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WOMEN IN CONTEMPORARY ARAB AND ISLAMIC LEGAL SYSTEM

U ovom tekstu se analizira položaj žena u savremenom arapskom i islamskom pravnom sistemu. Autorka daje kratak istorijski prikaz, zatim ukazuje na napore i rezultate koje je ostvario bivši tunižanski predsednik Burgiba u uspostavljanju novog, drugačijeg položaja žena u arapskom svetu. Autorka nas takođe upoznaje i sa delatnostima i aktivnostima današnjih nevladinih organizacija i sa najvažnijim problemima koji se nalaze u fokusu tih organizacija za prava žena

Ključne reči: istorija; šerijatsko pravo; Burgiba; nevladine organizacije; najvažniji problemi

I first want to clarify that this article tackles the situation of women in Arab and Islamic legal systems, from the sociological legal point of view. This means that the author will regard Islamic Sharia Law as any other legal system. A legal approach involves the following: It accords first of all primacy to the word of the text. The text serves as what is commonly called the source of law that is pronounced in the form of a legislature enacted law, including the constitution. Thus, it has in its text a further reference to the Quranic text, then the Quranic text is also made part of the legal text which constitutes the basic tool for the lawyer and jurist.

The emphasis on the text serves one function. This is to detract from the personality of the person pronouncing a judgment as the source of the law. In order to avoid the mishap of having the personality (be it an academic jurist, a judge or a Grand Mufti as in Egypt) to become the source of the law, and the text secondary. It is, hence, of crucial importance to keep the primacy of the text to serve what is thought to be one of the functions of law, which is to avoid arbitrariness. This concern is of equal importance to European legal systems as in contemporary Islamic legal systems. So, if there ari-

se different interpretations of the text, jurists start searching for the source of this difference in the hope of eliminating it and thus eliminating the danger of arbitrariness. The difference they might find lies in the text itself. It is simply unclear, for example. The difference might in fact lie in the personality of the legislators or the judges. If the text is at fault, it will be changed. If the person is at fault, then the legislator or the judge will be substituted. At this point in history there still seems to be a divergence between Islamic legal approach and the so-called secular European approach. While Islamic legislature can change the amendments to family law codes in Tunisia, Egypt, Pakistan, Jordan etc. it cannot change the Quranic text which are named in the legislated law as supplementary text sources.

As no text is regarded by jurists as a self-contained text in itself, this issue does not constitute a problem from a legal point of view. This is to say that each text contains in it a reference to another text outside it as another source of information, in order to understand what the text means. These other sources are what we call sociological norms or phenomena, public morality and the general sense of what constitutes fairness. For example, when European constitutions refer to the protection of marriage, the courts have used the religious Christian norms to understand the phenomenon of marriage that exists outside the text. Marriage is a union rooted in the Christian norm of monogamy – although the word monogamy is not mentioned in constitutions. Or when we examine the Quranic text regulating polygamy, we see that there is reference to a psychological phenomenon, namely, just treatment in relation to the ability of the man to act equally to all his four wives. On the basis of this reference to the psychology of the husband/wife relationships, the Tunisian executive Bourguiba convinced the legislature to abolish polygamy. This has also served other countries such as Egypt to justify a law whereby the husband is obliged to at least inform each of his wives that they have co-wives. Another example is set in pre-war Iraq, by which the Family Law obliged the husband to obtain the written approval of the first wife (or wives), in order to be able to conclude sequel marriages. Other contemporary jurists have emphasized the reference in the same Quranic text to demographic phenomena, namely if there are too many women because of war, for example then men being in minority should take extra responsibility by marrying more than one wife. But if most of the time the demographics are balanced by and large equally between men and women, then polygamy does not have to be permitted.

It is important to add, that on account of demographics it was recently announced that Saudi Arabia was due to issue a law banning its citizens (of both sexes) from marrying citizens of any other nationality. This was also the case in the United Arab Emirates a few years ago, when the national Islamic Council released a similar law.

It is also noteworthy, that even in the Tunisian that is considered to be the most liberal of Arab legal systems, cohabitation is prohibited, while this flexibility is offered to women in a system as traditional as in Iran.

Calls by women's movements and human rights activists' in general call for the modification of the following points, that are subject to "laws of Personal Status":

- Increasing the age of marriage for women from 15 to 18- thanks to heroic efforts made by Dr Nawal el Saadawi and others, a new law in Egypt was passed to protect the right of children where the age limit has been only recently changed ;
- Establishing the right to divorce by mutual consent, and acknowledging rightful compensation to the wife even when the divorce is being evoked by herself;
- The right for women to confer their nationality to their children and spouses. In spite of this drastic infringement of basic civil rights was heavily supported by Queen Rania of Jordan and members of the Royal Hashemite family, women's rights activists and others, the move continues to be heavily opposed by deputies of the Lower House of parliament;
- Placing polygamy and unilateral divorce by men in judicial hands;
- Repealing a wife's duty to obey her husband;
- Abolishing the requirement of a marital guardian for women to marry;
- Acknowledging the children's right to paternity in cases where marriage has not been officially registered or where it is difficult to determine if there be a mutual intent to marry. It is noteworthy to add here that during Dr Nawal Sa'adawi's campaign for presidency in Egypt in 2005, she was the first voice in the Arab world to have spoken out about civil rights that are acronym to this issue, and a law was recently passed in Egypt, titled The Child's Law, following the conditioning of the Islamic Sharia'a rule by Muslim jurists and lead clerics that was constantly put forward to stifle any such attempts. In Jordan, the Ministry of Social Development seems to be moving in a similar direction, while the effort remains to be in its embrionic phase.

- Right to child support and alimony to be enforced by governments. EL Habib Bourguiba of Tunisia had enforced a law and founded a fund for this purpose. Applicable Sharia' laws regulating this particular issue were conditioned in a manner that led to a sustainable and efficient application of the newly modified regulations in this respect;
- Inheritance laws that stipulate a man to hold a share that is equal to that of two women's shares of the heirloom, to be modified to .

While the legislator in Egypt remains silent on the age of commercial competence for women, in Lebanon the Commercial Law considers a married-18-year old woman as legally competent to enter into commercial endeavors.

In Conclusion, it is possible to combine the very best for women from all the interpretations of the Quranic text, as was demonstrated above. One can safely deduct that the decision to introduce the change remains to be solely political. The political will, manifested itself in Tunisia and presented a clear case where such a tendency can lead to a better utilization of a legal environment that is conducive to its very existence.

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The position of women in modern Arab and Islamic legal system is analyzed in this text. Author gives short historical review, then indicate efforts and results which have been achieved by former Tunisian President Burgiba establishing new, different position of women in Arab world. Author also introduce us with work and activities of non-governmental organizations and with the most important problems which are in focus of these organizations for women rights.

Key words: *history; Sharia Law, Burgiba; non-governmental organizations; the most important problems.*