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Changing God's Law: The Dynamics of Middle Eastern Family Law

Nadjma Yassari, ed.

Baudouin Dupret

This volume, edited by Nadjma Yassari, a leading authority in the field of Islamic and Middle Eastern law and especially family law, is the outcome of a conference held in Hamburg in 2013. It has the strengths and weaknesses of this type of publication. Regarding the latter, one can mention a certain degree of heterogeneity, which cannot be totally masked by the four-part structuration of the book. In addition, there is the very partial coverage of the very broad topic--change in family law--considered in an area, the Middle East, that is also broad and used in its widest sense, from Morocco to Pakistan. With regard to the strengths, one should emphasize the exceptional quality of the contributors, on the one hand, and the general framing of the question addressed by the volume, on the other. The latter follows the three pillars of the research group organized in the Hamburg Max-Planck Institute: interdisciplinarity, comparison, and attention to procedural law. As is often the case with collections, our review will proceed piecemeal.

In her introduction entitled "New family codes in Middle Eastern countries: reforms that are faithful to Islamic tradition?", Marie-Claire Foblets raises a series of relevant questions regarding, first, the emergence of what she calls a "new family law" and, second, the role of judicial interpretation. Foblets seems to imply that, initially, family codes did not depart from classical fiqh. On the contrary, there are good reasons to think that the adoption of a single code applicable to all Muslim citizens within the borders of one single (nation) state and enforceable through tightly organized jurisdictions structured in the three-level mode which is typical in civil law states did already constitute a legal revolution, in form as well as in content. This does not mean that codified family law was un-Islamic, but that its nature and economy was radically different from that of the normative organization that prevailed before the installment of the modern state. In that respect, the break is not between old and new family law, but between fiqh and positive law. Foblets gives the example of the reference to fiqh in case of gaps in legislation. However, looking closer at what judges do when filling these gaps, one observes that they either use templates or rely upon case law of their respective supreme court, made available on state-centralized databases. Actually, one can even contend that fiqh has become merely one source of law among many, albeit an important one. As a consequence, the conservative or progressist quality of national family laws is not primarily dependent on classical fiqh provisions, but on the social and political orientations of contemporary legislatures, and on the moral orientation of positive-law trained judges.

Part one of the volume consists of three chapters addressing the law, in general, and family law, in particular, at a very wide scale (the Middle East) or at a country level (Pakistan and Tunisia), under the quite broad umbrella of "continuities and changes". Chibli Mallat, in Chapter 2, extends his efforts to draw the history of "Middle Eastern law", taken as a millennium-old category embracing local and contingent developments such as Islamic law, to see, through case law rather than legislation, the main changes one can observe in the status of women after the 2011 upheavals. In legal history, it is rather well established that there are at best merely occasional connections between political and legal revolutions. Mallat explains these connections, in the frame of the Middle East, by the fact that equality already constitutes the horizon of legal reformism. From a distance, one might add that these upheavals, which failed to transform into revolutions, were a game of power much more than a struggle for law, something that proved even truer with the counter-coups that quickly followed. Shaheen Sardar Ali, in Chapter 3, addresses the issue of family law reform and

the plurality of legalities in Pakistan. She rightly remarks that “family law is now being discussed as a multilayered and complex subject,” and not as a mere continuation of classical fiqh. Ali ascribes the responsibility for gender inequality in Muslim contexts to “a moral and anthropological context that privileged male authority and the male voice” rather than to holy scriptures which, on the contrary, “ensured women a legal status and distinct (if not equal) rights in all spheres of life.” This is an assertion that should be qualified, considering the deep heterogeneity of the Sunna and even the Qur’an. Nonetheless, she convincingly states that the nature of legal reforms was closely dependent on the political regime that brought it about. She also emphasizes that, whatever the conservative or progressist spirit of legal reform, it always took place in the frame of the tutelage/protection (wilâya/qiwâma) nexus. This is also called in many places the complementary rather than equal roles of men and women—and it is a frame that prevails among state officials, and especially the judges and their case law, and across the many strata of the population. This notwithstanding, she also shows that present law in Pakistan is the heir of Anglo-Muhammadan law more than classical fiqh. In Chapter 3, Monia Ben Jémia addresses the relationship between family law and human rights in post-transition Tunisia. Interestingly, she demonstrates that even though family law was reformed long ago in Tunisia, the 2011 revolution and especially the 2014 constitution gave a new impetus to its progressist interpretation and actual implementation. Her conclusion remains open: “it remains to be seen whether equality will persist as a pillar of the Tunisian legal system or whether the ambiguity of the constitutional provisions on equality in family relationships will pave the way for a reversal on the basis of religious reference.”

Part two of the collection, addressing legislation, is also made of three chapters. In chapter 4, Lena-Maria Möller comparatively examines family laws in the Gulf area. She shows that Qatar, Bahrain and the United Arab Emirates started to codify issues related to the family with the dawning of the third millennium. She emphasizes that it constitutes a break, as codification is a state enterprise aiming to legislatively shape the law, something that strongly contrasts with the way classical Islamic doctrine was elaborated. Interestingly, she stresses the fact that Gulf laws were deeply influenced by Egyptian law, since most jurists in the region are originating from Sanhuri’s homeland. In chapter 5, Nora Alim and Nadjma Yassari review the law-making process in Egypt in the context of family law, dividing it into three reformative methods: the codification of substantive family law, the inserting of stipulations in marriage contracts, and the development of procedural law. As to the third method, they relate it to both the French influence and the legacy of siyâsa justice, the norms applied by the ruler parallel to shari’a courts. Such procedural method is particularly useful as it allows the reformation of the law without explicitly touching its content. The authors convincingly show that this approach put the reform of family law in Egypt in a stalemate from which one can see no way out unless further reforms in substantive law are achieved. In chapter 6, Nadjma Yassari explores the financial relationship between spouses in Iranian law. As is the case with the chapter on Gulf laws, Yassari’s contribution offers an in-depth study of a topic which is weakly addressed in most literature. Sketching the general evolution of Iranian family law, she shows how the post-revolutionary legislature strengthened the financial situation of divorced women “by reforming existing instruments and introducing new concepts.” However, such strengthening reflects a gendered conception of the society, the family, and the role of women, which does not suit the 21st century Iranian context, thereby risking the disconnection of the law from the society and running against the conception prevailing among young families that marriage is “a partnership that the spouses shape together.”

Part three addresses the judiciary at work in matters related to the family. Chapter 7, in French, deals with Tunisia and the powers of judges in matters of family law. Salma Abida stresses that, although the legislative texts are liberal and modernist, after the post-independence adoption of the family

code and the unification of the judiciary, their implementation and thus their impact is largely dependent on the judges, especially since the Tunisian legislature issued ambiguous provisions leaving room to judicial discretion. As a whole—and as could be expected—the courts' position has fluctuated between conservative and progressist approaches. Nathalie Bernard-Maugiron's contribution, in chapter 8, is a thoroughly documented attempt to describe judges at work in matters of divorce in Egypt. As Abida in the former chapter, Bernard-Maugiron emphasizes the fact that no legislative reform can be really assessed without a close look at its implementation and especially at judges' work of interpretation. After having quickly reviewed what she calls "law in the books", i.e. statutory law, she proceeds to the examination of case law in the specific domains of divorce on the ground of moral and physical harm and of divorce for polygamy. She demonstrates that reforms in divorce, while modest in their scope, substantially improved the legal status of women and their capacity to free themselves from unhappy marriages. However, even more interestingly, she shows that the role of progressist legal reforms and open-minded judges must be assessed against the background of a society within which the women's exercise of their rights is socially despised and faces therefore severe limitation. Chapter 9 addresses the practice of personal status law in Israel. It can serve as a backdrop to the other studies collected in this volume. Imen Gallala-Arndt offers an interesting summary of Israel's legal history, giving some religion related clues as to why Israel has not adopted any written constitution so far. She also proposes an overview of tribunals having jurisdiction in family matters, a legal domain in which the country follows the principle of the personality of laws. Finally, she describes some of the conflicts arising between religious and civil courts, especially the Supreme Court. In conclusion, she argues that the civil courts have a corrective impact on the personal status system and religion-based discriminatory rules. However, she also shows that this corrective action had an influence on the perpetuation of the religion-dominated personal status system.

The fourth and last part of the volume deals with the concept of "party autonomy", defined in the preface as the capacity of spouses to "abrogate dispositive marital law through marital agreements and thus reach tailored contractual agreements." Chapter 10 draws a grand picture of marriage contracts in Islamic history. Amira Sonbol pointedly remarks that it is paradoxical that any change in the structure of the family in its modern and thus state-centered meaning is perceived as an attack against Islam. Actually, this paradox perfectly reflects the transformation of fiqh into positive law. One can have more reservations regarding the picture she paints of pre-Islamic marriage or of marriage in Islam, as it bears the features of strong essentialism, and one can even doubt the possibility of drawing such picture. What is said about modern times should have been taken into consideration regarding ancient times. Specifically, concepts such as marriage have an history, they appear, disappear, live, and transform; and their ontology is historical. The state has transformed the understanding of marriage and family in a radical way, but probably not more radical than, for instance, the emergence of fiqh literature or the Ottoman empire's Hanafi-dominated judicial system. In chapter 11, M. Siraj Sait examines the issue of matrimonial property in Islamic contexts, whose systematically-claimed personal character contrasts with the paucity of legal sources on the subject. Addressing legal reform which, despite strong social and institutional resistances, point to equitable matrimonial property regimes, his contribution challenges the perceived incompatibility of classical Islamic law with concepts of marital property and the supposed inability of Muslim societies to recognize the contribution of both spouses.

In sum, one could easily subscribe to M. Siraj Sait's concluding quotation, according to which there is "no room for doubt that a common ground could be found between Islamic law and gender equality," if such statement was not marred by an essentialist posture. Islam, the Sharia, fiqh, Islamic law, and related terms have no essential meaning, at least in the perspective of the legal, social,

human and historical sciences, and it is precisely for this reason that they can be *made* compatible with issues such as gender equality, democracy, human rights, and the like. This volume is valuable for the extended and documented information it provides the reader with. One can find in it much material that is needed to produce the comprehensive analysis its heterogeneous character could not achieve.