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Personal Status Law in the Arab States. Process of Codification

The term "personal status law" (aḥwāl šaḫṣiyya) was unknown to the classical Islamic jurist and non-existent in all classical text of Islamic jurisprudence. Some scholars classified a part of what is now known as personal status law under mu'āmalāt and evident of this is the eminent Hanafi jurist Ibn 'Ābidīn's classification of matters related to marriage in mu'āmalāt[1].

Towards the 19th century and beginning of the 20th century big changes in the political system took place in the Arab World. These changes made it imperative to upgrade the legal and judicial system. The adaptation of European structure of codes and articles was one of the first steps in the development process. In the second half of the 19th century the Ottomans issued a modified European form of Codes relating to Commerce Law (1850), Penal Law (1858), Procedural Commercial Law (1861) and Maritime Law (1863). These laws were mostly influenced by French Law. All these adaptation did not contradict Shari'a, only necessary additions to cope with the new political and economic world scene[2].

The promulgation of the Ottoman Civil Code, known as Mağalla (1869-1876), was the next important step in the codification process of the Islamic law. This work was based on views of the distinguished Turkish jurist Ibn Nuğaym (died 1592) whose scripts, especially Al-Fatāwà az-zayniyya fī ăl-fiqh al-ḥanafiyya, were commonly appreciated. Although Mağalla was based, in principle, on the Hanafi doctrine it also adopted provisions from the other shools. This document was supposed to help jurists in retrieving rules scattered amongst a variety of classical Islamic texts. Family matters were not included, but were regulated directly by different doctrines of the

[1] Aḥmad al-Ḡandūr, Al-Ahwāl aš-šaḫṣiyya fī at-tašrī' al-islāmī, Kuwait 1994, p. 21 after: Radd al-muḫtār šarḥ tanwīr al-abṣār li-Muḥammad Amīn al-mašhūr bi-Ibn 'Ābidīn, vol. I. (Ibn 'Ābidīn died in 1835).

[2] Józef Bielawski, Islam, religia państwa i prawa, Warszawa 1993, pp. 307-308.

Islamic Law. Mağalla was binding on Turkish territory and in some Arab states[3].

Egypt attained independence from the Ottoman Empire in matters of legal and judicial administration in 1874. Two Civil Codes and a Code of Penal Law were promulgated in 1875. Although these documents were an adaptation of Napoleon's legislation, the Civil Codes consisted also of rules based on the Islamic law. In the end of 19th century, renowned jurist, Muhammad Qudri Pasha, elaborated matters related to personal status in his unofficial code of 646 Articles "The Shari'a Provision on Personal Status" (Al-aḥkām aš-šar'iyya fī al-aḥwāl aš-šaḫṣiyya) which was based on Hanafi doctrine. The term "personal status law" appeared for the first time in this book, which dealt with marriage, divorce, gift, interdiction, wills and inheritance. Although Muhammad Qudri Pasha's book was never proclaimed as official Code of the State it was a manual for the Shari'a Courts in Egypt and a base to many Personal Status Law codes in other Arab countries[4].

In Egypt, the Law Regulating the Judiciary of 1949, specified matters relating to personal status law as follows:

– status of the persons and their legal capacity;

– family rules i.e. betrothal, marriage, mutual rights and duties of the spouses, dowry and property disposition between the spouses;

– divorce, repudiation and judicial separation;

– sonship, paternity, degrees of kinship and maintenance duties among relatives and in-laws;

– acknowledgement of lineage and adoption; guardianship, tutelage, limitation of somebody's legal competence, the absent person and the declaration of a missing person to be dead;

– inheritance, wills and other acts taking effects subsequent to death[5].

The Family Rights Act promulgated on the 25th of October 1917 by the Ottoman Sultan Muhammad Rashad was one of the most important acts relating to personal status. It falls in 150 Articles and was based mostly on the Hanafi doctrine. It covered matters relating to marriage and divorce, and

[3] Jamal J. Nasir, The Islamic Law of Personal Status, 2nd ed., London 1990, pp. 4; 24-25; J.Bielawski, op.cit., pp. 308-309.

[4] Jamal J. Nasir, op.cit., pp. 31; Aḥmad al-Ḡandūr, op.cit., pp. 21-22; L.R. Sjukijajnen, Prawo muzułmańskie i ustawodawstwo rodzinne krajów arabskiego Wschodu, in: Prawo muzułmańskie, Warszawa 1990, pp. 211-212.

[5] Aḥmad al-Ḡandūr, op.cit., pp. 21-22; 'Abd ar-Raḥmān aṣ-Ṣābūnī, Aḥkām az-zawāğ fī ăl-fiqh al-islāmī wa-mā 'alayhi al-'amal fī Dawlat al-Imārāt al-'Arabiyya al-Muttaḥida, Kuwait, 1987, pp. 39-40.

recourse is ordered to the most authoritative opinion of the Hanafi jurisprudence in all cases which are not cover by this Act. This law applied either full or part by many territories even after the collapse and the termination of sovereignty of the Ottoman Empire in the Arab countries. In 1926 new codes were brought into force in Turkey. These include a Civil Code, a Penal Code, a Commercial Code, a Code des Obligations dealing with contracts in general, and a Code of Civil Procedure. Both the Civil Code and the Code des Obligations were based on and followed very closely the relative Swiss Codes. In the Arab countries a gradual process of codification also led to the enactment of new laws regulating personal status matters[6].

Lebanon was a relatively autonomous part of the Ottoman Empire for three centuries starting from 1516. It was under a French mandate from 1918 to 1943 and although French civil law had a great influence on the development of the Lebanese legal system and judiciary, the French authorities did not affect any substantive changes to the Ottoman Law of Family Rights of 1917 or to non-codified aspects of personal status law. A very heterogeneous Lebanese population led to the development of a highly complex system of power sharing for the major religious communities and sectarian structure of communal jurisdiction for Muslims, Druze, Christians and Jews. Decree No. 241 of 4/11/1942 (Art.111) directed the applications of Hanafi doctrine to Sunni personal status cases (except for those matters covered by specific provisions of Ottoman Law of Family Rights), and Jafari Doctrine and provisions of the Ottoman Law of Family Rights applicable to Jafaris in Jafari personal status cases. Although the latest Act of Family Rights (16 July 1962) abrogated this Decree, the full text of Article 111 was retained under Article 242. There is separate legislation applicable for Druze whose have a Codified Personal Status Act of 1948 amended in 1959[7].

In Jordan the Ottoman legal system was influential even after the dissolution of the Empire. The new Law of Family Rights No. 92 was enacted in 1951 and it was the first in a series of codification of Islamic family law issued in the 1950s by the national legislatures of newly independent Arab states. Although this law did not deal with anything other than marriage and divorce, it introduced new provisions that were not known to Arab family legislation before. For example, it did not allow marriages

[6] Al-Imām Abū Zahra, Muḥāḍarāt fī ‘aqd az-zawāǧ wa-āṯāruhu, Cairo 1971, p. 20; Sjukijajnen, op.cit., pp. 212-213; Jamal J. Nasir, op.cit., p. 32; Bielawski, op.cit., p. 311.

[7] Jamal J. Nasir, op.cit., pp. 32; 346-347.

where the age difference between the parties is 20 years or more while there is no clear benefit from this marriage. It referred to the most authoritative Hanafi opinion for recourse in matters not covered in this Law (Art. 130). On September 5th 1976 the Personal Status Law was promulgated replacing the said Law of 1951 and it dealt with marriage and betrothal, marriage contract, dowry, repudiation, dissolution by order of the court, parentage, fosterage, custody, maintenance for kin and provisions concerning the missing person and the will. The details of inheritance provisions were left to the classical text. This law contained new provisions in personal status for example, it allowed the marriage contract parties to stipulate lawful conditions that will be binding to the other party. The wife could put forward the condition that if her husband married again she has the right to request marriage dissolution from the judge. The Law of 1956 retained reference to the most authoritative Hanafi opinion in matters not covered in the text (Art.183)[8].

In Egypt the first attempt at codification was made in 1915 when a committee of senior jurist was formed to prepare a proposal for a Personal Status Law. Act No.25 was enacted in 1920 which was basically derived from Maliki school and dealt with maintenance, divorce on grounds of lack of maintenance or physical or mental defect, desertion and the prescribed waiting period following divorce or widowhood during which woman may not marry. Act No.25 of 1929 covered general rulings on divorce and family disputes and it was based on opinions of four schools. Law No. 56 of 1923 stipulated that courts may not hear cases where the parties have not attained minimum marriage age at the time of the marriage contract (18 for males and 16 for females), and that marriage contracts where either of the parties did not reach the minimum age may not be registered. Legislative Decree No. 78 /1931 stipulated that a marriage suit cannot be heard if the parties are aged below the minimum marriage age at the time of that suit. This Decree regarding the Regulations and Procedures of Shari'a Courts was extensively amended by the following acts: Act No. 462/1955 on the Abolition of Shari'a and Religious Courts; Act No. 77/1943 on Inheritance; Act No. 71/1946 on Wills; Act No. 131/1952, on cases for Dismissal of Guardians of the Person and Decree No. 119/1952 on Guardianship of Property[9].

[8] 'Abd ar-Raḥmān aṣ-Ṣābūnī, op.cit., pp. 50-51; Jamal J. Nasir, op.cit., p. 34; Sjukijajnen op.cit., pp. 215, 225.

[9] Dawoud S. El Alami, The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Law of Egypt and Marocco, London 1992, p. 4-5; Al-Imām Abu Zahra, op.cit., pp. 27-32; Jamal J.Nasir, op.cit., pp. 31, 346.

The codification process of legal principles relating to personal status law in Egypt is ongoing up to this date. Law No. 62 of 1976 modified some rulings on maintenance. In 1979 Presidential Decree No. 44 was issued and introduced new rulings on divorce, polygamy, maintenance, arbitration between spouses, custody and guardianship of the children. This Law gave the women improved rights to divorce and maintenance. In May 1985, Law 44 of 1979 was struck down by the High Constitutional Court of Egypt on technical grounds and was declared unconstitutional. The problem lay in the fact that it was promulgated without being referred to the People's Assembly for confirmation. The emergency decree issued by the State's President was unlawful on the grounds that there had been no emergency situation, which would justify its being used in this way. A few months after the verdict, the People's Assembly promulgated Act No. 100/1985 to take effect on the same date of publication of the High Constitutional Court ruling of the non-constitutionality of Decree No. 44/1979. The new Personal Status (Amended) Law did not cancel Acts of 1920 and 1929, but included modifications or replacement of parts of their text. A number of the changes made by the 1979 law were reintroduced as well as some new provisions added(10). In January 2000 the Egyptian Parliament passed a new law that makes divorce easier for women. The law allows wives to file for divorce on grounds of incompatibility and to get divorced within three months if they return their dowry and relinquish all financial claims, including their alimony. Another new provision stipulates that couples in an unofficial (‘urfī) marriage can now go to court for a divorce. The state had previously accorded no legal recognition to ‘urfi marriage, which are not registered[11].

Due to the special relation between Egypt and Sudan, changes that took place in Egypt are echoed by its neighbour. The dominant schools in Sudan were the Hanafi and the Maliki doctrines. Article 8 of the Law of 1902 stipulated that the chief shari'a judge (qāḍī al-quḍāt) can issue instructions to organize structure, decisions, jurisdiction and work of shari'a courts. This document initiated the process of codification of Islamic law in Sudan. The 1915 bill stated that judgment in shari'a courts should be according to the Hanafi school, except the matters specified under legislative circulars from the Chief Shari'a Judge, in which other doctrines might apply. The Chief Shari'a Judge issued various circulars on marriage, divorce, gift, waqf and inheritance. Several principles were applied in Sudan at the time they were

[10] Dawoud S. El Alami, op.cit., pp. 5-6; Jamal J. Nasir., op.cit., p. 31.

[11] Cairo Reuters, January 27, 2000 http://www.arab.com/article/0%2C1690%7C12035%2C00.html .

being discussed in Egypt. For example, circular No. 17 of 1916 took some rules of the 1915 Egyptian draft law, like the woman's right to get a divorce if the husband was absent for a long time. Although Sudan was heavily influenced by Egyptian legislation, their scholars had sometimes initiated their own provisions. This is evident in circular No. 28 of 1927, which dealt with the financial matter after divorce. This particular provision was based on one of Abū Ḥanīfa's follower, Imām Muḥammad's opinions, which sometimes were in contradiction with Abu Hanifa views[12].

Under Article 6 of the Shari'a Court Act for the year 1967 the Court of Appeal has replaced the Chief Shari'a Judge. Based on a new provision the Shari'a Court shall rule according to the most authoritative opinion of the Hanafi jurists, except in matters on which the Supreme Shari'a Court issues judicial circulars to apply the Hanafi or other opinion in legislation[13].

Civil war between the North and South continues to plague Sudan. The last elected government was suspended after a military coup on 30th June 1989. From 20th January 1991 the now defunct Revolutionary Command Council imposed Islamic law in the northern states, where it applies to all residents regardless of their religion[14].

In Syria the Ottoman Family Rights Act of 1917 continued to govern matters of personal status until 1953 when the Presidential Decree No. 59 was promulgated on the Personal Status Law. This law was derived from the following sources: Ottoman Family Rights Act; various Egyptian laws; Qudri Pasha's unofficial code; a Personal Status Law Draft prepared by the Damascus Judge, Shaykh ʻAlī aṭ-Ṭanṭāwī and an eclectic adoption by the Legislative Committee of rulings under doctrines other than Hanafi. In fact this law was not based only on Egyptian law but also on controversial projects that were wildly discussed but never applied. A case in point is the condition attached to polygamy, where according to original provisions of the 1929 project a man needs a court permission to marry more than one wife. This permission will be granted when it is proven to this court that he is financially able to support all wives and treat them equitably. Although this provision was not adopted into law in Egypt, the Syrian legislature stipulated that the judge might refuse permission for a polygamous marriage unless the husband establishes a lawful case and financial capacity. This law gives also the judge the choice to refuse a marriage contract on the bases of unusual age differences. The Syrian Law of Personal Status covered the subjects of

[12] Al-Imām Abū Zahra, op.cit., pp.32-37.
[13] ʻAbd ar-Raḥmān aṣ-Ṣābūnī, op.cit., p. 52; Jamal J. Nasir, op.cit., p. 36.
[14] http://www.odci.gov./cia/publications/factbook/geos/su.html.

marriage, divorce, parentage and custody, legal capacity, wills and inheritance. Moreover it was the most comprehensive code issued in the Arab world to that date. Article 305 of this code directs that, for matters not specified in the text, resort shall be had to the most authoritative doctrine of the Hanafi school. Law 34 on December 1975 made amendments in respect of polygamy, the dower, fostering, custody, legal capacity, maintenance and guardianship. Those laws apply to all Syrians except the Druze (Art. 307), Christian and Jewish Communities who shall apply their own religious provisions governing betrothal, marriage conditions and conclusions, wife's obedience, minor's maintenance, declaration of avoidance and dissolution of marriage, dower and custody (Art. 308)[15].

In Iraq, the birthplace of the Hanafi school, this doctrine was predominant. The situation however was not that simple due to the presence of a large Shi'a population that followed the Jafari school. The dual personal status law system dates back to 1917, when the courts were granted the right to rule on Shi'a suits according to their school. In 1923 the Jafari Shari'a courts were formed, where an unofficial code named "Jafari provisions in personal status matters" (Al-Aḥkām al-ğa'fariyya fī al-aḥwāl aš-šaḫṣiyya) was used. In Baghdad and Basra, the functions of Sunni and Shi'a judges were parallel, but in other areas the doctrine of the predominant population was applied. Due to the complexity of the situation in Iraq in terms of doctrines, there was a pressing need for a universal law to be applied to all Muslims. On 30 December 1959, the Code of Personal Status (Law No. 188/1959) was promulgated as the Universal Personal Law for all Iraqis, except those for whom special legislation was made, mainly relating to Christian and Jewish minorities. This Law has been amended by Act No. 11/1963 adding Chapter 9 on inheritance, and Act No. 21/1978 relating to women's rights in marriage and divorce[16].

In Tunisia, the first code based on Hanafi and Maliki doctrines was worked out in 1861 (20 years before Tunisia became a French Protectorate). It was binding only for three years, before the protest of Tunisian peasants caused its annulment by the Bey. Later on, Tribunals of Judges applied the Islamic law based mostly on Maliki, and sometimes Hanafi doctrines. Part of the civil judicature and all penal ones belonged to an administrative tribunal established by the French Protectorate's authorities. This institution

[15] 'Abd ar-Raḥmān aṣ-Ṣābūnī, op.cit., pp. 46-47; Sjukijajnen, op.cit., pp. 216, 226-227; Al-Imām Abū Zahra, op.cit., pp. 24-27; Jamal J. Nasir, op.cit., pp. 32-33.

[16] Al-Imām Abū Zahra, op.cit., pp.37-41; 'Abd ar-Raḥmān aṣ-Ṣābūnī, op.cit., p. 49; Jamal J. Nasir, op.cit., pp. 33-34.

used a code prepared specially for its purposes according to the project of Italian expert of Islamic and Roman laws, D. Santillan (died 1931). This document called Code civil et commercial tunisien was ready in 1899 and it took into consideration common rules of Islamic law according to Maliki doctrine and Roman law. Part of this code was officially proclaimed in 1906 as Code tunisien des obligations et contracts[17].

The experts mention three important steps related to the development of the Tunisian legislation: 1) the attempt to give shape to a code that could apply to all Tunisians was never enacted into law (1873); 2) the failed attempt to work out the next version of the Code of Civil Law (1896); 3) the new project Code of Civil Law inspired by Maliki and Hanafi doctrines which wasn't approved by colonial authorities.

In the twenties of the 20th century, Tahar al-Haddad demanded to separate religion from the state and the codification to be according to European legislation and Islam. In his work of 1930 he dealt with women status by writing about polygamy and divorce[18]. His controversial views were critiqued and he was accused of disagreeing with Islam. His opinions were used later in the fifties when a new Tunisian Code was being composed[19].

Tunisian Law of Personal Status (Mağalla-Le Code du statut personel) was promulgated on 13/8/1956, soon after independence and amended by Law No. 40 of 27/9/1957, to abrogate a separate personal status law for Jewish and non-Muslim Tunisians who are now subject to the same legislation. It deals with marriage (later amended by Act 1/1964), divorce (with additions under Act 41/1962 and Act 7/1981), maintenance, custody (as amended under Acts 49/1966 and 7/1981), parentage, the missing person, inheritance, majority and interdiction (as amended under Act 7/1981), wills (added under act 77/1959), and gifts (added by Act 17/1964)[20]. The new Tunisian Code was derived from the following sources: Islamic law according to Maliki and Hanafi doctrines; Tahar al-Haddad views; customary law and European, mainly French, legislation. Among the most controversial provisions of this law were those banning polygamy and extra-judicial divorce. Judicial divorce is available, after reconciliation efforts, at the request of either party. If the divorce was at the

[17] Bielawski, op.cit., pp. 314-315; Anna Barska, Status kobiety w tunezyjskim systemie obyczajowo-obrzedowym, Opole 1994, p. 48.

[18] Barska, op.cit., p. 48 after: Tahar al-Haddad, Notre femme, la legislation islamique at la société, Tunis 1978.

[19] Barska, op.cit., p. 49.

[20] Jamal J. Nasir, op.cit., p. 35.

husband's request, the judge may determine what financial compensation is due to the wife (or vice-versa if the divorce was effected at the request of the wife). Although the Tunisian Code was repeatedly amended there is still a lot of demands to change it back to fully conform to Islamic law. For example, earlier versions of this law allowed Muslim women to marry Jew or Christian, which was a direct violation of Islamic principles. This provision was revoked by an Act on November 5th of 1973 due to big pressure from traditional activists[21].

In Morocco, following independence in 1956, a royal commission was established in August 1957 to draft a Code of Islamic Law. The Code, known as Mudawwana, was promulgated by a number of Royal Decrees, issuing a series of books dealing with personal status. The following decrees were issued implementing the legislation in the said area: Decree No. 1/57/343 of 22 November 1957, comprising Book One in connection with marriage (Arts. 1-43) and Book Two related to dissolution of marriage (Arts. 44-82); Decree No. 1/57/379 of 18 December 1957, comprising Book Three on the birth of children and the consequences of this, namely custody, fosterage and maintenance for the wife and relatives (Arts.83-132); Decree No. 1/58/019 of 25 January 1958, comprising Book Four on legal capacity and representation (Arts. 133-172); Decree No. 1/58/073 of 20 February 1958, comprising Book Five in connection to wills (Arts. 173-216); Decree No. 1/58/112 of 3 April 1958 comprising Book Six on succession (Arts 217-297). This Law was based primarily on the Maliki school, but it turned to the others schools there where it saw greater benefit to be found. It was also based on legislation from other Arab countries, most importantly on the Syrian Code of Personal Status of 1953. The Moroccan Code directs that "with regard to anything not covered by this law, reference shall be made to the most appropriate or accepted opinion of prevailing practice of the school of Imam Malik"(Art. 197). More legislation was passed after that regulating the jurisdiction of application of that law in terms of nationality and religion (Law of 6th September 1958, Decree of 24th April1959, Decree of 4th March 1960). On October 3rd 1959, a Decree was passed establishing a criminal penalty for a husband refusing to return to the marital home after the issuing of an enforceable ruling obliging him to do so, or refusing to pay maintenance when he has been ordered to pay (Art. 27). Major amendments to the Code's provisions relating to marriage guardianship, polygamy and divorce were made in 1993[22].

[21] Barska, op.cit., pp. 49-51.

[22] 'Abd ar-Raḥmān aṣ-Ṣābūnī, op.cit., p. 51; Jamal J. Nasir, op.cit., p. 35; Dawoud S. Al-Alami, op.cit., pp. 6-8.

In Algeria, which was under French rule from 1930 to 1962, courts applied Maliki principles in personal status matters and succession. In 1916, a commission headed by the French jurist Marcel Morand was appointed to formulate a draft code of Muslim Law. The draft code, Avant-project de Code du droit musulman algerien, based mainly on Maliki principles but incorporating some non-Maliki provisions (for example Hanbali), was never formally passed into law although it did influence the application and administration of family law in Algeria. Independence was achieved in 1962 after which a lot of social and political changes took place. The Family Law No. 84/1984 was promulgated on 9 June 1984 dealing with marriage, maintenance, inheritance, wills, gifts and waqf[23].

In Libya, during the period of the Ottoman Empire, a dual judicial system developed and it distinguished between religious and secular matters. Matters relating to personal status, such as marriage and inheritance, were for Muslims under the jurisdiction of religious courts, which applied the Maliki doctrine. Laws covering secular matters, those involving civil, criminal, and commercial laws, reflected Western influence, particularly the Napoleon Code. Following the Italo-Turkish war, Italy annexed Libya in 1934, then after World War II the British and French shared control over the region. The colonial powers maintained the dual judicial system. After Libya achieved independence in 1951 an attempt was made to merge the religious and secular legal system. In 1954 the merger involved the subordination of Islamic law to secular law, but the opposition caused the reestablishment of the separate jurisdictions in 1958. A military coup in 1969 ended the monarchical system and established a republic under Colonel Mu'ammar al-Qaḍḍāfī. Al-Qaḍḍāfī and other Revolutionary Command Council members believed that the separation of state and religion violated Qur'ān and relegated Shari'a to a secondary status. The Legislative Review and Amendment Committee, composed of Libyan legal experts, was created in October 1971 to make existing laws conform to Shari'a. The Higher Council for National Guidance was created in 1973 to present Islamic moral and spiritual values in a way that they would be viable in contemporary Libyan society. At the same time civil and Shari'a courts were merged following Al-Qaḍḍāfī's abolishment of the dual judicial system[24]. Although the Maliki doctrine is applied by the Shar'ia Courts, the authorities are now in the process of compiling a Personal Status Act to be eclectically based on all the doctrines of Islamic jurisprudence[25].

[23] J. Bielawski, op.cit., pp. 314 –315; Jamal J. Nasir, p. 35.
[24] http://lcweb2loc.qov.cgi-bin/query/r?frd/cstdy:@field{DOCID+ly0104}.
[25] Jamal J. Nasir, op.cit, p. 36; 'Abd ar-Raḥmān aṣ-Ṣābūnī, op.cit., p. 54.

In the former People's Democratic Republic of Yemen, that was Southern Yemen, Family Act No. 1/1974 was promulgated, containing some provisions on marriage and dissolution of marriage which were not in conformity with Shari'a's rules. For example, polygamy was limited only to two wives and the principle of marriage guardianship was not applied. In the Yemen Arab Republic, which was Northern Yemen, personal status was governed by Family Act No. 3/1978[26]. The reunification of the two Yemens took place on 22nd May 1990 and the new Constitution of 16th May 1991 (Art. 3) stated that Islamic Shari'a shall be the main source of legislation, while the constitutional amendment of 1994 stated that "Islamic Shari'a is the source of all legislation"[27] (the predominant school in Yemen is Zaydi doctrine). The following laws, which deal directly with the working of the judicial system, have been promulgated since the reunification: Judicature Law No. 1/1991, Commercial Code No.32/1991, Commercial Companies Law No.34/1991, Civil Code No. 19/1992, Family Law No. 20/1992, Penal Code No. 12/1994, Maritime Law No. 14/1994 and others[28].

In Kuwait, there were five stages of the development of the judicial system. The first stage covered beginning of Kuwait until 1925, when all inhabitants were under the same law regardless of their religions or nationalities. In 1925 the British established a special court to oversee cases of non-Arab inhabitants in Kuwait[29]. In 1938, the legislative council was established to organize the courts and legal system. During that time a decree was issued specifying the scope of the British court. In 1948, a Supreme Court was established to control all others courts. For matters of personal status, the Maliki doctrine was applied. In 1959, the Law Regulating the Judiciary was promulgated. This law abolished the British court and initiated the process of subjugating all inhabitants of Kuwait under the same judicial system. Soon after independence in 1961 the leaders of Kuwait started the process of codification. In 1977 the Council of Ministers issued a decision to make all Kuwaiti laws in line with Islamic Shari'a. Accordingly in 1978, Shaikh Salmān ad-Du'ayğ aṣ-Ṣabāḥ, the Minister of State for Legal and Administrative Affairs, issued a decision to established a committee to put forward a draft of personal status law covering marriage, divorce, children rights, wills and inheritance. In 1984 the Code of Personal Status was promulgated. Although its provisions are not based on one school of

[26] Sjukijajnen, op.cit., pp. 214-215, 224-225, 228.
[27] http:// www.al-bab.com/yemen/gov/con 94 a.htm.
[28] http://www.gpc.org./ye/jud.00003htm.
[29] From late 19th century Kuwait was under British extra-territorial control.

Islamic law, recourse should be made to the most authoritative opinion of Maliki doctrine in the absence of any provision (Art.343). It applies to those who were governed by the doctrine of Imam Malik and to the non-Muslims of different religions and denominations; non-Maliki Muslims shall be subject to their respective doctrines (Art. 346)[30]. Recently, in November 1999 a Ga'fari Appeals Court was established to hear appealed cases relating to personal status[31].

In the United Arab Emirates process of codification is ongoing at present. Comprehensive legal provisions on transactions, criminal offences, procedures, labour, companies and personal status were drafted, all based on Islamic Shari'a. The Constitution declares Islam as the official state religion and states that Islamic Shari'a shall be a principle source of legislation. The Personal Status Draft Act includes 555 Articles and covers provisions on marriage, repudiation, parentage, fosterage, custody, wills, inheritance and maintenance. The last Article of this Act provides that in the absence of any legal text the Maliki doctrine shall apply, failing which the Hanbali doctrine[32].

In the Kingdom of Saudi Arabia, where the Hanbali doctrine is dominant, there is no written law of personal status. Courts refer to original text of Hanbali fiqh to judge cases. In some areas where non-Hanbalis reside, the courts can refer to others doctrines[33]. Some legal matters regulated by state regulations and royal decrees. In May 1999, the Mufti of the Kingdom of Saudi Arabia, Shaikh 'Abd al-'Azīz Ibn Bāz, died. He held his position from 1993. His fatwas and religious decrees might be used as laws, for example, the death penalty for drug dealers and not allowing women to drive[34].

In the 1990's a different form of marriage, called "the ambulant marriage" (zawāğ misyār) became popular. The ambulant marriage does not involve the two living together, nor that the man is economically responsible. The husband can visit his wife according to a predetermined schedule. It was officially legalized by the Egyptian Sunni Imam, Shaikh Muḥammad Sayyid aṭ-Ṭantāwī, in February 1999. Although zawag misyar has met a strong opposition from other scholars, especially from the Al-Azhar University in Cairo, it is considered in line with Shari'a in Saudi Arabia[35].

[30] Aḥmad al-Ğandūr, op.cit., pp. 13-24; 'Abd ar-Raḥmān aṣ-Ṣābūnī, op.cit., p.53; Jamal J. Nasir, op.cit., p.35; Qānūn al-aḥwāl aš-šaḫṣiyya, Kuwait, p. 427.

[31] Daily newspaper "Al-Qabas", 14.11.1999, Kuwait.

[32] 'Abd ar-Raḥmān aṣ-Ṣābūnī, op.cit., pp. 42-44; Jamal J.Nasir, op.cit, p. 36.

[33] 'Abd ar-Raḥmān aṣ-Ṣābūnī, op.cit., p.53.

[34] Daily newspaper "Arab Times", Kuwait 15 May 1999, pp.1, 6; "Al-Muğtama'" No. 1350, Kuwait, p. 45.

[35] Encyclopaedia of the Orient, Misyar marriage wysiwyg://read.4/http://www. icias.com./e.o/misyar.htm; Qussama Arabi, The Ambulant Marriage, Az-

In Bahrain, the personal status law remains uncodified. The legal system is based on several sources, including customary tribal law, three separate schools of Islamic Shari'a Law, and civil law as embodied in codes, ordinances and regulations. In Bahrain, the Ja'fari school is predominant and Sunni minorities follow either the Shafi'i or Maliki school. Bahrain has a dual court system, consisting of civil and Shari'a courts. Shari'a courts, divided into Sunni and Shi'i departments, deal primarily with personal status matters such as marriage, divorce, and inheritance[36].

In Oman, Royal Decree No. 101/96, called "The White Book", was promulgated on the 6th of November 1996 on the issue of the basic law of the State. Article 2 declares that "The religion of the State is Islam and the Islamic Shari'a is the basis for legislation"[37]. Invariably, tribal law has become mixed with religious law. Modern commercial law, adopted from other parts of the Middle East and Europe, also operates in the business sphere. Classical Ibadi fiqh is applied to personal status matters[38].

Qatar maintains a dual system of civil ('Adliyya) and Shari'a courts. Distinguished to Qatar's judicial dualism is the fact that Adliya court is not subordinate to the Amir and his ministers. This is contrast to the other Gulf states where the economic activities and civil matters of non-Muslims are regulated by special committees or courts which are supervised by the ruler and the Council of Ministers. From 1916 to 1971 Qatar was under a British protectorate, which brought special jurisdiction to govern British and non-Muslims residents, this jurisdiction ceased after independence. Because the status of non-Muslims became incompatible with the law applied by Shari'a courts, the Amir, šayḫ Ḫalīfa Ibn Ḥamad aṭ-Ṯānī created the 'Adliyya courts, which applies Western law. The Shari'a courts role has been gradually eclipsed by the increasing number of civil, criminal and labor laws which are under the jurisdiction of the Adliya courts. This has limited jurisdiction of the Shari'a court mainly to personal status matters, where the classical Hanbali fiqh is applied[39]. Recently, towards the end of the year 2000, a new Code of Personal Status Draft is being discussed. The most controversial

Zawaj al-misyar: Grass Root law-Making in Saudi Arabia of the 1990s http://iue.it /RSC/MED/meeting2000-absractWSO6.htm .

[36] http://lcweb2loc.qov./cgi-bin/query/r?frd/cstdy:@field{DOCID+bh0042}.

[37] http://www.omanet.com/basiclaw.htm.

[38] http://lcweb2loc.qov./cgi-bin/query/r?frd/csdy:@field{DOCID+om0063}.

[39] A. Nizar Hamzeh, Qatar:The Duality of the Legal System {http://al-masriq.hiof.no.ddc/projects/pspa./qatar.html}. This article first appeared in "Middle Eastern Studies", Vol.30, No.1, January 1994, pp.79-90, published by Frank Cass, London.

provision is the female marriage age set at 14 years which is too young according to the draft's critics[40].

An important draft law was created during the period of the United Arab Republic, which was the political union between Egypt and Syria (1958-61). The unified draft law of the personal status law for Egyptian and Syrian territories at the time of unity (Mašrū‘ qānūn al-aḥwāl aš-šaḫṣiyya al-muwaḥḥad li-l-iqlīmayn al-miṣrī wa-ăs-sūrī fī ‘ahd al-waḥda baynahumā) was based on the Ottoman Law of Family Rights, Muḥammad Qudri Pasha's book, Egyptian and Syrian legislation, rules from the four Sunni schools and other sources not in contradiction with Islamic Shari'a. Although this draft was never enacted, it constituted a good codification model[41].

Many attempts have been made to come up with a unified personal status law for the Arab League since 1977. Finally, in March 1987, the unified Arab Code of Personal Status Draft (Mašrū‘ al-qānūn al-‘arabī al-muwaḥḥad li-l-aḥwāl aš-šaḫṣiyya) was approved by the Arab justice ministers. This draft dealt with the following matters:1) marriage (Art. 1-85); 2) dissolution of marriage (Art. 86- 144); 3)legal capacity and guardianship (Art. 140-203); 4) wills (Art.204-239); 5) inheritance (Art.240-291). The final article of this unified draft law states that recourse in matters not covered by this draft in to Islamic Shari'a rules most consistent with this draft[42].

From all of the above, we can see that the Islamic Shari'a still plays an important role in the modern Arab world. The rules and conclusions of different schools form the basis for the present provisions related to personal status law. It is worth mentioning that although present day legislation not entirely reflect the full Shari'a rules (except in Saudi Arabia) any attempts to deviate far from these principles will be met with strong opposition. For example, Tunisia and Yemen changed some of their previous provisions that were in direct contradiction to Shari'a. Throughout the Arab world there are some movements to go back to strict Islamic Shari'a. Another fact that worth mentioning here is that in many codes, there is a recourse clause to a specific doctrine. Moreover, the process of talfīq (legislative construction drawing on rules pertaining to different Islamic schools) became accepted and is gaining more popularity.

The personal status law is a totally separate and independent branch of legal system. It draws most of its provisions from the Hanafi and Maliki

[40] "Az-Zaman", No. 106 2000/10/28, Kuwait, p. 10.

[41] Mašrū‘ qānūn al-aḥwāl aš-šaḫṣiyya al-muwaḥḥad li-l-iqlīmayn al-miṣrī wa-as-sūrī fī ‘ahd al-waḥda bayhahumā, Damascus, Beirut, 1986.

[42] ‘Abd ar-Raḥmān aṣ-Ṣābūnī, op.cit., p. 45.

schools. This law can be comprehensive code like in Kuwait and Syria, or a collection of legislative acts and decrees such as in Egypt and Sudan, or it draws directly from authoritative classical treatises like in Saudi Arabia and Oman. Presently, some countries are working on codification of the personal status law (i.e. Libya), others are working towards a more comprehensive law that is already there through new draftcodes (i.e. United Arab Emirates, Qatar). Serious attempt are being made to h a unified personal status law for all Arab states.

It is evident that the Islamic Shari'a did not only influence the present provisions, it also constituted the main source of legislative institutions and terms up to this date, such as the latest Act in Egypt relating to divorce, which based on dissolution of marriage known as ḫul'. There is a vibrant debate currently among jurists regarding matters of personal status law (i.e. ambulant marriage), sometimes they arrived to contradicting conclusions, which is characteristic to iğtihād. I think that the above mentioned process proves that knowledge of Islamic Shari'a is basic to understanding the Arab world.