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Governing Diversity in the Personal Status Domain in the Arab Mashreq States

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The Arab Mashreq region, namely Syria, Lebanon, Egypt, Jordan, Palestine and Iraq, is known for its significant religious diversity, a fact that casts its shadow on various aspects of these countries' political, cultural, social and legal life. In this region, citizens' religious affiliation affects their legal status. In civil status matters, Christians have their Canon Laws, Muslims are subject to Islamic Sharia and the Druze their own doctrinal laws. Over and above that, the region has a variety of religious courts, whereby there are spiritual courts for Christians, doctrinal (madhabi) courts for the Druze and Sharia courts for Muslims. Egypt is a different case since it annulled religious courts for non-Muslims in 1955, but kept their Canon Laws under certain conditions.

Diversity management in the personal status domain, like in other fields, should ensure religious freedom and the citizens' equality as far as rights and responsibilities are concerned, as well as in front of the law and justice. However, current religious legislation and jurisprudence relevant to personal status show serious shortcomings as we will explain in the paper.

This paper provides an analytical and critical review of the way the legislators and the judiciary in the Arab Mashreq govern diversity in the personal status domain and emphasizes the legal provisions that violate religious freedom and equality before the law and justice. It starts by reviewing the impact that these laws have on people's lives, considers the jurisprudence of various religious courts. Finally, it provides a series of recommendations in line with the principles of personal and religious freedom, and equality among the citizens.

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The foreign mandate period in the Arab Mashreq saw the enactment of several positive laws regarding equality among citizens, which helped promote respect for the principle of citizenship and limit the influence of religion on the state and laws in the Arab countries.¹ Nevertheless, the political infrastructure of ruling regimes in the Arab world, in general, and the Arab Mashreq countries in particular, remains unclear since it is still difficult to determine whether these political systems are religious or civil in nature. While the majority of these countries' constitutions stipulate that Islam is the state religion – save for Syria and Lebanon² - and that Islamic Sharia is one of the sources, if not the main source of legislation, there is a noticeable lack of genuine and comprehensive application of Sharia law, like in Saudi Arabia and Iran.³ This does not mean that religion has no influence on legal legislation or ruling regimes in the region, especially in Egypt, Syria, Jordan, Palestine and Iraq. This influence is clearly evident in the personal status domain⁴ where laws are mainly drawn from Islamic Sharia (particularly from the Hanafi school of law) for the Muslims, Canon Law for Christians and the Druze doctrine for the followers of this sect. In addition, non-Muslims, whose religion is officially recognised, have their own courts, save in Egypt where Law No. 462 of 1955 has annulled all religious courts for non-Muslims, though church laws are still being applied under certain conditions.⁵

Governance of religious diversity, especially in the personal status domain, is one of the most important challenges facing Arab regimes that already came or might come to power as a result of the political changes currently sweeping the Arab world. The hoped- for democratic transition, including good governance and good religious diversity management, faces several difficulties embodied by the influence of religion over the state and laws, and the negative impact

that some inherited negative habits and traditions have on the legal, political and social levels. This takes place in tandem with continuous attempts by despotic regimes, over the past decades, to spread backwardness and division among the country's population, and use religion and the sectarian card to ensure their survival in power, not to mention the intentional absence of a human rights and political culture to abort any democratic project. With this in mind, the new regimes should diligently correct all deviations in the domain of sectarian and public freedoms, in particular religious freedom, to ensure respect for the rights of all citizens. This is especially true for citizens who belong to various religious minorities who should be integrated in their societies, on the basis of full equality, in order for society to progress. This would not only benefit members of these minorities, but all citizens alike.

The study will confine itself to two of the most important aspects of personal status domain that show poor management of diversity and violation of equal rights and religious freedom, and destabilise the judicial system and enshrine sectarianism. The first section tackles mixed marriage and its consequences. The second section focuses on religious conversion, and its implications.

Mixed Marriage and its consequences

Mixed marriage and its legal implications is one of the most complex personal status issues; we will first address the ban on certain types of mixed marriages in the Arab Mashreq countries before moving on to the issue of custody and the children's religion in such marriages.

The ban on mixed marriages

The majority of laws in effect in the Arab Mashreq region still ban certain types of mixed marriage, especially the marriage of a Muslim woman to a non-Muslim man, and that of a Muslim man to a non-Muslim woman who does not belong to one of the Abrahamic faiths (Christianity and Judaism).⁶ Article 48 of the Syrian Personal Status Law states that the marriage of a Muslim woman to a non-Muslim man is null and void, and the same appears in Article 28 of the Jordanian Personal Status Law of 2010. However, though this ban is not clearly stated in the Egyptian legislation, the absence of any clear reference requires the judge to return to the teachings of the Hanafi jurisprudence, as it appears in Qadri Pasha's book, that ban these kinds of marriages. Moreover, any Egyptian citizen can file a case before courts based on the so-called "*daawat alhisba*" (filing a case on behalf of the Muslim community without necessarily having a stake in the case)⁷ in order to sever intimate marital relations which are considered as illegal under Sharia Law. In Lebanon's Personal Status Laws on mixed marriage involve several complications, though marriages concluded abroad are recognised, unlike in neighbouring countries.⁸

Mixed marriages, i.e., marriages between people from different religions or sects, are vital for the cultural enrichment of society and for mitigating the widespread sectarianism in the Arab Mashreq countries. Restricting the individuals' freedom to choose their spouses denies them access to the most sublime human relationship, which involves love, emotional harmony and the founding of a closely-knit family. Banning mixed marriages also involves social and legal repercussions including having children out of wedlock, circumventing the law and compelling those who wish to enter into a

mixed marriage to change their religion. Moreover, many honour crimes are a result of mixed marriages that society usually rejects for a variety of reasons, including the laws stipulating this ban.

Finally, the ban on mixed marriage violates the international bill of Human Rights that stipulates the right to marry without discrimination.⁹ It also violates the right of Muslim women to choose their spouses, and the right of non-Muslim men since current laws allow a Muslim man to marry a woman belonging to one of the Abrahamic faiths. This ban also leads to violating the rights of children who are deemed illegitimate.

Custody and religion mixed marriage children

As indicated above, only a marriage between a Muslim man and a Christian or Jewish woman is legally sanctioned. The following part discusses how litigations regarding the custody and religion of children born out of mixed marriages are settled.

Child custody. Several rulings show flagrant discrimination against non-Muslim women in marital disputes over child custody. Although Muslim jurisprudence in principle does not stipulate that the custodian and the child should be of the same religion, in the majority of cases custody is granted to the Muslim party without regard for the child's uppermost welfare. The Christian mother is deprived of her custodial rights when there is fear that the child might be influenced by a religion other than his Muslim father's religion, even if the latter converted to Islam purposely to deny his wife her custodial right. However, although most personal status laws are vague and undecided on this particular issue, jurisprudence in many Arab Mashreq countries have formerly adopted this

judgment and denied the non-Muslim mother custody of her children, like the judgment of the Syrian Court of Cassation of April 6, 1981, based on Article 381 of Qadri Pasha's book.

The above mentioned article allows the forfeiture of a non-Muslim mother's custodial right if there is fear for the child's Muslim religious affiliation. Egyptian jurisprudence followed the same track in different judgements, including the 1954 ruling by Alexandria's Religious Court of First Instance in the case of Zoghbi Hallak, a Christian convert to Islam who was granted custody of his daughter out of fear for the child's Muslim faith from her Christian mother. Despite the Egyptian Church's objections to the ruling, under the pretext that the child was born and raised a Christian, the religious court said that the child, who was over eight years old, could be influenced by the Christian religion of her mother who, according to the judge, could teach her "infidelity."¹⁰

In Jordan, until 2012, judgements in many cases had been more tolerant and had not forfeited the Christian mother's custodial rights based primarily on the uppermost welfare of the child, which indicates a certain level of religious tolerance and a modern interpretation of Islamic Sharia.¹¹ However, this was before the enactment of the Jordanian Personal Status Law, of 2010, that clearly stipulates in Article 172 that custodial rights are forfeited if the child is over seven years old, and the custodian is not a Muslim.

The children's religion. In most countries of Arab Mashreq the children of a Muslim father and a Christian or Jewish mother are considered Muslim by law, even if this violates the parents' right to bring their children up in another religion. Therefore, in a mixed marriage such as this, the parents cannot choose to bring up their children in a

religion other than Islam or enrol them in religion classes other than Islam, in clear violation of the international bill of Human Rights, and especially the Convention on the Rights of the Child.¹²

Like the conflict over child custody, the child's adherence to Islam is usually predominant in all religious court judgements that clearly stipulate that "the child should follow the parent who adheres the nobler or better religion." This was the judgement of the religious court in Damascus in a case where the spouses belonged to different religions, in which it decided that the child "should follow the mother's religion, Islam, because it is the noblest of the two parents' religions(...)" The court also considered the woman's marriage null and void, and requested that the spouses be separated and their intimate relations deemed illegitimate.¹³

In Egypt, Syria and Jordan, when one of the non-Muslim spouses converts to Islam the children automatically follow suit. On March 16, 1958, Alexandria's Court of First Instance ruled that children should follow their mother's religion after she converted to Islam so long as her husband remains Christian, using as excuse the notion that "Islam is the better religion of the two parents'," and rejecting the children's choice to remain with their father on the premise that the "children's wish has no value, while the rule of law should be implemented."¹⁴ It is worth noting that in Syria such cases allow the children to return to their original religion when they reach the age of consent, pending verification by the judge that they neither openly acknowledged Islam nor performed its religious rites after reaching the age of consent.¹⁵ Lebanon deals with this issue differently than the above countries, whereby in cases of mixed marriage it grants parents

the freedom to choose their children's religion. Moreover, when spouses are of the same religion and one of them converts to another religion, the children follow the father, while the mother's conversion does not affect the children. Children who follow their father's new religion could return to their original one after reaching the age of consent.¹⁶

It is clear from the above that the individual's affiliation to a particular religion has a major impact on his ability to gain certain legal advantages, particularly regarding the custody and religion of his or her children. For this reason, changing one's religions impacts legal conflicts in a variety of ways, a subject we will focus on in detail when addressing the second aspect.

Conversions and their implications

Among the most significant violations of religious freedom and of equality in front of the law and in the justice system, occur when issues related to conversion are at stake. We will first shed light on the repercussions of converting to Islam, and then on those of reconvertng from Islam to another religion.

Conversion to Islam

Unlike the case of converting from Islam, converting to Islam is easy and in most cases, people who publicly convert to Islam are exempted from paying the administrative fees, as the case in Egypt (Egyptian Law no. 69 of 1949). Conversions to Islam mostly happen when legal disputes arise in the shadow of multiple personal status laws. However, although in most case this system has helped non-Muslims, in particular the Christians, avoid having Sharia law imposed on them, unlike other countries like Sudan,

the system has several negative aspects reflected mainly in the domain of conversion to Islam. Every year, tens of thousands of Arab Mashreq citizens, especially Christians, convert to Islam for a variety of reasons, chief among which is gaining custody of their children; marrying a Muslim woman,¹⁷ or even taking a second wife since Islam allows polygamy; voiding a religious court judgement, or for inheritance purposes since in Islam non-Muslims do not inherit.

Moreover, the ban on divorce by certain Christian denominations and allow it only in very rare cases, if at all, is one of the main reasons why people convert to Islam in order to obtain a divorce and be able to remarry.¹⁸ Catholic denominations in the Arab Mashreq countries "forbid divorce except on grounds of adultery," and even in such cases they rule in favour of a "legal separation" that makes it impossible for the parties to remarry. On the other hand, Protestant and Orthodox denominations are more flexible in this regard and usually allow divorce for a wider variety of reasons, including marital infidelity, the wife not being a virgin, the wife squandering her husband's money, an absentee husband or one who was sentenced for more than three years, a wife who fails to return home despite the judge ordering her to do so, failing to fulfil marital duties, etc. However, despite this legislative flexibility, Egyptian Orthodox denominations consistently refuse to marry those who got divorced for reasons other than adultery, a fact confirmed by late Pope Shenouda in his famous Decision No. 7, of November 18, 1971. In this context, Egyptian courts have had to consider several cases against the Orthodox Church for refusing to issue marriage licenses to those who got divorced for reasons other than adultery.¹⁹

Apostasy (converting from Islam)

In the Arab Mashreq countries, Islam is imposed on all individuals born into a Muslim family without allowing them the chance to choose another religion, or no religion at all, later on. Most Arab States consider those born to Muslim families as Muslims and apply Islamic personal status laws on them, although some do not believe in these laws or in the religious authority that enacted them. The same applies to the followers of the other officially recognised religions, whereby their own religious laws are imposed on them and they are recorded in the civil registry under the same denomination as their families. The same goes for non-believers and those belonging to unrecognized religious minorities who in turn see other people's religious laws imposed on them, in clear violation of religious freedom which involves the freedom to believe or not believe, to belong or not belong to a particular religion or sect, and freedom to change religions.²⁰

Apostasy entails a series of legal violations, including denying converts their political and civil rights. In most cases, the court orders that converts be separated from their spouses, takes away their custodial rights, confiscates their property and denies them their legal personality that allows them to be party to various contracts.²¹ Among such well known cases in the Arab world is that of the late Nasr Hamid Abu Zayd whom the Court of Cassation accused of apostasy in 1996, and ordered that he be forcibly separated from his wife under the pretext that a marriage between a non-Muslim man and a Muslim woman is null and void. It is worth noting that although the Arab Mashreq countries do not criminally penalise apostasy, in most cases the individual concerned is put in jail for a variety of unconnected reasons, including threatening general security and national

unity and showing disdain for the Abrahamic religions, as in the case of Egyptian Sheikh Baha' Eddin Al Aqqad who spent several months in jail before being released upon a decision by a court in Cairo, on July 30, 2006.²²

Violations relevant to reconversion from Islam are not limited to Muslims but to non-Muslims as well, since the conversion of Christians to Islam is allowed and facilitated, while Muslims are barred from converting to Christianity. The issue of apostasy also affects marital relations, since a marriage contract between a Christian man and his Christian wife is severed if she converts to Islam and he does not. Moreover, Christians are often arrested and detained for proselytisation, an activity that many countries allow based on the right of self-expression and belief.²³ Finally, Christian converts to Islam who decide to return to their original religion, a group known as the "Returnees to Christianity," face multiple legal difficulties. This is one of the issues that cause religious sensitivities to flare-up the most in the Arab Mashreq region.²⁴

In addition to the above-mentioned violations, it is worth noting that non-Muslims are discriminated against in other ways, in matters related to personal status, such as rejecting their testimony in Sharia courts and forfeiting their right to inherit in cases where different religions are involved, which deprives a Christian woman married to a Muslim man, and her children, from inheriting her husband. Poor diversity management is also amply evident when non-Muslim laws are set aside in cases where the laws conflict. In Egypt, Sharia Law is applied to Christians when the parties involved in a case belong to different denominations, like for example a case involving a Catholic and an Orthodox individual.²⁵ Egypt is the only

country to apply Islamic Sharia on Christians in the Arab Mashreq; in Jordan, for example, spouses belonging to different Christian denominations are free to choose the laws of either denomination, and if this fails the case is considered by a civil court.²⁶ In Syria and Lebanon, the laws of the religious court that signed the marriage contract are applied.

Conclusion

The paper reviewed different violations of the right to equality and religious freedom relevant to the personal status of both Muslims and non-Muslims. It shed light on how different legislations and rulings lead to reinforcing sectarianism and promoting the religious establishment's control on society. They also lead to social fragmentation as a result of applying multiple legal systems to citizens of the same country, and help circumvent the law and tamper with the country's legal stability, a main pillar of communal peace. Also, religious freedom is violated when religious laws are applied to those who do not adhere to any of the monotheistic faiths or are secular by nature, even on the Bahais and other members of the unrecognized religious minorities. This is especially true given that those who have actually enacted these laws are religious officials rather than officials of the state which represents the people and, as such, is supposed to have exclusive legislative rights. Moreover, the personal status legislation of each and every sect contains provisions that violate human rights principles and discriminate against women, particularly regarding the marriage of underage girls, sanctioning polygamy and making it easy for Muslim men to divorce their wives, etc.

The poor management of religious diversity in the Arab Mashreq countries, which is clearly evident in the personal status domain,

is an obstacle to the development of Middle Eastern societies at the legislative, social, political and cultural levels. For this reason, these countries should enact modern and up-to-date personal status laws that conform to the International bill of Human Rights, and remove from their laws all negative aspects that enshrine judicial instability and allow certain provisions to circumvent the law, especially in cases where the parties belong to different religions and sects. International agreements and conventions have to be taken into account, as well, in particular the Covenant on Civil and political Rights, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child.²⁷

The Arab Mashreq states should recognise civil marriages concluded abroad as in the Lebanon's case. There also should be a law that legalises civil marriage regardless of the parties' religious affiliation. Despite the difficulty of annulling the current religious personal status laws and supplanting them by positive laws,²⁸ it is recommended to enact a civil code while preserving each sect's personal status laws, which will give those who want to marry the right to choose between a civil and a religious marriage, even both together, as is the case in most advanced countries. The enactment of civil legislation inspired by modern-day needs and applicable to all citizens, regardless of their religious affiliation, is the right of everyone who believes that religion, given its holy and sublime nature, should be separated from politics. It is a step that will no doubt promote respect for human rights and forge ahead towards building civil democratic states based on the principles of equality and religious and political pluralism.

1 During this period, attempts to replace currently applied religious laws in the personal status domain by enacting new positive laws have failed.

2 The Syrian Constitution states only that “the President of the Republic’s religion is Islam” in violation of the principle of non-discrimination among citizens; though the Lebanese Constitution does not refer to Islam, it is based on a sectarian apportionment system that has so far failed to overcome political sectarianism.

3 Most legal legislations currently in effect in the Arab Mashreq are almost entirely positive in nature, and based on equality among citizens with no discrimination on the basis of religion, even gender.

4 Personal status issue include all matter related to the family, such as marriage, divorce, child custody, alimony and inheritance.

5 See below.

6 The majority of Christian Personal Status Laws in the Arab Mashreq countries also ban marriages between followers of different religions and even Christian denominations, though this ban is usually overlooked when the matter involves Christians and Muslims, in favour of applying Islamic Sharia law that allows the Muslim man to marry a Christian woman.

7 See Law No. 3, for 1966.

8 It is worth noting that the situation in Lebanon is different than in the rest of the Arab Mashreq, from the point of view of equality between Muslims and non-Muslims in the Personal Status domain. Despite that, these laws involve a lot of discrimination against women.

9 Article 16 of the Universal Declaration of Human Rights states, “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family; they are entitled to equal rights as to marriage, during marriage and at its dissolution.” Article 23 of the Covenant on Civil and Political Rights underlines the importance of marriage and charged society and state to protect it in Paragraph One of that article, and paragraph 2 of the same Article states, “The right of men and women of marriageable age to marry and to found a family shall be recognized.”

10 Dina Charif Feller, “La garde Hadana en droit musulman et dans les droits egyptien, syrien et tunisien,” Librairie Droz, Geneve, 1996, p. 213; et Sami Aldeeb, “Non-Musulmans en Pays d’Islam, cas de l’Egypte,” Thebookedition, Lille, 2009, p. 319.

11 See for example the ruling by the Jordanian Court of Appeals No. 493/65 published in the Jordanian Lawyers’ Journal in 1966, according to which Christian women were allowed custody of their children until the age of nine, if the ward is a male and until the age of eleven if the ward is a female.

12 Article 14 of the Convention on the Rights of the Child highlights the latter’s right to freedom of thought, conscience and religion. Paragraph two of this article commits states to respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. The Convention also insisted that the best interests of the child shall be a primary consideration.

13 Basic decision no. 2205, Decision no. 904, of October 10, 2000

14 Cf. Sami Aldeeb, “La definition international des droits de l’homme et l’islam,” in *Revue generale de droit international public*, tome 89, 1985, no. 3, A, Pedone, Paris, 1985, p. 668.

15 Charif Feller, *op. cit.*, p. 216.

16 See Article 2 of Decision No. 146 of November 1938.

17 See above.

18 See Sabri Hasanein, "150 Thousand Christians Threaten to Leave Orthodoxy in Egypt," (Arabic), August 13, 2011, <http://www.claph.com>

19 See for example Case No. A/3580 personal status raised by Egyptian citizen Eid Subhi Ghattas against the late Pope Shenouda, on August 30, 1998.

20 Article 18 of the Covenant on Civil and Political Rights stipulates everyone's the right to freedom of thought, conscience and religion, including the freedom to "freedom to have or to adopt a religion or belief of his choice;" paragraph two of the same Article states "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

21 For example, Article 171 of the Jordanian Personal Status Law, of 2010, clearly states that the custodian not be a reconvert from Islam.

22 See also: J. G. Orban de Lengyelfalva, Aid to the Church in Need, "Violence against Christians in the Year 2003," ed. 2004, p. 58.

23 Gianfranco Rossi, "Le Droit à la Liberté de Diffuser sa Religion," in *Conscience et Liberté*, no. 59, 2000, pp. 123.

24 Cf., Nael George, "Les chrétiens dans le monde arabe et la question de l'apostasie en Islam," *Maghreb-Mashreq*, No. 209, Automne 2011, pp. 109-119.

25 Christian legislations are also overlooked when they contradict the general system of which Sharia is a major source. Over and above the application of Islamic Sharia on Egypt's Christians, the latter are subjected to violations in the domains of freedom of expression, equality before the law and other aspects of life, like labour and education. They and their churches are also constantly attacked during prayer times and many obstacles are placed on the construction and restriction of religious sites, at a time when Christians in neighbouring countries are subjected to similar violations.

26 See Article 10 of Law No. 2, of 1938.

27 Since the Arab Mashreq countries ratified these agreements they are bound by their provisions and their application on the national level.

28 We should also remind the reader that the success of such an endeavour in Middle Eastern societies requires a number of necessary steps that deepen culture of human rights and citizenship, by amending current academic curricula that do not help achieve this objective. Suffice it to mention, for example, Dr. Omar Suleiman Al-Ashkar's attack on civil marriage in his book that clearly explains the personal status law that is being taught at the Faculty of Law at Jordan University. To quote, "Judgment on civil marriage is for those who rule in parliament and allow or prohibit as they wish; Westerners have banned multiple marriages (in their parliaments) and allowed adultery, homosexuality, fornication and killing foetuses in the womb. The Westerners want us to follow the secular path and reject our religion and Sharia as they did in their own countries that ruined families, destroyed morality and tore down values."