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CONCLUSION

Religious Law and Social Progress in Contemporary Islam

LOOKING to the future there are two principal features of modernist legal activities which command attention.

In the first place the current expression of the law rests upon a striking diversity of juristic criteria, which represent varying degrees of fusion between the two basic influences of practical necessity and religious principles. During the first stage of legal modernism these two influences had produced a clear-cut dichotomy in the law. Western law was directly adopted in the field of crime and civil transactions generally, while traditional Shari'a doctrine continued to govern the sphere of personal status. Recent trends, however, have tended to break down this firm division. In the civil law a growing emphasis has been placed on religious principles. A merger of foreign and Islamic elements is the outstanding feature of the Iraqi Civil Code promulgated in 1953. Many of its rules were derived from the Hanafi codification of the *Majalla* and from traditional Shari'a texts, while other provisions, on such matters as insurance and aleatory contracts, rest squarely on European sources. Family law, on its side, has been increasingly permeated with Western standards and values, and it is here that the juristic basis of the law, viewed as a whole, appears most complex. For, as it stands within the limits of any single modern Code, the law is an amalgam of traditional and novel elements, and the novel elements are the result sometimes of the manipulation of estab-

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lished principles, sometimes of a fresh interpretation of the original sources, and sometimes of the frank recognition of the needs of the time.

Economic grounds alone were thus held to justify the total abolition of family settlements under the traditional *waqf* system in Syria in 1949 and in Egypt three years later, while social necessity has been the declared basis of certain recent reforms in that traditionally most invulnerable sphere of the Shari'a—the law of succession. In 1945 a judicial circular in the Sudan allowed bequests to be made, within the established limit of one-third of the net estate, in favour of legal heirs, and expressly stated the reason for this reform to be the need felt by testators to make additional provision for the less fortunate of these heirs. Ithnā-asharite law, it is true, had always maintained that bequests to legal heirs were permissible, on the ground that the Tradition, "No bequest in favour of an heir", should either be read with the additional words "except within the permitted third", or should be interpreted to mean not that it was prohibited to make such bequests but that it was no longer obligatory to make them. When Egypt adopted the same reform in her *Law of Testamentary Dispositions* of 1946, a veiled and oblique reference was made to the Ithnā-asharite view. But for a Sunnite community the direct adoption of the views of a heterodox sect could not be an acceptable juristic basis for reform; and so it is hardly surprising that the validity *per se* of bequests to legal heirs, contrary as this is to the consensus of traditional Sunnite authorities, has not been recognised by any other Muslim country save Iraq, where the adoption of the rule is due to the fact that at least half of the population is Shi'ite.

An even more radical departure from the traditional law of succession is contained in the Tunisian law of 1959 which provides that *any* lineal descendant of the

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deceased, male or female, excludes the deceased's collateral relatives from intestate succession; for under the agnatic system of traditional Sunnite law the brothers of the deceased, in the absence of any surviving *male* ascendant or descendant, are the primary residuary heirs. It could in fact be argued with some force that this provision does implement the general spirit of the Qur'anic legislation. For one of the basic trends of the reforms introduced by the Prophet was the replacement of the wider social unit of the tribe by the unit of the individual family. This purpose had been largely nullified by the traditional law, in inheritance at least, by its retention of the customary tribal system, which gave superior rights to male agnate relatives. But it is obviously the concept of the family, as consisting of the husband, wife, and their issue, which inspired the Tunisian reform. No attempt, however, was made to suggest that the law rested on any other basis than that of the need felt by society. Finally, it was on this same ground that the Pakistani *Muslim Family Laws Ordinance* of 1961 directly modified the traditional law of inheritance by introducing the principle of full representation in regard to intestate succession by lineal descendants of the deceased. This last reform, therefore, stands in sharp contrast to the Egyptian method of dealing with the same problem by the system of obligatory bequests, which found its juristic basis, convincingly enough, in traditional authorities.

If the outright recognition of the needs of society which jurisprudence has thus endorsed in many respects is to be regarded as modern *ijtihād*, it is obviously a very different concept of *ijtihād* from that we have seen operating, for example, in relation to polygamy and repudiation, where reforms were based on particular interpretations of specific Qur'anic injunctions. In sum, it appears that modern jurisprudence has not yet evolved

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any systematic approach to the problem of adapting the traditional law to the circumstances of contemporary society. Lacking any consistency of principle or methodology, it has tackled the process of reform as a whole in a spirit of juristic opportunism.

The second feature of modern Islamic law which is relevant to the question of potential future development is the fact that many of the substantive reforms must appear, on a long-term view, as temporary expedients and piecemeal accommodations. This is not to deny the present efficacy of the reforms in solving the immediate problems of the areas in which they have been introduced. But certain provisions, such as the partial restrictions placed upon polygamy and repudiation, point inevitably towards the direction which future progress must follow and can represent only an intermediate stage in the advancement of a society along this road. In some cases novel provisions lie in uneasy juxtaposition with the traditional law. The introduction of the representation rule in succession in Pakistan, for example, is completely disruptive of the finely balanced scheme of priorities established by the Shari'a. It means, for instance, that a granddaughter of the deceased, the child of the deceased's son, will now exclude the brothers of the deceased from inheritance while the deceased's own daughter will not. In other cases reforms, far-reaching in themselves, disclose a root problem which has still to be solved. The restriction of polygamy and repudiation, for example, is obviously aimed at the ultimate goal of equality between the sexes. Within the structure of traditional Shari'a law, however, these institutions appear as derivative rights of the husband stemming from the root concept of marriage as a contract of sale wherein the husband purchases the right of sexual union by payment of the dower. If the law, therefore, is to endorse, logically and satisfactorily, any

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system of real equality between husband and wife, it is at least arguable that this basic traditional concept, epitomised by the payment of dower, must be completely eradicated. Finally, the uncertainty which still clouds the basic conflict between traditionalism and modernism is revealed by recent events in Iraq. In 1959 the Iraqi *Law of Personal Status* adopted a completely new system of inheritance which owed nothing to traditional Shari'a law but was derived from Ottoman legislation, itself of Germanic inspiration, concerning succession to government lands. The purpose of this enactment was to unify the law on a national basis, and since the divergence between the Hanafi and the Shi'ite laws of succession was too deep-rooted to admit of compromise, a "neutral" system was adopted as the only one which would be acceptable to both the Sunnite and the Shi'ite communities. By a law of February 1963, however, this system has now been abolished and replaced by traditional Shi'ite law.

In combination, therefore, with the opportunist character of modern jurisprudential method, the nature of the substantive reforms themselves lends a general air of transience and instability to current Islamic law. The fortress of the traditional law has been breached beyond repair, but the complex structure that has taken its place does not as yet rest upon the same solid foundations, and its substance is almost volatile by comparison.

This is perhaps inevitable in the circumstances of the time. For history appears to have turned full cycle and to have confronted Islam with a situation remarkably parallel to the one she faced during the Umayyad period. Just as the law of the Medinan community, a rudimentary system of customary practice modified by basic Qur'anic precepts, proved wholly inadequate to meet the circumstances of the new political empire, so today traditional Shari'a law has crumbled under the impact of

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Western civilisation. And modern reformers, just like the Umayyad administrators, have managed to control the sudden surge of events by *ad hoc* measures adopted under a policy of pragmatism and expediency.

During the eighth century jurisprudence had systematically reduced the haphazard growth of Umayyad legal practice and the hotch-potch of customary, Qur'anic and foreign elements of which it was compounded into terms of an Islamic legal system. The question, therefore, may naturally suggest itself as to whether modern jurisprudence will assume a similar function by endeavouring to assimilate and "Islamise" the mass of heterogeneous material which makes up current legal practice; and, following the approved fashion of concluding historical surveys, we may now briefly speculate upon the form such a process might take.

Fundamentally, and in its simplest terms, the problem facing Muslim jurisprudence today is the same problem which it has always faced and which is inherent in its very nature—namely, the need to define the relationship between the standards imposed by the religious faith and the mundane forces which activate society. At the one extreme is the solution adopted by classical jurisprudence, a divine nomocracy under which religious principles were elaborated into a comprehensive and rigid scheme of duties to form the exclusive determinant of the conduct of society. The other extreme solution is that of secularism, as adopted by Turkey, which relegates religious principles to the realm of the individual conscience, and allows the forces of society an unfettered control over the shape of the law. Neither of these solutions can be acceptable to modern Muslim jurisprudence; for while the former is wholly unrealistic, the latter is positively un-Islamic. Obviously, therefore, the answer lies somewhere between these two extremes,

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in a concept of law as a code of behaviour which is founded upon certain basic and immutable religious principles but which, within these limits, does not neglect the factor of change and allows the adoption of such extraneous standards as may prove more acceptable to current Muslim opinion than indigenous tradition.

Historical enquiry reveals that during the early period of Islam the religious precepts contained in the Qu'rān had been gradually absorbed within the framework of the existing customary law and the administrative practices of the Umayyad Empire. When nascent Muslim jurisprudence came to systematise this material, it did so, in some cases, on the basis of a loose and liberal interpretation of relevant Qur'ānic precepts in the light of existing practice—this was generally so, for example, in regard to matters of family law—while in other cases it had developed the Qur'ānic principles with extreme rigour, as, for example, in the doctrine of *ribā*. And ultimately these accretions of juristic interpretation had all come to be artificially expressed, particularly through the growth of Traditions, as manifestations of the divine command. As has so often been suggested in recent times, it must be the primary task of modern jurisprudence to ascertain the precise limits of the original core of divine revelation. And this perhaps will necessarily involve a re-orientation of the accepted attitude towards Traditions, not only as regards their authenticity, but also as regards the nature of their authority if their authenticity is duly established. Once the limits have been ascertained, it is axiomatic that these precepts of the divine revelation must form the fundamental and invariable basis of any system of law which purports to be a manifestation of the will of God.

It cannot be denied that certain specific provisions of the Qur'ān, such as that which commands the amputa-

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tion of the hand for theft, pose problems in the context of contemporary life for which the solution is not readily apparent. But, generally speaking, the Qur'ānic precepts are in the nature of ethical norms—broad enough to support modern legal structures and capable of varying interpretations to meet the particular needs of time and place. And on this basis it would seem that Islamic jurisprudence could implement, in practical and modernist terms, its fundamental and unique ideal of a way of life based on the command of God. Freed from the notion of a religious law expressed in totalitarian and uncompromising terms, jurisprudence would approach the problem of law and society in a different light. Instead of asking itself, as it has done since the tenth century and still generally does today, what concessions must be wrested from the law by the needs of society, its new terms of reference would be precisely the opposite: to determine what limitations religious principles set upon society.

Radical though the break with past tradition which such an approach involves might be, it is nevertheless a break with a particular construction of the religious law and not with its essence. This, at any rate, would seem to be the only realistic basis for future development and the only alternative to a complete abandonment of the notion of a law based on religion. Law, to be a living force, must reflect the soul of a society; and the soul of present Muslim society is reflected neither in any form of outright secularism nor in the doctrine of the mediaeval text books.