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Tracing the Development of the Tunisian 1956 Code of Personal Status

By Rayed Khedher¹

Abstract

Tunisia has a unique set of family law codes that continue to operate from 1956 to the present day. The 1956 Code of Personal Status deals with crucial issues such as marriage, divorce, inheritance, alimony, child custody and adoption. The enactment of this code and Tunisian women's emancipation and its uniqueness in the Arab Muslim world can be attributed to a combination of various historical, political and social factors: the country's 'so-called' homogeneity, its particular colonial experience, and above all the country's modernization policy implemented by Tunisia's first president *Habib Bourguiba*. This article focuses on the early years of independence and the role played by Tunisia's first president in implementing those laws benefitting women and the society at large. It examines the Code, its prominence for the modern independent Tunisian society and the historical trajectory which led to its enactment. This article also focuses on the role played by early Tunisian intellectuals and social reformers who paved the way for the significant amendment of Islamic family laws, the enactment of the Code of Personal Status (The CPS) and the later construction of the post-colonial modern nation-state. The article investigates the radical attempt to modernize and reinterpret the *Sharia* jurisdiction through a re-reading of this new set of laws as they came in *Majallat Al-Ahwal Al Shakhsiya* (The CPS) in an attempt to better understand the context in which it was promulgated and the reasons accounting for its success. The article utilizes a few secondary sources which document and scrutinize the roots of Tunisia's trajectory towards the advancement of women's causes. Throughout the analysis, I re-examine the code itself to better comprehend the newly promulgated civic rights and obligations granted to women by this revolutionary legal document.

Keywords: Tunisian women, Tunisian 1956 Code, Arab women

Introduction

Tunisia's unique position in the Arab world in terms of women's emancipation and the overall improvement of their status can be attributed to a combination of historical, political and social factors: the country's 'so-called' homogeneity, its particular colonial experience, and above all the country's modernization policy under the leadership of Tunisia's first, Western-educated president *Habib Bourguiba* and his *Hizb Al Dustour Al Jadeed*.

The issue of women's emancipation in the Arab world is not new and goes back to as early as the 19th century when a number of scholars (*Maghrebi* and *Mashreki*) as well as Islamic

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reformists such as *Mohamed Abdu, Abdel Aziz Thaalbi, Jamal al-Din Al Afghani, Ibn Abi Al Diaf, Khayr Al Din Bacha, Rifaa Al Tahtawi*, strongly believed that the reason for the socio-economic lag in the Arab Muslim countries was, in part, related to the inferior position of women. They shrewdly but cautiously proceeded to advocate for the reform of certain customary Islamic structures and wide spread popular beliefs that marginalized women and placed them in a lower position to men. However, their main concern was how to implement this reform without having to drift away from the Islamic texts (*Quran* and *Sunna*) and to venture a possible accusation of plotting for the westernization of Arab societies and culture. Hence, these scholars skillfully proceeded with the advancement of their liberal ideas defending Islam and reasserting its role in the protection of women and the defense of their rights. Most of these scholars used the *Sharia* as a departure point giving examples from the holy Quran and the *Hadith* (sayings of Prophet Muhammad) on how most wives of Prophet Mohamed, for instance, knew how to read and write and even negotiate business transactions. Many of them also emphasized women equality with men and the mutual respect of rights and duties of wives and husbands in Islam, considering them necessary components for a successful marital relationship and a healthy society. In order not to be caught in a contentious polemic, a number of these scholars also underlined the primacy of the *Quran* (God's word) as the major sacred text and source of all the rules of life for all Muslims regarding matters of family, society, economy, politics, culture, art, science etc. However, they also discussed cases in which the *Quran* might not be too clear or detailed enough and suggested searching in the *Sunna* (collection of Prophet Mohamed's words, actions and practices) as the second major source of Islamic teachings and *Sharia* for additional guidance on these matters.

It is important to recall that for the majority of these scholars (*ulama*, the understanding and interpretation of the *Quran* and the *Hadith* happens through Islamic jurisprudence (*Fiqh*), which often takes *Sharia* as a basis to interpret and hence improve certain laws and principles pertaining to matters of concern to today's Muslims. Moreover, in their efforts to cope with the new changes facing them, some of these scholars resorted to *Ijtihad*, an alternative way to make legal decisions based on the interpretation of certain Islamic laws, vis-à-vis emerging questions about various aspects of Muslim societies, politics, economy, family, property rights, inheritance, sexuality, and many other important issues.

A number of Muslim scholars such as *Youssef, Sharaawi, Al Zahawi, Fawwaz* (Badran 1995, Tabari 1974, Youssef 1974,) seduced by liberal Western thought and philosophy, were convinced that cultural practices of earlier Muslim societies were the main cause of women's low status arguing that the Westernization of Arab societies is the only avenue for the improvement of women's situation. However, several criticisms of this argument started to appear purporting that Islam is innocent from the deterioration of the female condition as it rather improved the status of women by establishing rights of property ownership, inheritance, education, marriage and divorce. *Qasim Amin*, for instance, argued that the inferior position of women was not caused by Islam, as some of these Westernized Arab elite and other Westerners claim, but by people's ignorance and their misreading and misinterpretation of Islamic laws. In the late 19th century, *Qasim Amin* published a book titled '*The Liberation of Women*' which was the starting point of the female question not only in Egypt but also in the entire of the Arab Muslim world. In his book, he argued that women's emancipation, such as their access to education and socio-economic opportunities, an essential first step towards the modernization of the Arab societies (Amin 1992 [1899]: 25). *Amin* argued that contrary to some beliefs, Islam rather came to guarantee and defend women's rights as well as men's and that the *Sharia* would function as a solid legal system granting Muslim men and women their full rights and establishing their mutual responsibilities vis-à-vis society.

Amin writes: “The Islamic legal system, the *Sharia*, guaranteed the equality of women and men before any other legal system. Islam declared women’s freedom and emancipation, and granted women all human rights during a time when women occupied the lowest status in all societies...Women are considered to possess the same legal capabilities in all civil contexts pertaining to buying, Charity-giving, trusteeship, and disposal of goods, unhindered by requirements of permission from their father or their husband” (Amin 1992 [1899]:7). In proceeding with his modernist revolutionary understanding, *Amin* also reiterated that divorce is not *haram* (a sin) and that it is rather acceptable in Islam, affirming that it should no longer be initiated by the husband’s whim through repudiation. He states: “If women are given the right to initiate divorce, then indeed we will have brought about more just and humane conditions for them. We have proposed this right because many women experience injustice in their relationships with insensitive husbands” (Amin 1992 [1899]: 101).

In the western part of the Muslim world (North African countries), the issue of the emancipation of women was not totally new either, as during the era of French colonization, a number of North African intellectuals started to also advocate for a better position for their women. In Tunisia, for instance, *Mohamed Abdu* and *Qsim Amin* frequently visited and lectured on women’s rights in Islam. Furthermore, in 1897, the Tunisian scholar and *Imam Shayk Muhammad Snoussi* published ‘*The Flower's Blooming*’ in which he emphasized the place of women in Islam and the important role of education for Tunisian girls. In the same period (1900s), *Abdelaziz Thaalbi*, together with other intellectuals published a volume titled ‘*The Koran's Liberal Spirit*’ advocating for the education of girls and the elimination of the veil arguing against the seclusion of women considering it a major obstacle towards social progress. All these new ideas on the condition of women in Tunisia created a liberal atmosphere igniting the interest of other intellectuals to write a variety of articles about women which later appeared in the Tunisian Arabic press, most of which dealt with the importance of female education as well as the contentious issue of the veil. Several of these articles were written by *Tahar Haddad*, a young political activist who studied at *Al Zeituna* mosque (Tunisian Center for religious education and scholarship) and who was obsessed with finding ways to remedy the state of the Tunisian society of the time within his role as a fervent member of the *Destour* Party.

Haddad argued that Islam did not oppress women but rather came to improve their status compared to their pre-Islamic condition, and to guarantee and protect their basic rights. He even denied the veiling requirement for women, and argued that the veil was just a symbol of chastity and that the *Quran* did not impose it on women. *Haddad’s* main argument is that Islamic civilization reached its peak when Muslim women took part in the society, and it only began to decline when they started to be secluded from the main stream of public life and to be absent from social activities under the name of Islam (Haddad 1930).

Moreover, *Haddad* reached the conclusion that most of the hurdles facing Tunisia were caused, not only by the French oppressive colonizer, but also by the widespread ignorance among the Tunisian population and more specifically females. In his courageous defense of the rights of Tunisian women, *Haddad* wrote a plethora of articles which he incorporated in his revolutionary book ‘*Imraatuna Fi Al Sharia Wa Al Mujtamaa*’ (Our Women in the *Sharia* and in Society). The book is divided into two parts; the first part is devoted to the study of women’s condition from an Islamic perspective, while the second part deals with the socio-economic and family status of Tunisian women. Similarly to *Qasim Amin*, *Haddad* examined the rights that women enjoyed in Islam and demonstrated, using direct quotes from the *Quran*, that religion, far from discriminating against her, granted her considerable rights. He went on to say that these rights were largely

misunderstood by his contemporary Tunisian society. The second part of the book has an ethnographic tone in that Haddad succeeded to provide a vivid picture of the situation of women in Tunisia with illustrations drawn from his own personal observations of their daily lives and his various Court visits mainly in Tunis. He states: "I went in person to our *Sharia* Courts to ascertain if there was statistical data telling about marriages and divorces and I found that they did not exist" (Haddad 1930:78-79). Haddad also believed that female oppression in the Tunisian society was deeply embedded in the patriarchal system governing the socio-cultural relations, yet most importantly, in the narrow understanding of Islam which, according to him, ought to be more liberally interpreted. He strongly attacked the passive role of a number of *ulama* and *fuqaha* (Muslim scholars) who did nothing vis-à-vis the various social changes that occurred in recent centuries and who often based their judgments on the standards prevailing in the first century of the *Hijra* (Haddad 1930:112-113). It is worth noting that many Tunisian traditionalists from *Al Zeituna* attacked Haddad and accused him of duplicating the French missionary propaganda condemning his writings and accusing him of attempting to destroy the Islamic faith.

After the mysterious early death of Haddad in 1935, the feminist cause was taken over by a young lawyer named *Habib Bourguiba* and other partisans of the New Constitutional Liberal Party (most commonly known as *Neo Destour*), becoming part and parcel of the whole unified national struggle against the French colonizer. Upon the founding of the *Neo destour* party in 1934 the final chapter of Tunisian nationalism started. *Bourguiba* and his *Neo Destour* members belonged to an elite group of new intellectuals new intellectual elite whose modest background helped them better identify with the masses and whose Western education enabled them to fight the French colonial power on its own ground. *Hedi Nouria* writes: "Trained in the Western school, they borrowed from French political parties their tactics, their organization, and even their slogans" (Nouria 1954:317).

The Tunisian nationalist movement ended with the termination of the French Colonization and the independence of Tunisia on March 20, 1956 with *Habib Bourguiba* as its first president. During its first year of nationhood the priorities of the *Neo Destour* moved from the pre-colonial political national struggle to the post-colonial social change; a crucial component in meeting the challenges of modern Tunisia. In his struggle against the legacies of colonialism and the various impediments to Tunisia's advancement and progress, *Bourguiba* believed that the first step would be the transformation of people's consciousness through reforms in education, religion and the status of women. Soon, a series of major reforms were implemented regarding the condition of women, the reorganization of the educational system, the elimination of the *Habous* (land held as an endowment to support a family, etc.).

In the building of the modern state, *Bourguiba* believed that these profound social changes could not be enforced on the newly independent Tunisian society, but should rather be gradually introduced. As such, he implemented his national political method known as *Bourguibism* which is a unique strategic political premise based on the establishment of socio-economic and political reforms through gradual and measured stages. In describing the tactics of his distinctive doctrine, *Bourguiba* states, "such a policy is fully justified when the ideal solution is not immediately feasible, but it must always be dynamic, each step preparing the way for the next step to follow" (Bourguiba1966:481). President *Bourguiba* was extremely popular among Tunisians. Many citizens viewed his nightly show *Tawjihat Assaied Errais* (Mr. President's Recommendations) broadcasted right before the 8 pm News in which he addresses the whole nation talking about various issues from politics to health, sexuality to religion. *Bourguiba* was remarkably charismatic and succeeded to attract the masses and to gain their confidence until they ended up considering

him ‘the father’ of the newly independent state and the astute architect of its national unity. He was even nicknamed ‘*Habib Il Umma*’ (the lover of the nation). In one of his famous speeches addressing the nation about the challenges facing Tunisia and the various social changes ahead, *Bourguiba* declared: “This change represented in our minds a choice in favor of progress ... the end of a barbaric age and the beginning of an era of social equilibrium and civilization ... We must fight anachronistic traditions and backward mentalities” (Bourguiba 1978:158).

It is important to remember that although the issue of gender equality had been under way for several decades, it was not until independence that *Bourguiba* came to take major legal procedures through his revolutionary enactment of the Code of Personal Status (CPS) in 1956. In fact, *Majallat Al Ahwal Al Shakhsiyya* (The Code of Personal Status) was enacted just six months after Tunisia’s independence and was widely viewed as a vital step towards the country’s path to modernization. Through the Code, President *Habib Bourguiba* outlawed polygamy, forced marriage and repudiation, abolishing the Islamic *Sharia* Courts and setting up equal divorce rights for men and women.

The drafting of the CPS involved lawyers as well as religious leaders and one of its most controversial issues was the criminalization of polygamy (despite the rare occurrence of this practice in Tunisia) and the termination of extra-judicial divorce. In a defense of Tunisia’s Islamic legacy, *Bourguiba* continuously argued that the draft code, based on *Maliki* family laws, did not aim at changing the rules of what was *halal* or *haram*, but it rather aimed at issuing legal codes applicable to the Tunisian contemporary social life. *Bourguiba* presented the newly drafted code as a ‘fresh’ return to the true spirit of Islam through the positive legal reforms of matters relating to personal status and women’s rights. When discussing the Islamic spirit of the CPS, *Nouri Ganna* states: “Unmatched in the Muslim world except perhaps by the 1924 Turkish Civil Code, the Tunisian Code did not, however, abolish the *sharia*, or Islamic law, altogether, nor did it proceed to sweepingly mimic the somewhat ‘a la *Ataturk*’, a European model” (Nouri 2010:108).

Majallat Al Ahwal Al Shakhsiya (The CPS) was established as a Presidential Decree and was put together under the direction of the Ministry of Justice becoming law on January 1, 1957. The code introduced dramatic changes in family life such as the proclamation of marriage and divorce as state matters, the setting up of a minimum age for marriage, the protection of the wife against abuse by her husband and most importantly the abolition of polygamy. In addition, this new Code was set to secure more rights for women, granting them a legal recognition and putting them on an equal position with men in most aspects of family matters. So, what are the specifics of this Code? And what does it contain?

The Code is made up of ten books, each of them includes a number of articles redefining the legal status of women and protecting Tunisian family life through a novel set of laws on *Al Zawaj* (marriage), *Al Talaq* (divorce), *Al Nafaqa* (alimony), *Al Hadhana* (child custody), *Al Nasab* (determination of parenthood), *Al Laqit* (abandoned children), *Al Mafqud* (missing persons) and *Al Mirath* (inheritance) (Sfeir 1957).

Book I discusses the marriage contract and asserts that for a marriage to be valid, it must allow women as well as men to freely consent to their marriage in front of ‘two worthy witnesses’ and to acquire *al mahr* (a specified dowry) which provides the wife with future protection against domestic abuse (Sfeir 1957: 309).

In a speech delivered by *Bourguiba* on this marriage consent issue, he declared: “It is inadmissible, I am sorry to say, that parents constrain their son to marry a young woman chosen for their own convenience. We have in this respect strange practices. There are the young women who have been ‘promised’ to a young man for a long time. There are the female cousins, the female

relatives with various degrees of kinship closeness, a whole series of young women to marry off...Let's leave the decision to the husband and wife to be" (Bourguiba 1978:166-67). The Code came to put an end to previously popular practice of arranged marriages and to take away the authority of the father or guardian to force a young woman to marry against her will. Under legislation, marriage became a voluntary union between two individuals and only courts had the authority to end it.

Article five, in the same book, states that the minimum age for marriage is 15 years old for women and 18 years old for men, with certain exceptions allowing marriages under age to take place with the consent of the couple's guardians and the authorization of the Court. The article states: "Below this age, marriage cannot be contracted, except by the special authorization of a judge who may grant it under exceptional circumstances. In this same case, consent for the marriage of a minor must be given by the parent who must fulfill three conditions: namely being of sound mind, adult and male" (Sfeir 1957:309-10). Also, a new legislation was included to eliminate constraints on interfaith marriages preventing Muslim women from marrying non-Muslim men.

As for polygamy, despite its infrequency, the code prohibited it and declared it a crime punishable by Tunisian law. The Code states: "Whosoever marries another wife/husband while married to another wife/husband shall be sentenced to a one-year of imprisonment and a fine" (Sfeir 1957:310).

On the impediments to marriage, article 14 prohibits marriage between blood relationships (*al qaraba*), others sharing affinity by marriage (*musahara*), children breast-fed by the same woman (*al rida*) or couples whose marriage was terminated by final divorce (*al taliq thalatha*).

With regards to the treatment of women in marriage, book I under article 23 announces that husbands must treat their wives with benevolence abstaining from causing them any harm. Wives would in turn respond by performing their conjugal duties in 'conformity with usage and custom' (Sfeir 1957:310).

Book II is about divorce which became, through the Code and unlike in *Maliki* law, a civil matter available to both husbands and wives, taking place exclusively in the Court. It put an end to unilateral repudiation, a common Muslim tradition of dissolving a marriage that is still practiced in many Arab Muslim countries. According to the Code, both, the husband and wife can equally file for divorce; yet, the Court would still attempt to reconcile between the two parties with the aim of avoiding the termination of their marriage. Article 32 stated: "The judge shall not grant a divorce decree until after he has examined the causes of the dispute between the spouses and finds it impossible to bring about a reconciliation" (Sfeir 1957:310). It is noteworthy that once the marriage is terminated by the judge, the woman becomes automatically entitled to a financial indemnity paid to her by the ex-husband for the damage resulting from the divorce as granted by *Sharia*. The judicial procedure of divorce and the heavy financial indemnities incurred made the whole act more difficult to carry out as opposed to *Talaq Il Thalath* (final divorce), opening the possibilities of reconciliation between husbands and wives.

Book IV deals with alimony (*Al Nafaqa*) which occurs through marriage (*Al Zawaj*), blood relationship (*Al Qaraba*) and contractual obligation (*Al Iltizam*) and which aims at protecting the divorced woman and guarantees her rights to alimony and child support. According to the Code, alimony includes "food, clothing, shelter, education, and all that which by usage and custom is considered of the nature of necessities" (Sfeir 1957:311).

The various articles under Alimony (articles 38-53) highlight the support of the husbands to their ex-wives and their under-age children until they become financially independent and able

to earn a livelihood. The other remaining volume (child custody, determination of parenthood, abandoned children, missing persons, inheritance, interdiction and maturity) are instigated by a synthesis of laws of the two *Sharia* schools *Maliki* and *Hanafi* pertaining to issues such as child care, lineage, paternity, child illegitimacy, age of majority ... (Sfeir 1957:311). Under these articles, the custody of the children and their upbringing becomes the responsibility of the mother and the family on the mother's side, which has priority in looking after the affairs of the child. The Court can also intervene to determine which party is entitled to become the guardian of the child, regardless of kin relations and based entirely on the child's best interest. (Sfeir 1957:311).

It is worth mentioning that some of the articles under these rubrics did not bring major improvements to the *Sharia* laws as they remained unchanged especially the issue of inheritance which still follows the *Maliki* law recognizing that the woman's share is still half of her male's counterpart. In her book '*States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*', Charrad states: "In light of the other regulations of the CPS, which gave more rights to women and favored the immediate family over the extended patrilineal kinship system, the stipulations on inheritance were surprising. They did not seem in concord with the spirit of the *majalla* (journal) as a whole" (Charrad 228: 2001). However, a major change occurred with regard to inheritance as far as the procedures for wills are concerned. The CPS stipulated that a will should no longer be orally transmitted, but must rather come in a written text which has to be dated and signed for it to be considered legal (Sfeir 1957:313-15).

In conclusion, the distinctive position of Tunisia in terms of gender equality and the advanced legal status of women can be mainly credited to the modernization policy implemented by *Habib Bourguiba*. Throughout the analysis, the article briefly addressed the role of *Bourguiba's* predecessors in challenging some *Quranic* regulations and the *Sharia* law on matters concerning women. In the exploration of the historical trajectory illustrating the evolution of women's rights, the article examined the particular circumstances that led to the promulgation of the CPS analyzing some of its major reforms regarding the legal status of Tunisian women. The CPS instituted a number of changes benefitting women and accentuated the durability and value of marriage as a conjugal union which bonds can only be dissolved by the judicial Court. It can be argued that the CPS was an important instrument of social change used by president *Bourguiba* and the *Neo Destour* party to construct a secular modern nation able to cope with the challenges of the time.

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