

Secular Law and the Emergence of Unofficial Turkish Islamic Law

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In secular Turkey, traditional Islamic law has been officially replaced with a secular legal system. The article examines the ways in which local and unofficial Islamic legal practices have been retained alongside secular law, despite the official position.

A postmodern legality is visible in Turkey, where the traditional Muslim law was totally but only officially abolished and replaced by transplanted secular laws. Local and unofficial Turkish Muslim laws have resisted the unification and assimilation purposes of the modern nation-state.¹ People have not abandoned their local and religious laws and customs, whether legal modernity recognizes them or not. Today, secular official and Muslim unofficial laws co-exist in the Turkish socio-legal sphere.

Turkey was one of the very first Muslim countries that encountered the modern West and its civilization and that attempted to respond to the challenges posed by the Western power and civilization. The questions surrounding these challenges, how to respond to them, preventing the collapse of the Ottoman State, modernization, and transplantation of Western institutions have always been on the agenda of the Turkish intellectuals. The modernization attempts in Turkey had already begun in the seventeenth century when the Ottoman rulers became aware that they were far behind the European powers. Substantial discussions over whether to import European technology only, or to take all of the Western way of life, culture, laws, and so on preoccupied the public sphere for many decades. These endless discussions were cut short by the

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1. The notion "local" is more complex than earlier sharp distinctions between, for instance, the concept of "great" and "little" (or "folk") traditions as a means of describing large-scale civilizations such as Islam. However, it must be emphasized that the notion carries the misleading implication of something provincial, or an inferior and imperfect realization of a "genuine" or "high" culture of religious belief and practice, see Dale F. Eickelman, "The Study of Islam in Local Contexts," Richard C. Martin (ed), *Islam in Local Contexts*, (Leiden: E. J. Brill, 1982), 1-16, p. 2. Although this misconceptualisation is sometimes the case, it cannot be generalized, since the term "local" refers to the concepts of culture, religion, and law which are not under the auspices of the state or the leading elite whether it might be "genuine," "high," and "perfect" or not.

Kemalist elite when the new republic was established: to reach the level of contemporary European civilization, the Western way of life had to be espoused and imported with all kind of its institutions including laws.

The new Turkish state assumed that cultural change and modernization could be imposed from above through the force of law. One of the major expected changes was the secularization of society.² When the new secular Turkish Civil Code became effective in 1926, it created an anomaly. Family law had been one of the last bastions of Islam, and the legal system the area most resistant to secularization. Muslim family law officially became secular for the first time in history, while Islam continued to be the religion of most Turkish citizens. The new secular law was meant to change the core structure of the Turkish domestic life to bring it closer to the Western models.

On the other hand, the empirical reality shows that the uniformity-focused homogenization expectations of the state and the plurality-centered survived unofficial Muslim family law conflict. This article endeavors to show that the Turkish Muslims have not totally abandoned their Muslims laws in favor of the transplanted 'secular' Western law, although the Jacobin social engineers have long wished them to do so. These Muslim Turks have actively assimilated to the secular law but *on their own terms*. By combining the rules of two different normative orderings, they have pragmatically been successful to meet the demands of both the secular law and religious law.

This article, firstly, gives a concise theoretical account of legal modernity and instrumentalist usage of law by modern nation-states. Secondly the history of secularization of law and Turkish legal modernity will be summarized. Then picture of postmodern socio-legal reality vis-à-vis family law issues of Muslim Turks is presented.

LEGAL MODERNITY AND INSTRUMENTALIST USE OF LAW BY MODERN NATION-STATES

In legal modernity, the territorial nation-state, rather than mankind, is adopted as the point of reference for law. Unification of laws is a paramount objective. Laws are applied over wider spatial, ethnic, religious and class areas; personal law is no longer an issue at stake; territorial laws replaced personal laws; special laws are replaced by general ones, customary ones by statute laws. Individual rights and responsibilities

2. For the history of the secularization of Turkey, see in detail Niyazi Berkes, *The Development Of Secularism in Turkey*. (Montreal: McGill UP, 1964). A more analytical account could be found in Binnaz Toprak, *Islam and political development in Turkey*, (Leiden: E. J. Brill: 1981). See also, Mumtaz'er Turkone, *Modernleşme, laiklik ve demokrasi*, (Modernism, Laicism and Democracy)(Ankara: Ark: 1994); Nilüfer Gole, *Modern mahrem*, (Istanbul: Metis, 1992), Serif Mardin, "Religion And Secularism In Turkey," Ali Kazancigil and Ergun Ozbudun (eds) *Ataturk: Founder Of A Modern State*, (London: Hurst and Co, 1981), pp. 191-219; Mardin, "Turkey: Islam and Westernization," Carlo Caldarola (ed) *Religions and Societies: Asia and the Middle East*, (Berlin et al: Mouton Publishers., 1982), pp. 171-198; Javaid Saeed, *Islam And Modernization: A Comparative Analysis Of Pakistan, Egypt, and Turkey*, (Westport, Connecticut. London: Praeger, 1994).

have taken the place of corporate rights and responsibilities. Secular motives and techniques have superseded religious sanctions and inspiration. Law-making and application have become a professional area that operates in the name of central national power. This central national power tolerates no rivals by means of law in its sovereignty, since uniform law is seen as a condition of progress toward modern nationhood.

In modern legal systems, there has been a strong tendency to replace traditional local laws with one uniform modern state law. Most governments seek to modernize their laws in addition to unification. The modernizing elite rejects the inherited, the old, and searches for a new way of life, new structures, and new patterns of social relations. To them, customary law exists when, and to the extent that, state law recognizes that it exists.

In modern thinking, it is widely believed that traditional law does not serve as an instrument of change. Traditional law is accused of keeping people from acting in compliance with the development aims of the state. In contrast, modern state law is believed to change societies. The ideological role of law is of central importance in legal modernity. Law is used as an instrument of social control, and as a mode of organizing beliefs and values.³ According to instrumentalist mentality, "all legal goals consist of specific end results realizable at some particular moment in time."⁴ Instrumentalists take the social space between legislator and subject implicitly as a normative vacuum. In other words, they assume that the legislator is more or less autonomous from the social context in which the rule is to have its effects, the subjects of the rule are atomistic individuals and the legislator's command is uninfluenced by the social medium.

At times, any group aspiring to state power attacks the old social order and attempts to use its own system of legal rules and principles first. To this end, laws are sometimes transplanted from another culture or other cultures by voluntary reception. In some other cases, laws are transplanted by involuntary imposition.⁵

A state can undertake the process of legal importation as a result of fundamental

3. David Sugarman, "Law, Economy And The State In England, 1750-1914: Some Major Issues," David Sugarman (ed) *Legality, ideology and the state*, (London et al: Academic Press, 1983), pp. 233-235; Kalman Kulcsar, *Modernization And Law, Theses And Thoughts*. (Budapest: Hungarian Academy of Sciences, 1987), p. 64.

4. Robert S. Summers, "Naive Instrumentalism And The Law," P. M. S. Hacker and J. Raz (eds) *Law, morality, and society*, (Oxford: Clarendon Press, 1977), p. 197.

5. On the issue of transplantation, see also in detail Robert L Kidder, *Connecting Law And Society*, (Englewood Cliffs: Prentice Hall, 1983); Kidder, "Towards An Integrated Theory Of Imposed Law", Sandra B. Burman and Barbara E. Harrell-Bond (eds) *The Imposition Of Law*, (New York: Academic Press, 1979), pp. 289-306; Alan Watson, *Legal Transplants*, (Edinburgh: Scottish Academic Press, 1974); Watson, "Legal Transplants And Law Reform," *The Law Quarterly Review*, 1976, pp. 70-85; Watson, *Society And Legal Change*, (Edinburgh: Scottish Academic Press, 1977); Watson, *Legal Transplants*, 2nd ed, (Edinburgh: Scottish Academic Press, 1993); Watson. "From Legal Transplants To Legal Formats," *The American Journal of Comparative Law*, V. 43 N. 3, 1995, pp. 469-476; Watson, "Aspects Of Reception Of Law," *The American Journal of Comparative Law*, V. 44 N. 2, 1996, pp. 335-351.

revolution and, under that upheaval, may adamantly attempt to establish a completely clean and blank legal sheet. The elite of a given country may decide to transplant a law or a legal system entirely to procure the social transformation of society. To reach this goal, the elite can impose radically new patterns of behavior by opting for transplanted law, using law to reconstruct society and its social relations.

However, some problems emerge during modernization: The lack of power behind modernization programs can cause failure; there may be a difference between reality and over-ambitious aims, insufficient knowledge of reality or ignorance of it, the lack of exploration of the possible consequences, and the neglect of social phenomena, cultural conditions, religious and customary traditions. Sometimes state law can be seen as unnecessary, avoidable, and remediable by society. Laws do not work effectively if they are not congruent with their social context. It is evident that no law can ultimately compel action. All the law can do is "try to induce someone, by order or by persuasion or by suggestion, to a certain course of action."⁶

It is also possible that there may be a number of competing norms in the countries that transplanted their official law from abroad, usually from Western countries. *Shari'a* and *dharma* can be given as examples of norms competing against the state law. They are deep-rooted traditions that have developed approving 'legal postulates' among their followers.⁷ Although they may be regarded by orthodox jurisprudence as simple customs and practices, these religious precepts and ethical imperatives influence both official and unofficial law. To put it differently, transplanted state law does not exist as a separate system but co-exists with unofficial laws peacefully or conflictingly. As a result, in some cases, a radical reform attempt in the legal arena may well fall far short of bringing the assumed crucial transformation.

A body of research shows limits to the capacity of law in transforming social life.⁸ Moore's semi-autonomous model explains why new laws to direct change do not necessarily produce the anticipated consequences.⁹ To her, the social space between legislator and subject is not a normative vacuum. Although the state has the power to use physical force, it does not mean that there are no other agencies and modes of inducing compliance.¹⁰ In other words, even though the formal legal institutions enjoy a kind of monopoly in terms of the legitimate use of power, there are some other forms of effective coercion or effective inducement. Between the individual and political body there are various interposed social fields to which the individual belongs. These

6. Antony Allott, *The Limits Of Law*, (London: Butterworths, 1980), pp. 45-46.

7. Masaji Chiba, *Legal Pluralism: Toward A General Theory Through Japanese Legal Culture*, (Tokyo: Tokai UP, 1989), 125.

8. See for example, Allott, *The Limits Of Law*, op.cit.

9. Sally Falk Moore, "Law and social change: The semi-autonomous social field as an appropriate subject of study," V. 7 N. 4 *Law and Society Review*, 1973, pp. 719-746; see also Moore, *Law As Process: An Anthropological Approach*, (London et al: Routledge and Kegan Paul, 1978).

10. See also in detail, Leopold Pospisil, *Anthropology Of Law: A Comparative Theory*, (New York et al: Harper and Row, 1971), pp. 193-232; Pospisil, "The structure of society and its multiple legal systems," P. H. Gulliver (ed) *Cross-examinations: Essays in memory of Max Gluckman*, (Leiden: E. J. Brill, 1978), pp. 96-109.

social fields have their own rules and the means of coercing or inducing compliance. In all culturally heterogeneous communities a number of modes of normative orderings co-exist with the official law. Local laws and customs are some of the major factors that influence and impede the effectiveness of law in modern societies. These factors are the sources of incoherence, multiple legal authorities and interpretations, local interests and local concerns. There is usually a continuous competition between these normative systems for the allegiance of those to whom they are addressed. This condition is called 'dynamic legal pluralism' and exists where cultural pluralism is a social reality.¹¹

Dynamic legal pluralism is an attribute of a social field and not of "law" or of a "legal system." It is the presence in a social field of more than one legal order. The whole picture of law as it operates in society is composed of three levels: official law, unofficial laws, and legal postulates since law must be understood as a cultural construct and as enduring ideas, structures, processes, and practices (written and unwritten, formal and informal, legalistic and less legalistic, local and national). Law exists at every level of society, sometimes as state law, sometimes as norms or rules of conduct and it is always infused with cultural and historical meanings. Law is a process and is shaped by rules and a cultural logic. In the condition of dynamic legal pluralism, unofficial and official laws continuously and dynamically interact. The socio-legal sphere is not a normative vacuum and the operation of law is under the influence of legal postulates that always exist in the socio-legal sphere, whatever legal modernity asserts.

TURKISH LEGAL MODERNITY AND SECULARIZATION OF TURKISH LAW

Turkey has a unique experience in the whole Muslim world, as a country that has completely secularized its legal system. The secularization movement in modern Turkey has followed a Jacobinist and militant course, very much like the French experience. Laicism has been perceived as an alternative religion. Founders of the Republic believed that there was not enough time to wait for the slow process of evolution. The

10. See also in detail, Leopold Pospisil, *Anthropology Of Law: A Comparative Theory*, (New York et al: Harper and Row, 1971), pp. 193-232; Pospisil, "The structure of society and its multiple legal systems," P. H. Gulliver (ed) *Cross-examinations: Essays in memory of Max Gluckman*, (Leiden: E. J. Brill, 1978), pp. 96-109.

11. I use the term "dynamic legal pluralism" to denote a condition of a socio-legal sphere where dynamic interactions between official laws, unofficial laws and legal postulates and continuous reconstruction and hybridization processes take place, see in detail Ihsan Yilmaz, *Dynamic Legal Pluralism And The Reconstruction Of Unofficial Muslim Laws In England, Turkey And Pakistan*, (London: SOAS, 1999), chapter 2. For the literature on legal pluralism, see John Griffiths, "What is legal pluralism?", *Journal of Legal Pluralism*, V. 24, 1986, pp. 1-2, 8; Sally Engle Merry, "Legal Pluralism," *Law and Society Review*, In: V. 22 N. 5, 1988, pp. 869-896; Masaji Chiba (1986) (ed) *Asian Indigenous Law In Interaction With Received Law*. London. New York: Kegan Paul International; Chiba (1989) *Legal Pluralism: Toward A General Theory Through Japanese Legal Culture*. Tokyo: Tokai UP; June Starr, *Law As Metaphor: From Islamic Courts To The Palace Of Justice*, (New York: State University of New York Press, 1992), p. 174.

Kemalist elite had conceived religion as a threat to their modernist movement and revolutions. In this positivist reading of secularism, religions should stay in consciences and places of worship and should not be mixed with material life.¹²

Western law had already been in the process of being received into Turkey for a period of about one hundred years before the Republic. The precedents for the introduction of Western-based systems of law into Turkey have a history, extending even to the *Tanzimat* of 1839.¹³ These were in addition to, and not a replacement of, the Muslim law. There was a dualist legal structure. Ottoman bureaucrats engineered a revolution from above by creating parallel, secular legal institutions at the national level that existed alongside Islamic ones in the later nineteenth century Ottoman state.

Although secularization of law had started since the *Tanzimat*, legal provisions based on the Muslim law were, more or less, still in effect. In the field of family law, all earlier reforms, however extensive they seemed, had not affected the traditional Muslim law, which governed family life. The laws of marriage, divorce, inheritance, and custody of children for Muslims continued as before.

On October 25, 1917, the Ottoman Family Law was enacted. This was an eclectic law, which reflected and amalgamated the views of different juristic schools of Islam. The law tried to give marriage a more official character by stating that the unilateral *talaq* (statement of divorce) in the presence of two witnesses did not suffice to terminate a marriage. The presence of a judge or a deputy was required by the law. Moreover, every marriage and divorce had to be legally organized according to state procedures. The law also granted a wife two new grounds for divorce. For the first time age limits for marriage were set. The new law also allowed women, at the time of betrothal, to write into the marriage contract that if the husband takes another wife, her marriage would be immediately null and void.

Although the new Ottoman Family Law of 1917 marked certain differences in the rights of women, it did not break free of the conceptual rules of Islamic family law. This did not happen until 1926.

The Kemalists made their first attempt to change the legal system by the appointment of special committees of the Ministry of Justice to prepare the framework for a new set of secular codes in 1924. However, the results of the reports showed the heavy influence of the traditional Muslim law in the proposed changes.¹⁴ The project was thus dropped and the government decided to adopt the Swiss Civil Code, the Italian Criminal Code, and the German Commercial Code. The European model was essential according to the Minister of Justice of the time, Mahmud Es'ad Bozkurt:

... we are badly in want of a good scientific code. Why waste our time trying to produce something new when quite good codes are to be found ready made? The

12. Mardin, "Turkey: Islam And Westernization," p.180.

13. See for the origins of the secular law in Turkey, Mardin, "Some Explanatory Notes On The Origins Of The Mecelle," *The Muslim World*, V. 51 N. 3, 1961, pp. 274-279.

14. See, for details and comments in the press about the mentioned proposal, Nermin Abadan-Unat (ed) *Women In The Developing World: The Evidence From Turkey*, (Denver: University of Denver, 1986), pp. 130-131.

only thing to do is to take a good ready-made Code to which good commentaries exist, and to translate them wholesale.¹⁵

Concurring with Bozkurt, Atatürk underlined the point that “it is our purpose to create completely new laws and thus to tear up the very foundations of the old legal system”.¹⁶ Indeed, “(t)he aim of this wholesale adoption was to use law as an instrument of modernization and westernization”.¹⁷ As a result, in attempting to build a new national identity for Turkey, the secular legal system became the very foundation of the modern Turkish state.

As marriage is a basic institution of society, it is not a coincidence that family formation would be the first target of legal penetration. The Turkish Constitution refers to the family as the basic institution of the society. It is considered that if the institution of family is healthy, then the society and the state will be healthy as well. Thus, by protecting and regulating the family, the state protects and empowers itself. To that effect, the legal system imposes upon the state certain ‘duties’ towards the family. Article 41 of the Constitution puts that: “The state shall take... measures and establish the necessary organisation to safeguard the peace and well-being of the family”. The protection of mothers and children and family planning are especially stated as the duties of the state under the Turkish Constitution.

Thus, radical reforms were introduced in family law matters. The law of Islam was abolished for matters of personal status in 1924. It was replaced by a civil code taken from Swiss models. The adoption of the Swiss Civil Code and Swiss Code of Obligations in 1926 represented a profound attempt of change by the Kemalist elite in the social life of Turkey.¹⁸ The Civil Code differs fundamentally from the provisions of the Muslim law. Although, it was claimed that the potentialities and possibilities inherent in and derivable from the Muslim canonical law had been taken into consideration before enforcing the new code, the enactment of the Civil Code aimed to achieve a complete separation between religion and law. With this law, Islam was completely disregarded. It was relegated to a matter of conscience that was left solely to the private sphere. Citizens could be Muslims in their private lives, yet they could not claim any room for Islam in the public arena.

The elite for whom law-making was the primary tool of social change rather than the product of large-scale demands “attempted to present one consistent image of justice and one unified legal system. Islam fell under the control of the modern state through laicism, which intended that no Islamic competition could again challenge the secular state’s monopoly over law”.¹⁹ One system of nation-state law framed by the Constitution of the state, entirely secular, and one system of state courts administered by the Ministry of Justice constitute the official legal system in the country. The Civil

15. Quoted in Starr, *Law as Metaphor*, p. 16.

16. Quoted Starr, *Law as Metaphor*.

17. M. B. Hooker, *Legal Pluralism*, (Oxford: Clarendon Press, 1975), p. 364.

18. Adnan Guriz, “Sources of Turkish law,” Tugrul Ansay and Don Wallace, Jr (eds) *Introduction to Turkish Law*, (The Hague et al: Kluwer Law International, 1996), p. 9.

19. *Introduction to Turkish Law*, p. 170.

Code is applied in all parts of Turkey, and all Turkish citizens and residents are subject to it. The modern Turkish Constitution takes it for granted that Islam in today's Turkey does not offer a competing legal sensibility to secular law. From a theoretical perspective, then, religion as a source of law has been abolished, the positivist idiom of state law has triumphed.

*THE SOCIO-LEGAL CHALLENGE TO LEGAL MODERNITY
AND THE CONSTRUCTION OF THE TURKISH MUSLIM LAW*

The state under the reins of the Kemalist elite assumed that cultural change could be imposed from above through the force of law. One of the major expected changes was the secularization of society. However, it is now recognized that the place and influence of Islam in Turkish social life have not changed a great deal. Even though Islam has been officially removed from public life, which was firmly based on the theory and practice of the Ottoman State, it is still deeply rooted in the minds and hearts of the people. The Kemalist ideology, which had national, secular, and modern elements, could not fill the gap that Islam was supposed to have left.²⁰ The state, through its secular policies and programs of Westernization, has threatened the value system of the Muslim people in the country without providing, at the same time, a satisfactory and all-encompassing ideological framework that could have mass appeal and could have replaced Islam. Local Islam survived despite all attempts of the state.²¹ Islam is pervasive in Turkish society, and this shows the failure of the Republican elite's attempts of making religion a private belief.²²

In the legal field, too, Islam still continues to influence people's lives. With the passage of time, the expectation that people would learn and follow only the official

20. Mardin, "Turkey: Islam And Westernization," pp. 180-181.

21. Mardin, *Religion And Social Change In Modern Turkey: The Case Of Bediuzzaman Said Nursi*, (Albany: State University of New York Press, 1989), p. 229.

22. A quick scan in Turkish dailies will show that tensions between the officials who enthusiastically aim to secularize the society from above and some people who retain their neo-traditional Turkish Muslim culture still continue, showing that the two sides have not yet given up, see in detail Hakan Yavuz, "The Assassination Of Collective Memory: The Case Of Turkey," *The Muslim World*, 1999, 89:3-4, p. 195 and Yavuz, "Cleansing Islam From The Public Sphere," *Journal of International Affairs*, Fall 2000. Head scarf issue at the Turkish universities is only one these tensions. A recent government decree shows the state's social engineering desires by means of law has not yet waned. The decree states that "head-scarved parents shall not be allowed to enter school playground or premises anymore while the National Anthem is chanted by schoolchildren," which is the usual national practice at the beginning of the week on Monday mornings and at the end of the week on Friday evenings, http://www.haberturk.com/look.asp?N_Id=16706; *Resmi Gazete* (Official Gazette), April 6, 2001. Only one week before the announcement of this decree took place, a head-teacher got rid of a traditionally head-scarved parent from the school playground, vigorously commenting that "if Atatürk saw you with that headscarf, what would he have said?" Nobody was able to denounce his remarks in public. Yet it is an irony that more than 80 percent of women wear headscarves in 2001's Turkey, where democratic rhetoric is unintermittently employed by everybody and also it is only ironic that Atatürk's mother and wife both always sported a headscarf!

lex loci by entirely abandoning the Muslim law turned out to be untrue. In the late 1990s, there were still conflicts between the official legal system and the local law.²³

In the case of marriage, the attitude to the Code turns to one of outright conflict between the official law and Islamic rules or, more accurately, what the people regard as rules of Islamic law.²⁴ There exist a number of fundamental differences between the secular civil law of Turkey and the unofficial Muslim local law. These differences include the secularization of the marriage ceremony. A legal marriage had to be registered with the civil authorities and concluded in their presence. Religious ceremony was made optional and carried no legal weight. A religious marriage without official registration was made a criminal offence. The adoption of the principle of monogamy meant that polygamy was under no circumstances allowed and became a criminal offence. The secularization of divorce proceedings was another key reform. The new law gave both parties an equal right to sue for divorce. *Talaq* (religious divorce) was no longer recognized. Divorce could only be granted by an official court.

People in Turkey, after the reception and transplantation of the Swiss Civil Code have had three alternatives: Avoiding the official law, following the Turkish state law or following a combination of the requirements of the Muslim law and Turkish law. Evidence has shown that they preferred the third option. They have developed a new hybrid Turkish Muslim law that amalgamates the rules of unofficial Muslim law and of the state law.²⁵

Solemnization of Marriage and Nikah

Under the official law, only civil marriages performed by authorized marriage officers are allowed and recognized.²⁶ Article 16 of the Civil Code states that the formalities of celebration commence with the submission of the necessary documents by the parties to the marriage office at the place where they are residing at the time. The authorities start inquiries to check whether impediments to the marriage exist. Only after the celebration of the civil marriage is a *nikah* or religious marriage permitted. Contrary acts by *imams* are punishable offences.²⁷ If a civil ceremony in a register's

23. Yilmaz, *Dynamic Legal Pluralism*, chapter 4; Tugrul Ansay, "Family Law". Tugrul Ansay and Don Wallace, Jr. (eds) *Introduction to Turkish Law*. (The Hague et al: Kluwer Law International, 1996), p. 110.

24. In order to emphasize that point we use the term "local Muslim law," which covers the rules that the people consider Islamic, whether they are genuinely Islamic or not. See in detail for these local practices, Turkoz Erder (ed), *Family In Turkish Society. Sociological And Legal Studies*, (Ankara: Turkish Social Science Association, 1985); Hicri Fisek, "Introduction", Erder (ed) *Family in Turkish Ssociety*. 287-298, see already earlier Paul Stirling, *Turkish Village*, (London: Weidenfeld and Nicolson, 1965).

25. See in detail Yilmaz, *Dynamic Legal Pluralism*, chapter 4. In the British context, Muslims developed a parallel rule system, amalgamating the English law and unofficial Muslim laws, which is called *Angrezi shariat* by David Pearl and Werner F. Menski, *Muslim Family Law*, 3rd ed, (London: Sweet & Maxwell, 1998).

26. Article 174/4 of the Turkish Constitution.

27. Article 108 of the Civil Code and Article 237/3 of the Criminal Code.

office is followed by a religious one, the religious ceremony does not supersede or invalidate the civil ceremony and is not registered as a marriage in any marriage register book. The men and women who perform a religious marriage ceremony without having made the legal marriage contract are considered to be punishable.²⁸

On the other hand, "many Turkish citizens still prefer the informal or consensual marriage, or *nikah*."²⁹ Sometimes they marry with *nikah* only without registration, which is not recognized under the Civil Code. There are still some marriages performed by the *imams* without the prior official celebration.³⁰ In rural society, the religious ceremony is still regarded as valid in itself, and a civil marriage alone is not regarded as valid by the Muslim community.³¹

An earlier study found in the 1970s that 35.4% of all marriages in Turkey were civil, 49.2% were mixed civil-religious (concluded in the presence of civil authorities and later, an *imam*), and 15.0 percent were only religious and hence carried no official legal weight.³² Some 70 years after the transplantation of the Civil Code, the norms that consider a child born only of non-religious (civil) wedlock a 'bastard' are quite dominant, since legitimacy in the eyes of society still rests solely on the *nikah*.³³ In the 1990s, it is an undeniable fact that "many unmarried couples, and the society they live in, believe that the religious ceremony provides enough evidence for the validity of their marriage."³⁴

State Planning Organization's data from the 1990s show that the importance of the religious marriage in the eyes of the people still continues: in urban areas, the ratio of civil only marriages to all subsisting marriages is 13.59%, the figure for religious only marriages is 3.09%, the ratio of couples who employed both civil and religious marriage ceremonies is 82.70%; in rural areas, the figures are 5.11%, 6.89%, and 87.38% respectively.³⁵

According to recent research conducted by the Directorate of Religious Affairs,

28. Tugrul Ansay et al (eds) *The Turkish Criminal Code*, (London: Sweet & Maxwell, 1965), p. 85. For some cases which appeared before the court of Cassations, see Y.4.C.D. 06/06/1983 E 983/2664 K 983/3310; Y.4.C.D. 09.12.1986 E 986/9510 K 986/9813; Y.4.C.D 28.04.1992 E. 992/2504 K. 992/

29. Abadan-Unat, *Women In The Developing World*, p. 172; Aydin Zevkliler, *Medeni hukuk* (Civil Law), (Istanbul: Savas, 1995), p. 705; Belkis Kumbetoglu, "Aile, evlilik, nikah: Farklılaşan kavramlar" (Family, Marriage, *Nikah*: Changing Concepts), *Toplum ve Bilim*, N. 73, 1997, p. 121.

30. Kumbetoglu, "Aile, Evlilik,;" Ansay, "Family law", p. 113.

31. Hooker, *Legal Pluralism*, p. 365; Nancy Tapper, "Changing Wedding Rituals in a Turkish town", *Turkish Studies*, V. 9, 1985, pp. 305-306; Nuran Elmaci, "Polygamy: Çok-esli evlilikler" (Polygamy: Polygamous Marriages), Necla Arat (ed) *Türkiye'de kadın olmak* (To Be a Woman in Turkey) (Istanbul: Say, 1994), p.109.

32. Timur, *Türkiye'de aile yapisi* (Family Structure in Turkey), (Ankara: Hacettepe University Press, 1971).

33. Birsen Talay, *The Changes In Turkish Family Structure Between The Years 1923-1935*, (Istanbul: Bogaziçi University, 1994), p. 34; see already earlier, Balaman, "Family formation," p. 211.

34. Talay, *Changes*, a woman journalist in the eastern Turkey states that *everybody* in the region marries by *nikah*, and official marriage is also *common*. *Sabah Melodi*, March 25, 1998.

35. State Planning Organization (SPO), *Türk aile aractirmasi* (Turkish Family Research) (Ankara: DPT, 1992), p. 42, table 31.

54.8% of the university youth in Turkey want *nikah* in addition to official registration. This number increases, as we have seen from the statistics, when it comes to marriage, so that most of them perform *nikah* due to a number of reasons, such as social and parental pressure although some of them (45.2% in the said research) would not necessarily desire so.³⁶

It is also clear from these data that Turkish people have learnt to combine the official and unofficial marriages. Even in the village level, the ratio of performing both marriages is 87.38%. Religious only marriages still occur in substantial numbers, opposing the wishes of the official law. Other evidence showing that people have learnt to combine the rules of the secular and religious laws is the decreasing time interval between the religious and secular marriages.³⁷ People have realized to a great extent that marrying religiously only has disadvantages, whilst having married secularly in addition to the religious marriage has substantial benefits especially for the women concerned.³⁸ Research conducted by Hacettepe University in years 1988 and 1993 also confirms the above-mentioned official research.³⁹

The state's desire for uniform legal standards is opposed to the religious and cultural diversities of the people. As a matter of fact, as the empirical research shows, social reality is not responding fully to the desires of the secular law. Even the state accepts this phenomenon. In a publication of the State Institute of Statistics, it is stated that in spite of the legal prohibition:

. . . it is assumed that religious marriages (not accompanied by official marriages) often take place, especially in the Eastern and Southeast parts of Anatolia. Therefore the number of marriages appears to be lower than they actually are, since religious marriages are not included in these statistics.⁴⁰

In sum, in accordance with the unofficial Turkish Muslim law, Muslims will marry twice with several permutations to satisfy the competing demands of secular law and religious belief. There are five different patterns of solemnization of marriage in the Turkish context: Civil marriage, religious marriage, both civil and religious marriages at the same time, civil first without solemnization for a period and then the religious marriage, and finally religious first and after a while civil marriage.

36. See *Hurriyet*, 23 February 1998, p. 12.

37. Nurettin Yıldırak, *Köy kadınlarının sosyo-ekonomik ve kültürel konumları* (The Socio-economic and Cultural Situation of Village Women) (Istanbul: Friedrich Ebert Vakfı, 1992), p. 22.

38. See now in detail, Yılmaz, "Non-Recognition of Post-Modern Turkish Socio-Legal Reality and Predicament of Women," *British Journal of Middle Eastern Studies*, 2001 (forthcoming). Similarly, in the British context, the state's hesitation to recognize unofficial Muslim socio-legality has important reflections in the public sphere at the expense of the Muslim minority, especially the women, see in detail Yılmaz, "Muslim Law in Britain, Reflections in the Socio-Legal Sphere and Differential Legal Treatment," *Journal of Muslim Minority Affairs*, V. 20 N. 2, 2000; Ihsan Yılmaz, "The Question Of Incorporation Of Muslim Personal Law Into The English Law And Law As Chameleon," *Journal of Muslim Minority Affairs*, V. 21 N. 2, 2001.

39. Hacettepe Üniversitesi Nüfus Etüpleri Enstitüsü, *Türkiye nüfus ve sadık araştırması* (Turkish Population and Health Research), (Ankara: Ministry of Health and HUNEE, 1993).

40. State Institute of Statistics Prime Ministry Republic of Turkey (DIE), *Marriage Statistics*, (Ankara: DIE, 1997), p. ix; see now, www.die.gov.tr.

Having Polygamy

With regards to polygamy, there is an obvious conflict between classical Muslim law in which a man is permitted to marry up to four wives at any one time and the official law of Turkey. Thus, a marriage in which either party is already married to someone else will automatically be null and void according to the official law. The Civil Code states that no person shall marry again unless he proves that the earlier marriage has been dissolved by death or by divorce or by a decree of nullity, and that a second marriage shall be declared invalid by the court on the ground that a person had a spouse living at the time of marriage. In other words, the second marriage is absolutely void, or *void ab initio*.⁴¹

The parties knowingly contracting such a marriage are considered as having committed a criminal offence under Article 237/5 of the Criminal Code that states: If the man is already married, he shall be punished by imprisonment for six months to three years. If the woman knowingly marries such a man, she shall be given the same punishment.⁴²

However, polygamous marriages have in no sense been eradicated in Turkey.⁴³ The polygamous local tradition still survives to a certain extent,⁴⁴ even though polygamous marriages are only exceptional as Turkish society has generally been a monogamous society. Although it varies from region to region, in the history of Turkey, the ratio of polygamous marriages has already been minimal. According to recent research, already in 1885, the proportion of polygamous marriages to all subsisting marriages in Istanbul was only 2.51%. In 1907, the figure was 2.16%.⁴⁵

Social acceptance of succeeding wives is gained by performing only "*nikah*". Numerous first marriages are also religious only but not registered. A study based on survey research found that approximately 2% of all marriages in Turkey were polygamous in the early 1970s.⁴⁶ Estimates of the proportion of polygamous marriage in rural areas during the present century range between 10% and 2%. In the early 1980s, Sahinkaya, in Eastern Anatolia, found the rate of polygamy to be about 4.4%.⁴⁷ In the late 1990s, the number of males who marry polygamously and defend that state of

41. Articles 93 and 112/1, 114, 115. Y.H.G.K. 26/3/1986, E. 2/751- K. 287; Y.2.H.D. 27/2/1986, E. 1729- K.2054; Y.2.H.D. 03/06/1990 194/2546.

42. Ansay et al, *The Turkish Criminal Code*, p. 86.

43. Abadan-Unat, *Women in the Developing World*, p. 173; Kumbetoglu, "*Aile, evlilik, nikah: Farklılaşan kavramlar*," p. 121.

44. Fatma Mansur Cosar, "Women in Turkish society," Lois Beck and Nikki Keddie (eds) *Women in the Muslim World*, (Cambridge, MA/London: Harvard UP, 1978), pp. 124-140; Guriz, "Sources of Turkish Law," p. 4; Kumbetoglu, "*Aile, evlilik, nikah: Farklılaşan kavramlar*," p. 121.

45. Alan Duben and Cem Behar, *Istanbul Households: Marriage, Family And Fertility, 1880-1940*, (Cambridge: Cambridge UP, 1991); and the Turkish translation of the same, Duben and Behar, *Istanbul haneleri: Evlilik, aile ve doğurganlık, 1880-1940*, (Istanbul: İletişim, 1996). 161.

46. Timur, *Türkiye'de aile yapısı*, p. 93; see also Cosar, "Women in Turkish society", p. 127.

47. Rezan Sahinkaya, *Diyarbakir ili merkez köylerinde aile strüktürü* (Diyarbakir County Villages Family Structure) (Ankara Üniversitesi: Ziraat Fakültesi Yayınları, 1983), p. 50.

affair in public has been steadily increasing.⁴⁸

Nikah utilizes polygamy in a particular way. Some polygamists reported that if they had to divorce their wives to remarry, they could not have married, since the issue of divorce is not perceived positively in the community.⁴⁹ The two most common reasons given for these bigamous unions were the need for another female helper and the suspected sterility of the first wife. In Turkish society, the most important ground for legitimizing divorce is the infertility of the wife. In field research, Basaran found that in rural areas people approve polygamy of a husband if he has no male child from his first wife. 97.3 % of women and 80.4% of men agree that it is appropriate for a husband to have a second wife if he has no male offspring.⁵⁰ In infertility cases, thus, a solution is sought not by divorce but rather by a polygamous marriage of the husband to a widow or an unmarried woman. A third reason for polygamy according to some research was the institution of the levirate or widow inheritance by married kin of the deceased. In these cases, polygamy is regarded as a social duty or a pious obligation. However, it must be emphasized that there are many polygamists who had no such excuses or reasons prior to their second marriages other than satisfying their whims and desires.

Polygamy or more generally survival of the local law is not a rural phenomenon although most writers tend to see it as such. Even in big cities and metropolitan areas, despite the smaller figures, dynamic Muslim legal pluralism is a reality. Sometimes, it is easier to continue a polygamous life free from *Gemeinschaft* pressures in a crowded metropolitan city.⁵¹ A quick scan in newspapers will also show that polygamous marriages are not confined only to the rural and eastern parts of Turkey. In that context, one can see some people who polygamously married, in the urban areas as well. For instance, there are some politicians, businessmen, singers, actors, members of Parliaments and even ministers of the Cabinet who are known as polygamists, despite what the legal system says.⁵²

In the Turkish Muslim law, there are at least four patterns of polygamy. However that figure can easily increase depending on the number of wives concerned. In the

48. Kumbetoglu, "Aile, evlilik, nikah: Farklılaşan kavramlar." pp. 121, 127.

49. Elmaci, "Polygamy," p. 109.

50. Fatma Basaran, "Birden fazla kadınla evlenmeye karşı vaziyet alıslar" ("Positioning Against Polygamy"), Behlul Dikeçligil and Ahmet Çigdem (eds) *Aile yazıları* (Writings on Family), (Ankara: T. C. B. Aile Araştırma Kurumu Başkanlığı, 1990), p. 187.

51. See Elmaci, "Polygamy," pp. 105; 108

52. For a recent case about a minister of the Cabinet, as he then he was, a member of the then ruling Welfare Party, which became a controversial issue between European politicians and the Turkish politicians with regard to the human rights issues in Turkey, see *The Independent*, April 17, 1997, p. 14. For another case, regarding another former minister of the cabinet who is currently the chairman of a very popular football club, see *Hurriyet*, November 7, 1997, p. 27. In another recent case, second wife of a polygamist businessman with *nikah* only claimed in the court that after her husband died he left only 3 companies to her, 23 to the first wife, but she claimed that that was injustice and she deserved much more, applying for the annulment of the contract left by the husband regarding inheritance. Reported in *Hurriyet*, March 20, 1998, p. 43.

first pattern, the man marries two or more wives with only *nikah* without any registration. In the second pattern, only one of the women is a wife by civil ceremony. If, for instance, the first marriage was civil, the second will be religious only. Significantly, the first wife then becomes the legal mother of the children born to the second wife. Birth certificates and identification documents are arranged accordingly.⁵³ Yet it is quite possible that a second, third or fourth wife could be the official wife if the husband did not prefer to register the earlier marriage. In this third pattern, the husband takes his first wife without official marriage, which is a common practice in rural areas, then he marries the second one both officially and unofficially. In the fourth pattern, the husband divorces his wife officially but does not pronounce *talaq* so that she is still his wife in Islam. Then, he marries another woman both officially and unofficially (with *nikah*).⁵⁴ Thus, it is made sure that both children of the first wife and the second wife are legitimate in the eyes of both Muslim law and the official legal system. These scenarios can be adapted to the cases of the possible third or fourth wives with different permutations.

Prohibition of polygamy was a radical step in the history of Turkey. Yet, as one can easily conclude, this was neither a great revolution nor a big change, since the society was anyway more or less monogamous. The ratio of polygamous marriages, as stressed above, was already minimal. This ratio has continued to exist in spite of all legal actions against it.

Divorce and Talaq

The divorce rate in Turkey has been relatively low.⁵⁵ Thus, the case of *talaq* has not been a big issue in terms of numbers. People in Turkey generally react negatively to the idea of divorce. It is conceived as an unpleasant experience and it is usually condemned by families and friends. Even though in Muslim law divorce can be obtained in a number of extra-judicial ways like *talaq*, in secular Turkish law there is solely one way of divorce, which is through a decree granted by a court of civil jurisdiction on the ground that the marriage has irretrievably broken down. The judge can either declare the marriage void, if the conditions for a valid marriage do not exist; or

53. Ali Riza Balaman, "Family Formation And Dissolution In Rural Areas", Erder (ed) *Family In Turkish Society, Sociological And Legal Studies*, p. 211; Elmaci, "Polygamy," p. 109.

54. Religious scholars have been asked by people regarding this issue. Beser contends that if the husband does not say "I divorced her" but writes it with no sincere intention to divorce and then if the judge decides to grant divorce, they are not Islamically divorced. If he pronounces the *talaq*, or "I divorced you", then he can remarry her under the Muslim law, Faruk Beser, *Fikih pencesinden sosyal hayatimiz, V. I* (Our Social Life from Fiqh's Perspective), (Istanbul: Nun, 1993), p. 162.

55. The most detailed research on divorce in Turkey is Zwahlen's study which surveys the issue from ancient Turks to modern Turkish society Mary Zwahlen, *Le divorce en Turquie: Contribution à l'étude de la réception du code civil suisse*, (Divorce in Turkey: Contribution to the Study of the Reception of the Swiss Civil Code), (Genève: Librairie Droz, 1981). Another detailed study on Turkish law yet to be published is H. P. Williams, *The Role Of Adjudicatory Law In Divorce Proceedings In Turkey*, (Tufts: Tufts University, 1982), (Unpublished Ph.D. dissertation).

grant an annulment; or decide to grant a divorce or separation. The Code had made divorce by collusion or mutual consent difficult for many years.⁵⁶ However, the new revision in the Civil Code makes a divorce by mutual consent possible.⁵⁷

In an earlier case, the Court of Cassation did not recognize a *talaq*, stating that there is only one type of dissolution of the marriage under the Civil Code. Muslim law's prohibition on the marriage after three *talaqs* between the couple was refused on the ground that there is no such rule in the Civil Code.⁵⁸

On the other hand, since marriages are religious, divorces are also made by *talaq* to terminate the religious marriage, the *nikah*.⁵⁹ Although statistical records do not include the number of dissolved informal marriages, husbands still divorce their wives with *talaq* and devout Muslim wives have to agree to the official divorce.⁶⁰ However, this type of easy divorce is not an easy option in Turkish society where most marriages are still arranged.⁶¹ Effectivity and intensity of the relationships between families make it impossible for an individual to reach a decision to divorce, so that individual desires cannot easily be put into effect.⁶² Yet it is evident that with the waning of the institution of the arranged marriages, *talaqs* could become easier. Also in urban areas, due to the declining intensity of social pressures and rising individualism, divorce would inevitably become an easier option.

THE FUTURE OF POSTMODERN TURKISH LEGALITY AND TURKISH "DEMOCRACY"

Although the Turkish state tried to abolish Muslim law by transplanting new secular and uniform laws, the result has been that Turkish Muslims have not abandoned their local Muslim family laws. The socio-legal reality of Muslim legal pluralism stemming from resistance of local Muslim law has, for many years, been seen as a rural phenomenon in Turkey. However, it is becoming clear that Muslim legal pluralism is a reality of urban areas too. The state and the elite expected that by means of education, members of society would learn the rules of the official legal system, and they believed that with the increase of urbanization people would give up their local customs and religious laws and would follow only the official law.

Nevertheless, the Turkish empirical data have not confirmed this expectation. Rather, Turkish people have reconstructed their unofficial religious laws in spite of all the claims of the secular legal system, particularly in the issues of marriage, manifestly showing that state law has limits to shape the society. The Turkish experience is

56. Article 150 of the Civil Code before revision.

57. Ansay, "Family Law," p. 117.

58. Y. H. G. K. 08. 06. 1968 E. 1966. 2-1487 K. 425 T.

59. N. Serpil Altuntek, *Van yöresinde akraba evliliği* (Marriage of Close Kin in the Van Area) (Ankara: Kültür Bakanlığı Yayınları, 1993), p. 77.

60. See in detail Yılmaz, *The Dynamic Legal Pluralism*, Chapter 4.

61. Balaman, "Family formation," p. 214.

62. Balaman, "Family Formation," p.215.

instructive in the sense that it reminds us the possibilities and limitations of attempting to reconstruct society by restructuring its law.⁶³ By developing a new Turkish Muslim law, these Turks have met the demands of both the secular Turkish legal system and the unofficial Muslim law. Since Turkish Muslims have reconciled these conflicting points by employing Turkish Muslim law rules, only a few cases have appeared before the courts. Even though we have only dealt with family law issues in this article, it is also starkly observable in the Turkish society that in other fields such as business, finance, banking,⁶⁴ insurance, and in all sorts of spheres of life, Muslim law is referred to and obeyed by many people despite the non-recognition of the state.⁶⁵

Even the state and the ruling elite are aware of the reality that Turkey continues to be a Muslim country, no matter what changes may have taken place in Turkey's Islam, which shows the partial failure of the Kemalist elite's instrumentalist use of law to make religion a private belief. It is ironic that now some lobbyist groups, a Maoist party, and some businessmen's associations demand that the state's Directorate of Religious Affairs must issue a *fatwa* which would prohibit the usage of US Dollars in daily life and order *imams* to instruct the faithful during Friday sermons to deal with Turkish Lira instead of US Dollars in their daily affairs so that the recent financial series of crises could be overcome.⁶⁶ As a matter of fact, on the 31st of August 2001, in

63. Starr, *Law as Metaphor*, p. xli.

64. A recent survey has found that 14.1 of Turkish people opened accounts in interest-free Islamic finance institutions despite the non-existence of state guarantee for any losses as opposed to the case with the mainstream banks, see, "Anar Anketi March 2001," www.anararastirma.com.tr. Same research has also shown that these people are of different political party affiliational background, not only of so-called "Islamic" Virtue Party.

65. *Fatwa* books are bestsellers in Turkey. Moreover, many newspapers have *fatwa* columns. Recently, the number of Turkish *fatwa* sites on the inter-net has increased, see for example, the state's Directorate of Religious Affairs' *fatwa* site, <http://www.diyenet.gov.tr/dinibilgiler/dinibil.html>. Also, through various popular newsgroups and e-mail discussion lists, Turkish Muslims solicit information about what "Islam" says about any particular problem or issue. Contemporary and frequently asked issues in Turkey: working in Europe, *madhhabs* (legal schools of Islam), using amplifier when reading *azan* (the call to prayer), Friday prayer and work, *dar al-Islam*, fasting and traveling by train, stock exchange, tax, *halal* meat, *nikah*, marrying a non-Muslim woman, *talaq*, court divorce, polygamy, nationalism, unemployment benefit, inflation, interest, customs tax, bribery, depositing money at a bank in non-Muslim countries, selling alcohol in a non-Muslim country, gambling in *dar al-harb* (non-Muslim countries), sterilization, plastic surgery, using perfumes, abortion, *ijtihad* (independent legal reasoning), military service, organ transplantation, prayers (*salah*) on bus, VAT, mortgage, European Union, golden tooth, alcohol in medication, eau de cologne, life insurance, feminism, fertility clinics and so on, see Faruk Beser, *Fetvalar (fatwas)*, (Izmir: Nil, 1991); Ahmet Kurucan, *Yeni bir fikhi aci (A New Fiqh Perspective)*, (Izmir: Isik, (1998), TDV, *Gunumuz: meselelerine fetvalar (Fatwas on Contemporary Problems)*, (Ankara: TDV, 1999), see also Yilmaz, "Muslim Legal Pluralism in *Asr Al Darura*, Surfers on the Inter-Madhhab-Net and Neo-Ijtihad," Frank Vogel, Peri Bearman and Ruud Peters (eds), *The Islamic School of Law: Evolution, Devolution and Progress* (Cambridge, MA: Harvard University Press, 2001), (forthcoming).

66. www.internethaber.com/detay.php?d=3558; www.medyakronik.com/guncel/28080103.htm; Kursat Bumin of *Yeni Safak* critically made fun of the state's move making reference to the article 24 of the Turkish constitution which puts it that "No one shall be allowed to exploit or abuse religion

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the 85,000 or so mosques in all over Turkey where the state feels free to manipulate, if not abuse, religion and officially non-recognized religious laws in the name of "the special circumstances of the country," *imams* read the same text discouraging the usage of US Dollars, written and sent by the Directorate.

The Turkish case shows us again that legal pluralism is not only an issue for traditional societies, but also a concern for contemporary ones, as virtually every society is multicultural. Thus, dynamic legal pluralisms have come into operation as ubiquitous phenomena of the post-modern age. As a consequence of the interconnectedness of social orders, there is a mutually constitutive relation between official law and unofficial law(s). The socio-legal reality has repeatedly confirmed a general principle that there is an inseparable and dynamic interrelationship between law and culture, as law is a cultural construct.⁶⁷ The post-modern stage of legal development is one of hybrid plurality rather than facile uniformity. An individual in the post-modern arena is subject to more than one law and these laws might, in some cases, be diametrically opposing. However, these individuals overcome this challenge by manipulating and amalgamating different types of normative orderings.

In this postmodern condition, Turkish Muslims not only have challenged the presumptions of Turkish legal modernity but have also shown that they can become citizens while at the same time retaining their Muslim identity. Indeed, advocates of a Turkish-Islam or an Anatolian-Sufism put always an emphasis on Turkish modernity as an alternative to Saudi or Iranian versions or images, underlining that this moderate discourse of Islam is not in contradiction with the modern world.⁶⁸ They seek to define laicism along more Anglo-Saxon lines and reinterpret Islamic theology to respond to modern challenges, underscoring that revelation and reason do not conflict; the state should be neutral on beliefs and faiths prevalent in the society; governance of the state cannot be based on the dominance of one religious tradition.⁶⁹ Indeed, a recent report about 'political Islam in Turkey' commissioned by a respected think tank -TESEV, the Foundation for Economic and Social Studies- shows that Turks tend to be pious Muslims, but are attached to the secular system and tolerant of other beliefs. 46% of the

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or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets", <http://www.mfa.gov.tr/grupc/ca/cag/Part2.htm> ; www.yenisafak.com.tr/kbumin.html on 8/28/2001.

67. Chiba, *Asian Indigenous Law*, Op. Cit, Chiba, *Legal Pluralism*, Clifford Geertz, *Interpretation Of Cultures*, (New York: Basic Books, 1973); Geertz, *Local Knowledge: Further Essays In Interpretive Anthropology*, (New York: Basic Books, 1983); Lawrence Rosen, *The Anthropology Of Justice: Law As Culture In Islamic Society*, Cambridge: Cambridge UP, 1989); Naim Gerber, *State, Society And Law In Islam: Ottoman Law In Comparative Perspective*, (New York: State University Of New York Press, 1994).

68. See, for example, Yavuz, "Towards An Islamic Liberalism?: The Nurcu Movement And Fethullah Gülen," *The Middle East Journal*, Vol. 53, No. 4 (1999), 596-597

69. "Journalists And Writers Foundation: And The Third Abant Convention," *Milliyet*, July 24, 2000.

respondents say they pray five times a day, and only 3.7% have never fasted on Ramadan. But over 80% thought that even those who drank and did not pray should still be considered as Muslims. There is also little support for the so-called "Islamic penal laws" as practiced in Saudi Arabia.⁷⁰ These Muslim Turks, as we have seen above, retain even their Muslim law in secular and modern contexts in a post-modern way without violating the democratic order.⁷¹

The Turkish power elite has conceived Islam as a threat to their modernist movement, reforms, and progress. Yet in today's Turkey, the roles have recently changed. Muslim Turks have modernized themselves on their own terms. Now, most practicing and activist Turkish Muslims advocate Turkey's accession to the European Union, once perceived to be a "Christian club," and believe that "the Copenhagen criteria" are *amr bil ma'ruf* (ordering the good),⁷² whilst the role of reactionary conservatism is now left to the militarist "deep state" elite.⁷³ On democratization, general peace and dialogue among civilizations, activist Muslims now either take the lead and even guide the state as in the example of the Fethullah Gülen's moderate faith-based movement⁷⁴ or adapt themselves to the new Muslim discourse like Tayyip Erdogan and Abdullah Gul of *AK Parti*, who are from the *Milli Gorus* tradition.⁷⁵ In this regard, postmodern

70. Reported on April 15, 1999 at <http://www.turkeyupdate.com/tesev.htm>; see for a summary of the report at the think tank's website, http://www.tesev.org.tr/projeler/proje_din_saha_ozet.html. Now, in Turkey "an increasing number of Turks, especially those of the younger generation, see themselves as European and Muslim at the same time," Dale F. Eickelman, "The Coming Transformation Of The Muslim World," The 1999 Templeton Lecture on Religion and World Affairs. Foreign Policy Research Institute, www.biu.ac.il/SOC/besa/meria/journal/1999/issue3/jv3n3a8.html.

71. This phenomenon is by no means unique to Turkey; it is global, see Michael King, "The Muslim Identity In A Secular World", King (ed) *God's law versus state law: The Construction of Islamic identity in Western Europe*, (London: Grey Seal, 1995), pp. 91-114.

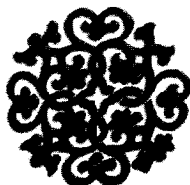
72. Ali Bulac, *Zaman*, June 4, 2000.

73. Recent discussions in Turkey after the two consecutive financial crises are remarkable in the sense that the Turkish society is becoming aware of how the military's sensitiveness on modernity and laicism has been abused by corrupt "militarist" politicians, businessmen, media tycoons and some high-ranking civil and military bureaucrats. Uncensored cyberspace media such as www.haberturk.com plays a substantial role in this nascent awareness.

74. Fethullah Gülen's discourse is based on "the synthesis of Islam and science; an acceptance of democracy as the best form of governance within the rule of law; raising the level of Islamic consciousness by indicating the connection between reason and revelation; and, achieving this-worldly and other-worldly salvation within a free market and through quality education", Yavuz, "Cleansing Islam From The Public Sphere," see also Yavuz, "Societal Search for a New Contract: Fethullah Gülen, Virtue Party and the Kurds," *SAIS Review*, V. 19, N. 1 (Winter/Spring 1999); Yavuz, "Towards an Islamic liberalism?," Interview with Hulusi Turgut, *Sabah*, January 1997; Ebru Altinoglu (1999) *Fethullah Gülen's perception of state and society*. Istanbul: Bosphorus University, 102; see also in detail, Yilmaz, "Changing Institutional Turkish-Muslim Discourses on Modernity, West and Dialogue". Paper presented at the Congress of the International Association of Middle East Studies (IAMES). Freie Universitat Berlin, Germany, October 5-7, 2000.

75. See in detail, Yilmaz, "Changing Institutional Turkish-Muslim Discourses."

Turkish Muslim legality suggests that the Turkish people by and large have harmonized the elements of democracy and Islam and have also shown that these two are not necessarily mutually exclusive. Now it is the Jacobin ruling elite's turn to come to terms with socio-legal reality and to show that it is possible to amalgamate the elements of democracy, civil society, multiculturalism, human rights and "Kemalism,"⁷⁶ recognizing that it is now postmodern times, and legal pluralism is here to stay where cultural plurality exists.



76. Civil society has been suppressed by the militarist elite especially after the postmodern coup of February 28, 1997. Knowing that they have the real power and that their Western allies will always tolerate an undemocratic Turkey, the so-called Kemalist elite is still on their way to "modernize" and homogenize the society, despite the sociologists' constant warnings that simmering tensions between the civil society and detached authoritarian state would lead to unhealthy sociological consequences. In this regard, it is worth noting that the most powerful man of the February 28 coup, General Cevik Bir, exhibited his "conceptual vision" when making a "political" speech to the journalists, vigilantly stating that "sociology could confuse our minds."