The Young Turk Legislation, 1913-17 and Its Application in Palestine/Israel

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A burst of legislative activity important for British Palestine and later for the State of Israel occurred between 1913-17 under the Young Turk regime in the Ottoman Empire. Some observers have speculated that among the reasons for this far-reaching legislative reform were Turkish needs during the Great War and that a liberalization of certain aspects of religious law was required in the war effort.[1] It is hard to see that this was the case for all three areas of legislation. The protocol issued with the *irādes* of 1916 alluded to the problem of "foreign Muslims" abandoning their wives in the Ottoman Empire, though who these foreign Muslims might have been in such circumstances is an enigma.[2] It is possible, however, that this, together with the problem of the reputed death of a spouse, do reflect a wartime milieu. Rather than speculate too much though on the reasons for the far-reaching innovations we are going to describe, it would perhaps be best to say that the Ottoman authorities took advantage of this critical juncture in the history of the Empire to make changes that had long been thought desirable.

The innovations we are speaking about were carried out in the three main areas of law still dominated after the *Tanẓīmāt* by religious and traditional norms: land law, civil law (or transactions), and personal status — the chronological order in which the Young Turk regime addressed them. At least as far as the first two are concerned, the reforms preceded the outbreak of the war, and therefore must be seen as part of the attempt to upgrade and modernize the Empire, in particular Turkey itself, that reached its apogee after the war under the Atatürk regime. Interesting for the purposes of this study is that they were absorbed into the nascent legal structure of Palestine, despite the fact that they had hardly had a chance to penetrate the legal framework of Turkey itself. The Ottoman Law of Family Rights, for instance, continued in effect in Palestine and is still in effect in Israel today, even though immediately after the war it was abrogated in Turkey in favor of a more modern European approach.

The Provisional Land Laws of 1913-14

The six laws that were promulgated between 1913 and 1914, which bore the title "Provisional" because The Committee of Union and Progress had stormed the Porte two months before and no parliament was yet sitting,

completely altered the nature of land tenure in Palestine and throughout the Ottoman Empire.[3] Their total effect was to widen the rights of freehold tenure over *mīrī*, so as to approach *mülk* in character, thereby creating for the first time in the Ottoman Empire a concept of "immovables".[4] A distinction was made between these two categories only in the sensitive area of succession and in several other aspects of transfer and mortgage.

The first law in this series concerned a subject unrecognized in Islamic law, "juridical persons".[5] It recognized the right of Ottoman corporate bodies, government, commercial, and charitable, to own and deal with land according to the laws of the Empire. Interestingly enough, when it came to charitable institutions and the government's ongoing concern to limit the illegal conversion of *mīrī* into waḳf these were limited to possessing building property in towns and villages only, i.e., *mülk*, out of which waḳf could freely be dedicated.

The second of these laws was the most controversial, and for Palestine, the most interesting. This was the Provisional Law of Inheritance of 27 Rabīʿ al-awwal, 1331/March 6th, 1913. This law is considered throughout Palestine and Israel to have appeared on 3 Rabīʿ al-awwal, which probably stems from a mistake made by the Palestine legislator when he appended it to the Succession Ordinance of 1923 in the Second Schedule. This date probably really is an attempt to represent the date as it appeared in *Düstūr*, the promulgation date (laws in the Ottoman Empire took effect upon their publication in *Düstūr*) and not the adoption date, i.e., 3 Rabīʿ al-thānī, 1331 (Ottoman fiscal dating February 27, 1328 or March 12, 1913).[6] Some scholars have confused Ottoman *Mālī* (fiscal) dating with Hijra dating. Bernard Lewis, for example, mistakenly gives a date of February, 1910 for these "temporary" laws, which if accepted without challenge would confuse the historical impetus for their original adoption.[7] The Provisional Law of Inheritance was the only one in the series to drop the subject "immovable property" from its title; and side stepping the subject of succession to *mülk*, which was administered by the *'ulemā* according to *Sharī'a*, it confined itself to *mīrī* and its derivatives. Based on the *B.G.B.*, the German Civil Code of 1896, it treated women systematically with men and representation for the predeceased at all degrees of the inheritance schedule was provided for, both serious deficiencies in Islamic law when viewed in terms of modern Western practice. However, the *B.G.B.* was intended for succession in urban areas, whereas the Young Turks applied it primarily to agricultural land, an outstanding example of the pitfalls involved in the pell-mell adoption of Western legal norms. The result was the further impractical fragmentation of land so characteristic in the Middle East.[8]

The last four laws in this series dealt systematically, i.e., all Ottoman categories of land were included, with mortgage, disposal (or transfer), partition, and leasing. Since Islamic law knew nothing comparable to the Western concept of mortgage,[9] the Provisional Law for the Mortgage of Immovable Property of March 10th, 1913 finalized the introduction of a

completely Western concept of mortgage which had been gradually developing during the *Tanẓīmāt*.[10] The Provisional Law of Disposal of Immovable Property of April 12th, 1913 further extended the developing freehold status of *mīrī*, lifting all restrictions on the owner's right to freely dispose of his property of any kind with the notable exceptions of dedicating *mīrī* for waḳf or bequeathing it by legacy.[12] Whereas before *mülk* accretions on *mīrī* land, such as houses, orchards, vineyards, etc., were always treated under the separate Islamic law applying to them; they were now viewed as following the land. Trees and vines growing wild on the land, soil, sand, and stones could now be disposed of freely by the owner, but, significantly, not minerals found under it, which were still to be covered by Art. 107 of the Land Code.[13] Since an Islamic law of partition already existed for freehold property in the *Mecelle*,[14] the Provisional Law for the Partition of Joint Immovable Property of December 14th, 1913[15] was the only really "Islamic" legislation of the series and generally narrowed the prerogatives opened in the Land Code of 1858 to the party desiring partition.[16] The last of this series, the Provisional Law for the Leasing of Immovable Property, was actually adopted in the early part of 1914 and was mainly a recapitulation of an earlier *irāde* of 1882.[17] Here, too, provisions of the *Mecelle* were extended and rationalized; however, in anticipation of the extension of the concept of freedom of contracts now to be undertaken in an amendment to the Ottoman Code of Civil Procedure, parties were permitted to introduce by agreement conditions "not repugnant to law or public morality", which echoed the original language of Art. 64.

The 1914 Amendment to Art. 64 of the Ottoman Code of Civil Procedure

Though the first steps had already been taken in 1879, via the fiction of procedural change, to admit a Western concept of contract alongside the Islamic law of *muʿāmalāt*, the original language was ambiguous and restrictive.[18] On May 4th, 1914, several months after the last law in the series discussed above, an amendment was adopted to Art. 64 of the Ottoman Code of Civil Procedure, itself the last major piece of legislation to come out of the *Tanẓīmāt*.[19] The hesitant steps taken some thirty years before in both the *Mecelle* and the Ottoman Code of Civil Procedure to use the fiction of procedural change to alleviate some of the more pernicious effects of Islamic and customary practice (pernicious from the point of view of the modern European legislator) were pressed forward with telling effect. Though in a preamble to the amendment, the pro forma acknowledgement that the *Mecelle* and Islamic law probably contained all that was "necessary" to solve the difficulties was included, still "freedom and certainty" of contractual undertaking were considered to be of critical importance to the economic development and social well-being of the nation and the parties to a contract themselves were considered "best able to express their own wishes".[20] What the Young Turks did was to alter the previous ambiguous language in Art. 64

permitting freedom of contract "not forbidden by law or contrary to morality and public order". The words, "not forbidden by *special laws and regulations*", were inserted for "not forbidden by law", and the former were now interpreted to include only those regulating matters of minor detail as distinct from laws of more general application, such as the *Mecelle*, the Penal Code, and the Commercial Code,[21] the exact opposite of the sense of the earlier language.

Two further paragraphs were added: the first generally extending the subject matter of contracts to interests, rights, and even things not yet in existence (i.e., contracts relating to things to be produced in the future), all more or less at odds with the approach of Islamic law as expressed in Arts. 197-213 of the *Mecelle*. Another potential trouble spot in Islamic law for the new doctrine of freedom of contracts being enunciated by this amendment to Art. 64 was also removed by the second paragraph, which stipulated that once a contract on fundamentals was concluded subsidiary matters passed over in silence would not then affect its validity. What in effect had been achieved by the Young Turks in this seemingly relatively inoffensive amendment was the revamping of the whole law of contracts or "transactions" as it had been operating until then in the Ottoman Empire. Though there was very little time to work out the implications of what had been done in the courts of the Ottoman Empire before its dissolution, if Palestine and later Israel are any yardstick, it became clear that the rules of the *Mecelle* regarding the incidence of contract were only in effect subject to the agreement of the parties concerned. Aside from being explicit, i.e., written or spoken, such agreements could also be inferred from the conduct of the parties or from related stipulations. Contractual stipulations generally, including those for damages, notions either frowned on or unprovided for in Islamic law, were now recognized and large portions of the *Mecelle*, while not actually repealed, were either rendered inoperative or in time lapsed.[22]

The Ottoman Law of Family Rights and the Ottoman Law of Procedure for Sharī'a Courts of 1917

Undoubtedly the most well known and certainly the most troublesome, as far as application in Palestine was concerned, were the several laws in personal status adopted between 1916-17 after the unilateral abrogation of the Capitulations by the Young Turk regime at the outbreak of the war in August 1914.[23] The first two were simply *irādes* which were later incorporated and expanded in the Ottoman Law of Family Rights of 1917.[24] The first of these, following Ḥanbalī *fiḳh*, provided for judicial dissolution of marriage on the wife's initiative in cases where she was deserted and left without support. It was at this point that the protocol issued with the two decrees by the Office of the *Şeyḫ ül-Islām* put the blame on the number of foreign Muslims marrying and then abandoning Ottoman wives, but this seems rather incredible on the face of it. As with the second *irāde*, which relied on a variant Ḥanafī view to permit a

wife to seek judicial dissolution of marriage if the husband became afflicted with certain diseases that made cohabitation dangerous and in connection with which, the Explanatory Memorandum of the Ottoman Law of Family Rights the next year spoke of "elephantiasis, leprosy, and madness" (though the Lebanese version of the same law with considerable more frankness included "syphilis");[25] it does not take very much imagination to envisage the utility of both of these innovations in the conditions engendered by war.

The Ottoman Law of Family Rights (OLFR) and the Ottoman Law of Procedure for *Sharī'a* Courts (OLPSC), which accompanied it, came into effect by imperial *ḳarār* (a decision of the Council of Ministers) on November 7th, 1917.[26] There certainly must be a question as to whether the laws ever came into effect in the *Sharī'a* courts of Palestine before the area fell to the British. In the south, anyhow, they probably did not, since the country fell in stages, with Allenby's triumphal entry into Jerusalem on December 9th ending the first stage which began somewhere between November 5th and November 8th just a few day after the very well-timed publication of the Balfour Declaration on November 2nd — all in all a very significant week in the Middle East.[27] This made little difference to the British, who had the dates of the laws wrong in any case and who, though at first seemingly puzzled by the two laws, ended up by applying them in Palestine as two very useful pieces of legislation. For their part, why the Young Turks would have chosen such a disastrous moment in the history of the Ottoman Empire for the promulgation of two such significant pieces of legislation is a question that will probably always puzzle commentators. The laws, however, very definitely represent a giant step forward on the road to Turkish nationalism, though they were very soon afterwards withdrawn in Turkey itself and only remained operative in countries like Palestine, where they had hardly had a chance to come into effect before they were detached from the Ottoman Empire.[28] Finally, to compound the anomaly, the *Sharī'a* courts in Palestine and Israel went about their affairs in a "business as usual" fashion only referring to these laws where required or when it suited them, generally preferring compilations like Ḳadrī Paşa's.[29]

The Ottoman Law of Family Rights was a complete and highly systematic codification of the two central areas of personal status, marriage and divorce. The law not only made extensive use of the device of *talfīḳ*, i.e., combining the doctrines of more than one school in one and the same legal topic, considered "reprehensible" by most Islamic jurists, but employed what Schacht characterized as an "unrestrained eclecticism", going back into the past to adopt any opinion from any time whatsoever that might suit the purposes of the modern legislator.[30] Reforms in Islamic law came mainly in the adoption of more stringent regulations with regard to child marriage, recognition of stipulations inserted in marriage contracts, limitations on the effectiveness of certain expressions of unilateral repudiation, and extensions of women's rights to seek judicial dissolution of marriage even beyond those already initiated and incorporated in this law from the year before.

The problem in Palestine with the OLFR is that it was originally intended to be territorial in application, i.e., it was to apply across the board to all Ottoman citizens and probably with the abolition of the Capitulations, all foreigners as well. The *millet* system was in effect to be scrapped and the *Sharī'a* courts were envisioned as the new National Courts of Personal Status. It is for this reason I have referred to it as nationalistic and the OLPSC was adopted to accompany it, which applied the procedure of the Ottoman Code of Civil Procedure, based as it was on the French Civil Code, to *Sharī'a* courts.[31] So disturbing were the original articles applying to Jews and Christians, i.e., Arts. 3, 12, 20-32, 39-41, 51, 58-59, 78-79, 91, 132-38, 148-49, and 155-56, that they are rarely found in any extant version of the law, though the Young Turks must have expended quite some effort in their preparation.[32] It would seem the British authorities were also disturbed by them, as they were by the references to appeal to the Court of Cassation in Istanbul (an innovation in itself in the sphere of Islamic jurisprudence).

The Application of the OLFR and OLPSC in Palestine

When the system of judicial administration was reestablished in Proclamation no. 42 on June 24th, 1918 by the O.E.T.A. (South), the Occupied Enemy Territory Administration with headquarters at Jerusalem, recourse to the Court of Cassation and the *şeyḫ ül-Islām* in Istanbul were abolished and a *Sharī'a* appeals court was promised for Jerusalem.[33] However, the authorities do not seem to have been aware of the existence of the two Ottoman laws of November, 1917, since the all-important take-over provision for law in force in the courts of Palestine specified the date of the occupation as the cut-off with such modification as might be proper in the light of private international law and good administration without additional reservation.[34] Proclamation no. 42 also contained an introductory note explaining that all disabilities imposed by the Ottoman authorities on British or Allied subjects were to be removed, and it is in this light that the offending sections of the OLFR might be viewed. When the offensive was resumed in the north the following November and the administration extended into the new areas of conquest by Proclamation no. 81 of November 18th, 1918,[35] the British authorities show for the first time they have become aware of these two laws by changing their system of reception of Ottoman law and making special reference to them. Confirmation, too, is provided of the fact that the laws already had had time to enter the practice of the courts in the north by a proviso stipulating that cases already entered under them were to continue to be judged according to them. Proclamation no. 81 now specifically provided that the law and procedure of *Sharī'a* courts were not to include the "Ottoman laws of the 25th of October, 1333, 1917". Here the misunderstanding of Ottoman fiscal dating has already crept in, just as a similar confusion in the dating of the Provisional Law of Inheritance of 1913 was to creep into the Second Schedule of the Succession Ordinance of 1923.[36]

Whereas Proclamation no. 42 specified the cut-off date for the reception of Ottoman law was to be "before the occupation", Proclamation no. 81 now altered this scheme for all courts, secular and religious, to the more precise "before October 25th, 1917", the presumed date of the OLFR and OLPSC. When the final judicial structure in Palestine was established some two and a half weeks after the League of Nations officially confirmed the Mandate in Article 46 of the Palestine Order-in-Council in August, 1922, the take-over of Ottoman law was put further back to the commencement of hostilities, November lst, 1914. As we shall see, however, the OLFR and the OLPSC continued to be a focus of interest and were provided for by the additional proviso "and such later Ottoman Laws as have been or may be declared in force by Public Notice..."[37]

The OLPSC had already been put back into effect in the *Sharī'a* courts by an order in the *Official Gazette* of August lst, 1919 without Arts. 14, 47-48, 50-52, and 62 which dealt with institutions of a specifically Ottoman nature. It still constitutes part of the corpus to be applied in theory in the *Sharī'a* courts in Israel today, even though Arts. 17-20, 26-27, 39-41, 45-46, 53, 56, and 58 make specific reference to the Ottoman Code of Civil Procedure of 1879, which was canceled in Palestine in 1936-38 in favor of more British rules of court.[38] All references to the Court of Cassation in Istanbul (implied in Arts. 53-55) were now understood in Palestine to be to the *Sharī'a* Appeals Court, which had been established the year before on September 13th, 1918 in Jerusalem as promised in Proclamation no. 42. Reference to it was theoretically to take the place of reference to the *şeyḫ ül-Islām*, though its competence did not extend to the review of any decisions made in the *Sharī'a* courts before the British occupation.[39]

Pursuant also to the promulgation of the OLFR and OLPSC, Administrative Regulations were adopted by the Ottoman authorities to regulate matters of registration of marriages and divorces as called for in Arts. 37-38 and Art. 110 of the OLFR.[40] Accompanying these, an amendment was adopted to the Ottoman Penal Code providing for six months' imprisonment for husbands, participating judges, and judges' deputies who arranged or performed marriages in contravention of the regulations set forth in the OLFR. This was the first effective coupling of criminal sanctions with relevant procedural regulations in the Middle East and was soon to become a fixture of legal innovation in personal status in the region. These carried over into the Palestine Criminal Code Ordinance of 1936 with slight refurbishment according to more British tastes and even some extension into non-Muslim affairs.[41] In contrast to the OLFR and OLPSC, these Administrative Regulations were never officially put into effect in Palestine. However, testifying to the stubborn independence of the *Sharī'a* court judges, the *ḳāḍīs* applied them as if they were operative whenever they thought that they were relevant.[42] Rather, on September 23rd, 1919 two days before the OLFR was

itself reapplied, a Marriage and Divorce (registration) Ordinance was adopted, again showing what the concern was holding up the readoption of the OLFR.[43] This was wider in scope than the Ottoman and effective across the board for all communities. Being, therefore, more general in tone, it dealt only with the procedures of registration itself, leaving out such subjects pursuant to the OLFR and contained in the Ottoman Administrative Regulations, as publishing of marriage bans, the examination for impediments, the exact recording of stipulations inserted in the marriage contract, and the problem of objections by marriage guardians. On the other hand, it tightened up the procedures for registration of divorce in pursuance of Art. 110 of the OLFR. But even more than this, by providing that any person failing to observe such procedures be liable to criminal prosecution according to Art. 99 of the Ottoman Penal Code, it specifically imported this law also and made its penalty of six months' imprisonment for all procedural infractions in marriage and divorce applicable in Palestine. At a very early stage, therefore, in its administration the typical Islamic modernist legal device of coupling penal sanctions with procedural reform to limit undesirable social practices in sensitive areas of law was imported into Palestine.

The Ottoman Law of Family Rights of 1917 was actually once again applied in Palestine by special ordinance on September 25th, 1919.[44] The title of this law, the Muslim Family Law (Application) Ordinance, tells in microcosm the story we have been unraveling. When the OLFR was put back into effect in this manner, it was not put into effect as the "Ottoman" Family Law, i.e., theoretically applicable to all citizens on a territorial basis, but rather as the "Muslim" Family Law, shorn of its controversial articles applying to Christians and Jews and restricted to the Muslim religious *millet* only. This was an extremely conservative position, especially in view of the fact that the Turkish Government was simultaneously retracting it in favor of more modern European legislation in the field, and characteristic of British colonial policy towards the customs of "native" peoples. In a famous case towards the end of the Mandate, where a Muslim woman attempted to have a case of maintenance transferred to the civil courts (the system of separate judicial competences had also in effect been imported by the adoption of the OLFR in this manner) because it was not one of the subjects treated in the OLFR, this conservatism was graphically illustrated even in the courts. The High Court of Justice, which had jurisdiction in conflicts of jurisdiction between the separate judicial competences, held that the Muslim Family Law (Application) Ordinance did not "deprive the *Sharī'a* courts of jurisdiction in matters not referred to in the Ottoman Family Law 1333".[45] Since both the OLFR and the OLPSC had been specifically applied by special ordinance, they continued in effect under the scheme produced by Art. 46 of the Palestine Order-in-Council of 1922 mentioned above.

The Application of the Amendment to Art. 64 of the Ottoman Code of Civil Procedure

The 1914 Amendment to Art. 64 of the Ottoman Code of Civil Procedure had far-reaching effects for the whole range of civil law in Palestine and Israel. Under the guise of a procedural amendment, it introduced the concept of freedom of contracts into Palestine. This amendment was directly absorbed into Palestine under all the jurisprudential schemes, whether that of Proclamation no. 42, Proclamation no. 81, or the final one of Art. 46 of the Palestine Order-in-Council of 1922. What occurred, and this is clear when one reviews the court practice in Palestine and the early Israeli state, was that the *Mecelle*, the pioneering attempt at codifying almost pure Islamic *fiḳh* in the area of transactions, while not invalidated per se, was reduced in a widely recognized manner and transformed into a table of contractual norms in all cases subject to the will and agreement of the parties concerned. Together with Art. 46 of the Palestine Order-in-Council, which as it came to be interpreted more or less stripped the Islamic law embodied in the *Mecelle* of its essence and acted to superimpose the norms and practice of English law upon it, it was developed in the practice of the civil courts (the Palestinian successors to the *niẓāmiye*) as a means of limiting the actual extent to which the *Mecelle* was put in effect.[46] Even when the Ottoman Code of Civil Procedure was repealed by the British in legislation governing procedure from 1936-38, so basic was Art. 64 seen to court practice and the legal structure as it was functioning in Palestine, that it was retained. Here the Mandate authorities very strikingly pointed up that the Amendment to Art. 64 of 1914 was not the procedural matter the Young Turks passed it off as, but a cornerstone of substantive civil law in the country.

It was carried over into Israel via Sec. 11 of the Law and Administration Ordinance of May 19th, 1948 (the counterpart to Art. 46 of the Palestine Order-in-Council in Israel) and played something of the same role in Israeli court practice as it had during the Mandate. It was not repealed until 1973, when the Law of Contracts (General Part) Law, which was meant to stand as the first and theoretical part of the developing new Israeli Civil Code, was passed. Since the Israeli authorities were by now systematically developing their own statutory law in a consistent manner, it is not surprising that this Amendment to Art. 64 of the Ottoman Code of Civil Procedure should finally be repealed at a time when the *Mecelle* itself was finally being removed from the Palestine/Israel scene.[47]

The Application of the Provisional Land Laws of 1913-14

The series of provisional laws regarding land discussed at the start of this study were also absorbed into Palestine and from there into Israel via the same mechanism as the Amendment to Art. 64. Because of the implications of the

Balfour Declaration and the confused situation regarding land generally, a moratorium on transactions in land was imposed from the very first days of Allenby's campaigns.[48] Not only had the administration of land in the Ottoman Empire generally been reduced to chaos since the attempts to have all transactions registered following the 1858 Land Code, but the Ottoman authorities had made matters worse in Palestine by running off with all the Land Registers at the approach of the British forces. Transactions were allowed to resume in 1920 with the promulgation of the Land Transfer Ordinance and the accompanying Correction of Land Registers Ordinance in anticipation of the establishment of special land courts the next year and a whole mechanism known as Land Settlement, which it was hoped would clarify the situation, but which did not get going until 1929-48.[49] The Land Transfer Ordinance of 1920 very consciously operated within the framework of the Provisional Laws of 1913-14; for instance, as in the Provisional Laws of Disposal and Mortgage, *mülk* appendages affixed permanently to *mīrī* land were conceived of as being part of that "land".[50] The *Maḥlūl* Land Ordinance of the same year, adopted mainly to curb the unregulated process of what the British saw as "squatting", i.e., the occupation of land falling vacant either through a three-year failure of cultivation or a failure of heirs (considered legitimate in Islamic legal theory as it developed), actually referred to the Provisional Law of Inheritance of 1913 for the first time in any Palestine piece of legislation. It specifically applied it to such situations and thereby emphasized the basic *mīrī* character of such land and the British willingness to operate within the Ottoman and Islamic system of land tenure as they inherited it.[51] Here, too, for the first time the mistake in dating of this law is already evident.

Aside from settling certain problems regarding the permissibility of mortgaging *mīrī* in the Land Law Amendment of 1933 (first raised in the Provisional Law for the Mortgage of Immovable Property of 1913 and referred to in Sec. 10 of the Transfer of Land Ordinance of 1920),[52] most attention in Palestine, and thereafter in Israel, focused on the Provisional Law of Inheritance of 1913. This is already evident in the *Maḥlūl* Land Ordinance above before the promulgation of the Palestine Order-in-Council of 1922. What the Ottomans had created were two different systems of inheritance: one, a secular one, having to do with *mīrī* was to be carried on according to a law based on the German *B.G.B.* whether in the secular courts or the *Sharī'a*; the other, applying to freehold and all other *mülk*, was carried on as always, at least where Muslims were concerned, according to *Sharī'a*. This system the British absorbed via the *Maḥlūl* Land Ordinance and the Palestine Order-in-Council two years later. The Land Courts Ordinance of 1921 had specifically empowered the new courts it set up to deal with rights in and over every kind of land, including *mülk*, *mīrī*, and derivatives of the second, direct the Land Office to register valid rights, and consider applications for corrections of the Land Registers. However, such regulations could only apply to Muslims in "mixed"

suits, since the *Sharī'a* courts still exercised exclusive jurisdiction over Muslims in matters of succession.

In 1923 the British formally approached the problem of succession in a territorial manner. The solution they reached was conservative, in line with their usual colonial policy (Palestine had been transferred from the Foreign Office to the Colonial Office in 1921 after the civil disturbances of that year and in anticipation of the confirmation of the Mandate by the League of Nations). The main lines of the system they adopted were Ottoman and these have passed on into Israel with little intrinsic change despite the passage of a new Succession Law in 1965. Though the Succession Ordinance of 1923 purported to be of territorial applicability, Muslims were excluded from its provisions and from the list of religious communities appended in the First Schedule. Still, the British did specifically apply the Provisional Law of Inheritance of 1913 to all matters of succession relating to *mīrī* lands in both civil and religious courts, a far-reaching directive for any secular government in the Middle East. Though the *Sharī'a* courts had been in the habit of applying the Provisional Law of 1913 to *mīrī* anyhow, now they were specifically directed to do so by the secular authorities (as were the other religious and secular courts), and to punctuate this, the 1913 Ottoman law was actually appended to the Succession Ordinance in the Second Schedule.

The Israelis went even further. Inheriting the system depicted above, through the vehicles we have described, the Israelis were interested in immediately turning their attention to certain problems relating to the equality of women, always a sore point in the Middle East and not something likely to have unduly troubled a British colonial administration. They did this in a law entitled the Women's Equal Rights Law of 1951. The law handled a compendium of subjects all relating to the treatment of women, and succession was dealt with in Sec. 4. Having already forbidden in a territorial manner laws detrimental to women *qua* women (as Islamic law most certainly was, at least through Western eyes) in Sec. 1, the legislator stated: "Notwithstanding anything laid down in any other law, rights in an inheritance of *mülk* land and movables shall be determined in accordance with the provisions of the Second Schedule of the Succession Ordinance",[53] which meant the Provisional Law of Inheritance of 1913. Therefore, not only had the Israelis absorbed the Provisional Law of 1913, they now extended it to cover an area it was never meant to cover, i.e., intestate succession to *mülk* lands. This is not the place to go into whether the Muslims carried out the provisions of this law or not; suffice it to say they ignored it, since the Israeli authorities did not set up any supervisory apparatus to ensure its observance. The Israelis seemed more interested in citing a general principle than in ensuring it was carried out in actual practice. In any event, in Sec. 7 of the same law they immediately qualified what they had done, obviously in deference to the religious parties with the words in Sec. 4, unless all parties to a given suit agreed "to be judged according to the law of their community". The Muslim community, anyhow, took this as a blanket

permission to apply *Sharī'a* law to *mülk* in succession matters as they always had done. Still, what had been contemplated here was a potential interference into the law of personal status of the various communities of far-reaching extent and the vehicle of this interference even in 1951 was to have been the Provisional Ottoman Law of 1913.[54]

The following year work began on an Israeli Succession Bill. The scheme originally was to withdraw the area from religious court jurisdiction altogether.[55] This ran into immediate difficulties from the religious parties, with the Muslims content to let them "run interference" for them. Therefore, after much wrangling, when the bill was finally submitted six years later in 1958 to the Knesset, concurrent jurisdiction in the Palestine/Ottoman manner was provided for at the written request of the parties concerned. The law that finally emerged from the Knesset seven years later in 1965 conserved this scheme. However, unlike that enunciated in the Women's Equal Rights Law of 1951, which actually directed the religious courts to apply the Ottoman law of 1913 to *mīrī*, the religious courts were given leave to apply any law of personal status they chose, just so long as all interested parties consented to their jurisdiction and with the proviso that maintenance out of the estate be not less than under secular law.[56] One might have thought that such a system would give the *Sharī'a* courts greater power than they had before to effect succession orders concerning either *mīrī* or *mülk* in accordance with *Sharī'a*. In fact it did, but the *Sharī'a* courts, consistent to a fault and seemingly completely indifferent to Israeli reforms, did nothing of the sort. They have gone on behaving as they always have, settling *mülk* according to *Sharī'a* and *mīrī* according to the Ottoman law of 1913.[57]

The 1965 Israel Succession Law aspired to be comprehensive and therefore repealed all articles of the *Mecelle* dealing with such matters, Sec. 4 of the Women's Equal Rights Law, and the Succession Ordinance of 1923, including as it did the Provisional Ottoman Law of Inheritance of 1913. However, perhaps even more anomalous than anything so far described, the scheme of succession it chose to adopt for all intestate succession in the civil courts was that of the 1913 Ottoman law. That the new Israel Succession Law of 1965, aspiring to be modern, should have finally settled on the scheme of the old 1913 Ottoman law is surprising to say the least. This, of course, comprised a widening of its provisions beyond anything contemplated in Ottoman times. The reason given by those responsible in the Israeli Justice Ministry was simple: The Ottoman law was working well and had the advantage of being widely known among the people.[58] Nothing perhaps could be a better testament to the durability and lasting influence of these Young Turk initiatives in land law, contract law, and personal status in Palestine/Israel than this.

Notes

1 See J.N.D. Anderson, "Recent Developments in Shari'a Law", vi, *Muslim World*, 43, pp. 276-80; Bernard Lewis, *The Emergence of Modern Turkey* (Oxford, 1961), pp. 22f. and 238; N. Berkes, *The Development of Secularism in Turkey* (Montreal, 1964), p. 416; and R. Eisenman, *Islamic Law in Palestine and Israel* (Leiden, 1978), pp. 35f.

2 Eisenman, pp. 35f.

3 Hitherto land under the category of *mülk* had been regulated by Islamic law through the *Mecelle* of 1869, *mīrī* and its derivatives through the Ottoman Land Code of 1858 incorporating principles going back to the early days of the Ottoman Empire and Islam. See my discussion of these two laws, pp. 19-26 and 53-62.

4 *Mīrī* land was land righly appertaining to the state, going back to the early days of the Muslim conquests; *mülk* lands were lands held in freehold tenure. Outside the Arabian Peninsula itself, the latter mainly were in towns and villages.

5 "The Provisional Law Concerning the Right of Certain Corporate Bodies to Own Immovable Property", *Düstür*, 2nd series, vol. 5, p. 114; R.C. Tute, *The Ottoman Land Laws* (Jerusalem, 1927), p. 165.

6 *Düstür*, vol. 5, p. 145; Tute, p. 165.

7 Lewis, p. 458; see also E. Mardin, "Development of the Sharī'a under the Ottoman Empire", in M. Khadduri and H.J. Liebesny (eds.), *Law in the Middle East* (Washington, 1955), pp. 279-91.

8 See Lewis, pp. 458-59; E. Mardin, p. 287; M. Silberg, *Personal Status in Israel* (Jerusalem, 1965), pp. 182-211, in Hebrew.

9 The primitive concepts of *farāgh bi'l-wafā'* (pledge with the right of redemption) and *bay' bi'l-wafā'* (sale with the right of redemption) were often used as a kind of mortgage in the Ottoman Empire, but these were forbidden in Palestine. See Eisenman, pp. 12, 52, 60, 65, etc.

10 *Düstür*, vol. 5, p. 185; Tute, p. 166; Eisenman, pp. 65f.; 1 Rabī' al-thānī, 1331.

11 Fiscal dating March 30, 1329; *Düstür*, vol. 5, p. 158; Tute, p. 169; Eisenman, pp. 166f.

12 The actual words in Art. 5 run: "Whosoever owns by virtue of a formal title-deed *mīrī* or *mevḳūfe* may transfer it absolutely or subject to redemption and may lease it and lend it and mortgage it as security for debt, and he alone has the right to all increase and to the full use of it and to all the crops which grow naturally upon it... The rights for disposal and transfer... or... fixtures and additions constructed on *mīrī* or *mevḳūfe* will be the same as for the land itself".

13 Arts. 5, 9, and 11.

14 Arts. 1114-91 of the *Mecelle*.

15 Fiscal dating Dec. 1, 1329; *Düstür*, vol. 6, p. 100; Tute, p. 172.

16 See my discussion of this, pp. 67f.

17 Feb. 14th, 1914 or 18 Rabī' al-awwal, 1332; *Düstür*, vol. 6, p. 193; Tute, p. 175; Eisenman, pp. 68f.

18 See my discussion, pp. 26f.; see also C.A. Hooper, *The Civil Law of Palestine and Trans-Jordan*, vol. 2 (Jerusalem, 1936), pp. 141-71.

19 Fiscal dating April 24, 1330; *Düstür*, vol. 6, p. 574; Hooper, vol. 2, pp. 75, 114-16, 123f.

20 See Report in Hooper, vol. 1, pp. 4f.

21 Hooper, vol. 2, pp. 116-17.

22 See my detailed discussions of these matters, pp. 106-35 and 162-67.

23 The Ottoman abolition of the Capitulations was never repealed in Palestine as elsewhere in the Middle East, and therefore these were never reapplied. They were suspended by Art. 8 of the Mandate confirmed by the Big Powers in the San Remo Treaty in July, 1921 and abolished altogether by the Treaty of Lausanne officially ending World War I on July 27, 1923. See E. Malchi, *The History of the Law of Palestine* (Jerusalem, 1942), p. 40, in Hebrew and E. Vitta, *The Conflict of Laws in Matters of Personal Status in Palestine* (Tel Aviv), pp. 5ff.

24 *Düstür*, vol. 8, pp. 853-7; Anderson, "Recent Developments...", iii, p. 38 and vi, pp. 272, 277-79, and *Islamic Law in the Modern World* (New York and London, 1959), pp.

26f.; S.D. Goitein and A. Ben-Shemesh, *Muslim Law in Israel* (Jerusalem, 1957), pp. 229-30, in Hebrew. Y. Meron has supplied the correct date of March 25, 1916 (fiscal dating March 12, 1322).

25 See Anderson, "Recent Developments...", vi, pp. 276-80.

26 Fiscal dating Oct. 25, 1333, which of course is not Oct. 25, 1917. See Eisenman, pp. 32-35.

27 See T.E. Lawrence, *Seven Pillars of Wisdom* (London and New York, 1935), p. 387 for dating of the start of this campaign.

28 *Düstür*, vol. 9, pp. 762-83; Goitein and Ben-Shemesh, pp. 213-33 and 273-87; L. Bouvat, "Le code familial ottoman de 1917," *Revue du Monde Musulman*, 43 (1921), pp. 5-26. See also Eisenman, pp. 37 and 50.

29 A. Layish, "*Qādīs* and *Sharī'a* in Israel," *Asian and African Studies*, 7 (1971), p. 249.

30 Joseph Schacht, *An Introduction to Islamic Law* (Oxford, 1964), p. 106.

31 See Anderson, "Recent Developments...," iv, p. 118; N.J. Coulson, *History of Islamic Law* (Edinburgh, 1964), p. 163; and Lewis, p. 229. See also my detailed discussion of the OLPSC, pp. 45-49.

32 One place they can be found is in Rushdī as-Sarrāj's Arabic translation, *Kitāb Majmū'at al-Kawānīn al-Shar'iyya* (Jaffa, 1944), pp. 185-97. See also Goitein and Ben-Shemesh, p. 290

33 See *Proclamations, Ordinances, and Notices Issued by O.E.T.A. (South) to August, 1919 (PONOETA)*, no publication date, available at Hebrew University Law Library, p. 9, Secs. 8-9.

34 *Ibid.*, Secs. 1-2. See Eisenman, pp. 17-19.

35 *PONOETA*, p. 12; N. Bentwich, *Legislation of Palestine*, 1918-25 (Alexandria, 1926), vol. 1, p. 612, Sec. 4.

36 The date should be Nov. 7, 1917, since there are thirteen days difference between Ottoman fiscal dating, which follows Byzantine practice and Julian dating followed in the West.

37 Eisenman, pp. 79-80 and 106 and Hooper, vol. 1, pp. 28-81.

38 See my discussion, p. 34. An amendment was adopted to the new Civil Procedure Ordinance in 1944 which stated, inter alia, that regardless of references to the OCCP in the OLPSC, these articles were not to be considered in effect in the *Sharī'a* courts. Still in HC 110/46, the Supreme Muslim Council, later defunct in Israel, was adjudged the sole custodian of tradition and procedure before the courts of the Muslim religious community.

39 Public Notice, no. 66, Sept. 9, 1918, *PONOETA*, p. 18 in fulfillment of a promise made in Sec. 9 of Proclamation no. 42.

40 See Anderson, "Recent Developments...," iv, pp. 118ff. and Goitein and Ben-Shemesh, p. 218. The latter dated these incorrectly as December, 1917. Again the mistake seems to relate to fiscal dating, which is Dec. 31, 1333 or Jan. 13, 1918.

41 See my discussion, pp. 37ff. and 102-105.

42 Goitein and Ben-Shemesh, p. 218.

43 R.H. Drayton, *The Laws of Palestine* (London, 1934), vol. 1, Cap. 88; Goitein and Ben-Shemesh, pp. 218 and 232f.; Bentwich, vol. 1, p. 57; Eisenman, pp. 38 and 51.

44 Drayton, vol. 2, Cap. 96; Goitein and Ben-Shemesh, p. 213; Bentwich, vol. 1, p. 58.

45 H.C. 49/45, 12 PLR 426; 1945 ALR 659. See also Vitta, pp. 145-48 and Silberg, pp. 21, 27-28.

46 See my discussion, pp. 131ff.

47 *Israel Law Review*, 9, no. 2 (April, 1974), pp. 274-91; Eisenman, pp. 258ff.

48 Proclamations 18/11/18 and 30/4/19 temporarily forbade transactions in land and invalidated promissory notes in connection with such, as for example the practice of *farāgh bi'l-wafā'*. See also Secs. 16-23 of Proclamation no. 42.

49 Bentwich, vol. 1, p. 26; Drayton, vol. 2, Cap. 81, p. 881. For Land Courts Ordinance, see Bentwich, vol. 1, p. 150; Drayton, vol. 2, Cap. 75, p. 828. For Land Settlement, see the Land (Settlement of Title) Ordinance, 1928, Drayton, vol. 1, Cap. 80, p. 875 and my discussion, pp. 146-51. Though transactions began, litigation did not until the establishment of the Land Courts.

50 Sec. 2.

51 Sec. 2. The Mandate Authorities actually arrogated to themselves the traditional role of the Ottoman sultan in leasing out land appertaining to the state.

52 See Eisenman, pp. 65 and 150.

53 *S.H.*, 5711, no. 82, p. 248; 6 *LSI* 171. See also Silberg, pp. 398-435.

54 See Layish, *Women and Islamic Law in a Non-Muslim State* (Jerusalem, 1976), pp. 307ff. and "Qāḍīs and Shari'a", pp. 77f.

55 See U. Yadin, "The Law of Succession and other Steps Towards a Civil Code", in Yadin and Tedeschi (eds.), *Studies in Israel Legislative Problems* (Jerusalem, 1966), p. 105.

56 *S.H.*, 5725, no. 446, p. 63; 19 *LSI* 58, Sec. 155.

57 A personal communication to me by A. Layish; see also Layish, *Women*, p. 309; Eisenman, pp. 204ff.

58 Yadin, p. 115.