VIEWS ON THE TRANSITION IN TURKEY FROM ISLAMIC LAW TO A WESTERN LEGAL SET-UP

The reasons of this transition, and the relations between Islamic law and religion (*)

by

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My worthy Colleagues,

The Gentlemen who have preceded me gave us a clear picture of Islamic thought, with special regard to the sphere of law. 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. This ostensible importance of Islamic law has led the organizers of the colequium to give due attention in the Conference to the topic at our hand.

My ten minute introductory speech will consist of three parts: The first part will be devoted to the legal reformation that has taken place in Turkey since 1926. The over-all reasons which have necessitated and brought about this transition will be discussed in the second part. And those views expounded for the purpose of coping with the doctrinal diversities that exist in the Moslem world with regard to legal concepts and provisions as well as significant relations between religion and jurisprudence, will constitute the subject-matter of the third part.

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1) This introductory address was delivered at the " Colloquium on Islamic Culture in its Relation to the Contemporary World " organized by Princeton University in September 1953.

Throughout the centuries the Turkish Empire suffered from considerable difficulties in its judicial affairs vis-à-vis the body of those diversified and divergent provisions, interpretations (içtihat) and fatwas, called in to " Islamic Law ". In fact, the existence of Moslems affiliated with different and irreconcilable religious sects and orders within its territory on the one hand and the continual increase of non-Moslem citizenry ever since the annexation of Istanbul by Sultan Mohammed the Conqueror on the other, have been conducive to insurmountable difficulties and incompatibilities in the domain of jurisprudence. 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 over-all legal set-up, and to extend legal equality to all citizens without any discrimination based on religious affiliation. As a matter of fact, 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 the legalization or 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 spcial committee to draft legal provisions necessary for the efficacious regulation of legal relationships throughout the country. According to the preliminary order, 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 propritious and efficient means for the over-all 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. And the workings of the committee, lasting a whole year, resulted in an absolute dead end. 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 time, entirely novel codes were drafted following the provisions of the Swiss Civil Code, Italian Criminal Code, German and Italian laws of land and sea trade, and the Neufchâtel procedural law, all of which were accepted and ratified following the regular discussions in the Grand National Assembly. After a time other codes followed these.

This extensive legislative achievment, conducted under the leadership of Atatürk, was by no means a haphazard seelction based on an irrational admiration of the European legal systems, but an inevitable solution to the centuries of paradoxes and conflicts described above. The over-all 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 aremany. On several occasions, Turkey, as a sovereignity 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 supplies 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 develope 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. As a matter of fact, this structure of the Arab community was largely responsible for Mohammed's acquisition of a personality which was not restricted to the spiritual domain only, but called for his indispensable guidance and teachings relating to the sphere of everyday relationships between individuals, and necessarily embracing legal concerns and principles. Let us leave aside the wide disputes over the authenticity of the Prophet's words which are called traditions. It is still 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 deem it 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 exaclty 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 sources 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 modificatons in value

judgments. The acceptance of the fact that such inevitable changes take Place in a developing society, is also in 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 extended up thhere In that case, what would be the standing " in the other world " and as delineated by religion itself, of an individual who has already been punished for a misdemeanor on the earth, or who has evaded the execution of the judgment, or to whom amnesty has been extended?

On the other hand, the prevalent political concepts of our times makes it a requisite for a state to extend an equal footing to all of 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 justice exercising jurisdiction over different segments of the population in the same country, on the ground of differences in religious affiliation, and consequently to hand down vastly varying court judgments applcable to separate individuals in quite similar situatoins. 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 unpractised in all Moslem countries, as previously in Turkey, or have become impraraticable in that they have at some point in time fallen short of meeting the requirements

brought about by the continuous metamorphoses of the communities, and have completely lost their vitality. For example, thousands of articles incorporated into the Megelle on the ground that they were vital and integral parts of the Moslem law have become a dead letter because of their napplicability. 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 legalize and codify this loose religious provision, as 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 prehaps unrealizable conditions, was a great improvement over the unlimited polygamy of pre-Islamic Arabia, thus pointing the way to monogamy.

Furthermore, during the legal reformations in Turkey the potentialities and possibilities inherent in and/or derivable from Moslem canonical law have also been scrutinized before the final establishment of an over-all 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 o 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 dilemmas is apparently achieved, the important question still remains before us Moslems as to what should be done to reconcile the embarrassing divergencies existing in the framework of Islamic jurisprudence. The Honorable Judge Mahmassani has presented and proposed a set of solutions, which in spite of their extremely interesting character, strikes me as somewhat unrealistic and impracticable. The unification of four schools is an example. Although this desired unification may take place, it would hardly solve our problems. The reason for this is that each of the four legal schools is based on relatively early Muslim opinion and tradition, both of which reflect an entirely different social era and milieu. Therefore, the unification of the four schools would not provide us with legal solutions to many contemporary problems and would still leave serious gaps in Islamic canonical law.

May I dare suggest the following ? Religion is a relation that exists between God and man ; it regulates and must regulate primarily the spiritual and ethical life of the individual. In Islam there is no hierarchy or intermediary between Allah and man. The Islamic religion is a universal religion and not the particular property of either Turks, Arabs, or anyone else. As a Muslim, I believe that religion inspires all life. Yet I also believe that our daily action should not be entirely prescribed (pre-determined) by detailed religious injuctions. God (Allah) gave us freedom and independent judgment for our guidance in this world. He alone will judge us in the next. In the case of a society which has achieved such a religious relationship I do not think that the application of Islamic law is a necessary requisite for true religion.

It must be granted that the Berbers and other Islamic communities who have been preserving a legal institution different from that of Moslem canonical law for centuries, are still good Moslems too. Likewise, it should not be asserted that the constitutions of Egypt, Syria, Iran and Iraq, which accept and resort to several originally and characteristically European concepts and institutions, as vital requisites for the continued existence of their political entities and for the firm establishment of their communities, are in violation of and incompatible with certain legal principles of Islamic religion. But. in a way, they bear out my assertions since such provisions in the constitutions cannot exactly be said to be compatible with the traditional obedience of the subjects to the ruler. In a somewhat similar manner, the Turkish population has preserved its allegiance to Islam with an intact and uniterrupted enthusiasm in spite of the fact that Islamic law has not been in force for twenty-seven years.

Obviously, to accept certain codes, which have been evolved for the purpose of regulating the legal relationships in a society existent 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 con-

formity 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. When there exists no legal provisions in the Koran and even in the authoritative traditions covering a specific case, the imposition of rules extracted by inference might easily bring about a dwindling in the religious faith of the community. Both of the parties in a suit may claim and believe to be right. In certain cases the rightful party may lose the suit and an innocent person be condemned as guilty. The possibility always exists that the resentful reaction of such persons, who have been condemned in the name of religion might well cause a simultaneous reaction against religion itself. It is not always necessary to hand down judgments in the name of religion.

The remarks and views I have presented are not intended to be an assault on any person or institution. I apologize if my words have offended anyone. Some of my ideas might appear to have gone too far and may even sound presumptuous, but I hope that they are excusable as representing my sincere beliefs on this important subject, beliefs based on a clear series of facts as I see them. Please allow me to invite your criticism and to assure you that I am quite willing to modify my views.