SOME REFLECTIONS ON MODERNIZATION OF ISLAMIC LAW

M. K. Nawaz

I. Modernization in historical perspective

MODERNIZATION OF Islamic law is essentially a twentieth century phenomenon. Some efforts were, no doubt, made in the past to 'modernize' Islamic law, but they were of a limited nature. The modernists of the past, for example, never found it necessary to think through the question whether Islamic law could be changed without challenging its basic philosophy and theory. Nor was it considered necessary by them to formulate a rational theory explaining the role of law in society and legal change. The following episodes chosen at random illustrate this ponit.

1. India : Emperor Akbar's decree of 1579

One example that readily comes to our mind in the context of modernization of Islamic law is an incident that took place in the sixteenth century at the Mughal Court in India. Inspired by the secular outlook and conduct of the Mughal Emperor, Akbar, Shaykh Mubarak drafted what subsequently came to be known as "infallibility decree" of 1579. Its terms in part were as follows :

> Now we, the principal *'ulamā'* . . . have duly considered the deep meaning, first, of the verse of the *Qur'ān* "Obey God and obey the Prophet, and those who have authority among you"; and secondly of the genuine Tradition, "Surely the man who is dearest to God on the day of judgement is the *imām al-'ādil*. . . ."; and thirdly, of several other proofs based on reasoning or testimony; and we have agreed that the rank of *Sultan al-'ādil* is higher in the eyes of God than the rank of a *mujtahid*.
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> Further, we declare that . . . should . . . in future a religious question come up, regarding which the opinions of the *mujtahid* are at variance, and His Majesty, in his penetrating understanding

> and clear wisdom be inclined to adopt, for the benefit of the nation and as a political expedient, any of the conflicting opinions which exist on that point, and should issue a decree to that effect... We do hereby agree that such a decree shall be binding on us and on the whole nation.
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> Further, we declare that should His Majesty think fit to use a new order, we and the nation shall likewise be bound by it; proivded always that such order be not only in accordance with some verse of the *Qur'ān* but also of real benefit to the nation; and further, that any opposition on the part of the subjects to such an order passed by His Majesty shall involve damnation in the world to come and loss of property and religious privilege in this. . . .[1]

It was the chief objective of this "decree" to declare, *inter alia*, that the sovereign was entitled to select, among the several conflicting verdicts of the *mujtahids*, the one which in his opinion best served the interests of the nation. Not only that; the "decree" declared that the ruler enjoyed a rank superior to that of a *mujtahid* in the eyes of God—a position certainly not warranted in traditional interpretation of Islamic law.

What is the significance of the "infallibility decree"? Its chief significance consists in the fact that probably for the first time in the history of Islamic law in the Indian subcontinent the sovereign was empowered to exercise his authority in a realm which long had been considered to be the exclusive province of the *'ulamā'*. True, the "decree" required the king to exercise his discretion in accord with the *Qur'ān*, but, nonetheless, it vested a power in the political sovereign. This was, indeed, a radical step taken by the Court at Agra in circumscribing the powers, authority and jurisdiction of the *'ulamā'*. Whether or not Akbar exercised the powers conferred on him, the episode in itself was revealing.

2. Egypt : Muhammad 'Abduh's reasoning

Muhammad 'Abduh, who worked in different capacities—teacher, ournalist, *mufti*, and reformer—left a deep impact on the modernist movement in Egypt as also in other parts of the Muslim world.[2] 'Abduh's basic contribution to Islamic law consists in his forceful rejection of the traditional teaching that the doctrines of the *Qur'ān* and *Sunna* have been authoritatively expounded once and for all by the doctors of the first three cen-

1. As quoted in Vincent Smith, *Akbar—The Great Mogul*, 179-80 (1919).
2. An excellent account of Abduh's life and his contribution to Islam will be found in C.C. Adams, *Islam and Modernism in Egypt* (London 1933). As to his impact on Egyptian writers see Malcolm Kerr, 'Rashīd Rida and Islamic Legal Reform : An Ideological Analysis', 50 *Muslim World*, 99-108 (1960).

turies of Islam, and that no free investigation of the sources could be tolerated.[3] In his commentary on chapter II, verse 243 of the *Qur'ān*, Abduh said:

> How far those who believe in *taqlīd* are from the guidance of the *Qur'ān*! It propounds its laws in a way that prepares us to use reason, and makes us people of insight. . . . It forbids us to submit to *taqlīd*.[4]

He thus rejected the doctrine of *taqlīd* and pleaded for *ijtihād* (literally, endeavour, but understood as independent investigation for the purposes of reinterpretation). This was, within limits, an important step in the direction of reform of Islamic law.

However, it should be pointed out that the views of 'Abduh on the *Qur'ān* and *Sunna*—two of the cardinal sources of Islamic law—were not much at variance with those of other Islamic lawyers. *Sharī'a* was fundamental to his whole manner of thinking as it was to other traditionalists. Indeed, he thought that the *Qur'ān* and *Sunna* were dynamic enough to form the basis of all reform in Islam and its legal system. What Islam required was only a reinterpretation of its basic sources.

II. The nature and scope of Islamic law

1. The Qur'ān

The *Qur'ān* occupies a pre-eminent position among the sources of Islamic law. A study of the legal norms embodied in the *Qur'ān* would, therefore, be the starting point of any inquiry into Islamic law. The *Qur'ān* is held to embody divine revelations conveyed to the Prophet through the angel Gabriel.[5] The *Qur'ān*, it is claimed, was given to the world not as a code but in fragments, during the period of about twenty two years, from 609 to 632 *A.D.*[6] The body of these revelations, it is said by the traditionalists, was not collected and published in the form of the *Qur'ān* known to us until eighteen years after the death of the Prophet. Despite this, it is firmly maintained that the text of the *Qur'ān* is pure and authentic.[7]

The *Qur'ān*, of course, is not a book of law; it deals with such varied matters as theology, morals, hygiene, etiquette and law. Norms of legal significance occupy only a minute part of it.

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3. This was based on *taqlīd* (the so-called doctrine of the closure of the gates of interpretation).
4. See C. C. Adams, *op. cit.* supra note 2 at 130.
5. This kind of description of the *Qur'ān* is typical of all writers on Islamic law. See, for instance, M. Hamidullah, *Muslim Conduct of State*, 16 (1954); also Abdur Rahim, *Muhammadan Jurisprudence*, 52-55 (1911).
6. *Cf.* A. K. Brohi, *Fundamental Law of Pakistan*, 771, (1958)
7. *Ibid.*

(i) *Meaning and significance of Qur'anic norms* : In order to comprehend the meaning and significance of the Qur'anic norms, it is necessary to know their genesis. Most Muslim and non-Muslim writers seem to agree as to how the Qur'anic legal norms originated. They hold that the legal norms in the *Qur'ān* are in the nature of legal solutions to the socio-economic and political problems that arose during the life time of the Prophet in Mecca and Medina.[8] In terms of contemporary legal theory, they embody legal precedents of the Arabo-Islamic society of the early seventh century.

(ii) *Theory of divinity of Qur'anic norms* : But most writers, and more especially the Muslim writers, attribute to the Qur'anic norms a different significance.[9] For example, the Delegation of the Muslim States of the Far East, in a note presented to the United Nation's Committee of Jurists at the San Francisco Conference, is reported to have stated:

> Legal rules (in Islam) stem from the divine command, expressed directly in the *Qur'ān* or indirectly in the Traditions of the Prophet, *al-Sunna*.[10]

And, more recently, in Pakistan the Munir Report referred to the question of Islamic law in similar terms.[11] In brief, it is the view of the Muslim writers that the Qur'anic legal norms are based upon divine revelations. The argument probably is that if the *Qur'ān* is divine, as it itself proclaims,[12] the legal order of the *Qur'ān* must also be divine. Undoubtedly there is consistency in such a formulation. But nevertheless it is questionable, for. such an exposition belongs to theology rather than to legal science.[13] It is quite probably that the early Muslim theologian-jurists could not differentiate the two disciplines—theology and law.[14] But that need not preclude us from describing them by their proper designation. Yet, Muslim

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8. See Abdur Rahim, *op. cit. supra* note 5 at 17, where he says: "Many of the verses laying down rules of law were revealed with reference to cases which actually arose". Similar are the findings of Macdonald in *Development of Muslim Theology, Jurisprudence and Constitutional Law*, 69 (1913).
9. Abdur Rahim, *op. cit. supra* note 5 at 17; M. Hamidullah, *op. cit. supra* note 5 at 4; *cf.* A.K. Brohi, *op. cit. supra* note 6 at 750.
10. 14 *United Nations Conference on Internatianal Organization Documents*, 375-79 (1945).
11. See *Report of the Court of Inquiry constituted under Punjab Act II of 1954*, 206 (1954).
12. The *Qur'ān*, XLIII : 3; LVI : 76-79; LXXV: 21-22.
13. In commenting upon the theory of the infallibility of Qur'anic norms, Prof. H.A.R. Gibb writes "The ultimate reason is metaphysical and *a priori*", Gibb, *Mohammedanism*, 191 (1949).
14. J.N.D. Anderson, writes : "To the pious Muslim, all down the ages, life has been dominated by the twin sciences of theology and law. Theology prescribes all that he must believe, while the law comprises all that he must do or leave undone." See Anderson, 'The Significance of Islamic Law in the World Today', 9 *American Journal of Comparative Law*, 187 (1960).

usists of all periods,[15] from Shāfi'ī to Abdur Rahim,[16] have given expression to the above theory, namely, the divinity of Qur'anic legal norms.

More than one explanation is offered for the theory of divinity of legal norms in history. Roscoe Pound's explanation is that:

> This is an attempt to put symbolically the sacredness of law or the antiquity and authority of the custom on which the general security rests.[17]

Majid Khadduri, on the other hand, holds the view that:

> In order to give a rational justification for this jural order, Islam, like other religions, asserted that its ideal system proceeded from a divine source embodying God's will and justice.[18]

(iii) *Traditional interpretation of the Qur'ān* : Starting from the premise that the *Qur'ān* was the embodiment of the word of God, the classical jurists worked out a body of rules of construction applicable to the legal norms in the *Qur'ān*. As testified both by the Muslim[19] and non-Muslim[20] writers, the rules of construction are analogous to those relating to statutory construction in the Anglo-American legal systems. Indeed, both Muslim and non-Muslim writers seem to agree on this, though for diverse reasons. For the Muslims the *Qur'ān* is God's word and, consequently, is to be taken literally and unquestioningly. Although it is not God's word for non-Muslims, insofar as the *Qur'ān* embodies legal norms, it should, according to them, be construed literally.

Thus, the *Qur'ān* is most often interpreted in the same manner as legislative codes. But the *Qur'ān* is not a code of law. Nor was the Prophet a law-giver in the modern sense of the term.[21]

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15. For Shāf'ī's view on this point see J. Schacht, *The Origins of Muhammadan Jurisprudence*, 15 (1953).
16. *Cf.* Shāfi'ī with Abdur Rahim, *op. cit. supra* note 5, at 16 and 17, Abdur Rahim, indeed, goes to the extent of saying that "the first postulate, therefore, of Muhammadan jurisprudence is *īmān* or faith, the essential constituent of which is belief in God and acknowledgement ....of His authority over our actions."
17. Roscoe Pound, *Interpretations of Legal History* (1946).
18. Majid Khadduri, *War and Peace in the Law of Islam*, 23 (1956); *cf.* Hans Kelsen, *General Theory of Law and State*, 8-17 (1946).
19. Abdur Rahim, *op. cit. supra* note 5 at 77-115; Muhammad Ali, *Religion of Islam*, 46 (1936).
20. H. A. R. Gibb, *op. cit. supra* note 13 at 93-94; S. G. Vesey-Fitzgerald, 'Nature and Sources of the Sharī'a', in *Law in the Middle East*, 85-118 (1955).
21. J. Schacht, 'Pre-Islamic Background and Early Development of Jurisprudence', in *Law in the Middle East*, 28-56 (1955).

2. The Sunna

In the traditional theory *Sunna* occupies a position only next to that of the *Qur'ān* among the various *usūl* of Islamic law.[22] *Sunna*, like the *Qur'ān*, is not solely concerned with law. Among other things, the traditions of Muhammad deal with theology, ethics, trade, and law. The legal norms, in turn, relate to such varied subjects as domestic relations, property, criminal law, and war.[23]

(i) *The nature and scope of Sunna* : Shāfi'ī was perhaps one of the earliest Muslim jurists to state that *Sunna*, especially when it was authentic, was infallible.[24] Shāfi'ī was of the view that since Allah made obedience to the Prophet obligatory[25], *Sunna*, which embodied enactments of the Prophet, should be deemed to be obligatory.

Starting from the theological premise that *Sunna* was divinely inspired[26], Islamic jurists arrived at the conclusion that *Sunna*, like the *Qur'ān* was infallible, universal, and eternal. This kind of explanation naturally fails to take account of the society, times and, above all, the context in which the norms were formulated. In order to understand the precise scope of *Sunna*, it is necessary to refer to the concept of *Sunna*, especially its genesis and development.

The term *Sunna* literally means "a path, a procedure, a way of acting."[27] But in the technical sense of the term, i signifies the utterances and deeds of Muhammad as well as his unspoken approval of a particular course of conduct.[28] Moreover, the concept of *Sunna*, as the penetrating researches of Goldziher[29] and Schacht[30] have shown us, is one which Islam inherited from its Arab pedigree. In other words, *Sunna* constitutes an Arab legacy to Islam. Islam no doubt modified Arab *sunna* (traditions) whenever it found it to be inconsistent with Islamic precepts.[31] But the modification was effected by the political and social exigencies of Islam.

Sunna, in terms of modern legal theory, can be identified as customary law. But it is the customary law of Arabo-Islamic society of the seventh century.

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22. *Supra* note 15 at 135.
23. This is true of almost all books of Traditions.
24. Quoted in J. Schacht, *supra* note 15 at 13.
25. *Id.* at 16.
26. Shāfi'ī, says Schacht, was non-committal on the question whether *Sunna* was divinely inspired or not (*Ibid.*). Yet other jurists expressed the view that *Sunna* was in the nature of an 'indirect' or 'internal' revelation. Abdur Rahim, *op. cit. supra* note 5 at 69.
27. C. S. Hurgronje, *Selected Works*, ed. G. H. Bousquet and J. Schacht, 268 (1957).
28. *Shorter Encyclopaedia of Islam* at 232.
29. See I. Goldziher, 'The Principles of Law in Islam', 8 *Historian's History of the World*, 294-304. (1907).
30. *Supra* note 15 at 28-56.
31. *Supra* note 29 at 294-304.

(ii) *Early compilation of Sunna* : Long before legal theory of Islam recognized *Sunna* as constitutive of legal rules and regulations, it was considered authoritative by the Muslims.[32] Indeed, the authority of *Sunna* was so great that an invocation of a rule embodied in *ahādīth* (the records of *Sunna*) had conclusive effect.

Obviously, the necessity for recording the *Sunna* of Muhammad arose quite early in Islam. The task of recording them, however, proved none too easy. For, when the early traditionalists began compiling *Sunna* several spurious ones were already in circulation. It, therefore, became the foremost task for the traditionalists to distinguish the authentic *Sunna* from the forged ones.

It is no wonder that Abu Hanifa, who lived at a time when the traditions were still fresh in the memory of the successors of the companions of Muhammad, is reported to have accepted only seventeen or eighteen of them as genuine.[33]

(iii) *Traditional interpretation of Sunna* : The early Muslim jurists formulated several rules for the purpose of resolving conflicts between contradictory traditions. Shāfi'ī, for instance, mentions diverse canons of interpretation. He stated that conflicts, if any between two or more traditions should be resolved by a process of harmonious interpretation. It is stated that his book *Ikhtilāf al Hadīth* is particularly devoted to this subject. Schacht informs us that Shāfi'ī never considered two traditions from the Prophet contradictory, if there was a way of accepting them both.[34] Shāfi'ī said that when conflicting traditions could not be harmonized, then the one more in keeping with the *Qur'ān* should be chosen as authoritative.[35]

All these canons of interpretation resemble those normally applied in statutory construction. But *Sunna* is not a code of law. How, then is it interpreted as a legal code?

Thus, the methods applied for interpreting the twin sources of Islamic law—the *Qur'ān* and *Sunna*—are far from appropriate to the legal norms embodied in them. These Islamic sources call for a new interpretation, an interpretation which relates law to religion, politics and society, and also shows how religion and society affect legal norms. This, we shall call sociological interpretation of Islamic law.

III. A sociological interpretation of Islamic law

The school of sociological jurisprudence has time and again pointed out how imperative it is to apply a scientific methodology for understanding the meaning and function of law in society. The writings of Eugen Ehrlich,

32. *Supra* note 27 at 269.
33. Abdur Rahim *op. cit. supra* note 8 at 32.
34. Schacht, *op. cit. supra* note 15 at 13-14.
35. *Id.* at 14.

Roscoe Pound, and Julius Stone contain valuable information concerning sociological methodology. Julius Stone says that a scientific methodology can be easily applied to past societies or societies very different from our own.[36] Moreover, the application of sociological methodology has yielded fruitful results in civil and common law systems. This methodology indeed dispelled some of the illusions which have long persisted in the western legal systems. An application of this methodology to Islamic law is bound to yield equal, if not more fruitful, results. An application of sociological methodology to the *Qur'ān* and *Sunna* simply means that the legal norms embodied in the twin sources should be interpreted in their social context.

In order to determine the precise meaning of the norms of the *Qur'ān* it is necessary to undertake a study of Arab history, both before and after the rise of Islam, the political biography of Muhammad and, above all, the history of the *Qur'ān*. Since Islam grew up in the full light of history, it should be possible to perceive the historical context in which the legal norms in the *Qur'ān* and *Sunna* were prescribed. *Sunna* also should be studied in a similar way, that is in terms of its social context. No doubt, a determination of the social context of the legal norms of *Sunna*, in view of the fabrication of several of the "traditions" will be far more difficult than that of the Qur'anic norms, but precisely for that reason it is necessary to determine the social context of *Sunna*.

Only by sociological interpretation can we properly delimit the legal norms of the *Qur'ān* and *Sunna*. Of course, the task of sociological interpretation is by no means an easy one. For it requires the application of more than legal talents. Lawyers have to cooperate in a meaningful way with social scientists, historians and linguists for embarking upon a scientific analysis of the twin legal sources of Islamic law; the *Qur'ān* and *Sunna*. Herein a small beginning is made towards a theory of sociological interpretation of Islamic law.

IV. Reform of family law

Of the various changes in the rules of Islamic law, those concerning marriage and divorce are probably the most significant. The challenge of modernization in a sense is chiefly concerned with the law of family relations in Islam. For marriage and divorce laws constituted the heart of Islamic law. It is for this reason that changes in family law are being resisted especially by the orthodoxy. It is also for the same reason that the success or failure of modernization of Islamic law will eventually depend upon the success or failure of the reforms in regard to family law. Turkey is a case in point. In 1926 the Ataturk regime substituted for the Islamic

36. J. Stone, *The Province and Function of Law*, 447(1961).

rules of marriage and divorce the Swiss Civil Code, with the result that monogamy and judicial divorce became the law of the land.

How were those changes received in the Turkish society? The fact on record is that, despite the statutory changes, marriages and divorces on the Islamic pattern continue to flourish in the villages of Anatolia,[37] and the Islamic form of marriages greatly outnumber marriages under the Code.[38] Various reasons are given fo this phenomenon.[39] All of them are of considerable relevance to the sociology of Islamic law. To refer to only one, Anderson says greater prestige was accorded to the Islamic form of marriage over the statutory one in the villages of Turkey.[40] This signifies that the statutory law of monogamy has not pierced the social fabric of Turkish society. Consequently, the social response to the legal reform is limited. This is not to question the desirability of the legal reform, nor to doubt its impact on society. What is maintained here is that a major reform such as this should be properly explained. As to what extent the modernists in other countries are able to explain the change, and to what extent the *Shari'a* has been changed in other Muslim countries, will be briefly considered hereafter.

Impact of 'Abduh's reasoning

'Abduh, the eminent Egyptian scholar, probably set the trend of modernization in regard to marriage and divorce. 'Abduh's reasoning may be presented in the following terms. The *Qur'ān* imposes two conditions on polygamy; one, that the husband should be financially capable of supporting a plurality of wives, and the other, that he should treat his wives impartially. Since the second condition cannot be fulfilled, it should be held that the *Qur'ān* does not authorize a second marriage. Similar arguments were advanced by 'Abduh in regard to *talāq* (unilateral repudiation of marriage). It was argued that the *Qur'ān* orders the appointment of arbitrators in the event of "discord" between husband and wife. Since *talāq* implies discord between the spouses, the argument proceeds, repudiation of marriage should not be permitted unless a court authorizes it.

These ideas bore no immediate fruit, although they inspired many a reformist movement both in and outside Egypt. To what extent the recent legislation in family law in Syria, Tunisia, Morocco, Egypt, and Pakistan is due to 'Abduh's ideas is difficult to answer. But nobody can deny that 'Abduh's thinking has had a deep impact on modernist movement in the Muslim society.

Changes of various intensities have taken place in Muslim countries

37. J.N.D. Anderson, *Islamic Law in the Modern World*, 88 (1959).
38. *Ibid.*
39. *Id.* at 88-89.
40. *Id.* at 89.

in the field of marriage and divorce.[41] That the changes should vary can be explained in sociological terms. It is a commonplace observation in sociology of law that legal change corresponds to social demand. But seldom, if at all, is such an explanation given by the modernists of Islam. The change in Islamic law is invariably explained in Islamic legal categories. In fact, the change is explained as *ijtihād*. There is nothing wrong about this. But, with due respect, it is submitted that it is bound to produce the same kind of problems which Islamic law encountered down the centuries. If the repetitions of the past mistakes must be avoided, then a theory which explains Islamic law in scientifically veritable terms should be devised. This is the crucial problem of modernization of Islamic law.

V. A retrospect

One point that emerges from this study is that there is no rational theory which presents in perspective the changes of Islamic law. That there is an imperative need for such a theory today more than ever before hardly needs substantiation. And yet few, if any, efforts are being made in this direction.

The science of Islamic law has not made any strides after its golden age in the period of Shāfi'ī and other Islamic jurists. Not only that; even the great contributions of the Islamic jurists are not scientifically explained. Besides, surprisingly enough, Islamic lawyers of the twentieth century still use the language and categories of the past in explaining the nature and function of law in Islamic society. References were earlier made to this aspect of Islamic law. Probably it is not necessary to reiterate the various arguments advanced earlier in regard to the sociological interpretation of Islamic law. But one thing should be pointed out: that unless the old myths are exploded, we cannot make much progress in regard to the modernization of Islamic law.

41. A thorough account of the reforms introduced in Islamic law in the West Asian countries and in some other parts of the world will be found in Tahir Mahmood, *Family Law Reform in the Muslim World*, (I.L.I., 1972).