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**“The Impact of Western Colonialism and Secularization on
the Application of the *Shari’ah* Law in the Muslim World[©]”**

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Introduction

This paper attempts to highlight the influence of western Colonialism and Secularization on the application of Islamic law in most Muslim countries in the nineteenth century. Before discussing the issues related to the impact of Western colonialism on the application of the *Shari’ah* law in some Muslim countries, the first part of this discussion will highlight the position of the *Shari’ah* in pre-colonial period in which the *Shari’ah* has been considered the core and the essence of Islamic civilization, and thus a key component in the fabric of Islamic thought. The second part will focus on the position of the *Shari’ah* law after the expansion of Islam in the vast regions of the Muslim world extending from Spain to central Asia. Throughout its long history, Islam has encountered many civilizations such as those of Greece, Persia, India and Byzantium, whose precepts were alien to the ethos of Islam. The *Shari’ah* law was continued to retain its vigor and continued to prosper in the early years of its history with the formation of the four major schools of law. However the latest encounter of the Muslim particularly the Ottoman Empire, with western civilization of the eighteenth and nineteenth centuries ended up with their weakness and the adoption of the Western law. Before conclusion, the last part of discussion will be focused on the impact of colonialism and secularization on the application of *Shari’ah* law in the Muslim world in general and

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particularly in Turkey and the reasons for the failure of Muslims to content with the challenges of the West and for adoption Western model in certain areas of law.

***Shari'ah* Law in Pre-Colonial Era**

Before the expansion of colonial empires of the European nations in the nineteenth century, the Muslim world was characterized by the predominant role of Islam and local customs. With the spread of Islam and the expansion of Muslim territories, Islamic law became the law of the land in vast regions extending from Spain to central Asia.¹ As late as the seventeenth century, Islamic law was in force in the Indian sub-continent under the Monghuls. Its influence extended to lands which had never been subject to the political denomination of the Arabs even at the greatest expansion of their empire, such as Indonesia and certain parts of Africa. In expression used by David Bonderman, “*this traditional ‘Muslim law’ has spread from modest beginning in Arabia to mix with divergent local and customary law from Morocco to Malaysia and from Central Africa to Eastern Europe and Turkistan, forming ‘Muslim’ Legal systems that vary from place to place.*”² It had been claimed that for many parts of the Muslim world, Islamic law remained to have been, uninterruptedly and exclusively, the law of the land until the mid-nineteenth century, when it has to give way to Western type of codifications in many areas of the law.³ In view of such wide spread application of Islamic law which extended far beyond the confines of its original birth place and enduring in time, it is, therefore, amounted to be one of the major world legal systems beside Roman law and Common law.⁴ The *Shari'ah* law is thus considered to be among the most important written laws which followed in varying rites, and in varying degrees of accommodation with

¹ Gamal Moursi Badr, “Islamic Law: Its Relation to Other Legal Systems,” *The American Journal of Comparative Law*, Vol. 26 (1978), p.188.

² David Bonderman, “Modernization and Changing Perception of Islamic Law,” *Harvard Law Review*, Vol.81, No.6 (1968), p.1169.

³ Jamal Moursi Badr, “Islamic Law and the Challenge of Modern Times,” in James Fiscatori and George S.Harris, eds., *Law Personality and Politics of the Middle East* [Washington, D.C. : The Middle East Institute, 1987], p.27.

⁴ Jamal M.Badr, “Islamic Law...,” *The American Journal of Comparative Law*, Vol.26 [1978], p.187.

customary law from Morocco to Indonesia.⁵ The adoption of Islamic law as part of the law of the land is identifiable through the application of different schools of law in various territories of the Muslim communities.

The Hanafi school of law is followed by overwhelming majority of the Muslims Afghanistan, India subcontinent, and by the majority of the Muslims in China. In Arab countries, it is well presented in Iraq and Syria. It further became the favorite school of the Turks both in Central Asia and particularly in the Ottoman Empire; a part from Turkey proper, The Turkish Muslims in the Balkan countries, Cyprus, Rhodes and others are all Hanafis. This school of law had also gained minority followers in Jordan, Egypt, the Anglo-Egyptian Sudan, Libya, and among the Muslim population of Israel.⁶

The Maliki School had gained dominant followers in Egypt. It spread over particularly the whole of Muslim Africa: Upper Egypt, the Anglo-Egyptian Sudan, Libya, Tunisia, Algeria, Morocco and others. The Shafi'i School had gained its followers in lower Egypt, in the Hijaz (including Mecca), and in parts of South Arabia (Aden, Hadramaut, and parts of Yaman). It is further well represented in parts of Eritrea and Somaliland, and prevails among Muslims in Tanganyika and Kenya. There are also Shafi'is in some districts of Central Asia, and on the Malabar and Coromandell Coasts of India. Finally, the Shafi'i school is followed by the overwhelming majority of the Muslims in Indonesia and Malaya (Malaysia) and the rest of the British East Indies, by Muslims in Siam (Thailand), Indo-China, and the Philippines (Sulu).⁷ The Hanbali school had gained its foothold in many parts of Islamic world, including Persia (before some of them became Shi'i's followers). Its adherents were numerous in Syria and Palestine, Hijaz and in the adjoining principalities of Gulf. This school has been officially recognized in Saudi Arabia, and the inhabitants of Najd are practically all Hanbalis.⁸ In view of its wide spread adherents, Islamic law is still amounted to be one of the great legal systems of the modern world, dealing with human affairs of a total Muslim population in various countries, and in fact, many states with the

⁵ Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* [Princeton: Princeton University Press, 1985],p.6.

⁶ Joseph Schaacht, "The Schools of Law and Later Developments of Jurisprudence," in Majid Khadduri and Herbert J.Liebesny,eds.,*Law in the Middle East*, Vol.1, pp.68-69.

⁷ *Ibid.*,p.69.

⁸ *Ibid.*,pp.69-70

Muslim population continue to affirm in their laws, and often in their constitution and their adherence to the principles of Islam. By virtue of the spread of Islam, the Muslim world was bound together by belief, the acts of worship such as prayer, pilgrimage to Mecca, by literary and artistic expression, law, education and political ideas and institutions.

Islamic legal theory of the classical schools of jurisprudence regarded Islamic law as immutable religious law. Man could interpret and explain the law, but he could not himself legislate. Nevertheless, the requirements of daily life and expanding culture necessitated adaptation of legal rules to new situations. In this situation the Muslim jurists not only based their legal judgment on the *Qur'an* and the *Sunnah*, but they also sometimes referred to the other two main sources, namely consensus (*ijma'*) and analogical reasoning (*qiyas*). As such, Islamic law is rather a system of rules, hierarchical in degree, supported by the science of jurisprudence which guided the individual reasoning in reaching the Islamic solution for the new problems. The development of the science of jurisprudence (*'ilm usŒl al-fiqh*) is a peculiar characteristic of Islamic law.⁹ By applying the Islamic legal methodology (*'usul al-fiqh*), Islamic law was capable of developing and flourishing throughout the Muslim caliphate without the use of one Roman or Greek term or institution.¹⁰

Throughout its long history, Islam has encountered many civilizations, such as those of Greece, Persia, India and Byzantium, whose precepts were alien to the ethos of Islam. Each time, however, as a result of those encounters, Islam had successfully assimilated various aspects of those civilizations, producing higher forms of culture.¹¹ The best illustration that can be referred to is the case of Muslims' encounter with Greek civilization, as a result of which there came about the Golden Age of Islamic philosophy and science. Muslim intellectual heritage of this period reached such a remarkable success which considered to have contributed to the reintroduction of Aristotelian philosophy into pre-Renaissance Europe, and to have laid the foundation for the blooming of scientific

⁹ Ibrahim Shihata, "Islamic Law and the World Community," *Harvard International Law Club Journal*, vol.4. no.1 [1962], p.104.

¹⁰ It has been noted by Fitzgerald that, "there is not a single reference in any Islamic law book to any Roman authority. Whereas Islamic philosophy also, though not to the same extent as Islamic law, is theocentric, yet it is able to acknowledge openly a debt to Plato and Aristotle," see S.V. Fitzgerald, "The Alleged debt of Islamic to Roman Law," *The Law Quarterly Review*, vol. 67, no.265 [1951], p. 86.

¹¹ Seyyed Vali Reza N. Nasir, "Religious Modernism: Reflections on the Historical Links Between the Middle East and Asia," *British Journal of Middle Eastern Studies*, vol. 19, no. 1.[1992], p.6.

knowledge in the West. Similarly from the encounters of the Muslims with Indian and Chinese civilizations, there came about the important heritage of Islamic medicine and many form of technology, as well as the magnificence of Islamic art and architecture.¹²

This phenomenon was due largely to the force of Islam; the Muslims were exalted by a new faith which generated the spirit of constant dedication, universalism, tolerance and open-mindedness towards other cultures. Although the Arabs (the Muslims) assimilated much of the civilization which they found in the Mediterranean countries, they were not Romanized, rather the conquered countries embraced Islam.¹³ Seyyed Hussein Nasr has attributed the success of Islam to the primordial character of its revelation, and its confidence that it was expressing the Truth at the heart of all revelations, permitted Islam to absorb ideas from many sources, historically alien yet inwardly related to it. This was especially true in regard to the science of nature, because of the ancient cosmological science-Greek, as well as Chaldean, Persian, Indian, and Chinese- had sought to express the unity of nature and were therefore in conformity with the spirit of Islam. The Muslim united these sciences into a new corpus, which was to grow over the centuries and become part of the Islamic civilization, integrated into the basic structure derived from the Revelation itself.¹⁶ Furthermore, the success lies in the confidence which resulted in the formation of the Islamic institutions as well as the intellectual activity of the religious scholars. From its inception, Islam enjoyed a history of success, victory and glory. The Muslim political and military victories had guaranteed an environment most conducive to cultural synthesis, one from which a grand civilization was born.¹⁴

Islam reached its maximum extent when it was the seat of three great empires: the Ottoman (1517-1918) in the Eastern Mediterranean; the Safavid (1501-1722) from Iraq northeastward into the highlands of Central Asia; and the Mongul Empire (1526-1857) in

¹²*Ibid.*, p. 5.

¹³ Henri Pirene, *Mohammed and Charlemagne*, tran. By Bernard Miall [New York: Harper & Row Publishers, Inv., 1939], pp., 150-151.

¹⁴ Seyyed Hussein Nasr *Science and Civilization in Islam*, [New york: The New American Library, Inc., 1968], p. 30.

the Northern India.¹⁵ Although “Islamdom” and the institution of caliphate in the Medieval era had decayed from within, Islamic society for a while under these three smaller empires continued to prosper and maintained their image in its early years of history. The introduction of foreign law into the Middle East, as Enid Hill observes, occurred at different times and under varying circumstances. “*Reception*” of foreign law has meant everything from a colonial power’s imposition of its law upon its colony to the voluntary adoption of a foreign civil code. Some countries adopted the laws of other countries in form, but not in substance; other countries, like Egypt, have received their law from one foreign power while being occupied by another.¹⁶

Colonialism and Secularization of Law

Colonialism and the Nation-State

As a matter of fact the modern national state with its separation of state and church is the legitimate child of the French revolution of 1789 C.E.¹⁷ According to Bernard Lewis, the French revolution is the first great social upheaval in Europe to find intellectual expression in purely non-religious terms.¹⁸ In the history of political philosophy two consequences follow from the ‘break’ caused by the French Revolution: secularism, either as agnosticism or a straightforward atheism, has ever since replaced, first in French and then in Europe, the religious stance of the state. Hence liberalism, born after the revolution, should be historically predisposed to make agnosticism, if not atheism, preside over its political philosophy. Indeed, in most current definition, liberalism is political agnosticism. The second consequence is that liberalism is born in direct opposition to its historical

¹⁵ The dates of fully establishment of each empire are based on Albert Hourani, “The Ottoman background of the Modern Middle East,” in Kemal H. Kerpart, ed., *The Ottoman State and Its Place in World History* [Leiden: E.J. Brill, 1974], p. 61.

¹⁶ Enid Hill, “Comparative and Historical Study of Modern Middle Eastern Law,” *The American Journal of Comparative Law*, vol.26 [1978], p. 286.

¹⁷ Erwin I.J. Rosenthal, “Some Reflections on the Separation of religion and Politics in Modern Islam,” *Islamic Studies*, vol.3, no. 3 [1964], p.250.

¹⁸ Bernard Lewia, “The Impact of French Revolution on Turkey,” *Journal of World History*, vol..1, no. 1 [1953], p.106.

contemporary, the other philosophy descended from the French Revolution, namely Hegel's dialectical system, which finds its supreme synthesis in the state.¹⁹

The movement that culminated in the French Revolution and the modern national state did not make itself felt in Muslim countries of Asia and Africa until the nineteenth century, in the wake of colonial expansion and empire building. The modern history of the Muslim world as other parts of non-Western world begins with the encounter with European colonialism.²⁰ By the latter part of the eighteenth century most of the Muslim world had passed under European rule. The British East India Company established themselves as the *de facto* rulers of Bengal, and was gradually extended to the rest of the Indian sub-continent and supplanting the authority of the Monghul emperors of Delhi.²¹ Similarly the Dutch government, taking over the properties and rights of the Dutch East India Company in 1800, had gained predominant in Java and Sumatra, and rest of Indies by the third quarter of the nineteenth century.²² In 1830 France invaded Algeria, and after almost two decades of war succeeded in conquering the county and opening it up to the French policy of cultural assimilation and large-scale European colonialism.²³

During the same period, Russia too was steadily bringing into subjection ancient Muslim lands in the Caucasus and in Central Asia, and encouraging their settlement by large numbers of non-Muslims. Between 1865 and 1873 Tsarist Russia extinguished the independence of the central Asian emirate of Khokand and established a protectorate over the two other emirates of Khiya and Bukhara.²⁴ France established a protectorate over Tunisia in 1881, and to all intents and purposes became its ruler. The British occupied Egypt in 1882, and remained its rulers, practically if not formally, until after world war 1. The British occupation of Egypt led in due course to the establishment of an Anglo-Egyptian 'condominium' in the

¹⁹ Ghita Ionescu, "The Theory of Liberal Constitutionalism," in Vernon Bogdanor, ed., *Constitutions in Democratic Politics* [Aldershot: Gower Publishing Co. Ltd., 1988], p. 43.

²⁰ Bassam Tibi, "Islam and Modern European Ideologies," *International Journal of Middle East Studies*, vol. 18, no.,1 [1986], p. 21.

²¹ Ira M. Lapidus, *A History of Islamic Societies* [Cambridge: Cambridge University Press, 1988], pp., 465-466.

²² *Ibid.*, p 485.

²³ Jamil M, Abun-Nasr, *A History of the Maghrib*, 2nd. ed. [Cambridge: Cambridge University Press (?)], pp.238-250.

²⁴ Elie Kedouri, *Islam in the Modern World*, [London: Mansell, 1980], p.1.

Sudan, in which the real power was unequivocally in the hands of the British.²⁵ Similarly by the 1880s, the Muslim rulers of Malaya (now known as Malaysia) came to acknowledge British as the protecting power.²⁶ In the first decade or so of the 20th century, Italy invaded and conquered Tripolitania; and the French established a protectorate over the greater part of Morocco, while the Spaniards, as their junior partners, exercised their protectorate over the rest of the Sharifian kingdom. As in Tunisia, in Morocco too the protecting powers established a network of their own officials who in effect governed the country.

European powers affected Muslim states in other, indirect ways. By a natural development, the British empire in India led to British control in the Persian Gulf, Aden and Hadramaut. It also gave British special position in southern Persia. Similarly, on the eve of World War 1, the Ottoman empire had come to be divided into zones of influence between the European powers which allowed them to establish a preponderance of economic enterprise and, if they could, of political influence. As a direct result of this expansion, and of the concomitant weakening of Ottoman power and prestige, the Christian populations of the Balkans began to aspire to independence. These aspirations, supported more or less actively by one or other European power, led eventually to the independence of Greece, Serbia, Rumania and Bulgaria.²⁷ All these territories contained sizable and old established Muslim populations whose position was undermined, and whose possessions and lives were, in many cases, imperiled or destroyed.

The long period of European dominance reached its apogee during and after World War 1, in which its Young Turk rulers led the Ottoman empire to defeat and eventual destruction. The end of the war saw Mesopotamia and the Levant under Allied occupation, with British troops in Baghdad and Damascus- cities which had been Muslim time out of mind, and which no Christian had ever conquered. The aftermath of war, and the Bolshevik evolution of 1917 has led in 1920 to the final extinction of Khiva and Bukhara as distinct entities, and the incorporation of their territories, in due course within USSR.²⁸

²⁵ Hisham B. Sharabi, *Nationalism and Revolution in the Arab World*, [New York: Van Nosstrand Reinhold Co., 1966], pp. 35-38.

²⁶ Ira M. Lapidus, *A History...*, p. 486.

²⁷ Elie Kedouri, *Islam....*, pp.1-2.

²⁸ *Ibid.*

The encroachment of European nations over the Muslim territories was pervasive that according to Hans Kohn, “in 1912 there hardly any Islamic state seemed destined to survive as an independent nation: Turkey and Persia appeared doomed to being partitioned or becoming spheres of influence; from Morocco to Java, from Bukhara to Decca, the vast majority of Muslims lived under British, Dutch, French, Italian, and Russian domination.”²⁹

This is a brief overview of the zones of influence and colonization of European nations over the Muslim territories, i.e., the Dutch and the British in Southeast Asia, Russia in Central Asia, France, Italy, Spaniards and British in North Africa, British in India, and Britain and France in the middle East including the Ottoman Empire.

Thus, Muslims’ encounter with modern Western Civilization awakened them to review their positions. Politically, the Muslims were very much concerned about their relations with European, and this was also true economically: most of the foreign trade, particularly, of the Middle East was now with Europe. Furthermore, the intellectual challenges to the Muslim world were now posed by European ideas and institutions. Notwithstanding the dominance of the religious underpinning in Islamic societies, substantial changes in the political language employed, and in its content, have taken place since the encounter of the Middle East with Europe beginning with Napoleon’s expedition to Egypt in 1798.

The historians and social scientists of the Middle East in particular, are generally in agreement to consider 1798 C.E. as the year in which the history of the beginning of modern Middle East including modern Egypt. Nikki R. Keddi, for instance, considers the real break with the past did not occur until the beginning of the nineteenth century; it was Napoleon’s invasion of Egypt in 1798 C.E. that started the process.³⁰ This even strikingly signaled the military and political superiority of European nation to Muslim states and particularly to the Ottoman Empire. Napoleon’s conquest might be termed as the impact of the West. Hence, the immediate aspect of the western challenges was military and political; however, its

²⁹ Hans Kohn, “Nationalism and Imperialism,” in Ruth Nanda Anshen, ed., *Mid-East: World-Center* [New York: Cooper Square Publishers, Inc., 1975], p.294.

³⁰ Nikki R. Keddi, “Intellectual in the Modern Middle East: A Brief Historical Consideration,” *Daedalus*, vol. 101.,no.1 [1972], p.44.

cultural aspect became apparent as well, and has had more pervasive and lasting effects. This challenge paved the way for the emergence of modern Arab as well as Muslim intellectuals in general.³¹

Thus, Napoleon's conquest of Egypt paved the way for the introduction of Western thought into Egypt in particular, and its spread to other parts of the Ottoman Empire in the nineteenth century. Similarly, the introduction of western reforms into Ottoman Turkey from the time of Selim III (1789-1807 C.E.) followed consecutive losses of territory to Christian powers in the battlefield, a process best seen in the Treaty of Kuchuck Kaynarca of 1774.³² The treaty was a milestone in Russo-Turkish relations and must be considered as a major political event in the history of Turkey and of Europe. From that time on Russia began to exercise relentless pressure on the Ottoman Empire, using the weapons of diplomacy, Pan-Slavism, Orthodoxy, and outright military aggression to achieve her purpose.

The encounter of the Muslims, particularly the Ottoman Empire, with the Western civilization of the eighteenth and nineteenth centuries ended up with their failure.³³ Historians have long debated the reason for the failure of the Muslims to successfully contend with the challenges of the West. Generally, they are in agreement that the causes for such failure lay in politico- military nature of this latest encounter. The cultural challenge of the West followed, and was therefore superseded by the superiority of Western civilization in military and political status vis-à-vis the Muslim world . Ergil and Rhodes have emphasized some economic factors that led to the decline of the Ottoman State such as corruption, the refusal to accept the techniques and social organization of the West. In addition, they assert that , “ *the ineffectiveness of the Ottoman State can only be understood through an examination of the increasing dependence of its treasury on loans floated in Western Europe, and the conversion of the Empire into a backward supplier of raw material to Western capitalism.*”³⁴

³¹ Menahen Milson, “ Medieval and Modern Intellectual Traditions in the Arab World,” *Daedalus*, vol.101.,no.1, [1972], pp.22-23.

³² George Lenczowski, *The Middle East in World Affairs*, 3rd.ed. [Ithaca: Cornell University Press, 1962], pp.10-11.

³³ Seyyed Vali Reza N.Nasir,” Religious Modernism...”,p. 6.

³⁴ Dogu Ergil and Robert I. Rhodes, “ Western Capitalism and the Disintegration of the Ottoman Empire,” *Economy and History*, vol.18., no. 1 [1975], p. 50.

Summarizing the main reasons for the successful penetration of modern Western thought into the Muslim world, Bernard Lewis states: “*the success of Western ideas in the Islamic world in 19th century is often attributed to the advance of the material might of the west to the establishment of European economy, political, and certainly, military supremacy in the Islamic world...But this is not a sufficient explanation...The initial attraction of these ideas is to be found in their secularism.*”³⁵

Secularization of Law

It should be mentioned that a basic difference between the *Shari’ah* law and modern systems of law is that in the latter, the yardstick according to which the unlawful or immoral character of an act is to be measured, is entirely based on the public interest and the morals of the community viewed from purely human angle. In Muslim law, on the other hand, the yardstick is based on the revealed law of God. While modern legal institutions have achieved complete separation of church and state, the *Shari’ah* law is still a religion, an ethic and a law all in one.³⁶

In fact, the influence of Western colonialism gave rise to a duality of institutions and structures that now can be discerned quite clearly as those institutions associated with “modernity” and all others associated with “traditionalism”. In pursuing this sort of policy, systematic efforts were carried out to undermine an Islamic background of the Muslim community. In the field of law, dualism in the application of law remained to be seen in the form of legal pluralism in which different forms of legal rules are applied. These rules consist of imported and locally made law of Western type, customary laws and religious laws. These types of laws continued to apply even up to the time of independence. In fact, this dualism in types of law remains even in the post-colonial period.

As a matter of fact, the colonial rule and foreign influence have left an immense influence on the legal systems of many Muslim countries. In due course, the so called “positive laws” of

³⁵ Bernard Lewis, “Early European Influence on the Ottoman Empire,” in Benjamin Rivlin and Joseph S. Szyliowics, *The Contemporary middle East: Tradition and Innovation* ,[New York: Random House, 1965], p. 119.

³⁶ Saba Habachy, “Comments: The System of Nullities in Muslim Law,” *The American Journal of Comparative Law*, vol. 13, no. 1 [1964], p.65.

the Muslim countries in their present form differ greatly from one another. There is a group of Muslim countries which have become socialist republics such as Albania and the socialist republics of Central Asia. Founded on the principles of historical materialism and Marxist-Leninist doctrine, the law which is enforced in these states is included in the socialist law family and absolutely secular in nature since it based on the Soviet legal system. There is no attempt to preserve the Islamic law officially since it is considered by the established authorities as diametrically opposed to the fundamental principles of state ideology.

Another group constitutes of the states in which Islamic law is limited to dealing with matters of personal status. Whereas “modern” law has been adopted to regulate new social relationships. This group can be divided into two sub-groups as to whether the modern law is based on the Common Law such as in the case of Pakistan, Malaysia, Northern Nigeria and the Sudan; or it based on the Civil Law which applied in the countries such as French-speaking of African states, Arab speaking states other than the Sudan, and Iran, or the Dutch model but influenced by Napoleonic codes, such as Indonesia.³⁷

The third group is made up of countries that have no close connection with the non-Islamic legal systems, instead they claim to formerly adhering to the *Shari'ah* as the “source” of their legal systems, though sometimes, they differ from Islamic norms in preference for customary practice. The most typical examples are like Kuwait, Mauritania, Oman, Qatar, Saudi Arabia, United Arab Republic and Yemen Arab Republic.

Generally, the influence of the European law in most Muslim countries has always been greater in the fields of public law than in the areas of private law. As such, constitutional, administrative and criminal laws were the first to be divorced from the traditional dictates of the *Shari'ah*. However, commercial law too was gradually separated from its Islamic patterns. According to Lenczowski, the period between the two world wars and coincided with the division of the Ottoman Empire into Turkey proper and a number of Arab successor states, may be best described as “constitutional-liberal phase.”³⁸

³⁷ Rene David and John E.C. Brierly, *Major Legal Systems.....*, p. 408.

³⁸ George Lenzowski, “ Democracy, Development and Political Integration in the Arab World,” in Carl Leiden, ed., *The Conflict of Traditionalism and Modernism in the Muslim Middle East* [Austin: University of Texas Press, 1968], p. 50.

The impact of colonialism and secularization on Muslim community in modern time may be viewed from the two levels of cultural influence and colonial domination, that is from the standpoint of cultural borrowing by Muslim society and its consequences on the social, political, economic, and intellectual dimensions; and from the standpoint of Europe's military supremacy and political control. The superiority of Europe over Islam and its immediate threat to Muslim society became evident by the end of the eighteenth and early nineteenth centuries. The core of the Muslim community in the nineteenth century was the Ottoman Empire, the seat of the caliphate and still the most powerful state in the Muslim world.³⁹

Within the system of the Ottoman government, the Sultan or the Padishah was the highest ranking member of society. He was the temporal leader resuming the title of the Caliph who was accountable to God and to the ruled. The Ottoman Sultan did not claim divine nature or any prophetic attribute; but he was viewed as being different from other mortals since he held the highest position in the divine arrangement of the world.⁴⁰ Thus, the *Shari'ah* constitutes the laws which governed the Muslim world as well as the Ottoman domain. Although the legislative authority left to the will of the Sultan was large, the royal laws (*qanun*) could not contradict the basic principles of the *Shari'ah*. The *ulama* (Muslim scholars) were responsible for maintaining the harmony between the *qanun* and the *Shari'ah*. The close relation between religion and the state (meaning the function of the government) in the Ottoman Empire made the *'ulama* status an important social group.⁴¹ The *ulama* specific function was partly to see that the Sultan's legislation, administration and justice agreed with *the Shari'ah*.⁴² This implies that all members of the ruling institution as well as Ottoman Muslim citizens came under the jurisdiction of the *Shari'ah*. The administration of *Shari'ah* was carried out by the *qadis* (Muslim judges) and they are generally appointed by the *Shaykh al-Islam* who was at the top of the bureaucratic hierarchy of the religious institution. Non-Muslims came into contact with Islamic law only when involved in dispute with a Muslim

³⁹ Hisham B. Sharabi, *Nationalism and Revolution in the Arab World* [New York: Van Nostrand Reinhold Co., 1966], p. 18.

⁴⁰ Niyaze Berkes, *The Development of Secularism in Turkey* [Montreal: McGill University Press, 1964], p.13.

⁴¹ Dogu Ergil, " Development...., " p. 183.

⁴² Niyazi Berkes, *The development....*, p.16.

and then non-Muslim concerned was obliged to appear before a *qadi* (judge) for a legal decision in a case.⁴³ This fact also indicates that the principle of religious tolerance was observed by the Ottoman government through the millet system.⁴⁴

The introduction of legal and administrative reforms (*Tanzimat*) in Turkey in the second and third quarters of the nineteenth century (1839-1876 C.E.) marked the retreat of Islam on the legal and institutional fronts, and it constituted the first Western-inspired legal reforms in the Middle East.⁴⁵ The reforms implied the establishment of new national courts and were given jurisdiction over most of commercial and penal matters; Western style codes, legally based upon French law, were adopted in the areas of commercial law (1850), penal law (1858) and commercial procedure (1861). Though these early codes were indeed a novelty in the Muslim world, they affected only in the area in which the non-*Shari'ah* legal systems had operated.

Another significant product of *Tanzimat* was introduction of the *Majalla*, a codification of the Islamic law of transactions (*fiqh al-mu'amalat*) based on the Hanafi school of law. It actually did not introduce new principles of law, but rather a codified version of the Islamic legal principles which had served as the civil law of the Ottoman Empire.⁴⁶ The *Majalla* was considered as the major reform of Islamic law in modern times and one of the important means of preserving Islamic institutions while the Ottoman Empire was changing from an Islamic to a Western society. The outstanding characteristic of the *Tanzimat* era was the present of two separate legal systems derived from different sources. Before 1839, there was only one system of law within the Ottoman Empire-the *Shari'ah*. However, after 1839 new laws were adopted from Western codes. From then on a dual systems of law developed

⁴³ Don Peretz, *The Middle East Today*, 3rd.ed. [New York: Hlt, Rinehart and Winston, 1978], p. 57.

⁴⁴ The Millet system may be defined as a political organization which granted to the non-Muslim subjects of the Ottoman Empire the right to organize the communities which possessed political power delighted under their own ecclesiastical chiefs. The head of the Millet was directly responsible to the state for the administration of all its subjects...," see Werner J. Cahnman, " Religion and Nationality," *The American Journal of Sociology*, vol. 49, no. 6 [1944], pp. 525-526.

⁴⁵ Hisham Sharabi, " Islam and Modernization in the Arab World," *Journal of International Affairs*, Vol.19, No. 1[1965], p.18; David Bonderman, " Modernization and Changing Perception of Islamic Law," *Harvard Law Review*, Vol. 81., No. 6 [1968], p 1177.

⁴⁶ S.S Onar, "The Majalla," in Majid Khadduri and Herbert J.Liebesny, eds., *Law in the Middle East*, vol.1 [Washington D.C.,the Middle east Instutute, 1955] ,p.292.

within the Empire, one having its origin in Islamic religious law and the other based on continental European, particularly French codes.

The *Majalla* had the force of law and was applied as the civil code of the Ottoman Empire. A revision was made to the *Majalla* in 1920 and 1921 C.E. Nevertheless it never went into effect because of the complete abolition of Islamic law in 1926. In the same year a new Civil Code was adopted "based almost entirely on the Italian Criminal Code of 1889."⁴⁷

In the Arab nation-states of the Fertile Crescent and Egypt, Islam as a legal and constitutional system was also abandoned. Western type of legal and parliamentary system was gradually established. Though lip-service to it, it was evident that Islamic law had been superseded and that society was well on the way to secularization. Perhaps the disintegration of the Muslim world was more decisive in the area of political dimension. In the Arab world until roughly 1900 C.E. allegiance to the Ottoman Empire was more than loyalty to a state or to a set of political ideas: loyalty was rooted in the concept of the Caliphate and in the unity of the Islamic *ummah*.

When the Caliphate system was abolished in 1924 C.E., Islamic system of government came to the end of a continuous existence of nearly fourteen hundred years. Thus, Islam as an institutional political force had finally succumbed. However, Secular politics in the Middle East in particular may be said to begin with the promulgation of the Ottoman nationality law in 1869 C.E. Its provisions were subsequently affirmed within a more comprehensive framework in the first Ottoman Constitution of 1876 C.E. which was the culmination of the *Tanzimat*. Prior to this time, full citizenship in the Islamic state and its corresponding rights, obligations and privileges had been defined religiously. However, with the provisions of both the nationality law and the constitution, the political community was defined in non-religious terms. The Ottoman reforms of 1876 signified an important innovation in the Islamic system. On the one hand, important secular principles of politics were accepted as valid. These secular bases are apparent in two areas. First, membership in the political community was separated from membership in a specific religious community. Presumably all citizens

⁴⁷ Andrew Davison, *Secularism and Revivalism in Turkey*, [New Haven: Yale University Press, 1998], p. 141.

regardless of faith, were accorded equally before the law. In place the religious principles, loyalty to the Ottoman dynasty was substituted.⁴⁸ Second, the source of authority, the criterion of legitimacy, and to a certain extent, even the central purposes of the state were no longer to be deductively derived from external referent. The people came to be thought of as the source of all authority and legitimacy. Hence, the purpose of government was transformed from that of enforcing God's law on earth to that of advancing the public interest and welfare of the citizens of the state in this world.

In spite of secularization of a good deal of public life, the religious bases of the state were nevertheless reaffirmed in different form. In the first place, the Ottoman Constitution specified that Islam was the official religion of the state and charged the state with its protection. In the second place, although large segment of public life were to be regulated by newly enacted codes of law, for the most parts were derived from Western codes, nevertheless Islamic law was recognized as a principles source of legislation. In the third place, whereas all the Ottoman citizens were accorded legal equality, the religious communities continued to enjoy corporate status and protection.

It is evident therefore that by certain constitutional provisions the state began to view itself in partially secular terms and the view the course of the future as being in a secular direction. For the first time in the Islamic history, the basis of legitimacy of authority, source of power, legislation, and the definition of what constitutes the public interest was successfully transferred from an external source to one which was human and temporal. Furthermore, a good deal of the sacral basis of the state was exchanged for the secular and, as the years went on, many more aspects of public life and activity were regulated by laws and norms conceived in secular terms.⁴⁹

It can thus be generally stated that modern Muslim nation-states with their separate constitutions and governments have risen from the remains of the Ottoman Empire. National sovereignty has replaced the multi-national religious doctrine of the Caliphate. This is precisely in line with Ziya Gokalp's political agenda for modern states in which "*.....all*

⁴⁸ *The Ottoman Constitution* 1876, (Arts. 3-5), 17, pp. 367-369.

⁴⁹ Ibrahim Ab—Lughod, "retreat....", pp 451-452.

traces of theocracy and clericalism should be completely eliminated."⁵⁰ Therefore, Western-type codes, courts, and legislations have dispossessed the religious courts and all but deprived the *Shari'ah* of social effect in Turkey and Egypt. On the face of it, the *Shari'ah* has been a major victim of western legal concepts and method.⁵¹

It is apparent that most of the modern Muslim states have emerged, in one way or the other, from specific background of Western colonization. With regard to the law which is the *sine qua non* of a state, the expression of the colonial empires of the European powers in the nineteenth century brought the civil law system based on Roman law to many countries in Asia and Africa. British colonial rule extended the influence of common law to many parts of Asian and Africa where the present laws of the newly independent countries still reflect the strong impact of common law. Thus, the colonialist enterprises of the French and British and, to a lesser degree, other European, provided the way for the entrance of Western legal principles into the region, and thereafter, came to predominate in civil, commercial, and criminal law. In many Middle Eastern countries, these legal spheres were confined to laws of personal status, i.e., laws of marriage, divorce, succession, child custody, and guardianship. A unified national courts systems were often established. The French and British frequently encouraged local allegiance to customary law in their efforts to separate the so called "tribes" from "Islamic population"⁵²

Conventional analysis of the reasons for adoption of western law attributed mainly to the root of the crisis which goes back to what is known in the Sunni schools of law as the "closing of the gate of *ijtihád*: in the fourth century of Hijrah or tenth century C.E.⁵³ Since then it was believed that the legal rules were stagnated and unable to meet changing social conditions. However, it has been argued that the Muslim *fiqh* scholars had never reached unanimous opinion on the closing of the gate of *ijtihád* simply for a law that cease to evolve

⁵⁰ Andrew. *op.cit.*, p. 101

⁵¹ Richard H. Nolte, "The Rule of Law in the Arab Middle East," *The Muslim World*, Vol.48, No. 4., [1958], p. 304.

⁵² Daysy Hilse Dwyer, "Law and Islam in the Middle East: An Introduction," in his,(ed.) *Law and Islam in the Middle East* [New York: bergin and Gurvey Publishers, 1990], p. 3.

⁵³ As Coulson puts it: "Muslim jurisprudence of the early tenth century formally recognized that its creative force was now spent as exhausted in the doctrine known as, "the closing of the door of *ijtihád*," "the right of *ijtihád* was replaced by the duty of *taqlid*," N.J. Coulson, *A History of Islamic Law*, [Edinurgh : Edinurgh University Press, 1964]. P. 80.

would be incapable of meeting the social and economic needs of society. The *shari'ah* rulings (*al-ákkÉm al-shar'yyah*), however, according one of the maxims of *fiqh* (*qawÉ'id al-fiqhiyyah*), “may change with the changing of space and time,” in order to adopt to the changing circumstances of Islamic society. Hence, in modern era, the most prominent scholars of *fiqh* have vehemently refuted the assertion that the gate of *ijtibÉd* has been closed. al-ShÉtibÉ, for instance, asserted the necessary continuity of *ijtibÉd* in the following expression, “ *IjtibÉd* cannot cease except at the end of the world when man’s subjection to the law will cease,”⁵⁴ Perhaps the closing of the gate of *ijtibÉd* or rather adherence to *taqlÉd* may partly explain why the Islamic law became relatively stagnant and the adoption of Western laws.

It was in fact under increasingly European pressure throughout the eighteenth century that forced the Ottoman government to comply itself to reform. The forms of pressure were multi-facet including the military superiority of Christian Europe; European merchants circulated freely in the Ottoman Empire, bring new ideas about commercial operation. Western ideas crept into all corners of society, given impetus both by the instance of the occupying forces and by the obviously superior Western technological developments. This implies that it was the onslaught of European imperialists that finally pave the way for disestablishment of the *Shari'ah* and the imposition on the Muslim societies of positive Western law.

CONCLUSION

It is apparent that the *Shari'ah* law has been adopted in practice in many parts of the Muslim world. The impact of colonialism and secularism on Muslim community in modern time may be viewed from the two levels of cultural influence and colonial domination that is from the standpoint of cultural borrowing by Muslim society and its consequences on the political, economic, intellectual and socio-legal dimensions; and from the standpoint of Europe’s military supremacy and political control. The superiority of Europe over Islam and its immediate threat to Muslim society became evident by the end of the eighteenth and early nineteenth centuries. The imposition of European powers over some Muslim countries not

⁵⁴ Abu Ishaq al-Shatibi, *al-Muwafaqat...*, vol. 4., p..89.

only gave rise to a duality in institutional structures associated either with "modernity" or "traditionalism", but also contributed to "dualism" in the application of law.

The *Shari'ah* law constitutes the determinant which shaped the uniqueness of Islamic Society whether in countries of Middle East, Asia or Southeast Asia. As a matter of fact, most of the modern Muslim states have emerged, in one way or the other, from specific background of Western colonization. In spite of secularization of a good deal of public life, the religious bases of the state were nevertheless reaffirmed in different form. The Ottoman Constitution, for instance, specified that Islam was the official religion of the state and charged the state with its protection. However, the separation between religion and politics seemed to fulfill the policies that were taken by Ataturk to abolish the Caliphate (1924), and to eliminate from the constitution the statement that Islam is the religion of the state (1928), and to declare the state "secular" in the constitution of 1937. Although large segment of public life were to be regulated by newly enacted codes of law, for the most parts were derived from Western codes, nevertheless Islamic law remained to be recognized as a principal source in certain areas of legislation.

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