

Sudanese Organization for Research and Development (SORD)

The Philosophy behind the 1991 Sudanese Personal Status Law

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Introduction

Law is considered a vital part of any social, economical and political transformation in a society and is thereby affected by the cultural, social, economical and ideological mentality of that society. It is therefore essential to understand and analyse the contributing factors in law issuing if transformation is to occur. This is indeed the case when it comes to laws that have an impact on women.

Personal status law is one of the important, if not the most important, law that affects women which could be attributed to three factors as follows:

Family is the primary space where women's social identity is formed. Historically it has been observed that women's status inside the family greatly influences their status outside the family. ■

The presence of conflicting laws where women are given their rights in one law, and robed of their rights in another, usually in the personal status law. ■

The difficulty in changing personal status law especially in conservative societies which strongly resists any kind of transformation or reform. ■

Objectives

The objective of this paper is to attempt to extrapolate the philosophy behind the 1991 personal status law for Muslims in order to reach a working strategy for law transformation or at least law reform. This attempt is bases on three points namely:

Some of the doctrines that clarifies the ideology of the legislature towards women's issues. ■

The language of the law. ■

The references used when writing the law. ■

Law and Morality

The relationship between law and morality is a complicated one and has been the subject of differences between the various jurisprudence schools. Some jurists have concluded that the origin of law is morality given that morality is what made humanity enact laws initially in order to organise the relationships between individuals and the society and determine the rights and obligations of these individuals. According to the natural law school of jurisprudence all written laws must be informed or made comport with universal principles of morality and justice, whereas the legal positivism school of jurisprudence holds that there is no necessary connection between law and morality and that the force of law comes from some basic social facts. Aristotle is said to be the father of natural law. Political justice in accordance to Aristotle derives from his

discussion of the “just” as a moral virtue derived as the mean between opposing vices. Even though, the theory of natural law sees no contradiction between law and morality, it rejects any confusion between them.

The relation between law and morality is not just philosophical but also practical in nature as it is reflected clearly on the various laws. Two enquiries are of importance in this aspect:

What are the lines of convergence and paradox between law and morality? There are several jurisprudence and legal theories concerning this question including Islamic *Shariah*. However, one can conclude that a space always exists between law and morality; hence law cannot and should not govern every aspect of life. This is especially important when it comes to personal status law since the question that needs to be asked is how personal can the personal status law be e.g. caring for ones parents is a moral value, should this be governed by law? And if such an article exists, can it be applicable? .1

It can be stated that morality constitutes the ideal behaviour of an individual while the law constitutes the minimum that governs the behaviour of an individual.

Does the moral society rise from law or does law rises from morality? Some schools view law as a mirror reflecting social reality and others sees law as a tool that transforms the morality of a society. It is without doubt that law, together with other factors, participate in the process of social transformation as well as affect the framework and awareness of the society. Simultaneously, the morality and ideology of a society influences the enacting of law. However, it is dangerous for law to be the only factor contributing to societal transformation and should therefore play its role together with all the other cultural, economical, social and political factors. .2

Law can impinge on individual’s personal freedom if it is confused with morality. This is the case when it comes to the personal status law since it interferes with the personal freedom of women such as the tutelage article which assigns a man to marry them.

The masculine mentality often correlates morality with women and women’s bodies. Consequently women’s position, appearance and morality are often viewed as a standard for the morality of a society. This is the case in both eastern and western societies. Nevertheless, this fact is more obvious in eastern Islamic societies since women are one of the important aspects by which morality is judged. That is why discussing the issue of morality from this point of view means discussing women’s issue one way or another. This masculine mentality reflects the mentality of the Sudanese legislator when releasing the 1991 personal status law.

The Relation between Religion, Law and Personal Status

There is a definite relation between religion and law since law, like religion, also governs the behaviour of individuals in addition to having a power over societies. Thus, law and religion

share the quality of influencing individuals. This is of importance in regards to legislation even in the most secular societies and is especially significant when it comes to personal status law. The IGAD convention states that family and personal status laws in Sudan will be enacted according to religion and tradition even though the convention adopted secular principles.

Nonetheless, discussing the issue of personal status law ultimately means discussing religion. Sudan has not adopted any other source except religion when issuing personal status laws even though the rest of the legislations have been influenced by English colonial law. This could be attributed to the following reasons:

The Muslim individual lives in a state of cultural failure due to the continuous oppression and is therefore only left with personal status issues to make him/her feel connected to his/her Muslim roots or identity. That explains why most Muslim countries hesitated to ratify the convention of Elimination all forms of Discrimination against Women since it touches the sensitive matter of the personal status law.

Colonism did not aim to change personal status laws of fear of raising the ire of the people.

The strongest reason is the presence of a huge number of religious doctrines concerning personal status matters. This is due to the political aggression that the Muslim history faced when the freedom of religious research was confiscated and scholars were not allowed to discuss politics limiting their research on solely issues related to personal status.

There are areas where religion differs from law as follows:

Law is regional which means that it can only be applied in a fixed geographical area whereas; religious doctrines are based on religious affiliation and are hence applied in different areas. So when religious laws are applied in a certain area, it will cause problems to people who don't belong to those certain religious doctrines as was the case with the 1983 *shariah* laws application in Sudan. .1

As previously mentioned religion, law and morality interact in various aspects. Law, however, doesn't interfere with all aspects of morality whereas religion gives elaborate doctrines regarding all the aspects of life. If law is enacted based on religion, it leaves no space for personal freedom and personal believes. Religion offers many rules and directions regarding the choice of many decision such as choosing a life partner, but can laws be released with the same rules and hence dictates how one should or should not chose their life partner? .2

The controversy between religion and law has resulted in many a differences between various Islamic scholars, some of which as the *Hanafi* approach, tends to have a more legal approach in contrast with others such as the *Maliki* approach which tends to have a more religious approach even though all these approaches have *shariah* as their base.

One can draw that the relation between religion and law is a complicated relation which interacts in various issues especially issues dealing with personal status of individuals. This is why cautiousness is vital when handling such matters.

Personal Status Law of 1991

As illustrated previously, personal status law is of great sensitivity since it handles issues of marriage, divorce, child custody, inheritance etc in addition to the division of labour between the sexes.

In 1902, legislative courts were established in Sudan but issues dealing with personal status remained to be governed by the *Hanfia* approach or the regulations releases by the High Court or the Chief Justice. This remained to be the case until the release of the 1991 personal status law which has in a way simplified legislation which depended formerly on personal effort and research. However, the law was written hastily without the necessary discussion and deliberation. Furthermore, no explanatory note and procedural law was annexed to the law. All of these factors created a flawed and inaccurate law.

Features of the 1991 Personal Status Law

Definition of marriage

Article 11 of the law defines marriage as follows: *Marriage is a contract between a man and a woman based on an internal intention, whereby both can sexually enjoy each other legitimately.* This obtuse definition damages both men and women; however women are damaged more by this definition.

Minimum age of marriage

The minimum age of marriage is the same age of majority (*altamyeez*) which according to article 2-40 is 10 years of age.

Tutelage

Tutelage is necessary for the contract to be legal. The guardian has to be a male and has the right to annul the marriage if he so desires if the marriage's period is less than a year.

Competence

Determining competence is the right of the guardian according to article 22. This means that a woman does not have the right to decide for herself. Subsequently the guardian is the one who decides if the husband to be is competent or not.

Standard Ideal

This has to do with issues related to the dowry which is one of the legal terms of marriage. In case of conflict dowry is estimated according to a standard ideal. A woman deserves the dowry of women in her level whatever that means. This definition considers dowry as a price of women and is an inhumane view.

Obedience (articles 91-95)

Women should obey their husbands based on specific terms, else their maintenance right dissolves.

Testimony

The law's position regarding testimony of women is unclear. Women are considered less eligible compared to men as witnesses in a marriage where a man is equal to two women. At the same time, women's testimony is accepted in other cases as in the establishment of descent (article 105) or establishment of delivery (article 106).

Financial Maintenance

Strangely enough, there is complacency when it comes to maintenance with many loops present. This can only be explained due to the fact that financial maintenance is the obligation of husbands and since the law is a masculine law, it tends to give men a way out. In addition to that, the law does not estimate the amount needed for maintenance.

Divorce regulations

Divorce is the area where women are mostly humiliated, greatly damaged and hurt and their freedom confiscated. Men are given the right to divorce as they wish with intention as the only term, while women are only allowed to be divorced through a court of law as per extremely strict terms. Women become therefore prisoners in their own marriages. There are also many contradictions such as the fact that the mentally ill and minors are not allowed to divorce but at the same time allowed to marry!

Polygamy

The law does not mention polygamy as much as the other issues except in some articles such as the article stating women's right in a marriage where a husband has to justly treat his wives.

The language of the law

Even though the Arabic language is a rich language, the legislators have chosen a language that is characterised with terms that enforces the inferiority of women in addition to it being very vulgar at times.

References and Sources of the law

The references and sources of the 1991 law are deficient and have used the Unified Arab bill as a major reference which is a project by the General Secretariat of the Council of Arab Ministers of Justice as well as using the views of some religious scholars. Other references have also been used of which none is contemporary jurisprudence which has been deliberately neglected.

Conclusion

The issues related to women in the personal law affects her position inside and outside the family. The law is unfair and unjust and interferes with women's personal freedom giving her little space. The Sudanese woman becomes thus weak and vulnerable in addition to the removal of her basic rights.