

CHAPTER IV
THE SUDAN

I

A UNIQUE PROCESS OF LAW REFORM

A large number of family law reforms surveyed in the preceding chapter are shared with Egypt by a neighbour country, the Sudan. While in the former State, the said reforms were effected by legislative enactments, the Sudan adopted them, *mutatis mutandis*, by a different process. The *Mālikī* and the *Shāfi'ī* schools of Islamic law prevailed in the Sudan before she formed a part of the Ottoman Empire.¹ Subsequently, the *Hanafī* legal system became dominant there and remained in that position till the enactment of the *Muhammadan Law Courts Organization and Procedure Regulation*, 1915. Conferring an important power on the Grand *Qādī* of the country, the *Regulation* said:

Decisions of the Muhammadan law Courts shall be in accordance with the authoritative doctrines of the *Hanafī* jurists except in matters in which the Grand *Qādī* otherwise directs in a *Circular* or *Memorandum*, in which case the decision shall be in accordance with such other doctrines of the *Hanafī* or other Muslim jurists as are set forth in such *Circular* or *Memorandum*.²

Under the authority so vested in him, the Grand *Qādī* of the Sudan issued, from 1916 onwards, a number of Circulars known as *Manshūrāt al-Qādī al-Qudā* (*Circulars of the Grand Qādī*). 'With regard to authority and enforceability these *Circulars* were identical with legislative enactments. Thus, unlike Egypt and other Arab countries, the traditional Islamic High Court, and not the legislature, was given in the Sudan the authority to enforce non-*Hanafī* legal principles in supersession of those of the locally dominant *Hanafī* school.

1. Farran, *Matrimonial Law of the Sudan* (London, 1963), 8.
2. Article 53.

Some of the non-*Hanafī* Islamic principles enforced in the Sudan by the aforesaid *Circulars* relate to family law and succession. These were derived, as provided in article 53 of the Law of 1916 cited above, either from the variant legal opinions in the *Hanafī* school itself or from the other schools of Islamic law.

The first *Circular* was issued in 1916³ by the Grand *Qādī* Shyakh Muhammad Shākir, an Egyptian scholar who was fully conversant with the family law reforms then under consideration in Egypt. Also when some other *Circulars* relating to family law were issued, the Grand *Qādīs* were under the influence of social-reform movements in Egypt. Consequently, almost all the non-*Hanafī* legal provisions enforced in Egypt by the laws of 1920 and 1929 formed part of the four *Circulars* reforming family law issued in the Sudan between 1916 and 1935.⁴ A few other *Circulars* enforced in the Sudan some of the principles relating to intestate and testamentary succession enacted in Egypt under the Laws of 1943 and 1946 with a view to establishing uniformity in respect of certain controversial matters.⁵ To a large extent, therefore, the reform of family law in the Sudan was identical with that in Egypt.

II

EGYPTIAN REFORMS ADOPTED IN THE SUDAN

The following is a summary of those principles introduced in the Sudan which were borrowed generally from the schools of Islamic law other than that of Imām Abū Hanīfa, and contemplated or enforced earlier in Egypt.

A—LAW RELATING TO MARRIAGE AND DIVORCE, ETC.

MAINTENANCE⁶

If a husband owns property out of which his wife can obtain maintenance, a decree for the same to which she is entitled under law may be executed out of such property. If a third person owes a debt or a deposit to the husband or has in his possession the latter's property, the wife can prove this before the Court in order to obtain her maintenance therefrom. If the husband has no known property out of which a maintenance order can be executed, the wife can demand dissolution of her marriage, which shall be granted forthwith. But if the husband is a destitute, he shall first be given by the Court a period of respite.

3. *Circular No. 17 of 1916.*

4. *Circulars No. 17 of 1916, No. 28 of 1927, No. 34 of 1932 and No. 41 of 1935.*

5. *Circulars No. 26 of 1925, No. 49 of 1939, No. 51 of 1943 and No. 53 of 1945.*

6. *Circular No. 17 of 1916, articles 1 to 9.*

If a husband who has no known property from which a maintenance order can be executed goes away leaving his wife without maintenance, she may demand dissolution of her marriage. In such a case, if the husband can be contacted, he shall be asked by the Court to arrange for her maintenance within a specified period; if he fails to do so without any excuse, the Court may dissolve the marriage. On the other hand, if he cannot be contacted or has disappeared completely or is of unknown whereabouts (*mafqud al-khabar*), the marriage may be dissolved without delay. The Court's order under these provisions dissolving a marriage shall effect a revocable divorce. The husband can revoke it during the period of 'idda if he is prepared to provide maintenance.

DISSOLUTION OF MARRIAGE

(i) MISSING PERSON (*Mafqud*)⁷

If the husband of a woman is missing for a long time, notwithstanding that he has left behind property out of which she can obtain her maintenance, she can institute proceedings before the Court. The Court shall, thereupon, make all possible inquiries about the missing husband. If he fails to get any news of his life or death, he shall ask the wife to wait for a period of four years and to observe 'idda of death at the end thereof. She shall be free to contract another marriage after the expiry of 'idda. If after her second marriage the first husband turns up, the latter marriage shall stand, provided that it was consummated by the second husband without any knowledge about the life of the former husband. If the second husband had information of the survival of the former husband and even then consummated his marriage, the second marriage shall be void and the wife shall belong to the former husband.

(ii) DESERTION AND CRUELTY⁸

Where a husband has deserted his wife for more than a year, as a result of which the wife has faced hardship or is likely to fall into immoral behaviour, she may apply to the *Qādi* for dissolution of marriage. On receiving such an application, the *Qādi* shall warn the husband, if he can be contacted, either to come back or send for the wife to join him within a specified time. If the husband fails to respond or if he cannot be contacted, the *Qādi* shall dissolve the marriage forthwith. Similarly, if a husband treats his wife with cruelty, she can institute a suit for the dissolution of her marriage which may be granted on adequate proof of the allegation.

7. *Id.* articles 10-12.

8. *Id.* articles 13-14.

(iii) MEDICAL GROUNDS FOR DISSOLUTION OF MARRIAGE⁹

If a husband is suffering, at the time of marriage, from a dangerous disease or defect, the wife who did not know of this at the time the contract was concluded can demand dissolution of her marriage by the Court, which shall be granted if the allegation is proved. If in such a case, a wife who consented to the continuance of marital relations even after knowing the state of her husband shall lose the right to seek dissolution of marriage on that ground.

EFFECT OF CERTAIN DIVORCES

As under the Egyptian *Law No. 25 of 1929*, a divorce pronounced by a husband while he is drunk or under duress, a conditional divorce used only as a threat or inducement, and a divorce pronounced through a metaphorical expression not meant to dissolve the marriage, shall not be operative in the Sudan.¹⁰ Similarly, a formula of 'triple divorce' would constitute only a single divorce.¹¹

SETTLEMENT OF MARITAL DISPUTES¹²

If there is a dispute between the spouses, the Court may appoint two arbitrators, one each from their families. Where no suitable members of the families are available, it may appoint outsiders. The arbitrators shall make all efforts to effect a reconciliation between the parties; if they fail and a dissolution of the marriage seems to be the only practical solution, they may award it. Where the arbitrators find that the fault lies on the wife's side exclusively, they may award a *khul'*, under which the wife will have to give up the whole or a part of her dower.

As regards a dispute between the spouses about the amount of dower, if the wife fails to prove her claim, the husband's statement shall be decisive, provided he does not mention an unreasonable amount.¹³

GESTATION

As under the Egyptian law, the maximum period of gestation in the Sudan shall be one solar year.¹⁴

CUSTODY OF CHILDREN

The Sudanese law relating to extension of the normal period of children's custody with the mother (*hādina*) is slightly different from its Egyptian counterpart. Under the former the Court can, in the interest of a

9. *Circular No. 28 of 1927.*

10. *Circular No. 41 of 1935*, articles 1, 2 & 4.

11. *Id.* article 3.; *cf* the Egyptian *Law No. 25 of 1929*, article 3.

12. *Circular No. 17 of 1916*, article 15.

13. *Circular No. 41 of 1935*, article 10.

14. *Id.* article 8.

child, extend the normal period up to puberty in the case of a boy and up to the time of removal to her husband's house in respect of a girl.¹⁵

B—LAW OF SUCCESSION

In the field of intestate succession the Sudan has adopted only three of the numerous principles enacted by the *Egyptian Law of Inheritance*, 1943 with a view to effecting uniformity in some controversial cases.

DOCTRINE OF RETURN

One of these, namely, the right of a spouse-relict to share under the Doctrine of *Return* the residue of the estate (when the *Qur'anic* heirs do not exhaust it and there are no agnatic heirs) has been enforced in the Sudan with a slight modification.¹⁶ The surviving spouse shall have such a right in the Sudan only if the deceased is not survived by an acknowledged kinsman,¹⁷ whereas under the Egyptian law the surviving spouse shall have the said right even in preference to such a kinsman. The presence of an acknowledged kinsman being a rare circumstance, the law in the two countries will not, however, be much different in practice.

CONTROVERSIAL CASES OF INHERITANCE

The other two principles of inheritance introduced in the Sudan relate to the controversial cases of full (or consanguine) and uterine brothers inheriting together (known as the *Himari'ya case*), and a paternal grandfather inheriting with brothers and sisters. These are identical with the corresponding provisions of the *Egyptian Law of Inheritance*, 1943.¹⁸

TESTAMENTARY SUCCESSION

Contrary to the traditional *Hanafi* law, a bequest in favour of an heir shall be valid in the Sudan irrespective of other heirs' consent.¹⁹

Another principle introduced into the law of bequests in the Sudan relates to testamentary distribution of estate by the propositus. It provides that if a person has, under a bequest, specifically distributed various items of his property among his legal heirs, such a distribution shall be valid and binding so long as the principle of *bequeathable third* is not thereby violated; but if such a distribution would result into giving to any particular heir more

15. *Circular No. 34 of 1932*, article 11; *cf.* the *Egyptian Law No. 25 of 1929*, article 20.

16. See the *Egyptian Law of Inheritance*, 1943, article 30, *supra*, chapter III, 55.

17. *Circular No. 26 of 1925*; for the law relating to acknowledged kinsman see *Fyzee, Outlines*, 395.

18. Articles 10 and 22; see the discussion in chapter III *supra*, 55-56

19. *Circular No. 53 of 1945*, article 1, *cf.* the *Egyptian Law of Bequests*, 1946, article 37.

than the *bequeathable third* of the whole property, it shall be governed by the ordinary law of bequests.²⁰ This rule was derived from the *Shāfi'i* and the *Hanbalī* rulings, as stated in the preamble to the *Circular* which enforced it.²¹

III

DISTINCTIVE REFORMS IN THE SUDAN

A *Circular* issued in the Sudan in 1960 introduced some important reforms in the law relating to marriage-guardianship and the freedom of a girl to choose a life-partner. These are not found in the Egyptian statutory family law. We will examine the background of this *Circular* and its provisions in detail.

In 1933 a *Circular* had adopted and enforced in the Sudan certain provisions of the *Mālikī* school relating to guardianship in marriage and the authority of marriage-guardians to compel their wards to accept the former's choice regarding the bridegroom.²² These *Mālikī* rules were later abandoned in favour of the corresponding provisions of the other schools of Islamic law in some countries where the *Mālikī* school was followed almost exclusively. Their replacement by other Islamic principles was, therefore, found necessary in the Sudan as well. *Circular No. 54 of 1960*, repealed that of 1933 and enforced various new provisions derived from the *Hanafī* school which was notably liberal in the matter of girls' freedom in marital choice.²³ A few *Mālikī* principles contained in the *Circular* of 1933 which were not considered unsuitable were, however, retained by the new *Circular*.²⁴

Under the *Circular* of 1960, the traditional requirement that the marriage of a woman should be settled by a guardian has been maintained.²⁵ But in the case of the absence of a legal guardian, and also when he unreasonably objects to the marriage desired by his ward, the *Qādī* may contract her into marriage, provided that there is no other legal impediment.²⁶ Further, a remoter guardian may act in the absence of a nearer one and the former's consent would extinguish the latter's right.²⁷

If a girl to be married has attained puberty, her free consent must be

20. *Circular No. 53 of 1945*, article 2.

21. As quoted in Anderson, 'Recent Developments in *Shari'a* Law', 41 *Muslim World* (1952), 34.

22. *Circular No. 35 of 1933*. Details of this *Circular* will be found in Anderson, 'Recent Developments in the *Shari'a* Law in the Sudan', *Sud. N. and R.*, 30/II (1950), 96-98.

23. Farran, *Matrimonial Law of the Sudan* (London, 1963), 43.

24. The new *Circular* was enforced with effect from 28 February 1960 and was not given a retrospective effect (article 9.).

25. *Circular No. 54 of 1960*, article 1.

26. *Id.*, article 3.

27. *Id.*, article 5.

obtained in respect of the other spouse²⁸ as well as the amount of dower.²⁸ In this connection silence of a girl who in being married for the first time would be equal to her consent; but if it is not her first marriage, the girl must give her express consent.²⁹

A girl who has not attained puberty is not to be married.³⁰ The *Qādi* may, however, permit the marriage of a girl who has completed ten years of age, if immoral conduct is feared on her part. The conditions on which the *Qādi* can give such permission are that the bridegroom should be acceptable to her and that there should not be any disparity between the spouses; also the amount of dower and the *jihāz* (household goods given to the bride) should be reasonable.

28. *Id.* article 6.

29. *Ibid.*

30. Article 8. It is said that this provision should prohibit child-marriage in the Sudan as effectively as express legislation could do. See Anderson 'Modernization of Islamic Law in the Sudan', *Sud. L. Jour. & R.* (1960) 302.

APPENDIX TO CHAPTER IV

SELECT PROVISIONS OF THE SUDANESE CIRCULARS*

(a) CIRCULAR NO. 34 OF 1932

CUSTODY OF CHILDREN

1. The *Qādi* may give permission to a woman having a right to the custody of a child, to extend the normal period of custody in case of a boy up to his puberty and in case of girl up to her removal to her husband's house after marriage.

2. Where the *Qādi* has exercised the power given under article 1 above, the *hādina* (the woman having custody of the child) shall have no right to claim extra remuneration from the child's father in respect of the extended period.

(b) CIRCULAR NO. 41 OF 1935 (EXTRACTS)**

EFFECT OF CERTAIN DIVORCES

1. A formula of divorce uttered in a state of intoxication or under duress shall be invalid.

2. A contingent divorce which is not meant to be effective immediately and is used as an inducement or threat shall have no effect.

3. A formula of divorce coupled with a number, expressly or impliedly, shall effect only one divorce.

4. Metaphorical expressions used for a divorce shall have the effect of dissolving the marriage only if the husband actually meant a divorce.

5. All divorces shall be revocable by the husband, except a third divorce, a divorce before consummation of marriage and a divorce for consideration.

MAINTENANCE OF WIFE

6. The scale of wife's maintenance shall be fixed up with regard to the financial condition of her husband.

7. No claim of maintenance shall be heard by the *Qādi* in respect of the period in excess of one year from the date of the husband's death or divorce as the case may be.

GESTATION

8. The *Qādi* shall not hear any disputed claim of paternity in a case where it is proved that the spouses never had access to each other from the time of marriage or if a child is born more than a year after the date when the husband died or divorced or left this wife.

*This paraphrase of the Sudanese *Circulars* has been prepared by the author of the present study. It is not an exact translation of the texts of the *Circulars*. For its sources, see the works relating to the Sudan cited in the bibliography at the end of the book.

**The last few articles of this *Circular* omitted here relate to the law of gift which is out of the scope of the present study.

9. The period of a year referred to in articles 7 and 8 is a solar year.

DISPUTES RELATING TO DOWER

10. Where there is a dispute regarding the amount of dower, unless the wife can prove otherwise the husband's statement on oath shall be accepted; but if he states an amount which cannot normally form the dower of a woman of the wife's status, the proper dower shall be binding on him.

(c) CIRCULAR NO. 54 OF 1960

GUARDIANSHIP IN MARRIAGE

1. The Marriage of a girl which is not contracted by the legal guardian either personally or through delegated authority, shall be ineffective.

2. A person acting as guardian in marriage must be an adult male, a Muslim and sane. If a person entitled to such guardianship does not fulfil any of these requirements, the right shall pass on to the next person in order.

3. (a) (The *Mālikī* order of priority for guardianship in marriage shall normally be followed.)*

(b) If a girl has no guardian or if the guardian is far away or is unreasonably opposing the girl's wishes, the *Qādi* shall act as the guardian, provided that there is no legal impediment to the marriage.

(c) Where no *Qādi* is available at a place, any Muslim can act as the guardian.

4. If a girl is contracted into marriage by a person under clause (c) of article 3 above in spite of the fact that any of her guardians could be easily contacted and consulted about the marriage, the contract shall be ineffective.

5. (a) If either of two guardians who have equal rights has consented to the marriage, the requirement as to the guardians' consent shall be deemed to have been complied with.

(b) If the nearer guardian refuses to conclude the marital contract and a remoter guardian has done so, the marriage shall be valid.

(c) If a nearer guardian who is entitled to be consulted about the marriage is absent and it is feared that lapse of time may result into the loss of a good bridegroom, a remoter guardian may act and his consent will be valid.

CONSENT TO MARRIAGE

6. (a) The consent and approval of a girl who has attained puberty is essential for the choice of her husband as well as for the amount of dower.

(b) As to puberty, the statement of the girl shall ordinarily be accepted, unless it is contrary to clear indications.

(c) Silence of a virgin as to the choice of the bridegroom and the amount of dower shall amount to her consent; and her assertion that she did not know that silence would mean consent shall not be accepted, unless she is mentally too weak.

(d) If a girl signifies her refusal expressly or impliedly, the marriage if concluded shall be void.

(e) In case of a girl's second marriage silence will not suffice; her express consent as to the husband and the dower shall be necessary.

7. Where a virgin girl who is adult is contracted into marriage by her guardian

*These relations and their order of priority are specified in this article.

without her consent, she must, on being informed of the marriage, make an express statement giving her consent. Failing such a statement, the marriage shall be ineffective.

8. Where it is feared that a girl under the age of puberty who has completed the tenth year of her age may fall into immorality, she may be given into marriage with the consent of the *Qādī*. The *Qādī* will give such permission on the conditions that the bridegroom is acceptable to the girl, that he is her 'equal', that she is given a suitable *jihāz* and that the dower fixed for the marriage is reasonable.