남북예멘 민법의 차이에 관해 소개하는 논문

내고향점촌

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Family Law in Pre-Unification Yemen

1. *Yemen Arab Republic*

When family law was codified in the Yemen Arab Republic (YAR, "North Yemen") in 1978, it incorporated Zaydī legal traditions[1]

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[1] The authoritative Zaydī manual is the fourteenth century *Kitāb al-Azhār fī fiqh al-aʾimma al-aṭhār*. Its provisions on family law were criticized by then dissident Zaydī scholars like al-Ḥasan al-Jalāl (d. 1673) and Muḥammad ʿAlī al-Shawkānī (d. 1834), who had moved closer to Shāfiʿī positions in some fields. Several Zaydī Imams, including the last Imams of the Ḥamīd al-Dīn family, Yaḥyā (d. 1948) and Aḥmad (d. 1962), had their own legal opinions (*ikhtiyārāt*), sometimes deviating from established doctrine. Under Aḥmad, the Cassation Court (*maḥkamat al-istiʾnāf*, founded in 1911) issued a number of binding rulings that deviated from school doctrine by adopting Shawkānī's positions (see ARJ, *Majallat al-buḥūth* 1980); at the same time, Imam Aḥmad commissioned three judges to codify the current school opinion. After the overthrow of the Imamate in 1962, the Ministry of Justice, barely established, issued seventy-one guidelines for judges, which did not differ substantially from pre-revolutionary provisions ("*Qarārāt wizārat al-ʿadl*", see al-ʿAmrānī 1984: 233-44). In this and later republican legislation, reference is made to al-Shawkānī's opinions; sectarian tensions were thus minimized and a post-*madhhab* national legal consensus established (see Haykel 1999: 195). The family law of 1978 resembled some of the rulings of the Cassation Court and the Ministry of Justice guidelines pertinent to marriage and divorce. For further details, see Würth 2000: 39-43, 79 fn. 28, 86-7, 93-5, 98, 101, 104-7.

without significant borrowing from other schools.[2] At the same time, the court structure was adapted to accomodate Yemeni judicial traditions, after the failure of attempts to import the Egyptian model without modifications. Egyptian and Sudanese influence remained important in commercial law and courts, but the three-tiered Yemeni court system had scarcely any specialized jurisdictions during the late 1970s. First Instance Courts in the districts had general jurisdiction in civil, penal and family law. Benches of three judges in the provincial capitals considered appeals, and the Supreme Court in Sanaʿa, which had several specialized chambers, functioned as a Court of Cassation.[3]

Unlike family law codes in some other Arab republics, Yemeni Family Law 3/1978 did not attempt to act upon social organization or initiate even modest social change.[4] Despite tremendous social and economic turmoil in Yemen, the republican state did not interfere in family affairs more frequently or in a manner different than it had done in pre-revolutionary times.[5]

According to the 1978 Yemeni Family Law, the marriage of minors is legal, but the law interdicts consummation prior to the onset of puberty. A violation of the law is punishable by a fine or jail term of between one and three years and compensatory damages to the

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[2] On *talfīq* as a tool for legal innovation, if not necessarily reform: see Chehata 1970: 67ff.; for a critical reading of the Middle Eastern modern legislation thus created: see Moors 1999: 153ff., 166.

[3] I have outlined the details of judicial reform in Yemen elsewhere, Würth 2000: 36-50.

[4] An earlier attempt at social engineering in 1976, the placing of a ceiling on the *mahr*, largely failed. Mundy (1995: 134) correctly observes that placing a limit on the *mahr* may ultimately jeopardize the main avenue that women have to acquire property.

[5] See Messick 1993: 64ff.

wife for the loss of virginity.[6] Polygyny is subject only to a husband's exercise of equity (*'adl*). A husband's right to repudiate his wife unilaterally (*ṭalāq*) is unrestricted, whereas a woman must sue for divorce (dissolution of marriage: *faskh*)[7] if her husband fails to uphold his financial obligations or abandons her. A woman may also sue for divorce if she feels "hatred" (*karāhiya*) for her husband, but she must return the *mahr* (dower).[8] As long as a wife remains "obedient" towards her husband,[9] she is entitled to maintenance from the date on which the contract was concluded; arrears of maintenance may be (and were) collected retroactively. In general, courts were relevant mainly to the poor, but in the 1970s bodies of customary dispute resolution settled most conflicts pertaining to divorce and post-marital issues.[10]

Family law was not on the agenda of the nascent YAR women's movement. The women's movement was composed of a very small number of educated women whose high-status background allowed them to obtain an education and enter the political sphere. Their prime concern was to integrate women in development projects, which, at the time, meant facilitating access to services, especially education, health care and sanitation, and goods, such as cooking gas and water.[11] As for the legal status of women, the consensus appears to have been that it is "traditions and customs" (*al-'ādāt wa'l-taqālīd*) that prevent women from participating in society, for example, by favoring boys over girls in education. This development-oriented agenda avoided a conflict between the women's movement and the male technocratic elite. The latter, in turn, supported women's activism in general, and Women-In-Development programs in particular, joining in the criticism of "tradition" as the main impediment to development—which was identified with modernity. In the long run, the class background of activists, the corresponding choice of an agenda and the political alliance with the male elite imposed constraints on advances in women's rights in family law, but secured elite women some influence.

[6] I have seen only one judgment in which this provision was applied: the first instance judgment imposed a sizeable fine of U.S. $3,750 on a husband and father and ordered the father to reimburse the husband for all wedding expenses. The appeal court overturned the latter part of the ruling, arguing that the father was the injured party to begin with (3/1405, 11.8.1406, 21 April 1986).

[7] *Faskh* and judicial divorce (*tatliq*) differ substantially even though the result, divorce, is the same. In *faskh* cases, the wife dissolves her contract orally in the presence of the judge, who rules on the validity (*ṣiḥḥat*) of *faskh* but does not divorce her in the place of the husband.

[8] *Faskh* on grounds of *karāhiya* resembles a *khul'* administered judicially against the wish of the husband, as recently enacted in Egypt. The first reference that I have found to *karāhiya* divorce is in a Cassation court judgment of 1371/1952; in support of the ruling, the judges cite a *ḥadīth* about Thābit b. Qays' wife's "dislike" for her husband (YAR, *Majallat al-buḥūth* 1980: 35). Cf. the Pakistani and Egyptian discussions, Carroll 1996: 97ff.; Arabi 2001: 177 note 25, 182 note 50.

[9] "Taking care of property or assuming a public function" without the permission of the husband does not constitute disobedience (Article 37.4)—in contradistinction to legislation in other Arab states.

[10] Mundy 1981: 122.

[11] On women's agricultural work, universal female illiteracy and high rates of child and maternal mortality in the 1970s, see Carapico 1996: 89; Lackner 1995: 85.

2. *People's Democratic Republic of Yemen*

The content of the feminist agenda in South Yemen differed in part from the dominant agenda in the North. But the women's movement in the two states was very similar in social composition (mainly elite women) and strategy (policy of non-confrontation with the male political elite).[12] Improving the material conditions in which women live and their legal status was regarded as part of the anti-colonial and nationalist struggle, waged by the forces who would later form the Yemeni Socialist Party (YSP), the only party in the People's Democratic Republic of Yemen (PDRY, "South Yemen"). Next to land reform, women's rights were part and parcel of the YSP's anti-colonialist and anti-feudalist rhetoric[13] that was employed until the late 1980s. The state's commitment to women's rights was also conditioned by economic necessities. In a sparsely populated country of two million, with some 200,000 citizens working abroad, women were an economic asset whose access to education and entry into the formal labor market were actively encouraged.[14] Accordingly, PDRY legislation was radical: laws relating to land reform and the family attempted to redesign not only family relations but also their generative structures. Law 1/1974 defined marriage as a consensual union between partners who had equal responsiblities: husband and wife share the costs of getting married and maintaining the house-

hold, if possible. The age of marriage is eighteen for men, sixteen for women. Marriage is valid only if registered and divorce only if pronounced by a court. Polygyny is contingent upon court approval and a first wife's infertility or chronic illness, as confirmed in a medical report. Divorce counseling with a social worker provided by the Women's Union is mandatory and women do not lose custody of their children upon remarriage. Until 1988, a civil law provision allowed a divorced mother with custody to keep the marital home.[15]

Reality was far less radical, and application—or rather the social possibilities of application—of the law were uneven, especially outside of the major cities. A three-month marriage bar for men had to be introduced to prevent a man from divorcing his first wife, marrying a second, and taking the first wife back during her waiting period of three months. Furthermore, faced with a chronic housing crisis in Aden, courts often had to rule that the marital home, theoretically to be awarded to the divorced mother, was to be divided between the divorced couple, who were thus forced to continue to live together, separated by a hastily erected wall or curtain. The authority of the law was also uncertain, particularly outside of the city centers, where government measures are generally regarded as a mixed blessing. These factors may explain why, in the aftermath of political unity, male political actors from the South paid only lip service to the preservation of PDRY family legislation, formerly understood as a backbone of socialist ideology.[16]

여권의 측면에서 꽤 큰 차이를 보였다 하네요

- 따밍호는 밍호따요