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2. Custody and the Best Interests of the Child in Egyptian Courts

Nathalie Bernard-Maugiron*

Recent legislative reforms in Egyptian family law have given paramount importance to the protection of the 'best interests of the child' in custody cases. The 2008 amendments to the 1996 Child Law set this course, later entrenched in the 2014 Constitution, when the best interests of the child made their first appearance in a constitutional provision. However, no definition of what constitutes the 'best interests of the child' is provided in these texts. The law, on the other hand, assigns significant powers to judges to allow them to ascertain such an interest on a case-by-case basis by prioritising different conflicting interests.

Through the analysis of a court decision dealing with a custody case, this contribution tries to identify the elements that Egyptian judges consider when looking for the 'best interests of the child.' In doing so, it investigates whether new trends have appeared in this field in the face of the heated debates that have been dividing Egyptian society for several years regarding custody and visiting rights of divorced fathers.

1. The Shubra Family Court case of 30 April 2011

On 30 April 2011, after Egypt overthrew its president and was going through a phase of great instability under the leadership of the Supreme Council of the Armed Forces, the Family Court of Shubra[1] accepted the request of Taymur[2] to have his two young daughters, Manal and Lubna, stay at his home once a month.[3] This decision was unexpected since divorced fathers were struggling to reform the family laws which were depriving them of custody and hosting rights of their children.

If the Egyptian personal status laws of 1920 and 1929 have often been criticised for establishing an imbalance in rights and duties within the couple in favour of the husband, custody is one of the areas, along with payment of dower and alimony, where

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1 Popular district of Central/North Cairo.

2 To protect the anonymity of the family all names have been changed.

3 Shubra Family Court, Wilāya 'ala-l-nafs, case No 841/2010, April 30, 2011.

the wife has been given more power than the husband. This has continued to increase up to the present day after the laws were amended several times.

2. The facts behind the Shubra Family Court case of 30 April 2011

On 12 December 2010, Taymur filed a motion in the Family Court of Shubra asking for the right to see *(aḥaqqiya fī-ruʾya)* his two daughters, Manal and Lubna, once a week as well as the right to have them stay at his home (*istiḍāfa*) once a month.

According to the summary of the facts included in the decision, the couple had married in 1996, the marriage had been consummated (*maʿa al-dukhūl wa-l-muʿāshara*) and two daughters were born to the couple, Manal in 1997 and Lubna in 1999. Both were in the custody of their mother but the father complained that his wife had deprived him without any reason of the right to see them (*manaʿathu min ruʾyatihimā dūn waǧh ḥaqq*) even though she was still under his authority (*mā zālat fi ʿiṣmatihi*) and owed him obedience (*taḥt tāʿatihi*). After failed attempts by the court's conciliation office to reach an amicable settlement (*taswiyya waddiyya*), he resolved to take legal action. The two parties, each represented by their lawyer (a female lawyer for the husband), and the representative of the public prosecutor's office had attended the hearing that took place on 27 March 2011.

The court, comprised of three judges, had proposed conciliation (*ṣulḥ*) to the parties but they refused, and the case was postponed for a month, until 24 April 2011. As it turned out, it was a holiday (Coptic Easter), so the decision was delivered on 30 April 2011.

3. The decision of the Shubra Family Court

The Court decided to allow the father to host his daughters on the first weekend of each month and to see them during the other weekends.

3.1. Regarding accommodation

In order to accept the father's request regarding accommodation, the Court referred to several legal grounds, including international law.

3.2.1. International human rights law

The Court first referred to the provisional Constitutional Declaration adopted by the Supreme Council of the Armed Forces on 30 March 2011 to replace the 1971

Constitution that had been abrogated on 13 February 2011 after the fall of Hosni Mubarak. According to Article 56 of this Declaration, the Supreme Council of the Armed Forces was to undertake the administration of the affairs of the country, including the representation of the state at international level and the conclusion of international treaties and agreements. Article 62 of the same Declaration added that all laws and regulations decided before the promulgation of the Constitutional Declaration were to remain in force as long as they had not been modified. The court considered that international conventions ratified by Egypt were therefore to remain in force too.

The court then invoked several international conventions ratified by Egypt. It referred to the Convention on the Rights of the Child and in particular to Article 3, according to which in all actions concerning children, the best interests of the child shall be a primary consideration; to Article 9, by which states undertake to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests; and to Article 18, by which states shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

The judge also invoked the African Charter on the Rights and Welfare of the Child (Art. 19) ratified by Egypt in 1999, according to which every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. The Charter also affirms that no child shall be separated from his/her parents against his/her will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.

3.1.2. Egyptian legal and religious norms

The court then pointed out that the two young girls were under the age of 15 and were therefore in the care of their mother. It added, however, that it was recognised (*min al-muqarrar*) by *sharīʿa*, by *fiqh* and law (*qānūn*^{an}) that it was prohibited to deprive a child of the right to receive care (*riʿāya*) from their father, especially since he is the one who covers their expenses for food, clothing, housing, medical care and education.

The Court concluded that it saw no legal impediment (*māniʿ qānūnī*) in allowing the father to house his children, especially since the mother had presented no means of defence. The judges therefore authorised the father to receive his daughters at his home on the first Thursday of each month, for 24 hours, from Thursday evening at

seven p.m. until Friday evening at seven p.m., provided that he undertook to deliver them back to their mother.

3.2. Right of visitation

With regard to the right of visitation, the court recalled that according to Article 20 of law No. 25 of 1929, as amended in 1985 by law No. 100 and by law No. 4 of 2005, each parent has the right to see his/her child but that this right cannot be enforced by force (*qahr*[an]). However, if it is not respected without excuse (*bi-ghayr ʿudhr*), the custodial parent may have custody of his/her child temporarily withdrawn for the benefit of the following beneficiary in the list.

The court also recalled that in accordance with Article 5 of ministerial decree No. 1087 of 2000, the duration of the right of access of the non-custodial parent cannot be less than three hours per week and must take place between nine a.m. and seven p.m., preferably on a day off so as not to disrupt the child's schooling.

The court stressed that the fact that the father had brought the case to the court proved the failure of the parents to organise access rights by mutual agreement, which was also shown by the fact that the mother did not present any plea of defence.

Based on the report of the sociologist and psychologist who examined the case before it was submitted to the court, the judges decided that the most suitable time for the father to access his daughters was on Fridays from one p.m. to four p.m. and that these visits would take place at the Sharābiyya Youth Center (*markaz shabāb*), except in the weeks when the father would host his daughters.

4. Analysis of the Court decision

4.1. Custody in Egyptian law

The question of the visitation rights of the non-custodial parent has been the subject of heated debate in Egyptian society for several years.

4.1.1. Allocation of custody to the mother

Custody (*ḥaḍāna)* of the child in case of the separation of their parents is regulated by Law No. 25 of 1929 as amended in 1985 and 2005. The 1929 law (Art. 20) made a distinction according to the sex of the child: it set the custody age at seven for boys and nine for girls, after which the child should be taken from their mother and entrusted

to their father. However, the judge had the power to extend the custody rights of the mother up to nine years for boys and to eleven years for girls, when the interests of the child so required (*idhā tabayyana anna maṣlaḥatahum taqtaḍī dhālik*).[4] The law therefore followed the traditional solution in Hanafi law where the mother is entrusted with the rearing of young children before handing them over to their father, and where the duration of maternal care of daughters is longer than that of sons.[5] In 1985, the law was amended (Art. 18bis2) to extend the custody rights of the mother until the age of twelve for girls and ten for boys, with the possibility for a judge to extend this to fifteen years for boys and up to their marriage for girls, if it appeared that their interest so required. In 2005, the law was amended again (Art. 1 of Law No. 4) to raise maternal custody of both daughters and sons until the age of fifteen. After that age, the judge will ask them to choose between their mother and father but will not be bound by their opinion.

During the entire period of custody, the father must pay an alimony to the mother (*aǧr al-ḥaḍāna*) to compensate for the care provided to the children. He must also pay a pension for the maintenance of his children (*nafaqat al-awlād*). However, in the event of an extension of custody by the judge, only the child's pension continues to be paid.

If the mother, as a custodian, is entrusted with the day-to-day care of the children, the father is assigned guardianship (*wilāya*) over the person and the property of the child. He is responsible for managing the child's property until he/she comes of age and for making the most important decisions regarding him/her. Egyptian law is therefore based on the traditional distribution of responsibilities between the father who exercises guardianship over the person and the property of the child while the mother is entrusted with custody in their younger years. Furthermore, the Egyptian legislator takes it for granted that every mother is affectionate, close to her child, understanding and protective, while a father cannot have the same qualities.

If the mother can no longer provide custody, the law of 1929 (Art. 20 para. 5) as amended in 1985, specifies the order in which custody must be distributed among the relatives of the child: the mother of the mother is the first in line to exercise custody after the mother, then the mother of the father, then all female relatives of the mother and the father, then the father and all male relatives on both sides.

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4 The Courts often agreed to extend a divorced mother's custody for two years when the father had remarried. See Kholoussy 2010: 120–121.

5 This traditional Hanafi solution had also been codified in the Qadri Pasha Code of 1875 (Art. 391).

The main case in which the divorced mother is deprived of custody is when she remarries with a 'stranger' to the child from the point of view of the child's kinship. Although no law currently in force in Egypt provides for the forfeiture of the mother's right to custody in the event of remarriage to a man who is not a relative of the child within the prohibited degrees, court records show that forfeiture is often pronounced by judges in application of the prevailing opinion within the Hanafi school. This is in accordance with Article 3 of the preliminary provisions to the promulgation of law No. 1 of 2000 that provides that if the law is silent on a certain matter, the judge shall apply the prevailing opinion in the Hanafi school.

4.1.2. The father's visiting and accommodation rights

Article 20 of the 1929 law, as amended in 1985, grants both parents and, in their absence or in the event of death, grandparents, a right to "see" (*ḥaqq al-ruʾya*) their minor children or grandchildren. If the meeting cannot take place on the basis of an agreement with the custodian, the judge must arrange the visit. According to Law No. 1 of 2000 on procedure in personal status cases (art. 67) an executive order of the Minister of Justice was to determine the conditions under which the visitation right takes place. The Executive Order No. 1087 of 2000 decided that the non-custodial parent is entitled to see his/her child for a minimum period of three hours per week between nine a.m. and seven p.m., preferably on a day off so as not to disturb the child's school life (art. 5). The meeting can take place in a sports or social club, a youth protection centre or a child protection house provided there is a garden, or in a public park (art. 4). There is no provision in the law regarding housing of the children by the non-custodian parent or even receiving them in their house during daytime. Legally, therefore, the father cannot claim the right to have his children visit him at his home without the mother's agreement.

Several bills have been drafted, both before and after 2011, to reform visiting rights and enhance divorced fathers' rights of access to their children. After the uprising of 2011, divorced fathers took advantage of the wave of freedom brought about by the fall of Mubarak and formed associations to expand their rights for joint care after divorce, blaming the current visitation conditions for operating in a climate of hostility and lack of privacy, not conducive to the establishment of an emotional bond with their children.[6] To pressure public opinion and institutions, protest groups went so far as to organise sit-ins in front of al-Azhar University, the Ministry of Justice and the newly elected parliament. They called for the resignation of the mufti and sheikh of al-Azhar, blaming them for having approved the laws currently in force, which were contrary to the *sharīʿa*. It may be paradoxical that they were calling for the respect of Hanafi law

6 For a study of the arguments raised by these associations, see Sonneveld and Lindbekk 2015.

with regard to the age of custody that they wanted to be seven for boys and nine for girls, while against the implementation of the same Hanafi law with regard to the list of relatives that may have custody of the child after the mother and which excludes fathers.

On the opposite side, groups of divorced mothers replied that, most often, fathers do not pay alimony for their children, do not use their visiting rights, and that giving them a right to have the child stay in their home would risk multiplying the cases of abduction of children, with fathers refusing to return them to their carers. They added that existing laws were not based on concepts imported from the West but were in accordance with the principles of *sharīʿa* and that the reforms invoked by the groups of fathers would have a negative impact on the well-being of their children.[7] The People's Assembly was dissolved in June 2012 without the draft laws having been adopted or even discussed in plenary.[8]

The debate arose again at the end of 2016. A reform bill proposed that fathers could have their children stay with them at their home two days a week as well as for one month during the summer holidays[9]. It was taken up by the opposition party al-Wafd, but the bill was rejected by parliament for violating the rights of women, without any reflection on the best interests of the child. The different parties involved each defended the interests of the father or the mother, but the best interest of the child was never at the heart of the discussions.

4.2. The reasons behind the Shubra Family Court decision

The decision of Shubra Family Court may have been taken in the euphoria of the fall of Mubarak and the high expectations of Egyptian society regarding the establishment of democracy and respect for human rights and international standards. Other reasons may be more specific to the case. Indeed, the parents were not divorced but only separated. As mentioned at the beginning of the decision, the mother was still in her husband's *ʿiṣma* and had to obey him even if they were not living together anymore. Legally, the husband could have filed a case requiring her to remain obedient to him and come back and stay with him with his daughters, on penalty of losing her

7 Sonneveld and Lindbekk 2015

8 In November 2014, al-Azhar University published a fatwa stating that the custody age as stated in the law should not be changed and that the father should not have his children to stay in his house without the mother's agreement.

9 Sayed Ahmed 2016.

maintenance (*nafaqa*) rights. It may be that this was the reason why the mother did not try to present any plea of defence.

Another reason, also specific to the case, may be the fact that the two parents lived separated but in the same district, street and even in the same complex of buildings in the popular district of al-Sharābiyya. It is therefore to be expected that both the mother and the judge were confident that the mother would be able to keep an eye on her children and that the risk of abduction was less high.

This case, however, is not isolated. Mansoura Court of Appeal, for instance, quashed a family court judgment which had denied a divorced father the right to host his son during holidays and vacations.[10] The Court held that since there was no provision in Egyptian law regulating accommodation of a child by their father, the judge had to apply the prevailing opinion within the Hanafi school, in accordance with Article 3 of the promulgating law of law No. 1 of 2000. In childhood, clarified the Court, the child needs their mother, while later they need to train themselves intellectually (*tathqīfa*) and learn discipline (*taʾdībiyya*). The Court added that according to the Hanafi school, this second stage begins when the child reaches the age of seven. The judge added that even though custody is often considered a right of the father or the mother, it must be considered as a right of the child. Their interest must prevail and has to be taken into consideration by the judge.

In this case, the Court of Appeal held that since the child was over seven and was able to dress and feed themselves, there was nothing preventing their father from hosting them two days a week as well as during holidays and vacations. Accommodation was in the best interest of the child because it allowed them to get closer to their father and to know him better, to strengthen their bonds, to make them more obedient and to forge a more virile character while maintaining contact with their relatives. The judge added that the mother would suffer no prejudice as a result of this short-term temporary accommodation.

5. The best interests of the child

In 2008, the Egyptian 1996 Child Law was amended to require that the best interests of the child (*maṣlaḥat al-ṭifl al-fuḍlá*) prevail "in all decisions and measures relating to children regardless of the party which is at their origin or which applies them" (Art. 3). The 2014 Constitution also mentioned the best interest of the child for the first

10 Mansoura Court of Appeal, Case No 280/60, 10 February 2009.

time: “The State shall endeavour to achieve the best interest of children in all measures affecting them” (Art. 80 para. 6).

Egyptian courts attach paramount importance to the protection of the best interest of the child in custody cases. However, this concept is a very difficult one to define. Neither the International Convention on the Rights of the Child, nor Egyptian law, provide a definition. Both refer to the interpretation which is given by the authorities responsible for implementing their provisions and in particular to judges.

Egyptian case law on custody rests on a very precise conception of what constitutes the best interest of a male child: he is to be raised by his caring mother during his youngest years, followed by his father who will train him intellectually and instil discipline and manhood in him. Tearing him away from his mother during this period when he is not independent would therefore be prejudicial to him. For Egyptian courts, it goes without saying that the mother should have the main responsibility in caring for a male child in his first years. It was only after finding that the child in question was autonomous that Mansoura Court of Appeal considered that he could stay with his father from time to time, implying that the father would not have been able to take care of his young child alone.

Furthermore, although the judge did not challenge this provision, a visitation right of three hours a week violates the Convention on the Rights of the Child and the other human rights instruments he mentioned, which stress the importance for a child of seeing both parents.

The law assigns significant powers to judges in determining the best interests of the child, and invites them to determine such an interest on a case-by-case basis by prioritising different conflicting interests. In practice, however, judges rarely look for the child's interest in the factual circumstances of the case submitted to them, and systematically assume that it is in their best interest is to stay with their mother during their youngest years, followed by their father in their later years.

Moreover, legislative reforms have extended the duration of maternal custody, unifying rules between girls and boys, and allowing a child of over 15 years of age to express their preference. At the same time, paternal rights to custody have been increasingly limited. In addition, since the amendment of the Child Law in 2008 (Art. 54 of Law No. 126) the right to assume educational guardianship (*wilāya taʿlīmiyya*) over her children and to supervise their education has been transferred to a mother who has custody: previously this was the responsibility of the guardian father. Although an increasingly powerful movement had been advocating for the right of

fathers to exercise joint care of their children, the law has not been amended yet. However, some judges, like those at Mansoura and Shubra courts, did not wait for the legislator to amend the very controversial rules. Instead they decided to look for what they considered to be the best interests of the child on a case-by-case basis, relying on the different legal sources available, the constitution, international conventions and *fiqh*.

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A bill amending the personal status law was introduced in parliament in February 2021 by the Egyptian cabinet.[11] Among the measures included is the proposal to modify the list of those of a child's relatives of entitled to custody: the father would now come fourth, after the mother and the two grandmothers. Furthermore, he would be granted the right of accommodation of his child but would face a prison sentence up to six months and the loss of his right of accommodation if he did not return the child to their custodian. If voted into law, the bill would also require the father's permission for the mother to travel abroad with her children. The bill also includes a provision intended to diminish the mother's financial and administrative rights over the child (*wilāya*).

The proposal sparked widespread controversy and backlash, especially from feminist and human rights organisations who complained about their complete exclusion from the drafting process of the amendment. An online campaign also criticised the bill under the hashtag "guardianship is my right" (*#al-wilāya_ḥaqqī*, in Arabic).[12] In the best interest of the child?

11 Hamed Mohammed Hamed, Mohammed Ali 2021.

12 Mada Masr, 18 March 2021.