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NEW LAWS FOR OLD: THE MOROCCAN CODE OF PERSONAL STATUS

A Letter from Charles F. Gallagher

Tangier
June 20, 1959

In any society the code of laws by which a people governs itself ranks high among the indices of its fundamental patterns of life and thought. This is perhaps especially true of the Arab-Muslim community in which Islam has for so long played a multiple role as religion, state, and an all-encompassing system of divine jurisprudence designed to control the acts of its followers in this world as well as to deal with their reward and punishment in the next.

Following a well-established tradition in the Semitic Middle East, dating from the Code of Hammurabi and the Laws of Israel, Islam built an imposing legal edifice for itself beginning as early as the 8th century, shortly after the death of the prophet Muhammad. This structure reflected quite adequately the social system of the Islamic world at that time and for the next thousand years, and it remained largely unchallenged until the impact of Western thought began to be felt in the Middle East early in the 19th century.

The influence of the West has been extended to all fields of Islamic society since that time, but, as might have been expected, it was and is particularly important in the domain of law. For not only was there a predisposition within Islam to a legicentric attitude, but to a traditional society the importance of a fixed system for regulating behavior

is emphasized to the extent that the society is threatened with change or destruction. In brief this is the danger which the Arab-Muslim world has faced increasingly since 1800. As almost all aspects of its social organization came under attack, first externally and later internally, the legal foundations of the structure became suspect and a growing need was felt to revise or renovate much of Islamic jurisprudence in accordance with the demands of modern life and the pressures of changing opinion.

It would not be unfair to say that throughout the 19th century and up to the present day there has been a steady evolution of Muslim law in the direction of norms which approach more closely those established by Western society; this in spite of certain countercurrents which have been felt from time to time, some of which--as at present in the Middle East--may be considered to be inspired by the politics of the moment, while others represent a more far-seeing effort to adjust the circumstances of the times to the profoundest principles of Islam (rather than the other way around), principles which are held to be capable of assimilating the events of the past century just as they withstood the accumulated happenings of the previous millenium.

Although I cannot deal here in detail with the history of Muslim thought on this question,[1] its development may be traced briefly through the

1 For changes in Muslim thought, including but not limited to the law, the best reference is H. A. R. Gibb, Modern Trends in Islam. An excellent general treatment of the problem is found in R. H. Nolte, "The Rule of Law in the Arab Middle East" in The Muslim World, Vol. XLVIII, 4, October, 1958. Also valuable is Fauzzi M. Najjar, "Islam and Modern Democracy" in The Review of Politics, Vol. 20, No. 2, April, 1958. For more specific accounts of legal changes in the Middle East see G. N. Sfeir, "The Abolition of Confessional Jurisdiction in Egypt" in The Middle East Journal, Vol. 10, No. 3, Summer, 1956, and Nadav Safran, "The Abolition of the Shar'i Courts in Egypt" in The Muslim World, Vol. XLVIII, 1 and 2, January and April, 1958.

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earliest codes based on Western models, the Ottoman Majallah in 19th-century Turkey, and Egyptian legislation of the same period based upon compilations of Ḥanafī[2] law. These were the ancestors of the modern civil codes of Egypt and the Levant states, and they drew partly upon traditional Islamic law and partly upon Western legal thought, principally French, Swiss, and Italian.

The impact of Western law and legal ideas had the effect of dividing Muslim scholars of the law into two very general groupings. The first, which might be called modernist, felt that traditional law was no longer adequate to the needs of Muslim society and required supplementing, either from the reworking of able scholars acquainted with modern problems (which is what was essentially meant by "reopening the gates of interpretation," or ijtihād) or--a feeling less explicitly held by a few--by adaptation from external sources. The second and more conservative was either driven to hold fast to the sacred law (sharī'ah),[3] or at worst to prefer giving it up entirely as far as secular application was concerned, maintaining it as a part of the Kingdom of God and considering it as a divine, unchanging law of ideals--not unlike the natural law of Christianity--which may not be tampered with by men. Parallel to this first split between the realms of the divinely theoretical and the earthly practical may be traced an interesting similarity between the gradually increasing concern of Christian thought with the welfare of man in this life and the slightly later development of the same trend in Islam toward redefining the sharī'ah for the benefit of man as a social being.

Looked at from this perspective it is clear that the issue of a reformed divine law, as against a compromise between the laws of God and external realities, will continue to be a major problem in Arab-Muslim society for some time to come, but, as has been remarked: "It seems clear that in the process Islam and its Sacred Law will have been altered, secularized, and weakened even as an ideal."

To some degree this has already begun to happen in the Arab Middle East. Now in the recently independent countries of Arab North Africa we find the same kind of problems arising as those which Middle Easterners had at least started to thresh out in the last century.

Coming to political independence only yesterday, after several generations of direct European rule which debilitated all traditional institutions in

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2 One of the four orthodox schools of Muslim law, in favor in the Ottoman Empire, founded by the imām Abu Ḥanīfa (d. 767).

3 The Arabic translation of technical legal terms has been included for the benefit of readers with a special interest in the law who might wish to pursue a special point. A detailed discussion of them can be found in the Encyclopedia of Islam listed under their Arabic titles.

numerous ways, both Tunisia and Morocco have taken steps in the direction of reforming their laws and legal institutions. In comparison with the Eastern Arab states, Tunisia and Morocco in meeting their problems have the advantage gained from studying Middle Eastern (and other Islamic) experimentation in addition to having had more prolonged contact with the West--the latter it is true perhaps not always a favorable factor. Significantly both countries have been true to the main lines of their social personality in their decisions. In Tunisia, a relatively advanced country, reform was more immediate. Politically it resulted in the proclamation of an egalitarian republic, Islamic in name but with strong secular overtones; socially it led to the abolition of polygamy, the institution of civil divorce action, equality of the sexes, the granting of the franchise to women followed by their participation in general elections, and the weakening of religious power outside the state through such devices as integrating religious education into the national system and dissolving religious mortmain lands (waqf, or ḥubūs) in certain categories. In Morocco reforms have been slower in realization and on the whole less bold in conception.

In both countries, however, the newly-promulgated Codes of Personal Status have had to touch upon the heart of the matter. Since the Tunisian Code (Majallah al-Ahwāl al-Shakhsīyah, hereafter called the Majallah), which came into force on January 1, 1957, has already been translated into English[4] and is readily available, this letter will confine itself to a description of and brief comments on the more recent Moroccan Code (Mudawwanah al-Ahwāl al-Shakhsīyah, hereafter called the Mudawwanah) of which no complete translation has yet been made in a European language.

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During the years of the French protectorate in Morocco (1912-56) traditional Muslim law suffered from the direct and indirect inroads made on it by protectorate authorities. French law obtained for all cases involving Europeans and prevailed where conflict arose because of mixed jurisdiction. Political offenses were usually judged by military courts under the fiction that a state of siege existed. For political motives certain rural and mountain areas where Berber and not Arabic was the spoken language were separated from the authority of Muslim law by the famous "Berber Dahir (ẓahīr)" of 1930, and reserved to customary Berber law, which was pushed by the French at the cost of bitter hostility from religious and intellectual circles in North Africa and the Arab world in general. Finally, the stagnation in which Mālikī[5] legal literature found itself at the beginning of this century in

4 G. N. Sfeir, "The Tunisian Code of Personal Status" in The Middle East Journal, Vol. 11, No. 3, Summer, 1957.

5 Another of the four orthodox schools of Muslim law, in general use throughout North Africa, especially Algeria and Morocco, founded by Mālik ibn Anas (d. 795).

Morocco was tacitly encouraged by the French as a barrier against the rise of a neo-religious reform nationalism.

But the fleeting idea of co-sovereignty which was entertained by French settlers and some protectorate officials after the deposition of the then Sultan Muhammad V in 1953, led to a changed outlook. A new criminal code was prepared, which aligned this segment of the law to a greater degree with European practices, and a digest of principles of Mālikī civil law, taken mainly from decisions approved by the Chraa (Shari'ah) Court of Appeals in Rabat, was undertaken for the guidance of judges and lawyers engaged in such cases. This compendium was not intended, however, to have the force of a code.

With the idea of reform in the air, particularly in nationalist circles, independence brought matters to a head. Beginning in 1956 the Moroccan court system was renovated and unified, and the sharī'ah tribunals, which had previously been independent of other jurisdictions, were included in the hierarchical organization. By a series of royal decrees in 1956-57, qadial courts of first instance were established, with a regional court of appeal in each regional tribunal of common law (mahkamah iqlimīyah) and finally, a qadial Court of Cassation was set up within the Supreme Court. At the same time the jurisdiction of the qadis was modernized by introducing the necessary subsidiary personnel and procedures of modern court practice. The vision of a robed judge sitting on a rug in the courtyard of a mosque dispensing personalized justice, which could have been true a decade ago, went out the window.

It was still essential, though, in order that the qadial courts be equal to their new tasks, to provide them with a modern, unified code concerning those parts of Muslim law which fell within their competence: personal status, inheritance, and certain categories of property litigation. Beginning with the most urgent of these tasks, a Moroccan judicial commission produced a Code of Personal Status treating the family, marriage, divorce, and inheritance, which came into effect from January 1, 1958, with additions promulgated by decree early in the same year. It is this code, the main provisions of which are discussed here.

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The Family. According to the Mudawwanah the Moroccan family continues to be based upon the principle of patriarchy; links of parentage are established only through the male line. And the family, in which the male elements have a privileged place ('aṣabah), remains in substance as it has always existed in traditional law. The principle of recognition of paternity (istilḥāq) which was used to justify the entrance into the family of a child without raising the question of his maternal links, has notably been retained.

Within this traditional family, women still play only a relatively modest role. They are granted certain rights under the terms of the Code, but these are less than the rights granted men. For example they are still entitled only to a half-portion in cases where their position in inheritance is equal to that of the male, e.g., a sister and brother. More importantly the ethic and spirit of the family continue to be regulated in favor of the male, who conserves the right of polygamy subject to certain restrictions, and who retains the right of unilateral repudiation.

Marriage. Marriage is described as constituting the principal basis of the family. Article 1 of the Mudawwanah defines it as a "compact of legal union between a man and a woman, concluded on a durable basis and having as its aim a life of fidelity and purity, joined to the desire for procreation, by the foundation, under the direction of the husband, of a family and permitting the spouses to bear their burdens in security, peace, and mutual respect, and affection."

The principal item of interest in the section of the Code dealing with marriage relates to the articles on polygamy. The Mudawwanah, less bold than the Majallah which bans polygamy unconditionally, permits the Muslim husband to have at one time the legal number of wives (four) allowed by the Quran. The article following this, however, restricts the right to a certain extent. Plural marriage is not permitted if "inequality in treatment is feared." But the vagueness of the text does not indicate whether this fear is left to the discretion of the husband or to the decision of a judge. It will be necessary to see what practical application the courts give to the question. Article 31 reiterates the traditional right of the wife to stipulate (ishtaraṭa) at the time of her marriage that her husband will take no further spouses, with the provision that if he does she may ask for the dissolution (faskh) of the union. There are additional guarantees for the wife which are novel: even if she has not stipulated monogamy in the marriage declaration, she may appeal to the qāḍi if a second marriage takes place, and a second marriage is not to be legalized until the second wife has been informed that her suitor is already married. No punishment is mentioned for violation of this clause, but one may presume that it offers the second wife the right of dissolving a marriage now considered illegal.

In contrast to the Majallah, the Mudawwanah specifically repeats the traditional prohibition of the marriage of a Muslim woman to a non-Muslim man. Considerable difficulty may be raised by this prohibition since these marriages, although always looked upon unfavorably by the Muslim community in Morocco (and elsewhere), were performed in all legality under the laws of the French protectorate in this country and a goodly number of mixed households exist. Lawyers have already raised the question of jurisdiction in cases where the Muslim woman already married to a non-Muslim has acquired the nationality of her husband according to the laws of his country.

An important provision of the section on marriage fixes the minimum marriageable age at 15 full years for girls, 18 for boys. Tradition had previously sanctioned family-arranged child marriages. In principle it was possible for parents to marry off both male and female children (the only proviso being that they be actually born at the time the contract was made), but in practice the custom was limited to females. The only exception to the minimum age requirement is that a dispensation from the qāḍi may be secured for the male, but in all cases the required consent of both parties will have the theoretical result of abolishing forced marriages of child brides.

Parallel to these provisions is the suppression of the right of matrimonial constraint (jabr). It is now necessary for the woman as well as the man to give consent to the marriage. By this requirement the Mudawwanah goes beyond the traditional recommendations of doctors of the law that "the young girl should be consulted" before being married, a recommendation which in reality, particularly in country regions, was no more than a pious formality. And although it will certainly be some time before country girls will feel free to express their true feelings without fear of family reprisal, newspapers have reported several cases in the past year in the larger cities where young women have refused an arranged marriage--and where they have been enthusiastically supported by the writers of "Dorothy Dix" columns in these papers.

An interesting survival of the right of jabr is found in the attribution to the qāḍi of the power to direct the marriage of a young woman who has reached the age of puberty and whose "immoral conduct is to be feared." And Article 137 stipulates that the consent of the wali, or guardian (i.e., father or legal tutor), is necessary until the contracting parties have reached the age of legal majority. The woman continues to be deprived of the right to present herself for marriage, however, no matter what her age; she is required by the Code to be given in marriage by her matrimonial tutor.

In form the marriage is a contract between the husband and this matrimonial tutor of the bride-to-be, witnessed by two notaries, verified and recorded by the judge. The witnessing and recording do not make the marriage a civil ceremony in the Western sense, though; the marriage is only a private contract as it has always been in Māliki law. A first step toward its inclusion in the civil status, however, is found in articles of the Code which call for a copy of the act to be sent to the office of civil status and require that an identity document be produced before the marriage contract will be validated.

A further sign of the tendency toward civil legalization is found in the article of the Mudawwanah which denies binding force to the marriage request (khuṭbah). This and other similar traditional ceremonies, such as the reading of the first chapter of the Quran (Fātiḥah), are considered simply exchanges of gifts, and both parties may change their mind up to the final

moment when the contract is legally signed, witnessed, and registered.

The rights and duties of the married couple are summarized in three articles. The organization of the household and the obligation of support are incumbent on the husband (unlike the Majallah provision which, carrying to the fullest the doctrine of equality of the sexes, requires the wife to contribute to the expenses of the household if she works or has means). But there are two innovations of traditional law: the duty of the husband to provide medical care for his wife if necessary, and the proviso that the support of the children must be assumed by the wife if she is wealthy and her husband indigent. And perhaps the most novel modernist right attributed to the woman is the opportunity given her to indicate in her marriage contract her intention to "engage in activities relating to the political affairs of the country."

It should be added that the wife maintains the right to her own property without any interference from the husband who "has no tutelary rights over her." (In traditional Mālikī law the wife could not dispose of more than one-third of her goods without her husband's approval during his lifetime, and it is to be assumed that the Code, by passing over this matter in silence, intends to follow tradition; here, as in many places, the vagueness of the text will have to be tested in the courts.) Finally, the wife retains the use of her own family name and is entitled to bring suit before the law in her own right.

Divorce. The Mudawwanah maintains a conservative approach to a question which increasingly preoccupies more and more of the younger Arab intellectuals. In contrast to the Majallah, which now provides for divorce upon the simple demand of one of the parties to the marriage and withdraws from the husband the right of unilateral repudiation, the Moroccan Code follows Mālikī teachings in permitting the dissolving of the marriage by repudiation (ṭalāq) on the husband's part. It also restricts the right of the wife to sue for divorce to a limited number of situations.

There are some restrictions on the husband's capacity to pronounce repudiation, however. The repudiation may not be plural, that is, he may not get rid of several of his wives at one time; it must be made on three separate occasions, the first two of which are revokable and are to be followed by fixed waiting periods; and the final separation is not definitive until after the expiration of the third period consecutive to the final pronouncement. Conditional repudiation ("You are repudiated if you do, or do not do, such-and-such"), often held in the past as a permanent threat over the wife, is forbidden. And a consolation sum (mu'ṭa) is instituted in favor of the wife who is unilaterally repudiated, the amount to be fixed by the judge taking into account the financial situation of the couple. Traditional law had heretofore considered the Quranic text on this subject as having only the force of a recommendation.

The causes for divorce on the wife's part are confined, as was traditionally was the case, to lack of support, abandonment, absence of the husband,

an oath of continence on his part, and physical cruelty. An important innovation in the Code is the required intervention of the judge in an effort to conciliate and the reduction of the role of two religious arbiters, formerly decisive, to that of simple observers or investigators. Furthermore, proof of repudiation is now required in the form of a document duly witnessed by two notaries. The judge is also obliged to inform the wife of the legal deposition of the repudiation statement, a step which promises to reduce the number of informal repudiations in which, as frequently happened in the past, the husband would simply tell the wife to pack her things and leave.

Among other items of importance which should be mentioned is the establishment for the first time of an age of legal majority, set at 21 full Gregorian years[6] for both sexes. The enjoyment of full civil rights is subordinated to arrival at the age of majority, plus possession of all normal mental faculties. Withal a certain order is introduced into the minority years by their subdivision into fixed periods: until the age of 12 the child is considered without discernment or understanding (tamyīz); from 12 to 15 he is regarded as incomplete in his capacity and his acts are subject to tutorial approval; from 15 to 18 he may receive a part of his property, for example, and exercise by way of experience the powers of a full adult; and after 18 he may legally obtain his emancipation (tarshīd), becoming in effect a provisional adult. The problem of minors had already been dealt with in the revised criminal codes in order to put an end to the scandalous situation existing under the protectorate where children as young as 8 years were found guilty of criminal or political (!) offenses and, in the absence of any special provision for their disposition, were sentenced to jail and held in indiscriminate confinement with adult offenders.

Inheritance. The final volume of the Mudawwanah is devoted to questions of succession. It repeats in general the provisions of classical law with the innovation that if an individual dies without heirs the State Treasury receives the estate as the recipient of "ownerless property" rather than acceding to the inheritance as a subsidiary heir ('aṣab), an adaptation from Western legal thought. The usual prohibitions on inheriting as the result of murdering a parent, illegitimacy, and such, are retained, as is, significantly, the difference in religion: the Muslim does not inherit from the non-Muslim and vice-versa.

A question remains as to whom the new Code is applicable. It applies de plano to all Muslim Moroccans who were previously subject to the

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6 The use of Gregorian years of 365 days, as opposed to a Muslim lunar year of 354-5 days, says something in itself of the consistent, pervasive influence of Western ways. The difference is important in some details of the law relating to the lapse of time which determines the legitimacy or illegitimacy of a child; a year is the maximum period allowed in the Moroccan Code, but it is not made clear in this particular situation which year is meant.

sharī'ah or to customary Berber law before it was abolished. Moroccan Jews continue to be governed by their own laws of personal status. But the decree promulgating the new Code of Moroccan Nationality states that the Code of Personal Status applies to all nationals except Moroccan Jews, and thus to foreigners who now have, for the first time, the possibility of becoming naturalized Moroccans. For these Moroccans, neither Muslim nor Jewish,[7] however, certain features of the code are voided, e.g., they are not permitted plural wives, the right of repudiation is denied, and divorce may be legally pronounced only after an unsuccessful attempt at reconciliation has been made. In case of conflict the law of the husband or the father prevails, and as we have seen above, he will almost always be a Muslim.

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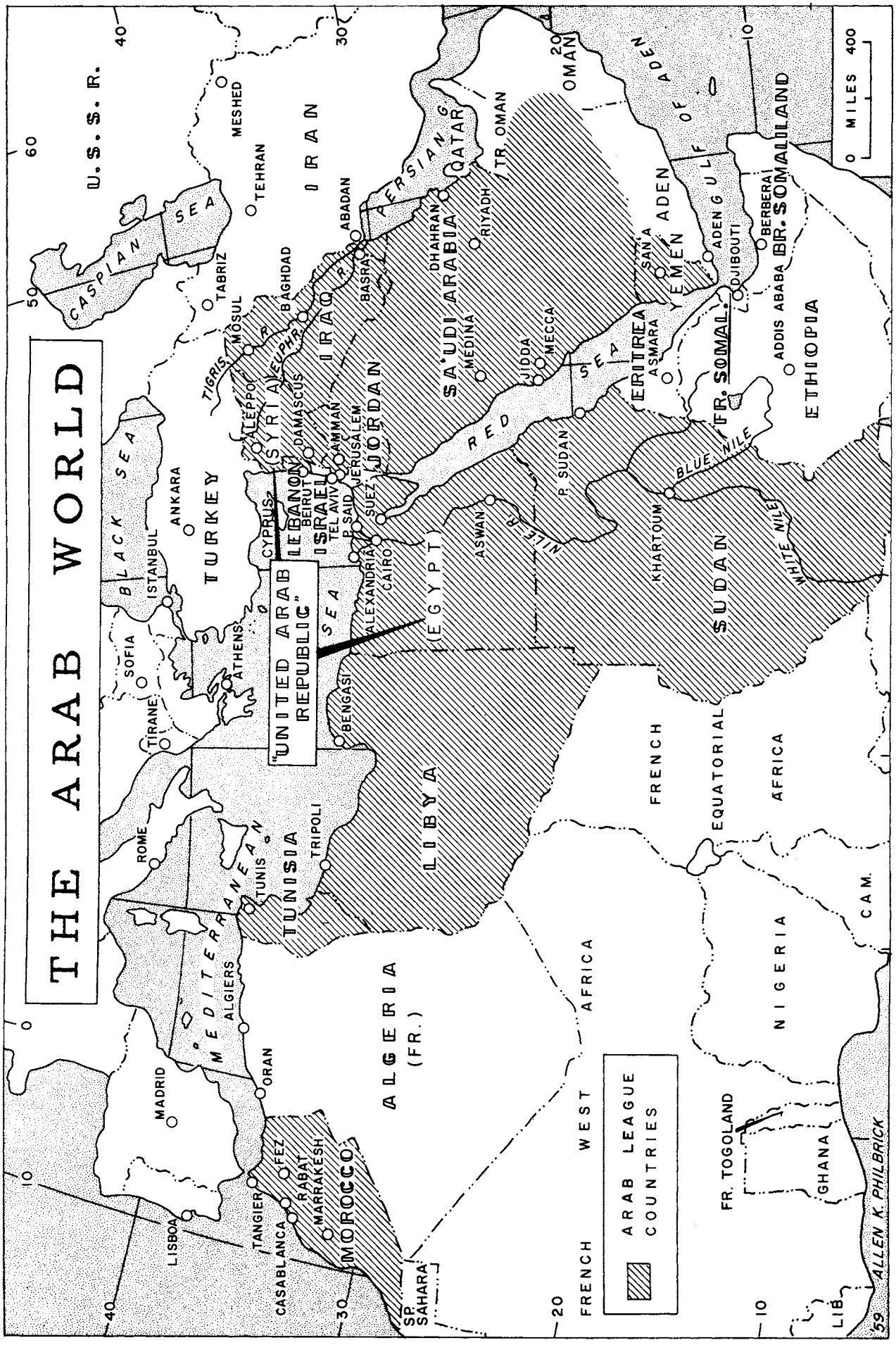
The above brief description of the Mudawwanah demonstrates the conservative nature of representative Moroccan thought. The cautious infiltration of the sharī'ah, the effort to begin reform while still clinging to past values, and the renewed confessional emphasis which are all found in the Code represent the timidity with which traditional leaders approach modern social problems. Their conservatism is shared to a greater extent than might be supposed by large numbers of the rural masses and many in the cities who look upon themselves as members of a vast family, of an equally religious and national character, watched over by a paternal ruler.

But there exists also a restless, modernizing lower-middle class in the urban areas who give every sign of looking for dynamic leadership and solutions, and who are being successfully appealed to by those who say that the social and economic revolutions which will round out the political revolution have yet to come. The gap between tradition and innovation within the society seems to be widening at the moment; the partisans of these two tendencies are finding it harder to speak a mutually comprehensible language.

Morocco is, in the words of its Prime Minister, "a modern country inhabited by people living mainly in the Middle Ages." The new Code illustrates this within one institutional framework and points up the length of the road ahead.

Charles F Gallagher

7 This limited category is restricted, even in theory, to a small number of Christian Arabs from the Middle East, a handful of long-time European residents of Morocco, and some refugees, either from the Spanish Civil War or from the displaced persons camps in central Europe, who came to Morocco as stateless persons and did not take French citizenship under the protectorate.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