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REFORMS IN THE LAW OF PERSONAL STATUS OF THE MUSLIMS IN ISRAEL LEGISLATION AND APPLICATION *

Aharon Layish
The Hebrew University of Jerusalem

1 Introduction

The material law applicable to personal status in *sharī'a* courts in Israel draws from a mixture of religious and secular sources. Its basis is the theoretically immutable *sharī'a* which reflects the structure of the pre-Islamic family, with variations emanating from Mohammed's ethical and religious reforms. Israeli *qāḍī*s frequently rely on the well known codification of personal status and succession laws by the Egyptian Qadrī Pasha (which has no statutory status in Israel). The Hanafi school, one of the four Sunni orthodox schools of law in Islam, is dominant in the *sharī'a* courts, even though most of the population, especially in rural areas, belong to the Shafi'i school. Ottoman heritage added important legal reforms concerning marriage, divorce and succession. The Family Rights Law of 1917 did not disrupt the *shar'ī* legal system; reforms were mainly carried out by means of the *takhayyur* device, the selection or combination of elements from different schools of law.[1] The Succession Law of 1913, based on a European source, introduced

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the element of complete equality between the sexes.

The Mandatory legislator gave effect to the Ottoman reforms and scrupulously preserved the status quo in matters of material law relating to Muslims; while introducing reforms by means of criminal legislation, such as the ban on the marriage of minor girls and on polygamy, he provided a 'good defence' to Muslims qua Muslims and exempted them from penal sanctions.

2 Knesset Legislation

The Knesset, the Israeli parliament, intervened in matters of personal status to improve the legal status of women, sometimes to a far-reaching extent. It abolished some of the provisions of religious law discriminating against women and granted them social and political rights. Section 1 of the Women's Equal Rights Law of 1951, the corner-stone of its legislation in these matters, provides: 'A man and a woman shall have equal status with regard to any legal act; any provision of law which discriminates, with regard to any legal act, against women as women shall be of no effect.' The Israeli legislator, for obvious reasons, could hardly adopt the legislative techniques of *takhayyur* and other devices customary in Arab countries, which were intended to give reforms the appearance of an internal refurbishing of religious law. However, out of regard for the legal systems of various religious communities, the Knesset subjected its legislation to two severe restrictions: it abstained from interfering with any religious prohibition or permission as to marriage and divorce, adopting procedural provisions and penal sanctions as deterrants in preference to substantive provisions which would have invalidated the relevant religious law; and, in matters for which provisions displacing religious law were enacted, the parties were usually given the option to litigate in accordance with religious law.

The material law applicable to matters of personal status is thus determined by two legal systems, the religious and the secular, each based on different social philosophies. Only in matters of succession has there been since 1965 a clear demarcation between the religious judicial authority which applies religious law and the civil judicial authority which applies secular law. In other matters of personal status the *sharī'a* court must, in the absence of consent between the parties, apply Knesset legislation specifically addressed to it. Disregard of this legislation signifies excess of authority and grounds for intervention by the High Court of Justice.

The following are the main reforms introduced by the Knesset:

(a) The Marriage Age Law of 1950 raised the minimal age of marriage for women from fifteen years, as under Mandatory law, to seventeen years, as under the Ottoman Family Rights Law; abrogated the 'good defences' against a charge of contravention of age-of marriage legislation; and increased the penal sanction. At the same time a District Court judge (but not a religious court) was empowered to permit the marriage of a girl who was pregnant or had given birth, and, since 1960, the marriage of a girl of sixteen.[2]

(b) The Women's Equal Rights Law of 1951 abolished the defence available to Muslims against a charge of polygamy (forbidden by the Mandatory authorities by way of criminal legislation), and instead has given them two defences against such a charge: prolonged absence or mental illness of the spouse.[3]

(c) The same law also forbids divorcing one's wife against her will unless permission to do so has been given by a religious court. In 1959 it was amended that permission should be given at the time of the dissolution (rather than post facto). A person contravening this prohibition is liable to punishment, but the divorce is valid.[4]

(d) The law enables a woman to be a natural guardian of her children along with their father, but the religious court may decide otherwise if it deems it in the interest of the child. The Capacity and Guardianship Law of 1962 supplements and develops the

principle of natural guardianship of both parents and raises the terminal age of guardianship to eighteen years for both sexes.[5]

(e) The Women's Equal Rights Law provides that the Ottoman Law of Succession shall, in intestacy, apply also to *mulk* (property of which full ownership is vested in the holder) and movables, not solely to *mīrī* (property of which full ownership is vested in the Government while possession and usufruct are vested in the holder), unless the parties, being adults, agree before the religious court to litigate in accordance with the law of the religious community. The Succession Law of 1965 provides for complete equality between the sexes, and between agnates and cognates, in all categories of property (*mīrī* or *mulk*), grants preference to the husband or wife over descendants and other relatives, and complete freedom of testation. In contrast, the *sharī'a* permits only one-third of the estate to be disposed of by will, and even that not in favor of a legal heir. The provisions of the Succession Law apply only in civil courts; when the religious court has by consent of the parties been empowered to deal with the matter, it may apply religious law to all categories of property.[6]

(f) The Maintenance (Assurance of Payment) Law of 1972 transferred the burden of maintenance payment fixed by court judgement to the National Insurance Institution, which is expected to receive the debt from the husband. As a result, women can realize their right to maintenance without delay and without having to resort to further legal proceedings.[7]

(g) The Property Relations between Spouses Law of 1973, provides that upon dissolution of a marriage, the value of the spouses' combined property shall, in the absence of agreement, be equalized between husband and wife. This signifies a far-reaching reform for Muslims whose religious law does not recognize community property of spouses. According to the *sharī'a*, divorced women are entitled only to waiting-period maintenance and the deferred dower (provided the latter had been stipulated in the marriage contract). In cases of unilateral divorce against the wife's will she is entitled, under Israeli law, to half the spouses' combined property, while the husband becomes liable to penal sanctions.[8]

(h) The Family Law Amendment (Maintenance) Law of 1959 provides inter alia, that the scope, measure, and mode of provision of maintenance for relatives other than the spouse and minor children shall, in the absence of agreement between the parties, be prescribed by the religious court 'according to the need of the person entitled and the ability of the person liable.' This principle is consistent with the Islamic conception.[9]

Secular legislation has contributed significantly to the improvement of the status of women. It increases the wife's security by creating a mechanism enabling her to realize her rights through the threat of penal sanctions. Even where seldom resorted to, the very existence of such a mechanism may have an effect in deterring potential offenders. The legislation is also important as a medium in transmitting the normative values of a modern society to Muslim society.

Now intervention by the Knesset, a non-Muslim legislator, in this sensitive area of personal status is of great concern to Israeli Muslims. True, the State of Israel is not a theocracy in the conventional sense; Jewish law is not the state law. Nonetheless, it is a source of inspiration for legislation. For example, the concept of 'maintenance out of the estate' in the Succession Law of 1965 is modelled, albeit in a distorted manner, after ancient Jewish law. Furthermore, the 1980 law named Foundations of Law determines that where statute law, case law or analogy fail to provide an answer to a legal question, the court shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage. Though the provision is vaguely phrased, some jurists claim that this law provides constitutional recognition to the concept of Israel as a Jewish state.[10] Moreover, state sanction has occasionally been enlisted by means of legislation to support various Jewish

religious precepts. Though the so-called 'religious legislation'[11] should be assessed in national and cultural rather than purely legal terms, the inhibitions on the part of Israeli Muslims to identify with it are quite understandable.

Israeli Muslims suspect that Knesset legislation is guided by a desire to undermine the position of the *sharī'a* and of traditional social order and values. For example, it is being claimed that the prohibition of polygamy, albeit by penal legislation, contradicts the *sharī'a*. The Israeli Supreme Court maintains that this prohibition does not, in the general legal sense, violate freedom of religion, in which polygamy is only permissible, not obligatory. Muslim jurists for their part maintain that the matter should be conceived in terms of the five *shar'ī* legal-ethical degrees (*al-aḥkām al-khamsa*), according to which polygamy should be regarded, under certain circumstances, as a religious obligation.[12]

Muslims further claim that they are discriminated against with regard to 'good defences' against a charge of polygamy. In addition to prolonged absence or mental illness of the spouse - available to both Muslims and Jews - the latter have another 'good defence' in the form of permission for polygamy granted as a final decision by a Rabbinical court and endorsed by the two Chief Rabbis. The Muslims demand to give the *sharī'a* court full discretion in this matter in order to have access to the same defence available to Jews.

The Knesset has prohibited polygamy as a general norm for the public, providing at the same time legal means to circumvent the prohibition through the institution of the common-law wife. While this device is common practice in Jewish society there are strong inhibitions towards its use in traditional Muslim society in view of the severe sanctions imposed by both the *sharī'a* and custom on extra-marital relations.

The principle of natural guardianship of children by both parents, introduced by the Knesset through substantive legislation, is

another instance of explicit contradiction to the *sharī'a*, which recognizes natural guardianship by the father alone, and in his absence by the child's agnates according to aspecific order. The child's mother may act as guardian only through nomination, not by virtue of blood relationship. Another case in point is the principle of equality as to entitlement to succession between the sexes and between cognates and agnates of the same degree of relation to the deceased — once again in glaring contradiction to the *sharī'a*. Again, these provisions apply only in civil courts, while the *sharī'a* court, having been empowered to deal with a matter by consent of the parties, may apply the *shar'ī* law of succession with no restrictions whatsoever. Additional instances of the Knesset's legislation contradicting the *sharī'a* are the prohibition, by means of penal - sanctions, of the marriage of a girl under seventeen and the divorce of a wife against her will.

The haphazard character of this secular legislation frequently upsets a delicate equilibrium in the Muslim family. For example, the restriction of the husband's freedom of divorce without providing him in circumstances such as the wife's 'rebelliousness', with grounds for dissolving the marriage by legal proceedings, or with a 'good defence' against a charge of divorce against a wife's will has, together with the ban on polygamy, created a practically intolerable situation. These two prohibitions also shook the traditional balance, anchored in Islamic law, between the rights and duties of the spouses. Moreover, in its eagerness to impose a progressive legal norm on the Muslim public, the Knesset has sometimes harmed more than helped women: the ban on polygamy has caused an increase in the divorce rate in some places; a man who wants a young wife is compelled, sometimes reluctantly, to divorce his first wife (and compensate her for agreeing to the divorce). In a traditional society, divorce may be worse than polygamy from the wife's point of view. The welfare officer's intervention in legal proceedings concerning minors may impair the status of a woman as a

natural guardian of her children when the principle of their interest is translated into traditional terms. Under these circumstances it is not surprising that there are many instances of circumvention of the Knesset's legislation by various strategems, just as it is usual to bypass the *shar'ī* norm.[13]

3 Application of the Knesset Reforms by the Sharī'a Courts

The *sharī'a* court enjoys wider jurisdiction than any other religious court in Israel. This is a legacy from the Ottoman period when the *sharī'a* court was a state court. When Palestine ceased to be part of a Muslim entity, the Muslims there were practically, though not legally, equalized with the other recognized religious communities. In the absence of a Muslim sovereign, the British authorities established the Supreme Muslim Council, which was competent, inter alia, to appoint *qāḍīs*, *muftīs* and other religious functionaries.[14] This short judicial autonomy ceased in 1948. In Israel the *shar'ī* judicial system has been fully integrated into the general judicial system.

Article 51 of the Palestine Order of Council of 1922, which is still the principal enactment defining the powers of the *sharī'a* courts, grants them exclusive jurisdiction over Muslims in all matters of personal status and *waqf*. In Israel the competence of these courts has in some matters been restricted. The Age of Marriage Law of 1950 empowers the District Court to permit the marriage of a girl below seventeen years of age under certain circumstances, and a welfare officer is empowered to request the dissolution of the marriage of an underage girl - but the power to perform the marriage and dissolve it remains in the hands of the religious court. The Succession Law of 1965 has downgraded the jurisdiction of the *sharī'a* court in matters of succession and wills from exclusive to concurrent. As in other religious communities,

jurisdiction in these matters has been transferred to the District Court, except where all parties consent in writing to the jurisdiction of the religious court. The Bedouin too have been amenable to the *sharī'a* court in matters of personal status and succession.[15]

East Jerusalem Muslims maintain their own court where modern Jordanian family laws (1951, 1976) apply. The court itself has no statutory basis in Israeli or Jordanian law. Its qadi is nominated by the Muslim Board, a voluntary body of political and religious leaders established shortly after the unification of Jerusalem in 1967. The jurisdiction of an Israeli *sharī'a* court has been extended to East Jerusalem. This court is resorted to where applicants wish to make use of the execution proceedings available to it.[16]

The *qāḍīs*, selected by a committee with a Muslim majority, are appointed by the President of the State, and must dispense justice in accordance with its laws. To what extent do they utilize their position as men of law to adapt the law of personal status to changes in family structure and to the requirements of contemporary society?[17] Most declare they are conscious of such a task. They are guided by the doctrine of *maṣlaḥa* (public interest), and by the principle that innovations are permissible as long as the textual sources of Islamic law (Koran and *sunna*) contain no express prohibition against them. This applies, for example, to the recommendation by the *qāḍīs* that a divorced woman should be compensated for damage caused her by her divorce.[18] Under the *sharī'a*, a divorced woman is only entitled to maintenance during her waiting period, which usually lasts for three months.

The *qāḍīs* often appear ambivalent in their jurisprudent approach. They generally interpret the law in strict adherence to the *taqlīd*, the consolidated positive law of the Hanafi school.

Some deliberately refrain from applying provisions of the Ottoman Family Rights Law which conflict with it. On the other hand, many of their decisions are not in acccordance with the strict religious-legal norm. To avoid a clash with religious law, the *qāḍīs*

use their personal authority, sometimes with the aid of middlemen, to bring about an amicable settlement between the parties, and give the compromise the effect of a judgement; this method, especially frequent in actions for maintenance, obedience and divorce, does not involve the application of the *sharī'a*. But there are *qāḍī*s who in their liberal interpretation of the law do not hesitate to deviate from the Hanafi school.

The *qāḍī*s' attitude to secular legislation explicitly addressed to religious courts is also ambivalent. Not all of them are sufficiently alive to the Knesset's reforms in such matters as marriages of minors, polygamy, divorce against the wife's will, and succession; most make no use of the wide discretion given them by the Knesset in permitting a wife's divorce, and regard themselves bound by *shar'ī* norms in these matters. Permission is granted almost automatically, or the divorce is confirmed ex post facto (provided it is valid according to Islamic law). Contrary to the Knesset's expectations, the *qāḍī*s do not recognize a bride's being under seventeen as grounds for dissolving a marriage. Some improperly interpret substantive legislative provisions such as those relating to guardianship or succesion. By taking this approach, the *qāḍī*s unwittingly encourage circumvention of the secular law.

Yet, there are many indications that the *qāḍī*s are responsive to secular legislation. Some *qāḍī*s rely on it expressly in their decisions, adopt its principles even where contrary to Islamic law (as in the case of the status of women as natural guardians of their children and that of the interest of a child), and frequently make use of the administrative machinery of the welfare officer. Some display a keen awareness of the ban on divorce against a wife's will and on polygamy, warn against contravention of the law, and where it has occured, point out to the plaintiff wife that she may bring a criminal charge against her husband. Sometimes *qāḍī*s find themselves in a moral dilemma when religious and secular laws clash. Their perplexity is reflected in the simultaneous application of elements of

both legal systems in spite of the wide chasm between them. For example, they recognize the status of a woman as a natural guardian of her children in accordance with secular law and at the same time appoint the paternal grandfather in his capacity as a natural guardian under the *sharī'a*. There are those who welcome the ban on polygamy and even find support for it in the Koran and modernist interpretation while on the other hand showing concern for the validity of Islamic law in this issue, even finding social justification for it.

This ambivalent approach has an ideological basis. The *qāḍī*s are not opposed to the Knesset's interference in matters of personal status so long as it involves no encroachment upon the *sharī'a*. Some would even welcome further reforms of a procedural or penal character, such as additional defences against a charge of divorce contrary to a wife's will or of polygamy on grounds of her 'rebelliousness,' sickness, or barrenness, so as to restore the balance between the legal and the social status of women. Some believe that secular penal sanctions can be used to back *shar'ī* norms in matters of marriage and divorce which at present depend on ineffectual ethical sanctions. Moreover, there are *qāḍī*s who do not hesitate to call for secular legislation of an explicitly substantive character, as in the matter of safeguarding the economic position of divorced women. In sum, with regard to the character of Islamic law and the difficulty of imposing secular legislation on religious courts, it seems that the *qāḍī*s have made an important contribution to the adaptation of family law to the requirements of a modern society.

Notes

1 For more detail see N. Anderson, *Law Reform in the Muslim World*, London, 1976, p. 47ff.; N.J.Coulson, *A History of Islamic Law*, Edinburgh, 1964, p. 185ff.
2 For more detail see A. Layish, *Women and Islamic Law in a Non Muslim State*, Jerusalem and New York, 1975, pp. 14-15. Cf.A.Layish and R.Shaham, *EI*, art. 'Nikah,' II.1.v. pp. 29-30.
3 For more detail see Layish, *Women and Islamic Law*, pp. 72ff; Cf. Layish and Shaham, 'Nikah,' II.1.ix, p. 30.
4 For more detail see Layish, *Women and Islamic Law*, pp. 132ff; Cf. Anderson, *Law Reform*, pp. 123-24; J.J.Nasir, *The Status of Women Under Islamic Law*, London, 1990, pp. 71ff.
5 For more detail see Layish, *Women and Islamic Law*, pp. 263-65.
6 For more detail see ibid., pp. 279-82; Cf. A. Layish, *EI*, art. 'Mirath,' 2, pp.111-13.
7 A. Layish, 'Ma'amad ha-'isha ha-muslimit be-veit ha-din ha shar'i be-Yisra'el' (the status of the Muslim woman in the *sharī'a* court in Israel), in Frances Raday (Chief ed.), *Ma'mad ha-'ishaba-hevra uva-mishpat* (the status of women in society and law), Schoken Publishing House (forthcoming); Cf. Layish and Shaham, 'Nikah,' II.1.xii.
8 Layish, '*Ma'amad ha-'isha ha-muslimit*.'
9 For more detail see Layish, *Women and Islamic Law*, p. 104.
10 D. Kretzmer, *The Legal Status of the Arabs in Israel*, International Center for Peace in the Middle East, Tel Aviv, 1987, p. 28.
11 M. Elon, *Haqiqa datit*, Tel Aviv, 1968.
12 A. Layish, 'Qāḍīs and Shari'a in Israel', *Asian and African Studies*, 7 (1971), p. 268.

13 Layish, *Women and Islamic Law*, pp. 330-31.
14 U.M. Kupferschmidt, *The Supreme Muslim Council*, Leiden, 1987.
15 For more detail see Layish, *Women and Islamic Law*, pp. 14-15.
16 A. Layish, *EI2*, art. 'Maḥkama', 4.vi, pp. 31-32; D. Farhi, 'ha-Mo'atza ha-muslimit be-mizrah Yerushalayim uvi-huda ve-Shomron me-'az milhemet sheshet ha-yamim' (the Muslim Board in East Jerusalem and Judea and Samaria since the Six-Day War), *Hamizrah Hehadash*, 28 (1979), 1-2, pp. 3-21; Lynn Welchman, 'Family Law under Occupation: Islamic Law and the Sharī'a Courts in the WestBank,' in Ch. Mallat and J.Conners (eds.), *Islamic Family Law*, London, 1990, pp. 94ff., 100-108.
17 For more detail see Layish, *Women and Islamic Law*, pp. 332 ff.
18 Cf. Anderson, *Law Reform*, pp. 124-25.