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# Balancing Individual Rights, Religious Law and Equality

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Landmark Decisions from Egypt, Kuwait and Tunisia

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*With a Preface by Angelika Nussberger*

## Preface

Human rights have been declared universal values of humankind. The Universal Declaration of Human Rights summarizes what the international community considers common heritage. What philosophical or legal texts specifically define as “human rights” is open to interpretation, however. What is life, when does it start, when does it end? What is freedom, when is it restricted in an unacceptable manner? Are there limits to freedom of expression, and if so, what are they? Answers vary over time and across regions. This is especially true for “freedom of religion” and, even more so, for “equality”.

The short volume edited by Anja Schoeller-Schletter shows fascinating examples of tradition meeting modernity in the jurisprudence of the MENA courts. These courts are facing developments of a globalized world – women loving non-Muslim men, women running for election without wearing the hijab, women seeking to change their sex and to register a new male name in their birth certificate, women claiming the same financial benefits as men, non-Muslims asking to get a month off for pilgrimage like their Muslim colleagues. The answers to these questions are not explicitly written in the legal texts the courts have to apply; but the way in which they interpret the law is often – though not always – inspired by international treaties and the spirit of a genuine human rights jurisprudence.

The decisions of the courts in the MENA region are not easily accessible to the non-Arab speaking world as translations are often missing. Nevertheless, they form an important part of the international human rights jurisprudence. Argumentation patterns and approaches are specific to the region, sometimes leading to the same, sometimes to different results than European human rights jurisprudence.

This collection of recent court decisions on questions of religion and equality is all the more very valuable. It provides a fascinating insight into the thinking and reflection of judges in a region in transition.

**Angelika Nussberger, Cologne, December 2020**

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## Introduction:

### Landmark Decisions for Comparative Research

*Anja Schoeller-Schletter*

In many countries of the Middle East and North Africa, the institutions charged with constitutional review have undergone substantial reform in recent decades, indicating a rising awareness of the constitutional review as a potent instrument. New courts have been created (e.g. Iraq 2004), and existing courts have been attributed new competences and procedures (e.g. Tunisia 2014, Morocco 2017). Most courts have expanded their role and relevance (e.g. Egypt and Kuwait), shaping political and societal change.

Like in most countries across the world, these constitutional courts and councils are facing the challenge of keeping the balance between the rights instituted in the text of constitutions and constantly developing realities of society. To take but one example, equality rights and individual freedoms as conceived in most modern constitutions often do not coincide with the values and realities of a conservative society with its traditional family values. This has been a matter of fact across the world. It was until 1958, for example, that in Germany women had to ask permission of their husbands to get a driver's license, until 1962 to open a bank account and until 1977 for permission to work. Only in 1969 were married women considered to have full legal capacity.

In many countries of the Middle East and North Africa this social reality is often conceived in religious terms, traditional values being seen as enshrined in the God-given Shari'a. To highlight the importance of this set of laws in society and to add legitimacy to the constitutional state, many countries have opted to place references to these religious laws into the text of their constitutions, without implementing a clear mechanism how these laws are to be interpreted, however, or which of the traditional interpretations is to be given preference. It is then mostly the highest courts, the courts charged with constitutional review in particular, that are tasked with the challenge of balancing controversial interpretations of constitutional rights enshrined in the constitution and based on culturally and historically rooted religious and secular norms. As a result, the courts are continuously defining the substance and limits of individual rights and freedoms in view of - and sometimes pushing for - a developing societal consensus.

Largely unrecognized by the international community, constitutional courts and councils of the MENA region have met this challenge in innovative and constructive ways. The three papers published here on Egypt, Kuwait and Tunisia address these developments, highlighting specific cases and rulings from across the region. The intention is to demonstrate the diversity of solutions found by the courts and the rationale behind in order to support their decisions. Of particular interest is, for example, how the Constitutional Court of Kuwait has resolved the question of women having or not the right to carry their own passport. It has attributed this right by referred to individual rights of women, bypassing entirely questions of gender equality.

These papers and case studies of jurisprudence may raise awareness among researchers and judges beyond the region for the many remarkable developments in constitutional law, particularly as courts outside the region face challenges in adjudicating in questions that concern the right to exercise religious belief, frequently concerning Muslims. In this regard, the editors are particularly grateful for the interest and support of Angelika Nussberger, who has been spending much time and reflection on such cases in her role as judge to the European Court of Human Rights from 2011 to 2019 and as vice-president, and who has always actively participated in international exchange and comparative analysis. A special thanks goes to all those who have followed with great interest and continuous encouragement the projects in comparative constitutional law carried out by the Rule of Law Programme Middle East & North Africa during the past years.

## Equality in the Jurisprudence of the Supreme Constitutional Court of Egypt

*Yussef Auf*

### Abstract

In his contribution, *Yussef Auf* illustrates the Supreme Constitutional Court's jurisprudence on equality rights by describing and analyzing three of the court's rulings from the last 20 years. The first and most recent ruling (2017) tackles a legal provision on whose basis the plaintiff, a Christian Egyptian citizen and public employee was denied a one-month paid leave for pilgrimage. The court, in this ruling, did not accept unequal rights in labor law on the basis of religious belief and emphasizes the state's role to guarantee the freedom of belief equally. In the second ruling (2001), the Supreme Constitutional Court interprets a provision of the personal status code of Orthodox Copts as not related to a religious matter, declares it unconstitutional, and decides that the respective provision in the status law for Muslims is applicable instead. The third ruling (2000) declares a Ministerial Decree unconstitutional, on the basis of which the husband's plaintiff was able to prohibit her from traveling. The court stated that the legislator violated its mandate to regulate fundamental rights by law, and that a decision, which limits the freedom of movement, has to be taken by the judiciary and not the executive power. The selected rulings reflect a pro-active court with a liberal tendency that confidently declares itself competent not only to say what the constitution is, but also what it should be. More than once, the Supreme Constitutional Court balances the Islamic Shari'a, the state's main source of legislation, with constitutional equality rights.

### Introduction

In the Egyptian Judicial System, it is the Egyptian Supreme Constitutional Court (SCC) that has the exclusive authority of constitutional review. The court, as an independent judicial body among other bodies within the Egyptian judicial system, has been practicing its exclusive jurisdiction for five decades since 1969. The 1971 constitution stipulates in Article 174 that "the Supreme Constitutional Court shall be an independent judicial body with a distinct legal personality." Article 175 reads: "The Supreme Constitutional Court has the exclusive competence to control the constitutionality of laws and regulations and to interpret the legislative texts in the manner prescribed by the law." The stated constitutional articles have been repeated in the recent constitutional documents adopted in 2012 and 2014, the latter being the currently applicable constitution of the country. Over the years, the SCC, as the adjudicator of constitutional issues, has been accumulating a considerable jurisprudence dealing with the Equality Principle, among other rights and freedoms, as one of the major constitutional matters in every society. Article 40 of the 1971 constitution has been the major reference that the SCC resorted to for equality principle applications. Article 40, which had been applicable for more than four decades, reads: "All citizens are equal before the law. They have equal rights and duties without discrimination between them due to race, ethnic origin, language, religion or creed."

More elaborately, the equality principle in the current constitutional document of Egypt, adopted in 2014, stipulates in Article 53 that "citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason. Discrimination and incitement to hate are crimes punishable by law. The state shall take all necessary measures to eliminate all forms of discrimination, and the law shall regulate the establishment of an independent commission for this purpose."

This brief paper will focus on some of SCC's recent verdicts that dealt with the equality principle, specifically equality between genders and religions, among other principles. The paper will cover the facts and background of each case study, followed by discussing the verdict itself and its major features.

## Case Studies

### Case No. 153 of Judicial Year 32

#### 1. Facts and Background

In a recent decision, issued on February 4th, 2017, the Supreme Constitutional Court reiterated its long-standing jurisprudence on religious freedom and equality. The SCC ruled that it is unconstitutional to deprive Egyptian Christian citizens, as public employees, from the right of a one-month special paid leave to perform religious sanctification to the holy city of Al-Quds (Jerusalem).

The SCC issued its decision in the case No. 153 that had been referred to it from the Administrative Court of Al-Mansoura (case No. 15637 for the judicial year 29). The plaintiff was a Christian Egyptian citizen who visited Jerusalem for a month to perform religious sanctification. However, her leave was counted as annual leave and not as the special paid leave for one month that is granted to all Muslim public employees (who perform al-Hajj to the holy city of Mecca) according to Article 71\1 of law No. 47\1978 of the State's Civil Servants Law. As the plaintiff filed a lawsuit requesting to declare her leave days as those designated for religious sanctification as described in Article 71\1, the Administrative Judiciary Court (the Subject Matter Court, Mahkamat el Maoudo'a)<sup>1</sup> ruled in the plaintiff's favor and accepted her claim challenging the constitutionality of the above-mentioned article.<sup>2</sup> The plaintiff's argument to challenge the constitutionality of Article 71\1 is that this article did not explicitly grant the same right to one-month special paid leave to perform religious sanctification to Christians, thus violating the applicable constitution that guarantees her rights on the basis of equality and freedom of religion.

Although Law No. 47\1978 was canceled and replaced by the law of Civil Service No. 81\2016, the SCC acknowledged the plaintiff's right to continue considering the case as she is one of *"those whom the law was applied to during its validity period, legal consequences were incurred upon them and personal interests exist to urge them to appeal its unconstitutionality"*.

Article 71\1 of law No. 74\1978 reads: "The employee is eligible for a special fully-paid leave not calculated among other types of leaves identified in previous articles which are in the following instances: (1) To perform the obligation of al-Hajj [pilgrimage] for a period of one month once during the whole career life."

The State Litigation Authority<sup>3</sup> submitted its memo defending the legal text of Article 71\1 and requesting the SCC to reject the case, as the plaintiff has no interest [Maslaha] in its claims since the challenged legal text does not imply depriving the Christian employees of the right of one-month special leave to perform religious sanctification like Muslims have, as the language is general and already addressing all public employees, regardless of their religion. The State Litigation Authority therefore attributed the discrimination that the plaintiff had suffered to her employer who decided to consider her month leave as annual leave, and not - as it should be according to Article 71\1 - as a special one-month paid leave.

The SCC did not accept the stated defense submitted by the State Litigation Authority. Rather, the SCC interpreted Article 71\1 as clearly addressing the pilgrimage of Muslims, as one of the five main pillars of the Islamic religion, only. To prove its interpretation, the Court compared between Article 71\1, and Article

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<sup>1</sup> The Subject Matter Court is a term used by the SCC to describe the "referral court". The referral court is any court that is considering a judicial dispute and decided - upon one party's request, or on its own - to suspend the case and refer it to the SCC to consider the constitutionality of one or more legal articles in a law or a regulation. The Subject Matter Court can be a court affiliated with the General Judiciary or the Administrative Judiciary. The Latter two Judicial Bodies are the only competent judicial authorities to refer a case to the SCC, and hence the only way to reach to the SCC for a constitutional review matter.

<sup>2</sup> The decision of the Administrative Judiciary Court to accept the plaintiff's challenge to the constitutionality of the law is not a decision on whether the law is constitutional, rather it is a decision that the challenges raised by the plaintiff are "serious" (Daff' Jeddy) enough to be referred to the Supreme Constitutional Court to review the law constitutionality. This referral mechanism should take place because, as explained, the SCC has the exclusive jurisdiction over the constitutional review.

<sup>3</sup> The State Litigation Authority is a Judicial Body that is responsible for representing the State in all judicial litigations.

53 of the Labor Law No. 12 for the year 2003. The latter article stipulates, in clear language, that “the employee as defined in the law who worked for the employer for continuous five years is eligible for one month paid vacation once during the employment period to perform the pilgrimage obligation or visit the holy city of Al-Quds.” This text of the labor law reveals the intention of the legislator to treat Muslim and Christian employees/workers concerning their right to paid leave for pilgrimage and sanctification equally, but by addressing this in particular terms, and that is not the case regarding Article 71\1.

## 2. The Ruling

The plaintiff based her challenge to Article 71\1 of law No. 47\1978 on Articles 2, 8, 40, 46 and 68 of the then applicable (1971) constitution. Additionally, she said that her right to be granted paid leave for religious sanctification is guaranteed by Islamic Shari’a, and as well as described in Article 53 of law No.12\2003 of Egyptian Labor Law. The SCC ruled in favor of the plaintiff and declared Article 71\1 of law No. 74\1978 unconstitutional. The Court based its decision on the principles of freedom of belief, freedom to practice worships and equality. The SCC stated that every constitutional text prescribed freedom of belief since the 1923 constitution until the current 2014 constitution.

Article 64 of the latter reads: *“Freedom of belief is absolute, and freedom of practice of religious rituals and establishment of worship sites of divine religions’ followers is a right stipulated by law”*. The Court then concluded, in this regard, that *“successive Egyptian constitutions had complied with the principle of freedom of belief and freedom of practice of religious rituals and establishment of worship sites, which the current Constitution is keen to protect. These principles have close linkage to the citizenship which Article 1 of the Constitution considers a main foundation of building the State and its democratic republican regime. In addition, they are considered among several well-established constitutional fundamentals in every civilized country. Freedom of belief is absolute with no control above it. Each human being is free to believe in whatever religion or belief he/she opts. No authority shall impact his/her decision. Thus, freedom of belief is too close to the individual that it, as is stipulated in Article 92/1 of the Constitution, cannot be suspended or derogated. ... In addition, it is not accepted to protect such freedom on the account of the followers of other religions. The State shall not facilitate following any religion, whether in secrecy or openly by imposing a burden on believers of any other acknowledged religion to follow it. Furthermore, the State’s intervention shall not constitute a punishment for those who follow a belief it does not choose, and it shall not create conflict among followers of different religions by discriminating between one and another.”*

The Court added: *“As the freedom of practice of religious rituals and establishment of worship sites represent an external manifestation of the Freedom of Belief, they need not to stay hidden but shall be expressed clearly through worship sites of various types”*.

The above reasoning by the SCC implies that discrimination between the citizens regarding their religion-related rights is a blatant violation to the essence of the freedom of belief itself, as this latter principle “needs not to stay hidden”. In this context, moreover, the Court refers to the role of the state to guarantee, whether through the legislative or the executive bodies, that such rights are granted equally, otherwise the state will be deemed deviating from its constitutional mandate.

On the equality principle, the Court reiterated the fact that all Egyptian constitutional documents have incorporated the principle in their bill of rights section. In addition to Article 53 previously mentioned, the SCC referred to Article 4 as well which reads: *“Sovereignty belongs to the people alone, who exercise it and protect it. They are the source of power. They safeguard their national unity, which is based on the principle of equality, justice and equal opportunity between citizens, as provided in this Constitution.”* The Court considers these constitutional articles as tools to guarantee equal legal protection of public rights and freedoms, whether these rights and freedoms are prescribed in the constitution or elsewhere in the ordinary legislations, whether it be a law, a regulation or an administrative order\decree. The SCC explained that the law shall not impose unjustified discrimination upon those who possess equal legal status, as this is not only a violation to the equality principle but, in addition, to the principle of citizenship.

The court, in this matter, acknowledged that both Muslim and Christian public employees have the same “legal status” concerning their right for a special one-month leave to perform pilgrimage and sanctification,



because this kind of place-bound worship is an integral part of both religions. Hence, any discrimination towards that right, as Article 71\1 of the law of civil servants does, is deemed unconstitutional. The Court added, that this discrimination is in addition a violation to the right to work and to assume public positions that are protected by the constitution as per Articles 12, 13 and 14 of the 2014 constitution.

### 3. Concluding Remarks

3.1. The SCC in this decision did not ignore the constitutional limitation that freedom to practice religious rituals and establishing of worship places is only guaranteed and safeguarded regarding the three divine religions. Although this constitutional matter was not presented before the Court, it reiterated what it has been consistently indicating in its jurisprudence that the constitutional legislature in Egypt guarantees such rights and freedoms to the followers of the three revealed religions, i.e. Judaism, Christianity, and Islam only, as stated in Article 64 of the 2014 current constitution.

3.2. Additional limitation was added by the SCC upon asserting the right to freely practice religious rituals and establishing worship sites. The SCC referred that although the condition of considering public order and morals (Annezam al'AAM Wal Adaab) is dropped from the current constitution, it is *"known that negligence of such condition does not construe its deliberate drop or approve the practice of religious rituals even if they violate the public order or morals. Such a condition is not necessarily needed to be proven or clearly stated. It is obvious and self-evident in the Constitution and shall be enforced even if the text lacks it."* Despite the Court acknowledging that this restriction (considering public order and morals) has been abolished from the current 2014 constitution intentionally, it stated that it is still applicable even though the constitution abandoned it. The SCC, by this approach, establishes itself not only as the highest authority to say what the constitution is, but also what it should be. Moreover, imposing such restriction by the court seems to be a conservative tendency as this principle has been one of the - although debatable - matters in the Egyptian legal\constitutional life for decades. The principle has shown to be vague enough, and gives wide discretionary power to the authorities, including the judiciary, when deciding what is or is not "against" this undefined public order and\or morals principle.

3.3. Finally, the Court stated that the plaintiff grounded her challenge to the text of Article 71\1 of the law on the basis, among others, of Islamic Shari'a, mainly that Shari'a guarantees her equal rights with her fellow Muslim employees. The plaintiff here was referring to her rights as a Christian citizen in Egypt, which should be guaranteed according to Shari'a, being the main source of legislation in a country whose official religion is Islam. However, it is important to indicate that the SCC did not adopt this argument in any way. This reiterates the Court's semi-liberal jurisprudence regarding interpretation and application of Article 2 of the Egyptian Constitution; that rights and freedoms of Egyptian citizens found its source in the constitution, apart from Islamic Shari'a principles, whereas these latter principles, stipulated for in Article 2 of the constitution, have no *supra-constitutional* status.<sup>4</sup>

## Case No. 107 of Judicial Year 21

### 1. Facts and Background

In a significant decision, issued on December 9th, 2001, the SCC examined the constitutionality of the provisions of the Personal Status Code of Orthodox Copts approved by the General Religious Council in its session on 9 May 1938 and effective starting 8 July 1938. The SCC found Article 177 of this code to be unconstitutional on the basis that it establishes discrimination among Egyptian citizens regarding the time period that must be elapsed, by law, to declare a missing person as dead by a court decision.

The SCC issued its decision in the case No. 107 that had been referred to it from the Cairo Court for Personal Status Affairs / 7th province (case No. 2314 for the judicial year 1996). The plaintiff was a Christian Egyptian citizen who was married to a Christian man who traveled to the state of Kuwait in 1977 and has ever since disappeared and all endeavors to locate him had been failed.

The plaintiff (the wife) had then filed her lawsuit before the Personal Status Court (the Subject Matter Court), in 1996, requesting to issue a decision to declare her husband as dead, in order to be able to divide his heritage.

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<sup>4</sup> Supreme Constitutional Court Decision, Case No. 20 for the Judicial year No. 1, May 4 1985.



The plaintiff grounded her requests on paragraph (a) of Article 21 of law number 25 for the year 1925, amended by virtue of law number 100 for 1985, concerning provisions of maintenance (Nafaqa) and other issues of personal status affairs. The State Litigation Authority submitted a memo requesting refusal of the plaintiff's requests on the basis that she is a Coptic Christian, as well as her missing husband, and hence the applicable law for this case is the Personal Status Code of Orthodox Copts effective starting 8 July 1938, and mainly Article 177, and not Article 21 of the Personal Status Law No. 25\1929 for Muslims.

Article 177 of the Personal Status Code of Orthodox Copts states that: *"It is permissible to rule [by a court decision] the death of the absent [missing] person after elapse of thirty years of the decision of proof of disappearance or elapse of ninety years from the date of the person's birth."* And whereas the plaintiff filed her lawsuit after only 19 years of disappearance – meaning that she has no ground, as per Article 177, for her requests submitted to the Court – she challenged the constitutionality of Article 177 and requested the application of Article 21a of law number 25\ 1925; the personal status law for Egyptian Muslims. The Subject Matter Court (Cairo Court for Personal Status) accepted the constitutional challenge raised by the plaintiff and allowed her to file the lawsuit before the Supreme Constitutional Court.

## 2. The Ruling

In accordance to what has been its jurisprudence consistently, the SCC reiterated, that its jurisdiction extends to review the constitutionality of the personal status code of the Orthodox Coptic Christians, as well as all other codes of the various Egyptian Christian Sects. Once again, in this context, the SCC stated, that the nature of personal status codes of all Christian sects as "legislations", i.e. mere laws with the same status as any other law, is based on the fact that they fulfill the two main conditions that characterize laws: the generality of the rules and its abstractness (Shartai Al-umomiah wal Tagreed). Notwithstanding the fact, that they have been drafted and approved by the "General Religious Councils" of each sect with no involvement from the legislative authority.

The plaintiff challenged the text of Article 177 of the Orthodox Coptic Code on the basis that *"it is discriminatory between members of one homeland in an issue not related to religion without any ground. It effects inequality between Muslims and Orthodox Copts concerning the conditions under which to consider the missing person as dead, to the detriment of the interests of the Copt Family. Therefore, the challenged text is in violation to Articles 9 and 40 of the [then, 1971] Constitution."*

The SCC accepted the plaintiff's challenges and deemed Article 177 of Personal Status Code of the Orthodox Coptic's as unconstitutional. The Court basically grounded its verdict on Articles 9 and 40 of the 1971 constitution, which stipulates that *"the family is the nucleus of society, and is founded on religion, morals and patriotism. The State shall ensure to protect the genuine features of the Egyptian family with the values and norms it embraces, as well as assurance of such pattern and its development within the Egyptian society."* The Court referred here to the generality of the language used in Article 9 that *"covers every Egyptian family no matter their religion."* Article 40 reads: *"Citizens are equal before the law. They are equal in rights and public obligations, no discrimination between them due to sex, origin, language, religion or belief."* The Court concluded that *"it is not allowable that one rule [re missing Muslim] is different from another [re missing Coptic Christian] when both rules have the same merit, unless such difference relates directly to issues of belief."* The Court added: *"Legal rules may differ as they are based on a constitutional basis which is a guarantee of freedom of belief as stipulated in Article 46 of the Constitution. This article provided full and absolute respect to all religious beliefs of all Egyptians."*

The above-mentioned arguments by the SCC reveal the essence - and significance - of its judgment; that the Court grants itself the authority to decide on whether a specific rule in any given personal status law\code is a religion-related matter, and hence, if the rule is not related to a religious matter, it can be deemed unconstitutional under the principle of equality. The SCC, therefore, did not adopt the criterion of merely organizing a specific matter in the personal status laws\codes making it part of the religious issues that must be respected as such – by virtue of the freedom of belief principle – even if the rule establishes clear discrimination among the citizens. On that basis, the SCC decided that: *"the organization of the situations of disappearance and missing of Egyptians is a social matter and is integrated totally in the organization of the Egyptian family in its wider scope, which surpasses differences in religions and beliefs and makes it a public national issue without restricting to the belief and its spiritual implications."*

Upon determining that the missing\absent issue is a mere “social”, not religious matter and hence needs to be organized under a unified legal rule for all Egyptians regardless of their religion, the Court compared Article 177 of the Orthodox Coptic code for personal status, which it declared unconstitutional, with Article 21\1a of the personal status law for Muslims, No. 25\1925. Article 21\1a reads: *“The missing person shall be decided dead after four years of the date of loss”*. The comparison led the Court to conclude that Article 21\1a of the Muslims personal status law: *“has achieved the delicate balance between the rights of the missing person and the possibility of his re-appearance on one side, and the rights of those persons whose lives and situations are affected by the loss or death of the missing person and their need for stability and decision about specific issues related to the loss or death on the other side. This balance was achieved by identifying the time period for probable re-appearance to be four years since the date of loss. It is neither too short a period in which the interests of the missing person may contradict if he faces extraordinary circumstances which prevent the flow of news, nor too long a period which might contradict with reconciling situations and rights of persons related to the missing one.”* On the contrary, Article 177 of the Orthodox Copts Code *“had focused only on the rights and probable re-appearance of the missing person. It had set a grace period of thirty years since the date of the verdict, which confirms the absence or continued absence till reaching ninety years since the date of his birth. These time periods, for sure, affect the lives and situations of the persons related to the missing one and cause extreme confusion and perplexity.”*

### 3. Concluding Remarks

3.1. It has been a legal tradition in Egypt - recently by virtue of Article 3 of the 2014 constitution - that non-Muslim Egyptians have the right to organize their personal status matters by a religiously based code. However, the application of these codes, by Personal Status Courts, is conditioned by the necessity that the two parties – in a particular dispute – belong to the same religion, doctrine and sect. Otherwise, if these requirements are not matched or the code is inapplicable for another reason, namely in case of its annulment, Islamic Shari’a, codified in the Personal Status Laws of Muslims, shall prevail. These applicability rules are prescribed for in Articles 32 of the Egyptian Civil Code and Article 3 of Law No. 1\2000 regarding procedures of litigation in Personal Status Affairs. In light of that, the SCC could have concluded its decision by deciding on the constitutionality of Article 177 of the Orthodox Copts Code only, however, the verdict additionally proclaims that Article 21 of the law No. 25\1929 for Egyptian Muslims, shall apply as well for the Orthodox Copts. The SCC, hence, took an additional step by emphasizing what is the applicable law after annulling Article 177.

3.2 The SCC approach to compare between the two Articles (Article 21\1a of the Personal Status Law for Muslims, and Article 177 of the Orthodox Copts Code) was not to select the better rule, in its discretion, but rather to set Article 21 of the Muslims Personal Status Law as a reference to annul Article 177; i.e. to decide that it is unconstitutional. In other words, the SCC had no authority to choose between the two texts, but to apply the Muslims Personal Status Laws as it is the General Law for personal status matters in Egypt, even for non-Muslims, when the codes of the latter sects are not applicable or do not exist at all.

## Case No. 243 of Judicial Year 21

### 1. Facts and Background

On November 4th, 2000 the SCC decided it is unconstitutional a) that the legislature authorizes the executive to organize what is constitutionally mandated to the parliament to regulate, and b) to limit or undermine the freedom of movement, including travel abroad, by an executive authority order. The SCC issued its decision in the case No. 243 that had been referred to the SCC from the Administrative Judiciary Court (case No.10431 for the judicial year 53). The plaintiff, an Egyptian citizen, filed a lawsuit before the Administrative Judiciary Court (the subject matter Court) requesting the annulment of the Interior Ministry Decision that puts her name on the travel ban list upon a request by her (the plaintiff’s) husband. The Administrative Court decided in the plaintiff’s favor and suspended the case to refer it to the SCC challenging the constitutionality of Articles 8 and 11 of the law No. 97 for the year 1959 on passports.<sup>6</sup> Article 8 of Law No. 97\1959 states that: *“In a decision issued by the Minister of the Interior, with the consent of the Minister of Foreign Affairs, the passport’s*

<sup>5</sup> The Administrative Court did not decide to refer the case to the SCC upon a request from the plaintiff, rather, the Court decided this by virtue of its authority as per Article 29\1a of the SCC’s law No. 48 \1979.

<sup>6</sup> This law was issued by a presidential decree because of the parliament’s absence. Successive Egyptian constitutions have stipulated that the President of the Republic has the right to issue laws by virtue of presidential decrees (Marsom B-Qanon) upon the parliament’s absence. Article 156 of the current 2014 constitution stipulates for that.

*external appearance, validity, renewal method, conditions and process of issuance shall be identified...*"  
Article 11 reads: "Via a decision issued, the Minister of the Interior may reject passport issuance or renewal as well as passport withdrawal after being issued for important reasons estimated by the Minister".

The Administrative Judiciary Court argued, as it referred the case to the SCC, that "the Constitution asserts the freedom of movement and acknowledges the right of citizens to migrate. The Constitution mandates a law [issued by the legislator] to regulate such freedom and right. However; the legislator has violated such mandate and delegated the executive authority to identify conditions and procedures of passport issuance to citizens. The legislator even authorized the executive to reject issuance or renewal of passports, as well as the withdrawal of passports after having been issued, as stipulated in Articles 8 and 11 of law No. 97 for 1959. Thus, the legislator violated the provisions of Articles 41, 51 and 52 of the [then, 1971] Constitution. Such violation extends to Article 3 of Minister of Interior's Decision number 3937 for the year 1996 issued to implement provisions of the law [No. 97\1959]".

Article 3 of the Minister of Interior Decree No. 3937\1996 stipulated that: "Issuance or renewal of the passport of the wife shall be initiated upon submission of her husband's approval to travel abroad. In addition, the approval of the legal representative of the illegible person shall be submitted to issue or renew his passport in both cases.

*The approval to issue or renew a passport shall be considered a permission to travel during the validity time period of the passport. Cancellation of such approval shall be carried out via a statement of the husband or the legal representative after the verification of personality and correctness of the issuance of the statement by him before a competent officer of the Passports, Immigration and Nationality Authority and its branches, or before Egyptian Consulates abroad. Such statement shall be referred to the said authority or its branches within appropriate time prior to travel."*

## 2. The Ruling

The SCC accepted the Administrative Judiciary Court challenges against Articles 8 and 11 of Law No. 97\1959 and Article 3 of the Minister of Interior Decree No. 3937\1996 and found them unconstitutional. The Court reasoned its verdict on Articles 41, 50, 51 and 52 of the 1971 constitution stating that: "whereas the citizen's right in obtaining and holding a passport shall not be considered a title of his/her Egyptian nationality honored to enjoy inside and outside homeland, but further it is considered a tribute of personal freedom safeguarded by the Constitution in Article 41 which is protected and shall not be affected and except in situations of being red-handed, it is not permitted to arrest any person or..... or ban him from movement unless by an order required for investigation purpose and maintaining security of society. Such order is issued by the competent judge or public prosecutor in accordance with the provisions of the law."

The Court added: "The Constitution safeguards the rights related to freedom of movement. Article 50 states the citizen shall not be obliged to reside or banned from residing at a certain place unless in situations defined by the law. Then Article 51 bans extradition of citizens or depriving them of the right to return to their homeland. Article 52 stresses the citizen's right in permanent or temporary immigration under the limitation that the law regulates this right, procedures, and conditions of the immigration, and homeland departure. The Constitution does not mandate the Executive Authority any competencies to regulate whatever act affecting the rights it guarantees. Such regulation is managed via laws issued by the Legislative Authority".

## 3. Concluding Remarks

3.1. The SCC underlined the basic constitutional principle that rights and freedoms must be regulated, if the constitution necessitates such regulation, by the legislative authority, as per Article 86 of the constitution. The parliament's organization of these rights and freedoms, moreover, must fully consider that rights and freedoms limitations should, exclusively, take place by virtue of a judicial order, not the Interior Minister or any other executive authority representative. Hence, the SCC did not decide the unconstitutionality of Articles 8 and 11 of Law No. 97\1959 only because the legislature authorizes the executive (Interior Minister) to regulate this matter, but because of the content of the two articles as well, mainly that they granted the Interior Minister the authority that is vested exclusively to the judiciary to limit the rights and freedoms. This tendency can be seen as a directive from the SCC to the parliament when legislating the rights and freedoms prescribed for in the constitution.

3.2. In the same direction, the SCC decided to drop Article 3 of the Ministerial Decree No. 3937\1996<sup>7</sup> because “the adjudication of their [Articles 8 and 11 of the law] unconstitutionality obligates necessarily the drop of Article 3 of the [Ministerial] Decision”. However, this SCC’s adjudication was not based on a formal reason (Sabab Shakly) only, rather it implies that the substantive rule included in this article is unconstitutional per se as well; namely regarding Article 3 stipulates that the “issuance and renewal of the wife’s passport, stating the conditions needed along with approval to revoke previous approval of passport issuance or renewal”. Hence, revoking Article 3 of the Interior Minister decree is annulling the authority granted to the husbands over their wife’s right to obtain a passport, and therefore, travel freely. This approach by the SCC can be interpreted as a liberal tendency towards affirming women’s rights and equality among the two sexes. Nevertheless, the Court concluded its verdict by stating that “in spite of the above-mentioned, it does not prevent the legislator from making a new law to regulate the issuance and renewal of passports for female spouses as well as their withdrawal, taking into consideration the freedom of movement, which includes departure and return back to their homeland, and the scope of Article 11 of the Constitution, which guarantees the conciliation between the woman’s family duties and her work in life, and being equal to man without affecting the fundamentals of the Islam Shari’a, as well as Article 2 of the Constitution which states that proven principles of Islam are the main source of lawmaking”.

The SCC in this context reaffirmed what has been consistent in its jurisprudence, mainly regarding its interpretation and application of Article 2 of the constitution, which, although principles of Islamic Shari’a are the main source of legislation, not implies a Shari’a supremacy over the constitution and its articles, specifically the rights and freedoms enshrined for in the constitution. Rather, Islamic Shari’a principles are a mere constitutional article that will be interpreted and applied with consideration to those rights and freedoms and in a way balancing between both principles (Shari’a on one side, and rights and freedoms on the other) to achieve the *organic unity* of the constitution upon interpreting its articles.<sup>8</sup>

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<sup>7</sup> Issued according to the authority granted to the Interior Minister, as part of the executive, to issue ministerial decrees implementing laws and its executive regulations. The hierarchy of the legal rules in the Egyptian legal system starts with the constitution, followed by Laws, regulations and finally the administrative decrees/orders.

<sup>8</sup> Johansen, Baber, “The relationship between the Constitution, the Shari’a and the Fiqh: The Jurisprudence of Egypt’s Supreme Constitutional Court” (2004) 887, ZaöRV.

## Kuwait's Constitutional Court Decisions and its Impact on the Understanding of the Right of Equality and Islamic Principles

*Fawaz Almutairi*

### Abstract

Fawaz Almutairi translates and analyzes four decisions of Kuwait's Constitutional Court from the years 2007 – 2009 with regard to the application of Islamic law and its relation to the principle of equality. The first ruling (2009) deals with the appeal against the election of two women to the National Assembly on the basis of not complying with provisions of Islamic law, namely to wear a hijab. The court dismisses the appeal with regard to the ambiguous nature of the electoral law's provision on the adherence to Islamic law, outlining that the latter is not the sole source of legislation and that Islamic principles do not have binding force unless the legislator codifies them. The second (2008) and third ruling (2007) are both concerned with the refusal to pay housing allowance to female employees of a certain rank. While the court declares the legal foundation for the refusal in the first case unconstitutional, the respective provision of the second case is deemed constitutional, but wrongfully applied. In both cases, the court tries to define its understanding of equality, reaching from a merely formal model to a substantiate approach. The fourth ruling (2009) deals with the case of a mother whose husband refused to hand over her and her children's passports. The court declares the legal basis unconstitutional and delivers an interpretation of Islamic Law that foresees the right to movement for every individual. The selected rulings illustrate the court's efforts to reconcile Islamic Law with constitutional equality rights and the freedom of belief.

### Introduction

The Constitutional Court has been endowed a developed degree of monitoring or control over laws, bylaws and regulations that violate fundamental rights, including the right to equality, the right to litigation, the right to assembly and gather and other constitutional and fundamental rights. The Constitutional Court, in its early stages, was rarely rendering decisions of unconstitutionality despite the fact that the laws challenged before it often clearly violated the constitution. This may be due to the fact that some of its members had no understanding of the role played by a constitutional court and that a majority of the court's members were graduates of the Faculty of Shari'a, with different views on basic rights than their colleagues who graduated from the Faculty of Law. After fierce criticism directed to the Constitutional Court on this matter, decisions on the unconstitutionality of certain legislative and regulatory provisions have been successively issued; especially in the period from 2006 to 2009, when the Court took course to confront legislation contrary to the Constitution, taking its natural place as the protector of constitutional provisions against authorities' infringement. The Court also issued several decisions regarding the mechanism of applying provisions derived from Islamic Shari'a. It has answered several questions about whether Shari'a is self-executing or whether it needs to be mediated by the legislator by being transferred into an applicable legislative form. We will select some decisions concerning the position of the Constitutional Court towards Islamic Shari'a.

Although a specific royal family dominates the Emirate<sup>1</sup> and the regime in Kuwait, and although there is no political party system that forms the government, Kuwait is intended to be a democratic regime with an elected government.<sup>2</sup> The Constitution explicitly states: "*The System of Government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers. Sovereignty shall be exercised in the manner specified in this Constitution.*"<sup>3</sup>

The Kuwaiti constitution explicitly guarantees both equality and justice: "*Justice, Liberty, and Equality are the pillars of society; co-operation and mutual help are the firmest bonds between citizens.*"<sup>4</sup> In addition, article 29 stated that "*All people are equal in human dignity and in public rights and duties before the law,*

<sup>1</sup> The Emirate is equivalent to the presidency but without election system.

<sup>2</sup> Eschel M. Rhodie, *Discrimination Against Women A Global Survey*, 347 (McFarland & Company, 1989).

<sup>3</sup> Article 6, Kuwait Constitution.

<sup>4</sup> Article 7, Kuwait Constitution.



*without distinction to race, origin, language, or religion.”*

The Constitutional Court has had several opportunities to interpret the equality guarantee; with the court recognizing disparate impact on women as a violation of equality.

## Case Studies

### Case 1430 AH corresponding to 28/10/2009

In the Name of His Highness the Amir of Kuwait

Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah

The Constitutional Court

At the public hearing held at premises of the court on Dhu'l-Qi'dah 9, 1430 AH corresponding to 28/10/2009 AH,

Presided over by Chancellor / Yousef Ghanam Al Rasheed, chief justice

Formed by the judges/ Faisal Abdul Aziz Al Morshid, Rashid Yaqub Al Sharrah, Khalid Salim Ali and Saleh Mubarak Al-Hariti and attended by the hearing secretary/ Mr. Khalid Faisal Al-Azran.

The following judgment was rendered

In the appeal registered in the Constitutional Court under No. 20 of 2009 –  
“Appeals relating to elections of the National Assembly (in Kuwait) in 2009”

Filed by: Hamad Abdul Aziz Ibrahim Al Nashi

Against:

1. Aseel Abdul Rahman Haji Taqi Hajeih Al Awadi
2. Rula Abdullah Hajeih Dashti
3. Minister of Interior in his personal capacity
4. Secretary-General of the National Assembly in his personal capacity
5. Minister of Justice in his personal capacity

### Facts

As indicated by documents, the facts can be summarized as follow – The Contestant (Hamad Abdul Aziz Ibrahim Al Nashi) has impugned validity of the 2009-elections of the National Assembly in the third electoral district; he has impugned validity of the elections under a notice of appeal deposited to the Court Bureau on 28/5/2009; in conclusion thereof, the Contestant requested the court to rule the following: Annulment of accepting nomination of the first Respondent (Aseel Abdul Rahman Haji Taqi Hajeih Al Awadi) and the second Respondent (Rula Abdullah Hajeih Dashti), annulment of their win in the third electoral district, annulment of their membership in the National Assembly and annulment of the consequences thereof.

In explanation of his appeal contest, the Contestant/ Hamad Abdul Aziz Ibrahim Al Nashi stated that the National Assembly Elections Act No. 35 of 1962, amended by Law No. 17 of 2005, allows the Kuwaiti women to exercise their political rights in nomination and elections, provided that the women shall adhere to the rules and provisions approved by the Islamic *Shri'ah* (Islamic Law), including the Hijab (veil) worn by women to maintain modesty and privacy from unrelated males (husband or any other relative to whom they are prohibited to marry) for the entire body of the woman except her hands and face to be covered in the presence of people of the opposite sex other than close family members; this provision is established under the Qur'an, the *Sunnah* and consensus of the Imams; the first and second

Respondents have applied for nomination for the National Assembly in the third electoral district in the elections scheduled to be held on 16/5/2009, where both Respondents were allowed to participate in these elections and then, they succeeded in such electoral district, although they breached the condition of Kuwaiti women's nomination and violated Article 1 of the Election Act because they do not wear the Islamic veil (Hijab) stipulated by the Great Islamic Law; therefore, both Respondents' nomination, declared success in the elections and membership in the National Assembly are marred by invalidity pursuant to provisions of the Islamic *Shri'ah* and the law; accordingly, and based on the foregoing, the Contestant had to file his current appeal in his capacity as an elector (voter) and former nominee in this electoral district, asking the court to adjudicate the above-mentioned request in his favor.

Along with his notice of appeal, the Contestant submitted a docket of documents containing photocopy of the statements contained in the Encyclopedia of *Fiqh* issued by the Ministry of *Awqaf* and Islamic Affairs with respect of the women's legal dress, photocopy of an advice issued by the Ministry of *Awqaf* and Islamic Affairs on 24/9/2006 and photocopy of another advice issued by the Ministry of *Awqaf* and Islamic Affairs on 26/9/2006.

After the Court Bureau has received this appeal, it registered such appeal in its records under No. 20 of 2009 and served a notice of appeal to the Respondents.

This court has considered the appeal as it is stated in minutes of the hearings in which the Contestant's attorney/ Emad Mohamed Yaqub Al Yousef appeared before the court and adhered to the requests contained in the notice of appeal, the first Respondent's attorney/ Emad Suleiman Al-Saif has appeared before the court and submitted a memorandum of plea to the jurisdiction of this court to consider this appeal based on the fact that jurisdiction of this court is competent to consider the election process in its definite technical sense, including voting, counting the votes and declaration of the results and its jurisdiction does not include the pre-election phases; in addition, the first Respondent's attorney pleaded for unconstitutionality of the last paragraph of Article 1 of Law No. 35 of 1962 concerning election of members of the National Assembly for stipulating a special condition for the women's right to nomination and voting, *alternatively*, he requested the court to reject the appeal on merits.

The second Respondent's attorney/ Dr. Mohamed Abdel Mohsen Al-Moqatei has appeared before the court and submitted a memorandum of plea to jurisdiction of the court to consider this appeal because the Contestant's request is originally considered a request for membership termination/ cessation which falls within competence of the National Assembly, he requested the court to dismiss the appeal for non-relevance to the electoral process and procedures and for lack of the documents supporting his appeal; on merits of that appeal, the second Respondent's attorney/ Dr. Mohamed Abdel Mohsen Al-Moqatei requested the court to reject such an appeal.

Representative of the Legal Advice and Legislation Department has appeared before the court on behalf on the Government and submitted a memorandum of defense in which he requested the court to rule the following – *Originally*: Reject the appeal and dismiss the first Respondent's plea to unconstitutionality and *alternatively*, to reject this plea on merits. The Contestant's attorney submitted a memorandum in which he adhered to the Contestant's requests, requested the court to reject the plea submitted by the first and second Defendants and submitted photocopy of the second report issued by the National Assembly's Legislative and Legal Affairs Committee on 11/11/2008 on the extent of constitutionality or legality of assigning some women to take over some ministries in light of Article 1 of the Election Law and the conditions to be met by the person taking over the ministry, stipulated in Articles 82 & 125 of the Constitution.

The court decided to render its judgment on that appeal in the hearing of 30/9/2009 and then, it decided to arrest the judgment to the today's hearing.

#### The Court

After reviewing the documents, hearing the pleading and taking out legal deliberation:

Whereas the first and second Respondents pleaded for non-jurisdiction of this court to consider this appeal on the basis that its jurisdiction does not include the election process in its definite technical



sense, including voting counting the votes and declaration of the results and this court is competent to only consider nomination in the elections and it is a pre-election phase; therefore, this court is not competent to adjudicate this appeal.

This plea is groundless because this court's jurisdiction to consider the appeal is relating to election of or validity of membership of the National Assembly Members depends on the nominee's run for the elections and meeting the entire nomination requirements, where contesting the election process includes voting, counting the votes, announcement of the result and the objections and faults relating to the elections and announcement of the voter's will; membership in the National Assembly is primarily based on will of the voters who cast their votes in favor of a particular nominee who fulfills the conditions stipulated by the Constitution and the law; if the nominee is allowed to run for the elections and he is not eligible for previous or contemporary reasons, the voters' will shall be irrelevant for electing and voting and that illegible nominee's success in the election shall not express the voters' will; in addition, there is no reason to claim that immunity of the nominees in the nominee lists shall be realized if it is not contested, if his legal status is completed by declaring his success in the elections or by challenging it under an acquired right that is difficult to be changed.

Therefore, contesting the procedures relating to election of a member of the National Assembly – whether the appeal is relating to the election procedure or the nominee's losing in the elections while being declared as successful therein – involves appeal to the election process because the decision in this regard would necessarily affects valid membership of the person declared to be successful in such elections; in addition, it is firmly established that contesting the election results is not as a appeal to an administrative decision falling within jurisdiction of the Administrative Court in terms of requesting for annulment thereof, where declaration of the election result does not express the will of the administrative authority, but it expresses the voters' will. Based on the foregoing and whereas the decrying in this appeal is related to the election procedures in the third electoral district, declaration of success of the first and second Respondents and claiming annulment of their election, declaration of their success and membership in the National Assembly for their breach of the legally-prescribed requirement for the women concerning their right to nominate, this appeal falls within the electoral appeals falling with jurisdiction of this court to consider it, where there is no reason for the second Respondent's challenge to claim that such appeal is related only to terminate the membership and this matter does not fall with jurisdiction of this court and falls only within competence of the National Assembly; the cases of termination/ cessation of the membership in the National Assembly is not related to the election procedures, but it exclusively relates to the members and the National Assembly shall have jurisdiction over affairs of its members only after verifying the valid election procedures and valid membership of the successful nominee(s). Accordingly, the second Respondent's plea shall be wholly rejected.

As for the second Respondent's plea for inadmissibility of the appeal for not submitting the documents supporting such appeal as required by the court regulation, it is refuted as follows: it is documented that the Contestant has enclosed with his notice of appeal a docket of documents containing his defense jurisprudence opinions supporting his defense concerning the women's legal dress, as well as advices issued by the Ministry of *Awqaf* and Islamic Affairs; therefore, this plea shall be disregarded.

Whereas the appeal fulfilled its legally formal conditions;

Whereas the Contestant has established his appeal for annulment of the election process in the third electoral district and invalid success and membership of the first and second Respondents in the National Assembly on the grounds that they did not adhere to wearing the Islamic veil, in violation of the Election Law which requires the female nominees to abide by the rules and provisions approved by the Islamic law; Whereas Article 1 of the National Assembly Elections Law No. 35 of 1962, as amended by Law No. 17 of 2005, stipulates that "Each Kuwaiti of twenty-one years old shall have the right to vote, except for the naturalized person who has not been naturalized for twenty years in accordance with provisions of Article 6 of the Amiri Decree No. 15 of 1959 concerning the Kuwaiti Nationality Law; for the women's nomination and election, they shall abide by the rules and provisions approved by the Islamic *Shri'ah* ; in sense of provision of this latter provision, it is evident that it is stipulated in general, absolute and without comprehensive definition forming control of the meaning; whereas it is provided for in the form of a condition,

interpretation of the essence of condition holds more than one meaning and contains hidden meaning of the condition, where the phrase (rules and provisions approved in the Islamic Law) is a general meaning including all the religious provisions and the related doctrine, morals and the nominated persons' deeds and acts, some of these rules and provisions are contained in the Holy Qur'an and the Prophet's Sunnah and some thereof are derived from the other legal evidence; in addition, the sense of this provision has a meaning related to sense of the Islamic Jurisprudence which is limited to the understanding and knowledge of a part thereof, which is the legal practical provisions concerning acts of the appointed persons and not falling within provisions of the doctrines and morals; the term (approved) contained therein may refer to the definitive provisions in terms of their validity and meaning and may also refer to the provisions derived by discretion within scope of the presumptive provisions on basis of the on the different legal evidence, whether firmly establish (such as the Qur'an and the *Sunnah*) or not firmly established (such as commendation and custom), when the evidence is available and there is an interest in application thereof as deemed appropriate by the rulers/ leaders.

By reviewing record of proceedings of the National Assembly at its session held on Monday Rabi Al-Thani 8, 1426 AH corresponding to 16/5/2005 AD, it is evident that a draft law was submitted by the Government to amend certain provisions of the Law No. 35 of 1962 concerning elections of members of the National Assembly, in which it is stipulated that "Provision of Article 1 of the said Law No. 35 of 1962 shall be replaced by the following provision: "Article (1): Each Kuwaiti of twenty-one years old shall have the right to vote, except for the naturalized person who has not been naturalized for twenty years in accordance with provisions of Article 6 of the Amiri Decree No. 15 of 1959 concerning the Kuwaiti Nationality Law". Then, some members of the National Assembly proposed to add the following paragraph to Article 1 of the Draft Election Law submitted by the Government, which is read as follows: " For the women's nomination and election, they shall abide by the rules and provisions approved by the Islamic *Shri'ah* " and by reading this Article (1) after adding this paragraph thereto, the members of the National Assembly approved it without any clarification or declaring the reason or purpose of this amendment, where the Law No. 17 of 2005 was promulgated to approve this amendment in the form approved by the National Assembly; by reviewing the explanatory memorandum thereof to define the reasons and causes that called for promulgation thereof to understand the provision and conclude the legislator's intention, it has been evident that this Article only referred to the fact that such amendment is made to maintain customs and traditions of the Kuwaiti society; by application of the Greater Islamic Law, it is evident that new wording of the Article (1) states that the women shall abide by provisions of the Islamic law while exercising their right to nomination and election.

Whereas it is firmly established that when deriving the meanings from the legislative provisions, if the provision has more than one meaning, it shall be considered on the meaning that makes it more compatible with the supreme legislation and in the form holding it valid and avoiding incompatibility, even if this meaning is of less clarity; accordingly, interpretation of this provision shall be in light of the governing principles and controls contained in provisions of meanings thereof in the Constitution pursuant to the principle of the legal rules hierarchy, where the lower-order legislation may not contravene the higher-order legislation, whether contravention is in the form of restriction of the higher-order rules or in the form of generalizing the restricted rules; in fact, the Kuwaiti Constitution does not stipulate that the Islamic law – in the sense of "Islamic jurisprudence" – the sole source of legislation and does not prevent the legislator from approving other sources to keep the people's conditions and affairs to maintain their legally-considered interests; in addition, the Constitution ensures the personal and religious freedom as long as such freedom is within scope of (belief) (i.e. the secrets which are between the person and his Lord) and the Constitution does not discriminate among people in rights and duties on basis of the religion or sex.

In addition and in fact, provisions of the Islamic Law are not of binding force like the legal rules, unless the legislator intervenes and stipulated it to a legally binding rule; provisions of the Islamic Law are not of immediate and direct force/ effect, but they shall be stipulated in certain legislative provisions and contents that shall be adhered to by those to whom these legislative provisions shall be applied and by those who are assigned to execute and enforce these legislative provisions; accordingly, provisions of the Islamic Law shall not be equal to the substantive provisions, where the substantive provision is self-executing; therefore, the said provision (the Islamic Provision) may not be described as a certain substantive provision; however, in accordance of its content as a provision of the Islamic Law, it is considered a guiding provision in the form

of source of guidance and directing which are not binding as it is stated in the explanatory memorandum of the law in this regard; moreover, it is not conceivable to consider that the legislator has intended, within the framework of current provision, to leave those who appointed to execute and enforce it to investigate these unregulated rules and provisions, leading to confusion and contradiction among these rules and provisions due to different jurisprudence views.

Whereas the court has concluded the foregoing with respect of the said provision to primarily declare the extent of validity thereof to deny its unconstitutionality, the court shall disregard and reject the first Respondent's plea to unconstitutionality of this provision.

Based on the foregoing and whereas the Contestant has established his appeal on basis of the first and second Respondents' illegibility to nomination for their violation of the last paragraph of Article (1) of the said Election Law, invalid run for the elections, invalid declaration of their success in the elections and invalid membership in the National Assembly, in contrary to the correct understanding of this provision in the above-mentioned form, the appeal is groundless and shall be rejected.

#### For these reasons

#### The Court ruled the following:

- Reject the appeal.

### Notes

Kuwaiti women had been deprived of running and electing since the establishment of the Constitution in 1962 until 2005, when the Law on Granting of Women's Political Rights was promulgated, a special provision was added to women alone. Law No. 17 of 2005 amending the Law on the Election of the Members of the National Assembly No. 35 of 1962 was issued amending the Article through adding the following statement "women are required to adhere to the rules and provisions adopted in Islamic law when running and electing". In fact, the terms used in the legislation are loose and vague, what does this phrase mean? Are only women obliged to abide by the rules and provisions adopted in Islamic law? Are there not any rules for men's dress and appearance in Islamic law? Does the Article mean formal or behavioral obligation? The legal assessment element in the previous Article is not clear, and therefore it is difficult for women to abide by something because of ambiguous texts in the previous Article.

It is noted that the text of the law did not address the dress and appearance of women. When the elections of the National Assembly were held in 2009, four women won in various constituencies, but there were two members, namely Aseel al-Awadhi and Rola Dashti, that did not wear the *hijab*, so a voter challenged the validity of their membership for violating Article 1 of Electoral Law. The Court dismissed the appeal and we can summarize what was done in this case as follows:<sup>5</sup>

The plaintiff challenged the validity of the 2009 National Assembly elections. In his lawsuit, he claimed the invalidity of the candidacy of Mrs. Aseel Al Awadhi and Rola Dashti as the first and second appellees violate the Electoral Law of National Assembly Members No. 35 of 1962 as amended by Law No. (17) of 2005. The first Article required women candidates to abide by the rules and provisions of Islamic law; these rules and provisions stipulate that they must wear the hijab, to lower [part of] their outer garments, to hide the adornment from men, and that only the face and hands can be discovered since the woman's body is' awrah (private part). This ruling is established as per the Holy *Quran*, Prophetic *Sunnah* and agreement of the *Imams*. Since the first and second defendants do not wear the *hijab* and have won parliamentary seats by election, this is contrary to the said Article of the Electoral Law, according to the plaintiff's statement and therefore the court must declare their membership invalid for violating conditions of candidacy.

In its interpretation of Article (1) of the Electoral Law, the court stated that this Article has been drafted in a collective form, without specifying a *holistic cross-cutting* definition to clarify the meaning. It used the minutes of the National Assembly to determine the meaning of the text, but was unable to do so, so it decided that "*in the field of assessing the denotations from legislative texts, if the text is charged with more than one*

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<sup>5</sup> Decision of the Constitutional Court No. (20) of 2009 issued on 28 October 2009.

*meaning, it must be interpreted according to the meaning that makes it more compatible with the higher legislation, reflect its correct meaning, avoid contradiction, even if this meaning is less apparent. The interpretation of this text shall be within the framework of governing principles and fundamentals contained in the Constitution in letter and spirit “.*

The Court highlighted that Islamic law is not the sole source of legislation. The Constitution does not prohibit legislators from adopting other sources according to the public interest. The decision also indicated that the Constitution also “*guarantees personal freedom and made freedom of faith unrestricted, for it is within the scope of (belief) or the (inner thoughts) which shall be ordained by Allah, but no distinction between people in terms of rights and duties or because of religion or sex.*”

Moreover, the Court stipulated that “*Islamic law rulings do not have the binding force like legal rules unless the legislator intervenes and codifies the Islamic principles. It does not have the power of self and direct execution, but it must be molded in specific legislative texts and a specific legislative content to which both, the governed and those who execute and apply it, can adhere. Accordingly, it is not possible to equate it with substantive texts. A substantive text is self-executing in its substantive rulings, and therefore the text under consideration cannot be described as containing a specific substantive rule. This text, in accordance with its content, contains guiding provisions, which provide for control and guidance, but are not intended to be binding and obligatory. This is reflected in the explanatory note of the law; in this respect, it is inconceivable that the will of the legislator has been directed – within the framework of this existing text – to leave those responsible for implementation and execution to investigate such indeterminate rules and provisions, which may lead to confusion and contradiction between these rules and provisions according to the different views of jurisprudence”.*

The court interpreted Article 17 of the Electoral Law in accordance with Articles of the constitution, specifically Article two, Articles of rights and liberties, such as personal freedom, freedom of belief, through reconciling them. It tried to reconcile between the view that Sharia was a source of legislation and the right to freedom of belief. In the end, the court rejected the appeal and validated their membership.

#### **Case 1429 AH corresponding to 08/06/2008**

Edition No. 874/54

Date: Sunday Jumada Al Thani 4, 1429 AH corresponding to 8/6/2008.

In the Name of His Highness the Amir of Kuwait  
Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah

The Constitutional Court

At the public hearing held at premises of the court on Jumada Al-awwal 23, 1429 AH corresponding to 28/5/2008;

Presided over by judge/ Rashid Abdel Mohsen Al-Hammad, Chief justice,

Formed by the judges/ Yousef Ghanam Al Rasheed, Faisal Abdul Aziz Al Morshid, Kazim Mohamed Al Muzidi and Rashid Yaqub Al Sharrah and attended by the hearing secretary/ Mr. Jasim Qazaz Al-Jasim.

#### The following judgment was rendered

In the lawsuit No. 307 of 2008 Administrative/ 1 referred by the Administrative Circuit of the Plenary Court:

Filed by: Hind Mubarak Sultan Al Bin Ali

Against:

1. Head of the Legal Advice and Legislation Department in his capacity.
2. The State Minister for Cabinet Affairs in his capacity.
3. The Prime Minister in his capacity.

The lawsuit was registered in record of the Constitutional Court under No. 5 of 2008 (Constitutional Lawsuit).

#### Facts

Through the order of referral and all other documents, the lawsuit facts can be summarized as follows: The Plaintiff has filed the lawsuit No. 307 of 2008 Administrative/ 1 against the Defendants (in their capacities), where she (Plaintiff) requested the court to rule the following: Settle her status by giving her the right to receive the housing allowance of the same category equal to her male peers at The Legal Advice and Legislation Department as of 5/3/2003, along with the new developments made to such allowance and to receive the financial differences resulting therefrom.

In explanation of her lawsuit, she stated that she was appointed in the position of "Lawyer" at the Legal Advice and Legislation Department as of 9/12/2000 and that she was promoted in her career until she became Senior Lawyer as of 13/12/2006; then, she knew that her single male colleagues in Department receive monthly housing allowance of KD 200 and that her married male colleagues in Department receive monthly housing allowance of KD 300, while she was deprived of receiving this allowance because she is female and unmarried (single); where discrimination of the male staff with this feature and depriving the females of such feature are not based on legal ground, she had to file her lawsuit containing the above-mentioned requests.

While considering and hearing the lawsuit before the court, the Plaintiff's representative submitted a memorandum of plea to unconstitutionality of paragraph (2) of Article (2) and paragraph (5) of the Article (3) the Cabinet Resolution No. 142 of 1992 concerning housing of the judges, staff of the public prosecution and staff of the Legal Advice and Legislation Department, amended by both Resolutions Nos. 1162 & 734/VII of 1994, where these two paragraphs stipulate that the housing allowance are only limited to the single and married and does not include the single females, despite this feature is also granted to the single males; this establishes discrimination between the males and females in terms of the career rights for irrelevant reasons, where this Cabinet Resolution establishes discrimination between those receiving this features and those who are deprived thereof and thus, the Cabinet goes beyond its competence to include the legislation within its career scope in contrary to the equality principle; this is considered encroachment over the legislation authority and prejudice to the principle of the separation of powers (governmental powers) in violation of provisions of the Articles Nos. 7, 8, 18, 20, 22, 29, 41, 50 and 163 of the Constitution.

At the hearing of 8/4/2008, the court ordered to suspend considering the lawsuit and referred it to the Constitutional Court to adjudicate the extent of constitutionality of paragraph 5 of Article 3 of the Cabinet Resolution No. 142 of 1992 concerning housing of the judges, staff of the Public Prosecution and staff of the Legal Advice and Legislation Department, amended by the Resolution No. 734 of 1994, on the basis that such paragraph establishes discrimination between males and females in terms of the right of housing allowance, in contradiction to and in violation of the equality principle.

The lawsuit file was received by this Court Bureau and it was registered in its record under No. 5 of 2008 (Constitutional) and a notice was legally served to the relevant parties in this regard; at the hearing of 5/5/2008, this court considered the lawsuit as stated in minutes of the sessions in which the Plaintiff's representative submitted a memorandum in which he requested the court to rule the following: Unconstitutionality of paragraph 2 of Article 2 and paragraph 5 of Article 3 of the Cabinet Resolution No. 142 of 1992 concerning housing of the judges, staff of the Public Prosecution and staff of the Legal Advice and Legislation Department and its amendments and unconstitutionality of the related articles; representative of the Legal Advice and Legislation Department appeared before the court and stated that the government delegates the court to announce its opinion in this regard and accordingly, the court decided to render its judgment at the hearing of 14/5/2007 and then, it decided to postpone pronouncement of the judgment to the today's hearing.

### The Court

After reviewing the documents, hearing the pleading and taking out legal deliberation:

Whereas the procedures of referral to this Court have fulfilled their legally prescribed conditions;

Whereas article 8 of Decree Law No. 14 of 1977 concerning job grades (functional levels) and salaries of judges, staff of the Public Prosecution and staff of the Legal Advice and Legislation Department, amended by Decree Law No. 124 of 1992 stipulates that: "Each of the judges, staff of the Public Prosecution and staff of the Legal Advice and Legislation Department shall receive private housing, commensurate with his position, in accordance with the regulations to be promulgated under the Cabinet Resolution". Pursuant to this provision, the Cabinet promulgated the Resolution No. 142 of 1992 concerning housing of judges, staff of the Public Prosecution and staff of Legal Advice and Legislation Department, as amended by both Resolutions Nos. 1162 of 1992 and 734/VII of 1994, where Article 2 thereof stipulates that "Each of the Kuwaiti judges, staff of the Public Prosecution and staff of the Legal Advice and Legislation Department has the option of allocating the government housing or receiving housing allowance by that rate:

- KD 200 per month for the single.
- KD 300 per month for the married.
- This shall not prejudice their right to receive the social bonus prescribed for their jobs.

In addition, Article 3 of the same Resolution stipulates that: "It is not admissible to allocate government housing or grant housing allowance to the following groups: 1-....., 2-....., 3- ....., 4-....., and 5- Females, except the married females".

Whereas the scope of the constitutional lawsuit is determined by the scope of the plea to unconstitutionality before the Court of First Instance and is determined within limits of the extent of seriousness of such plea according to the court discretion, whereas decrying/ criticizing paragraph 5 of Article 3 of the above-mentioned Cabinet Resolution is established on the fact that the provision of this paragraph 5 deprives the single females of a career feature granted to their male colleagues in contrary to the equality principle ensured by the Constitution and whereas the order of referral acknowledged seriousness of this plea in this course, the constitutional lawsuit is limited only to this scope to the extent of its relation to the Plaintiff's interest in the relevant lawsuit.

Based on the foregoing and whereas the Constitution is keen on and stipulates the principle of equality in a number of its provisions, where Article 29 of the Constitution expressly stipulates that "*People are equal in the human dignity and legally public rights and duties without distinction to race, origin, language, or religion*" and this provision is complementary to provision of Article 7 of the Constitution which stipulates that "Justice, freedom and equality are the pillars of society" and is complementary to Article 88 which stipulates that "The State shall ensure pillars of the society, security, serenity/ tranquility and equal opportunities for citizens". It is not surprising and it is no wonder that the above-mentioned provision of Article 29 is general and addressed to all state authorities, where the legislator (legislative authority) shall adhere to such provisions in its laws, the executive authority shall adhere to such provisions in promulgation of the regulations, rules and individual resolutions and the Judicial Department shall adhere to such provisions in respect of the justice affairs and its judgment; equality essentially means the equal treatment among the similar legal position holders and different treatment among the different legal position holders; in other words, the law stipulates that the principle of equality means that all persons are equal before the law with no discrimination, the rights and features stipulated by the law and granted to those subject to the law under legally standard rules and equal degree of legal protection and the duties and obligations imposed by the law shall apply to everyone under no discrimination or preference of a person over another one.

Based on the foregoing and whereas the legislator (legislative authority) has legislated special regulations, regulating the career affairs of the judges, staff of the Public Prosecution and staff of the Legal Advice and Legislation Department, as explained and included in the Law No. 14 of 1977 as amended by Law No. 124 of 1992 and such law subjected the concerned persons to it, including male and female staff of the Legal Advice and Legislation Department, where that law stipulates equal



treatment between them in their varied career positions and material or in-kind features and Article 8 of that law stipulates to grant each of the judges, staff of the Public Prosecution and staff of the Legal Advice and Legislation Department private housing, commensurate with his position, according to the regulations promulgated under the Cabinet Resolution.

Whereas the Cabinet has promulgated the Resolution No. 142 of 1992 concerning housing of judges, staff of the Public Prosecution and staff of the Legal Advice and Legislation Department, as amended by the Resolution No. 1162 of 1992 and Resolution No. 734/VII of 1994, where Article 2 thereof stipulates that each one of the foregoing persons has the right to select between allocation of government housing or receiving a housing allowance and specified the rate of such house allowance for the single and the married, without prejudice to their right to receive the social bonus prescribed for their job and paragraph 5 of Article 3 thereof stipulate to deprive the single/ unmarried females of that feature despite this feature is prescribed for the single males; accordingly, it is evident that provision of this paragraph 5 relinquishes this feature in this case, stipulates different treatment among those who are subject to the same law, violates the principle of equal rights among the similar legal position holders and establishes an unequivocal discrimination between the males and females, including prohibited arbitrary discrimination on basis of sex in contrary to the principle of equality stipulated in Article 29 of the Constitution; therefore, the court shall decide unconstitutionality of such provision of Article 3 in this regard.

#### For these reasons

#### The Court ruled the following:

Unconstitutionality of provision of paragraph (5) of Article (3) of the Cabinet Resolution No. 142 of 1992 concerning housing of the judges, staff of the Public Prosecution and staff of the Legal Advice and Legislation Department, amended by the Resolution No. 734/VII of 1994 because this provision relinquishes the unmarried females' right to benefit from the provision contained in Article 2 of this Resolution

#### **Notes**

In article 8 of Cabinet decree No. 14 for the year 1977, regarding the salaries and degrees of judges, prosecutors and the employees of the Fatwa and Legislation department, which was modified by Cabinet degree No. 124 for the year 1992, states: "Judges, members of the prosecution department, and members in 'Fatwa and Legislation' shall be given an appropriate domicile commensurate with their position, and further order shall be issued by the Cabinet." Because of this article, the cabinet issued order No. 142/1992, modified by orders no. (1162)/1992 and No. (734/seventh)/1992, which state: "Judges, members of the prosecution department, and members of 'Fatwa and Legislation' shall have the option between the allocation of government housing or receive a housing allowance of:

- 200 for singles
- 300 for married"

In article 3 of this order, it states that "the allocation of government housing and receiving a housing allowance shall not be provided for the following categories; 1-...2-...3-...4-...5- females unless if married." As a result, Hend Al-Bin Ali, a single woman who is a member of the "Al Fatwa and Legislation," Department sued all of the following: 1) the president of the "AL Fatwa and Legislation" Department in his capacity; 2) the Minister of the State for Cabinet Affairs in his capacity; 3) the prime minister in his capacity, for violating the constitution. In this case single male members were provided with 200 K.D, but not the single female members. Al-Bin Ali alleged that this unjust treatment based on gender without any legal justification is a violation of the constitution, especially of the articles "7,<sup>6</sup> 8,<sup>7</sup>

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<sup>6</sup> Justice, Liberty, and Equality are the pillars of society; co-operation and mutual help are the firmest bonds between citizens.

<sup>7</sup> The State safeguards the pillars of Society and ensures security, tranquility, and equal opportunities for citizens.



18, 20,<sup>8</sup> 22,<sup>9</sup> 29, 41,<sup>10</sup> 50, and 163.<sup>11</sup> She filed case No. 5/2008 before the constitutional court of Kuwait demanding to be paid the same amount as her male fellows and to disburse any financial differences by alleging the unconstitutionality of the fifth part of article No.3 of Cabinet order No. 142/1992, modified by order No. 743/1994; she claimed that it contains discriminatory and differential treatment for males and females in receiving housing allowances, which constitutes a violation of the equality principle of the constitution. In this case, the court began its examination by assuring that the appellant merely asked that the constitutionality of part five of the order be examined; therefore, the court could not take any further action beyond the request. It stated:

“The appellant had alleged the unconstitutionality of part five based on its denial to provide a single female member with the housing allowance that is given to her male counterpart, which constitutes a breach of the equality principle since the constitution has confirmed and assured the necessity of respecting the equality principle in many of its articles, such as article 29, which explicitly prohibits any distinction based on gender, origin, language, or religion, and is a complement to article 7 that assures that justice, freedom, and equality are pillars of society, as well as article 8, which states that ‘The State safeguards the pillars of Society and ensures security, tranquility, and equal opportunities for citizens.’ Not surprisingly, the content of article 29 is a general provision directed to all the government’s branches and authorities, committed by the legislative branch in its enactment, as well as by the Executive branch in its regulations and regulatory decisions; the judicial branch is committed by it in when it handles the organization of judicial affairs and when it decides the cases of the people. Equality in its essence means to equalize and to treat similarly situated people as the same, and to differentiate between unlike people or categories as different in their legal situations. Therefore, equality before the law means that all people are equal before the law without any distinction or discrimination, since the rights and privileges, which are provided by the law and enjoyed by the targeted people who are covered uniformly by its provision, are ensured by the protection of the law to the same degree. People are compelled by legal obligations and requirements equally and without any distinction, and when the government classifies a group to whom an order or legislation applies or upon whom a benefit is conferred, the classification must be reasonable and must rely upon the fact that the difference has a just and considerable relation to the legislation’s goals.

Judges, members of the prosecution department, and members of the Al Fatwa and Legislation Department are among the Cabinet members who are given an option between an allocation of governmental housing or receiving a housing allowance in order No. 1162/1992 and order No. 734/seventh/ 1994, article 2, and yet in part five of article 3, it clearly states that women are not eligible for this privilege except if married, despite the fact that their male colleagues enjoy this privilege. As a result, the challenged Cabinet order wrongfully differentiated between similarly situated persons without any legal reason or purpose, which constitutes an arbitrary prohibited discrimination that violates the principle of equality assured by article 29 of the Constitution, and based upon the foregoing, the court has held the unconstitutionality of part five of article 3 in Cabinet order No.142/1992 about the governmental housing for judges, members of the prosecution department and members of Al Fatwa and legislation, which was modified by Cabinet order No. 734/ seventh/ 1994.”

The Constitutional court has not explicitly acknowledged the models of equality in deciding equality cases, except in decreeing that persons of similar circumstances be treated alike. From the language of the decision, it would seem that the court has adapted the formal model; nonetheless, the holding in this decision is compatible with both formal and substantive models because the regulation that was struck down violated both models. It is unclear which one was intended, and hence it leaves the final

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<sup>8</sup> The national economy shall be based on social justice. It is founded on fair co-operation between public and private activities. Its aim shall be economic development, increase of productivity, improvement of the standard of living, and achievement of prosperity for citizens, all within the limits of the law.

<sup>9</sup> Relations between employers and employees and between landlords and tenants shall be regulated by law on economic principles, due regard being given to the rules of social justice.

<sup>10</sup> (1) Every Kuwaiti has the right to work and to choose the type of his work.

(2) Work is a duty of every citizen necessitated by personal dignity and public good. The State shall endeavor to make it available to citizens and to make its terms equitable.

<sup>11</sup> In administering justice, judges are not subject to any authority. No interference whatsoever is allowed with the conduct of justice. Law guarantees the independence of the Judiciary and states the guarantees and provisions relating to judges and the conditions of their Irrevocability.

choice open. The court did not examine whether it would follow a similar interpretation even if the outcome of identical treatment were severely unjust for a specific group. Thus, this formal interpretation has not answered the question of whether the application of equality should fulfill the requirements of justice.

Moreover, the Constitutional court has not developed a theory of scrutiny that should be used regarding the governmental classification cases, so the court's method in deciding who is alike and who is different is ambiguous, and it is unclear whether it uses the levels of scrutiny or the Canadian scale of scrutiny. As a result, when any legislation classifies persons, how do we ensure that these classifications are products of rational analysis and not automatic applications of traditional assumptions about the appropriate role for specific groups in society?

#### **Case 1428 AH corresponding to 04/11/2007**

Edition No. 843/53

Date: Sunday Shawwal 24, 1428 AH corresponding to 4/11/2007.

In the Name of His Highness the Amir of Kuwait  
Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah

The Constitutional Court

At the public hearing held at premises of the court on Shawaal 19, 1428 AH corresponding to 30/10/2007;

Presided over by Chancellor/ Rashid Abdel Mohsen Al-Hammad, President of the Court,

Formed by the judges/ Yousef Ghanam Al Rasheed, Faisal Abdul Aziz Al Morshid, Kazim Mohamed Al Muzidi and Rashid Yaqub Al Sharrah and attended by the hearing secretary/ Mr. Mohamed Mefrej Al Mefrej.

#### The following judgment was rendered

In the lawsuit No. 466 of 2006 Administrative/ 5 referred by the Administrative Circuit of the Plenary Court:

Filed by: Prof. Souad Ahmed Hussein Al Bustan

Against:

1. Manager of the Kuwait University in his capacity.
2. Head of the Civil Service Bureau in his capacity.
3. Minister of Higher Education in his capacity as the Supreme President of the Kuwait University.

The lawsuit was registered with the Constitutional Court's Register under No. 18 of 2006 (Constitutional).

#### Facts

Whereas in the facts – as apparent in the referral judgment and all documents – The Plaintiff has filed the lawsuit No. 466 of 2006 Administrative/ 5 against the Defendants in their capacities, where she requested the court to rule the following:

First: Appoint an expert to indicate her salary, her housing allowance that has not been disbursed to her and date of suspension of payment of that housing allowance and to calculate her housing allowance as of date of suspension thereof until date of filing the lawsuit and the financial

consequences and differences resulting therefrom.

Second: Keep the First Defendant in his capacity under obligation to pay her the financial differences concluded by the expert in his report.

In explanation of her lawsuit, she stated that she is a language professor at Kuwait University, she received a housing allowance and her housing allowance was suspended on the grounds that her husband has government housing and the Kuwait University Housing Regulations promulgated by the Minister of Education and Higher Education Resolution No. 30 of 2001 stipulate in paragraph C of Article 2 that to receive this feature and this allowance, the husband or the wife shall not have housing welfare of any kind from the Kuwait University or from any other governmental or non-governmental agency; the Plaintiff stated that although her husband has government housing for him, his first wife and their children, this shall not be a reason for depriving her of the housing allowance originally prescribed for her as a financial feature due to her profession and the Administrative Authority may not set general regulations that would deprive the beneficiaries of their features for considerations not relating to the requirements or nature of the profession.

The court has appointed an expert in the case; after the expert filed his report, the Plaintiff modified her requests as follows: First: Keep the first Defendant in his capacity under obligation, before the second and third Defendants, to pay her an amount of KD 21851,667 as of date of suspension of paying the housing allowance on 11/3/1999 until date of filing the lawsuit and pay her whatever entitlements arise, at a rate of a monthly housing allowance of KD 350; in addition, the Plaintiff submitted a memorandum of defense in which she adhered to her modified requests; Second: Cease considering and refer the lawsuit to the Constitutional Court to decide the extent of constitutionality of the University Housing Regulations; the court asked the Plaintiff about contents of her above-mentioned memorandum, the Plaintiff submitted a memorandum of plea to unconstitutionality of paragraph C of Article 2 of the Housing Regulations for being in contrary to provisions of Articles 8, 9 and 29 of the Constitution.

At the hearing of December 17<sup>th</sup>, 2006, the court ordered to suspend consideration of the lawsuit and to refer the lawsuit to the Constitutional Court to decide on the extent of unconstitutionality of paragraph C of Article 2 of the Housing Regulations promulgated by the Minister of Education and the Higher Education Resolution No. 30 of 2001, for quasi-unconstitutionality thereof because it involves depriving the woman of the housing allowance prescribed for her by virtue of her profession, on the basis that she is a wife and her husband has a governmental housing despite her not sharing it and for denial and exclusion of her right to have this benefit and for granting this benefit of housing welfare to her husband, not to her as well; whereas this forms prohibited discrimination, infringement of her right originally based on the work relationship and in violation of the equality principle which is based on the equality and non-discrimination between females and males in terms of their rights and freedoms on the basis of sex; therefore, the provisions of the paragraph C are in violation of the Constitution of which Article (8) stipulates that "Justice, freedom and equality are the pillars of society, and cooperation and compassion are a close relation among the citizens", Article (9) thereof stipulates that "The State shall ensure pillars of society, security, tranquility and equal opportunities among citizens" and Article (29) thereof stipulates that "People are equal in the human dignity and legally public rights and public responsibilities and there shall be no discrimination among the people on the basis of sex, origin, language or religion".

The lawsuit file was received by this Court Bureau and it was registered within its register under No. 18 of 2006 (Constitutional) and a notice was legally served to the relevant parties in this regard; the Plaintiff submitted a memorandum in which she requested the court to rule unconstitutionality of the appealed provision and the Legal Advice and Legislation Department submitted a memorandum of the government's opinion in which it requested the court to rule the following: *Originally*: 1- Inadmissibility of the constitutional lawsuit for lack of capacity and *alternatively*: Reject the lawsuit for lack of the

Plaintiff's personal direct interest and full *alternatively*: Reject the lawsuit. The Plaintiff submitted a memorandum of rejoinder in which she commented on the above-mentioned governmental opinion.

This court has considered the lawsuit as it is stated in the minutes of the hearings, the representative of

the Legal Advice and Legislation Department submitted a memorandum in which he adhered to the above-mentioned governmental memorandum and the court decided to render its judgment at the hearing of June, 6<sup>th</sup>, 2007 and authorized submission of memoranda within ten days, five days to each party; during that period, no party has submitted any memorandum; at the said hearing of June, 6<sup>th</sup>, 2007, the court decided to postpone pronouncement of the judgment to the hearing of September 23<sup>rd</sup>, 2007 in which it decided to render its judgment at the today's hearing.

#### The Court

After reviewing the documents, hearing the pleading and taking out legal deliberation

It is firmly established by law and this court that the jurisdiction of this court over constitutionality of the laws, decree-laws and regulations is based on their relation to the lawsuit in accordance with the procedural conditions of the litigation regulations before it and this shall be through the methods stipulated in provisions of Article 4 of Law No. 14 of 1973 concerning the establishment of the Constitutional Court, including referral of the lawsuit to the Constitutional Court from any of the courts either sua sponte, it deems quasi-constitutionality of a provision that shall be adjudicated to deciding on the dispute before it or based on a significant plea to constitutionality brought by any of the disputing parties or his representative before the court under a power of attorney or agreement – the trial court has sua sponte considered that there is seriousness of this matter and whereas this provision grants all the courts of different degrees to sua sponte refer the legislative texts to the Constitutional Court even if the opponent did not plead for unconstitutionality, in order to ensure the correct application of the legal rule, overriding of provisions of the Constitution and uphold of the Constitution over all other lower-degree legislations; whereas the law has granted the court before which the plea to constitutionality is raised the right to assess the extent of seriousness of such plea and the extent of adjudication of the constitutional issues to adjudicate the subject matter of the lawsuit, this is to exclude the seemingly malicious plea aiming at temporization and wasting time and justice, so that the provisions of this Articles shall be understood/ interpreted along with its purpose to ensure the seriousness of litigation and the justice's interests;

It is not surprising and it is no wonder that the trial court's selection of such method to mobilize jurisdiction of the Constitutional Court over a certain legislative provision falls with discretionary power of the trial court, as evidenced before it by the apparent reasons for its unconstitutionality, in light of its primary assessment of the objections to such provision and the extent of validity of its grounds; in addition, it is firmly considered that the sub-plea to unconstitutionality is only means of defense – as a general principle – like the other plea aimed at staying of litigation until deciding on a preliminary matter of which adjudication shall lead to adjudicate of the litigation matter; it is also firmly established that this plea is in essence, a cornerstone, by virtue of its connection with the establishment of the legal rule applied to the lawsuit facts, is not a formal or procedural plea, but it is a substantive plea, where its content and objective is confrontation of the contested legislative provision by provisions of the Constitution for preponderance thereof and to confirm its close relation to the public order, where the constitutional provisions are the worthiest and the most preferred to be applied, so that the judgments shall adhere to application of the valid constitutional rules; in addition, this plea may be raised in any status of the lawsuit and there is no provision restricting the opponent from raising such plea at any litigation proceedings; there is no doubt that such plea would not lead to raise the constitutional lawsuit and refer the matter to the Court Constitutional Court for adjudication thereof, but the role of the trial court shall remain in assessing the seriousness of and the extent of necessity of adjudication of such plea in order to adjudicate the substantive lawsuit filed before that trial court.

Based on the foregoing, whereas it is documented that the person who submitted the plea to unconstitutionality before the trial court is an attorney appointed to defend the Plaintiff, and their relationship is still existent under the proxy No. 5928/Record C dated 24/4/2004, whereas the Plaintiff has appointed him (the attorney) to represent her before this court under the proxy No. 472/Record D dated 16/1/2007 and whereas the trial court has stated that such plea to constitutionality is serious, the Legal Advice and Legislation Department's plea for inadmissibility of the lawsuit for lack of its relation with this court due to lack of the attorney's capacity in this regard, is groundless and shall be rejected.

Whereas it is firmly established by this court that the direct personal interest, which is a condition for the acceptance of the constitutional lawsuit, depends on whether a logical relationship between the said personal interest and the interest existing in the substantive lawsuit, where the settlement of the constitutional matters is necessary for the settlement of the substantive dispute and there should be evidence proving that a direct real damage has occurred to the Plaintiff and that the said damage is caused by the contested provisions, hence should it appear that the breach of the claimed rights was not caused by said provisions or should the settlement of the constitutional issue have no effect on the substantive dispute, this means that the aforementioned interest does not exist.

Based on the foregoing, whereas the scope of the constitutional lawsuit shall be limited to the scope of plea to the constitutional issue before the trial court within the limits of seriousness assessed by this court, whereas the essence of the Plaintiff's requests in the substantive dispute is related to the extent of the Plaintiff's entitlement to receive the housing allowance prescribed under the Kuwait University Housing Welfare Regulations promulgated under the Minister of Education and the Higher Education Resolution No. 30 of 2001, whereas the Plaintiff's plea to constitutionality of paragraph C of Article 2 of these regulations is on the grounds that the application of such provision of paragraph C to the Plaintiff causes damages to her and deprives her of the claimed right, whereas her decrying against the contested provision – as apparent in the referral judgment – is based on infringing the equality ensured by the Constitution as a pillar of the society and is based on the grounds that such provision violates the principle of equal opportunities among citizens and violates the principle of equality between males and females as ensured by the law, whereas the referral judgment has identified the scope of the plea seriousness in terms of violation of Articles 8, 9 and 29 of the Constitution, whereas it is apparent by reviewing the above-mentioned housing regulations that Article 1 thereof stipulates that the housing welfare feature is granted to the teaching staff, language professors, the instructional personnel and assistant-professors at the Faculty of Allied Medicine as specified in the table provided for in this Article, where that table indicates the housing allowance and furniture allowance corresponding to each profession and states a housing allowance of KD 250 for the single language professor and KD 350 for the married language professor.

Article 2 of this regulation indicates the conditions for benefiting from this allowance, including paragraph C thereof which stipulates that "To receive this allowance, the husband or wife shall not be receiving a housing welfare of any type from the Kuwait University or any governmental or non-governmental agency in the State", and Article 3 thereof stipulates that "In application of the provision of the above-mentioned Article, the following rules shall be taken into consideration: C- The rental government housing falls within concept of housing welfare provided by the State to the citizens, so that the person who has such rental governmental housing may not have the housing welfare prescribed under these regulations" and whereas the above-mentioned provisions stipulate that the said housing allowance is prescribed for the husband or the wife who are subject to provision of these regulations and occupy the professions specified therein, this prescribed housing allowance shall not be paid/ disbursed to any of the spouses if one of them receives this housing from the University or from any governmental or non-governmental agency in the State and there is no suspicion in that contested condition which avoids duplication of payment of such housing allowance as long as the spouses remain together in the housing welfare prescribed for one of them and avoids duplication of this feature to the husband and his wife at the same time, where this contested provision does not deprive the wife of the housing allowance if it is proven that she does not benefit from the housing welfare granted to her husband and if the grounds and justifications of enforcement of this condition are not available. This is a reasonable conclusion not going beyond this provision, but it is consistent with the existing considerations for prescribing this allowance which primarily relates to preservation of, cohesion and strengthening of ties and unity of the family confirmed by the provision texts which hold this consideration. Accordingly, and based on the foregoing, the Plaintiff has no direct personal interest in settlement of the extent of constitutionality of the contested provision and this shall not be affected by the Administrative Authority's dispute in this regard because the related damage is not directly related to the contested provision, but it is related to the wrong application thereof; therefore, this matter is not within scope of the constitutional lawsuit and the court shall reject the lawsuit.

For these reasons

The Court ruled the following:

- Reject the constitutional lawsuit.

## Notes

In another case that was decided by the constitutional court in Kuwait, the appellant (Suaad Al Bustan) filed complaint No. 18/2006(Constitutional) against the government and sued all of the following: 1) the Manager of Kuwait University in his capacity; 2) the Chairman of the Board of Civil Service in his capacity; and 3) the Minister of Higher Education in his capacity as the head of Kuwait University, alleging that the refusal to pay her the housing allowance violates her constitutional right of equality. The appellant was a lecturer in the linguistics department at Kuwait University, and she was initially paid the housing allowance, but the university stopped the payment, contending that her husband at the time had government housing. The regulation of residential care that was issued by the Minister of Higher Education in order No. 30/2001 stipulated in part C of article 2 that in order to receive the housing allowance, either husband or wife should not enjoy residential care of any kind by Kuwait University or by any other entity. However, the appellant's husband had a governmental house that was occupied by him and his first wife and their daughters, but not by the appellant, and so she brought this action claiming that the fact that her husband enjoys residential care should not justify preventing her from receiving the housing allowance, since she does not enjoy the residential care. The housing allowance that she was supposed to be receiving was the result of her prestigious position as a teacher at the university. Because most women employees do not receive this housing allowance, and because she was receiving it as a privilege in this unique position, she alleged that the university could not deprive her of any employment privilege based on reasons that were not related to the employment. As a result, she asked the court to decide the unconstitutionality of part C in article 2 because it deprived her of her right to housing merely based on her husband's enjoyment of housing services, which constitutes an unconstitutional discrimination and violation of the equality principle and articles 7, 8, and 29. The court in the last part of its holding stated that:

"The article's requirement that each of husband or wife should not be covered by the residential care as a condition to receive the housing".

However, part C of article 2 does not prevent the wife from receiving the allowance, even if her husband enjoys the residential care, if it is shown that she does not benefit from her husband's house. As a result, this law was wrongfully applied to the appellant, and this fact does not render the article to be unconstitutional because it serves governmental interest in maintaining the structures of the family and strengthening its ties and unity. As a result, there is no legitimate interest on the appellant's side to decide the constitutionality of the article since her allegation and the damages were based on an incorrect application and interpretation of the article by the department; thus, it removes this issue from the scope of the constitutionality claim, and the claim is denied."

The court in this case has rightfully applied the substantive model in its interpretation by moving beyond the language of the regulation. The court has found that this regulation is facially neutral because it applies to both husbands and wives, but it found that this regulation has a disparate impact on women because the practice of polygamy means that only wives will lose their housing allowance when their husband's housing is shared with a different wife.

### **Case 1430 AH corresponding to 25/10/2009**

Year/ 55

Date: Sunday Dhu'l-Qi'dah 6, 1430 AH corresponding to 25/10/2009 AH In

the Name of the Allah, the Most Gracious, the Most Merciful

In the Name of His Highness the Amir of Kuwait



Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah

The Constitutional Court

At the public hearing held at premises of the court on Dhu'l-Qi'dah 1, 1430 AH corresponding to 20/10/2009 AH

Presided over by Chancellor/ Yousef Ghanam Al Rasheed, Chief Justice,

Formed by the judges/ Faisal Abdul Aziz Al Morshid, Rashid Yaqub Al Sharrah, Khaled Salem Ali and Saleh Moubarak Al Harriti and attended by the hearing secretary/ Mr. Ali Hamad Al Saqr.

The following judgment was rendered

In the lawsuit No. 3670 of 2008 Full Commercial Civil Governmental/3 referred by the Plenary Court:

Filed by:

1. Fatima Abdullah Mohamed Al Baghli
2. Yousef Mustafa Hussein Al Baghli
3. Hussein Mustafa Hussein Al Baghli

Against:

1. Mustafa Hussein Ahmed Al Baghli
2. Undersecretary of the Ministry of Interior in his capacity
3. Undersecretary of the Ministry of Health in his capacity
4. Director-General of the Public Authority for Civil Information in his capacity

The lawsuit was registered with the Constitutional Court's register under No. 56 of 2008 (Constitutional).

Facts

Whereas in the facts – as apparent in the referral judgment and all documents - the Plaintiffs have filed the lawsuit No. 3670 of 2008 Full Civil Commercial Government/ 3 against the Defendants and requested the court to rule the following:

First: Keep the first Defendant under obligation to hand over the first Plaintiff her passport.

Second: Keep the first Defendant to hand over the second and third Plaintiffs' identity documents of birth certificates, civil ID cards, citizenship certificates and passports.

Third: Keep the first Defendant under obligation to hand over the first Plaintiff the identity documents of the small girl (Zahra), namely: birth certificate, civil ID card and passport.

Fourth: Authorize the first Plaintiff to obtain the passport if the first Defendant did not hand over the passport to her and enforce this authorization against the second Defendant.

Fifth: In the case of not obtaining and receiving the above-mentioned identity documents of the second and third Plaintiffs from the first Defendant, they request the court to authorize them to obtain these identity documents and enforce this order against the second, third and fourth Defendants.

Sixth: In the case of not obtaining and receiving the above-mentioned identity documents of the small girl (Zahra) from the Defendant, the first Plaintiff requests the court to authorize her to obtain these identity documents and enforce this order against the second, third and fourth Defendants.



In explanation of the lawsuit, the first Plaintiff stated that she is wife of the first Defendant under the valid marriage contract dated October 19<sup>th</sup>, 1989, that they had under the matrimonial relationship the children Zahra, Yousef (the second Plaintiff) and Hussein (the third Plaintiff), the first Defendant refused to hand over her documents and her children's documents, namely: passports, birth certificates, Civil ID cards, citizenship certificates and therefore, she filed the lawsuit and submitted her above-mentioned requests. At the hearing of November, 11<sup>th</sup>, 2008, the court ruled the following:

The first Plaintiff is entitled to obtain passports, citizenship certificates, Civil ID cards and birth certificates for her children (Yousef, Hussein and Zahra) in confrontation of the Defendants.

Whereas the court considered that provision of paragraph 1 of Article 15 of the Law No. 11 of 1962 concerning the passports, which stipulates that a wife may not be granted an independent passport except with the consent of her husband, has a suspicion of unconstitutionality, the court ruled to stay of considering the Plaintiff's above-mentioned request until the Constitutional Court settles the constitutional issue and ruled to refer the matter to the Constitutional Court matter; the trial court established its referral judgment on the grounds that there is contrariety between the above- mentioned provision and the provisions of Articles 29, 30 and (31) of the Constitution, where this provision restricts the wife's right to obtain an independent passport, and even if this provision intends to affirm the husband's right to permit his wife to travel, this means that the wife is forced to reside and restricts her movement on the grounds that the wife's obey of her husband is a religious and moral obligation, but this obligation may be not be forcibly imposed over her without her will and may not be forcibly imposed over her by the public authority or by the law; to confirm this consideration, in the Personal Status Law No. 51 of 1984, the legislator has adopted this principle, where Article 88 thereof stipulates that it is not permissible to enforce the obedience ruling over the wife and it is sufficient to deal the wife with effects of her rebellion, where this is considered damage to the husband who may in this case request separation and obliging her to bear the material impacts according to the provisions of the fault-based divorce, where the trial court concluded that the contested provision grants the husband the right to accept or reject his wife's issuance of her passport without limits or controls and whereas this provision is a restriction on the wife's right to movement ensured by the Constitution and even if the husband's refusal, withholding or taking his wife's independent passport is subject to judicial control if the husband abuses his right, this provision and the husband's pre-consent to issue, renew and obtain his wife's current/ new passport keeps this restriction over the wife in her movement and travel, in contrary to and with prejudice to essence and content of this constitutional right.

The lawsuit file was received by this Court Bureau and it was registered within its register under No. 56 of 2008 (Constitutional) and a notice was legally served to the relevant parties in this regard; the first Defendant submitted a memorandum in which he requested the court to reject the lawsuit on the grounds that there is no contrariety between the contested provision and the provisions of the Constitution, that the right of movement may be regulated and restricted pursuant to provisions of the law, and that this contested provision only regulates how to obtain the wife's passport and this provision considers provisions of Islamic *Shri'ah* which is considered by the Constitution as a source of the legislative provisions and the contested provision only intends to preserve the family entity and strengthens its relationships as it is confirmed and stipulated by the Constitution in Article (9) thereof.

This court has considered the lawsuit as it is indicated in the minutes of the hearing, the Legal Advice and Legislation Department submitted a memorandum of the government defense in which it requested the court to rule the following: *Originally*: 1- Inadmissibility of the constitutional lawsuit for lack in interest therein on the ground that the Plaintiff's request does not necessarily require settlement of the constitutional issue and *alternatively*: It requested the court to reject the lawsuit on the grounds that the contested provision intends to affirm the husband's right to permit and authorize his wife to travel as the husband has the legal guardianship of his wife and this is to preserve the family and its pillars of morality, adherence to rules and principles of the religion and the wife's necessary obedience to her husband to establish stabilized marital life and avoid a crash of the family which is pillar of the society; whereas this provision regulates the wife's movement, it does not restrict or prohibit the wife's right in this case and does not prevent the court from considering the disputes arising from the husband's abuse of this right. In addition, the Plaintiff submitted a memorandum in which she commented on the government's memorandum and requested the court to accept the lawsuit due to availability of her interest therein and also, she requested the court to rule

unconstitutionality of the contested provision on the grounds that it infringes the wife's right to obtain an independent passport, grants the husband the right to accept or reject so without restriction or control, in contrary to the personal freedom rights and restricts the wife's right of movement in contrary to principle of equality ensured by the Constitution. The court decided to set date for adjudication at the today's hearing.

#### The Court

After reviewing the documents, hearing the pleading and taking out legal deliberation:

Whereas it is firmly established by this court that the direct personal interest (which is a condition for accepting the constitutional lawsuit) is based on the existence of a relationship between that direct personal interest and the interest in the substantive lawsuit and that the settlement of the constitutional issues is necessary for adjudication of the related substantive requests presented before the trial court. Based on the foregoing and whereas it is apparent in the documents that the trial court's referral of provision of paragraph 1 of Article 15 of the Law No. 11 of 1962 on the passports as amended by the Law No. 105 of 1994, indicates that aspect of the constitutional violation considered by the trial court is related to the legislative provision referred by it to the Constitutional Court and this constitutional violation is that such contested provision restricts the wife's right to obtain an independent passport and this violation is based on the existence of contrariety between this provision and provisions of the Constitution, where this provision is in contrary to the personal freedom, violates the principle of equality and declines the constitutional right of movement and travel made only by obtaining the passport; whereas the substantive dispute relates to the Plaintiff's right to obtain an independent passport without being restricted by the contested provision and whereas settlement of the extent of constitutionality of this restriction is subject matter of the present constitutional lawsuit filed by the Plaintiff to invalidate this restriction contained in the contested provision, settlement of this constitutional issue is related to the substantive dispute on the grounds that settlement of the constitutional issue necessarily affects the relevant substantive request and this is a legal reason to accept the constitutional lawsuit; therefore, the Legal Advice and Legislation Department's plea for inadmissibility of the lawsuit, on the grounds that settlement of the constitutional issue is not necessary to adjudicate the substantive dispute, is ungrounded and shall be rejected.

Whereas decrying/ criticizing provision of first 1 of Article 15 of the Law No. 11 of 1962 on the passports, as amended by the Law No. 105 of 1994 - as it is apparent in the referral judgment - is based on the grounds that such contested provision is contrary to Articles 29, 30 and 31 of the Constitution and whereas the freedom of movement (going and coming back) from a place to any other place within the State and abroad is considered a part of the personal freedom and a main right established by most constitutions of the world and ensured by the international conventions to which the State of Kuwait accessed - as it is stated in the Universal Human Rights Declaration of 1948 of which the preamble states that the rights stipulated therein are based on the United Nations Peoples' belief of the fundamental human rights, value and dignity of each individual and each person's need to be treated with others according to standards equivalent to its content, so that the person shall not be obliged to resist the oppression and tyranny in light of lack of these values and existence of these values, ensure better standards for a life of which pillars develop in a deeper framework of freedom. Among these rights, there is the right stipulated in Article 13 thereof which stipulates that: "Everyone has the right to leave and return to any country, including his homeland" and the International Covenant on Civil and Political Rights (ICCPR) promotes the respect for the human rights and fundamental freedoms, where paragraph 2 of Article 12 thereof stipulates that "Everyone has the right to leave and return to any country, including his homeland".

There is no need to say that the Islam (the valuable religion) has preceded the constitutions for more than fourteen (14) centuries ago, where it ensures each individual's freedom of movement as he wants whether within his homeland or abroad and allow each individual to move from one country to another one for a religion or earthly matter and also, the Islam calls all Muslims to walk on the earth and its places for tourism, speculation, learning and earning livelihood, where Allah Almighty says "those who turn repentant (to Allah), those who serve (Him), those who praise (Him), those who fast" in Surah Al Tawba (Repentance) - Verse 112, and says "Travel in the land , and see the nature of the consequence for the rejecters" in Surah al-An'am - Verse 11 and says "It is He Who has made the earth manageable

for you, so traverse ye through its tracts and enjoy of the Sustenance which He furnishes: but unto Him is the Resurrection” Surat Al Mulk - Verse 15; the great Islamic *Shri'ah* makes the freedom of movement as a public rule and restricting it is only for a necessity on basis of a public interest, on the grounds that it is to protect the Islamic faith or to preserve the public health or preserve the honors and morals; also, the Islamic *Shri'ah* does not prevent the woman from traveling as long as she travels with an unmarriageable person, her husband or a safe companionship according to some jurists and as long as the woman commits to its legal controls, including limits and morals.

Based on the foregoing and whereas each Kuwaiti male or female has the right to obtain and hold a passport on the grounds that such right is not only as a means of his belonging to the State of Kuwait of which he is proud inside his State and abroad, but also this right is an aspect of freedom ensured and preserved as a natural right by provisions and principles of the Kuwaiti Constitution of which Article 30 stipulates that: “The personal freedom is ensured” and Article 31 thereof stipulates that “No person shall be arrested, imprisoned, restricted in his residence or restricted in his freedom of residence or movement except in accordance with provisions of the law”; this indicates and proves that the personal freedom is a basis for the other public freedoms and a fundamental right of the human on basis of self-independence (autonomy) of each individual, where the will of selection is a scope for which his personality is not integrated without it, including the pillars of freedom of movement and the sub-right to travel and the personal freedom is in the front of the public freedoms that may not be strangled for no reason, unjustifiably opposed or restricted under no requirement; according to the above- mentioned provision, the Constitution has assigned the legislative authority for discretion of this requirement, where it was required to specify the conditions for obtaining the passport - the document whereby the exercise of the right shall be made and without it, this right shall be non-existent and becomes in vain - The original rule herein states that granting this right shall be accompanied by the right of movement and travel and exclusion herein means prevention from obtaining the passport, leading to restriction of personal freedom; whereas regulating the right of movement and travel falls within the legislator's discretionary power as it is previously stated, however, it is not permissible for the legislator to impose restrictions under this regulation to the extent that such right is reduced, derogated or excluded in terms of its content; in addition, the legislator shall not prejudice the balance imposed between the Constitution in the area of this regulation and its provisions which are complementary with each other in one frame.

Based on the foregoing and whereas the contested provision is in contrary to this direction, where it originally stipulates that the wife may be granted an independent passport only under her husband's consent and this contested provision denies this right for the adult mature wife to obtain an independent passport, in spite of her personal independence, maturity and completed eligibility and despite of the fact that she shall have the same rights ensured by the Constitution, in a manner that would wastes her will, encroaches her humanity and restricts her freedom and right of movement under no legal justification. Her personal independence does not necessarily mean non-obedience of her husband, there is no evidence proving that her possession of an independent passport contravenes the interests of her family, makes a poor relationship with her husband or diminishes her husband's role or legal rights; therefore, this contested provision is contrary to provisions of the Constitution provided for in Articles 29, 30 and 31 thereof and thus, the court shall repeal it; there is no need to say in this regard that repealing the contested provision and excluding it from the scope of its application, under provisions of the Constitution, does not prejudice the husband's right to prevent his wife from travel in accordance with the general rules, whenever there is considerable evidence proving that her use of this right would cause damages to him or her family, where it is not permissible to use this right to cause damages to the others and repealing a provision does not prejudice the legislator's right to regulate issuance and renewal of the wife's passport and withdrawal thereof, in balance between the freedom of movement, including the right to leave and return to the homeland and provisions of Article 9 of the Constitution which ensure conciliation among the wife's duties towards her family to preserve her entity and strengthen its relationships and ensure her equality with the man in terms of public rights and responsibilities as stipulated in Article 29 of the Constitution, without prejudice to provisions of Great Islamic Law and Article 2 of the Constitution which stipulates that religion of the State is the Islam which is the master source of legislation.

For these reasons

The Court ruled the following:

Unconstitutionality of paragraph 1 of Article 15 of the Law No. 11 of 1962 concerning the passports, amended by the Law No. 105 of 1994, in terms of its provision which stipulates that:  
(The wife may not be granted an independent passport except under her husband's consent).

Hearing Secretary  
Chief Justice

## Notes

The case is summarized in the fact that the Plaintiff filed her case before the Supreme Court and specifically before the Civil Commercial Circuit. In this case, there are four adversaries; the first is the first Plaintiff's husband, two representatives of the Ministry of Interior and Health in their personal capacity, and the Director General of the Public Authority for Civil Information in his personal capacity. The first Defendant, namely the husband refrained from handing over the passport to the plaintiff and also refrained from handing over identity documents to her children. In her case, she requested to oblige her husband, the first Defendant to hand over all the required papers. In case of his refusal, she requested authorization to extract these identity documents as her passport, her children's passport and the rest of the papers from the Ministry of Interior, the Ministry of Health and the Public Authority for Civil Information.

During the proceedings, the Trial Court held that the legal provision of Article 15 of Law No. 11 of 1962 Regarding Passports which stipulates that a wife may not be granted an independent passport without the consent of her husband, is vitiated by the constitutional suspicion of violating Articles 29 and 30, (31) of the Kuwaiti Constitution. Therefore, the court decided to suspend the case until the constitutional issue is resolved.

The Constitutional Court then examined the current appeal. The first defendant submitted his statement of claim requesting to dismiss the lawsuit and confirmed that there was no conflict between the challenged Article and Articles of the Constitution. He also stated that the appealed text complied with the provisions of Islamic Shari'a originally considered by the Constitution as a main source of legislation.

After the Court heard the requests and pleadings, the court ruled that "every Kuwaiti - male or female - has the right to extract and hold the passport, since this right is not only a title to his belonging to the State of Kuwait, the source of our proud and pride [...] rather, it is also a manifestation of personal freedom that the Kuwaiti Constitution has made a natural right to safeguard and protect through its principles". It is stipulated in Article 30 that "*personal liberty is guaranteed*". Article 31 states that "*No person shall be arrested, detained, searched, or compelled to reside in a specified place, nor shall the residence of any person or his liberty to choose his place of residence or his liberty of movement be restricted, except in accordance with the provisions of the law.*"

The court also stated in its ruling that Islam has already preceded the positive constitutions in recognizing the right of movement for every individual as he/she wishes. Islamic law has made freedom of movement the general rule and restricting it is an exception, which is only a necessity that shall be valued according to the circumstances and in favor of the public interest and Islamic ruling. The ruling also states that Islamic law does not prevent women from traveling as long as they are with a *mahram*,<sup>12</sup> a husband or a trusted companion according to what some scholars have adopted if women committed themselves to the limits of legality and ethics of Islam.<sup>13</sup>

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<sup>12</sup> (unmarriageable kin with whom marriage or sexual intercourse would be considered unlawful).

<sup>13</sup> Asma Al-Sairafi. Effectiveness and Effect of Amendment of Article 2 of the Kuwaiti Constitution: (Comparative Study with the Egyptian Constitution of 1971). MA Thesis, Kuwait University.

The Court also stated that *"personal liberty is the basis of other public liberties and an inherent right of the individual; it represents self-independence of each individual. The will to choose represents a scope for personal liberty without which the individual's personality is not integrated. Among its foundations is the freedom of movement and the right to travel branched out of it. It is one of the categories of public liberties that cannot be withdrawn without cause, fought against without justification, or be restricted them without necessity."* The Court then explained that the Kuwaiti Constitution had entrusted the legislature to assess this requirement, but it was not permissible for the legislature to place restrictions on this right, the extent of this limitation may not reach to revoking, derogating, or nullifying this right. The Court also stated an important principle that *"the legislator must not violate the balance between the provisions of the Constitution and his rules which are integrated within one framework"*.

Finally, the decision confirmed what it said in the area of legislating laws and the necessity of respecting the balance between provisions of the constitution and the enacted legislations. It stressed that rendering a decision of unconstitutionality of the previous text *"does not violate the right of husband according to the general rules to prevent his wife from traveling when well-established evidence is provided that the use of this right shall harm her and her family. Revocation of the text also does not prejudice the right of the legislator to regulate the extract and renewal of the wife's passport and withdraw thereof, striking a parallel between the freedom of movement [...] and what stipulated by Article 9 of the Constitution guarantees the reconciliation of women duties towards the family [...] and being of equal rights with men in accordance with article 29 of the Constitution and without prejudice to the provisions of the lofty Islamic Shariah and the provisions of Article (2) of the Constitution states that "The religion of the State is Islam, and the Islamic Shari'a shall be a main source of legislation"*.

## Tracing Tunisian Case Law on Freedom of Religion, Equality and Islamic Law

*Imen Gallala-Arndt*

### Abstract

In the absence of an established constitutional court in Tunisia, Imen Gallala-Arndt analyzes the relationship of Islamic law with the constitutional principles of freedom of religion and equality on the basis of translated rulings of different Tunisian court concerning three topics. Unlike in other Muslim countries, Islamic Law is not mentioned as a source of law by the Tunisian constitution. However, the political and legal system never really broke with Islamic principles. Laws, such as the Code of Personal Status (CPS), were often interpreted with a Shari'a-based perspective. The selected court decisions illustrate a shift of paradigm towards legal interpretation focused on constitutional principles and human rights granted in international treaties. In 2009, the Court of Cassation decided that a difference of religion is not an impediment to marriage or succession. In 2017, the Tribunal of First Instance of el Kef abandoned the approach that understood the best interest of the child, as legally decisive factor, as its Islamic upbringing and awarded custody to a mother whose second husband was a non-Muslim. In 2018, the Tribunal of First Instance of Tunis became the first Tunisian court to recognize gender reassignment by granting an applicant, who underwent surgery abroad, the change of sex and name in the civil registry. The overall paradigm shift in the Tunisian case law is the result of a process that started towards the end of the 1990s. After the Arab Spring and the adoption of the 2014 constitution, this trend seems to consolidate, although the political sphere is still divided between Muslim identity and the Civil state.

### Introduction

As Islam is a religion with a highly normative character, it has been often asked and debated whether the Islamic law that was elaborated between the 9<sup>th</sup> and the 10<sup>th</sup> CE is compatible with the liberal democracies and their catalogues of individual rights and freedoms especially the right to freedom and to equality.<sup>1</sup> States with a Muslim majority attributed themselves after their declaration of independence a western model of governance with a constitution, separation of powers, and respect for human rights. In most cases Islam and Islamic law were attributed a privileged status. As a consequence, Islamic Law had a wide impact on the Laws of Muslim states especially in the ambit of family and succession laws. Tunisia has had in this context a particular position. In fact, Islamic law is not considered a source of legislation there and the Code of Personal Status (CPS) which regulates issues of personal status, family, and of succession, contains solutions that depart from the pre-modern Islamic law norms. Already in 1956 polygamy was forbidden and penalized (Art. 18 CPS) and the repudiation which means the unilateral breach of the marital relationship by the husband (arab. talaq) was also prohibited. In the Code divorce is only possible by a judicial ruling and what is decisive is that men and women are concerning divorce placed on the same footing of equality.<sup>2</sup> Moreover shortly after its enactment the Code was applicable to all Tunisians regardless of their confessional belonging.<sup>3</sup>

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<sup>1</sup> Ben Achour Y, *La deuxième Fatîha, L'islam et la pensée des droits de l'homme*, Paris 2011, 79-80; Bielefeldt, Christentum, Islam und der Anspruch der Menschenrechte, in: Rohe/Engin (Eds.), *Handbuch Christentum und Islam in Deutschland- Grundlagen, Erfahrungen und Perspektiven des Zusammenlebens*, Freiburg i. Breisgau (2014), 254- 255.

<sup>2</sup> Feldman, *Models of Feminism; Tunisia's Opportunity to overcome the Secular/Islamist Binary*, *Hawwa* vol.13/1 (2015), 57; Ben Achour S., *Madjâallat al-aḥwāl ash-shakhṣiya wa ḳawānīn al-buldān al-ʿarabiya: ikhtilāf al-khiyārāt at-tashrīʿiya*, in: Ben Achour/Djélassi, *Sittīniyat madjallat al-aḥwāl ash-shakhṣiya (1956-2016)*, Tūnis 2019, 61-65.

<sup>3</sup> Mezghani, *Religion, mariage et succession, l'hypothèse laïque*, in: *Mélanges Ben Achour*, Tunis 2008, 346.



In spite of these liberal aspects regarding gender equality, some other provisions in the Code of Personal Status maintained gender inequality or were given, on purpose, an ambiguous formulation and lacunae.<sup>4</sup> The interpretation of these provisions was the occasion of a confrontation between a traditionalist position founded on Islamic law and a modern one based on the constitutional principles of freedom and equality.

The Tunisian case law does not show a consistent interpretation of these norms, but rather a fluid one since the enactment of the Code. This variety and change is due to factors affecting the judges directly such as their training and outer elements concerning the socio-political state of affairs of the society where they operate.<sup>5</sup>

The provisions of the CPS that are ambivalent involve issues of freedom and equality.<sup>6</sup> These are mainly the freedom of religion and the principle of equality regardless of the religious affiliation. The three chosen rulings of Tunisian tribunals in this book illustrate fields in which there is a conflict between the regulations of Islamic law and the contemporary notions of freedom and equality as entrenched in the Tunisian constitution and in the international conventions to which it is a party.

This essay aims to trace the steps done by the Tunisian case law while defining the place of Islamic law in the Tunisian legal order especially its relationship with the constitutional principles of freedom of religion and of equality. The article explores the dynamics of change in the Tunisian case law. After a short overview on the status of religion and of religious law in the Tunisian legal order in general, this essay focuses on the central issues tackled by the rulings selected for this book and follows the evolution of the case law presented in them. These topics are the role of religion in decision-making on custody, differing religion as an impediment to marriage and to inheritance, and finally the claim of recognition of gender-reassignment. By looking at all these cases a shift of paradigm may be observed, be it progressive and sometimes cautious. In the first stage the Tunisian courts rendered in the discussed issues rulings founded on the assumption that sharia is a source of law in the Tunisian legal order. In the second one the references of the judge were supported by the human rights perspective, as entrenched in the constitution and in the ratified international treaties.

### **Status of Islam and Islamic Law in the Tunisian Legal Order**

The relationship between Islam, Islamic law and the Tunisian legal order is quite difficult to define. One can perhaps state that it is hybrid.

If we examine the work of the national liberation movement, it appears clear that the national elite used Islam and the adherence of the majority of the Tunisian people to it as an opposition factor to the power of protectorate. Bourguiba emphasized that the ousting of the colonizer amounted to a victory for the Islam.<sup>7</sup> The popular meetings of the national liberation movement started with the recitation of the Qur'an and it is reported that this was not a mere political strategy but that the national elite of the time trained in Muslim secondary schools and in French universities was sincerely convinced that Tunisia would develop as a country that "reaches the procession of civilization" only when it adapted its religious and cultural heritage to the necessities of building a "modern nation".<sup>8</sup>

Art. 1 of the constitution of 1959 postulates that "Tunisia is a free state, independent and sovereign, its religion is Islam, its language is Arabic, and its regime is the republic".

<sup>4</sup> Charfi, *Al-Aḥwāl ashakhṣīya at-tūnisīya bain at-tashrīf wa-'l Qadā'*, in: *Mélanges Ben Achour*, 431.

<sup>5</sup> Bostanji, *Turbulences dans l'application judiciaire du code tunisien du statut personnel : Le conflit de référentiels dans l'œuvre prétorienne*, *Revue internationale de droit comparé* 1/2009, 26: Bostanji does not attribute a decisive role to the training of the judges in the change of the case law.

<sup>6</sup> Mezghani, *Réflexions sur les relations du code de statut personnel avec le droit musulman classique*, *RTD* 1975 II., 81; Bostanji, *Turbulences dans l'application judiciaire du code tunisien du statut personnel*, 12.

<sup>7</sup> Hajji, *Bourguiba et l'Islam- Le politique et le religieux*, traduit par Sihem Bouzgharou Ben Ghachem, Tunis 2011, 17.

<sup>8</sup> Ash-sharfī, in: *mélanges Ben Achour*, 424: Bourguiba wrote his first article with which he started gaining fame in which he defended the Islamic veil for women as a factor of identity and a tool of resistance against the complete assimilation of the Tunisian people in the French one: Ghorbal, *Orphelins de Bourguiba et héritiers du prophète*, Tunis 2012, 41.



According to the travaux préparatoires of the constituent assembly of that time Art. 1 of the constitution had a descriptive nature. It should show that the majority of the Tunisian people are Muslims.<sup>9</sup> The consequences of that description is that the state through its administration recognized the right and the duty to organize the exercise of the Islamic religion in the society.<sup>10</sup> Unlike most of the constitutions of Muslim countries the Tunisian constitution did not mention Islamic law as a source of law. After an amendment of 1980 the Egyptian constitution stated that Sharia shall be the main source of laws. Art. 9 of the Algerian constitution of 1996 made clear that the institutions are prohibited from doing practices contrary to the Islamic Ethic.

In addition, there is no provision in Tunisian law giving Sharia the function of a subsidiary source of law. Article 1 of the Civil Code in Egypt enjoins the judge in case of a loophole to seek the solution in the principles of Islamic law. Art 1 of the Algerian Civil Code goes even further in his Sharia faithfulness. In fact, it even stipulates that the judge must refer to Sharia before customs to fill the lacunae of the law provisions. In the more specific field of personal status law Art. 222 of the Algerian Code of Family and Art. 400 of the Moroccan Mudawwana follow the same approach. These three levels in Tunisia are lacking any reference to Sharia.

Nevertheless, one should not be mistaken on the secular nature of the Tunisian legal system. In Tunisia, the president of the Republic has to be Muslim. Although Bourguiba and the modern elite in the wake of independence insisted on building a modern new state they never broke with the Islamic traditions. Bourguiba himself did not justify the keen reform in the field of personal status with a break with Islamic law but he considered himself able to construct a new interpretation of the Sharia rules while following its purposes. This is not the case in some sub-Saharan African states with a Muslim majority such as Senegal and Burkina-Faso where the states are completely secular.<sup>11</sup>

The Tunisian tribunals gave many provisions in the CPS a sharia-based meaning. Apart from the cases presented here, the Tunisian case law in many other occasions sought the solution directly in pre- modern Islamic law, such as considering breastfeeding an impediment to marriage although this was not expressly provided for in the Code of Personal Status.<sup>12</sup> It must be clear that it is not the mere reference to Islamic law that is not accurate but the fact of choosing solutions therein which are not compatible with principles and provisions that the sovereign state has chosen constitutionally and internationally.<sup>13</sup>

In the wake of the so-called Arab spring and the ousting of the dictatorial regime the newly exercised freedom of speech allowed different and contradictory opinions about the identity of the Tunisian society to show up. The status of religion in the state divided the society in roughly two camps which were mirrored in the heated debates in the constituent assembly: There are on the one hand those who want the Arab and Muslim identity of the Tunisian society to be protected and emphasized on the level of the state and the laws against the "western influence", on the other hand those who - without daring to negate the Muslim identity - suggest its confinement to the private sphere while the political and legal system should be governed by principles of human rights as guaranteed on the international level.<sup>14</sup> Thus, the new constitution of 2014 was the product of a compromise between these two camps and entails provisions reflecting contradictory values. As a consequence, the need of a constitutional court is paramount, to define the content of these provisions.

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<sup>9</sup> Horchani, Islam and the Constitutional State - Are they a Contradiction? in: Grote/Röder (eds.), Constitutionalism, Human Rights, and Islam after the Arab Spring, Oxford 2016, 200.

<sup>10</sup> Amor, Constitution et religion dans les Etats musulmans, in: Cours de l'académie internationale de droit constitutionnel, Toulouse 1994, 44.

<sup>11</sup> Ghorbal, Orphelins de Bourguiba et héritiers du prophète, 14.

<sup>12</sup> Ben Halima, Al-fikh al-islāmī min Khilāl fikh al-ḡadā' at-tūnsī fī māddit al-aḡwāl ash-shakhṣīya, Mélanges Belaid, Tunis 2004, 63.

<sup>13</sup> Some of the sharia based interpretations are very helpful for the realization of one of the paramount target of Tunisian family law which is the protection of the most vulnerable members of the society (women and children): That is why when the referral and application of Islamic law leads to positive results and is congruent with the rationale of the legal institutions at stake there is no evil in doing that.

<sup>14</sup> Ben Achour Y, A historical Compromise between Civil State and Religion in Post-revolutionary Arab Neo-Constitutionalism, in: Ferrari/Toronto (Eds.), Religions and Constitutional Transitions in the Muslim Mediterranean, London 2017, 35.

Unfortunately, because of political struggles and vehement conflict between the political parties the Tunisian Constitutional Court could not be established.<sup>15</sup> That is why we resort to rulings of the courts and tribunals of the judicial order.

### The Difference of Religion as an Impediment to Marriage and to Succession

The difference of religion as an impediment to marriage has been very often linked to the issue of impediment to inheritance. Concerning the two issues the CPS either remains silent or contains provisions that could lead to different or to even contradictory interpretations. As far as the conditions of validity of marriage are concerned Art. 5 and 14 CPS are relevant. Art. 5 CPS stipulates that both candidates for marriage must be free from any legal impediment. The problem arises out of the adjective chosen to describe these impediments: The French version used the expression “empêchements légaux”, whereas the Arabic version which is the official one contained for legal not the more neutral term of qānūnī (provided for in law), but the word: sharʿī. This last word means both: stemming from the sharia and simply “legal” in the sense of that what is provided for in positive law as enacted by parliament.

Art. 14 CPS enumerates the impediments to marriage: the temporary ones and the permanent ones. The difference of religion does not show up among these impediments. The central provision in the issue of the impediment to inheritance is Art. 88 CPS according to which “among the impediments to inheritance is deliberate murder”. As mentioned above, in a first stage, the Tunisian tribunals followed a sharia-based interpretation of these ambiguous provisions.

#### 1. The first stage: Confirmation of the sharia-based impediment due to the difference of religion

In a first wave the Tunisian tribunals understood the term “sharʿī” in Art. 5 CPS as referring to Islamic law (Sharia). That led them to accept the difference of faith as an impediment to marriage and to inheritance. In fact, under the pre-modern rules of Islamic law the regulation of interreligious marriages for Muslims are gendered. Women are only allowed to marry Muslim men whereas Muslim men are allowed to marry also women adhering to the so-called book religions, mainly Christians and Jews.

According to the Sunni Islamic Law schools the difference of religion between the deceased and the heir is an impediment to succession.<sup>16</sup>

In a historical ruling known as Houria-ruling, the Court of cassation of Tunisia pointed out that the marriage of a Tunisian Muslim woman to a non-Muslim French man was void and that it represented “a big sin”. One must draw the attention to the fact, that the judges did not have any other alternative in that case. Since the marriage was concluded 1945 before the enactment and entry into force of the CPS, the marriage of Houria with the non-Muslim French man was void from the point view of the Tunisian law at that time which was identical with Islamic law.<sup>17</sup>

However the Court of Cassation at the same time, emphasized that the marriage of a Muslim woman with a non-Muslim man did not per se make her an apostate as the appellants pretended.<sup>18</sup> Concerning the central issue in that case which was succession law, the Court of Cassation decided that Art. 88 of the CPS, which deals with the impediments to succession, had to be understood with reference to the pre-modern Islamic law which considers that the difference of religion prevents the heirs from succeeding to the deceased person’s estate.

Although this position was very vehemently criticized by the legal doctrine, Tunisian courts continued on that track considering the sharia as a source of law without taking into consideration the principles entrenched in the constitution such as the equality among the citizens and the freedom of

<sup>15</sup> Blaise, Sana Ben Achour: “L’absence de Cour constitutionnelle menace le devenir démocratique de la Tunisie”, Middle East Eye 10.7.2019, <https://www.middleeasteye.net/fr/entretiens/sana-ben-achour-labsence-de-cour-constitutionnelle-menace-le-devenir-democratique-de-la>.

<sup>16</sup> Gallala, Religionsfreiheit und islamisch geprägtes Erbrecht: Gesetzliche Regelungen und Rechtsprechungsauslegung im heutigen Ägypten und Tunesien, in: Ellisie (Hg.), Beiträge zum islamischen Recht VII, Frankfurt am Main 2010, 573.

<sup>17</sup> Ben Halima, in: Mélanges Belaid, 59.

<sup>18</sup> De Lagrange, Le législateur tunisien et ses interprètes, Revue Tunisienne de Droit 1968, 11.

conscience.<sup>19</sup> Perhaps the tribunals considered themselves encouraged regarding their approach as the minister of justice issued a circular decree prohibiting the performance of marriages between Muslim women and non-Muslim men.<sup>20</sup>

## 2. The progressive disappearance of religion as an impediment to marriage and inheritance

Already since the end of the nineties lower tribunals started raising doubts about the difference of religion as an impediment to marriage and to succession. On 29 June 1999 the Tribunal of First Instance of Tunis considered that impediments to marriage should be those mentioned in the Code of Personal Status and as the difference of religion is not mentioned among them, this impediment does not exist in Tunisian law. In addition, it recalled that Tunisia ratified the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages on the 10<sup>th</sup> December 1962, which guarantees the freedom of choice of the partner.<sup>21</sup> The Court of Cassation needed much more time to clearly confirm this case-law.<sup>22</sup> At the beginning, the Court of Cassation just made it easier to prove the adherence of the concerned person to Islam in that it did not require the certificate of the Mufti as a unique evidence.<sup>23</sup> The Court of Cassation (CC) waited until 2009 in the ruling presented above to unreservedly confirm that the difference of religion was not an impediment to marriage or to succession in Tunisian law.<sup>24</sup> It based its decisions on the fundamental rights as entrenched in the Tunisian constitution and in the ratified international human rights treaties. It seems that the CC has maintained that position as shown by another ruling that it issued in 2014.<sup>25</sup> One should however mention that the Tunisian courts in some cases departed from the human rights-based approach and followed the sharia-based one.<sup>26</sup> It is nevertheless expected that case law in favour of the constitutionally and internationally guaranteed freedoms will gain more stability as the decree circular which was issued in 1973 and which prohibited the marriage civil registrars from conducting the marriage of a Muslim woman with a non-Muslim was also lifted in September 2017.

### Freedom of Religion in Decisions on Custody

The impact of religion on custody disputes has grown because of two seemingly contradictory phenomena: On the one hand, the number of interreligious marriages are increasing, especially because of the intensification of cross-border movement of people and on the other hand, we are witnessing a profound revival of religion as an identity-building factor.<sup>27</sup> This is also true for Tunisia.

#### 1. The regulation of custody in Tunisian law

The child's parental care is influenced in Tunisian law by classical Islamic law, since it distinguishes between custody and guardianship. Custody is traditionally awarded to the mother or a female relative from the mother's family until the child reaches a certain age. The custodian takes care of the child, his food, health and clothing and the child lives with him or her. The guardian is the legal representative of the child, takes care of his schooling and his religious education. He is according to pre-modern Islamic law the father or a masculine relative from the family of the father.<sup>28</sup>

<sup>19</sup> Mezghani, *Réflexions sur les relations du code de statut personnel avec le droit musulman classique*, RTD 1975 II, 69; Bostanji, *Turbulence dans l'application judiciaire du code tunisien du statut tunisien*, 26.

<sup>20</sup> Gallala-Arndt, *Eheschließung von Musliminnen mit Nichtmuslimen in Tunesien im Spannungsverhältnis zwischen staatlichem Recht und religiösem Recht*, StAZ Nr. 5/2018, 143-149.

<sup>21</sup> Available under : [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVI-3&chapter=16&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&lang=en).

<sup>22</sup> Gallala, *Religionsfreiheit und islamisch geprägtes Erbrecht: Gesetzliche Regelungen und Rechtsprechungsauslegung im heutigen Ägypten und Tunesien*. 520.

<sup>23</sup> Shādī, *Zawāj al-muslima bi-Ghair al-muslim*, in: *Mélanges Ben Achour*, Tunis 2008, 465.

<sup>24</sup> Ghazuānī, *Ta'īn al-ḥāḍir al-ḥāḍir at-ta'īn al-ḥāḍir* 31115/5.2.2009, *al-ḥāḍir wat-tashrī* (March 2009), 111.

<sup>25</sup> Cassation, Nr. 4266, 28.10.2014.

<sup>26</sup> Ben Jémia, *L'article premier de la constitution devant la cour d'appel de Tunis*, *Leaders* 24.4.2015 at <https://www.leaders.com.tn/article/16864-monia-ben-jemia>.

<sup>27</sup> Gallala-Arndt, *The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and South Asian Approaches*, *American Journal of Comparative Law* 63 (2015), 829-830.

<sup>28</sup> Ben Achour S., *Tunisia*, in: Yassari, Möller, Gallala-Arndt (Eds.), *Parental Care and the Best Interests of the Child in Muslim Countries*, Berlin (2017), 265.

Although the Tunisian Code of Personal Status as mentioned above adopted from the pre-modern law the distinction between custody and guardianship in parental care it departed from it on important issues. In fact, since an amendment on June 3<sup>rd</sup>, 1966 the traditional list of the priority of the custodians was abolished and Art. 67 CPS stipulated that the best interests of the child is the decisive criteria in the awarding of custody.<sup>29</sup>

Taking a gender perspective one can note that Tunisian parental care law has a tendency to avoid the differences between mother and father, thus not allowing any of them automatically to be the custodian of their child after separation. On the contrary, the judges are obligated to assess on a case by case approach which conditions will serve the best interests of the child.

According to the Tunisian Law the remarriage of the mother does not automatically lead to her losing the custody of her children if the judges deems it is in the benefit of the child to remain in her custody.

Art. 59 CPS contains the obligation to raise the child in the religion of the father. This does not apply if the holder of custody is the mother. One can already conclude from this idea that if one would arrange a hierarchy between raising the child with his mother and his Islamic upbringing, the law gives priority to the mother.

## 2. First stage: The Identification between the best interests of the child and its Islamic upbringing

Nevertheless, if one explores the decisions of the Tunisian courts one finds that they decided to allocate custody to the non-Muslim mother in the case of divorce only if the mother gave guarantees to ensure the Islamic upbringing of the child, thus raising the child in the religion of his father.<sup>30</sup> It is however true that the courts normally do not refer expressly to the obligation to raise the child in the religion of the father when the mother is foreign, although these cases existed: For instance the Tribunal of First Instance of Tunis observed in a ruling of 1999 that: "Despite the fact that Art. 59 does not apply to the mother, it is not possible, in the present case to award custody of the girl to the mother, because this contradicts the rules of Tunisian public policy of which Islam and Arabism are part. Islam and Arabism incidentally are the pillars of sovereignty according to the constitution."<sup>31</sup>

In the context of international proceedings, the Tunisian tribunals tended to dismiss the applications of recognition and enforcement of foreign judicial decisions which awarded the custody to the foreign and most non-Muslim mother living abroad. The Tunisian tribunals justified the dismissal with the fact that the child should be brought up in a Muslim milieu. They deduced from Art. 1 of the constitution which states that Islam is the religion of Tunisia that the welfare of the Muslim civilisation and religion is an imperative part of the Tunisian public order.<sup>32</sup> One can say that what was crucial for the decision was not the welfare of the child but the welfare of the religion and of the civilisation. Probably in the minds of the judges there was an identification between the two.<sup>33</sup> This identification seems in the last years to have weakened.

## 3. The dissociation between the best interests of the child and its Islamic upbringing

Since the beginning of 2000 the Tunisian case law started cautiously assessing the best interests of the child in an autonomous way and independently of the matter of the Islamic upbringing of the child (when being born to a Muslim father). It left the *in abstracto* assumption that it always serves the best interests of the child to grow up in the Muslim religion. The case-law moved to a more *in concreto* assessment of the welfare of the child in light of the particular circumstances of the case at stake. In fact, the CC rendered a ruling recognizing the enforcement of a Belgian judgement awarding the custody of a child born to a Tunisian father and to a Danish mother to the non-Muslim mother living in Belgium. The father invoked the necessity for a Child of a Muslim father to be brought up in a Muslim milieu as part of the Tunisian public policy. To this claim the Court of Cassation replied clearly: "Only the child's best interests must be taken into account without any other consideration."<sup>34</sup>

<sup>29</sup> Ben Achour S., 266.

<sup>30</sup> Ben Achour S., 272.

<sup>31</sup> Ben Achour, S., 275.

<sup>32</sup> Ben Jémia, *Ordre Public, constitution et exequatur*, in: *Mélanges Habib Ayadi*, Tunis, 2000, 283.

<sup>33</sup> Bostanji, *Turbulences dans l'application judiciaire*, 18.

<sup>34</sup> Ben Achour S., 282.

In this direction the Tribunal of First Instance of el Kef rendered a remarkable ruling on December 12<sup>th</sup>, 2017 in which it put the best interests of the child above the belonging to the Muslim religion. It was nearly for the first time that a Tunisian tribunal invoked the freedom of religion of the child. The council of the appellant claimed that the custodian mother should lose custody since following the divorce, she married a non-Muslim and this would prevent the children from a “conservative and Muslim milieu and lead them to leave the religion of their fathers”. The tribunal of El Kef first addressed the impact of the remarriage of the mother on her eligibility as a custodian. It emphasized that the mother by marrying did no wrong but exercised her freedom of conscience and faith recognized by Art. 6 of the Tunisian constitution (2014) and the international human rights treaties.

As for the impact of the marriage of the mother with a non-Muslim on the religion of the children, the Tribunal of first instance elaborated two arguments: First, the parents do not have the right to impose their own religion on the child. That the children grow up as Muslims is not any more per se considered as an imperative. The freedom of faith of the child is put above the belonging to Islam. The tribunal invoked the freedom of religion of the children. So, the tribunal abandoned the automatic nature of the belonging of children of a Muslim father to Islam.

Second the tribunal detached the best interests of the child from being brought up as a Muslim. The tribunal considered other factors as more important than the religious issue: It relied on the social investigation to point out that the children have excellent performance at school, they wanted to remain under their mother’s custody, they were mentally and psychologically well-balanced according to the experts and all their material needs were perfectly met.

Without expressly mentioning Art. 14 of the UN Convention on the Rights of the Child (CRC) concerning the religious freedom of the children and Art. 47 of the new Tunisian constitution the Tribunal of El Kef relied on them to reach its decision: In fact, the rights of the children have been entrenched in the new constitution of 2014 thanks to the efforts of the civil society.<sup>35</sup> Art. 47 of the constitution stipulates “(...) the state must provide all types of protection to all children without discrimination and in accordance with their best interests”. Accordingly, the Tunisian constitution decrees that the best interest of the child is the paramount factor for any decision concerning him.

As far as Art. 14 CRC is concerned Tunisia is a party to the convention since 1991 with reservations and a declaration.<sup>36</sup> Like most of the Muslim states the main objective of the Tunisian government through the reservations was the non-recognition of the right of the child to choose and to change its religion, since in Islam the child takes over the religion of his father.<sup>37</sup> Fortunately, Tunisia withdrew its reservations and declaration about the CRC. As a consequence, Tunisia recognizes since that date the freedom of thought and religion of the child and there is no obligation any more to raise the child in the religion of this father.<sup>38</sup>

It seems also that the Tribunal of First Instance of el Kef gave the freedom of religion of children a wider scope than the Committee on the Rights of the Child which reminds that as provided for, the parents do have a right to provide direction for the children in the exercise of that right. In fact, according to international law the freedom of religion of the child does not amount to the right to be brought up in a religiously neutral

<sup>35</sup> Baraket, Tunisie: Les droits de l'enfant, quelles réalités aujourd'hui ?, Nawaat février 2015, available <https://nawaat.org/portail/2015/02/19/tunisie-les-droits-de-lenfant-queelles-realites-aujourd'hui/>.

<sup>36</sup> “The Government of the Republic of Tunisia declares that it shall not, in implementation of this convention, adopt any legislative or statutory decision that conflicts with the Tunisian Constitution”. Even more explicit the declaration of the government of Algeria: “ Interpretative declarations Art-14: This article shall be interpreted in accordance with “ The family code, which stipulates that a child’s education is to take place in accordance with the religion of his father” See for more at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=IV-11&chapter=4&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-11&chapter=4&clang=en#EndDec) .

<sup>37</sup> Langlaude, The Child’s religious Freedom, Religious Upbringing and the Prevention of Coercion in International Law and English Law, *Annuaire Droit et Religions* 643, 4, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2445972](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445972) .

<sup>38</sup> Ben Achour S., 263.

environment.<sup>39</sup> On the other hand, the Tribunal of El Kef followed the international interpretation of the freedom of religion of the children as it pointed out that the children should be protected from any “indoctrination” in these matters and that they should develop their own convictions. The scope of the parental direction in religious issues depend on the evolving capacities of the children to think autonomously in these matters. The more the second increase he more the first diminishes.

### Recognition of the Gender Reassignment

In Tunisian Law there is no provision dealing with the possibility of gender re-assignment.<sup>40</sup> Nevertheless, the evolution of the medical techniques and the intensification of migratory movements have led to manifold new questions before the Tunisian judges touching on the relationship of the person with his or her body.

After long hesitation the Tribunal of First instance of Tunis recognized the sex reassignment of a transgender person by ordering the change of the sex in the civil register. Till that date the Tunisian tribunals refused to recognize that change if it was not imposed by a physical urge arguing with the Islamic jurisprudence and disregarding all the principles guaranteed in the constitution which could have backed a ruling in favour of the recognition of gender re-assignment.

#### 1. First Stage: refusal of sex-reassignment

The first position of the Tunisian tribunals can be designated as the “Sami case-law”. In this ruling the Court of appeal of Tunis did not grant the application of Sami to recognize the reassignment of his gender from male to female after the surgery he underwent in Spain.<sup>41</sup> The Court of Appeal rejected the claim of the appellant arguing that it was not compatible with the civilizational and ethical heritage of the Muslim Nation and that it can be permitted only if it corresponded to an exigency. Nevertheless, the court pointed out that in the case at stake the surgery was not an exigency as the appellant still had alternatives that he did not use such as the use of psychotherapy to get rid of his sexual identity disorder. What is most important for us here is the fact that Court of Appeal founded its decision mainly on the classical Islamic law. What is remarkable in the decision of the Court of Appeal in 1992 is the fact that it started with noticing that there is no provision in Tunisian law dealing with the possibility of gender re-assignment. It ignored that the Tunisian legal order contains principles out of which one could draw a solution. It stated on the contrary that it was then necessary to look for the norm in Islamic law as “the fundamental source of the Code of Personal Status”. Nothing in Tunisian Law allowed the Court of appeal such an automatic referral to Islamic law since it is not a formal source of law in Tunisia.<sup>42</sup>

What is even more striking was that the Court of appeal transferred to itself the jurisdiction to develop norms of Islamic law out of the recognized sources of that law, namely the Quran and the Sunna.<sup>43</sup> The Court of Appeal noticed in 1992 that there were no solutions in Islamic law about the recognition of the re-assignment of gender. The court introduced in its ruling citations from the Quran and the Sunna and drew from them the conclusion that such gender reassignment could only be recognized if it corresponded to an exigency. In addition, it emphasized that the change of sex as it was the result of a caprice of the appellant represented a threat to the family as a social institution.

The ruling of the Court of Appeal in the case of Sami matched the position of other Tunisian tribunals in the same period, where the re-assignment of gender in the civil register was granted when it was the result of a biological ambiguity of the gender of the concerned person. In such a context the Tribunal of First Instance of Ben Arous insisted that “the ambiguity of the sex of the claimant was not provoked like what occurs in the Western society such as surgeries or the consumption of drugs, it is rather a natural fact”.<sup>44</sup>

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<sup>39</sup> Langlaude Doné, *The Child’s religious Freedom, Religious Upbringing and the Prevention of Coertion in International Law and English Law*, 13.

<sup>40</sup> Jelassi M.A., *Choisir son corps*, in: Ferchichi (Ed.), *Le corps dans toutes ses libertés*, Tunis 2017, 66, available at <https://tn.boell.org/fr/2017/03/10/le-corps-dans-toutes-ses-libertes>.

<sup>41</sup> CA Civ. 10298, 22.12.1993, *Revue Tunisienne de Droit* (1995), 6.

<sup>42</sup> Jélassi, R., *Revue Tunisienne de Droit* (1995), 161-162.

<sup>43</sup> Jélassi, R., *RTD* 1995, 163

<sup>44</sup> Tribunal of first instance of Ben Arous, Civ. 621 28.3.1990, *Revue de jurisprudence et de législation* 33/1 (1991), 131; also a decision of the tribunal of first instance of Gafsa, cited by M.A., Jélassi, 68.



This case law was again confirmed by the Court of Cassation in a ruling of 2005 considering that the mention of the sex in the civil register could not depend on a “personal caprice or psychological disorders of the person concerned”.<sup>45</sup>

## 2. The second stage: The recognition of the sex-reassignment

The Tribunal of First Instance of Tunis is the first Tunisian tribunal that recognized the change of gender of a transgender person. In its ruling of July 9<sup>th</sup>, 2018 on the Lina case presented in this book, it granted the application of a transgender person, Lina who underwent a surgery abroad to change her gender from female to male, to amend the civil registration correspondingly (sex and name).

This is the second time in the Arab world an application like this was granted after the judge Jeannette Hanna in Lebanon granted a similar request.<sup>46</sup> Despite the revolutionary nature of its ruling the Tribunal of First Instance of Tunis tried to undermine the innovative character of its ruling and intended to give the impression that it just applied the argumentation already followed in the previous cases, by the Tunisian tribunals, especially in the case of Sami.

It is noteworthy that the tribunal in the case of Lina started its argumentation with comparative and international law considerations and only afterwards mentioned Islamic law. First, it reminded its readers that the ratified international conventions had according to the constitution of 2014 a higher rank than laws (Art.20 of the constitution). It mentioned that the European Court of Human Rights founded the recognition of gender re-assignment on the right of the respect for private life. It emphasized that the Tunisian state committed itself to the respect of private life through the ratification of the relevant international instruments and its new constitution which according to the tribunal reinforced the protection of individual rights (Art. 24 of the constitution).

It is very noteworthy that the tribunal recalled that it is the duty of the judge to interpret laws in the light of the principles and the human rights as guaranteed in the international conventions ratified by Tunisia and provided for in the Tunisian constitution.

Concerning the Islamic law, the tribunal justified its referral to Islamic law by the fact that Islamic law is a “material source” of personal status in Tunisian law. It further recalled that according to Islamic jurisprudence gender re-assignment is prohibited. Nevertheless, it found another opinion which allows that change as long as the change represents an exigency. It insisted on showing that the change of gender was not “capricious”, that it was not caused by “any form of perversity such as homosexuality” “but it was dictated by an exigency”: The claimant was suffering since her own brain was producing signals telling her that she was a male. The contradiction between these signals and her physical appearance was responsible for a suffering that led her to attempt suicide.

It is interesting that the Tribunal of First Instance of Tunis in the new ruling does rely on the right to be cured to recognize the gender reassignment but it does not mention expressly the right to health newly recognized in the Tunisian legal order through the post revolution constitution in Art. 38.<sup>47</sup>

The additional value of the ruling of the case of Lina lies not first and foremost in the protection of sexual rights or the right to the respect of private life, or the freedom to determine one’s gender, but in the protection of the right to health. This is due to the emphasis the tribunal placed on the suffering that the claimant went through because of the discrepancy between her self-perception and her original physical appearance. Moreover, the tribunal emphasized the fact that the claimant did not have another alternative than the surgery to preserve her life.

<sup>45</sup> Cass. civ. nr. 2828 15.12.2005, cited by Jélassi MA. 73.

<sup>46</sup> Issa, Transgender Court Ruling erases Barrier to Legal Recognition, The Daily Star 16.1.2016.  
<https://www.dailystar.com.lb/News/Lebanon-News/2016/Jan-16/332224-transgender-court-ruling-erases-barrier-to-legal-recognition.ashx>.

<sup>47</sup> Leaders, Pour l’inscription du Droit à la santé dans la constitution, 1.2.2012.



## Conclusion

In contrast to most of Arab and Muslim legal orders the Tunisian legal order did not confer on Islamic law the function of a subsidiary source of law. Nevertheless, the case law interpreted some provisions of the Tunisian CPS in light of the pre-modern norms of Islamic law while violating constitutional principles especially rights of equality and fundamental freedoms. However, since the end of the nineties of the last century a new trend started which based judicial interpretation on the freedom of religion, equality and other constitutional principles and departed from sharia-based interpretations of ambiguous provisions in Tunisian law. One can also notice that the new constitution and the reinforced guarantee of human rights therein has an impact on the current case law, since judges increasingly refer to the human rights as granted in the international treaties in their rulings.

## Case Studies

### Case No. 31 115 / Court of Cassation

Republic of Tunisia

Court of Cassation

Civil matters Nr. 31 115

dated 5.2. 2009

issued under the chairmanship of Mrs. Fatma Azzahra Ben Mahmoud,

Matter: Personal Status, succession

References:

Arts 88 and 174 of the Code of Personal Status, Arts. 5 and 6 of the constitution, Arts. 18 and 26 of the International Covenant on Civil and Political Rights, Para. 1/b Art. 16 of the Convention on the Elimination of all Forms of Discrimination Against Women (hereafter CEDAW).

The Principle:

The guarantee of the freedom to marry, for the woman equally as to the man, enshrined in Art. 16 paragraph 1 b [CEDAW] is not compatible with the statement that her religion has any impact either on her freedom to marry or on her right to inherit. This is due to the fact that international treaties are more binding than laws according to article 32 of the constitution.

The Court of Cassation issued the following ruling:

After examination of the claim of cassation which was submitted on the 7th of October 2008 by Maitre Mohammed el Moncef al-Barouni for

1) Zoubaida, 2) Hedi 3) Salwa  
against

1) Thouraya 2) Dalal,

After, examination of the judgment appealed against and issued by the Court of Appeal of Tunis on the 15th of July 2008 (Nr. 73928) and upholding the decision of the tribunal of first instance.

(...)

From the view point of the form:

Considering that, the claim of cassation fulfilled all the conditions required according to Art. 185 of the Code of Civil and Commercial Procedures and is therefore admissible from this perspective.

From the view point of the substance:

According to the merits of the case (...) the claimants on the merits filed an application to the tribunal of first instance of Tunis against their nieces [daughters of their brother], to prevent them from the inheritance of their deceased father using the argument of difference of religion since one of them has been married to and the other cohabiting with a non-Muslim man.

Considering that, the tribunal of first instance dismissed the claim arguing that, independently of the question whether the difference of religion represents an impediment to inheritance in the sense of Art. 88 of the Code of Personal Status or [Personal Status Code hereafter CPS] in the absence of a clear provision, the belonging to one religious community or to the other is a matter of inner conscience and belief. Therefore, the mere marriage of a woman to a man of a different faith or her cohabitation with him does not automatically and necessarily make her leave her faith and adhere to a new one, as long as it has not been confirmed that she exercised rituals of a religion different to hers.

Considering that, the claimants appealed against the mentioned judgment requesting it to be overturned, the Court of Appeal upheld the judgement of the first instance pointing out that the lack in the code of personal status of any provision providing for the difference of religion as an impediment to marriage and succession reveals the intention of the lawmaker to exclude these impediments. [The court of appeal] added that the respondents insisted that they were Muslims and the appellants did not bring up enough evidence to prove clearly and undoubtedly the defendants' apostasy. As a result, the request of appeal was rejected. The claimants requested the cassation against the ruling of the Court of Appeal applying for its overthrowing and referral for the following reasons:

1. The violation of Art. 88 of the Code of Personal Status

Stating that, even if Art. 88 CPS mentions only an instance of the impediments to succession, it was not mentioned as the unique impediment. This opens the door to interpretation due to the linguistic and grammatical structure of the text based on the preposition „among” (arab. min) (...) which indicates that there are impediments other than those mentioned by the lawmaker. These impediments must be searched for in the subsidiary sources of the Code of Personal Status. The most important [of these subsidiary sources] thereof is the Islamic law (arab. attashri<sup>c</sup> al-islami) which considers the marriage of a Muslim woman to a non-Muslim among the impediments to inheritance.

2. The weak argumentation:

Stating that, the Court of Appeal did not address the proofs brought by the claimants proving that the respondents do not adhere anymore to Islam since the first defendant was in a relationship with a non-Muslim and had two sons with him, and the second defendant married a non-Muslim and also had two daughters with him.

The Court [of cassation]  
(...)

Considering that, Art. 88 CPS provides that „the intentional murder is among the impediments to inheritance. “

Considering that, this provision is clear as the lawmaker added another impediment to succession to those explicitly mentioned in the code, such as the eviction out of succession (arab. Hajb) (Art. 122 CPS) and the severing of paternal filiation (Art. 72 CPS). In addition, the provision in Art. 88 ought to be interpreted in the light of the fundamental principles of the Tunisian legal system as they are set out in the Constitution and anchored in the ratified international treaties.

Considering that, the freedom of conscience enshrined in Art. 5 of the Constitution and in Art. 16 of the International Covenant on Civil and Political Rights requires the separation between the enjoyment of civil and political rights and the issue of religious beliefs and this by prohibiting the dependence between the enjoyment of the individual of his rights and his beliefs. This has been guaranteed by the Tunisian Law in respect to the transfer of rights upon both legal transactions in Art. 4 Code of Obligations and Contracts which stipulates that: “the difference of religions does not implicate a difference concerning of the contractual capacity” and in Art. 174 Code of Personal Status which provides that:” testament is valid even if the testator and the legatee do not share the same religion” and upon legal facts particularly in case of death. This explains the lack of any mentioning of religious belief in Art. 88 CPS as an impediment to inheritance.

Considering that, the legislature on the one side guarantees the freedom of conscience and on the other side prohibits the inheritance between persons belonging to different religious communities would lead to the conclusion that the lawmaker fell in contradiction. Such a contradiction would not be worthy of him as the prohibition of inheriting is a sanction imposed on the heir by preventing the transfer of the deceased's estate to him. Thus, it is not possible to hold that the lawmaker guarantees the freedom of conscience, and that he, nevertheless, penalizes the one who exercises that freedom by preventing him from inheriting his ascendants.

Considering that, the guarantee of the principle of equality provided in Art. 6 of the Constitution and Art. 26 of the International Covenant on Civil and Political Rights requires the non-discrimination between persons for religious reasons. This principle does not allow making the right to inherit dependent on issues related to the faith of the heir.

Considering that, the guarantee of the freedom of marriage for women on an equal footing to men as enshrined in Para. 1/B of Art. 16 of the Convention on the Elimination of all Forms of Discrimination Against Women dated 18 December 1979 and ratified by the Tunisian republic in virtue of the Law Nr. 68 of 1985 and dated 12 July 1985 precludes the submission that there is any impact of the women's religious belief neither on her freedom to marriage nor on her right to inheritance. This is due to the binding character of international treaties which are stronger than that of domestic laws according to Art. 32 of the constitution.

Considering that, the request of cassation founded on the existence of a religious impediment to inheritance in Tunisian law is not appropriate which leads to its dismissal.

Considering that the penalty is imposed on the claimant who fails in his undertaking according to Art. 184 of the Code of Civil and Commercial Procedures.

**For these reasons:**

The Court decided to accept the cassation in its form and to dismiss it in the substance (...).

**Case No. 44801 / Tribunal of First Instance of El Kef**

Tunisian Republic

Ministry of Justice

Tribunal of first instance of El Kef

Case Nr. 44801

Ruling of the 12.12.2017

(...)

Object of the claim

The representative of the claimant submitted that he and the respondent were divorced by virtue of the judgement Nr. xxxx rendered by the tribunal of first instance of El-Kef dated 26.4.2011 giving custody to the defendant and that the judgement was confirmed by the ruling of the court of appeal of El-Kef. The representative of the applicant requested the withdrawal of custody from the mother arguing that she has married a foreigner - He also applied for the conducting of a social survey (...)

The procedure

(...)

The references

(...)

Considering that, the representative of the respondent noted that the claimant was arguing with the fact that the respondent remarried and he specified that according to the law the female holder of custody was only entitled to exercise that right if she was not married and if the judge had not decided differently taking into consideration the best interests of the child. The representative of the respondent recalled that the court of cassation in its decision Nr. 69523 dated 4 January 1994 found that the mother had priority in getting the custody of her children. He added that it was obvious and clear in the law that the decision of attributing custody to someone should be based on the best interests of the child. The representative of the respondent thus asked how the claimant could request the custody of his children although he refused to pay them alimony. The representative of the respondent, the mother, requested to conduct a social survey in order to ascertain that the best interests of the children lies in them remaining under the custody of their mother.

Considering that, the representative of the claimant (...) submitted a written certificate from the sister of the claimant assuring that she was ready to take care of her brother's children.

Considering that, the representative of the respondent answered that the prominent prerequisite to attribute custody is the best interests of the child and added that the claimant did not pay alimony for the children.

Considering that, the representative of the claimant stated that the application's main purpose was the protection of the minors from the external factors that could have a negative impact on their life. She added that her client had not neglected his duties towards his children since there was no final judgment convicting him of not paying maintenance and she insisted on the conducting of the social survey.

Considering that, the tribunal rendered a preparatory judgement in the hearing dated 11 October 2016 ordering the social survey through the centre of defence and social integration in El-Kef to examine the material, social, and psychological situation of the parties and of their children, and to find out who is more appropriate to hold the custody of the children.

Considering that, the centre of defence and social integration observed that it could not reach the respondent. The counsel of the claimant submitted that the respondent disappeared and that her acceptance of the social survey was a mere manoeuvre to obtain the dismissal of the action and that her client succeeded in finding out that the respondent was living with her foreign husband in France. The council of the respondent answered that his client had a known domicile and requested the conducting of a complementary social survey. The tribunal ordered that complementary survey (...)

Considering that, the social welfare workers noticed in the report they submitted to the tribunal that the respondent was living in a rented modern house, that her material stand was good and that her husband was effectively bearing the costs of the family. They also noticed that the children insisted on remaining with their mother. As a consequence, the agents of the Centre found it to appropriate to keep the children under the custody of their mother because of the good social and material conditions that are [there] available to them. In addition, according to the psychological report the children did not suffer any troubles, they enjoyed good health and their results at school were outstanding. As a result, [the psychological social welfare workers] also found that it was in the interest of the children to keep them under the custody of their mother.

Considering that, commenting on [the report] the council of the respondent observed that the best interests of the child was the most prominent criteria to attribute custody and added that the social and psychological report fulfilled that criteria. He requested [the tribunal] to dismiss the claim and to order the claimant to pay to this client 500 dinars for the attorney fees.

Considering that, commenting on that the representative of the claimant stated that her client was fearing that his children would reject their Muslim milieu and their Arab traditions. She [added that her client] was still insisting on his claim to withdraw the custody of his children from their mother (...).

The tribunal

1. Concerning the main claim

Considering that, the main claim is to withdraw the custody from the mother and to attribute to the father. Considering that Art. 67 Code of Personal Status [following: CPS] stipulates that the best interests of the child is the most prominent criteria for the judge to examine while attributing custody. Considering that, according to Art. 57 CPS and the established case law custody is the protection of the child, taking the actions that benefit him, avoiding what would harm him and committing to his psychological and mental education (Ruling of the Court of Cassation civ. Nr. 67245 dated 26 January 1999). Considering that, Art. 58 CPS requires the person entitled to custody to fulfil a series of conditions mainly honesty and the ability to take care of the child's affairs, and if the custodian is male, it is required that there is a female person with him to exercise custody and if the person entitled to custody is female, it is required that she is not living in a consummated marriage, unless the judge decides otherwise.

Considering that, the council of the claimant holds that the divorcée of her client has married a foreign French man and that this prevents the children from an appropriate raising in a conservative Muslim milieu and leads them to apostasy from the religion of their community.

Considering that, the freedom of conscience is among the universal principles stated by religious and positive laws. This freedom is enshrined in Art. 6 of the constitution as an application of what has been guaranteed in the international pacts and treaties about human rights. [The freedom of conscience] means that any person believes according to what his own personal conviction dictates to him. As a consequence, the tribunal cannot meet the claim that the custody shall be withdrawn from the mother because she married a foreigner who does not profess Islam, for this issue is linked to the fundamental rights and freedoms of the individuals. Moreover, such a condition is likely to confiscate the right of the child to choose his own religion and put him on a lifestyle and a mind-set that he perhaps would not accept when he reaches maturity. This cannot be permitted by the tribunal in order to protect the child from any manipulation or orientation towards one religion rather than the other.

Considering that on the other side, the social survey has proved that the children live with their mother and insist on remaining with her, that their performances at school are good, their clothing are clean and tidy, and they behave properly. In addition, the psychological report emphasized that their mental health was good, and that it was in the interest of the children to let them stay with their mother to preserve their psychological balance.

Considering that, the best interests of the child are the essential factor and the unique criteria to attribute custody and that the issue of whom of both parents is most eligible to exercise the custody of the children belongs to the aspects of merits which fall under the jurisdiction of the lower tribunals without being subject to review by the Court of Cassation as long as their decision is based on correct facts sustained by the relevant documents in the case's file.

Considering that, the claimant did not submit what would prove that his children were being ill-treated or neglected, his claim to withdraw custody from their mother and attribute it to him is not appropriate.

Considering that, the affection of the mother towards her children is unique and cannot be substituted by the caring of anyone of the relatives whether it is the aunt of the children (father's sister) or another woman among the relatives whose tenderness towards the children regardless of its intensity cannot equate the sincere feelings of a mother that does not expect any reward or price in return for the love and affection towards her children.

Considering that, the tribunal, in the framework of its interpretation and according to what was submitted to it as evidence, came to the conclusion that it is in the best interests of the children to remain with their mother in order to preserve their inner peace and well-being and to guarantee their emotional balance. This is due to their small age and their need for their mother who is irreplaceable or an appropriate and strengthening raising.

The tribunal decided to dismiss the claim (...).

### Case No. 12304 / Court of First Instance of Tunis

The Republic of Tunisia

The court of first instance of Tunis

Judgement Nr. 12304

9. July 2018

Personal status

(...)

The claim's objective was the reassignment of the gender of the claimant from female to male, the change of her forename from Lina to Rayan and the order to the civil registrar to insert these changes in the civil register and in the birth entry.

The prosecutor general required the application of the law

(...) The claimant assured that she was born in Sousse and was belonging to the female gender since her birth as she had the body of a girl with all the female characteristics like breasts and vulva. She added that she suffered from thoughts and /psychosocial difficulties and she had a conversation with her father when she was 12 years old about her conviction that she was male in spite of the appearance of her body. She said that she kept on cutting her hair to maintain it short. She also stated that as her breasts appeared, she used to wrap them in a kind of bandage to hide them. All of that was due to her conviction that she was a male. This brought her to visit physicians. She pointed out that the gender identity disorder from which she was suffering and the hormonal influences in her brain were responsible for the perception she had about her gender. She saw herself as a male and that feeling persists until now. After she got her Baccalaureat she moved to Germany to continue her studies.

Judicial decisions were issued to her [in Germany], the first dealt with her gender re-assignment and the second with the change of her new identity as a male forename, Rayan, was given to her.

She assured that before presenting these claims (to the German tribunals) in November 2004, for two years she submitted herself to a psychological survey. Her position did not change during that period and she went on to live a male style of life. Afterwards, she underwent several surgeries, the first one in 2006 to remove her breasts and the second in 2009 to remove the uterus.

She noted that she was leading a normal male lifestyle especially because she was receiving a hormonal treatment through the injection of the hormone testosterone and she was still using it once every three months. She also stated that she was in a relationship with a young woman and that they recently got engaged. She added that she practiced sex and went through all the natural stages: erection, penetration without ejaculation as she has no sperm since she has no testes and they were not implanted to her. She insisted that she was feeling herself a male.

The legal question at stake consists in stating whether a gender reassignment is to be recognized.

The Tunisian lawmaker has not addressed the issue of gender re-assignment and has not regulated it. On the international level this question met different answers. Argentina recognized the concept of gender identity and defined it as the inner and individual model through which the persons perceive their gender. This recognition of the right of the individual, to the respect of his gender identity, led to the opening of the door for the change of the gender registered on request without any preconditions.

Also, Finland permits (the recognition of) the gender re-assignment but requires the performance of the relevant surgery.

In this context it is worth saying that most of the European states tend to permit gender re-assignment when it appears in light of the medical expertise that the transgender person used the surgery as a necessary medical act to cure a sexual identity disorder.

The French tribunals consider the right of a person to be healed of any physical or psychological disease a non-derogable fundamental and natural right... As a consequence, those tribunals held that the gender re-assignment was the natural consequence of the concerned person's exercise of her natural right to be healed. The French court of cassation issued a ruling on the 11<sup>th</sup> of December 1992 recognizing the freedom of gender re-assignment under the condition that a return to the previous gender was impossible.



The European Court ruled that the refusal of the request of gender change in the civil-status register, after the reassignment of gender by the transgender person, corresponded to a violation of the right to respect for private and family life as guaranteed by Art. 8 of the European Convention of Human Rights.

This international protection of the right of the individual to the respect for his private life has been reflected in Tunisia which undertook a constitutional reform reinforcing the human rights and freedoms because of its obligations by virtue of international law (as it ratified the core human rights treaties and the International Covenant on Civil and Political Rights).

The preamble to the Tunisian constitution adopted on the 27<sup>th</sup> of January 2014 states that: "The

state guarantees the supremacy of law and the respect of freedoms and human rights ...". Moreover Art. 20 of this constitution stipulates that the treaties accepted by the parliament and ratified are considered as having a higher rank than statutes and lower than the constitution". Art. 24 of the constitution entered under the chapter 2 (rights and freedoms) contained: "The state protects the private life".

The constitutionalization of the protection of human rights and freedoms requires from the judiciary, as the guarantor of the realization of justice, the supremacy of the constitution and the protection of rights and freedoms, to commit itself to interpret laws in a way that supports the enforcement of rights and fundamental freedoms. The judge must, in the absence of a legal text, take into consideration the international treaties relating to human rights and the provisions of the constitution while elaborating his judicial reasoning.

Considering that, as we presented above the comparative laws, the international treaties and what the European Court (for Human rights) and the French tribunals hold concerning the change of gender and its recognition, it is imperative to us, because of the absence of a clear legal provision regulating this question, to furthermore refer to Islamic jurisprudence as a material source of the personal status law in order to discover the positions of the scholars about it. We find a position of the Islamic jurisprudence (arab. fiqh) about this issue considering the change of a male person with a complete masculinity in the inside and in the outside to female or vice versa to be a crime, a change of God's creation and a compliance with the devil's will. According to this position the change of gender is not permitted even if the transsexual person suffers from a pathology/health disorder. It also considers that the gender change amounts to the devil's seductions of the transsexual person whose feeling about the belonging to a certain gender rather than the other ought not be decisive. In this approach, the change of gender is among the huge sins and not among the mere prohibitions.

We also discover a different position in the Islamic jurisprudence contradicting the approach presented above given that the Sharia-based exigency "arab. *ḍarūra*" permits what is normally forbidden according to the rule of Islamic jurisprudence methodology providing that "Exigencies suspend prohibitions". The Islamic scholars agree unanimously about this rule. As a consequence, the fulfilment of the conditions of exigency leads to the permission of what is prohibited. This approach about the sharia-based exigency was adopted by the scholars of the Zeitouna and by the Tunisian judiciary as well. This is documented in the appeal Nr. 10298 dated 22.12.1993 when the Court of Appeal of Tunis ruled that it accepted the appeal in the form and dismissed it in the substance justifying its decision in its recitals as follows: "the conditions of exigency are not available in the merits of that claim". The facts of that case can be summarized in the claim of "Sami" before the tribunal of first instance of Tunis requesting the change of his forename, after he had undergone gender reassignment surgery and the tribunal refused his claim stating that the change of gender occurred in an artificial way.

Considering that, being supported by the approach of our Islamic scholars and judicial instances we are required in our case to diagnose the state of the claimant and make sure whether the conditions for the existence of an exigency are fulfilled.

Concerning the diagnosis of the claimant's situation.

Considering that, the claimant maintained that since her childhood she was suffering of the disorder of gender identity.

Considering that, tribunal must make sure whether she is really suffering from that disease which requires the tribunal to know about the definition of that disease and about the corresponding medical treatment according to the medical expertise.

Considering that, the concept of sexual identity disorder is a scientific concept denominated as Gender Dysphoria according to what is mentioned in the medical encyclopedia, the CIBA. This medical concept is used to describe the state of a person who suffers from an intense mismatch between the brain impacts and his body and this corresponds with a pathological state according to the physicians.

Considering that, this disease corresponds to an animosity towards the own body which contradicts the gender identity leading to the rejection of the sex to which the body belongs. The doctors explain in this context that there are so-called gender brain connections in the brain which are responsible for the feelings about the gender one belongs to, thus the gender identity is also being called sexual identity. These gender connections may be object of a dysfunction where symptoms appear since birth as the concerned persons feel that their gender identity does not correspond to the organs of the sex seen on their bodies. Whereas the aspects of the body indicate a given gender, the brain structure of the affected person reveals the opposite gender.

Considering that, the disorder of gender identity was classified as a mental disease and then it was deleted from the list of those troubles because the physicians hold that its causes were biological as it was related to the brain structure, the gender impacts in the brain and to the consequent complicated state of mind resulting of the gender identity disorder.

Considering that, the behaviour of the affected person differs as some of them undertake a psychological treatment and if the healing is not possible because of the intensity of the disease the person goes over to the hormonal treatment and surgery to reassign the gender corresponding to the gender identity. There are also cases where the disorder worsens and as they do not seek any medical treatment, they commit suicide to put an end to their lives.

Considering that, the tribunal, in order to find out the degree of suffering of the claimant of the gender identity disorder, issued a provisional ruling on the 4<sup>th</sup> of December 2017 in which it decided to entrust the doctors Mrs x and Mrs. Y (...) with the examination of the psychological state of the claimant. The tribunal sought to find out whether she really suffered from the disorder of the sexual identity since her childhood and to what extent she was refusing her biological gender. It wanted also to find out whether the claimant had masculine tendencies and whether there was a distortion between the psyche and the body which would have led the claimant to undergo a gender reassignment surgery in Germany. The physicians were also required to inform the tribunal whether it was possible for the claimant to overcome the disorder without performing the surgery (if this one really took place) (...). In addition, the tribunal ordered to entrust the physician X in the hospital Ar-rabta to examine the claimant and to submit her to the forensic medicine in order to screen her whole body and to find out whether she is male or female especially after the survey she underwent.

(...)

Considering that, the two physicians confirmed that the state of the claimant was stable, that she was not suffering from any psychological trouble, that she had a full conviction of being a male (...) and that her state corresponds to transsexualism which means the state of a person who fully changed her gender without that this would represent a psychic trouble for her. The doctors reached the conclusion that her apparent gender was male.

(...)

Considering that, the physician assured that transsexualism did not stem from a mere desire to change the gender and to be like a given gender - He considered that it was neither a psychic, mental disorder nor homosexuality but that it corresponded to a disorder in the sexual identity. He added that the conviction of the claimant since her childhood that she was a male could not be explained since the gender identity could not be explained. He declared that despite the genetical survey in 2010 revealing the existence of the female genetical type, it was also clear that she had secondary genetical characteristics of the male type according to his diagnosis. The physician ended stating that it was proved that the claimant belonged to the male gender in her behaviour, manner, psyche and that he could really assure that she did not suffer from any perversion in the sexual behaviour like homosexuality at all.

Taking into consideration what has been presented above the tribunal comes to the conclusion that the claimant's feeling of belonging to the male sex since her childhood was due to her mental perception. Her conviction that she belonged to the male sex has not changed during many years since her childhood; Her brain informed her that she was a male meanwhile her organs revealed the opposite sex. The signals that her brain has been sending to her crystallized in the conviction that she belonged to the male sex. This led to her state as shown by the diverse medical reports. In this state the claimant has been suffering from an opposition between the signals sent by her brain and the external aspect of her body and from a complete disorder of the gender identity.

In addition, the experts assured that the claimant has not been subject to any psychic trouble and that it can be fully excluded that her behaviour will be temporary or correspond to a sexual perversion or homosexuality.

Considering that, the re-adaptation between the signals sent by the brain and the physical appearance opposing her gender identity made it necessary to correct the content to correspond to the truth. Doing this leads to the respect of the right to live naturally (normally) and the right to be medically treated against that disorder.

Considering that, the cure of the claimant of the gender identity disorder permitted to perform the surgery and the hormonal treatment and this was the position of the physicians especially, after the failure of the psychological mental treatment. In fact, it has been shown that the claimant underwent a psychological treatment for two years. She could however not be healed of her disease since her disorder was not psychic but rather biological and the brain impacts were responsible for it.

Considering that the claimant underwent two surgeries in 2006 to amputate the breasts and to remove her uterus (...). With this intervention the claimant fully lost the characteristics of the female sex. In addition, the existence of secondary male genes has been confirmed by the medical report and the two doctors X and Y diagnosed the claimant as a clear transgender type and underscored that the exterior type of her body was male which negate her belonging to the female gender (...).

Considering that, it is as a result necessary to make sure whether the conditions of exigency are fulfilled.

Considering that, the exigency (Darura) that makes the prohibited permitted is dependent on conditions which once fulfilled in the case of the claimant would lead to the conclusion that exigency is available: First if the patient makes an effort to adapt himself to his physical condition and he failed in that, second if the patient undertook the steps to be medically treated and third that after the failure of the medical treatment the patient got exposed to a considerable threat that he cannot avoid and that may lead to his own death. Considering that, after referring to the case's file, to the medical reports performed since 2004 (...) it became clear that the claimant had been, since the age of 12 until she underwent the surgery, trying to cope with her physical condition for a long time but she had a collapse as the signs of puberty appeared in her body, the psychological treatment failed and she attempted suicide.

Considering that, the safeguard of life represents an exigency, and the prejudice that the claimant has been subject of was significant as she attempted suicide. If she succeeds in avoiding it by removing the signs of the female gender from her body, she will avoid death (...).

Considering that, signs of the female sex in the body of the claimant were the source of her pain and of her gender identity disorder, it is permitted to remove them and this represents an Islamic law doctrine position about the realisation of exigency.

Considering that, after the medical treatment without surgery which had not offered her any relief and the failing attempt of suicide, her death had become imminent, the surgery she underwent in order to remove the signs of the female gender and avoid the pain resulting of her disorder, to get cured of it and to retrieve her real sexual identity corresponded to the necessity for a patient to get medically treated especially because the applicant cannot by anyway retrieve the organ of her previous body. As a consequence, in this case the conditions of exigency were fulfilled.

It can be concluded from what was presented above that after the realisation of the conditions of exigency, and arguing with the content of the international treaties and of the constitution, the claim to change the gender from female to male is accepted and the tribunal orders the change of the gender in her birth register by removing the mention female and replacing it by male.

Considering that, the claimant requested consequently to what was mentioned above the change of her forename from Lina to Rayan.

Considering that, the claim is not contradicting the law and as the claim is based on two requests and one of them was accepted it is decided also in favour of the second one by allowing the change of the name from Lina to Rayan as this is the name she is holding in Germany according to the judgements delivered in her favour and according to her German personal documents.

The tribunal decided in the first instance to reassign the gender of the claimant Lina, to consider her as belonging to the male gender instead of the female, to change her name from Lina to Rayan and to allow the clerk in the civil registry to insert that in the birth register and to make the applicant bear the costs of the proceedings.

## Contributors

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