

Sexual Equality, Constitution and Islamic Law in Algeria⁽¹⁾

Woman's status in Algerian law carries the mark of ambivalence. While she enjoys full rights in political law her personal status reduces her to a second class citizen. For example, the husband has the exclusive right to repudiation and polygamy and the actual division between political and civil rights is not confirmed by any fundamental text. But rather, this dualism dates from the colonial period and was based on differentiation between colonizers and colonized. Under Independence it becomes necessary to visualize Algerian law not as a quasi autonomous project but as a coherent whole.

Sources of the Algerian Law

Unlike the constitutions of other Arab countries which state that the Islamic Law is their

main source of legislation, no such stipulation exists in the Algerian constitution. Article 6 of the said constitution refers to the National Charter which confirms the equality of all citizens as the fundamental source of the Nation's politics and state laws.

There are three texts which permit the application of Islamic law in matters of personal status in Algerian law. But it happens that a large number of sectors, including the personal status, have not been provided with such a legislation. The judge is then led to refer to article one of the civil code which recommends that in the absence of a legal basis or reference a judge should resort to the principles of Islamic Law.

Apparently because Algerian laws do not include a family code the personal status has been subjected to Islamic law. Yet this reasoning is subject to discussion because the judge's first duty, whenever he applies the rules of Islamic Law, is to see that it conforms with the written law; i.e., with the principle of sexual equality ratified by the

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Constitution. It is probable that many constituents of Islamic law are in agreement with that principle but it is also certain that other constituents are not.

In classical law the principle of equality is considered most fundamental. The Algerian constitution of 1976 gives it special emphasis when it states that all discrimination based on prejudices of sex, race, or profession is condemned (art. 30 in fine). Moreover, "All citizens are equal in rights and obligations" (art. 39); "Law is the same for all, whether it serves to protect, to restrain or to repress" (art. 40).

The Algerian constitution adds that "the State is bound to cancel all economic, social or cultural obstacles which limit equality between citizens, hamper the blossoming of the human personality, and prevent the effective participation of all citizens in political, economic, social and cultural development" (art.41).

The above texts clearly show that no division is made between the political and the civil rights of women. In this respect the Algerian constitution differs from other Arab constitutions such as that of Morocco, which restricts sexual equality to political rights; and the Egyptian constitution, which specifies that "the State ensures for women the means for conciliating their domestic duties with their outside work, their equality with men in the political, social, cultural and economic fields, but without any prejudice to Islamic principles".

Equality, free from all restriction is also required by the National Charter which declares that

"Woman's promotion is both an imperative of the spirit of justice and equality, and an exigency dictated by the dialectic of progress, democracy and the harmonious edification of the country". The basic principle of equality entails two consequences: first, no particular obligations may be imposed on any category of citizens, second, no particular rights may be granted to any category.

These consequences are in contradiction with certain solutions admitted by Islamic law and applied in many instances in the family code, mainly in the cases of unilateral repudiation, polygamy, and inheritance.

It is true that legislation in many Moslem and Arab countries has endeavoured a good many years to promote women's condition. Certain measures have been taken to restrict polygamy and to limit unilateral repudiation by imposing the judge's arbitration. No matter how commendable the efforts have been, they fail to hit the root of the problem in Algeria because they do not respect the spirit and the letter of the constitution which affirms sexual equality.

Conclusion

Both the National Charter and the Constitution, the only texts that have been adopted by referendum, agree on the recognition of the citizens' equality in all rights, including sexual equality. It remains to be seen whether legislators will profit from the fundamental texts at their disposal and endow Algeria with a family code which will provide such equality constitution.