THE PROBLEM OF ADOPTION UNDER MODERN ISLAMIC LEGISLATION IN THE ARAB STATES

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1. Preliminaries

Adoption — the establishment of a child's parentage not based on consanguinity - comes under those legal regulations which are traditionally different in Western Christian and Islamic jurisprudence. The practical legal effects of this phenomenon range from the acknowledgement of a minor and a major to new consequences arising in the wake of medical progress dealing with areas such as surrogate motherhood and artificial insemination. Another social and political problem, especially in the Third World, is the agency of adoption, which can proliferate into illegal trafficking in children. Hence, positive and negative effects go together and require concrete legal rules. This is also the case in the Islamic states, where the actual situation regarding social grievances and illegitimate children requires solutions despite the very complicated legal and historical starting-point (see Chapter 3). Increasing efforts by public welfare international associations and individuals to give children in the Third World a future via adoption clash with Islamic rules preventing it. Consequently, an analysis of the rules contained in *šarīʿa* and modern Islamic legislation surrounding adoption and the institutions of parent substitution is urgently required. The following details are intended to clarify some key aspects.

2. The problem of adoption in *šarīʿa*-history

The major sources of Islamic law, namely the *Qur'ān* and *sunnat an-nabī*, convey a very clear picture of adoption (*tabannin*). According to the Qur'ān *sūra* 33, verses 4, 5 and 37, adoption is forbidden *expressis verbis* — a view which is confirmed by tradition. Although adoption was practised in pre-Islamic times and during the lifetime of the Prophet Muḥammad — as the example of freed slave Zayd b. Ḥāriṯa (d. 629) shows (at-Tarmānīnī 1982: 625) —, this practice was abolished in the *šarīʿa* upon direct prophetic intervention. The historical background to this was the "Zaynab affair". Zaynab bint Ǧaḥš (d. 641) (*ibid.* 982), a cousin of Muḥammad, was married to his aforementioned adopted son Zayd. After her repudiation (*ṭalāq*) by Zayd, Muḥammad was able to marry Zaynab provided that Muḥammad's relationship with Zayd was not perceived as being equivalent to a blood relationship — a legal maxim which is contained in *sūra* 33, verse 37, which was revealed in 627 A.D. ʿĀ'iša (d. 678), the wife of Muḥammad as of 623, is quoted as declaring at this moment that God himself comes to Muḥammad's aid, even assisting in a love-affair (Heller &

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Mosbahi 1994: 57). Muḥammad Ḥusayn Haykal (d. 1956) points out in his publication "The Life of Muḥammad" that, "The outcome, therefore, was that Muḥammad would not lend any weight at all to the people's gossip if he were to marry the ex-wife of his adopted son, since the fear of social condemnation is nothing compared to that of condemnation by God, of disobedience of divine commandment. Thus, Muḥammad married Zaynab in order to provide a good example of what the All-Wise Legislator was seeking to establish by way of rights and privileges of adoption" (Ḥaykal 1976: 297). Similarly, the authentic legal works of the four Sunnī schools of law and the "Twelver" *šīʿa* agree with the fundamental rejection of adoption.

3. Legitimate and illegitimate parentage

Under Islamic law, only begetting a child under a valid marriage contract (*ṣaḥīḥ*) can establish a paternal relationship (*nasab*). Legitimate parentage always means the parentage of the father who is legally permitted to have sexual intercourse with his wife. By contrast, illicit sexual relations, i.e. outside a legitimate marriage, are interpreted as unlawful intercourse (*zinā*), which is subject to the punishments specified for certain crimes (*ḥudūd*). However, owing to Islamic law's stringent proof requirements, illegitimate intercourse is only rarely justiciable. Whereas a flawed marriage (*fāsid*) can produce legitimate children if the parties had contracted in good faith, this possibility is completely ruled out in a void marriage (*bāṭil*). The key-word for the borderline between sexual intercourse outside legitimate marriage and *zinā* is *šubha*, "the 'resemblance' of the act which has been committed to another, lawful one, and therefore, subjectively speaking, the presumption of bona fides in the accused", as J. Schacht states (Schacht 1964: 176), or in Arabic "*mā iltabasa amruhu*" (Abū Ǧayb 1988: 189). The "matrimonial bed" (*firāš ṣaḥīḥ*) as a basis for proving legitimate parentage implies the possible legitimacy of a child of a repudiated or widowed woman, assuming the child is born within a certain period of time following the dissolution of marriage or the death of the husband. This is why the legally permissible (not the naturally possible) term of pregnancy (*ḥaml*) constitutes a major factor. The minimum term of pregnancy is six lunar months, whereas the maximum term ranges from two lunar years (Ḥanafīs) to four lunar years (Mālikīs, Šāfiʿīs and Ḥanbalīs) (ʿAqīla 1982: II. 277)[1]. This is to avoid any negative legal and social consequences for the illegitimate child, but also to minimise readiness to release such children for adoption. In some modern Arabic Family codifications, the maximum terms of pregnancy are clearly fixed in accordance with natural principles (9 months: Yemen; 10 months: Algeria; one year: Egypt, Kuwait, Libya, Morocco, Sudan, Syria, Tunisia, United Arab Emirates: Dubai and Abu Dhabi). The legitimate child has the right to maintenance (*nafaqa*) and inheritance (*mawārīṯ*) vis-à-vis his father, whereas

[1] The Twelver *Šīʿīs* only accept 10 lunar months.

these rights may only be asserted by the illegitimate child against his mother. The considerable social discrimination of the illegitimate child and the subsequent effective incrimination of mother and child can lead to foundlings (*laqīṭ*, pl. *luqaṭāʾ*) resulting from the individual or family-inspired abandonment of children. In addition to an inability or unwillingness on the part of the mother to look after her offspring, newborn children are sometimes abandoned because the parents do not want to be punished or outlawed for *zinā*. It is impossible to obtain exact figures in this field.

The *šarīʿa* reduces legitimate parentage to matrimonial parentage, rejecting any other parentage by adoption and any official change of parentage (legitimisation or the acknowledgement of an illegitimate child). In addition to parentage established by wedlock, the acknowledgement of **legitimate** parentage (*iqrār*; see Chapter 4) and evidence (*bayyina*) such as in Morocco and Tunisia can prove parentage (*asbāb*; causes of parentage). If consummation was *de facto* possible, an affiliation claim (*daʿwā nasab*) to deny fatherhood can be realized by *liʿān* (imprecation), which also dissolves the marriage (Kuwait, Libya, Sudan, Syria, United Arab Emirates, Yemen), whereas a claim to confirm parentage necessitates judicial evidence (Egypt, Iraq, Jordan, Kuwait, Sudan, Syria, Tunisia, United Arab Emirates).

4. Islamic legal regulations regarding adoption

The most important Islamic legal rule which refers to adoption is acknowledgement (*iqrār*; also referred to by the Mālikīs, e.g. in Morocco, as *istilḥāq*). The *iqrār* covers not only family law but also other legal areas of the *šarīʿa* such as criminal law. According to the Qur'ān (4:135) and Sunna, the *iqrār* denotes "the acknowledgement of the claimed" (*al-iʿtirāf bi-l-muddaʿā bihi*) (as-Sayyid 1985: 421). On principle the acknowledging person (*muqirr*) may acknowledge any degree of kinship, but only the acknowledgement of direct parentage (*iqrār an-nasab*) has an irrevocable effect (*lā yaṣiḥḥu lahu rušūʿuhu ʿanhu*) and proves legitimate paternity. Thus the acknowledged child obtains legal title to maintenance and inheritance vis-à-vis the acknowledging party. According to the various *Sunnī* legal schools, a valid acknowledgment must fulfil a number of conditions (*šurūṭ*):

a) The acknowledging party must be of age (*bāliġ*) in his personal affairs, be fully in possession of his mental faculties (*ʿāqil*), and be acting voluntarily (*muḫtāran*);
b) The acknowledged party (*al-muqarr lahu*) must be of unknown parentage (*mağhūl an-nasab*). However, this only means that no other legitimate parentage (*maʿrūf an-nasab*) has been established; it does not necessarily require fully unknown parentage such as in the case of a foundling;
c) Fatherhood must be plausible — the age difference between the acknowledging and the acknowledged parties must exceed ten years and there may not be any impediment to marriage between the child's mother and the acknowledging party (for instance kinship);
d) The acknowledged party must be alive (*ḥayyan*) at the time of acknowledgement;

e) The acknowledged child must confirm acknowledgement as long as he/she has reached the age of discretion (*sinn at-tamyīz*; about seven years).(ᶜAqīla 1982: 279, Nasir 1990: 163)

The Mālikī school of law supplements these aforesaid ḥanafī conditions by the requirement that the circumstances surrounding the child's birth must make paternity plausible (Pauli 1994: 130).

The well-known Egyptian lawyer Muḥammad Qadrī Pāšā (d. 1888) compiled the "*Kitāb al-aḥkām aš-šarᶜiyya fī-l-aḥwāl aš-šaḫṣiyya wa-l-mawārīṯ*" in 1875. Art. 350 of the "*Kitāb*" stipulates some Ḥanafī-based conditions of valid acknowledgement. The Egyptian wording became a pattern for family codifications in other Arab states (see Chapter 5) and formed the basis for the "Unified Arab Draft Law for Personal Status" (*mašrūᶜ qānūn ᶜarabī muwaḥḥad li-l-aḥwāl aš-šaḫṣiyya*; Art. 81), which was submitted to the Council of Arab Ministers of Justice in 1985 (Nasir 1990: 306).

The acknowledgement of a child as lawfully being the acknowledging party's child leads to the child gaining legitimate status from his or her date of birth onwards. Although acknowledgement is not governed by a specific form, it presupposes that the existence of a marriage between the mother of the child and the acknowledging father is at least not denied and really was possible. Thus the *iqrār* can *de facto* but not *de jure* imply legitimisation in the meaning of European law. In addition, actual adoption is possible in this way because natural parentage is not a necessary condition for acknowledgement. Hilmar Krüger correctly classifies the acknowledgement of parentage as a "legal rule per se" ("Rechtsfigur eigener Art") (Krüger 1977: 247).

The *kafāla* (suretyship; or in this case "care") of a child of unknown parentage who is not acknowledged by *iqrār* is considered a worthy act (*ᶜamal ṣāliḥ*) which deserves repayment (*ṯawāb*). *Kafāla* and *ḥaḍāna* (child care; custody) are largely identical (ᶜAqīla 1982: 281). However, *kafāla* does not establish parentage — and does not therefore make provision for inheritance. Taking in a foundling (*iltiqāṭ aṭ-ṭifl*) in particular creates effects similar to an adoption. The lack of inheritance claims can be compensated for by last will and testament (*waṣiyya*) or *tanzīl*. In this context *tanzīl* signifies that the testator (*muwaṣṣin*) grants a person a certain position within succession, with the inheritance being considered part of the will.

5. Modern Islamic legislation and legal regulations regarding adoption

The legal rules governing personal status vary throughout the Arab countries in many respects. In addition to legal differences attributed to the various *Sunnī* schools of law and to the varying intentions of the legislators, both uncodified law and codified law exist in the Arab world. Codified law follows Western legal practice (el-Alami & Hinchcliffe 1996: 36), although the subject can be based on the *šarīᶜa*. Some Arab states (Saudi Arabia and Arab Gulf States) only make use of the "classical" works of the dominant schools of Islamic law. The other Arab countries have a more or less comprehensive Law of Personal Status (*qānūn al-aḥwāl aš-šaḫṣiyya*) or a Family

Law (*qānūn al-usra*)[2]. In spite of formal and substantial differences, there is far-reaching consensus in rejecting adoption according to *šarīʿa* — *expressis verbis* in: Algeria Art. 46 (Aït-Zaï 1989: 120-121), Kuwait Art. 167, Morocco Art. 83/3, UAE Art. 188. Only in Tunisia has "Act no. 27 of 4 March 1958 concerning Public Guardianship, *kafāla* and Adoption", as amended by the Act of 19 June 1959[3] introduced adoption in a European manner and thus modified the prevailing doctrine of the *šarīʿa*. Arts. 8-16 of Act no. 27/1958 stipulate the modalities of adoption. According to Art. 10, a Tunisian may also adopt a foreign child. Adoption must be validated by an order of the district court (Art. 13). If the adopting parent grossly violates his duties concerning the adopted child, the court may revoke custody (Art. 16).

Family regulations in all the Arab states permit the application of acknowledgement regarding the conditions mentioned in Chapter 4. Some relevant codifications refer indirectly to the *iqrār*. For instance the Lebanese Law pertaining to Personal Status for the Druze Sect (Art. 171), the Lebanese Law of 16 July 1962 (Art. 242 for *Sunnīs* and *Šīʿīs*) and Egyptian Laws nos. 78/1931 (Art. 280) and 462/1955 (Art. 6)[4] stipulate that the rules of the most authoritative Ḥanafī school of law should be

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[2] The Arab laws listed below are included in this study. In the absence of references to the contrary, the articles pertain to these laws. For sources, see Ebert 1996: 59-88.

Algeria: Law no. 84-11 of 9 June 1984 comprising the Family Law;
Egypt: Law no. 25 of 1920, as amended by Law no. 100 of 1985 concerning the Provisions on Maintenance and Certain matters of Personal Status, Law no. 25 of 1929, as amended by Law no. 100 of 1985 concerning Certain Provisions on Personal Status;
Iraq: Law no. 188 of 1959 on Personal Status, as amended by Laws no. 11/1963, 21/1978, 72/1979, 160/1979, 57/1980, 156/1980, 125/1981;
Jordan: Law no. 61 of 1976 on Personal Status , amended by Law no. 25/1977;
Kuwait: Law no. 51 of 1984 concerning Personal Status;
Lebanon: Law of the Rights of the Family of 25 October 1917, amended by Law of 16 July 1962 (for *Sunnīs* and in case for Twelfer *šīʿīs*), the Law of 24 February 1948 pertaining to Personal Status for the Druze sect, amended by the Law of 2 July 1959;
Libya: Law no. 10 of 1984 concerning the specific Provisions on Marriage and Divorce and their Consequences, amended by Laws no. 22/1991 and of 17 February 1994;
Morocco: Code of Personal Status (*al-mudawwana*) of 22 November 1957, 18 December 1957, 25 January 1958, 20 February 1958 and 3 April 1958, amended by Code no. 93-347 of 10 September 1993;
Sudan: Muslim Family Law of 24 July 1991;
Syria: Presidential Decree no. 59 of 17 September 1953 on Law of Personal Status, amended by Law no. 34 of 31 December 1975;
Tunisia: Code of Personal Status (*al-Mağalla*) of 13 August 1956, amended by Law of 12 July 1993;
UAE: Draft Law on Personal Status of 1979 (not yet enforced, but applied in the Emirates Abu Dhabi and Dubay; hence taken into consideration);
Yemen: Republican Decree Law no. 20 of 29 March 1992 concerning Personal Status.

[3] Legal source: aš-Šarīf 1994: 259-267.

[4] Legal Sources of the quoted laws: Yūnis & Saʿīd 1983: vol. 9 Lubnān., Mahmassani & Messara 1970: 36-57, *al-Aḥwāl* 1987: 53-78, 80-83.

applied in the absence of any legal provisions. In the other Arab Family codifications, acknowledgement is explicitly mentioned: Algeria Arts. 40, 44 and 45, Iraq Arts. 52-54, Jordan Art. 149, Kuwait Arts. 173-175, Libya Arts. 57-59, Morocco Arts. 89 and 92-96, Sudan Arts. 96 and 101-104, Syria Arts. 129 and 134-136, Tunisia Arts. 68, 70 and 73-76, UAE Arts. 185-188, Yemen Arts 123-126[5]. Acknowledgement by the father is sometimes combined with acknowledgement by the mother (Algeria Art. 44, Iraq Art. 53, Jordan Art. 149[6], Kuwait Art. 174, Libya Art. 59, Sudan Art. 103, Syria Art. 134, Tunisia Art. 70[7], UAE Art. 187, Yemen Art. 123) or the "indirect" acknowledgement of any other kinship if so confirmed (Algeria Art. 45, Iraq Art. 54, Morocco Art. 93, Syria Art. 136, Tunisia Art. 73). The development of birth registers in the Arab world furthers the application of acknowledgement by authenticating it, thereby improving judicial reliability.

Some Arab countries regulate the *kafāla* as mentioned above in their family codifications or in special legal acts. In particular the Mālikī-based states pay great attention to those rules which benefit the children. In Algeria (Arts. 116-125) the *kafāla* provision relates to children of known and unknown parentage (Art. 119) and requires official judicial or notarial confirmation (Art. 117). By contrast, Art. 60 of the Libyan Law no. 10 of 1984 only enables the *kafāla* of a child of unknown parentage. Moroccan Code no. 1-93-165 of 10 September 1993[8] applies to foundlings, orphans and neglected children (Art. 1). The Sudanese Child-Care Act of 2 March 1971[9] regulates the care of foundlings and children abandoned by their parents (Art. 1). Art. 16 of the Child-Care Act refers to the inhibition of adoption in the *šarīʿa*, according to which a *Muslim* child has no claim to inheritance vis-à-vis his foster father.

The Moroccan *mudawwana* prohibits the "regular adoption" (*at-tabannī al-ʿādī*), but permits "paid or testamentary adoption" (*li-l-ǧazāʾ aw li-l-waṣiyya*), in which the adopted child is entitled to part of the estate (Art. 83/3). The combination of *kafāla* and *tanzīl* can establish a *de facto* adoption. However, the Moroccan *tanzīl*-provision (Arts. 212-216) goes beyond the testamentary transfer of property to an adopted child. It represents a specific form of a voluntary will, which is limited to one third of the estate; an adopted child can in principle be the beneficiary of such a will. A

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[5] The adoptee shall confirm the acknowledgment after the attainment of the legal majority (*bulūġ*) - Art. 123/c.

[6] By acknowledgement of a person of unknown parentage and relevant confirmation (here: by the mother). See Kohler 1976: 70-75.

[7] Indirectly: Acknowledgment of the mother by a person of unknown parentage and confirmation by the mother.

[8] Legal source: *Bulletin* 1993: 479-481.

[9] Legal source: Bergmann & Ferid 1992: 53-54.

similar *tanzīl*-provision has been introduced into the Libyan "Law no. 7 of 1423 (1994) concerning the will" (Art. 36)[10].

Acknowledgement of parentage must be distinguished from acknowledgement of other kinship regarding the legal effects. The legal consequences for the succession of the latter were specified in the codification of Qadrī Pāšā (Art. 584) (*Maǧmūʿa* 1992: 23) and largely remain in force to this day. Such an acknowledged person only has a claim to an inheritance after the heirs. Similar provisions are encountered in Egypt (Art. 41 of the "Law no. 77 of 1943 concerning inheritance")[11], Iraq Art. 66, Syria Arts. 262 and 298, UAE Arts. 504 and 540, Yemen Arts. 307 and 328.

6. Conclusion

With the exception of Tunisia, the provisions of adoption valid in the Arab states are inspired by the *šarīʿa*. Owing to the persistence of religious, cultural and social traditions, this situation is unlikely to change in the near future. However, the development of some legal institutions to side-step the prohibition of adoption could improve children's legal position — and thereby not only assist the children but also help to avoid social conflict. The legislator must observe the strict limits imposed by the *šarīʿa*. This situation can only be changed gradually. Some examples from other Muslim states should be taken into account. In Indonesia for example, *"Kompilasi Hukum Islam"* (which regulates Muslims' personal status and is designed to be the guiding principle for state and the people) was propagated in 1991. Art. 209 of the Kompilasi advocates a mandatory will (*waṣiyya wāǧiba*) for adopted children, which is fundamentally different from the mandatory will generally used in the Arab world (Hanstein 1997: 61, 82, 86).

Whatever the case, the growing intercultural contact between Orient and Occident calls for consideration of the legal provisions in the Arab countries — yet it also reminds us of our duty to overcome legal and social discrimination of illegitimate children and foundlings.

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[10] Legal source: *al-Faǧr al-ǧadīd* 1994.

[11] Legal source: *al-Mīrāṯ* 1986: 3-15.

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