THE PLACE OF ISLAMIC LAW IN TURKISH LAW REFORM

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The majority of the factors responsible for the emergence of divergent views, which have divided millions of Moslems into innumerable factions for thirteen centuries ever since the day Mohammed passed away, are legal principles. The four Islamic schools are originally and essentially based on legal doctrines.

Throughout the centuries the Turkish Empire suffered from considerable difficulties in its judicial affairs vis-à-vis the body of those divers fied and divergent provisions, interpretations (içtihat) and fatwas, called in toto " Islamic Law ". In fact, the existence of Moslems affiliated with different and irreconciliable religious sects and orders within its territory on the one hand and the continual increase of non-Moslem citizens ever since the annexation of Istanbul by Sultan Mohammed the Conqueror on the other, have led to insurmuntable difficulties and incompatibilities in the domain of law. Throughout its entire history, the Ottoman Empire has poignantly felt the necessity for the establishment of a well-settled, universally accepted and universally applicable legal system. Consequently, a significant aspect of the Reformations of 1839 was the conscious attempt to put an end to the apparent dearth of stability in the judicial sphere which weakened the law as a whole, and to extend legal equality to all citizens without any discrimination based on religious affiliation. In 1841 a criminal code was drawn up, ratified and promulgated ; laws regulating land and sea trade and procedure laws followed thereafter. But there still existed a lack of initiative toward legislation in regard to codification of family and marital relationships which constitute an integral part of society.

Following the 1923 Lausanne Peace Conference, the new regime in Turkey decided upon the formation of a special committee to draft legal provisions necessary for the efficacious regulation of legal relationships throughout the country. According to the preliminary device, the preparatory work of the committee was to be exclusively based upon the existent religious codes and judicial principles, because Turkey once more regarded the extraction and derivation of the needed codes from the ready source of Islamic law as the most propitious and efficient means for the overall codification. Even at the very start the preliminary discussions led nowhere but to impasses. A plethora of questions were raised and widely divergent views expounded as to the nature and correct meaning of the contradictory provisions and stipulations stated by the fatwas and by the interpreters of Moslem canonical law. Long disputes came to the foreground even over the selection of traditions according to their validity, authenticity and correctness. An the deliberations of the committee, lasting a whole year ,resulted in an absolute deadlock. The Turkish Government thereupon proceeded to dissolve the committee and reached the decision that the process of codification should be conducted in conformity with the legal systems of modern European states.

This extensive legislative achievement, conducted under the leadership of Ataturk, was by no means a haphazard selection based on an irrational admiration of the European legal systems, but an inevitable solution to the centures of paradoxes and conflicts described above. The overall legal innovation that took place in Turkey was not a transition from the legal machinery of one religion to that of another, for Western judicial systems are of a secular nature and divorced from religious legal provisions. This drastic shift to an entirely novel institution achieved in a turbulent and shaky period unfortunately had its excesses as would have been the case with any movements having their origin in a profound dissatisfaction. This explains why some amendments have been and can be made to the new Turkish legal system.

Reasons which led Turkey into such an extensive reform are many. On several occasions, Turkey, as a sovereignty deriving power from a deeply religious population, had engaged in drafting

laws and rules in accordance with the provisions of Moslem canonical law. But every single attempt she had launched upon to legislate had failed, or the newly introduced law proved inadequate. The aforementioned failures stemmed from the following facts and factors, which prove to a certain extent the erroneous nature of the notion that it is essential to regulate the legal relationships of an Islamic society in conformity with the provisions of its canonical law and which supplied an index of the impracticability of such a law in the face of the developing requirements of a modern society.

In the first place, the Koran must be considered as a great book for all time. But we must frankly ask ourselves why it became necessary in legal matters to create and develop three other sources of Moslem law. Although certain rules and provisions set by sources other than the Koran are obviously general principles of justice and equity, with a high degree of objectivity, a considerable majority of them are essentially and primarily regulations necessitated by the social nature and structure of the Arab community of that time. This structure of the Arab community was largely responsible for Mohammed's acquisition of a position which was not restricted to the spiritual domain only, but called for his indispensable guidance and teachings relting to the sphere of everyday relationships between individuals, and necessarily embracing legal concerns and principles. Let us leave aside the wide disputes over the Prophet's words which are called traditions. It is essential to state the fact that these traditions, some of which are remarkable for their wisdom for all times, include traditions which covered specific subjective cases and which are not widely applicable to our contemporary society. Likewise, the body of traditions available is not wide and comprehensive enough to offer reasonable solutions to legal problems of every kind. I regard it as unquestionable that we would still have the great Islamic religion had Mohammed been born into another era and place ; but in that case most probably there would never have come into existence a legal system as wide as the Moslem one or exactly the same as the one which we have inherited. The primary reason for the relatively more limited number of legal concepts and doctrines that can be found in Christianity is certainly

the existence and effective execution of the wide legal institution which we call the Roman Law, in the territory where Christianity came to be accepted.

It is essential to admit the fact that aside from the Koran proper and a few of the traditions, the remaining two soures of Moslem jurisprudence were essentially created to meet the needs of the community existing during and after Mohammed's era. But it is a postulate of social sciences that no society remains unchanged through time, and it is bound to go through a series of metamorphoses which naturally involve and bring about modifications in value judgments. The acceptance of the fact that such inevitable changes take place in a developing society, is also on conformity with the underlying principles of Islam.

Another factor that prevented Turkey from engaging in legislation or codification in complete accordance with religious sources was the absence of provisions in these religious sources applicable to the complicated and diversified requirements of any modern community. In fact, Islamic law contains no provisions regulating the sundry relationships of political institutions and commercial transactions. Likewise, rules relating to the vast field of criminal law and jurisdiction are simply too limited in number to serve adequately - not to go into a discussion of insurmountable difficulties this whole domain presents to any religion purporting to cover it in its entirety. It is an essential principle of religion, for instance, that reward for good and virtuous living is rendered in the world to come just as the punishment for evil and sinful acts is meted out in after life. In that case, what would be standing " in the other world " of an individual who has already been punished for a misdemeanor on the earth, or who has evaded the execution of the judment, or to whom amnesty has been extended ?

On the other hand, the prevalent political concepts of our times make it a requisite for a state to extend an equal status to all its citizens regardless of religious differences that may and do exist between them, and to apply the same laws to them without discrimination. It is absolutely contrary to the democratic and humanitarian principles of this century to establish separate courts of jus-

tice exercising jurisdiction over different segments of the population in the same country, on the ground of differences in religious affiliance, and consequently to hand down vastly varying court judgments applicable to separate individuals in quite similar situations. Who can deny that all great religions contain the same fundamental principles of equity and justice ?

Moreover, a great many Islamic codes and legal provisions have either been left untouched and disregarded in all Moslem countries, as previously in Turkey, or have become impracticable in that they have at some point in time fallen short of meeting the requirmeents brought about by the continuous metamorphoses of the communities, and have completely lost their vitality. For example, thousands of articles incorporated into the Mejelle on the ground that they were vital and integral parts of the Moslem law have become a dead letter because of their inapplicability. *Polygamy*, for one, is not a practice in effect in Turkey. According to Gibb, 90 % of the Moslem population in India are monogamists. It evidently is unnecessary to legalise and codify this loose religious provision in a civil code when and where it is not a universal practice. Polygamy, which is permissible according to the Koran, but only under exceedingly difficult and perhaps unrealizable conditions, was a great improvement over the unlimited polygamy of pre-Islamic Arabia, thus pointing the way to monogamy.

Furthermore, during the legal reforms in Turkey the potentialities and possibilities inherent in or derived from Moslem canon law were also scrutinized before the final establishment of an overall legal system in the European sense. The factors leading to, and the principles underlying this innovation, have never caused the emergence of resentment against Islam as a great religion. It must of course be granted that the efficacy and the degree of success of these reforms can only be determined after a certain lapse of time. And this brings me to the last part of my remarks.

Although Turkey's solution of her legal dilemma has apprently been achieved, the important question still remains before us Moslems as to whether it is possible to reconcile the embarrassing divergencies existing in the framework of Islamic jurisprudence. Each of

the four legal schools of Mohammedan Law is based on relatively early Muslim opinion and tradition ; each reflects an entirely different social era and milieu. Therefore, the unification of the four schools would not provide legal solutions for many contemporary problems and would still leave serious gaps in Islamic canon law.

To accept certain codes, which have been evolved for the purpose of regulating the legal relationships in a society existence thirteen centuries ago, and which at times emerged from dubious sources after Mohammed's death as binding upon the communities of this century, and to insist upon those codes as rules offering solutions to all the legal problems of the present day, suggests a narrow and hazy insight into our times. Likewise, preoccupation with highly ambiguous inferences from broad religious concepts, instead of seeking reasonable and practical solutions in conformity with general principles of justice and equity that are derived from religion itself, and having recourse to our religion for the purposes of settling petty disputes over ordinary transactions to which a religion should never be lowered, would necessarily be to the detriment of the dignity of our religion.