

Organization and functioning of Kuwaiti legal system

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Abstract

As in all Islamic countries, Kuwait's legal system is based on Islamic law, on doctrine and on amendments and interpretations of Sharia Islamic law by judges. The state can intervene only in areas not governed by Islamic law or when a particular interpretation is required, in the event that a certain religious disposition is ambiguous.

In a society dominated by the power of man and religion, human rights, inequality between men and women and between Muslims and non-Muslims are still a rather sensitive issue. In Kuwait, although article 70 of the Constitution stipulates that international treaties ratified by Kuwait have the force of law, the judicial and executive authorities, however, have not taken enough measures to implement this article.

Within the limits set by the Constitution, judicial power is exercised by courts on behalf of the emir. The courts are competent to resolve all disputes concerning a person's status (marital status), and also civil, commercial and criminal disputes. There are additional special courts for administrative, military and constitutional cases.

The two major sects of Islam, Sunni and Shi'a, give different interpretations of Sharia law. There are also differences of interpretation in the branches of each Islamic juridical school. For these reasons, Sunni and Shi'a Muslims resort to the courts that adhere to the respective school of Islam.

Key words: Islamic law, religion, court, Sharia, Sunni, Shi'a.

1. Introductory notions

Kuwait is a constitutional, hereditary, independent and sovereign monarchy (an emirate), led by Al-Sabah family, which governs it along with the most influent families and leaders of the community. The mounting on the throne is hereditary, being shared, alternatively, between the five branches of Sabah family: Al-Jaber and Al-Salem (Casey, 2007). This alternation is due to the fact that there is not a pre-established succession, the sovereign also vesting a hereditary prince, within a year after his mounting, chosen among the members of the royal family. According to the Constitution, the leader of the state has to be a descendant of Mubarak Al Sabah, the emir of Kuwait during 1896-1915.

In the organisation of Kuwait state, there are merged elements of heredity monarchy and theocracy, along with democracy. A defining feature, which is in the same time a limitation, is represented by the fact that the citizens do not have the right to change the government. Another essential feature is given by the fact that Kuwaiti state belongs to the “rentier states”, which are defined as the political regimes dependent on non-renewable natural resources (especially oil and natural gases), touristic exploitation of certain regions, economic help from other states etc. The characteristics of the rentier state can be summed up as following: the rent, even if it is not the only income of the economy, has to be preponderant; the origin of this rent has to be necessarily external, without the sustenance of a productive internal activity; the beneficiaries/administrators of this rent are the representatives of a restrictive minority-collectivity, owning economic and political controlling power; the majority of the population contributes to the system of distribution and use of the funds dedicated to this purpose, according to the rules of the leading elite (Beblawi&Luciani, 1987; Mansour & Amin, 1992; Mehdavi, 1970).

At the basis of the organisation and functioning of the Kuwaiti state lies the Constitution of 1962, revised in 1992. Nevertheless, we need to underline that the Constitution itself stipulates in art. 2 that “the Islamic law is the main source of legislation”. The Constitution

guarantees an entire system of fundamental rights and values – justice, freedom, equality and social cooperation, the role of the state being to assure security, peace and equality of chances for its citizens. In the Constitution, the personal freedom, the equality in rights and responsibilities regarding the law are protected, regardless of race, origin, language or religion, there are assured the presumption of innocence and the right to a fair justice, the religious freedom being considered absolute. The state has to observe the right of each citizen to practice their religion according to previously established customs, on the condition of not interfering with the public order and good morals and manners. The Constitution recognises the freedom of meetings, the freedom of speech, of the press and publications, the freedom to form national associations and unions (civil, professional, commercial), but only with peaceful purposes and only if they do not infringe the morals, under the circumstances and the provisions of the law. The right to work and the choice of a profession is guaranteed for each Kuwaiti citizen, the torture and the deportation of citizens being forbidden, and the residence is inviolable.

The Koran, the main holy book of the Muslims, does not give a special attention to the foundation and the type of state, the state power being confounded with the religious power; consequently, the accent falls on the religious values, on the nature and the structure of the Islamic society. Because the Arabian pre-Islamic societies used to be tribal societies, for the Muslims, the state represents only an alternative, while the society, based on fundamental values, as justice, equality, human dignity, is a necessity in Islam. A state that includes all these values can be, obviously, nothing but a democratic state, in which the powers are equally divided. The Koran and the religious text books provide a solid religious fundament, but they do not impose any state structure, or a governing authority, either hereditary or chosen. According to the morals of the religious laws, a state organisation has to guarantee equal rights, from the tribal, ethnic, national, linguistic point of view, to accept the rights of other religious communities to practise the religion and to confer equal rights for men and women, objectives that are equally pursued by the

modern, democratic and pluralist state: "As a consequence of all these provisions and precepts, for an Islamic state to be accepted according to the principles of the Koran, it should have the following main characteristics: to be non-discriminatory from ethnic, linguistic and national perspectives; to guarantee gender equality; to guarantee equal rights to all the religious groups and to accept the legitimate religious plurality; to have a democratic nature, on the basis of the human dignity principle" (Stuparu, 2011).

In the Kuwaiti state, although article 70 of the Constitution stipulates that the international treaties ratified by Kuwait have the mandatory power of law, nevertheless, the judicial and legislative authorities did not adopt sufficient measures for the implementation of the provisions in this article. As regarding the human's fundamental rights and freedoms, there were yet many unsolved issues and many obstacles to overcome. In a patriarchal and religion based society, in which the contradictions are manifested in all the fields of the social and political life, the inequality between men and women, as that between Muslims and non-Muslims, are still being considered a sensitive matter. Even if the fundamental rights are guaranteed by the Constitution, the Government imposed certain limitations to the freedom of expression, freedom of media, of association and meeting, freedom of religion and of circulation. The parties are still forbidden by law, but unlike other Arabian states from the Gulf, Kuwait is characterised by the effervescence of the political activity of some political groups that cannot actually be called parties. According to the political interests of their members - Bedouins, traders, moderate Sunni and Shiite religious activists, secular leaders, nationalists etc. - these groups have different orientations. The Kuwaiti fundamentalists tried in 2005 to constitute their first party from Kuwait, called the Nation's Party, which was not recognised by the Kuwaiti governing. Moreover, the government diminished the right of the workers to form or to join syndicates, to attend collective negotiations and to solve working conflicts with the employers, by negotiations. The clerks have a marginalised statute, without enjoying a system of their rights protection or working

conditions control. The unskilled foreign workers experience abuses (physical and sexual) from their employers, suffering from the lack of a regulated minimal wage in the private sector and because of the authorities' failure to apply the dispositions of the working legislation. Even if the Kuwaiti state adhered to the Convention on the elimination of all forms of discrimination against women, adopted by the United Nations General Assembly on the 18th of December 1979, the violence, the abuses and the discrimination against women, especially those without Kuwaiti citizenship, still remains a huge problem, internationally recognised (Kelly & Breslin, 2010; OECD Development Center, 2015). As regarding discrimination, there are registered cases in which the judicial authorities commit this kind of acts against foreigners, especially those who came to work in Kuwait. The situation of the Bidoons, the people without citizenship, still remains highly problematic, they residing in Kuwait legally, despite the fact that they do not have validated travelling documents or residence permits, on the territory of the Kuwaiti state (Abu-Hamad, 1995). The problem with the citizenship of thousands of "Bidoons" has still remained unsolved.

In the field of the human rights protection, there is a parliamentary committee called "The Committee for the Protection of the Human Rights", created in 1992, which has as main attributions: the forwarding of motions for the modification of the legislation that contravene the human rights; the supervision of the government's activity for the problems specific to the human rights; the solving of complaints on addressing the infringement of human rights and the forming of inquiry commissions, under the provisions stipulated by the law. Moreover, in this area, a lot of non-governmental organisations activate, such as: "Kuwaiti Union of Women Association", constituted in 1963; "The Cultural and Social Society of Women" (1963); "The Kuwaiti Society for the Promotion of Arabian Children" (1980); "The Kuwaiti Society for Human Rights", founded in 2004.

The two major schools of Islam are the Shiite and the Sunni - Shi'ia and Sunni. Besides these two religious schools, in the Islamic

Religion, there are numerous currents and schisms, as the groups of Kharjites, Mutazilis, Sufis etc.

2. Judicial system

Kuwaiti judicial system is based on the Islamic law, codified in an "Islamised" Napoleonian code (Htun&Weldon, 2011). The state cannot interfere, but in the fields that are not regulated by the Islamic law, or for imposing a certain interpretation, in the events that a certain religious prescription is too ambiguous.

The judicial precedent established in previous cases cannot be considered when trying another case, except for certain situations. Each litigation brought in front of this judicial system is solved based on its proper specific circumstances, without consulting necessary anterior decisions from similar cases. Even if the judges prefer consistency when applying the law, they are not forced, legally, to take into account the judicial precedent. They guide themselves after the doctrines ("ijmâ"), elaborated by the competent people - "the doctors of the Islamic law", doctrines that express their community of opinions regarding a certain judicial solution, which function as the laws (Avram et al., 2007; Dogaru, Dănișor, D.C.&Dănișor, Gh., 1999).

The organisation and the functioning of the judicial system originates in Koran and the religious text books too, according to which, the only defining values for an Islamic society are those of justice and benevolence. Koran is mainly opposed to the concepts of oppression („zulm") and unfairness-injustice („'udwan"), underlining the idea that no society in which these concepts are accepted can be called an Islamic society. According to the Koran, the duty of the Islamic nation, or Islamic community („ummah"), is to build a society based on positive values, on the denial of evil and inequality between people. In the Muslim society, the role of justice is primordial, helping the raising of a society without oppression and injustice, and considering the numerous ways of reaching the truth.

Another principle that helps the guidance of the judicial activity is the solving of litigations amiably (Chowdhury Akhtar, 2013): « The legal saying "the amiable solving is the best verdict" (al-sulhSayyid

al-ahkam), represents a long tradition in the Islam and the Islamic law, reflecting the deeply rooted perception, both juridical and social, that not only are the arbitration and mediation an integrant part of the juridical process and legislative process, but they also have priority before the judicial solution, which is usually regarded as the final resort. The Islamic leaders not only do they depend on this tradition of regulating the auto-solving at a micro-level, but they also encourage it, because it has facilitated the efficient governing, with diminished expenses, and has additionally preserved the public order. In a society in which the family and business relations are sacred, the litigations that involve intimate and private questions, have been kept away from the public eye and indiscretions, in such a way that, for each case arrived in court – and there have been a lot – a lot more were solved in an informal way, as a consequence of the elder intervention, the Imam, the master of the house or other people with prestige and equal authority» (Hallaq, 2009).

Under the limitations provisioned by the Constitution, the juridical power is exercised by courts, in the name of the emir. The courts are competent for the solving of all litigations that regard a person's statute (marital status), civil, commercial and penal litigations. There are three degrees of jurisdiction: the first instance courts (that include several divisions, including those regarding a person's statute); the appeal courts (made of 5 divisions, among which that regarding a person's statute); The Supreme Court and The Cassation Court (2 divisions, The Appeal Department and The Cassation Department). The decisions of the first instance courts for behaviour crimes, which are sanctioned with less than three years of prison or fines less than 250 Dinars (approx. 750 USD), cannot be contested by the superior courts.

There are supplemented specialised instances for administrative, military and constitutional causes. For example, the Court for the Safety of State, instituted by Law no. 26/1969, is competent to judge the cases related to internal and external aspects of Kuwait's security. The sentences passed by these specialised instances are definitive and irrevocable, not being able to be appealed.

The constitutional instance, which is called the Superior Constitutional Court, as it is called in Kuwait, has the competence to interpret the Constitution and to mediate the disputes on the constitutionality of laws, statuses or ordinances. Being the highest judicial instance, its decisions prevail before the decision of all the inferior instances.

The functioning of the judicial system is assured and supervised by the Judicial Council, made of the president and the vice-president of the Cassation Court, the President and the vice-president of the Appeal Court, the District Attorney, the President of (religious) Kullyyyia Courts and the deputy of the Minister of Justice. The Judicial Council is competent to apply disciplinary sanctions to all the judges, including the suspension or the removal from their position, the implementation of these measures being the duty of the Judicial Disciplinary Council.

For the causes regarding the statute of the physical person, the instances are divided in three sections - Sunni, Shi'ia and the department for non-Muslim, such is for the laws that apply to the religious minorities (Feldman, 2011).

The courts that judge trials referring to family, recognise only half of the woman's testimony, unlike that of a man (UNICEF, 2011), while all the other instances consider the testimony of men and women equally.

3. The Islamic religion and the constitutional statute of Sharia law

The characteristic feature of the Islamic religion is that resorting from its ability to insert in all the aspects of the people's lives. The personal and family life of the believers, along with their social, political, cultural life, the relations and the juridical institutions, has to be entirely subordinated to the religious laws. In the past, the justice was entirely attributed to the clergy, and the civil law, the family law and the penal law were based entirely on the religious law, while the carrying into effect and the interpretation of norms were supervised by theologians. Starting with the second half of the 19th century, there have been a lot of changes in Kuwait, which

diminished the power of religion and its representatives. The clergy have made concessions that the evolution of the society in its whole, the development of international relations and globalisation have imposed as a necessity: there have been softened or abrogated old interdictions, more rights have been recognised to women (Rizzo, 2005), the citizens are encouraged to perfect their education, and the Islamic religion, along with the content of the religious laws, are interpreted rather allegorically.

The Kuwaiti juridical system is the result of a conglomerate of law systems that merged, combining elements of English law ("common law"), French civil law, Islamic principles and Egyptian laws, "a system of secular law, unique among the states from the Gulf" (Chapin Metz, 1984).

As in all the Muslim states, the recognition of the constitutional status of Sharia law has actually been "a political issue" (Hill, 1988). Article 2 of the Constitution from 1962 stipulates that "the state religion is Islam, and the Islamic Sharia law is the main source of the legislation". Art. 1 section (2) from the Civil Code also regulates that, in the lack of legislative provisions, the judges have to pronounce according to a custom, and if an applicable custom is missing, they should guide themselves by the most adequate Islamic jurisprudence principles (*fiqh*). Comparing to the Romanian system, we can observe the (religious) custom has the statute of common law (similar to the civil law, to which all the other lawful departments from Romania relate), and the jurisprudence can represent, in certain cases, law sources.

If the Romanian system of law has as main source the law, the doctrine and the jurisprudence being excluded, the Kuwaiti one is a traditional religious system, which is very much based on doctrine and the modifications and interpretations given by the judges to Sharia Islamic law. While in Romania the first attempts to codify the juridical norms date of the 17th century (Avram et al, 2007), in Kuwait, the first bills of legislative codes were drafted at the end of 1950s (Hill, 1988; Lombardi, 2013).

As mentioned in the specialised literature, “the most widely spread problem in the juridical history of the modern Muslim world has consequently been the introduction of the notion of state-nation and its meeting with Sharia. It is not exaggerated to say that, practically, there is not a problem concerning this matter that does not permanently involve the institutional, conceptual, structural divergences, which exist between the Islamic/customary laws and the Continually growing and unavoidable European imports, appeared in the same time with the state-nation and the modern juridical system”(Hallaq, 2009; Mallat, 1993).

Regarding the relation between Sharia Islamic law and the civil law, we have to mention that the government is divided in a way that it should provide the sharing of competences between the religious and laic authorities. This division of the competences is essential for the existence of the government itself. Even if the state do not depend on the religious authority, as concerning its functioning and stability, nevertheless, the religious authority represent an essential source of legitimacy, both for its citizens and the entire Islamic community (Feldman, 2011; Salvatore, 2009).

4. Civil law and family law

The civil law system in Kuwait is dominated by the Civil Code adopted in 1981, about which Shaikh Salman said it is the first integrated civil code, whose dispositions are in harmony with the Islamic jurisprudence schools and does not contain any provision that cannot be accepted by any of these schools, or would be in conflict with the Sharia spirit(Huneidi, 1986).

The Family Law and the Personal Statute Law no 51/1984 are governed by the religious courts. The government reached a compromise by authorising the religious authorities to control the family law, in this way being free to apply the economic modernisation programme, without external interference. This compromise had as a result the scarification of the women rights, limiting in this way their right to fully public participation, a limitation that was realised under the protection of law.

The family code in Kuwait, which regulates aspects such as marriage, divorce, custody of children and inheritance, was adopted in 1984 and contains 347 articles. It suffered ulterior insignificant modification and it is based on Maliki School of Islamic jurisprudence.

Law no 36/1969 regulates the juridical regime of birth and death in Kuwait. This law has 26 articles, among which articles 1-6 regard the recording of birth, and articles 7-13 refer to the recording of death.

The two major sects of Islam, the Sunni and the Shi'ite - Sunni and Shi'ia, have different interpretation for Sharia law. Moreover, there are differences of interpretation within the different branches of each sect. For these reasons, the Sunni and the Shi'ite Muslims resort to the courts that adhere to those specific schools of Islam. Thus, the Sunnites and the Shi'ites have their own courts that solve litigations related to family law and, additionally, the matters of the personal statute, according to their own jurisprudence. The Sunnite courts use the Maliki or Hanbali interpretations of the Islamic law, while the Shi'ite courts use Jafari interpretation. The belonging of the husband or father to one of the sects - Sunni or Shi'ia - determine the competent court to solve the family law issues.

The treatment of women differs slightly between the two Islamic schools, especially on addressing the problems related to marriage, children's custody and inheritance. For example, the family law, according to the Sunni school, is more restrictive as confronted to the custody rights enjoyed by the divorced woman. Another difference is that, while in the Sunni family law, women are allowed to inherit a physical part of the property, according to the Shi'ite legislation, a woman can inherit only the value of the property.

The law of the personal statute legitimates the male domination over the women. However, even in this context of the legitimate masculine authority, the Kuwaiti legislation is full of paradoxes, which can be observed in all the departments of the law - civil law, family law, working law, penal law, as we are going to mention further on. For example, while it is provisioned that the husbands have to support their wives and children, the law does not confer the

husband the right to pretend absolute obedience (“ta’a”). Article 89 from the Law of the personal statute provisions that a husband should not forbid his wife to work outside her house, excepting the fact that the work affects negatively “the family interests”, but the formulation of the law is ambiguous, and can leave room for interpretations that refer to the establishing of the marriage or the children’s education.

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