REFORMS IN ISLAMIC LAW IN IRAN

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A great deal has been written in recent years about the cataclysmic changes which have come about in the law, both substantive and procedural, throughout the vastly greater part of what may be termed the Muslim world. In almost all the countries concerned the Shari'ah, or canon law of Islām, virtually reigned supreme up till the middle of the nineteenth century. True, this was seldom, if ever, the only law, just as those courts which were specifically committed to its enforcement were never, in practice, the only courts; for throughout the history of Islām there have almost always been courts other than those of the q*āḍīs* —courts presided over, for example, by local governors, by police, by inspectors of markets, or by the Ruler himself (or his deputy) in the Court of Complaints; and these special courts have never been as strictly bound as have the q*āḍīs* by the minutiae of the Sharī'ah, but have in fact administered a law which represented a sort of amalgam of the Shari'ah, of customery law, of administrative practice and of the will (or whim) of the executive. But, however this may be, it can be said that up till about 1850 the Shari'ah was the only law fully acknowledged as such the law to which reference was almost invariably made; just as the qāḍīs'courts represented the basic courts and the courts of residual jurisdiction.

But from the middle of the last century a radical change began to take place throughout most of the Muslim world, whether in the Ottoman Empire, British India or elsewhere. First, the scope of the Sharī'ah was extensively curtailed in favour of statute law of largely alien inspiration, and a whole system of 'secular' courts was established to administer the new legislation. The motive for this was basically twofold: to reform the administration of justice in a way which would harmonise with the ethos and meet the needs of a modern, bureaucratic government, and also, in part, to silence the criticisms and satisfy the requirements of foreign opinion. In the Ottoman Empire the resultant legislation was chiefly derived from the Code Napoleon, while in British India it was quarried from the Common Law; but in both cases the family law of Islām was left virtually intact, uncodified and unchanged — to be administered, in most of the countries concerned, by the Sharī'ah courts in precisely the way which had prevailed for centuries, but in India to be administered by courts of general jurisdiction (advised, initially, by Muslim experts). There was, however, one major exception to this generalisation, in so far as the Ottoman Empire was concerned; for when the Ottoman reformers came to codify the law of 'obligations', they eventually — after considerable hesitation — based their code (which is commonly known as the Majalla) not on French legislation but on principles and precepts derived from the Sharī'ah.

It is important to emphasise what a radical departure from the orthodox theory of Islāmic jurisprudence these reforms represent. All down the centuries the Shari'ah had been regarded as a law which was firmly based on divine revelation, which could not be changed by any human authority — and which was equally binding on both Ruler and subject -- an authoritative blueprint to which Muslim Peoples were always required to conform, rather than a law which could be adapted to the changing needs of a developing society. It was, indeed, its sacrosanct character which explains, in part at least, why it was quietly put on one side — as the ideal law which had, it was believed, once held exclusive sway throughout the Muslim world and which would no doubt prevail once more in the Golden Age which was to come -- in favour of a quite different law forced upon Muslim governments by the exiguous demands of modern life; for this was at first regarded as preferable to any profane meddling with its immutable provisions. It is in this context that the Majalla assumes such significance; for it represents the first example in history of the promulgation of precepts derived from the Sharī'ah in the form of legislation enacted by authority of the State — and based, indeed, not only on the dominant opinion in the Ḥanafī (or State-recognised) school, but rather on a selection of those opinions which seemed most suited to modern life (all of which had, I think, received some recognition by Hanafī jurists, although a few of them had in fact originated in some other school).

Such was the first stage in the modernisation of the law, and it prevailed from about 1850 until after the turn of the century. But in 1915 a further step was taken in the Ottoman Empire; for the miserable position of certain Muslim wives under the dominant doctrine in the Hanafī school made it essential that changes should be introduced even in the family law as administered by the Sharī'ah courts — and in such relationships which represent an integral part of the very web and woof of Muslim life, the reformers felt precluded from any abandonment of the Sharī'ah in favour of some law of alien inspiration, for they were convinced that the family law must necessarily remain distinctively Islāmic. So they were forced to resort to the expedient of actually introducing changes and adaptations in this law, as it was administered by the courts, to meet the needs of contemporary society.

But how could a law which was regarded as firmly based on divine revelation be adapted by any human authority? This was the problem: a problem which was largely resolved by what was, in effect, a recognition that the Shari'ah represents not only a divine law but also a lawyers' law; for although it was regarded as firmly based on divine revelation, it had certainly not dropped down from heaven in its developed form, but had been built up by the deductions and reasoning of generations of lawyers. So the reforms which have been introduced in recent years in so many Muslim countries have, for the most part, been based on an eclectic choice between the different deductions and reasonings of the different

schools and a multitude of individual jurists — a choice, indeed, which has sometimes gone so far as to represent a combination of two different opinions (both of impeccable ancestry, but based, in some cases, on wholly contradictory premises) in a provision of law which would not have been acceptable to either of the schools or jurists to which it is attributed. But sometimes even this device would not suffice, and the reformers were compelled to resort to a new interpretation of the ancient texts for which no traditional authority could be claimed.

Such, in brief, has been the pattern of law reform in the Muslim world as a whole— and it has been duplicated, in the main, in Irān. But it is significant that the Persian Civil Code was much more closely based on the Sharī'ah (in the form of that law which prevails among the Ithnā 'Asharī sect of Shī'ah than was the legislation in the Ottoman Empire or in British India, and also that it included in its scope a number of sections covering family law and the law of succession. This important departure from the two-stage approach which we have described above can, I think, best be ex plained by the comparatively late date at which this code was prom. ulgated. But the sections devoted to family law and succession were, in fact far from radical in their character, and represent little more than a codified version of the law which was already in force, with a few salutary, but not very revolutionary, reforms (to some of which reference will be made below).

More recently, however, the reformers in Irān have broken new ground by the enactment of the Family Protection Act of 1967. It would be superfluous in this context to examine this Act clause by clause; so I will confine my attention to points of particular interest.

The first and most important of thethat the Irānian reformers have restricted a Muslim husband's right to divorce his wife to a degree to which there is no parallel in any other Muslim country except Turkey (where the Shari'ah has been completely abandoned, in so far as the courts are concerned, since 1926) and among the followers of the Aghā Khān in East Africa.[18]

It is not that nothing has been done to restrict the incidence of unilateral repudiation of Muslim wives in other parts of the Islāmic world, for legislation has in fact been introduced elsewhere which provides that formulae of divorce pronounced under duress or in a state of intoxication, or even uncontrollable anger,[19] or intended as an oath or threat, [20]will no longer be legally binding; that the threefold formula of repudiation pronounced on one and the same occasion will be regarded as only a single, and therefore revocable, divorce; [21]that a husband who

[18] Cf. my article"The Isma'īlī Khojas of East Africa", *Middle Eastern .Studies* (October 1964), pp. 21 ff.

[19] E.g. in the Ottoman Empire, Egypt, Sudan, Jordan, Syria, Morocco and Iraq.

[20] E.g. in Egypt, Sudan, Jordan, Syria, Morocco and Iraq.

[21] E.g. in Egypt, Sudan, Jordan, Syria, Morocco and Iraq.

repudiates his wife without adequate cause, or in a way which inflicts hardship upon her may be ordered to pay her a sum of money by way of compensation;[22] and even that no divorce will be of any legal effect unless it is effected in a court of law,[23] or after a period of time during which attempts will be made to reconcile the parties.[24] But the fact remains that in all these countries a Muslim husband who is sufficiently set on divorcing his wife can always achieve his purpose, provided only that he takes the necessary steps and, in some cases, pays the appropriate sum by way of compensation.

In the Irānian reform, on the other hand, this has been radically altered, for the Family Protection Act not only categorically precludes any divorce until after attempts have been made to reconcile the parties,[25] but also, and in *all* cases, unless or until a 'certificate of impossibility of reconciliation' has been issued.[26] Nor is the court given any wide discretion as to when such a certificate may be granted; for the grounds on which this may be done are incorporated in the Act. Thus such a certificate can be obtained where both parties declare their agreement;[27] in any of the circumstances in which cancellation of marriage is permitted

[22] E.g. in Syria, Tunisia and Morocco.
[23] E.g. in Tunisia — and, in a tentative way only in Iraq.
[24] E.g. in Pakistan.
[25] Article 9.
[26] Article 11..
[27] Article 9.

under the Civil Code of 1937[28] (to which further reference will be made below); where either husband or wife has been sentenced by a final judgment to imprisonment for five years or more,[29] or is suffering from 'any addiction which according to the finding of the court is prejudicial to the foundation of family life and makes the continuance of married life impossible';[30] where the husband marries another wife without the consent of his existing partner;[31] where either party 'deserts family life';[32] and where either of them has been convicted by final judgment of 'an offence repugnant to the family honour and prestige' of the other.[33] Here the 'addiction prejudicial to family life' has been further defined[34] as addiction to drugs, alcohol, gambling or the like; but no attempt has been made to define by legislative enactment what is meant by the phrase abandons family life' so here there is considerable scope for judicial discretion, as is also true of offences repugnant to family honour (except that, in this case, the Act expressly states that the court must have regard 'to the position and social status of the parties' and must take into account 'custom and other relevant factors').

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[28] Article 11.
[29] Article 11 (i).).
[30] Article 11 (ii).
[31] Article 11 (iii).
[32] Article 11 (iv).
[33] Article 11 (V).
[34] Article 11 of the Regulations issued together with the Act.

When we turn to the sections on this subject in the Civil Code we find that provision is made for the cancellation or dissolution of marriage where either party is afflicted with insanity, whether permanent or recurrent;[35] where either party is incapable of having normal sexual intercourse;[36] where the existence of some special qualification in one or other of the parties has been specified as a condition of the marriage, and then found to be absent;[37] where the husband refuses, or is unable, to support his wife and it is impossible to enforce a judgment ordering him to do so;[38] and where the husband 'does not provide for the other indispensable dues of the wife and it is impossible to induce him to do so' (a clause which is interpreted as covering sexual intercourse), ill-treats his wife to such a degree that continued married life becomes insupportable, or is afflicted with some contagious disease, curable only with difficulty, which makes the continuation of married life dangerous for his partner.[39] It is also provided that a husband may cancel the marriage if his bride proves to be afflicted with leprosy, is crippled, or is blind in both eyes.[40]

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[35] Article 1121.

[36] With certain detailed provisos: see Articles 1122, 1123 (i), (ii) and (iv), and 1124-6.

[37] Article 1128.

[38] Article 1129.

[39] Article 1130.

[40] Article 1123 (ii), (iii), (v) and (vi).

Most of these provisions in the Code reflect normal Ithnā 'Asharī doctrine, while a few of them represent minor — but beneficial — reforms. It is noteworthy, however, that they go into considerably more detail retarding the circumstances in which a wife may either cancel her marriage or apply to the court for a divorce than they do in the case of the husband. The reason for this is not far to seek, for article 1133 states explicitly that 'A man may divorce his wife whenever he wishes to do so'. But this clearly gives rise to a question of principle in regard to the Family Protection Act, the general tenor of which seems to imply reciprocity of rights between the spouses. On this basis it would seem eminently arguable that a husband ought to be able to obtain a certificate of impossibility of reconciliation should his wife treat him in a way which makes the continuation of life with her 'insupportable' or should she refuse sexual intercourse — on the ground that these circumstances were not mentioned in the Code because they were amply covered by the husband's unfettered discretion' and were presumably omitted from the Family Protection Act by inadvertence. It would seem, however, that the courts consider themselves bound by the express provisions of the relevant enactments and do not feel free to read into them any such inference. It remains to be seen, however, whether the courts will interpret the clause in the Family Protection Act about 'deserting family life' as covering the case where a wife continues to live in the matrimonial home but refuses

relations. If not it would seem probable that husbands whose wives submit them to any form of 'insupportable' treatment may be provoked to respond in such a way as to induce their wives to agree to a divorce or even to take the initiative in seeking a dissolution of marriage.

The second point of outstanding significance in this Act has already been covered in outline: namely, the numerous circumstances in which it is open to Muslim wives to demand a certificate of impossibility of reconciliation and then to obtain a divorce. This represents a much less radical reform than the somewhat similar provisions regarding husbands (which impose a unique restriction, as we have seen, on a previously unfettered discretion), while wives have now been given the right to seek a judicial divorce in a number of different countries on *most* of the grounds now specified in Irān- This should not, however, obscure the fact that it is easier to adopt principles derived from, say the Mālik' law in a country in which the Ḥanafī law previously prevailed than it is to introduce the same principles in a Shī'ī country. But, however this may be, two aspects of these Irānian reforms in favour of a wife demand particular notice: the way in which a wife's right to obtain a divorce in all the specified circumstances has been brought superficially at least — under the aegis of recognised Muslim doctrine, and the implications of this law in regard to polygamy (even in the form of those

temporary marriages which are explicitly recognised in the Civil Code).[41]

The first of these points is covered in Article 17 of the Family Protection Act, which reads: 'The provisions of Article 11 shall be inserted in the marriage document in the form of a condition of the contract of marriage, and an irrevocable power of attorney for the wife to execute a divorce will be explicitly provided.' This means, in effect, that it is statutory requirement that every contract of marriage should include a delegation by husband to wife of authority to exercise on his behalf, in any of the circumstances specified above, his right of repudiation; so in theory it is not she who divorces him, but he who, by delegation, divorces her. This is a most ingenious expedient which might well be adopted in other Muslim countries. It should, however, be recognised that, in the Iranian legislation, it represents little more than a device, however justifiable; for I took the opportunity, on a visit to Tehrān in 1968, to ask a number of judges and lawyers whether they would, in fact, make any distinction between marriages concluded after the Act was promulgated (and in which this power of attorney was, or should have been expressly included) and those contracted previously (and without any such clause); and they replied that they would not. This reply was somewhat surprising in view of the rigidity with which they apparently adhere to the

[41] Articles 1075 ff.

letter of the enactment in other respects (as has been noted above). The conclusion is inescapable, therefore, that the intention of the Act is to set out those circumstances in which both husbands and wives may apply for a certificate of impossibility of reconciliation and then, where attempts at conciliation have failed, may obtain a divorce, and that Article 17 is primarily designed to placate orthodox Muslim opinion and satisfy the constitutional requirement that no legislation may be enacted which is 'contrary to the Shari'ah'.

A wife's right to obtain a divorce should her husband marry a second wife without her consent is, of course, also covered by this provision. This corresponds to somewhat similar legislation in certain other countries:[42] but it is particularly significant in Iran because of the full legal recognition accorded by the Civil Code to those temporary (or *mut'ah)* marriages which only the Ithnā 'Asharī law now allows — and which are still quite common in that country. These may take the form of a contract concluded for a period of 99 years or more, and so represent a union just as long-lived as any 'permanent' marriage, although inferior in social status and in the legel rights which it confers. It seems that today these *mut' ah* unions are chiefly contracted for a period of a few days on the occasion of a man's pilgrimage to Qumm or Mashhad. Since, therefore, these marriages represent little more than an exceedingly brief liaison in

[42] E.g. in the Ottoman Empire, Morocco and Pakistan.

which the wife receives a sum of money but is not entitled to maintenance or inheritance from her 'husband', it might well be thought that they would not give a man's permanent wife any more right to a divorce than would her husband's involvement in an illicit union with another women; but I was assured that this was not the case, and that a wife who had not consented to her husband's conclusion of a *mut'ah* marriage, and who wished to press for a divorce, would be entitled to obtain it on exactly the same basis as would obtain if he had concluded a second 'permanent' marriage.

Thirdly, there is another provision about polygamy in Article 14. This provides that a husband who wishes to marry a second wife must first obtain permission from the court, which will grant such permission only when it is 'satisfied, by taking any necessary measures and, if possible, by examining the present wife', that he 'has the necessary financial ability and sense of justice and capacity to accord equal treatment to the two wives.' To both of these requirements parallels might be cited from other Muslim countries;[43] and it is noteworthy that a second marriage contracted without such permission is legally valid in Irān, although the husband who concludes it is liable to penal sanctions.[44] But the clause in this Article about equal treatment must, presumably, be construed to mean that two

[43] E.g. in Syria, Morocco and Iraq.

[44] Compare, in this context, the position in Syria, Tunisia, Morocco and Iraq, where there are interesting contrasts in this respect.

'permanent' wives must be accorded equal treatment, not that a m*ut'ah* wife must be treated on an equality with a permanent wife. Even so, the provision is not wholly without difficulty in a Shī'ī country; for the Ithnā 'Asharī law provides that a wife's maintenance should be reckoned exclusively by reference to her own social and financial status, not that of the husband; so a man who marries one wife from an aristocratic and wealthy family, and another from a humble and impoverished home, would normally be required to maintain the first in quite a different style from that appropriate to the second. It is also noteworthy that this article has been cited in Irān as virtually making any future *mut'ah* marriages, if polygamous, subject to penal sanctions, since the courts are exceedingly unlikely to give permission for such an union. But it must be remembered that this does not mean that such a marriage, if contracted, would be legally invalid.

Fourthly, this Act also makes explicit provision for the court to issue a decree about the custody of children, provision for their support, and access to them by both the parties to the marriage (or, in their absence, by their close relatives)[45] Here the significant point is that the welfare of the children is given an absolute priority over the detailed rules of Islāmic law, for it is expressly provided that the maintenance of the children 'shall be payable from the

[45] Articles 9, 12, 13, 16 and 18.

income and property of the husband or the wife or both ... and even from the pensions of the husband or wife' and that them,yrotcntus tra euthe custody of the children to any person whom it deems fit'. This is not only salutary but almost revolutionary in its implications.

It is also noteworthy that there is reason to believe that these reforms will, in general, be interpreted and applied by the courts in the way which was intended by the legislature (by contrast, it must be observed, with what has happened — in some cases, at least — in Irāq). The reason for this difference is that litigation on such subjects in Irāq still falls within the competence of the Shari'ah courts, where the *qāḍīs* are often either unable or unwilling to rid them selves of their preconceived ideas and the influence of their training and experience, whereas the jurisdiction of *qaḍī's* courts in Irān has been progressively restricted since as early as 1927, and it seems clear that their competence under the present law would be confined to such questions as whether a marriage had, or had not, been validly concluded.[46]

[46] For this whole subject, see Doreen Hinchcliffe,"Legal Reforms in Shīī World — Recent Legislation in Iran and Iraq", *Malaya Law Review* (1968), pp. 292 ff.