of Ignorance,” *The Nation* (2001), <http://www.thenation.com/article/clash-mignorance> (accessed March 3, 2015).

that the Orientalists ascribed to it, precisely because it is always located in a contingent, socio-historical milieu. Consequently, theoretical formations that proceed, at least in part, from an Orientalist substrate, such as the Clash Thesis are susceptible to critique and academic re-examination both from a theoretical and empirical point of view.

CHAPTER 2: GENERAL PATTERNS OF ISLAMIC LEGAL FORMATION

The Types of Islamic Law, *Sharia* vs. *Fiqh*

Before proceeding further, it is necessary to differentiate between the two types of Islamic law, the *sharia* and *fiqh*. While some groups disagree, most Muslim scholars consider the *sharia* to be the over-reaching, pure law that God bestowed to Muhammad and *fiqh* to be the attempt to apply the over-reaching, universal series of principles and admonitions present within the Qur'an, Hadith, and other sources to specific cases.⁹ The process of analogical and innovative reasoning contained within *fiqh* is particularly important in determining how a Muslim should act in the face of specific scenarios and conditions that were alien to Arabian society during the time of the Muhammad, those that Muhammad did not encounter and render judgement upon during his life, or developed after Muhammad died. After Muhammad died and without the existence of codified schools of *fiqh*, or even a single, authoritative version of the Qur'an or Hadith, Muslim rulers ruled and governed in a necessarily ad-hoc manner, especially in regard to new or undelineated conditions. In responding to these conditions, the rulers were practicing *fiqh*, but they did not do so in a systematic way. During the ninth and tenth centuries, as Islam spread even wider geographically and entrenched itself in the existing institutional and intellectual structures that it encountered, there was an increasing need for systematic compilations of *fiqh* to establish the intellectual continuity of Islamic law and provide the tools to

⁹ Jorgen S. Nielsen, 3 - 4.

train new judges. The need for systematic *fiqh* motivated numerous jurists to create schools of Islamic jurisprudence (*madhhabs*), all of which reflect different “legal discourses and hermeneutic principles.”¹⁰ Thus, there are actually two types of Islamic law: the *sharia*, God’s universal, abstract, perfect and all-encompassing law that Muhammad received; and *fiqh*, the process by which the individual interprets God’s law, systematic versions of which are present in the *madhhabs*.¹¹

Islamic law as *fiqh*, through codifications like the Ottoman *Mecelle*, is subject to local conditions and thus “shares some features with other legal traditions such as Common Law and other modern legal systems.”¹² Not only is difference of opinion to be expected, but it necessarily follows from human cognition attempting to grapple with divine knowledge.¹³ In the same way that a modern political theorist writing about democracy would impugn certain characteristics to it, he or she would also acknowledge that local conditions shape the experience of democracy in a way that differs from the generalization. Within the Sunni sect alone, five major schools currently exist, the Hanafi, Shafi, Maliki, Hanbali, and Zahiri, excluding other major schools that

¹⁰ Guy Burak, “The Second Formation of Islamic Law: The Post-Mongol Context of the Ottoman Adoption of a School of Law,” *Comparative Studies in Society and History* 55 (2013): 582.

¹¹ Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden, NLD: Brill, N.H.E.J., N.V. Koninklijke, Boekhandel en Drukkerij, 2000), 4 - 5.

¹² Ahmed E. Souaiaia, *Contesting Justice: Women, Islam, Law, and Society* (Ithaca: State University of New York Press, 2008), xiii.

¹³ Abdullahi Ahmed An-Nacim, “The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law,” *Modern Law Review* 73 (1) (2010): 21.

no are no longer extent such as the Jariri, Laythi, Awza'i, and Thawri.¹⁴ Additionally, within Shia Islam, other schools exist such as the Ismaili, Zaidi, and Jafari.¹⁵

The *madhhabs* have reacted dynamically in response to the political, economic, social, and environmental milieu in which they exist. Moreover, *madhhabs* have coexisted along and interacted with non-Islamic legal traditions, such as the Central Asian/Mongolic, Persian, and Roman.¹⁶ However, many Islamic jurists have historically attempted to obfuscate the connection between Islamic and non-Islamic legal traditions and the connection between the *sharia* and *fiqh*. The jurists would usually also argue that their own *madhhab* supplied the only accurate heuristic framework to understand the *sharia*, blurring the lines between two different types of Islamic law and obscuring the extent to which Islamic law existed alongside other non-Islamic legal traditions.¹⁷ The jurists most often did so because to argue otherwise meant undermining the credibility of their own *madhhab*. For example, during the Umayyad and Abbasid empires, Islamic jurists argued that the *sharia* was the highest and only true standard of justice and legislation, superseding that of secular rulers and kingdoms.¹⁸ The jurists argued that the *sharia*, as the highest standard of ethical conduct, served to circumscribe the actions of secular rulers and defend the vulnerable masses.¹⁹ However, despite the sweeping, monolithic characterization that

¹⁴ Ahmed An-Na'im Abdullahi, "Sharia in the Secular State: A Paradox of Separation and Conflation," in *Law Applied: Contextualizing the Islamic Shari'a*, ed. Peri Bearman et al. (London, UK: I.B. Tauris, 2008), 326.

¹⁵ Ibid.

¹⁶ Sami Zubaida, *Law and Power in the Islamic World* (London, UK: I.B. Tauris, 2005), 108.

¹⁷ M. Hakan Yavuz, "Turkey: Islam without Shari'a," in *Shari'a Politics: Islamic Law and Society in the Modern World*, ed. Robert W. Hefner (Bloomington, IN: Indiana University Press, 2011), 153.

¹⁸ Ibid.

¹⁹ Ibid.

the jurists assigned to Islamic law, its implementation often fell under the purview of the secular state and interacted dynamically with other legal traditions in a larger juridical continuum. While Islamic law has been an important aspect of Islamic societies and governments, it has always operated most strongly in the private lives of subjects, rather than being a determinative constraint upon state policy. Rulers such as Mehmed II of the Ottoman Empire even codified and established legal systems on a primarily secular basis, only to bring them into line with Islamic law during a later period.²⁰ Importantly, these relationships and patterns of organization were not peculiar to the Ottoman state; rather they have been fairly common among Islamic states and societies in historical and contemporary environs.

The Experience of Islamic Law in the Ottoman Empire

The experience of Islamic law in the Ottoman Empire further validates the contingent nature of Islamic law. Before the nineteenth century, Islamic law, mostly under the Hanafi *madhhab*, reacted dynamically and in tandem with strong traditions of customary and statutory law within the Empire. Moreover, conditions peculiar to the Ottoman state left their indelible mark upon the expression and character of Islamic law. Both of these factors set the stage for the unique transformations that Islamic law underwent in the Empire during the nineteenth century.

Initial Orientalist scholarship emphasized the degree to which purely Islamic concepts of *jihad* and the frontier-warrior, or *ghazi*, were the primary basis of Ottoman identity, legitimacy, and authority. However, with further scholarship, it has become apparent that the Ottoman state not only was integrated into the existing “political and economic environments of Europe and the Mediterranean” but also “articulated sovereignty and claimed legitimacy by multiple means,

²⁰ Sami Zubaida, 220.

drawing on the entire legacy of Turko-Irano-Islamic kingship as well as [its] Byzantine heritage.”²¹ For example, the Ottoman frontier-warrior, *ghazi* identity drew upon the embattled attitude that the Islamic world assumed during the search to reorganize itself in the wake of the Mongol invasions and the “legacy of confusion and anarchy” that had characterized the final days of Byzantine rule.²² Thus, fundamental aspects of the Empire’s Islamic identity were unique products of their historical milieu and derived from a partially non-Islamic substrate. Whereas formerly, scholars believed that Ottoman institutions and intellectual currents proceeded on a mostly, if not purely Islamic basis, the present trend has emphasized how non-Islamic elements in the Empire co-existed and evolved with Islamic elements.

In the Ottoman Empire, the legal traditions of Central-Asian tribal societies such as the Mongols and Turks, and the Persian tradition of law and statecraft were as great influence upon its legal and governmental structure as the Islamic tradition. Situated within a larger “Turko-Irano-Islamic political matrix,”²³ Ottoman Islamic law reacted dynamically with surrounding political, economic, social, and intellectual conditions. The Central-Asian tradition required a ruler to proclaim a set of laws rooted in “tradition and custom” and enforce its arbitrary, just application to his subjects; the *yasa* of Genghis Khan is the archetypal product of this tradition.²⁴ The pre-Islamic, Persian legal tradition posited that the ruler was absolutely sovereign and omnipotent and, as such, he had to arbitrate personally all significant disputes; the

²¹ Douglas E. Streusand, *Islamic Gunpowder Empires: Ottomans, Safavids, and Mughals* (Boulder, CO: Westview Press, 2010), 29 - 31.

²² Rhoads Murphey, *Exploring Ottoman Sovereignty: Tradition, Image and Practice in the Ottoman Imperial Household, 1400-1800* (London, UK: Continuum International Publishing, 2008), 21.

²³ Douglas E. Streusand, 29.

²⁴ Sami Zubaida, 108.

Abbasid caliphs were previous Muslim rulers who drew upon the Persian tradition.²⁵ The Ottoman sultans and their bureaucracy drew upon both of these traditions to govern in conjunction with Islamic law.

Drawing on the Central-Asian tradition, the Ottoman sultan and his bureaucracy, the Empire's central executive, regularly issued a series of statutory laws, called the *kanun*, 'urfi, or sultanic laws. Periodically, government functionaries would distribute new *kanun* from the center to the provincial courts, adding to the existing statutory corpus.²⁶ For instance, through the *kanun*, the bureaucracy created and structured the tax-farming system that provided the state with its revenues, which did not have precedent in the Islamic tradition, and differed according to local customary laws.²⁷ The statutory laws served as the primary legal structure of the Empire and expanded the authority of the executive at the expense of the religious establishment.²⁸ The sultan himself and his bureaucracy were often comparatively uninitiated in the intricate structures and exacting details of Islamic law, delegating the duty of retaining and maintaining its corpus to the *ulema*.²⁹ Moreover, influenced by the Persian model, the sultan and his bureaucracy claimed the authority to protect subjects from abuse and so many of the statutory laws defined and regulated the relationship between the peasants and the local populace, making sure that the tax-farmers did not excessively abuse their tenants.³⁰

²⁵ Sami Zubaida, 108.

²⁶ M. Hakan Yavuz, 154.

²⁷ Stanford J. Shaw and Ezel Kural Shaw, *History of the Ottoman Empire and Modern Turkey* (Cambridge, UK: Cambridge University Press, 1977), 95.

²⁸ M. Hakan Yavuz, 154.

²⁹ Rhoads Murphey, 96.

³⁰ Sami Zubaida, 109.

Whereas, in theory, the Islamic judge (*qadi*) only renders judgement in accordance with the school of jurisprudence to which he ascribes, the Ottoman state entrusted its *qadis* with rendering judgements in consideration of its complete juridical corpus. The *qadis* rendered rulings that drew upon statutory, customary, and Islamic traditions.³¹ In the process, Ottoman jurists (*muftis*) often sought to and did bring non-Islamic practices into closer conformance with their schools of jurisprudence. However, while jurists were, in some circumstances, successful in situating the statutory laws within an Islamic discourse and character in some way, they did not change their essential non-Islamic trajectory and character.³² Additionally, through their interpretation of Islamic law, the Empire and its religious officials drew upon a highly heterogeneous and diverse medieval Islamic legal tradition.³³ The mix of different traditions, operating under the supremacy of the sultan's *kanun*, statutory laws, characterized all Ottoman legal structures from the fiscal, to the criminal, to the commercial.³⁴

Nonetheless, Islamic legal frameworks continued to exercise significant influence. For example, the state levied a tax on non-Muslims (*cizye*) in exchange for their exemption from military service, rule by their own laws and customs, and protection by the sultan.³⁵ Moreover, the state regulated the operation of Islamic charitable entities such as the *waqf* and rendered them largely exempt from taxes for the services they provided to their surrounding communities. While the sultan and his bureaucracy ruled in a largely secular, extra-Islamic fashion, the state

³¹ Sami Zubaida, 221.

³² Ibid., 111.

³³ Rhoads Murphey, 35 - 36.

³⁴ Sami Zubaida, 113 - 114.

³⁵ Stanford J. Shaw and Ezel Kural Shaw, 95.

was careful to promulgate an official discourse of strict adherence to the faith and often cloaked and justified extra-Islamic practices by appealing to an Islamic discourse.³⁶ The Islamic discourse assured the Muslim populace and religious establishment that the basis of all Ottoman law was the *sharia* and that the sultan, in serving as its ultimate executor and successor to the caliphate, was the defender of the faith.³⁷ The heavy discursive emphasis upon the *sharia* may have been a principal reason why European observers began to blend together *fiqh* and *sharia*, rendering Islamic law, in their minds, a monolithic, unchanging system.

As the preceding evidence demonstrates, within the Ottoman Empire, Islamic Law interacted with numerous other traditions of law and governance. Not only did the traditions coexist among each other, but also they exerted an influence upon one another, leading to new developments. However, ideas are only one component that shapes the expression of Islamic law in a given context. Institutions are also vitally important.

The Empire's Arbiters of Islamic Law

The institutional character of the Ottoman Empire had a significant impact upon its Islamic legal tradition. From its inception, the Empire was distinguished in its “elaborate administrative apparatus with a formalized hierarchy of rank and written regulations,” with the apparatus extending “authority from the imperial court, to the administration, of the provinces, from fiscal affairs to military provisions.”³⁸ Within the context of its centralizing tendency, the state extended its administrative apparatus to control over the religious establishment that oversaw the arbitration and implementation of its laws. The bureaucratic character of the

³⁶ Sami Zubaida, 114.

³⁷ Ibid.

³⁸ Ibid., 33.

Empire's institutions led to a unique relationship between the the dominant Hanafi school and the state, which was markedly different from prior relationships between ruling dynasties and *madhhabs*.³⁹

Prior to the Ottoman Empire, ruling dynasties had supported specific jurists or *madhhabs*, but they did not take a part in shaping the actual content of the *madhhab* itself to suit its interests and preferences.⁴⁰ In contrast, the Hanafi *madhhab* rose to prominence in the Empire only after the Sultan Suleiman the Magnificent proclaimed the restructuring of the legal system in accordance with it and declared it to be the Sunni Muslim orthodoxy. The state itself would also actively restructure the doctrine of the Sunni Hanafi school in line with its imperial objectives so that it, in effect, Hanafi Sunni Islam became Ottoman Sunni Islam.⁴¹ More broadly, the advent of greater levels of state-control over *madhhabs* may have been part of a larger pattern that took hold in South and Central-Asian Islamic states during the period, particularly those in which the Hanafi school was dominant.⁴² Nonetheless, while state-control over the Hanafi *madhhab* may have been part of a larger, concurrent phenomena, the fact that the Empire adopted the attitude was highly significant. The Empire would instantiate the normative and system of increasing state control over Islamic life throughout the geographically, ethnically, and intellectually diverse societies and peoples that they controlled, amplifying the importance of the development in the Empire compared to surrounding societies. Moreover, because the Empire possessed a

³⁹ Guy Burak, 584.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid., 601.

stronger operating system than comparable Central-Asian or South-Asian states, it was able to implement its normative system more vigorously.

The Ottoman Empire controlled the *ulema*, the arbiters of Islamic law, by making its members a branch of the state itself. In contrast to other Islamic societies, the Ottoman state managed the education, salary, and appointments of the *ulema*. Within the religious bureaucracy, there was a vast and far-reaching stratification of rank with the highest office being the *seyhulislam* or the mufti of Istanbul. Each judicial center in the provinces retained a *qadi* and, oftentimes, the *qadi* of a particular judicial center would also serve as mayor and chief of police.

⁴³ However, the *qadis* found their political and administrative role within the state circumscribed by administrative supervisors (*hlul-emr*).⁴⁴ The *seyhulislam*, the Empire's chief jurist, issued *fatwas*, rulings or determinations made in accordance with Islamic law, oversaw the implementation of Islamic law throughout the state, and headed the Office of the *Seyhulislam*.⁴⁵ The state issued numerous "laws, decrees, and local orders" for the writing and preservation of documents, registrations, and fees of *qadis* and *sharia* courts.⁴⁶ Holders of high religious offices such as the *seyhulislam*, the *qadiaskars* of Rumelia and Anatolia, and the chief provincial *qadis* were theoretically equal in rank to corresponding members of sultanic bureaucracy, such as the grand vizier and provincial governors, and were able to exercise significant autonomy.⁴⁷

⁴³ Ahmed Akgündüz, "Shari'ah Courts and Shari'ah Records: The Application of Islamic Law in the Ottoman State," *Islamic Law and Society* 16 (2) (2009): 204.

⁴⁴ Ibid.

⁴⁵ M. Hakan Yavuz, 156 - 157.

⁴⁶ Ahmed Akgündüz, "Shari'ah Courts and Shari'ah Records," 205.

⁴⁷ Sami Zubaida, 114.

However, the vast religious establishment was still another branch of the Ottoman bureaucracy, which the state controlled and directed towards its larger objectives as much as it could.

Given its control over the character and expression of Islamic law, the Ottoman Empire used it to defend its authority against competing sources of solidarity from domestic and foreign Muslim populations. While, through the *millet* system, the Empire made relatively generous allowances of autonomy to certain non-Muslim populations, it sought to keep a tight grip over Islamic religious life. Whenever heterodox Islamic populations appeared to gain a substantial base of support that challenged the authority of the center, the state deported or placed restrictions upon them in order to fragment their organizational structure.⁴⁸ For example, the *Alevi*, or *Qizilbash*, Shia sect supported policies of decentralization, which would allow religious and political autonomy for its communities. In response, the state viewed the *Alevi*s' religious heterodoxy and the "alternative source of solidarity" that it supplied, as a threat to the integrity of the state.⁴⁹ Thus, in the Ottoman context, rather than the Islamic law serving as an outside check on the power of the state, as was the classical interpretation, it served as a mechanism by which the state could exercise its power. Indeed, it was the oppressed, heterodox Muslim populations such as the *Alevi*s who were the groups who were most likely to hearken back to the view of Islamic law as a tool to circumscribe the power of rapacious rulers and the fundamental source of all law.⁵⁰ The Empire also appealed to its custody over the true Islamic orthodoxy to legitimate its opposition to foreign challengers such as the Safavid dynasty of Iran.⁵¹ As with the many

⁴⁸ M. Hakan Yavuz, 155.

⁴⁹ Ibid.

⁵⁰ Ibid., 154.

⁵¹ Rhoads Murphey, 95.

institutional relationships between the Ottoman center and periphery, divergences from official state policy existed. This was especially true in the Maghreb and Eastern Arab provinces wherein the Maliki and Shafii *madhhabs* respectively continued to exercise significant influence.⁵² However, the major trends and differences in the experience of Ottoman Islamic law, especially compared to previous and contemporary Islamic societies, is clear.

Conclusions

In order to understand the nature of Islamic law in a specific society, one must pay attention to the socio-historical milieu in which it is situated. While the *sharia*, the concept that God's divine knowledge is present in the Qur'an, the Sunna, and other texts, is unchanging and monolithic, *fiqh*, the human attempt to understand that knowledge, changes according to local conditions and circumstances and is the actual Islamic law that has been operative in Islamic societies. Since the Islamic law that *madhhabs* express is the latter rather than the former, Islamic law, and Islamic civilization as a whole, is not necessarily unchanging or monolithic. The further development and evolution of Islamic law in the Ottoman Empire underscores the contingent character of Islamic law.

In the Ottoman Empire, Islamic law interacted with many different legal traditions such as the Central Asian, Persian, and Roman, forming the foundations of the state's ability to articulate and propound sovereignty. Moreover, in the Empire, the religious establishment was an extension of the state apparatus rather than being an extra-governmental institution. The presence of many legal traditions and the religious establishment's close relationship with the state shaped and influenced Islamic law in the Empire more than any abstract, semantic notion of

⁵² Ido Shahar, "Legal Pluralism and the Study of Shari'a Courts," *Islamic Law and Society* 15 (1) (2008): 138.

what constitutes it. For example, the Ottoman *ulema*'s relationship with the state contrasted markedly with that of the neighboring state of Qajar Iran whose *ulema* exercised significantly more autonomy and were, in a real sense, an extra-governmental institution. The differing relationship between the state and religious establishment, along with a host of other factors, would lead to differences in the path of Islamic legal reform during the nineteenth century.

CHAPTER 3: ISLAMIC LEGAL TRANSFORMATIONS IN THE 19th CENTURY

The Impetus and Potential For Reform

Given the breadth and variability of Islamic law in the Ottoman Empire, it does not appear it was necessarily less capable of development or change than its Western equivalents or separated from other traditions of law in the way that the Clash Thesis maintains. Moreover, as the Ottoman central government had a history of significant control over the religious establishment, it seemed to possess the ability to undertake and enact systematic Islamic legal reforms.⁵³ Given that these appraisals are reasonably well-founded in the historical and methodological evidence, the question naturally emerges as to why a fusion of Islamic and Western law did not occur during the age of nineteenth-century Ottoman reform and why instead the state embarked on a trajectory that would lead to the secular program of Mustafa Kemal and his followers. While the Orientalist paradigm and the Clash Thesis contend that the Kemalists rejected Islamic law in order to be able to embrace Western modernity, the actual forces at work that led to the marginalization and abolition of Islamic law appear to be more complex.

The Ottoman legal reforms of the nineteenth century were part of a wider series of policies known as defensive modernization or defensive developmentalism. Perceiving a threat to their existence, Middle-Eastern states employed defensive modernization policies in order to

⁵³ Murteza Bedir, "Fikih to Law: Secularization through Curriculum," *Islamic Law and Society* 11 (3) (2004): 386.

defend against European intervention, conquest, and economic peripheralization.⁵⁴ The Ottoman reform movements of the nineteenth century, and the later Kemalist regime, were similarly characterized by the attempt to rationalize institutional functioning and centralize authority after large-scale decentralization that had occurred during the seventeenth and eighteenth centuries. The Empire's successive military defeats at the hands of aspiring and existing European empires and the subsequent, gradual cession of many of its most valuable European and Mediterranean domains further heightened the reformist impulse.⁵⁵ In this regard, the Empire, given its administrative and institutional history, was in a stronger position than many non-European societies,⁵⁶ especially compared to neighboring Near-Eastern states like Qajar Iran who were highly decentralized or the states of the Arabian peninsula who had fewer resources to defend against the European advance.

During the nineteenth century, Islamic legal reforms in the Ottoman Empire emerged within the context of centralization and modernization. The struggle for sovereignty and legal independence was epitomized by the fight against the Empire's infamous capitulations to European states. At the time of the initial reforms during the nineteenth century, the Empire had previously granted various extraordinary powers and privileges to European states and their representatives. While these privileges had formerly been minor impositions upon Ottoman sovereignty, they became more pronounced over time in relation to Europe's rising material power. By the early nineteenth century, the Empire was enduring significant violations of its own

⁵⁴ James L. Gelvin, *The Modern Middle East: A History* (New York: Oxford University Press, 2011), 72.

⁵⁵ Dogan Gurpinar, *Ottoman Imperial Diplomacy: A Political, Social and Cultural History* (London, UK: I.B. Tauris, 2013), 58.

⁵⁶ Sami Zubaida, 107.

sovereignty, which threatened the ability of the state to remain functionally or nominally independent of European suzerainty. For example, in the case of a dispute involving a foreigner, the consular courts of the foreigner's nation would arbitrate rather than the Ottoman courts, granting them favorable terms of justice.⁵⁷ Moreover, the embassies excluded many of their citizens from having to pay the state's taxes and conforming to its regulations.⁵⁸ The privileges also allowed embassies to abuse treaty agreements granting special privileges to the embassies' *dragomans*, which caused deep and widespread abuse, particularly in Ottoman commercial centers.⁵⁹ In the wake of the creation of such a favorable commercial status, Ottoman citizens began to petition European embassies to purchase *dragoman* status so that they could ignore Ottoman laws, giving them a comparative advantage over their competition.⁶⁰

The capitulations allowed European states to establish protective status over the increasingly restive non-Muslim populations of the Ottoman Empire. The nationalistic impulse led to ever-increasing numbers of rebellions and attempts at secession, which drove the Ottoman state deeper and deeper into the arms of European creditors both for the costs incurred during the fighting and for the lost revenues from ceded territories. The protective status not only eroded the state's control over its subjects, but also led to increased European intervention in its administrative affairs.⁶¹ By the beginning of the *Tanzimat*, foreign embassies had already

⁵⁷ Feroz Ahmad, "Ottoman Perceptions of the Capitulations, 1800–1914," *Journal of Islamic Studies* 11 (1) (2000): 19.

⁵⁸ Ibid.

⁵⁹ Avi Rubin, "British Perceptions of Ottoman Judicial Reform in the Late Nineteenth Century: Some Preliminary Insights," *Law & Social Inquiry* 37 (4) (2012): 997.

⁶⁰ Feroz Ahmad, 19.

⁶¹ Selim Deringil, "Redefining Ottoman Conversion Identities in the Late Empire: Policies of Conversion and Apostasy," in *Imperial Rule*, ed. Alexei Miller et al. (New York: Central European University Press, 2005), 110.

established a model of using political pressure and financial compensation to support Ottoman political figures who would serve their aims and represent their interests, fracturing the internal integrity of the state apparatus.⁶² Thus, as European economic and political power became more prominent, the issue of the capitulations, both in functional and optical terms, became progressively more acute.

In order to restore its sovereignty, the Ottoman Empire sought to reform its courts and legal codes so that it could arbitrate disputes involving foreign nationals in its own courts. In this way, the state would both retain elements of its indigenous law and institutions, and be able to defend its sovereignty against European expansionism. Importantly, the initial pressure to accommodate the Europeans meant that the subsequent attempt to reform the Ottoman legal system would have to involve the importation of Western legal principles and codes.⁶³ These local conditions were decisive in shaping the future of Islamic law in the Empire.

The Course of Reform

At the beginning of the reform process, the Ottoman Empire established courts in its great commercial centers to address the extraterritorial privileges that the capitulations afforded European embassies and collaborating Ottoman citizens. In order to bring the Europeans into the Ottoman legal system, the Empire instituted mixed (*Nizamiye*) courts that would employ European-style codes, colored in part by the Hanafi school of Islamic jurisprudence.⁶⁴ During the nineteenth century, the Ottoman Ministry of Justice was “engaged in an attempt to rationalize the

⁶² Stanford J. Shaw and Ezel Kural Shaw, 70.

⁶³ Margaret Kohn, “Western Imperialism and Islamic Law,” in *Law Without Nations*, ed. Austin Sarat et al. (Palo Alto, CA: Stanford University Press, 2010), 142.

⁶⁴ Ahmed An-Na’im Abdullahi, “Sharia in the Secular State,” 331.

Nizamiye court system through a reflexive process that included monitoring of irregularities, disciplinary measures taken against transgressing officials, and a continuous reconsideration of daily judicio-administrative practices.”⁶⁵ In 1867, the state passed legislation permitting foreigners to acquire and own property with the stipulation that all disputes involving property would now be tried in Ottoman courts.⁶⁶ In 1869, the Ottoman state passed a law creating the institutions of citizenship, thus making it illegal for Ottoman citizens to seek the extraterritorial status permitted under the capitulations.⁶⁷ By the 1870s, the state had instituted European-style commercial courts in the major centers of trade and commercial activity, including Izmir, Edirne, Selanik, Beirut, Cairo, Damascus, and Aleppo.⁶⁸ In terms of legal rationalization and centralization to meet the challenge of European powers, the process was generally successful in erecting a legal framework that reasserted Ottoman sovereignty while accommodating growing European economic interests, which could not be ignored.

While the Ottoman Empire had, at first, intended that European codes be limited to the *Nizamiye* courts, Ottoman reformers and European elites began to desire and implement their outright transplantation into its legal system.⁶⁹ Reformers drew upon the *Nizamiye* model and created new domestic courts that utilized European codes. French codes laid the basis for the Ottoman Commercial Code (1850), the Ottoman Penal Code (1858), the Code of Commercial

⁶⁵ Avi Rubin, 1009.

⁶⁶ Richard A. Debs, *Islamic Law and Civil Code: The Law of Property in Egypt* (New York: Columbia University Press, 2010), 57.

⁶⁷ Feroz Ahmad, 7.

⁶⁸ Avi Rubin, 997.

⁶⁹ Enid Hill, “Comparative and Historical Study of Modern Middle Eastern Law,” *The American Journal of Comparative Law* 26 (1978): 299.

Procedure (1861), and the Code of Maritime Commerce (1863).⁷⁰ The legal reformers preferred the French codes because they were the most comprehensive and widely-used European codes available at the time.⁷¹ Significantly, the Empire was the first muslim-majority state to implement a European legal code of its own accord rather than being a colonial imposition.⁷² Similarly, Egypt, in imitation of the Ottoman center, instituted *Nizamiye* courts in 1875 and domestic courts on the same model in 1883, both of which drew mostly upon European codes and partly upon islamic jurisprudence.⁷³ Through drawing upon Western legal traditions, the reforms of the nineteenth century introduced openly secular legislation rather than the cloaked secular legislation of the *kanun*.⁷⁴ However, as Chapter 1 and 2 illustrate, the change constituted more of a transition in the relative influence and configuration of different legal traditions and principles that were already present in the Empire rather than a true break with what had come before. As an additional consequence, the introduction of more secular elements did not necessarily mean the marginalization of those with a religious basis.

During the last quarter of the nineteenth century, the Ottoman Empire continued to Westernize its legal system. With the accession of sultan Abdulhamid II (r. 1876 - 1909), the Empire's discourse became much more visibly Islamic than it had been under the previous *Tanzimat* elites. However, despite a changing discursive emphasis and increased religious centralization, the Hamidian attitude toward legal reform was consistent from the prior period.

⁷⁰ Norman Anderson, "Islamic Law Today the Background to Islamic Fundamentalism," *Arab Law Quarterly* 2 (1987): 345.

⁷¹ Herbert J. Liebesny, "Stability and Change in Islamic Law," *Middle East Journal* 21 (1967): 24.

⁷² Enid Hill, "Comparative and Historical Study of Modern Middle Eastern Law," 293.

⁷³ J. N. D. Anderson, *Islamic Law in the Modern World* (Westport, Conn.: Greenwood Press, 1975), 22.

⁷⁴ Herbert J. Liebesny, 24.

Instead of integrating Islamic law into the European codes, during the reign of Abdulhamid II, “much of the constructive work of the Tanzimat was continued and extended.”⁷⁵ In a similar way to Meiji Japan and other non-European states undergoing European-style modernization, Abdulhamid II attempted to retain an Ottoman, Pan-Islamic identity with Western institutions.⁷⁶ The later Committee of Union and Progress (CUP) (r. 1908 - 1918) continued the process of modernization along European lines with a marginalization of Islamic law. In 1916, the state transferred all *sharia* courts, which had been left to arbitrate matters of personal status and family matters, from the *seyhulislam* to the direct administration of the Ministry of Justice and the Islamic schools to the Ministry of Education.⁷⁷ After World War I, Mustafa Kemal and his followers seemingly brought the process of escalating Westernization and modernization to its logical end by declaring Islamic law to be illegal and instituting another series of European codes as the single constitutive element of the Turkish Republic’s legal system.

While the majority of the Ottoman Empire’s reformist elites were satisfied with the marginalization of Islamic law from political life and the transplantation of European legal codes, a minority wanted to pursue a more gradualist trajectory. The minority wanted to reinvigorate the Empire’s legal framework and fuse its Islamic heritage into the fabric of a modern, centralized state. The leader of the minority group was the *Tanzimat* official Ahmed Cevdet Pasha who, from 1869 - 1877, issued the first codification of Islamic law, the *Mecelle*

⁷⁵ D. K. Fieldhouse, *Western Imperialism in the Middle East, 1914-1958* (Cary, NC: Oxford University Press, Incorporated, 2006), 10.

⁷⁶ Renée Worringer, “‘Sick Man of Europe’ or ‘Japan of the Near East?’: Constructing Ottoman Modernity in the Hamidian and Young Turk Eras,” *International Journal of Middle East Studies* 36 (2) (2004): 218.

⁷⁷ M. Hakan Yavuz, 157.

(Law Collection). Cevdet's life and actions outline the course of gradualist reform that could have occurred in the Empire.

Ahmed Cevdet

Despite his importance to the Ottoman age of reform and later Islamic legal developments, the life of Ahmet Cevdet has garnered a less-developed literature than most of his contemporaries. In the words of one writer, Cevdet was truly “one of the most underrated men of the *Tanzimat* period.”⁷⁸ Cevdet was a unique figure in that he bridged the administrative world of the Westernizing reformists with the academic world of the religious establishment, the *ulema*. Supplementing his Islamic educational base, Cevdet studied the legal traditions of individual European countries, with a particular emphasis on that of France, and international law.⁷⁹ Through his experiences, Cevdet came to believe that the Empire had to modernize, but also thought it was possible to achieve modernization through modifying and adapting the indigenous legal system rather than the wholesale transplantation of European codes.⁸⁰ When Mustafa Resit, the architect of the *Tanzimat*, wanted to find an expert in Islamic law who had the flexibility to be able to accommodate his reformist agenda and diffuse opposition from the embattled *ulema*, Cevdet, with his extensive studies of both Islamic and Western law and institutions, was the perfect candidate.⁸¹

⁷⁸ Stanford J. Shaw and Ezel Kural Shaw, 64.

⁷⁹ Ibid.

⁸⁰ Richard L. Chambers, “The Education of a Nineteenth-Century Ottoman Alim, Ahmed Cevdet Pasa,” *International Journal of Middle East Studies*, 4 (4) (1973): 463.

⁸¹ Ibid.

From 1858 onward, under the tutelage of Mustafa Resit, Cevdet gained administrative experience to supplement his academic base. When he began his sixth term as grand vizier, Resit made Cevdet a member of the Council of the *Tanzimat*, the chief engine of reform in the Empire. Cevdet utilized his legal education by creating and administering numerous institutions in a way that combined the Ottoman Empire's Islamic institutional and legal heritage with European equivalents. Specifically, in regard to law, Cevdet created "regulations on land ownership and cadastral surveys" and "was the principal author of the regulation that created the new Supreme Council of Judicial Ordinances in place of the Council of the *Tanzimat*" to which he would accede as a member,⁸² along with serving in a series of administrative posts of increasing power and prominence.

The Mecelle

In 1868, Ahmed Cevdet served as the chairman of the commission tasked with creating a new European-style law code that incorporated Islamic legal principles for the Ottoman Empire. Prior to the convening of the commission, Cevdet played a significant role in convincing the sultan that "the new civil law code should be based on principles derived from Islamic law, modernized to meet current realities."⁸³ Cevdet and his colleagues' administrative and academic experience allowed them to forge a powerful fusion of Islamic and Western law in the tradition of the earlier, pre-reform juridical continuum that had existed in the Empire, but also marked a unique development in the history of Islamic law. From 1869 to 1876, the state enacted the product of Cevdet's Law Commission, the *Mecelle* (Law Collection), the first European-style legal codification of *fiqh*.

⁸² Stanford J. Shaw and Ezel Kural Shaw, 65.

⁸³ Ibid., 66.

The composition and release of the *Mecelle* marked a new era in the history of Islamic law. Previously, Islamic law had not operated as a statutory law in the sense of setting precedent and establishing legislation, was not codified along European structural lines, and did not operate off the increasingly positivistic, in contrast to naturalistic, foundation that European legal systems were expressing. Instead, *fiqh* was the attempt to interpret and organize the *sharia* according to specific interpretative principles that the *madhhabs* established and, in certain cases, modify those principles to meet changing realities. In the traditional framework, when a *qadi* issues a *fatwa*, the *fatwa* is not binding for all cases of a similar nature in the future; rather, it only serves as a judgement in the individual instance and relies for all its power upon the *qadi*'s "personal religious authority."⁸⁴ In this regard, the Islamic juristic tradition stands in contrast to the European traditions of Common Law and Civil Law. When a Common Law judge delivers a ruling, he or she sets a precedent that other judges utilize and when a Civil Law judge delivers a ruling, he or she does so according to a set of established statutes that contain a fairly limited field of possible interpretation. Civil Law, which structured the transplanted French codes, is "grounded in rationality and it is objectively enforced by the rational judgements of competent tribunals" with judges as "executors of this law [who] have themselves no claim to represent the charismatic authority of powerful individuals."⁸⁵ In this way, the *Mecelle* combined Islamic legal principles with the structure of European Civil Law, generating a new transformation in the history of Islamic law. However, while the *Mecelle* undoubtedly signalled a shift in Islamic law

⁸⁴ Aharon Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt Des Islams* 44 (2004): 88.

⁸⁵ Mohammad Hashim Kamali, "Shari'ah and Civil Law: Towards a Methodology of Harmonization," *Islamic Law and Society* 14 (2007): 406.

to “European models of the state and administration of justice,”⁸⁶ it is important to recognize that the Islamic juristic legal tradition had coexisted and co-evolved with statutory traditions since the establishment of the first *madhhabs*.⁸⁷ For example, the Ottoman *kanun* was a type of statutory law that had existed alongside the juristic law of the Ottoman Sunni Hanafi *madhhab* and others for centuries.⁸⁸ Thus, the main way that the nineteenth-century European legal traditions differed from those that had already been present in the Empire were their positivistic orientation. However, the extent to which previous statutory laws like the *kanun* expressed and were truly conceived under the principles of natural law rather than those of legal positivism is still unclear.

Cevdet and his colleagues were the first in the history to take Islamic legal principles, as established by individual *madhhabs*, and establish them as a type of statutory law. Cevdet and his colleagues drew upon the Civil Law tradition of Europe, as expressed through various French codes, as their statutory context. In this way, the *Mecelle* was an attempt “to codify the rules of contract and tort according to the Hanafi school, combining European form with Shari’a content.”⁸⁹ The new type of Islamic law would differ from the juristic process of *fiqh* because it would now rely for its authority on the extent to which the *qadi* enforced established legislation rather than almost purely upon his expertise and education. The process of codification was also significant in its own right. The *Mecelle* included “sixteen books addressing the issues of sales, debts, ownership, lawsuits, evidence, and judicial procedure.”⁹⁰ In the process, the *Mecelle*

⁸⁶ Ahmed An-Na’im Abdullahi, “Sharia in the Secular State,” 330. .

⁸⁷ Sami Zubaida, 108.

⁸⁸ M. Hakan Yavuz, 154.

⁸⁹ Ahmed An-Na’im Abdullahi, “Sharia in the Secular State,” 331.

⁹⁰ Stanford J. Shaw and Ezel Kural Shaw, 66.

“simplified a huge part of the relevant principles and made them more accessible to litigants and jurists.”⁹¹ Excepting family law, which the *Mecelle* left to the domain of the traditional *sharia* courts, the *Mecelle* constituted a comprehensive civil code.⁹²

The *Mecelle* also innovated in its application of existing Islamic legal principles. Within Islamic law, *tahhayyur* is the practice of incorporating rulings and principles from different *madhhabs* according to what the jurist determines to be relevant and correct.⁹³ Before the *Mecelle*, the application of *tahhayyur* had been fairly common within the *madhhabs* themselves, but the composition of the *Mecelle* marked the first time that the jurists had used the practice to matters of Islamic law relating to state policy.⁹⁴ In the context of the *Mecelle*, the use of *tahhayyur* became associated with selecting the Islamic legal principles of that “seemed most suitable to the prevailing conditions of society.”⁹⁵ The revised definition allowed Islamic legal scholars to select the rulings and principles that would facilitate accommodation between Western political and economic institutions while retaining Islamic influence. More broadly, the methodology of the *Mecelle* would fuel a larger trend toward eclecticism within Islamic law and jurisprudence, leading to comparatively greater amounts of legal innovation.⁹⁶ The principles of

⁹¹ Abdullahi Ahmed An-Nacim, “Sharia in the Secular State,” 331.

⁹² Dora Glidewell Nadolski, “Ottoman and Secular Civil Law,” *International Journal of Middle East Studies* 8 (1977): 518.

⁹³ M. Hakan Yavuz, 156.

⁹⁴ Abdullahi Ahmed An-Nacim, “The Compatibility Dialectic,” 20.

⁹⁵ Mohammad Hashim Kamali, 406.

⁹⁶ Abdullahi Ahmed An-Nacim, “The Compatibility Dialectic,” 20.

tahayyur, codification, and the recasting of Islamic law as a statutory tradition would heavily influence subsequent attempts to reform Islamic law during the process of modernization.

During the remaining history of the Ottoman Empire, there were some other important legal developments in Islamic law, the most prominent of which was the Ottoman Family Law of 1917. Following the model of the *Mecelle*, the authors of the Family Law used the principle of *tahayyur* to select individual rulings from different *madhhabs*. However, whereas the *Mecelle* had drawn upon those of the established *madhhabs* such as Hanafi, Shafi, and Maliki, the authors of the Family Law expanded *tahayyur* to include individual jurists that operated outside of the dominant *madhhabs*.⁹⁷ Specifically, the Family Law drew upon the rulings of Mu'tazli scholars on the issue of guardianship in marriage.⁹⁸

Despite the *Mecelle*'s comprehensiveness, vitality, and level of compliance that it was able to inspire, Ahmed Cevdet and his colleagues failed to stem the rising tide of Westernization. In the wake of the *Mecelle*'s promulgation, Cevdet found himself profoundly disenchanted with the inability of the *Tanzimat* to stem the gradual disintegration of the Ottoman Empire and its domination by European economic and political interests.⁹⁹ European states in particular continued either to flout the Ottoman codes or force the state to assume a more aggressively European orientation. As the century wore on, it seemed to many domestic elites and foreign observers that, despite Cevdet's significant innovation, Islamic law was in an inevitable, irreversible decline.

⁹⁷ Mohammad Hashim Kamali, 407.

⁹⁸ Ibid.

⁹⁹ Richard L. Chambers, 464.

Implementation of Islamic Legal Reform

While the process of re-centralizing its authority may have constrained its ability to institute Islamic legal reforms, the Ottoman Empire was able to inspire substantial compliance in both its central and outlying provinces. From the sixteenth century to the nineteenth century, local elites had carved out their own semi-autonomous states that sought to implement reform on their own terms. While the center, theoretically and legally, had authority over provincial governments, it often did not possess the power necessary to enforce its policies, especially in the more peripheral provinces of North Africa and the Levant.¹⁰⁰ Therefore, the extent and character of Islamic legal and institutional reforms in a given area depended upon the existing relationship with the Ottoman center and local conditions. For example, in response to the *Tanzimat* Decree of 1839, Muhammad Ali, the ruler of Ottoman Egypt, agreed to grant his subjects the civil rights that the *Tanzimat* Decree instituted, but reserved the right to interpret the Decree in terms of its applicability to cases and codification into law.¹⁰¹ In 1841, desiring more vigorous compliance with its reforms, the Ottoman center capitulated and issued a specific decree allowing Ali to modify his reform process “in accordance with the requirements of the locality and the principles of justice.”¹⁰² In other cases, provincial developments in Islamic law prefigured those at the center such as the abolition of slavery in Tunisia in 1846 prior to its abolition by the Ottoman center in 1857.¹⁰³

¹⁰⁰ Ebubekir Ceylan, *Ottoman Origins of Modern Iraq: Political Reform, Modernization and Development in the Nineteenth Century Middle East* (London, UK: I.B. Tauris, 2011), 24.

¹⁰¹ Richard A. Debs, 57.

¹⁰² Ibid., 57 - 58.

¹⁰³ Ismael M. Montana, *Abolition of Slavery in Ottoman Tunisia* (Gainesville, FL: University Press of Florida, 2013), 124.

However, while provincial elites had more authority the further from the Ottoman Empire's center they were, there appears to be a rough uniformity in the process of nineteenth-century legal reform and acceptance of reforms from the center. For example, while Muhammad Ali and his descendants had the power to institute legal reforms as they pleased, Egyptian reforms proceeded along almost the same lines as those in the Ottoman center.¹⁰⁴ Moreover, the *Mecelle*, the Ottoman civil code that Ahmed Cevdet composed remained active in the Empire's former Arab domains for the next sixty years, with Israel being the last to abolish it in 1984.¹⁰⁵ Even if the Empire may not have been able to enforce its legal reforms through an operative system of law, it was able to erect a normative system that motivated its outlying subjects to adopt them and may have influenced the behavior of neighboring or constituent states like Ottoman Egypt. As a corollary that is relevant to discussion about the possibility of Islamic legal reform during this period, it does not appear to be the case that limitations of authority would have prevented the Empire from applying Cevdet's approach to the rest of its law codes.

Conclusions

The rise of Europe presented new challenges to the Ottoman Empire and significant, sweeping transformations in its legal system. In particular, the increasing economic and political power of European states caused the gradual erosion of Ottoman sovereignty. In response, the Empire attempted to strike a middle way of reform between appeasing European interests and retaining its Islamic identity through reforming its legal system. While Ottoman reformers initially implemented European legal codes on a limited basis, mostly in cases

¹⁰⁴ J. N. D Anderson, *Islamic Law in the Modern World*, 22.

¹⁰⁵ Shlomo Guberman, "The Development of the Law in Israel: The First 50 Years," <http://www.mfa.gov.il/mfa/aboutisrael/israelat50/pages/development%20of%20the%20law%20in%20israel-%20the%20first%2050%20yea.aspx> (accessed March 3, 2015).

involving foreign nationals, the process soon intensified with the outright transplantation of European codes into the Ottoman legal system, resulting in a strengthening of the statutory tradition of law whose lineage lay in the *kanun*. Simultaneously, a minority of legal reformers, such as Ahmed Cevdet, aspired to preserve the parity between Islamic and non-Islamic legal principles that had historically existed in the Empire. However, ultimately, the promulgation of the *Mecelle* was an intellectual and institutional anomaly within the larger movement toward the Westernization of the Empire's legal system. The question of why the *Mecelle* failed to set the precedent for further reform within the Empire is the primary concern of the following chapter.

CHAPTER 4: OBSTACLES TO ISLAMIC LEGAL REFORM

Why Marginalize Islamic Law?

As the preceding section demonstrates, Islamic law in the Ottoman Empire continued to be dynamic, situated, and interactive with evolving conditions during the period of nineteenth-century reform. In spite of the power and attraction of European codes, there was still a dedicated group of reformers like Ahmed Cevdet who capitalized upon the Empire's syncretic legal history, the reception of foreign novelties, and reinterpretations of existing principles to recast the Ottoman Islamic legal tradition, and Islamic law more generally, into a new form. The process of transformation yielded the Empire's civil code, the *Mecelle*.

Given that the *Mecelle* existed, the question emerges as to why the Ottoman Empire did not implement its intellectual and methodological model more widely and why, instead, the state slowly proceeded down the path of rising Westernization. The answer lies in the proximity of European states and their rising power within the world-system along with numerous obstacles that generated instability in the Ottoman state, which invited further intervention and seemed to confirm the supremacy of the West, its institutions, and its laws. Whereas the prior chapter demonstrated the impact that European proximity to the Empire had upon the impetus for legal reform, this chapter examines the role that it played in limiting the potential for reforms similar to Ahmed Cevdet's model from taking hold.

The Rise of Europe

The major challenge that confronted the Ottoman Empire's attempts at creating a fusion of Islamic and Western law was the rise of Europe. As their control over Islamic societies increased, European states used the opportunity to implant their legal and administrative systems because doing so supported their material and ideological objectives.

As Chapter 1 explained, two of the key elements of the Orientalist paradigm are that all Islamic societies are essentially the same and that they cannot substantially change. Within the minds of Europeans who were either intentionally or unintentionally ignorant of the Empire's syncretic legal history, the Orientalist paradigm necessarily precluded the possibility of Islamic legal reform. More broadly, the Orientalist paradigm that European states assumed toward Islamic societies was part of a larger pattern, stretching back to the colonization of the Americas, in which they denigrated and rendered invisible the legal systems of non-European societies.¹⁰⁶ Insofar as non-European societies and states did not possess systems that reflected European traditions of statehood, sovereignty, and law, European states did not recognize them as constituting true systems; rather they considered indigenous systems as ad-hoc, inefficient, and unenlightened confluences of customary practice or as nonexistent.¹⁰⁷ In the few cases that the Europeans did recognize indigenous legal traditions as constituting systems, as they did in the case of their interactions with Islamic societies, they asserted that they were inherently incapable of reform or coexistence with European systems.¹⁰⁸ European states utilized the rationale of the

¹⁰⁶ Abdullahi Ahmed An-Nacim, "The Compatibility Dialectic," 11.

¹⁰⁷ Ibid.

¹⁰⁸ Paolo Sartori and Ido Shahrar, "Legal Pluralism in Muslim-Majority Colonies: Mapping the Terrain," *Journal of the Economic and Social History of the Orient* 55 (4/5) (2012): 645.

superiority of their systems and the inferiority and irregularity of the indigenous systems to justify legal transplantation.

Expressing the Orientalist paradigm, European colonial officials within the Ottoman Empire believed that, despite the work of those such as Ahmed Cevdet, efforts to reform Islamic law were in vain because it could not be reformed.¹⁰⁹ For example, British consular reports charged the Ottoman state with being unable to implement Westernizing reforms, let alone construct an effective fusion of Islamic and Western law. In 1880, one British consular official charged, “The populations in Anatolia are not in a sufficiently advanced state of intellectual development to understand the beneficial purpose of laws framed in a more liberal spirit than the existing ones.”¹¹⁰ Reports such as these are important because they not only express the Orientalist paradigm that colonial officials possessed toward the Ottoman Empire’s legal system, but also demonstrate their profound lack of knowledge of it with frequent mistakes and mischaracterizations about the most fundamental of details.¹¹¹ Thus, it is possible that the basic assumptions of the Orientalist paradigm created expectations with the minds of the colonial officials despite the absence of evidence to confirm them. As European colonial elites precluded the possibility of reform, some also firmly believed that it was their mission to bring modernity to non-European societies through reforming the legal apparatus of non-European societies.¹¹² Moreover, European states also utilized the Orientalist paradigm to justify their occupation and

¹⁰⁹ Ebrahim Moosa, “Colonialism and Islamic Law,” in *Islam and Modernity: Key Issues and Debates*, ed. Muhammad Khalid Masud et al. (Edinburgh, UK: Edinburgh University Press, 2009), 164.

¹¹⁰ Avi Rubin, 1003 - 1004.

¹¹¹ Ibid.

¹¹² Ebrahim Moosa, 163.

re-making of Islamic societies, which benefited the growth of their political and economic power.¹¹³ Further integration between the European center and the periphery meant that European states would become even more powerful and dominant.¹¹⁴ Therefore, the Orientalist paradigm supplied the ideological base for legal transplantation, and material and humanitarian impulses would supply the impetus.

Of course, it is also important to recognize that the ability of European states to act upon these aims rested upon the comparative power of their institutions and material resources in relation to non-European societies. During the period of colonialism, if a non-European state could take advantage of technological and intellectual innovations from the West, as was the case in Meiji Japan, it was more likely to be able to retain its sovereignty and aspects of its indigenous identity than states who were not able to do so as effectively, as was the case with neighboring Qing China. Consequently, it is important to examine the Ottoman Empire's reaction to the rise of Europe, which would affect its ability and desire to retain Islamic law.

Ottoman Elite Attitudes

One of the major difficulties confronting Islamic Law in the Ottoman Empire during the nineteenth century was that its elites were very receptive to the Orientalist paradigm from Europe, which encouraged the marginalization and abolition of Islamic law. Historically, the elites of the Empire had played a decisive role in establishing and maintaining its legal apparatus. Moreover, other than being the historically powerful force at the top of the state apparatus, during the nineteenth century, Ottoman elites were all the more dedicated to their purpose of

¹¹³ Abdullahi Ahmed An-Nacim, "The Compatibility Dialectic," 11.

¹¹⁴ John R. Schmidhauser, "Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems," *International Political Science Review* 13 (3) (1992): 331.

reform because they “perceived [themselves] as the only source for the revival of the Ottoman state and the idea it represented.”¹¹⁵ Whereas the Ottoman public was not necessarily in favor of the legal reforms that elites undertook, the elites were, because of their power in society, able to act upon their beliefs and desires to move into the direction of reform that they desired.¹¹⁶ Given the cursory historical and intellectual survey at the beginning of this analysis, it would seem obvious that the Ottoman elites did not believe that Islamic law was monolithic and unchanging. However, in the late Empire, most Ottoman reformers drew upon the the Orientalist paradigm from Europe, which would influence the types of reforms that they would propose and initiate.

The majority of the Ottoman Empire’s elite reformers came out of the bureau of translation and correspondence with European states, in which they imbibed Western ideas about non-Western societies like Orientalism.¹¹⁷ Thus, the elites believed that the only way to be reform was to integrate the Empire into European networks and that the only way to do so was by adopting European economic, political, and social models.¹¹⁸ In doing so, the Empire would become a power equal to the European states.¹¹⁹ As a necessary corollary, most of the elites came to believe that Islamic law was backward and could not meet the emerging needs of a modern state, especially as it engaged with the institutional networks that the Europeans had erected.¹²⁰

¹¹⁵ Dogan Gurpinar, 56.

¹¹⁶ J. N. D. Anderson, “The Significance of Islamic Law in the World Today,” *The American Journal of Comparative Law* 9 (2) (1960): 189 - 190.

¹¹⁷ Armando Salvatore, “The Reform Project in the Emerging Public Spheres,” in *Islam and Modernity: Key Issues and Debates*, ed. Muhammad Khalid Masud et al. (Edinburgh, UK: Edinburgh University Press, 2009), 197.

¹¹⁸ M. Hakan Yavuz, 155.

¹¹⁹ Ussama Makdisi, “Ottoman Orientalism,” *The American Historical Review* 107 (3) (2002): 774.

¹²⁰ Ibid.

Specifically, in line with the Orientalist idea about the decline of *ijtihad*, Ottoman elites believed that Islamic law could not adapt to meet the needs of European economic institutions and practices.¹²¹ Accordingly, even though, intellectually and empirically it was questionable whether there was a necessary link between modernity and the marginalization of Islamic law, the elites sought to reform upon European lines. Another major internal obstacle to the Empire's attempts to reform its legal institutions and to do so on the basis of a fusion of Islamic and Western law was the institutional barrier between the Western-oriented elites and the *ulema*.

Institutional Barriers Between Ottoman Reformers and the Ulema

When the *Tanzimat* commenced, the Ottoman Empire's religious offices did not experience the same level of the development and empowerment that other Ottoman ministerial departments underwent. Even before the alienation of the *ulema* during the nineteenth century, there were significant institutional divisions between the religious and administrative establishment of the empire, especially in regard to top positions. For example, during the entire history of the Empire, Ahmed Cevdet was the only person to transition to the rank of *vezir*, an administrative office, from the rank of *kazasker*, a religious office.¹²² Rather than strengthening existing religious institutions or leaving them alone, the state actually undermined, weakened, and marginalized them. In 1839, the state established the Council of State, in part, in order to weaken the Office of the Seyhulislam and the *ulema*'s relative standing within the Ottoman government. Since the Office of Seyhulislam was the arbiter of Islamic law in the Empire, its

¹²¹ Timur Kuran. "The Absence of the Corporation in Islamic Law: Origins and Persistence," *The American Journal of Comparative Law* 53 (4) (2005): 786.

¹²² Richard L. Chambers, 464.

decline led to the decline of Islamic law as well.¹²³ In the legal sphere, the Westernizing reforms widened the existing gap between statutory law, which traced its institutional lineage to the earlier *kanun*, and Islamic law.¹²⁴ The judicial reforms also tended to reduce the judicial power of the *qadis* and *muftis*, especially in view of the administrative and judicial power they had possessed during the preceding seventeenth and eighteenth centuries.¹²⁵ In 1870, the state founded the Ministry of Education and the Ministry of Justice, depriving the *ulema* of much of their administrative role.¹²⁶ More generally, the state tended to co-opt the members of the *ulema* who possessed the greatest early promise, encouraging a general decline in the vibrancy of religious institutions.¹²⁷ Accordingly, while the high-ranking *ulema* initially supported the reform attempts of Selim III (r. 1789 - 1807) and Mahmud II (r. 1808 - 1839), they began to feel alienated by the speed of modernization, especially with the extent to which reformers were importing European principles, traditions, and institutions into the Empire.¹²⁸ Consequently, the *ulema* became more intellectually conservative and hostile toward any type of reform, even an approach that would imbue the European-style institutions with some semblance of Islamic base.

Ahmed Cevdet's involvement in the administration of the Ottoman Empire also met with considerable hostility from the *ulema* itself. Because of its marginalization under the nineteenth-century reforms, most of the *ulema* resented anyone who it felt was part of the state

¹²³ M. Hakan Yavuz, 157.

¹²⁴ Ibid., 155.

¹²⁵ Avi Rubin, 998.

¹²⁶ M. Hakan Yavuz, 157.

¹²⁷ Richard L. Chambers, 464.

¹²⁸ M. Hakan Yavuz, 155.

bureaucracy and, thus, was betraying the interests of the institution as a whole. Consequently, Cevdet faced significant opposition, envy, and hostility to his involvement in spheres of conduct such as military and administration, which went beyond the traditional spheres of the *ulema*, such as education, scholarship, and juridical study.¹²⁹ It had been rumored that Cevdet, because of his prominence in the religious establishment, was in line to assume the leadership of the *ulema* by becoming the *seyhulislam*, chief *mufti* of the Empire, but the conservative leadership prevented his proposed appointment because he possessed a more liberal orientation.¹³⁰ Given the alienation of the *ulema* from the state apparatus, Cevdet was remarkably unique in that he was one of the few Ottoman reformers who received religious training in the *ulema* and still possessed the reformist spirit of many in the state apparatus.¹³¹ Thus, the hostility that developed between the *ulema* and the state, and the co-option of the best minds into the state apparatus, generally prevented other figures like Cevdet from arising who might have sought to incorporate Islamic law into the Empire's other legal codes.

Economic Weakness and Fragility

Another key aspect of Europe's challenge to Islamic law in the Ottoman Empire was economic. During the nineteenth century, the Ottoman state attempted to correct what it perceived to be the "misrule and inefficiency of provincial administration" that had developed during the seventeenth and eighteenth centuries, particularly the devolution of power and fiscal apparatus to provincial centers rather than Istanbul.¹³² For example, the state encountered

¹²⁹ Richard L. Chambers, 464.

¹³⁰ Ibid.

¹³¹ Ibid., 463.

¹³² Stanford J. Shaw and Ezel Kural Shaw, 84.

significant challenges in modernizing and centralizing its fiscal structure through the abolition of tax-farming. On February 7, 1840, the state reorganized the old tax system so that, whereas it had previously based taxes on a mix of Islamic, statutory, and sultanic law, it now based them on a fixed ratio according to taxpayer's income and capacity to pay.¹³³ However, the new system faltered because the tax-farmers saw little incentive to transfer their existing knowledge and relationships within rural districts to their successors from Istanbul.¹³⁴ The difficulty to reorganize the fiscal structure early on was particularly problematic as the Empire found itself engaged in multiple wars on its European frontier. If the Empire had possessed a more centralized, efficient fiscal base at the beginning of the century, it would not have been forced to borrow as heavily as it did from European creditors.

The strength of European economies combined with comparative Ottoman fiscal weakness yielded a potent combination for increased Western legal influence in the Ottoman Empire. In the face of an increasingly poor economic position, Ottoman reformers believed that reforming the Empire's legal system along European lines would allow indigenous industry to compete more effectively by easing access to foreign markets.¹³⁵ However, "legal reform made it easier for European merchants to do business locally" and "deepened the marginal economic position of the Ottomans in the emergent global economy."¹³⁶ Beginning with an 1838 free-trade agreement, the developed markets of Europe deluged the Empire with cheap, manufactured

¹³³ Stanford J. Shaw and Ezel Kural Shaw, 96.

¹³⁴ Ibid.

¹³⁵ V. Necla Geyikdagi, 160.

¹³⁶ Michael Gasper, "The Making of the Modern Middle East," in *The Middle East*, ed. Ellen Lust (Thousand Oaks, CA: CQ Press, 2013), 16.

goods, displacing indigenous industry with a superior economy of scale and more sophisticated, powerful modes of production.¹³⁷ In response to the increasing relative value of resources to European markets, Ottoman markets increasingly consolidated around the exportation of raw materials, drawing away capital from the already beleaguered industrial sector.¹³⁸ However, as the process continued, the terms of trade worsened with the Ottoman markets receiving manufactured goods that were less valuable than the raw materials that they were exporting. Moreover, the foreign direct investment that the Empire received was intended almost exclusively to meet the demands of European investors who were focused upon resource-exportation and manufacture-importation, and the infrastructure necessary to expand and deepen the system.¹³⁹ In order to secure the investment, the Ottoman state also had to pay disproportionately high interest rates of interests on its loans and commit itself to a disproportionately high number of contractual guarantees to European creditors.¹⁴⁰ In short, legal reforms intended to assert Ottoman sovereignty and independence from the imposition of foreign control, although conceptually sound and thorough, lacked the capacity to meet the creeping power of European states.¹⁴¹

One prominent example of these trends was the downfall of the Mehmet Ali regime and the British occupation of Egypt. Seeking to strengthen his domain against European invasion, Ali reorganized the Egyptian state apparatus along European lines. Ali focused the Egyptian

¹³⁷ V. Necla Geyikdagi, 160.

¹³⁸ Enid Hill, "Comparative and Historical Study of Modern Middle Eastern Law," 299.

¹³⁹ V. Necla Geyikdagi, 165.

¹⁴⁰ Ibid.

¹⁴¹ Feroz Ahmad, 6.

economy upon the production of cash-crops such as cotton, which the state could export to European consumers; he did so with the hope that there would be sufficient capital accumulation to fund eventual domestic industrial production.¹⁴² As in the Ottoman Center, Egyptian elites established a European legal apparatus in order to settle disputes between European merchants and Egyptians, facilitating increased trade and investor confidence.¹⁴³ While Egypt's economic growth greatly increased, its lack of economic diversity and highly unequal contractual agreements with European creditors meant that even a small economic disruption could drag the whole state into default.¹⁴⁴ Eventually, continued economic reversals led to European creditors taking over management of the economy, which inspired a fierce backlash among the Egyptian people who eventually toppled Ali's regime.¹⁴⁵ In 1882, the breakdown in order led to British occupation and cession. Once the British took control of Egypt, they reformed its legal system to integrate it further into their empire. Whereas, before the British takeover, the Egyptian state had limited Western legal principles and institutions to the the *Nizamiye* courts, in 1883, only one year after they took control, the colonial government instituted native courts along European lines, relegating Islamic law to *sharia* courts that only arbitrated matters of personal status.¹⁴⁶

The Ottoman center suffered from a similarly poor economic position and, thus, while not undergoing a European takeover, experienced a similar pattern of events, which lead to increasing legal transplantation. Beginning with the Crimean War, the Empire endured almost

¹⁴² Enid Hill, "Comparative and Historical Study of Modern Middle Eastern Law," 300.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Michael Gasper, "The Making of the Modern Middle East," 13.

¹⁴⁶ J. N. D Anderson, *Islamic Law in the Modern World*, 22.

fifty years of constant conflict with European states and nationalities who sought to partition it, gradually weakening the state's institutions and ability to resist foreign domination.¹⁴⁷ The almost constant state of conflict forced the Empire to issue large amounts of debt to remain solvent, in addition to the debts it had already incurred to fund its economic modernization projects.¹⁴⁸ By the 1870s, the Ottoman state was spending 60% of its annual tax revenues just to pay down the ever-increasing burden.¹⁴⁹ In an echo of the Egyptian case, the Empire's combined debts became so excessive that, in 1881, European powers forced the state to establish the Ottoman Debt Commission whose members represented the interests of foreign bondholders. The Commission possessed "extraordinary power to use tax payments to reimburse foreign investors" and with its establishment, "the Ottoman Empire essentially ceded control of its finances to Western Europeans."¹⁵⁰ Throughout this period, the extent of legal transplantation generally increased and it does not appear to be coincidental that the extent of legal transplantation and, hence, the extent of Islamic law, in many different Islamic societies, such as the Ottoman Empire, corresponded to the Europeans' material objectives rather than Islamic law's incompatibility with that of the West.

Reforming its legal system along European lines, although optically necessary to accumulate the capital necessary to compete with European manufacturers, actually facilitated further European control over and peripheralization of the Empire. As more time passed, the

¹⁴⁷ D. K. Fieldhouse, 9.

¹⁴⁸ V. Necla Geyikdagi, 161.

¹⁴⁹ Eliana Balla and Noel D. Johnson, "Fiscal Crisis and Institutional Change in the Ottoman Empire and France," *The Journal of Economic History* 69 (3) (2009): 839.

¹⁵⁰ Michael Gasper, "The Making of the Modern Middle East," 15.

Empire had less capacity to institute Islamic legal reform and codification, which both European and Ottoman elites believed would undermine their interests.

Conclusions

During the nineteenth century, European states expanded their influence in the Ottoman Empire to support their material and ideological objectives. In this process, legal transplantation served a vital role because it facilitated the growth of European economic and political influence. European states supported legal transplantation by arguing that the legal systems of non-European societies were either non-existent or could not be reformed. Among the many Islamic societies that European states attempted to influence and control, the Ottoman Empire was unique in its ability to remain comparatively sovereign until its dissolution after World War I. As a result, the Empire, unlike other Islamic societies of the period, was able to undergo a limited process of Islamic legal reform. Although its scope was limited, the *Mecelle* demonstrated the conceptual and institutional viability of Islamic legal reform despite the objections of Ottoman reformers and European elites.

However, as the century progressed, Ottoman reformers became more convinced of the superiority of Western law, the institutional barriers between the *ulema* and the elites became more ossified, and the Empire fell deeper under the influence of European creditors and governments, all of which contributed to the move toward legal transplantation. As a result, specific conditions that were largely unrelated to Islamic law's intellectual viability or ability to co-exist with other traditions of law led to its marginalization. At the very least, local conditions existing during the nineteenth-century Ottoman Empire were important in shaping the expression

and character of Islamic law and were likely more determinative than the characteristics that constitute Islamic law as an ideal type.

CHAPTER 5: TRANSFORMATIONS IN ISLAMIC LAW AFTER WORLD WAR I

Islamic Law in the Turkish Republic After World War I

After World War I, Mustafa Kemal and his supporters wrested control of Anatolia away from other competing factions and sought to continue the Westernizing trajectory of their Ottoman reformist predecessors. In their attitude toward Islamic law, the Kemalists shared “the drive toward centralization, regularization, and monopolization, which were pursued by the late Ottoman and early republican governments.”¹⁵¹ However, the Kemalists differed principally from their bureaucratic and intellectual predecessors in their comparatively higher level of hostility and paranoia they expressed toward religious institutions. One reason for the Kemalists’ attitude was ideological. In creating a Turkish nationalist identity, the Kemalists wanted to distance themselves from the Ottoman Empire, particularly in regard to the primacy of religion in shaping the state’s discursive identity and institutions.¹⁵²

The other major reason for the Kemalists’ more thoroughgoing secular attitude was pragmatic. In the wake of World War I, with the near partition of the Anatolian core of the Ottoman Empire at the hands of the Allied powers, the Kemalists were especially attentive to possible threats that could challenge the stability of the state, and invite further foreign

¹⁵¹ Amit Bein, *Ottoman Ulema, Turkish Republic: Agents of Change and Guardians of Tradition* (Palo Alto, CA: Stanford University Press, 2011), 165.

¹⁵² Busra Ersanli, “The Ottoman Empire in the Historiography of the Kemalist Era: A Theory of Fatal Decline,” in *Ottomans and the Balkans: A Discussion of Historiography*, ed. Fikret Adanir et al. (Leiden, NLD: Brill, N.H.E.J., N.V. Koninklijke, Boekhandel en Drukkerij), 152.

intervention and partition. In part, the Kemalists pursued a more vigorous Westernizing program than their predecessors because opponents of their regime often appealed to a traditional Islamic identity as the basis of their authority and sought to co-opt Ottoman religious institutions for leverage.¹⁵³ Importantly, as with the Westernizing trajectory of nineteenth-century legal reform, Kemalist secularism was a policy that emerged over time in response to changing conditions; in this case, the policy originated from growing perceptive threats from Islamic institutions rather than a necessary movement toward secular, modernity. The fact that the Kemalists expressed Pan-Islamist attitudes during the initial founding of the Turkish Republic until their opponents began to use Islamic institutions to challenge them tends to support the abolition of Islamic law as a contingent phenomenon.

On April 23, 1919, a Grand National Assembly convened in Ankara and elected Mustafa Kemal as president. During this initial stage, the nationalists professed their loyalty to the Sultan and the Caliph. In accordance with Ottoman rituals, the Assembly sacrificed sheep, held a public recitation of the Qur'an, and displayed relics of the prophet in a processional march. However, in response to the declaration of a republic, the *seyhulislam* in Istanbul issued a *fatwa* decrying the nationalists and urging true believers to destroy them; on May 1, the Istanbul government similarly condemned Kemal and his supporters to death. However, support for the Ankara government increased in the wake of the Greek advance into Anatolia, which greatly undermined the legitimacy of the Istanbul government. On July 2, further co-opting the religious legitimacy of the Istanbul government, Kemal called upon Turkish citizens to rise in holy war against the

¹⁵³ Paul Stirling, "Religious Change in Republican Turkey," *Middle East Journal* 12 (4) (1958): 397.

foreigners and expel them from the country.¹⁵⁴ Later, in December 1919, Mustafa Kemal made a speech in which he appealed to the remaining populations of the Ottoman Empire, the Muslim Kurds and Turks, to band together in pan-Islamic unity.¹⁵⁵

However, during a cabinet meeting on October 31, 1922, Kemal announced that the only way forward for the Turkish nation would be to abolish the sultanate, neutralizing the power that the Istanbul regime possessed. The next day, November 1, 1922, the Grand National Assembly separated the office of the sultanate from the office of the caliphate. In doing so, Kemal wanted to deprive the Istanbul faction of any leverage that it possessed in determining the future of the country by undermining its legitimacy, but wanted to proceed carefully in order to not alienate cultural conservatives. Having lost one institution with which they could oppose the regime, Kemal's detractors circled around the caliphate as an alternative mechanism to gain power. These opponents encouraged the caliph to petition Mustafa Kemal for expanded powers and a defined role within the new Turkish state. Realizing that his opponents would now use the caliphate, rather than the sultanate, to oppose him and the Turkish Republic, Kemal responded sharply and decisively. When the caliph petitioned Mustafa Kemal, he issued a public proclamation stating, "Let the caliph and the whole world know that the caliph and the caliphate which have been preserved have no real meaning and no real existence ... The position of Caliphate in the end has for us no more importance than a historical memory."¹⁵⁶ On March 3, 1924, the Grand National Assembly abolished the caliphate outright. Kemal was willing to allow

¹⁵⁴ Caroline Finkel, *Osman's Dream: The History of the Ottoman Empire* (New York: Basic Books, 2007), 542.

¹⁵⁵ *Ibid.*, 541.

¹⁵⁶ Stanford J. Shaw and Ezel Kural Shaw, 368.

the Caliphate to exist as an office and institution only if it did not challenge his nationalistic, Westernizing program. When the caliph and his supporters appeared to pose a threat to the stability of the nascent republic, Kemal's secularizing attitude heightened considerably.¹⁵⁷ As time passed, Kemal prohibited political parties who challenged his program¹⁵⁸ and made advocating for reincorporation of the *sharia* into the legal system a criminal offense.¹⁵⁹ The Penal Code of 1926 set out specific penalties for those who "by misuse of religion, religious sentiments, or things that are religious considered as holy, in any way to incite the people to action prejudicial to the security of the state, or form associations for this purpose."¹⁶⁰

Attempting to secure their authority and undermine their political opponents, the Kemalists energized the process of legal transplantation that had begun during the nineteenth century. Early in the history of the republic, the Kemalists had attempted to create a new Turkish legal code, but the Ministry of Justice submitted a draft that expressed substantial influence from Islamic legal principles, similar to Ahmed Cevdet's *Mecelle*.¹⁶¹ Rather than drawing exclusively upon the French codes, as the Empire had done with its legal transplantation, the Turkish Republic drew upon many different European legal codes, finding the ones would best reflect the unique position of the Turkish people.¹⁶² On October 4, 1926, the state instituted a new civil

¹⁵⁷ Mustafa Kocak, "Islam and National Law in Turkey," in *Sharia Incorporated: First Global Overview from Saudi Arabia to Indonesia*, ed. Jan Michiel Otto (Amsterdam, NLD: Leiden University Press, 2010), 241.

¹⁵⁸ Stanford J. Shaw and Ezel Kural Shaw, 380.

¹⁵⁹ Sami Zubaida, 158.

¹⁶⁰ Mustafa Kocak, "Islam and National Law In Turkey," 243.

¹⁶¹ Ihsan Yilmaz, "Secular Law and the Emergence of Unofficial Turkish Islamic Law," *Middle East Journal* 56 (2002): 118.

¹⁶² Herbert J. Liebesny, 26.

code, based on the Swiss civil code; on July 1, 1926, the state instituted a new criminal code, based on the Italian criminal code; and instituted a commercial code based on the German commercial code.¹⁶³ Finally, whereas the original 1924 Turkish Constitution identified Islam as the state religion and declared the National Assembly's obligation to enforce Islamic law, in 1928, the state declared the separation of *din wa dawla*, "religion and state," and proscribed the legal quality of religions within the state.¹⁶⁴ The state retained *waqfs* or religious foundations, but now assumed the majority of their revenues and later abolished them in the mid 1930s.

The Kemalists also eliminated the religious offices that oversaw the arbitration of Islamic law. On March 3, 1924, the state eliminated the state-funded *ulema* by vacating their remaining contracts and pensioning them off. On April 8, 1924, a National Law Court Organization Regulation (*Mahkeme Teskilati Kanunu*), abolished the *sharia* courts, vacated the judges' contracts, and transferred their jurisdiction to the secular court system. During the same year, the state also abolished the office and position of *seyhulislam* and the Ministry of Islamic Affairs and Religious Foundations, replacing it with the Presidency of Religious Affairs. The state mandated that the Presidency of Religious Affairs would be under the direct control of the prime minister and that its role and functions would sharply curtailed.

Despite the marked changes to Islamic law that it implemented, the Kemalist regime still exhibited its continuity with the Ottoman experience. In addition to the ideological and pragmatic impetus for reform, the Kemalists expressed the Ottoman heritage of substantial control over Islamic law's development and the institutions that oversaw it. Kemal and his supporters, similar to the way that Ottoman governments had approached religion, used the

¹⁶³ Stanford J. Shaw and Ezel Kural Shaw, 385.

¹⁶⁴ Ibid.

organs of state and the media to create a Turkish nationality with which the people could identify.¹⁶⁵ The Kemalists used Directorate of Religious Affairs in order to propagate a version of “enlightened islam,” which would provide a moral code for society, but not invade that nationalist, secular public sphere.¹⁶⁶ After the establishment of the DRA, the state sought to reduce further the heterodox communities and practices such as the Sufis.¹⁶⁷ Rather than supporting an alternate form of solidarity, Islam would constitute part of secular solidarity.¹⁶⁸ In the public-sphere, the explicitly nationalist discourse dominated while the progressively-oriented, Sunni Hanafi discourse fused itself into the private lives of citizens.¹⁶⁹ As a result, the relative ease with which the Kemalists were able to eliminate Islamic law depended substantially upon the specific context of Islamic law in the Ottoman legal system.¹⁷⁰

While the secular program of the Kemalists conceived of the traditional relationship between religion and state in a new way, it maintained an ideological and genealogical consistency with what had come before. Kemalism represented a gradual evolution in the ideology of reform from one that attempted to marginalize Islamic law through a largely gradualist, traditionalist paradigm to one that abolished Islamic law and replaced it with almost

¹⁶⁵ Stanford J. Shaw and Ezel Kural Shaw, 375.

¹⁶⁶ M. Hakan Yavuz, 160.

¹⁶⁷ Ibid., 161.

¹⁶⁸ Ihsan Yilmaz, 119.

¹⁶⁹ Richard H. Pfaff, “Disengagement from Traditionalism in Turkey and Iran,” *The Western Political Quarterly* 16 (1) (1963): 86.

¹⁷⁰ Dora Glidewell Nadolski, 535.

entirely new foundations.¹⁷¹ However, the desire to establish ideological and institutional authority, and not material or intellectual necessity, catalyzed the move to abolish Islamic law.

Islamic Law in Arab States After World War I

After World War I, differences in local conditions gave rise to divergent developments in Islamic law among the domains of the former Ottoman Empire. In Turkey, the Kemalists sought to identify national identity with a pre-Islamic, Aryan past and prevent political opponents from using Islamic law to mobilize against them. As a result, the Kemalists recast religion as belonging purely to the private sphere rather than being an integral part of national life, as it had been in the Empire. According to the Kemalists, since religion was to be a part of the private sphere, the laws of the new republic were to have no basis in Islamic law.¹⁷² Conversely, in the Empire's former Arab-majority domains, nation-building entailed identification with a glorified past in which the prophet Muhammad, as the father of the Arab people, and his accomplishments were integral.¹⁷³ Therefore, the Arab nationalists, in contrast to the Turkish nationalists, tended to support reconciling Islamic and Western traditions of law in a discursive and institutional capacity.

In constituting new legal codes, the Arab reformers drew upon the models that Ahmed Cevdet and other Ottoman reformers had created with the completion of the *Mecelle*. The most prominent of these Arab reformers was the Egyptian jurist 'Abd al-Razzaq al-Sanhuri. Using an approach that was highly influenced by Cevdet's framework, Sanhuri drafted the Egyptian Civil Code of 1948, the Iraqi Code of 1951, the Libyan Code of 1953, and the Kuwaiti Commercial

¹⁷¹ Stanford J. Shaw and Ezel Kural Shaw, 375.

¹⁷² M. Hakan Yavuz, 160.

¹⁷³ Richard A. Debs, 143.

Law of 1960/1.¹⁷⁴ In Egypt, whereas the civil code instituted during the nineteenth century had been “the superimposition of a Western Civil Code on traditional Islamic institutions,” the legal code of the mid-twentieth century “was a closer integration of the foreign and traditional elements in that system ... designed to serve the needs of a modern, developing nation.”¹⁷⁵ Importantly, Sanhuri justified his approach of Islamic legal modernization by arguing that Islamic law was one of the great systems of law, equal in stature to the Civil and Common law traditions of Europe.¹⁷⁶

Ahmed Cevdet’s influence on Sanhuri and the Arab reformers is undeniable. Sanhuri created legal codes that framed Islamic legal principles within a European apparatus instead of the juristic model that had predominated before Cevdet.¹⁷⁷ Sanhuri also drew upon Cevdet’s use of *tahayyur* to apply the Islamic principles that were most in line with conditions present in contemporary society, especially within the post-colonial context and among distinct states with varying conditions.¹⁷⁸ The principle of *tahayyur* would also prove immensely influential among twentieth-century Arab jurists.¹⁷⁹ Arab jurists used *tahayyur* to compose many national family laws, whereby Hanafi-dominant states drew upon both Maliki and Hanafi rulings on divorce and marriage contracts, usually selecting the tradition that afforded Muslims the most flexibility and

¹⁷⁴ Ahmed An-Na’im Abdullahi, “Sharia in the Secular State,” 332.

¹⁷⁵ Richard A. Debs, 143.

¹⁷⁶ Herbert J. Liebesny, “Religious Law and Westernization in the Moslem Near East,” *The American Journal of Comparative Law* 2 (4) (1953): 499.

¹⁷⁷ Ido Shahrar, 116.

¹⁷⁸ Enid Hill, “Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971,” *Arab Law Quarterly* 3 (1) (1988): 35.

¹⁷⁹ Abdullahi Ahmed An-Nacim, “The Compatibility Dialectic,” 20.

autonomy.¹⁸⁰ The *Mecelle* itself would also serve as one of the principal sources for various Middle-Eastern civil codes such as the Iraqi Civil Code.¹⁸¹ In the Francophone Islamic world, jurists like Marcel Morand drew upon the *Mecelle* to construct their own compilations of Islamic law.¹⁸² Other jurists in Jordan, Bahrain, Qatar, and the United Arab Emirates (UAE) drew upon Sanhuri's revision of Cevdet's model in their own revisions and codifications of Islamic law.¹⁸³

The Legacy of the *Mecelle* in Contemporary Debates on Islamic Law

Since the composition and institution of the *Mecelle*, scholars of Islamic law have differed as to the way forward. Some advocate for the establishment of pre-*Mecelle* juridical independence whereby individual *qadis* can issue *fatwas* according to their legal expertise and *muftis* issue judgements in regard to novel or unclear issues. This oppositional line of thought traces its origin, in part, to the original reaction against codification in the late nineteenth century; the most vigorous expression of intellectual revolt against Ahmed Cevdet's reforms occurred in Yemen where Zaidi imams cited its promulgation as justification for revolts in 1891 and 1904.¹⁸⁴ Others advocate for the institution of Islamic law along the lines that the *Mecelle* established whereby legislators compile Islamic legal principles from individual *madhhabs* and establish them as statutory law. Still others lament the tendency toward what they consider to

¹⁸⁰ Mohammad Hashim Kamali, 406.

¹⁸¹ Enid Hill, "Comparative and Historical Study of Modern Middle Eastern Law," 295.

¹⁸² William R. Roff, "Customary Law, Islamic Law, and Colonial Authority: Three Contrasting Case Studies and their Aftermath," *Islamic Studies* 49 (4) (2010): 458.

¹⁸³ Enid Hill, "Al-Sanhuri and Islamic Law," 39.

¹⁸⁴ Nathan J. Brown, "Sharia and State in the Modern Muslim Middle East," *International Journal of Middle East Studies* 29 (3) (1997): 360.

excessive eclecticism in Islamic law post-Cevdet.¹⁸⁵ Moreover, scholars debate whether the transformation of Islamic law into a statutory tradition demonstrates the vitality and adaptability of Islamic juridical principles or represents a contamination by alien traditions and co-option by outside actors.¹⁸⁶ In many states, these differing conceptions have come into conflict. One prominent instance of this tension occurred when the King Ibn Saud attempted to establish the interpretations of several Hanbali jurists as statutory law for all other *qadis* to follow.¹⁸⁷

Conclusions

After World War I, evolving conditions within the nascent Turkish Republic lead to Islamic law's further marginalization and eventual abolition. In contrast, differing conditions in the Ottoman Empire's former Arab regions lead to alternate developments. Arab legal reformers sought to continue the project of Ahmed Cevdet by combining Islamic legal principles with a European statutory form. Significantly, the fact that these Arab reformers were able to seize upon Cevdet's model and states instituted codes based on it tends to undermine the view that Islamic law does not and cannot co-exist with other legal traditions. The difference in outcomes also further demonstrates the tremendous impact that local conditions have upon the expression and character of Islamic law.

¹⁸⁵ Abdullahi Ahmed An-Nacim, "The Compatibility Dialectic," 20.

¹⁸⁶ Aharon Layish, 91 - 92.

¹⁸⁷ Ibid., 91.

CONCLUSIONS AND FINAL REMARKS

As this historical survey demonstrates, Islamic law derives much of its character from local political, economic, social, and environmental conditions. Within the Ottoman experience, Islamic law was situated within a Sunni Hanafi tradition that interacted dynamically with Central-Asian, Iranian, and other non-Islamic traditions. During the nineteenth century, multiple legal traditions continued to operate within the Ottoman Empire with a more vigorous European influence than before. However, the European tradition did not establish itself as the dominant, and eventually sole, basis for legislation as part of a necessary move toward modernity as Orientalism and the Clash Thesis would suggest. Instead, growing instability within the Empire and the efforts of pro-Western Ottoman elites increased the European hold over the state, gradually leading to legal transplantation. Nonetheless, Ahmed Cevdet and a small group of reformers drew upon the rich intellectual history of Islamic law, particularly the experience of Ottoman Islamic law, to create a new synthesis of Islamic legal principles and Western structures. Although the conditions within the late Ottoman Empire precluded the restoration of Islamic law, different conditions led to Cevdet's framework to be integral in the attempts of Arab legal reformers to incorporate their Islamic heritage into the fabric of Western modernity.

Insofar as, throughout its existence, Islamic law has shaped and been shaped by surrounding conditions, the divisions between different civilizations that Orientalism and the Clash Thesis maintain appear amorphous and dynamic rather than stark and unchanging. The

fact that Islamic law depends so thoroughly upon local conditions makes it difficult to determine the degree to which the legal systems of various states draw upon it. In most states that currently employ or draw upon Islamic law, the division between European, Islamic statutory law, and Islamic juristic law is often unclear and amorphous. The constitution may declare that the *sharia* is the fundamental basis of all legislation and, in the absence of prescribed statutes, all judges should defer to its principles. However, the actual effect and character of the Islamic elements within the legal code are not readily evident until one has conducted an exhaustive survey of the individual system. Even with multiple assessments by top legal scholars, it has been difficult to establish an academic consensus. At the very least, this study undermines the value of considering Islamic law as an ideal type in academic and policy analysis, which composes a vital part of Orientalism and a constituent part of the Clash Thesis.

Looking forward, this relatively cursory study into the development and character of Islamic law in the Ottoman Empire will help to challenge the Orientalist and culturalist assumptions that have constrained Middle-Eastern and Islamic studies, and spark more accurate and fruitful scholarship.

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