

"Family Laws and Citizenship"

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Sociological and political studies have clearly shown the close relationship between the emergences of States, or as one might say states of law, and the emergence of the Citizen, in other words an independent individual, emancipated from any guardianship.¹

The formation of States in the Arab world has been intimately bound up with the demands for national liberation and the calls for independence. It has concerned itself very little with any claim for equal status for women, who have often continued to suffer from a subordinate status.

However, the relationship between the status that an individual - man or woman - may have with regard to the private sphere is closely related with the status that he or she enjoys in the public sphere. How, indeed can a citizen - of whatever sex - be asked to be responsible for the affairs of the city, to take responsibility for the health of the planet, to regulate public affairs, if their ability to do so is hampered by a limitation of capacity and an inequality of opportunities which may start right in the early years of childhood or even before birth?

The relationship between the laws governing the family, known as family law, and citizenship becomes even closer when we observe that:

1 - Certain Arab constitutions refer directly in their actual wording to the laws on the family or to the code of personal status, recognizing thereby that these laws deserve the highest protection in the hierarchy of legal

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instruments. The very fact that these laws are called personal STATUTES reminds us by sound that this legal text gives a particular STATUS to the members making up the family. We note this also in ...

2 - The fact that the International Covenant on Civil and Political Rights (1996) emphasized this relationship between rights relating to the private sphere and those relating to the public sphere. Indeed, numerous articles stress that the family is a fundamental component of society deserving of protection both by the State and by Society. Furthermore, a large proportion of the pronouncements by the international Committee set up on the basis of the Covenant have to do with violations of the fundamental principles of liberty and equality as they relate to family laws.

3 - While it is true that the concept of personal status in the Muslim states has arisen directly from Islamic law, there is a need to agree on what lies behind this concept. One must not forget the impressive wealth of doctrine established by the *fuqaha* [Islamic jurists], nor the immense and varied output of the theological and legal schools (*madhahab*), with all that is implied thereby in terms of divergence and evolution over time and from place to place.

We will attempt throughout this paper to be as pragmatic as possible, giving illustrations drawn from the corpus of the positive laws of six Arab countries dealing with family law and in our view bearing a clear relationship with the citizenship of the six countries selected. The countries are Tunisia, Algeria, Morocco, Kuwait, Yemen and the Sultanate of Oman. These countries were chosen on the one hand because they all have legal systems of positive law, and on the other hand because they demonstrate the extent to which even closely-related systems can differ, according to the varying way in which political and judiciary matters may be handled in a given system. It is evident that the political will of the Arab countries largely explains the

¹ *Mounira Charrad: "States and Women's Rights: The Making of Post-colonial Tunisia, Algeria and Morocco," Berkeley, CA: University of California Press, 2001*

different ways in which the laws relating to family relationships have developed.

We shall examine four levels of legislative action: entry into marriage, relationships during marriage, the ability to divorce and relationship with children.

I - Entry into marriage

We should make a comparison with the legislation on elections. When a citizen is asked to vote, he or she is asked to do so with a personal and independent consent. It is the actual individual - man or woman - who expresses an opinion to choose his or her candidate, irrespective of what electoral system is on offer. The majority of the Arab countries recognize this right to vote for both men and women (except for Kuwait and Saudi Arabia), even in those cases where the constitution generally refers to the citizens in a more abstract way, without stipulating any reference to their sex.

However, in certain Arab countries these same female citizens, who are allowed to choose their political representatives, are not allowed to express their consent to their own marriage, to their becoming part of a couple and of a new family. In other Arab countries, their consent is not sufficient on its own, but has to be ratified by the consent of a guardian; and he, in turn, has to come from the agnatic family (father, brother, paternal uncle, male cousin, etc.).

Paragraph 3 of Article 23 of the 1966 International Covenant on Civil and Political Rights, however, states that "no marriage shall be entered into without the free and full consent of the intending spouses."

Let us look at the position of the Arab countries:

Tunisia

The full and free consent of a girl of the age of majority is required for a marriage contract to be created. Indeed, Article 3 of the Code of Personal Status of Tunisia stipulates for persons of competence and of the age of majority that "marriage is formed only by the consent of the two spouses." The same does not apply where the girl has not yet reached the age of 20. In the reform of 1993, the legislature succeeded in maintaining the appearance of attachment to the institutions of Islamic law, in that the new

wording of Article 6 of the Code of Personal Status makes such a marriage subordinate to the consent of the guardian who is defined by Article 8 of the same code as "the closest agnate relative" with an express provision that this relative has to be male.

This primacy given to the paternal line seems in flagrant contradiction not only with the scattering apart of the agnatic family but also with the social and customary reality of the involvement of mothers in the marriage of their children, even when the latter have reached the age of majority. But the modern choice of Tunisia plays a role, too, and the concept of "the child's best interests" has caused the legislature to offset this ascendancy of the father and of the male agnatic relatives by the condition, laid down in 1993, that the agreement of the mother had to be obtained in order for the marriage of her minor child. The father, or the agnate relative, would therefore have to come to terms with a refusal by the mother, which would have the effect of nullifying his consent. The veto on the marriage of the minor child is no longer in the hands of the father, as the head of the family; because since this reform the mother too has the right to oppose it. However, this right of veto can hardly be considered as synonymous with perfect equality between the two parents: while in the event of decease or incapacity of the mother, the father, as the head of the family, can give his consent on his own to the marriage of his minor child, if the father should die or become incapacitated the mother then has to obtain the consent of the closest agnate relative.

But where the minor child is convinced of the rightness of his or her own choice, is he or she then condemned to submit to vetoes which may prove to be messages of scorn and settlements of scores aimed at the spouse, rather than real views taken on the marriage itself?

The legislature did not wish to leave such a situation subject to the overriding opinion of the father as the head of the family, and instead, in paragraph 2 of the new Article 6 of the Code of Personal Status, placed the matter under the authority of a judge, who is required to resolve the disagreement between the mother and the father by an order.

Algeria

Article 11 of the Family Code of 1984 states that: "the conclusion of marriage for a woman falls to her guardian," but, with two additional aspects:

Firstly, the power of the guardian is placed under the supervision of a judge, since Article 12 stipulates that “the guardian cannot prevent the marriage of the person placed under his guardianship, if the person wishes it and if it is to the benefit of the person.”

The second aspect arises from the abolition by Article 13 of the *jabr*, in other words the right to impose marriage. The guardian can no longer compel a woman to marry against her will. This is a somewhat skewed advance in the law: the guardian is no longer able to compel, but obtaining his consent is still obligatory, which means in fact that the wish and the consent of the woman are necessary but are not sufficient on their own to allow her to marry.

Morocco

A rather similar situation is found in Morocco. The *moudawana* [traditional law] of 1957 contains an Article 5, which was modified in 1993, abolishing the right to impose marriage. But the matrimonial guardianship is still in existence, whatever the age of the girl to be married.

Kuwait

Law no. 51 of 1984 lays down the principle that the consent of the guardian is required as a prior and strict condition for the marriage to be valid, in the case of a woman up to the age of 25 (Article 29).

After the age of 25, and in the case of widows or divorced women, Article 30 stipulates the condition that the guardian must still be involved and thus must still give his consent, but there is an innovation in that the personal consent of the woman is also required, in addition to that of the guardian.

Yemen

Article 16 of Law no. 20 of 31 March 1992 concerning personal status cites the guardians, all agnate relatives. But Article 10 requires “in addition to the consent of the guardian, that of the woman and of the man.” This means that the consent of the future wife is necessary although in itself insufficient.

Sultanate of Oman

The new law of 4 June 1997 dealing with personal status also organizes the institution of the guardian among the relatives from the male line (Article 11). But in a sign of progress, the consent of the future wife is also required. This means that the consent of the guardian is no longer sufficient on its own to conclude the marriage. Nor is he able any more to compel a woman to marry, the right of *jabr* having been repealed. But on the other hand the woman cannot marry without the consent of the guardian.

An additional aspect is that, if the guardian refuses to give his consent, it is possible to appeal to a judge (Article 10).

Comments

We will make three comments on these different statutes:

The first is that these statutes remain bound to an interpretation which is more related to a patriarchal custom than to traditional Islamic law, which stresses the importance of consent and of the wish of the young people to be married².

Further, the Hanafite rite accepts that a woman who is of the age of majority and competent can marry without a guardian.³ This is the position followed by the legislature of Tunisia.

The second comment is that all of these statutes are encountered in a modern corpus, in other words codes and laws voted on by Parliament. They draw on the views of the scholars of today, rather than those of the past, to interpret these textual passages. And all of the statutes represent, to differing degrees, progress relative to the former state of the legislation in the majority of the countries under examination here. Thus, for example, all of these statutes have abolished the right to impose marriage.

² See for example Muhammad Sa'id al-Ashmawi: "Asud al-Shari'a" [Foundations of Shari'a]. Cairo: Dar Madbouli, 1983. Pages 99-101.

³ Muhammad Abu Zahrah: "Taareekh al-Madhaahib al-Islamiyyah" [History of Islamic Doctrines], undated, pamphlet 142. Cairo: Dar al-Fikr al-Arabi. Page 386.

The third comment applies equally to all of our examples. It is that these statutes have not escaped having comments made on them by the international Human Rights Committee set up on the basis of the International Covenant on Civil and Political Rights, which reminds states of the importance of the full and free consent of men and women to the contracting of marriage, and which also recalls that the states owe it to themselves to guarantee the exercise of that right on conditions of equality. The Committee then analyses the issues and adds that the age for marriage itself should be laid down according to the same criteria. These same observations are also made by the Committee set up by the CEDAW, even though these committees do not make the connection with citizenship.

The committee set up on the basis of the International Covenant on Civil and Political Rights recalls that in Kuwait, the age for women is still 15 whereas it is 17 for men. We may note that the new statutes in Yemen and Oman adopt the same criteria for future spouses of either sex, without discriminating between them (15 years of age for Yemen and 18 for Oman). That is proof, if any were needed, that this is a question more of tradition than of religion and that things can change.

II - During marriage

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) puts forward a family model founded on equality between husband and wife, the model known as the associative family. The duties and obligations of the two spouses are shared, and there is no head of family designated by the law. The great majority of Arab countries have repudiated this model and issued reservations on the relevant articles of the Convention.

It can be said that everywhere in the Arab countries, although to differing degrees, the legislators have stipulated the pre-eminence of the husband as head of the family, both with regard to the wife and with regard to children.

Tunisia

The legislature has simply followed the evolution of the modern Tunisian family which has changed from the patriarchal, authoritarian model

based on the omnipotence of the father, to the paternalistic⁴ model in which the powers of the head of the family have been weakened and in which the obligations arising out of marriage have become more bilateral.

In this pattern, the legislature advanced by successive steps, which had a fairly direct effect. Thus, the husband has never had the right to offer violence to his wife, and whenever he has done so has come up against Articles 218 and 316 of the Criminal Code, and against the fact that such violence constitutes a misfeasance which may be grounds for divorce granted against the husband, as provided for in the second paragraph of Article 31 of the Code of Personal Status. The dissuasive power of the husband thus found itself deprived of its most threatening weapon, conjugal violence, which was against the law.

By consequence, the submission which Article 23 of the Code of Personal Status imposed on women in 1956 was already significantly diminished, in that there was no longer any question of the woman being inevitably left to the whims of the husband, with his wishes representing commands for her, since now the obligation is placed on him to treat her well.

Next, the legislature of Tunisia decided in 1993 to delete any reference to the obligation of obedience from Article 23 of the Code of Personal Status, thus taking account of the upheavals which there have been in patterns of living, and the repercussions of these upheavals on costumes and usages.⁵

⁴ *Monia Ben Jemia: Le jeu de l'ordre public dans les relations internationales privées de la famille; Thesis for State doctorate in law; Faculty of legal, political and social sciences, Tunis. 1997. Page 239.*

⁵ *It has been shown by a major social survey carried out in 1993 that almost 55% of the persons polled state that the woman no longer obeys her husband. Additionally, one sociologist has pointed out that the higher level of education of the mother, "the more she will express opinions calling for an active and positive role for women." See Aziza Darghouth Medimegh: La famille tunisienne entre modèles et réalités. In "Structures familiales et rôles sociaux." Proceedings of the symposium at the Institut*

Additionally, a marriage which respects equality between the sexes implies a whole set of obligations which bear equally on the man and the woman, and which can be summarized as honesty, fidelity, cohabitation and maintenance. However, the result of this is not that the situations of men and women within the Tunisian family are interchangeable, because this bilateralization of the obligations sometimes does not entail equality between them. Consequently, a distinction has to be drawn between two types of obligation: some of them have been made perfectly bilateral and thus entail perfect equality between husband and wife, whereas others have been made less than perfectly bilateral and underlie a latent sexual discrimination.

Such complete bilateralization has its origins in what some sociologists have called the sentimentalization of family relationships,⁶ with the relationships founded on oppression and obedience being replaced by relationships based on shared feelings⁷ and reciprocal compassion. This applies not only to the obligation to give honesty and fidelity but also to the obligation to cohabit, even though the latter does also have a material aspect to it.

It is certainly not the case for the obligation to provide food, for which the Article 40 referred to above may act as a paradigm. Because this allows the wife to petition for divorce if the husband absents himself without ensuring a supply of food for her, disregarding her personal income which may be amply sufficient to meet her material needs. Article 39 of the same code also places on the head of the family the obligation to provide subsistence, since it allows a wife to obtain a divorce from a man who is indigent and whose economic difficulties last for more than two months.

These two related statutes undoubtedly arise out of Islamic law, which bases its intransigence with regard to the husband's execution of the

supérieur de l'éducation et de la formation continue. Tunis 3-4 February 1994. Editions C.é.r.é.s. 1994. Page 46.

⁶ *Jean Kellerhals, Pierre-Yves Troutot, Emmanuel Lazega, Lucila Valente: Microsociologie de la famille. Paris, Editions Que sais-je. Page 99.*

⁷ *Paolo Zatti and Giovanni Iudica: Italian Report. In "Les Groupements," Travaux de l'Association Henri Capitant des amis de la culture juridique française. Volume XLV 1994. Paris L.I.T.E.C. 1994. Page 241.*

obligation to provide food on two intimately interconnected reasons: firstly, the husband owes food to the wife, because she dedicates herself to the home on his account and on account of his children “احتباس,” and secondly because the authority of the husband “قوامه” and his pre-eminence “درجة” over his wife are dependent on his attending to her material needs, according to the Koran itself.⁸ But is it not a fact that the woman has long been active in the domain of remunerated work outside the conjugal home? And wasn't the obligation of obedience, which applied to her on the basis of the pre-eminence of the man, abandoned at the time of the reform of 1993?

The existence of these statutes can thus only be interpreted as reminiscences of an outdated conception of the conjugal relationship, a conception which in any event is inconsistent with the one which now arises from the new drafting of Article 23 of the Code of Personal Status, since this version now states clearly that "the woman must contribute to the expenses of the family if she has resources." Which is equivalent, from a doctrinal point of view, to "opening a breach in the supremacy of the husband,"⁹ because even if the reform of 1993 maintained the idea of the maintenance owed by him, the idea of sharing is introduced. This idea was not a revelation for Tunisian society, which for a long time had been familiar with the idea of a woman contributing to the expenses of the household, although she often did so in the shadow of her husband in order to preserve an appearance of authority for him as the head of the family.¹⁰

Algeria, Morocco, Kuwait, Yemen and Oman

In **Algeria** and **Morocco**, the woman is required to be faithful, to obey in accordance with the proprieties; and to breast-feed, if possible, the children of the marriage.

The *moudawana* of **Morocco** (Article 36) even stipulates that this deference is due to the father, mother and close relatives of the husband. The same applies in Algeria (Article 39).

⁸ *Zaki ud-Din Sha'ban: "Al-Ahkam al-Shari'a lil-Ahwal al-Shakhisyia" [Shar'ia Rules on Personal Status], second edition, Libya, 1971. Page 316.*

⁹ *Soukeina Bouraoui: Réformes juridiques et relations familiales. R.T.D*

¹⁰ *A. Darghouth Medimegh: Op. cit. Page 48.*

This same duty of obedience is also found in **Kuwait**, enshrined in Article 87 of the law of 1984.

In all cases, also, the obligation to maintain the family is made exclusively an obligation of the husband related to his being the head of the family, and to the obedience which is due to him. (Article 37 of the **Algerian** code, Article 74 of the **Kuwaiti** law, Article 41 of the **Yemeni** law, and Article 49 of the **Omani** law).

However, here too changes can be glimpsed in the different Arab countries.

Article 89 of the **Kuwaiti** law does not consider it to be a case of disobedience if the woman goes out for legitimate work.

Likewise, she does not need the authorization of her husband to make her pilgrimage to Mecca.

In **Yemen**, the duty of obedience is referred to, but Article 40 stipulates that the husband cannot prevent his wife from going out for a legitimate reason. One may note that the legitimate reasons for going out include the management of her own assets, work and visits to her parents.

The law of the **Sultanate of Oman** stipulates that the duty of obedience does not deprive the woman of the right to visit her parents and to keep her maiden name.

Comments

1 - The distribution of the rights and obligations between the spouses continues to operate on the traditional model, but with certain changes which are precursors of other more important modifications.

This is the case for the right to go out to work or in order to visit the family, now considered to be a legitimate right.

This relates to a fundamental principle which is considered constitutional in many Arab countries and is confirmed by the International Covenant on Civil and Political Rights, namely the freedom to move around, to choose one's residence, and to leave one's domicile or even one's country.

The international Committee, aware of the importance of these rules as they relate to citizenship, has requested States to provide it with the necessary information "on laws and practices contrary to women's freedom of movement," including those concerning "the authority of the husband over

the wife" or "the parental authority over adult girls" and to report to it on the measures taken to eliminate those laws and practices and to protect women against their effects, including the domestic recourses available.

2 – In several of the countries under examination, the duty of obedience is beginning to atrophy. Certain countries have even seen the beginnings of a trend towards making the obligations from marriage bilateral, which appears to be the price to pay for trying to make conjugal relationships emerge from the logic of domination and trying to bolster the democratization of the family.¹¹ Such a democratization will require objective markers to be put permanently in place, in order to form unbreakable boundaries both on the prerogatives exercised by the head of the family and on the claims and expectations of the members of it. In fact, the traditional family is being doubly undermined by modern-day changes in human rights and by the growing individualization of our societies. It is necessary to take note of an evolution which it is impossible to conceal, namely that the interests of the family are no longer solely in the hands of the head of the family, solely empowered to shape them and solely authorized to invoke them. The concept has undergone a profound mutation, now representing the association of interests¹² embodied by the modern family, which now stands more than ever for a natural society founded on marriage.¹³ This society needs everyone to make his or her contribution, and requires that everyone should find in it a space for his or her personality to bloom. And if sacrifices are still necessary, in the future they will have to be made by all the members of the group, without being allowed to go so far as to infringe on the fundamental rights of the human being.¹⁴ It is on the basis of reference to these fundamental rights that violence against women can

¹¹ *Lilia Ben Salem: La famille en Tunisie: Questions et hypothèses. In Proceedings of the symposium at the Institut supérieur de l'éducation et de la formation continue, op. cit. Page 24.*

¹² *Dominique Goubau: Canadian Report. In "Travaux...", op. cit. Page 203.*

¹³ *Article 29 of the Constitution of Italy protects the family as "a natural society founded on marriage."*

¹⁴ *P. Zatti and G. Iudica: Op. cit. Page 243.*

neither be considered as an action with any justification, nor an attenuating excuse, and must be penalized.

3 - It should be remarked in particular that once the family is no longer subject to the judgement and the full powers of the man alone, it is the judge, and thus the judiciary, which becomes the arbiter of conjugal disputes.

This turning of family matters into legal matters is a necessary stage in the creation of states of law, but it requires on the one hand that attention be paid to the training of the judiciary, and on the other hand that this training not be closed to women. In many Arab countries, in fact, the national legal service is still closed to women "owing to their lack of ability to judge with discernment." However, it is to women that we entrust the bringing-up of children, the citizens of the future, and it often also women to whom young children are entrusted in the event of divorce.

III – Divorce

This is the undoing or dissolution of marriage. This ending of a union which, for one reason or another, is imposed rather than being lived, has been recognized by all of the legislatures of the countries under examination here. The different cases of divorce are listed by the legal codes of those countries:

Tunisia

Article 31 of the Code of Personal Status provides that "The court will pronounce divorce:

- 1) in the event of mutual consent of the spouses;
- 2) at the request of one of the spouses on the basis of the harm that he or she has suffered;
- 3) at the request of the husband or of the wife."

The 4th paragraph stipulates that the court will decide "on the compensation for the material and moral harm suffered by one or the other of the spouses and resulting from the divorce pronounced in the two latter cases."

Algeria

Article 48 of the code of 1984 states that divorce "occurs at the wish of the husband, by mutual consent of both spouses or at the request of the wife." In this latter case, the Algerian code makes a distinction between two

situations: if the wife is making reference to a case of harm she has to support her petition by one of the cases listed in Article 53 of the same code; but if she wishes to separate from her husband without claiming a case of harm, Article 54 stipulates that this *khol'a* [divorce by a woman] is implemented “against compensation,” the level of which is either established by mutual accord or, in the absence of agreement, determined by the judge on the basis of “the value of the dowry at the moment the judgement is pronounced.”

Morocco

Article 44 of the *moudawana* as modified in 1993 defines divorce as being a dissolution of the marriage by the action of the husband or of his agent. The only action of the judge under Article 48 is to take note of this unilateral decision of the husband and to attempt to dissuade him from it, within an attempt at conciliation. Additionally, pursuant to Articles 25, 53, and 58 of the *moudawana* divorce can occur by a decision of the judge in the event of a failure by the husband to fulfil his obligation to maintain the household, of a disavowal of paternity, or of a refusal to engage in sexual relations for a period exceeding four months.

Kuwait

Articles 97 and 98 of the Code of Personal Status of 1984 stipulate the principle that the power to pronounce divorce is held by the husband. This power can be delegated by him on a voluntary basis to an agent. The husband can also be obliged to delegate this power to the judge who is to decide on a divorce on the grounds of harm suffered by the wife. Articles 120 to 138 list several cases of harm which can be grounds for an action for divorce by the wife, including failure by the husband to meet his obligation to maintain the family or refusal to have sexual relations for a period of four months.

As for the *khol'a*, this has been regulated by Articles 111 to 119. Pursuant thereto, this form of dissolution of the marriage requires both spouses to be in agreement as to its appropriateness and as to the amount owed by the wife. However, Article 116 transforms this *khol'a* into divorce on the grounds of harm and deprives the husband of any compensation, if the wife can prove to the court that he mistreated her in order to force her to take recourse to the *khol'a*.

Yemen

The law on personal status of 1992 covers the cases in which the woman can request dissolution of the marriage on the grounds of harm in its Articles 49 to 55, relating to terminations. Article 60 lays down the principle that divorce has to originate from the husband or his agent, but Article 71 allows a judge, if he detects an abuse on the part of the husband in his exercise of this right, to grant compensation to the wife calculated on the basis of the living expenses of a comparable woman for one year. In accordance with Article 73 the *khol'a* requires the mutual consent of the spouses.

Sultanate of Oman

Article 82 of the 1997 law on personal status states that repudiation originates with the husband or his agent. In accordance with Article 89 this repudiation can occur without involvement by a judge and can be proved either by confession or by reports from witnesses. In such a case, under Article 91 the repudiated wife must receive an amount of compensation set by the judge in accordance with the resources of the repudiating husband. As for the *khol'a*, Article 94 states clearly that it requires the agreement of both spouses and the payment of an amount of compensation by the wife. Finally, pursuant to Article 98 ff. the divorce on the grounds of harm or irreconcilable disagreement has to be decided by the court and may give rise to compensation calculated on the basis of the dowry.

Comments

1 – Apart from the case of Tunisia, it has to be pointed out that over and above the differences in the name given to the right of the husband unilaterally to dissolve the bonds of marriage, any involvement of the judge in an attempt at conciliating and re-establishing dialogue between the spouses is frequently non-existent or insignificant.

2 – The ability to dissolve the marriage unilaterally is not given to the wife. Consequently, with the exception of the Tunisian code, the situation is far from one of bilateral rights and obligations or interchangeable situations in the event of divorce. This places the majority of the countries under examination here in a position of non-compliance with Article 16 of the

Convention on the Elimination of All Forms of Discrimination Against Women, which call for women to have “the same rights and the same responsibilities [as their husbands] during marriage and upon its dissolution”.

3 – The *khol'a* undeniably represents a form of divorce based on the mutual consent of the spouses, giving them the possibility of taking the harsh feelings out of the dissolution of the marriage and basing it on an agreement which places the man and the woman on an equal footing for dealing with the failure of their life together. That does mean a change in attitudes, real pillars of the interpersonal relationships in the family.¹⁵

The recognition of *khol'a*, or of an equivalent form of divorce in the countries under examination here, reveals the existence of a genuine “conjugal working together” impacting societies¹⁶ in those countries which, to differing degrees, are starting to be tugged between the wider patriarchal family of yesterday¹⁷ and the more egalitarian and more conciliatory family of tomorrow, a family that will more fully embody the true values of citizenship.

IV - Relationship with children

The functions of protection against need and against harm coming from the outside, as well as those of guaranteeing successful integration into social life, based on the creation of a balanced personality,¹⁸ are causing

¹⁵ L. Blili: *Op. cit. Page 80; Relatedly, see also: A. Darghouth Medimegh: Op. cit. Pages 55 à 57.*

¹⁶ Dorra Mahfoudh-Draoui: *Traditionalisme et modernisme conjugal dans la famille tunisienne. In Structures familiales et rôles sociaux. Proceedings of the symposium, op. cit. Page 88.*

¹⁷ Aziz Krichen: *La place du père. In the proceedings of the symposium: Famille et société en Tunisie, organized by the Office national de la famille et de la population, Tunis, 10 December 1993. Page 28.*

¹⁸ *In fact, the varying degrees of social integration are due to mankind's upbringing, with the most profound coming from the family. See on this idea Khemais Taamallah: Evolution de la famille tunisienne à travers quelques indications sociales. In Proceedings of the symposium at the Institut supérieur de l'éducation et de la formation continue, op. cit. Page 89.*

parents' prerogatives to be placed increasingly under control. It is because of those functions that those prerogatives should relate rather to "functions ordered for the wellbeing of the child"¹⁹ than to rights. The legislatures covered by this paper have indubitably been tugged between the rigid precepts of Islamic law and the flexible criterion of the interests of the child.

Tunisia

The wave of innovation took Tunisia along a path laid down by the concept of the interests of the child. This concept was initially enshrined in the reform of 3 June 1966, which made those interests the only criterion governing assignment of the physical custody of the child, and was consolidated by way of the reform of 18 February 1981 under which legal guardianship was automatically transferred to the mother in the event of death of the father. But it is only since the ratification by Tunisia of the United Nations' 1955 Convention on the Rights of the Child, and the promulgation on 9 November 1995 of the Code on the Protection of the Child, that the interests of the child have turned into a constant of the legislation, one that cannot be bypassed. Since then, this concept has been able to ease its way into family law, nibbling away at the prerogatives of the father to the benefit of the mother.

Thus, since the reform of 1993, Article 23 of the Code of Personal Status has called for joint involvement of the parents in bringing up the children and managing their affairs, including those relating to education, travel, and financial transactions. The importance of this statute is obvious, in that rather than making children's upbringing and the management of their affairs the exclusive responsibility of the father as the head of the family, it also involved the mother in this framework. Thus it took into account a social reality which had become more and more evident and which ultimately was enshrined on the level of the responsibility of the fathers and mothers for their minor child, a responsibility which was made joint in accordance with Article 93 bis of the Legislative Code. This joint responsibility²⁰ can in no sense be interpreted as a balancing of the powers of the married couple over their offspring, since the father remains the head of the family who

¹⁹ *J. Carbonnier: Record of a judgement of the regional Court of Versailles of 24 September 1962. Dall. 1963. Page 54.*

fundamentally has the last word relative to the mother, who only enjoys a right of oversight over the upbringing of the children.²¹ It seems, rather, to derive from a degree of concern on the part of the legislature to favour the interests of the child who will benefit from the joint involvement of his or her parents in carrying out the tasks which formerly belonged to the head of the family alone.

In order, additionally, to preserve the interests of the child at risk in the event of death or incapacity of the father, the legislature in 1981 modified Articles 154 and 155 of the Code of Personal Status, to bring about the automatic transfer of the legal guardianship to the mother in such a situation, thereby infringing the rules of Islamic law which prescribe the transfer of the *wilaya* [guardianship] to the closest male relative in the agnatic family. The mother automatically becomes the legal guardian in the event of death or incapacity of the father, the head of the family, since she is then promoted, by virtue of this situation alone, to the position of head of the family responsible for the management of all of the family's affairs. And if the mother consequently manages the affairs of her children, she does so, in fact, by virtue of her new functions and not in her capacity as a mother.

The situation is very different in the event of divorce, because then all the ingredients are in place for the physical custody and the *wilaya* to be opposed in terms of implacable conflict.

Setting out from the starting point under Tunisian law of a hermetic partitioning between the physical custody "حضانة" attributed as a priority to the mother and the cognatic family, and the paternal authority "ولاية" which belongs to the father and the agnatic family,²² the solution was to reach an interaction between them in accordance with the interests of the child. It was the responsibility of the mother to take on the purely physical care of the child in the sense of raising him or her on the material level; whereas

²⁰ D. Goubau: Op. cit. Page 205.

²¹ S. Bouraoui: Op. cit. Page 195.

²² Ummar al-Daudi: "Al-Wilaya 'ala Nafs al-Saghir" [Paternal Authority over Children]. *Mudhakkara li-Nil Shahadat al-Darasat al-Mu'ammaqah fil-Qanun al-Kass al-Aam* [Notes from

responsibility for general guidance fell, under the former Article 60 of the Code of Personal Status, to the father who was the child's legal guardian, was the only one empowered to nominate the child's testamentary guardian, consent to the child's marriage, or even consent to his or her adoption in accordance with Article 13 of the law of 4 March 1958. This pointed up a marked dissociation between the *hadana*, an institution of natural law, and the *wilaya*, an institution of civil law.

However, the interaction between the two institutions was clearly laid down by Article 54 of the Code of Personal Status which defined the *hadana* as the activity of raising the child and ensuring his or her safety in the home, thereby considerably broadening the content of the concept. This broadening took effect on a considerable scale only with the reform of 12 July 1993, which conferred on the mother with the physical custody prerogatives closely similar to those of the *wilaya* attributed to the father. This came about in that the new wording of Article 67 of the Code of Personal Status transferred to her the responsibilities relating to the child's travel and studies and to the management of his or her financial accounts.

One sees here a change in the balance of the relationships of the father and the mother with respect to the child, in favour of the mother. To reach this goal, the legislature drew from the *wilaya* certain prerogatives which it then assigned to the mother as the holder of the *hadana*. It thus became possible to turn the *hadana*, restricted under Islamic law to material responsibilities, and limited to children of a tender age, into an institution which remains valid until the child reaches 18 and which can now, given the prerogatives which it confers, oppose or even invalidate the *wilaya*. This parallel power given by the *hadana* was conferred on the mother only with the intention of more firmly securing the interests of the child.

The widened *hadana* is thus far from being thought of in terms of rights of the mother relative to the father as head of the family, and should be seen rather in terms of resources granted to the mother to enable her to operate in the interests of the child. Taking those interests very seriously, the wording of Article 67 of the Code of Personal Status sets out to make a point

in listing the cases where the *wilaya* of the father may be eliminated, and applying it, in fact, to any factor which might jeopardize the interests of the child.

The bases of a new approach to the family-child relationship thus seem to have been laid for the future. Article 67 of the Code of Personal Status has revealed the sole criterion, of which the various cases that it lists are only specific applications, which the judge has a duty to put into practice in all those cases where he is obliged to dispossess the father of all or part of his paternal authority. The interests of the child have thus become, since the reform of 1993, the criterion by which the extent both of the paternal *wilaya* and of the maternal *hadana* is measured.

Algeria

Article 62 of the code of 1984 adopts a broad conception of the *hadana* which encompasses “the upbringing and education of the child.” These are prerogatives deriving, under Islamic law, from the *wilaya* exercised by the father. Articles 64 and 65 appear to enshrine the rigid rules of Islamic law with regard to the classification of the persons to whom physical custody could be assigned, and the age at which such custody ends. The concept of the interests of the child is starting, however, to appear in these two statutes, introducing a degree of flexibility, since Article 64 obliges the judge to grant physical custody, in the event that none of the persons listed and classified is extant, “to the persons most closely related, in order to best serve the interests of the child.” Also, Article 65 states that “account will be taken, in the judgement which terminates the physical custody, of the interests of the child.” However, it is Article 63 which, in our view, enshrines the tacit but clear involvement of the concept of the interests of the child, by granting to the mother the attributes of the *wilaya* of the father, in the event of “abandonment of the family by the father or of disappearance of the father,” for the period preceding the divorce judgement.

This concept also underlies several provisions concerning the *wilaya*, such as Article 87 which causes it to revert automatically to the mother in the event of the death of the father and Article 92 which allows the testamentary guardian to exercise his prerogatives only in the event of death or incapacity of the mother. The interests of the child also explain the provisions of Articles 88 and 89 which set up judiciary control over any actions taken by

the guardian relating to the assets of the child. Additionally, Article 90 makes allowance for a conflict of interests between the guardian and the child and thus conceives of interests of the child which diverge from and are independent of the interests of the father or the mother.

Morocco

Article 109 of the *moudawana* incorporates the distinction made in Islamic law between the *wilaya* of the father and the *hadana* of the mother, defining the latter very restrictively and limiting it to the material tasks of feeding, bodily hygiene and clothing of the child. The *moudawana* on personal status does not establish judiciary control over the actions taken by the father with regard to the possessions of his child. It seems to find sufficient the provisions of Article 11 of the *moudawana* on obligations and contracts, which makes such actions of disposal, by any and all guardians, with respect to the assets of the child under his guardianship subject to prior authorization by a judge.

It is however possible to see in several provisions that some consideration is given to the interests of the child independently of the interests of the guardian. Thus, for example, Article 150 of the *moudawana* on personal status makes the father subject to a stricter judiciary control in the event that he is poor and if the judge fears that he will usurp the child's assets. Similarly, Article 88 of the criminal code provides for the elimination of the *wilaya* in the event that the holder of it is sentenced to imprisonment for a crime or offence perpetrated against the person of a minor.

Kuwait

The law on personal status of 1984 generally ratified the distinction between the *hadana* of the mother and the *wilaya* of the father, as conceived of in Islamic law. Article 189 establishes an immutable order by which the *hadana* can be passed on, while Article 210 includes in the prerogatives of the *wilaya* the protection of the child and the management of his or her affairs, and the supervision of his or her upbringing and education. This means that the *hadana* includes only purely material matters. Under Article 209, the *wilaya* is handed down only through the paternal line.

It may, however, be remarked that Article 211 does not stipulate that the *wilaya* can be assigned only to males. Also, Article 209 provides that in the absence of a holder of the *wilaya* as in the lists which it contains, the

judge may grant it to another person whom he considers the most capable of fulfilling this responsibility. Which certainly allows the hope that one will see the Kuwaiti courts granting the *wilaya* to the mother, who definitely has closer bonds with the child, and who is more inclined to put the interests of her child first, than a distant relative, a judiciary guardian, or even a charity would be.

Yemen

The influence of the rules of Islamic law is evident in the majority of the provisions concerning the physical custody of the child. Article 138 of the law of 1992 defines the *hadana* as the protection of the child from what may harm or be fatal to him or her, without that being allowed to impinge on the rights of the guardian. Also, a preference, in the event of the death or incapacity of the mother, is stated by Article 142 for the women belonging to the maternal line.

The interests of the child, however, are found as a concern in some other provisions of this law. Thus Article 141 provides that the physical custody by the mother is not a right for the mother but rather a right of the child. On the basis of this statute, the mother is obliged to take on the custody even if she has expressed a refusal to do so.

Similarly, Article 139 allows the judge to make a derogation from the legal duration of the physical custody, if he considers the duration that he stipulates to be more in line with the interests of the child. Article 142 even authorizes the judge to ignore the legal order for handing on the physical custody, if the interests of the child require it.

Sultanate of Oman

The law of 1997 is not very different from the findings of Islamic law with regard to the contrast between *hadana* and *wilaya*. The conditions which the holder of the physical custody have to meet pursuant to Articles 126 and 127 derive without any doubt from the *fiqh* [Islamic jurisprudence]. The same applies to the order in which the physical custody can be handed on, as laid down by Article 130, and to the prerogatives of the guardian which arise from Article 133. Articles 164 and 165 even go so far as to allow the father to take possession of his child's assets without any judiciary

control, and to allow the paternal grandfather automatically to manage his grandchildren's assets in the event that the father becomes incapacitated.

However, Article 130 does stipulate the principle that the physical custody is an obligation which applies to both parents simultaneously, throughout the entire duration of their marriage. Article 132 ratifies this concept of the physical custody as an obligation when the marriage is dissolved, in that it obliges the mother to continue to have the physical custody of such of her children who still need her even if she has left the conjugal home. Articles 128 and 129 enshrine the concept of the interests of the child, permitting the judge to use this criterion as a justification for making a derogation from the legally-stipulated durations of physical custody. Additionally, on the basis of this same concept Article 168 can nullify certain actions taken by the father; and Article 169 can eliminate his guardianship, if he has taken actions which jeopardize his child's assets.

Comments

1 – The “male-worshipping”²³ patriarchal family, essentially based on a rigid distribution of roles, seems to be most often and most forcibly present in those legislations being examined here which tend to take as their starting point the pattern of Islamic law founded on an unbreachable separation between the *wilaya* of the father and the *hadana* of the mother, together with an order for handing on both physical custody and guardianship which observes this distribution of responsibilities and this type of family.

2- The influence of the United Nations' 1989 Convention on the Rights of the Child on these legislations is hard to deny. This influence varies strongly on the basis of the social changes which each country has undergone and the degree to which the legislatures have been open to those changes. This explains the uneven degree of integration of the concept of the interests of the child in the various situations. The integration of this concept takes the form in certain countries of its being adopted as a supplementary criterion, to allow a guardian to be designated in the absence of one from the legal list, or

²³ *Abdelwahab Bouhdiba: La sexualité en islam. Paris P.U.F. 1975. Page 20.*

to decide on the elimination of the guardianship. In others, it takes the form of its being introduced as a criterion correcting the imperfections of the rigidity of the provisions of Islamic law, by allowing the judge sometimes to act outside those provisions. And finally, in yet other countries, it takes the form of its being enshrined as a fundamental criterion which significantly modifies the traditional concepts of *hadana* and *wilaya*, and which lays the foundations for a new approach to the relationships between parents and children.

General Conclusion

This treatment, varying both in time and from place to place, demonstrates the dynamism and the changes, which are currently going on in the Arab world.

The Arab countries do not live closed in on themselves. From a commercial and economic point of view they take part in international trade as members of the WTO, but at the same time, they are undertaking to harmonize their national laws in this area. With regard to human rights, the Arab countries participated actively in the drafting of some of the UN Covenants. Without the developing countries, the International Covenant on Economic, Social and Cultural Rights of 1966 might not have been the same.

With regard to the most recent Conventions, which refer to specific populations such as women or children, a universal consensus was achieved at the end of very long negotiations and at a cost expressed in very many reservations issued by some countries. These reservations do not come from the Arab countries alone; as we have already shown the demarcation line is not between Muslim countries and non-Muslim countries. Rather, this demarcation line is closely related to conceptions of family relationships and of women's and girls' positions within the family unit.

It is indeed in this most intimate of spheres that the future of the citizenship of tomorrow will be played out.