

# Family Laws: The Changing and the Pseudo-Eternal

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## **Dictates of Practical Efficiency and its Justification**

Laws are a basic necessity of civilized living. They organize the various functions in society, ensure property rights, and aim to restrain transgression by stipulating to punish or rehabilitate transgressors. Laws also define the rights and responsibilities of each person vis-à-vis the state and with respect to other people. This is why they are an integral part, indeed a justification, of any theory of social contract.

But despite the crucial importance of regulating families, which constitute the basic building blocks of society, the law faces more difficulties in gaining access to the family than it does in acceding to other bigger more conspicuous social units. This is because the family's vigil to guard its privacy and its comparative smallness of size make it much more elusive and harder to control. Hence, ideologies that are very much into control, such as those of Plato's *Republic* and George Orwell's *1984* see the family as undesirable or 'ungood.'

Historically, the mode that societies chose for regulating or controlling the family took the form of giving dominance within it to the father/husband, so that he is held responsible for it in the eyes of society, while urging the family to regard him as its leader and primary decision

maker. This form of organization or delegation of control by society was often enforced by family legislation.

But as law includes aspects other than the organizational that seek to control, family status laws are enmeshed in several practical and ethical problems that are ignored by the above one-sided consideration.

In the first place, as with all laws, family law is supposed to have a judicial or quasi-judicial function in accordance with the traditional role of courts as guardians of the weak and unprotected. By giving additional status to the physically stronger member of the family (father/husband), family status law further weakens the position of the weaker members of the family and exposes them to possible tyranny or cruelty.

In the second place, the justification of a law is frequently based on ethics (Tulloch, p.4). Thus, critics and discussants of the law, as opposed to legal positivists who argue that the law is simply what is decreed by legislators, argue for, or critique, a law on the basis of how far it conforms to, or deviates from, ethical standards. If the moral stance is the one that leads to treating all human beings as equally entitled to happiness, dignity and free-

dom, then it would be difficult to justify the discrepancy in status between family members, especially between adults. Such discrepancy is opposed by believers in human rights, feminists and others who adopt trends of post-modernity. Others try to justify the traditional unequalitarian laws by supplying theories of philosophical anthropology that justify male superiority. Such theories overlook the practical aim behind giving precedence to men, essentializing male superiority and overlooking individual variation and any evidence of lived experience contrary to such theories. The history of civilization abounds with such theories from the time of Aristotle, whose enthusiasm for proving male superiority led him to blunders such as the claim that men have more teeth than women, to the modern times with Rousseau, Kant, Hegel, Freud, and many others.

For example, Freud considers women to be lacking in conscience (weaker super-ego) and in the power to sublimate. He also finds a difference in men's and women's emotional involvement with others, claiming that men are capable of loving the other as an other and women's love remains fixated in the narcissistic; i.e. that it is usually an extension of their self-love. Both of these Freudian differentiations between men and women are capable of justifying that men and not women should be in command of the family, as their superior conscience makes them better guardians of justice (rationality, fairness), and as their comparatively selfless love makes them more fit to be entrusted with the well-being of others.

Indeed the justification of existing forms of organization and of power have swayed common-sense beliefs about the difference between men and women so far, that even recent researchers could not evade its impact. For example, Garai and Scheinfeld (1968) describe a collection of measures on which women performed better than men as 'clerical abilities' rather than, say, 'superior ability at organization;' and Gray (1971) describes another category of activities on which women got higher scores than men as 'fearfulness' rather than, say, 'higher alertness' or 'quicker reflex.' Male superiority is taken so much for granted that the evidence of any female superiority is seen as a propensity towards excelling in subordination or towards the need to be protected.

It is to be remarked, however, that while some philosophical and other high-handed theories divest women of mental, moral and emotional equality with men, literature, even from ancient times, recognized women's full human stature, creating characters such as Antigone, Lady MacBeth, and Shehrazade.

#### **The Law: Eternal or Modifiable**

In the philosophy of law, we find two large groupings of

positions concerning the actual and desired origin of, and rationale for, the law:

Some hold that law is, and ought to be, rationally or authoritatively construed and/or divinely revealed so that it may mould, or create or recreate society in a certain desired fashion. Others maintain that it is social norms and opinions that do, and should, create laws; and that laws must, and will, get changed and revised when society outgrows them.

1. Authoritarian views sometimes spring from ideologies and sometimes from religious beliefs. The champions of authoritarianism include Plato, St. Augustine, Peter the Great, Mustafa Kemal (Atatürk), as well as regimes like those of Saudi Arabia and of the recently dismantled Taliban of Afghanistan. These individuals and schools of thought and regimes believe that a system ought to be imposed on society in order to steer it towards an envisaged end. This end could be the 'eternal good,' an idealized 'Europeanization,' the kingdom of heaven on earth or the Garden of Eden in the afterlife as the one goal of this life.

The English philosopher and legislator Jeremy Bentham, and his disciples, have a philosophy of law that believes that reason, guided by the principle of universal and impartial utility, is the best legislator. Their philosophy was highly influential for some time, although the codes of law that Bentham drafted, whether for Tsarist Russia or for emerging Latin American republics, did not prove, upon application, to be very successful. The recently deceased American philosopher John Rawls proposes another rationalistic (Kantian) philosophy of law, setting a standard of Justice as Fairness based on two principles of justice, governing rights and opportunities as well as the distribution of wealth. His theory is claimed to constitute a standard that measures fairness analogous to the standard that measures ethics described in Kant's *Foundation (or Grounding) of the Metaphysics of Morals*.

Parallel to this trust in reason, there is the belief of many Islamic jurists that shari'a is the proper and the best ground of legislation. They consider shari'a as law par excellence and as an authoritative blueprint based on revelation (Anderson, p.3). Indeed religious bases of legislation tend, in general, to resist change. Thus, even Christianity, which has comparatively left 'what's Caesar's to Caesar' is still resisting changing the vow of obedience by the wife to her husband, despite the prevalence of an ideology of equality in Christendom.

2. Believers in Change: In criticizing the blind belief of some jurists in reason, Oliphant draws attention to the inevitable need to consider legal questions from the prag-

matic point of view, whenever “general principles lead to shockingly unfair results” (Oliphant, pp. 20-1). Justice Holmes attributes such a belief to an innate desire for a deceptive sense of mathematical exactitude that flatters the mind’s longing for certainty and repose; and Dewey refers the rational or idealistic position to an aesthetic quality of the mind which responds to the form of symmetry of the syllogism and is cold to the apparent disorder of experimental thinking. He adds that the symmetrical is also favored because it involves less work.

Several critics of basing legislation on the authority of the absolute fixed dictates of reason insist that words, including concepts that are crucial to legislation, should always be understood in their context, since in different contexts they may have different meanings. Thus, terms like ‘law,’ ‘right’ and ‘status’ are ambiguous, having a common-sense meaning that is known but not understood, and a practical significance that derives from how much power the one whose ‘right’ or ‘status’ is being mentioned has, and from whether or not the one in charge of a law has the intention of, and the means to, implement it.

In criticizing those who profess commitment to an immutable *shari’a*, Anderson mentions that jurists of early Islam were perfectly free to go back to the basic sources and make their own deductions. He also points out that *shari’a* was never fully enforced, that a great deal of it is moral rather than legal and that a great deal of it has, from the beginning, been intermingled with local customs and modified by them (Anderson, pp. 2-5). Hassan Al-Turabi claims that while pretending to guard things as ‘God’s Word’ intends them, men in charge of Islamic schools of jurisprudence (*madhahab*) have been gradually taking away from women the rights that Islam gave to them (Al-Turabi, pp. 182-3). Hocking points out the interesting fact that although most codes were originally propounded by mystics and prophets, and although the mystic vision is an essential component of a life within the natural world, pure mystic vision vanishes out into meaninglessness and total impracticality (Hocking, pp. 270-1). This is perhaps why Christ instructed to separate what is Caesar’s from what is God’s. This also could be why Islam gave such weight to *shura* (discussion) and *ijma’* (consensus), as leeway to introducing the worldly dimension into divinely revealed law.

Nowadays, those who uphold the empirical and essen-

tially democratic position include Sanigny, Ehrlich, Oliphant, Hart, and others, including some earlier and present-day Islamists. The Tunisian regime of Burghibah implicitly holds such a view regarding *shari’a* as is evidenced by its considering laws that permit polygyny to be no longer suitable for Muslim communities. Similarly, Inamullah Khan advises Muslims to follow the prophet’s instruction when he says: “Knowledge is the property of the Muslim; seek for it wherever you find it” (Malik, p.3). Khan believes that the nineteenth and twentieth centuries witnessed the rediscovery of *ijtihad*, *ijma’* and *shura*, and that all those who obey the prophet should pursue these trends in legislating for their respective societies.

Those who believe that law ought to be the offspring of evolving social reality form the prominent and the largest trend among legislators in the industrial world. But in the so-called developing world, sometimes the opposite trend, which upholds the immutability of the law, still predominates, especially where family law is concerned. Friedmann observes that although some countries in the Islamic world have introduced changes in family law, changes in commercial and civil laws have evolved at a much faster pace (Friedmann, p.12). Indeed, even the clear dictates of the Qur’anic text, such as the prohibition

of taking interest on money lent, have generally been ignored in most Islamic countries, where corporate law has long been secularized. Moreover, family jurisdiction is the only legal function still left to religious judges (*qadis*) and the only domain in which the older words and procedures in legislation and ruling are still preserved (Anderson, pp. 3-5).

Is this surprising in a world in which men and their interests rule? Isn’t it a natural ruling of the interests and desires of patriarchy that allows men to have access to interest on

their money and stay sole rulers of their families? Clearly, it is not because religion is more keen on restricting women than bankers and businessmen, but because bankers are powerful in policy making and women lack power and access to decision making that the desires and sometimes whims of the former are accommodated, while the latter are denied equity (see works of Aziza Al-Hibri, Mona Zulfikar, Mona Haddad-Yakan, and many other Islamist feminists).

#### Family Law and Change

Those who study the course of history recognize change

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as the norm in human development across time. Indeed the very notion of 'history' presupposes change in time and recognizes that it is only in the human context that events can happen not according to cyclic or accidental factors, but either according to purposeful planning or in the course of ongoing social or economic or other forms of change or development that leave earlier stages behind.

Since the family is the material of which society is made, no social change can happen without touching the family or being touched by it. Among those in charge of family laws, some want to guide change towards certain values and/or religious ideals and others want change either to keep up with scientific and other forms of progress, which is bound to create new situations and conditions, or for reasons having to do with ethics and equity. Often, those who oppose change do so for selfish ends having to do with their holding on to power. But, sometimes, when the pace of change is too fast, people fear it lest it obliterates their specific characteristics or causes them to lose their identity. Perhaps some like to leave decision making to some authority, whether political, religious or posing as the embodiment of reason. Why they opt to do so is another intricate question that may lead to probing psychological propensities, such as the desire to stay in the role of the cared-for child or the obedient soldier. But this discussion is not within the present scope.

It has often been the case, of old and currently, that rulers, especially totalitarian ones, tend to oppose change, for fear that it will lead to their loss of power or their being replaced. Friedmann observes, in this context, that modern dictatorships resemble older absolutism in their hostility to the separation of powers and in the concentration of as many functions of government in as few hands as possible (Friedmann, p.7). He goes on to say that authoritarian rule not only keeps the same faces [and pictures?] in power, but it also seeks to control education so as to inculcate in the rising generations the attitudes and beliefs of the older ones. Thus, the people may continue to, meekly or even enthusiastically, accept what the rulers, whose continuation in their positions rests on their posing as guardians of tradition or revelation, want them to accept.

#### **Women and Change (for better or worse)**

It is important to note, however, that it is not just any change that is desirable, nor is change always one

towards justice and equity. Recently some changes in family law were in the direction of giving women rights equal to those of men, but others were in the opposite direction. For example, what happened in Afghanistan during the rule of the Taliban was change in the direction of preventing girls from attending schools and forbidding women from working outside the house. In the Arab world, women yearn for equitable changes in family laws, but sometimes we fear changes that may set us further back. Thus, when in a lecture delivered in the context of seminars held in celebration of the centennial of The American University of Beirut (AUB), Ahmad Zaki Yamani claimed that *shari'a* = the Qur'an + what is true and valid of the sunna + "consensus of the community represented by its scholars and learned men," some women present, including myself, feared that the last item of the equation (in Yamani's Saudi society context) may become the source of more injustice to women. Other jurists' recommendations to instigate change, in that same conference, were conducive to more hopeful projections towards the future. Among these last were the above-mentioned contribution of Inamullah Khan and most markedly the progressive and perspicuous recommendation of Musa Al-Sadr. For, Al-Sadr said, in the context of expounding God's elevation of human beings: "Islam sanctifies all the human needs.

It considers fulfilling such needs a form of worship and is displeased by neglecting or ignoring them" (Malik, p.161). The implication of this saying that everyone (including women) is required by God to attend to their needs and desires and to work for self-fulfillment and not just to serve family members, which is the traditional view, especially of religious authorities, fell on us women as a breath of fresh air and as an exhilarating promise of religious reform.

At the level of actual changes in family legislation, change towards more equity in family laws is taking place in many countries of the Arab and Islamic worlds, albeit at a far slower pace than it should. In Pakistan, a wife can now obtain a judicial divorce on the grounds of incompatibility. In Tunisia, the proclamation of Burghibah that polygyny, as well as slavery, were suited to the past times, but have grown to be obsolete, useless and unacceptable, inspired his party of Neo-Dastur to introduce various progressive modifications of family law. Law 44, known in Egypt as Jihan's law, was a step forward, which gave a booster and a horizon of hope to women's activism in seeking reform in family legislation.

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A positive sign in the direction of procedural efficiency and higher professionalism is the unification of civil and religious courts, which took place in Egypt and Tunisia; for a qadi trained in modern law schools is more likely to have responsive and progressive ideas and is more capable of applying codified law than one researching some medieval texts could ever be (see some opinions in Round Table in this issue of *Al-Raida*; also Anderson, p.28).

### In Lebanon

In Lebanon, changes in the laws of inheritance (1959) for non-Mohammedan sects and in custody 1991 (for Catholics) and 2003 (for Orthodox) in some Christian sects have taken place. Yet, other civil (e.g. nationality) and family laws (polygyny, custody and divorce, for Muslim sects) are lagging behind some other Arab and Islamic countries.

Resistance to change in family laws, in Lebanon, seems to derive from two basic reasons:

- On the side of those in power: Self interest prevailing over public interest and even over the cause of the very survival of society and of the country.
- On the side of the public: The lack of strong allegiance to, and belief in, Lebanon as a unified and integrated country, like any other.

### Those Vested with Power

Entrusting the religious authorities of the various sects with family legislation is a practice that Lebanon inherited from the Ottoman Empire. But whereas the Ottomans, at the time, applied the millet system only to minority groups, and kept legislation for the mainstream Sunni Islam in the hands of the state, in Lebanon all are minorities falling under an outdated millet system. The millet system of the Ottomans was a major reason behind the crumbling of the empire, as it led to outside interference and to rifts between the interests of the minorities and those of the mainstream Sunni civil society. Similarly, the sectarian system in Lebanon has hitherto led to several civil wars and continued interference from outside, and, more dangerously, to the interests and allegiances of the Lebanese people going in various, often conflicting, directions.

Turkey learnt from its mistakes and installed civil family laws as far back as 1926, but Lebanon does not seem to want to learn this obvious lesson, either from others' experience or from its own!

It is impossible to claim that politicians and religious authorities in Lebanon fail to be cognizant of the great risk to the country inherent in such a division-engendering and progress-preventing practice as that of subjecting the numerous sects to varied laws, kept under the jurisdiction of sheikhs and priests. But it seems that often those in charge are more concerned about their selfish aims of reaching power, or keeping it by the most immediately accessible means (emotional appeal to the masses and to self-serving religious authority) than about their responsibility for the viability, peace and unification of the country.

Moreover, the sectarian politics, that cause politicians to vie for the favor of constituencies divided along sectarian lines, cause them to uphold the existing laws of the sect, no matter what their beliefs are or what common sense clearly dictates. This is why almost everyone holding religious or political power posts opposed the optional civil law marriage proposed by President Hrawi in 1996. Even leading women's NGOs, whose very *raison d'être* is fighting for women's rights, did not dare to openly support Hrawi's proposed law for fear of loss of popularity with powerful leaders of the sects, religious as well as political.

It is well known that the masses are more easily swayed by emotional reasons having to do with their sense of identity and with their inherited beliefs and traditions than by ideas that seek progress and preempt civil wars and fragmentation. This is probably why, till now, the predominant trend among politicians seems to have been the choice of the easier access to popularity and votes by each embracing his/her respective sect rather than working to educate, and truly lead, constituencies towards what gives the country stability and allows it to move on, on the road of progress.

More understandably, the predominant trend among religious authorities has been to encourage adherence to the small religious and sectarian differences, thus to enhancing their own power and to making themselves indispensable. There are, of course, exceptions. Those exceptions make one wonder why Abdallah Al-Alayli was prevented from acceding to the position of mufti, and his books disappeared from the bookstores. Why was Gregoire Haddad bypassed by church promotions; and why did Musa Al-Sadr disappear? Was it simply coincidence that removed from the arena of religious power these three figures distinguished by rationality, tolerance and openness to change and to other religions and sects?

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## The General Public

Each Lebanese citizen finds himself/herself forced to be born, to get married and to die within a religious sect. Moreover, most Lebanese citizens need the support of the leader (*za'im*) of their respective sects in order to get a job in the government or in most other sectors. During the recent civil war many used such clientalism to free their imprisoned husbands or children or to liberate their occupied homes or to get their fair share of indemnity to restore their war-damaged property. Maybe some citizens do not know better than to adhere to their sect and nothing beyond it, but even those who know better are forced to pretend to have a narrow-minded view of their religious belief and to adhere to every command of the religious authority or party or *za'im* in order to get by in this highly sectarian set up.

This situation, between political leaders who espouse the stance of religious prejudice and pose as defenders and champions of their own religious sects, and citizens who need religious leaders or political representatives of their sects in order to get by, is a chicken-egg situation. It is hard to tell how things will be made to change (since change they must, unless we are living outside history).

Will the leaders start to do their ethico-political duty? Or will the people, or some from among them, start working to raise the level of popular consciousness in order to liberate the country from sectarian division and liberate the family from archaic judgments that create a lot of senseless suffering and humiliation?

If family laws derive originally from a practical aim towards efficiency, the Lebanese situation of having 18 different forms of family laws that often clash with civil laws and international ratified agreements is the acme of impracticality and inefficiency. And if laws in general need to be changed in order to accommodate changing circumstances and to get cleansed from injustice and other breeches of the currently recognized moral standards, the ones to change them are rarely other than those who suffer the injustice. This is because power strategy often interferes with legislation and with the theoretical justification of legislation. Thus, family law cannot be expected to become fair to women until women take part in law-making and in the coining of anthropological theories that support legislation, including religious jurisprudence and the interpretation or reinterpretation of religious texts.

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