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Equality in Family Property Division:

Between the Teachings of *Fuqaha*¹ and Societal Customs

تقسيم ممتلكات الأسرة بين الرجل والمرأة : تعاليم الفقهاء وأعراف المجتمع ؟

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الملخص بالعربية:

من أهم النقاشات الدائرة اليوم بالمجتمع المغربي والعالم الإسلامي، تلك المرتبطة بالحديث عن تقسيم ممتلكات الأسرة بين النساء والرجال داخل العالم الإسلامي، إذ تعد من المواضيع الصعبة، والأكثر إثارة للجدل والنقاش، سواء بين الحركات الإصلاحية والنخب المثقفة وكذلك الحركات النسائية، من جهة وبين حراس النص الديني ومؤسسة الفقيه من جهة أخرى. إن الأمر يتعلق بموضوع محاط بالعديد من التصورات والمعتقدات التي ميزت علاقة الرجل بالمرأة منذ عصور قديمة. ويأتي هذا المقال ليتناول بالشرح والتحليل مسألة توزيع ممتلكات الأسرة بين النساء والرجال في سياق واقع اجتماعي واقتصادي اتسم عبر الزمن بقيام المرأة بمجهود في العمل؛ سواء داخل البيت وخارجه، وإعادة الإنتاج البيولوجي وتنشئة الأطفال، في مقابل صمت المجتمعات الإسلامية على نشاطها، ومقاومة ولوجها للثروة الأسرية بشكل متساوٍ بينها وبين الرجل. لقد كان للاتصال الثقافي مع الغرب خلال فترات الاستعمار، وتطور العلوم الاجتماعية ومنظومات حقوق الإنسان وقع كبير على النخب المثقفة بالعالم الإسلامي، حيث وجدت نفسها أمام نساء غربيات انخرطن في معظم مشاريع التطور الاجتماعي على المستوى العالمي، في مقابل بقاء المرأة في العالم الإسلامي حبيسة التقاليد والنصوص الشرعية، ومحكومة بإرث العادات والتقاليد. وبالرغم من كون انفتاح النخب المثقفة على هذا الواقع، والتعديل من نظرهم إلى المرأة، إلا أن مطالب الحركة الإصلاحية خاصة الحركات النسائية والمنظمات الحقوقية، عموماً ستواجه بشكل كبير بانغلاق مؤسسة الفقيه على نفسها رافضة لأية قراءة جديدة من شأنها أن تحقق مجتمعا متوازنا.

Introduction

The division of family property amongst men and women is one of the most difficult and contentious topic in the Islamic world. Elites, reformists and feminists partake in this discussion against the extravagance of Islamic scholars. This controversial topic is surrounded by a number of conceptions and dogmas, which characterized the nexus between man and woman for decades. On the one hand, this division of family property has been situated within a socio-economic reality which was characterized, for a long time, by both women's participation in labor force and their inevitable role in the biological reproduction and raising infants (Al-Harass 1996:9); On the other hand, Islamic societies overlook or sometimes camouflage these salient female activities and impede, therefore, the right of women to inherit the family fortune in the same equal footing with men.

In the Islamic world, elites have been largely impacted by the cultural contact with the West during the colonial era, the progress in social sciences and human rights. So they have witnessed the engagement of occidental women in all spheres of social advancement in the world. However, oriental women are imprisoned by the chains of tradition and the authority of religious texts; they

are condemned by the heritage of traditions and customs. Although this group of elites is opened up to this reality and amends its vision towards the woman, the demands of reformist movements, feminists and human rights associations are faced by the dogmatic institution of the *faqih*, that refuses any valid interpretation in favor of reaching a social equilibrium. Thus, women find themselves, in the Islamic world, in the same equal footing with men in terms of religious duties, punishment and reward, for God states:

verily, the Muslims men and women, the believers men and women, the men and women who are obedient, the men and women who are truthful, the men and women who are patient, the men and women who are humble, the men and women who gave *Sadaqat* (Zakat and alms), the men and women who observe Saum, the men and women who guard their chastity and the men and women who remember Allah much with their hearts and tongue Allah prepared for them forgiveness and a great reward”(Quran 33:35, King Fahd complex)

However, this equality does not cover the other non-religious spheres of life. In fact, these religious practices, with their ensuing reward, endorse that equality is a religious axiom, for “whoever works righteousness_ whether male or female_ while he (or she) is a true believer, verily to him we will give a good life, and we shall pay them certainly a reward in proportion to the best of what they used to do” (Quran 16:97, King Fahd complex). On the contrary, there exists a gender based unequal access to family fortune; this inequality unfolds an unfair division of inheritance amongst man and woman and is backed up by the famous verse usually disoriented from its aim: “to the male a portion equal to that of two females” (Quran 4:11). With this understanding, *fuqaha* impede the empowerment of woman in having access to family fortune in the same equal footing with man; in so doing, the authority of *fiqh* lies in its ability to reproduce itself in the form of legal corpus, yet this latter starts liberating itself gradually from the grip of this religious authority. For example, Article 19 of *Morocco's constitution of 2011* guarantees that “the state works for the realization of parity between men and women” (The Kingdom of Morocco 2012:8) without getting delved into the complicated issues of inheritance. While Article 19 confirms that the government of Morocco endeavors to implement the parity between men and women, *Moroccan Family Code*, particularly in book six, confirms that the Moroccan legislator has to subjugate ‘inheritance’ to the Islamic laws of *Sharia'a*. On the basis of the for-mentioned, we inquire, through this article, about the driving logics behind dividing family properties amongst men and women.

The History of ‘Ussra’ and the Anthropological Dilemma of Inheritance: Trans-cultural comparison

To better regulate the concept of inheritance, it is vital to define first the concept of *ussra* (family), which usually alludes to groups of slaves and servants (Frédéric 1996:128), because it is derived from the Arab verb *asara*, which

means 'to slave' or 'to capture'. *Assra* (captives), the plural of *assir* (captive), used to guard the herd of sheep and work in agriculture and home services. It was well-known in Arab tradition, before the advent of Islam, that female *assra* became part of the system of *ussra*, family so to speak, and they were forcibly married to the men of the same group which Arab had captured from the war (Barakat 2000:357). After a long period, this concept started to be alluding to a human group whose members reside in the same property, work together and connect to each other through sexual relations amongst adults. This human network occurring in the same property results in having infants either through procreation or adoption.

Indeed, the conjunction between the concept of family and slavery is not bounded uniquely to Arabic, but this conceptual nexus exists in many languages such as: Asian language, Hebrew, Aramaic, Chinese and Latin. Afterward, this concept becomes central in shaping the relationships between men and women by making from family an institution for the transportation of values, the formation of identities and the transfer of family ownership/property, including customs. Therefore, dealing with a member of a family signals the relationship between father/lord/master and his slave. Hence, the logic of slavery becomes the governing element in family relations; women, children, the poor² form working class, yet they work and produce without having the right of access to family property and means of production.

The institution of family works by promoting the psycho-socio identities of individuals and insists on transferring family property from generation to generation; part of what a child inherits from his or her family is the family name. From a long antiquity, many other institutions: local societies, temple, church and *faqih* institution had contributed to regulate the family property transfer amongst generations. Family property transfer has raised a deep problematic as to the way it is viewed, for instance, by ancient Egypt wherein inheritance was subjugated to mores because there had been no legislation before. However, this property transfer was divided almost fairly amongst men and women (Salih 1988:126). Also, the distribution of family properties, in ancient Egypt, was subjugated to a mathematical computation amongst brothers, sisters and spouses after grants and wills had been detracted from the family fortune, and a one-third (1/3) had been of great importance in property transfer amongst wives and husbands (Salih 1988:126). Family property transfer did not continue with the same level; rather, it was subjected to different modifications in ancient Egypt, for the Egyptian family used to transfer its whole fortune to the elder boy; afterwards, husband's property was transferred uniquely to male children, and wife's property to female children.

Before the advent of Islam, Arab societies have remained conservative of many socio-psycho cultural traits that distinguish the patriarchal system; this system makes of father God and, the concept of family revolves around him

according to horizontal relations of governor/governed. This creates unequal relationships based on habits and coercion. Islam did not manage to dissect the patriarchal system and its inner relations; rather, it provided a suitable soil for producing class based societies, wherein women and children formed the working class (Brakat 2000:22). For example, in Morocco, women kept accomplishing different tasks such as agriculture, harvest, pitchfork, planting collection and picking up fruits and crops (Brakat 2000:250). Alongside with this dire work, women used to work at home and take care of baking the bread, sowing, collecting woods and breeding livestock with the aid of children and slaves who would be later referred to as serfs or *ikhamassn* in Tamazight (Raymond 1981:137).

Islamized Patriarchy and Dismantlement of Division of Inheritance

Certainly the members of Islamic society constitute a natural expansion of those of patriarchy, so the tribal dynamics remain the authoritarian voice for both spreading the religion of Islam and building up the Islamic state. Therefore, Islam has never striven to establish an urban state, but rather an Islamized patriarchy. The Islamization of patriarchy makes of property division a continuation of the culture of patriarchy in Arab societies and results in class discrepancy amongst women and men³ (Chaima 2015:130). Thus, the institution of *faqih* rejects to renew the system of inheritance division despite the principle of parity which exists extensively in Quran. Rather, this institution has adopted a class based strategy for inheritance division which makes of inheritance the total sum of fortune, left by a deceased person, that must be distributed religiously to the eligible/merited (*the Moroccan Family Code* 74). Islam adopts a mathematical computation⁴ in terms of the division of inheritance and allots women a portion of the inheritance in these following cases: woman as sister, wife, mother and grandmother. This mathematical element renders many Islamic scholars defend this small portion that the woman inherits under the guise that God has magnified her by allowing her to get access to family property in time she did not. Though woman's portion is much less than that of man, she is dignified for the fact that she has a fixed share and that her husband works on behalf of her by means of *qiwama*, which means that the man expends solely on his wife and his family. Others endorse that women inherit more than men do in some cases.

Inheritance based qur'anic verses are central to family property division, including that which is frequently quoted and disputed over by Islamic scholars: "to the male a portion equal to that of two females" (Quran 4:11). However, the tremendous changes that family has known in Islamic world should have entailed building up a political, reformist project aiming at changing the situation of woman and empowering her to have access to family property division in the same equal footing with man. Islamic inheritance, in all its minute details, is a system formed by the culture/ethics of the patriarchal

society, which is premised on class discrepancies and the absence of mind. Thus, the aim of many Islamic scholars pertains to reach a state of correspondence between the political and the religious: the first is based on legislative reform, and the second on both God and the teachings of fiqh without regard to societal changes that family has known in the light of the sociology of family.

Islamic scholars have been enmeshed in midst of minute details pertaining to the division of inheritance and lost in what the legislator has enacted for the transfer of family fortune from generation to generation. Such immersion hides, on the one hand, the mythical character of this minute theological division, and on the other hand, the idealistic character of the “Islamic family” which turns to be a *superstitious* family embedded in the ideal imagination Islam built for a long period. This ideal imagination is predicated on the maxim: women activities should be taking place at home, wherein they are looked upon as princesses. That is, women do not contribute to the economic growth of family investment; this occasions a negative consequence on the situation of women, in that they become prone to vulnerability and poverty, especially in rural regions (the kingdom of Morocco 2009:5). In addition, this mode of thinking camouflages the spirit of class based Islam, in that a number of prophetic sayings regard a wife as subject and her fortune to be looked after solely by her husband. A prophetic saying is reported by Abo Daoud, wherein a woman asked the prophet Mohamed (bpuh) about women access to the fortune of her husband, and he says to her you have access to what you eat (fruits) or what you give as a charity. This proves why women have no right to their husband fortune and explains how males are always privileged over females; societal jobs are uniquely of male character as they connote dominion and leadership. These are sedimented by the patriarchal society. This act of privileging men over women, according to Ahmed Aboudiyaf, in his *treatise*, is a creation based problem: Eve is created from Adam; the latter is the origin, and the second is the periphery (Aboudiyaf 2009:5).

Mores and Resistance to the Teachings of *Faqih*: Family Property Division Model in Souss.

The issue of family property division has been confined to the specialty of both fuqaha and local societies; the former is keen on applying Islamic rules as determined by Qur’anic verses, fiqh and Moroccan Family Code; hijacking this specialty by fuqaha gives this issue divine clothing. The latter, local societies so to speak, are usually deployed in favor of mores and traditions, which excludes woman from inheritance in some geographical zones of Souss (Alassoui 1961:92) and gives the woman access to inheritance in other zones⁵. The scholarly field has been immersed in a state of silence on this issue except some few sociological and anthropological studies and *nawazil fiqhia* which approach the division of family property. Hardly had we cast an eye on some indicators

proving that there will be a sort of renewal in this field: although there are some contracts preserving the right of woman to have access to family property, inheritance division undergoes and is coerced by mores. The reason why mores are of potent impact than those of contacts is the insistence of brothers to have portion of that which their mother had and the quarrel occurring between sisters and law-brothers (Raymond 1981:12).

In fact, contracts and *nawazil fiqhia* form an essential rule that should be worked out to fathom why they resist to such patriarchal distribution which is usually ascribed theologically to family fortune amongst men and women. However, *nawazil fiqhia* did not manage to provide a solution to this issue especially in extended or big families, but rather did with micro families (Al-Harass 1996:13). In this regard, we observe sociologically that in time of inheritance division by means of *nawazil fiqhia* the existence of a woman among side with her sisters and grandmothers; the thing that should be studied sociologically. Woman's participation in the economic growth at home presupposes that Islam gives her access to family fortune and means of production in the same equal footing with man: owing to the fact that the Islamic text pertaining to family property distribution does not undergo to any renewal. This, as a result, begets a sheer contradiction between the institution of *faqih* and reality. The real has become cramped with multiple feminine roles, in that women have broken into several economic, political and societal domains and reached the highest degree in education and formation (Al-Fakhori 2000:49).

Nawazil fiqhia connotes women resistance to the patriarchal system that precludes them from having access to family fortune and means of production (Al-Harass 1996:13). *Nawazil fiqhia* shows that women are willing to separate their property from that of their husbands and to recognize their portion to be known in the eyes of commonalty so that their right is preserved by law (Al-Harass 1996:13). Mores, in Souss, have always exhorted Islamic legislation to acknowledge the effective feminine contribution to family fortune in terms of family resources and livelihood. This fact renders fuqaha considering mores central for protecting women's right against the prevailing patriarchy. In this regard, *alkad* and *sia'ya*⁶ is a custom devised by Muslim Amazigh fuqaha to count all those who contribute in the family economic growth regardless to gender distinctions between: male and female, wife and husband, father and son, brother and sister and the like. Thus the only criterion whereby one inherits is to belong to family and contribute to his or her family fortune.

Moroccan Family Changes and the Backwardness of the Institution of *Faqih*: The Need for Improving the Mores of Equality

It has become difficult to circumscribe an adequate definition to the concept of family more than any other time because of the radical changes

(Jean-Hugues 2009:3) that this concept has witnessed in its fabric, functions and roles. In Morocco, different types of family structures have doubled, and new relationships have appeared. These changes operate at the economic and demographic level and the increase in migration from rural zones to urban ones due to drought, the decrease in agricultural work value and the crisis engendered by the policy of structural amendment/reform (Cered 1991:13). These changes manifest themselves in Morocco, where new paradigms of consumerism take place and the Moroccan state intervenes into the confines of family. With this in mind, the shift from a productive family to a consumptive one contributes largely in demolishing the common shared property and in urging women to work outside home. Again, this accelerating changes result in enlarging the gap between the institution of *faqih* and the reality.

The diversity of family structures in Arab society reached 282 types of the family with complex structures⁷. This latter reveals the end of the ideal family which is imposed by legislation and law, for this ideal family does not conform to the actual situation of the family in Moroccan society (Moulay Archid 1993:107). If the Moroccan family, which has gone through many structural and functional changes, presupposes the realization of a new family equilibrium, it will be vital to intervene reforms on the political legislation so that the improvement of juridical judgments becomes possible in tandem with the situation of Moroccan families today. The economic identity of women starts to be recognized in the public sphere, as the family economy gains power both from the feminist activities with high outcome and from hired labor. However, the group of men still monopolizes the family fortune and means of production either at the level of residence, work or property (Al-Harass 1996:107); the equality between men and women in the field of production, taking up responsibility and providing resources to the family has been dismantled by the imposition of what we call, “the superstitious family” on the Moroccan society. Indeed, the system of Islamic inheritance, which enables the woman a one-fourth or a one-eighth from the fortune of her deceased husband, urges women, especially if they are infertile, to resist the concept of “superstitious family” through *alkad* and *sia’ya* so that she will provide herself with domestic materials and create for herself a property. Afterwards, she will resort to ask for her right to have access in family fortune under the rubric of the performed work/effort so that she may have a portion of the family property. That is, the necessity for new egalitarian mores should take place, especially in this age where the institution of *faqih* failed to realize equality.

Conclusion:

We have to deal with the idea of equality between men and women in inheritance from a sociopolitical perspective. That is, the imposition of the concept of “superstitious family” by force of legislation and law on the Moroccan society stems from a patriarchal background; the imposition of

Islamic inheritance, characterized by masculine culture, is a result of both the Islamic immersion in banal, minute details and the law enacted by the legislator without regard to the situation of Moroccan families. The existence of these laws, which makes of women the weakest creatures in terms of getting access to family property, is conditioned by the sustainment of the same peninsula values until today. First, I think, therefore, that the institution of *nawazil fiqhia* can play a major role in answering many contentious issues about inheritance in accordance to the principal of *alkad* and *sia'ya*. Second, I think that changing laws related to inheritance will not cause any harm to Islam at all; rather, it will be in conformity with its ends (Alhamami 2003:60), in that bringing men and women into equality will preserve the essence of Islam embodied in high values: justice, equality and the like. This approach is going to be backed up in the fact that Islam is not based solely on Quran, but rather is a celestial message of human character founded on justice.

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¹ Fuqaha is synonymous to Islamic scholars; it is derived from the word fiqh, which means the science by which we deduce rules from Islamic texts: Quran, prophetic saying and ijma'a (the agreement of scholars, companions and tabi'in on certain matters). *Fuqaha* is the plural of the word *faqih*.

² Accordingly, father signals God, so the rest of family members are subjected to his will; thus he is responsible for the division of rules and has the right to exploit them and their fortune.

³ Many writings consider that Islam gives to sisters half of what which their brothers inherit, for Islamic observance does not oblige wives to give back what their husbands have given them either by means of dowry, expenditure or alimony; these expenses given by men are not decreed upon women by God. Therefore, it is fair enough for sisters to be given the half of what their brothers inherit, for brothers are obliged to expend. I think that this understanding is not right, because expense on women drives them to a state of slavery, bondage and subordination. Within the patriarchal system, women are being slaved on the basis of class discrepancies: giving money promotes slave/ master relations.

⁴ Islam discerns between four types of heirs: obligatory heirs (*warata bi alforod*) are those with fixed shares; once they inherit their portions respectively, the left over estate is passed on to residuaries (*warata bi ta'sib*). The third type is those who inherit as obligatory-residual heirs, for they inherit as obligatory heirs and residual ones altogether (*warit bi alfard wa ta'sib jamia'an*). The four type is those who inherit as obligatory-residual heirs individually (*warit bi alfard wa ta'sib fardan*). Islam has adopted a mathematical division of the estate. For example, a husband inherits a half of his wife's estate in case she has no relatives.

⁵ Mores constitute the Amazigh culture; however, the tribes of Souss, Daraa and Fqit are distinguished by writing down agreed-upon mores which oblige all Imazighen of all tribes to abide by them in time of disputes, crimes and the like. See *Awfaq Ourfia : Documents on the mid19th Ait Baamran*. First edition. 2007, p.11.

⁶ Alkad and sia'ya are synonymous to each other and mean in English striving, toiling and working. This custom does not take into account biological distinctions between males and females: whoever works and contributes to family fortune is going to be given his or her full portion when dividing the inheritance.

⁷ Moroccan Kingdom. *Taqrir Al-khamssinia*. Casablanca : Dar Nachar Al-maghribia.2006, p.36.