

CHAPTER IX

ALGERIA

I

REFORM OF ISLAMIC LAW IN ALGERIA

The Democratic and Popular Republic of Algeria is one of the predominantly Muslim states in North Africa. Following the declaration of independence in July 1962, a constitution was promulgated here which declared Islam as her state religion.¹ The school of Islamic law dominant among the Algerian Muslims is, like the rest of North Africa, the *Mālikī* school. There are, however, numerous followers of the *Ibādī* group² in several parts of the Republic.³ Under the system of judicial administration introduced during the French rule, the courts applied principles of the *Mālikī* law in all matters of personal status and succession, unless the parties to a case were the followers of the *Ibādī* school in which case the law of their own school was applicable. During the course of adjudication and interpretation of law, the Franco-Algerian courts developed principles of Islamic family law in a rather distinctive way.

Early in the current century, the French government in Algeria arranged for the codification of Islamic family law as interpreted by the local courts. A draft code called *Avant-projet de code du droit Musulman Algerien* was published in 1916. Although generally based on the *Mālikī* school, certain non-*Mālikī* principles of law, mostly of *Hanafī* school, were also incorporated in it.⁴ It was not formally passed into law; yet unofficially it influenced the application and administration of Islamic family law in Algeria.

Three years before the advent of independence, the government of Algeria issued an Ordinance in 1959 enacting some rules relating to family matters.⁵ The step was, it seems, inspired by the codification of *Mālikī*

1. *The Constitution of Algeria*, 1963, article 4.
2. See the Appendix to Introduction. *supra*, 11.
3. Percy and Stoneman, *A Handbook of New Nations*, (1966) 231.
4. Schacht, *Introduction to Islamic Law* (Oxford, 1964), 97—98.
5. *Ordinance No. 59-274* of 4 February, 1959.

law in Tunisia in 1956 and later in Morocco in 1958. While the brief provisions of the Algerian Ordinance were very similar to some of the rules of the Moroccan law, it did not effect any substantial changes in the family law. It will, however, be seen that the new provisions represented a partial adoption of the *Hanafī* school of Islamic law in place of the prevailing *Mālikī* principles.⁶ Later, in the same year, a Decree was promulgated containing regulations for the application and implementation of the Ordinance.⁷ A few provisions of the Ordinance were subsequently repealed in June 1963 and that made certain corresponding provisions of the Decree, too, redundant.⁸

The Ordinance originally provided that its provisions would not apply to marital transactions taking place under the *Ibādī* school.⁹ The *Amendment Law of 1963* repealed the said provision of the Ordinance and, therefore, the *Mālikī* as well as the *Ibādī* Muslims in the country presently stand in the same position with regard to the reforms introduced by the Ordinance of 1959.

A summary of the main provisions of the Algerian *Marriage Ordinance of 1959* as detailed in the explanatory Decree is given below.

II

A SUMMARY OF REFORMS

CONSENT OF PARTIES TO MARRIAGE

Article 2 of the *Marriage Ordinance of 1959* provides that express consent of the bridegroom and the bride exchanged in words in the presence of two competent witnesses shall be essential for the solemnization of a marriage. Want of free consent of either party would invalidate the marriage. Where a party is minor or interdicted, approval of the marriage by the guardian of such party shall also be necessary.

Explaining the above provisions of the *Marriage Ordinance*, article 2 of the Decree of 1959 provides that the consent of parties should be explicit and unequivocal and should not be suspended on the happening or non-hap-

6. Roussier J., 'Marriage et divorce en divorce en Algérie', *Die Welt Des Islam*, N.S., VI. (NR 3-4) 248.

7. *Decree No. 59-1082 of 17 September, 1959*. French text of the Decree will be found in III *Revue Algerienne* (1959), 25-30.

8. *Law of 29 June 1963*; article 5 of the *Ordinance* provided certain rules regulating the minimum age after the completion of which men and women could marry and before which a marriage could be contracted only with the permission of the Court which was to be given for 'grave reasons'. The amending *Law of 1963* repealed article 5 of the *Ordinance*.

9. Article 10 (repealed).

pening of a future uncertain event. Further, misrepresentation or compulsion shall invalidate the marriage contract.

PROMISE TO MARRY

Article 4 of the *Marriage Ordinance* provides that a mere promise of marriage or exchange of promises to marry shall neither constitute a marriage nor give rise to an obligation to marry on the part of the promisor.

SOLEMNIZATION AND REGISTRATION OF MARRIAGES

The *Marriage Ordinance* and its explanatory *Decree* provide detailed rules for solemnization and registration of marriages. When the parties to an intended marriage notify their consent to the *Qadi*, as required under article 2 of the Ordinance, he will send the necessary records to the civil officials within three days and they will register the contract and issue a certificate. If the notification is sent directly to the civil officials themselves, they will register the marriage. In the latter case, marriage ceremonies may take place after a certificate of marriage is received.¹⁰

Before issuing a certificate the *Qadi* or the civil official, as the case may be, shall ascertain names, places and dates of birth of the parties, their parents and witnesses. He shall also satisfy himself if the parties have freely consented to the proposed marriage and also, in the case of a minor or interdicted person, if permission of such person's guardian has been obtained.¹¹

DIVORCE

Article 6 of the Ordinance provides that a marriage may, apart from the death of either spouse which would in itself effect termination of the marital bond, be dissolved only by a judgement of the Court. Such a judgement may be issued by the Court on the application of either spouse.

Article 11 of the explanatory Decree adds that the Court shall pass a judgement of divorce in the following circumstances:

- (i) when claimed by either party accusing the other of:
 - (a) adultery,
 - (b) defamatory act or behaviour after marriage adversely affecting the reputation of the aggrieved party,
 - (c) cruelty or grave injury where it constitutes a violation of marital duties and makes the continuance of the married life intolerable,

10. The *Ordinance* of 1959, article 3.

11. *Decree No. 1082 of 1959*, article 4.

- (ii) when applied for by both spouses after a mutual agreement on divorce,
- (iii) when claimed by the wife on the ground that the husband has disappeared leaving her destitute, or
- (iv) when the husband has pronounced a unilateral divorce and either party notifies it to the Court.

The Decree further provides that in all cases the Court shall, before passing a judgement for divorce, try to effect reconciliation between the spouses. A divorce may be granted when reconciliation is not possible or when the defendant fails to appear before the Court in spite of the Court's efforts to summon him or her.¹²

Article 22 of the explanatory Decree says that when the wife claims divorce on the ground that her husband has disappeared leaving her destitute, she shall renew her application after one month from the date of her claim. A divorce may be granted after the wife swears on oath that:

- (i) her husband has sent no news since his disappearance.
- (ii) she does not know where he could be traced.
- (iii) he has not left for her any maintenance grant, and
- (iv) he has not deputed any person to provide necessaries of life to her.

After the expiry of four years from the date of her husband's disappearance, the wife may obtain from the Court a judgement of his death.

PROTECTION OF INTEREST OF DIVORCEE AND CHILDREN

Under the Ordinance, in a judgement for divorce the Court shall make provision for the protection of children's interest and for indemnities and alimonies for the spouses and children.¹³ To this provision of the Ordinance, the explanatory Decree adds that the Court while decreeing a divorce, shall make provision for the custody of children and the expenses of their maintenance and education to be paid by the parents according to their respective means.¹⁴ The Court may also make an order for alimonies to be paid by one spouse to the other in accordance with the needs of the spouse to whom it is paid and the means of that who pays it. When a divorce is granted on the basis of a unilateral *talāq* already pronounced by the husband and notified to the Court by either party, the Court may specify the damages to be paid by the husband to the wife for the material or

12. *Id.* articles 13-14.

13. Article 7.

14. Article 21.

moral injury caused to her by reason of his act. In any other case of divorce as well the Court may award damages.¹⁵

Article 8 of the *Marriage Ordinance* provides that in all proceedings of divorce the spouses shall personally appear before the Court unless it otherwise directs. Further, at any stage of the proceedings the Court may make provisional orders which it deems fit for the residence of the spouses, and maintenance and custody of children. Such orders made *pendente lite* may be cancelled or modified by the Court, *suo moto*, or on the application of either party, particularly when the other party fails to comply with any directions of the Court.¹⁶

15. Article 21.

16. Article 15.

APPENDIX TO CHAPTER IX

TEXT OF THE ALGERIAN MARRIAGE ORDINANCE, 1959*

1. The provisions of this Ordinance shall be applicable to those persons who have submitted themselves in respect of personal status and capacity to the local systems of personal status enforced in the various parts of Algeria. In respect of those matters which have not been provided for in the following articles, marriages and divorces of these persons shall continue to be governed by the law of personal status for the time being enforced.

2. Marriage shall take place with the consent of the parties.

It is essential that the consent must be express and unambiguous, given personally by the parties in the presence of two major witnesses and in front of either the *Qādī* or the Registrar of Civil Status; otherwise it shall be void. It is permissible for the parties to demand that the Registrar should be a Muslim.

If the consent is to be given by a party who is a minor or interdicted under law or a judicial order, it is obligatory that the consent should be confirmed by the executor or the guardian.

3. When consents are exchanged in the presence of the Registrar, he shall make their entry in the records immediately and the parties shall attend the Marriage Office for the confirmation of marriage.

If the consents are exchanged in front of the *Qādī* he will make entries and issue a certificate. After that he shall send it to the Registrar, within three days, who shall then receive the parties for the confirmation of marriage.

It is not permissible to hold the ceremony of the marriage unless the *Qādī* or the Family Relations Office has been informed. The Executive shall frame rules for the confirmation of marriage in accordance with the conditions laid down in this article.

4. A promise to marry by either party or both parties shall not effect a marriage; nor shall it give rise to an obligation to contract a marriage.

5. (repealed).**

6. Marriage shall not be dissolved except by a decree of the Court, apart from the cases of death.

A decree for dissolution of marriage shall be issued on the application of either party made to the *Qādī*.

* This English translation of the Algerian *Ordinance* has been prepared by the author of the present study on the basis of an Arabic text supplied by the Ministry of Justice, Government of Algeria, and an official French translation found in III *Revue Algerienne* (1959), 9.

** Repealed by the amendment law of 29 June, 1963.

7. It is essential to provide in the order of the dissolution of marriage for the custody of children as may be necessary in their interest; it shall also be essential to provide for compensation or maintenance agreed upon by the parties for themselves and for their children.

8. It is obligatory on the spouses to be present personally in the proceedings of divorce, unless the *Qādī* exempts them.

The *Qādī* may, either himself or on the request of the parties, provide for the residence of the parties, their maintenance and the custody of children.

9. The provisions of articles 1, 2, 3 and 5 of this Ordinance shall have no effect on the validity of marriage contracts entered into before its promulgation; but the dissolution of such a marriage shall not be permissible except in accordance with the conditions laid down in articles 6, 7 and 8 hereof.

10. (repealed).*

11. The Executive shall frame from time to time rules for the application of the provisions of this Ordinance.

12. The date of enforcement of this Ordinance shall be laid down by separate laws for various localities.

*Repealed by the amendment law of 29 June, 1963.