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The Moslem Marriage between Status and Contract

Originally the Moslem contract of marriage ([1]) could be seen as a matter of status, in the sense of a situation imposed by law without any discretion left to the parties, apart from the initial step of adhering to this contract.

This apparent status was due to marriage being a combination of an abstract contract and a standard form contract. What is an abstract contract? A good indication is given by a statement forged into a statutory provision, in the form of a tradition from the Prophet (a *ḥadīth*):

> "There are three [institutions] whose seriousness is serious and whose joke is [also] serious. These three are: manumission, repudiation and marriage".
>
> *Thalāth jiddu-hunna jidd wa-hazlu-hunna jidd; al-'atāq wal-ṭalāq wal-nikāḥ.* ([2])

The word "forged" is quite appropriate because the same provision, decidedly not presented as a *ḥadīth*, appears already in the *Mukhtaṣar* (epitome) of Al-Ṭaḥāwī (died 321/933) ([3]). Moreover Joseph Schacht offers an even earlier version of this inchoate *ḥadīth* as follows: "The rhyming legal maxim 'there is no divorce and no manumission under duress' ". ([4]) Marriage is not mentioned in this maxim and the Arabic for duress is *ighlāq*,

(1) The Moslem Contract of marriage is part of Moslem law as defined in my review of Bernard Botiveau, *Loi islamique et droit dans les sociétés arabes* in *Islamic Law and Society* vol. 6, 1 pp. 122-128 at p. 124, namely as "the tradition of *fikh*"

(2) 'Ala' al-Dīn Samarqandī, *Tuḥfat al-Fuqaha'* Damascus, Dār al-Fikr Edition, No Date, vol. 2, 201. 'Ala' al-Dīn al-Kāsānī, *Bada'i' al- Ṣana'i'*, Cairo, Sharikat al-Maṭbū'āt al-'Ilmiya, 1327, vol. II, 310 lines 9-10; vol. III, 100 lines 16-17. The same provision appears already in Al- Ṭaḥāwī's *Mukhtaṣar* (see next note), 408.

(3) Edited by al-Afghānī, (Cairo, Dār al-Kitāb Al-'Arabi, 1370), 408. This is remarkable in view of al-Ṭaḥāwi's reputation as a scholar having "'a lively interest in *ḥadīth* " and preferring "a *ḥadīth* report that supported the Ḥanafī position" (Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C. E* (Leiden-New York-Köln, Brill 1977), 118-19). More remarkable is Y. Linant de Bellefonds who finds this *ḥadīth* in Abū Dawūd, *Sunan*, II no 2.194, (Cairo, Muṣṭafa Muḥammad edition) - all cited in Y. Linant de Bellefonds, *Traité de Droit Musulman Comparé* (Paris La Haye, Mouton & Co, 1965), vol. 1, p. 73, note 9.

(4) Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford, Clarendon Press, 1959), 180 and 235.

not *ikrāh* which is the technical term in Moslem law for duress: *lā ṭalāq wa-lā 'atāq fi ighlāq.*

The seasoned *ḥadīth* provides that if a man says to a woman: "I marry you", he cannot extract himself from this marriage by claiming that what he said was said jokingly. The woman can, then, sue him for dower, for support and for any other right involved in marriage. According to Y. Linant de Bellefonds, this position is "rationally indefensible". Yet this author himself provides an eloquent defense of it, stating, with regard to the abstract nature of repudiation: "the social and religious consequences ... are far too grave to allow the destruction of [the repudiation's] effects by the mere claim that the repudiation was uttered jokingly". (5)

Chafik Chehata minutely analyzed the intentional element in the joke. "... the Moslem jurisconsults found themselves in front of a borderline case in which the person making the declaration is in full possession of his mental faculties but at the same time is stripped off from the required intention.

There the need arose to dissociate the intentional element from the rational element. This is the case of the declaration made by way of a joke (*jocandi causa*).

Certainly in Moslem law, a declaration cannot produce its effects unless it is made seriously. Every declaration made not seriously (*hazl*) is characterized as null and void, except for [declarations relating to] marriage, repudiation and manumission.

Intention plays here its role as a formative element of the legal act.

But what is, then, the intention? The authors themselves explain that the person making the declaration by way of a joke does not see the effects which the declaration has to produce. This amounts to saying that he does not have, present in his spirit, the effects launched by the declaration. It is not because he did not want the effects which come into being independently of his will, but rather because he did not envisage, in his spirit, the consequences of his act, that the act will be considered as ineffectual.

The intentional element thus understood is a kind of *animus* which accompanies the declaration. The declaration is a significant which implies a signified caught by the intelligence of the person making the declaration. But, in order to produce its legal effects, the declaration must be sustained by a state of the spirit oriented towards the aim to be achieved by the act. If this condition is lacking, the legal act will be amputated of all its effects. These effects are, nevertheless, not considered as being the result of this state of the spirit. If there is a point on which the Moslem doctrine is unanimous it is that all the effects emanating from the declaration will come into being as the law has foreseen them, not as the parties have foreseen them. Contract is a "cause" (*sabab*) laid down by the law to which are attached effects (*ḥukm*) equally foreseen by the law. There is a world of difference between the *animus* required as a condition

(5) Y. Linant de Bellefonds, *Op. cit.* (above note 3) vol. 2, 341.

necessarily accompanying every declaration and the *voluntas* considered as the substratum of the legal act." (6)

Another indication of the abstract nature of the Moslem marriage stems from section 57 of the 1917 Ottoman Family Law. Section 57 states: "A marriage concluded under duress (*ikrāh*) is vitiated (*fāsid*) (7)".

Why did the Ottoman legislator take the trouble to insert this provision in the Ottoman Family Law? As a contract, marriage too is subject to the general rule that a contract concluded under duress can be rescinded (*yuraddu*) (8). For this reason section 57 seems to be superfluous. In fact this section was necessary because, prior to the enactment of the Ottoman Family Law, under Moslem law a marriage could not be nullified by proving that it was concluded under duress, although duress was and is a valid ground for the rescission of a contract.

Here again Chafik Chehata presents the most penetrating analysis:

> "The authors tell us that a person who emits a declaration while being under the effect of a threat still has the necessary intention (*qaṣd*), namely the *animus* required for the efficacy of every declaration, in principle. For this reason a contract concluded under duress is a contract which satisfies all the formation conditions laid down by law. The contrat concluded under duress is considered to be formed under Moslem law. This contract is clearly distinguished from the contract based on a declaration by way of a joke (literally: a non-serious declaration).

Yet, because it lacks *riḍā*, it is beset by a blemish and can be annuled on request by the party who suffered the duress.

What is, then, *riḍā*? Is it consent, as is commonly believed? And if the defect affecting the consent gives rise to the nullity [of the declaration] does it not imply that the consent is an element playing its role in the contractual phenomenon?

> We reply peremptorily that this element, as the authors themselves say, is not a formation element. One of these authors was able to write that if the contract implies in current language an accord of wills, namely a consent – in law it is impossible to understand it as such. For this reason a sale concluded under duress is, in law, a sale (Ibn Abidin, IV, 9).
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> The contract will however be vitiated (*fāsid*) because the declaration which is its basis was made under duress. The lack of *riḍā* does not imply a lack of consent. It implies rather a defect inherent in the declaration. Having

(6) Chafik Chehata, "Le Contrat en Droit Musulman" in *Zeitschrift für vergleichende Rechtswissenschaft* 70 (1968), 81-96, 85.

(7) For the meaning of *fāsid* (vitiated) see the section "in Law" in the forthcoming article "*Waṣf*" in EI².

(8) See al-Ṭaḥāwī's *Mukhtaṣar ibid* (note 3). In the Ottoman Consolidation of Moslem Law (the Mejelle) an act concluded under duress is considered non-existent (*mu'teber olmaz*) (section 1006). The definition of duress (*ikrāh*) is, however, very restricted (see sections 949 and 1003-1005).

been made under duress, the declaration is considered to be vitiated despite the fact that it fulfils all the requirements for the launching of its effects. The declaration is, then, hit by a sanction not so much because it was not willed by the person who made it. It is so hit simply because it was made under illicit conditions. It is for this reason, for taking into consideration the defect of duress, that the threat should be an illicit act.

To sum up, *riḍā* is not consent. It is excluded only because the declaration was launched by an illicit act. Whatever is argued by the authors, *riḍā* is a phenomenon assigned independently of the will. The object of the *riḍā* is the declaration itself. This declaration will be valid only if it is made with *riḍā*, that is sheltered from every illicit act. The *riḍā* expresses here rather the state of security in which is found the spirit of the person making the declaration". (9)

The impossibility of nullifying a marriage concluded under duress is due to the abstract nature of the contract of marriage.

Thus we begin to see the essence of the abstract contract. An abstract contract ignores the will of the individual initiating it. Defects in the will of the individual have no weight at all. The marriage is valid even though it was concluded under duress, even if it was concluded jokingly.

The ineffectiveness of duress in an abstract contract is reflected also in section 105 of the Ottoman Family Law:

> "A repudiation (10) concluded under duress (*ikrāh ile*) is non-existent (*mu'teber değildir*)."

Similarly section 104 of the same Law provides: "The repudiation by a drunkard (*serkhūsh*) is non-existent (*mu'teber değildir*)."

Both these provisions reflect in the Ottoman Family Law long established provisions of Moslem law stating that duress is not a ground for rescission of either marriage or of repudiation. Drunkenness, too, is not a ground for rescission of repudiation. (11)

These articles abolished the abstract nature of the marriage contract. The Ottoman legislature seems thus to have acted in conformity with the famous phrase enunciated by Sir Henry Maine in the nineteenth century: "the movement of progressive societies has hitherto been a movement from Status to Contract". (12) Legislation in Arab countries followed the

(9) Chafik Chehata *(ibid* note 6), 86-87 § 12.

(10) The essence of the Moslem repudiation has been unveiled in: Y. Meron, "Accommodation de la Répudiation Musulmane" in *Revue Internationale de Droit Comparé* 47 (1995), 921-39, 927-28.

(11) Inspired by brands of Moslem law other than the Hanafi brand, Y. Linant de Bellefonds argues in favour of the validity of a repudiation pronounced by a drunkard who became drunk by taking medicaments or by similar innocent causes. These pleadings have no place in Hanafi law where the invalidity of the drunkard's repudiation is settled law ever since the first classical author al-Qudūri (died 1037). See Abū al-Hasan Ahmad b. Muhammad al-Qudūri, *Al-Matn* (Cairo, Halabi edition, Third impression, 1957), 78, line 21.

(12) *Ancient Law* (1864) 165, cited by K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, Third Edition trans. by Tony Weir, Oxford (Clarendon Press, 1998), 325.

Ottoman example, abolishing the abstract nature of the contract of marriage. ([13])

Yet, if its abstract nature was abolished, the contract of marriage is still not an ordinary contract, because all contracts under Moslem law are standard form contracts. Thus even if a Moslem couple agree among themselves that there shall be no dower in their marriage, proper dower is still due from the husband to his wife (section 84 of the 1917 Ottoman Family Law) ([14]) because the provision that there should be no dower is null and void. Moslem law does not recognize freedom of contract.

Freedom of contract nevertheless managed to penetrate two spheres. Since long ago a couple may agree between themselves as to the sum of their dower, whether it should be paid at once or in instalments, and how much will be paid at each instalment. This is stated in sections 80-82 of the Ottoman Family Law. ([15])

The second sphere concerns the provision of monogamy. Under Moslem law even if a woman inserted in her contract of marriage a term providing that her husband shall not marry any additional wife, the husband is free to marry as many wives as the law allows him to marry. On this point section 38 of the Ottoman Family Law innovated by stating:

Where a woman stipulates with the husband that he would not marry another woman and that if he does so she or the second wife would stand divorced, the contract of marriage shall be valid and the condition enforceable.

In sum, then, the Moslem Contract of Marriage, although originally an abstract contract, is now just a standard form contract with several intrusions of freedom of contract.

To what extent is this conclusion valid also for marriage and divorce in the Maliki brand of Moslem law? The Moroccan code of Personal Status (known as the *Moudawwana*) is culled from the Maliki brand of Moslem law. ([16]) Its section 49 states:

(13) Chafik Chehata, "Le lien matrimonial en Islam" in René Metz et Jean Schlick (eds.), *Le Lien Matrimonial* (Strasbourg, Université de Strasbourg II, Annuaire du Cerdic, 1970), 57-69, 66. Y. Linant de Bellefonds, *Op. cit.* (above note 3), vol. I, 76-77 ; vol. II, 341-342, 343. Rare are authors in English who are aware of this fundamental avatar in the Moslem law of Marriage. The reason for this unawareness may have been given by Bernard BOTIVEAU, *Loi islamique Op. cit.* (above note 1), 55-56. See also my review of his book in ILS 6, 1 122-28, at the bottom of p. 122.

(14) Y. Meron, "Formation of Contract Under Moslem Law" in: A. M. Rabello, *Essays on European Law and Israel* (Jerusalem, The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, 1996), 227-35, 228-29.

(15) Al-Kâsânî specifies that duress applied against the man to grant his wife dower in excess of what is habitually given to women of her class can be rescinded (Abu Bakr Al-Kâsânî, *Badâ'i' Al-Ṣanâ'i'* (Cairo, Gamâliya Edition, 1328/1910) vol. VII, 185). It is thus clear that duress does have its normal effect as far as the pecuniary incidents of marriage are concerned. See Y. Linant de Bellefonds, *Op. cit.* (above note 5) pp. 82-83

(16) Promulgated progressively between 22 November 1957 and 3 December 1958. Section 297 of this Code provides "For everything not included in this Law *(Qānūn)* reference should be made to the prevailing (*al-rājiḥ*) or the well known (*al-mashhūr*) or what is in usage (*mā jarā bi-hi al-'amal*) of Malik's brand (*maḍhab*)".

> Repudiation by a total drunkard (*al-sukrān al-ṭāfiḥ*), a person under duress (*al-mukrah*) and an entirely (*muṭlaq-an*) hot headed (*ghaḍbān*) person when in a fit of passion (*idha ishtadda ghaḍabu-hu*) has no effect (*lā yaqa'*). ([17])

Repudiation by way of a joke does not figure in section 49 for the simple reason that such a repudiation is valid under Maliki law. ([18]) On this point Maliki law seems to have always been at one with Hanafi law. The other elements of section 49, at least the drunkard and the person under duress, to the extent that the cases of these men are innovations ([19]) in comparison with Maliki law they indicate an original abstract contract in Maliki law. However more remarkable than that is the total absence of any one of the elements of section 49 in the context of marriage. Would it be correct to infer from this absence that the Maliki marriage is a normal contract at its inception while at its end it becomes an abstract contract, much the same as the Hanafi marriage which is an abstract contract from its inception to its end? ([20]) The answer is definitely not. Under Maliki law, the woman has no capacity to marry by herself any man. She can be married to that man only through the good offices of her guardian. ([21]) Now if the guardian proceeds to marry his female ward, while being himself drunk, he will merely disqualify himself for the task and no marriage will come about. Similarly if the guardian acts while being under duress, he will merely vitiate his own activity. This is why the Maliki law of marriage is not concerned with drunkenness or with duress in the course of the formation of marriage. The role of the guardian ([22]) camouflages the formation of marriage, including its abstract character.

(17) André Colomer, *Droit Musulman* (Rabat, Editions La Porte, 1963) 109.

(18) G.-H. Bousquet, *Précis de Droit Musulman* (Alger, La Maison des Livres, 1947), 123. On this point all the brands of Moslem law are unanimous. All agree that repudiation by way of a joke is valid. Y. Linant de Bellefonds, *Op. cit.* (above note 3), vol. II, 340.

(19) According to Bousquet the case of the person under duress would not be an innovation of the Moroccan Code of Personal Status because already under Maliki law "[l]a répudiation prononcée sous l'empire de la violence est sans effet" (above note 18, p. 123). However, Schacht expresses the opinion that "the Mālikīs pay no heed to the intention" ('Ṭalāḳ' in EI² p. 154). Y. Linant de Bellefonds attributes to the Hanafis an argument founded on the unanimous acceptance, by all brands of Moslem law, of the validity of a repudiation pronounced jokingly. If this repudiation is valid, the repudiation by a person under duress should *a fortiori* be valid because he has a semblance of an intention which the person pronouncing the repudiation jokingly does not have at all (*Op. cit.* [above note 3] vol. 2, 342). In fact the Hanafis could hardly use such a fine French argument because they deny any role to intention in the repudiation pronounced jokingly.

(20) This question can probably not be envisaged in Libya. According to Ann E. Mayer ("Development in the Law of Marriage and Divorce in Libya" in *Journal of African Law* vol. 22 (1978), 30-49) the Libyan Law No 76 of 1972 contains no mention of repudiation pronounced during intoxication or under duress (*ibid* p. 47 note 1). I thank Prof. A. Layish for providing me with this article.

(21) Bousquet, *Op. cit.* (above note 17), 92.

(22) The role of the guardian in marrying the woman has been a characteristic trait of Maliki law since its inception and contrasts with Hanafi law, according to which the woman is, in principle, fully capable of marrying whoever she likes without the intervention of any guardian. See Robert Brunschvig, "Considérations sociologiques sur le droit musulman ancien" in *Studia Islamica* III (1955), 61-73, 65-66; now in Id., *Etudes d'Islamologie,* Paris, Maisonneuve-Larose 1976, Tome Second, 119-131, 224. The Maliki rule has a precedent in antiquity in Hellenistic legal practice which governed Egypt ever since the 2nd Century B. C. E. Under the Ptolemies, and as reflected also in the writings of Philo, a girl appeared before a tribunal only

In this way Maliki law followed the same course as Hanafi law. Both began with marriage and divorce as abstract legal acts but have lost this characteristic in twentieth century legislation. Marriage and divorce partook at the beginning ([23]) in the status, to the creation of which they contributed. In modern legislation they no longer contribute to the status which is made of marriage and divorce.

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accompanied by her guardian. See J. Mélèze-Modrzejewski, "Jewish Law and Hellenistic Legal Practice in the light of Greek Papyri from Egypt" in N. S. Hecht et al. [eds.], *An Introduction to the History and Sources of Jewish Law* (Oxford, Clarendon Press, 1996), 84. It is to be noted that Maliki law goes apparently even further than the Hellenistic practice because it requires the guardian's intervention even in the conclusion of a totally private contract such as marriage.

(23) See the *ḥadīth* offered by Schacht (above note 4 and the text relying on it) Al-Ṭaḥāwī (above note 3), Al-Qudūrī (above note 11), al-Samarquandī (above note 2).