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Child abduction and relocation a Lebanese Perspective

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Introduction

The Lebanese constitution in its article nine stipulates that:

> *"The freedom of conscience is absolute. With compliments to God, the State respects all confessions and guaranty and protects their free exercise on the condition of not interfering with Public policy. It guaranties also to all populations, to whatever rite they belong, the respect of their Personal statute[1] and their religious interest[2]"*

The Lebanese system regarding the jurisdiction in the Matter of family cases, the System is unique, special courts has jurisdiction to solve the family disputes, Religious courts that are not affiliated to the Judiciary system of the State. The system of law operating in Lebanon in relating to Family matters is complex and is based on a conflict between different religious laws and authorities and the State ordinary Judiciary. Basically, we don't have in Lebanon one common code or act promulgated by the Lebanese State in such matters, but we have different religious laws and customs edited or applicable in front of the different religious courts as we will describe herein further.

Lebanon is composed of eighteen recognized religious families out of which the Israeli and four Islamic sects; all others are Christians. Each of the Christian sects has its own religious court called the Rouhi Court (spiritual or ecclesiastical court) that has jurisdiction to decide about the family matters of the families constituted under its authority, same for the Islamic sects. Each one has its own Court and applies special laws: The Sunni has the Sunni Sharia Courts, The Chi'a has the Jaafarit Sharia Courts, the Alawite the Alawite court and the Druze (which is not recognized by the other three as Islamic) the Mazhabi Courts. The Israeli Courts does not exist anymore.

Michel Shiha said in an article published in the newspaper "*Le Jour*", on July 30, 1947, while explaining the above mentioned article 9 of the Lebanese constitution: "*that the personal statute system in Lebanon is a regime of federal community law… the diverse Lebanese communities constitutes between themselves a federal group having the same powers and same autonomy*"[3]. It is widely recognized by Lebanese courts, even by the Lebanese Supreme Court, a secular court of the civil judiciary who has some limited competence in the matters of family law that "*the Lebanese system of family law gives the priority to the religious system*"[4].

So as a matter of principle, religious authorities have predominant jurisdiction over matters related to the family and especially matters of personnel statutes (matters of marriage, divorce, alimonies, child welfare etc…). They have also the exclusivity in matter of hearing and organizing marriages and marriage agreements. The Lebanese secular officials does not have any authority, their role is only to register the marriage agreements organized by the religious authorities. In some other cases there is an exceptional competence of the state

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[1] By Personal Statute the Lebanese constituent meant statutes, laws applicable the religions and rites.

[2] This text was voted at the time of the French mandate in 1926 and is still valid until our days. France governed Lebanon between 1918 and 1946. During this period of mandate the French high commissioner had legislative powers. He had the power to promulgate decisions having the power of a law

[3] As cited by Me Ibrahim Traboulsi, "The latest developments in matters of personal statutes in Lebanon and Egypt" *in Colloques du Cedroma, Vol. I, 2004, p. 215.*

[4] C.cass., 5th Chamber, no 159, 4 Jul. 2006, Rihani vs Rassi, Al Adl 2007, II, p. 167.

judiciary especially in matters where marriages are concluded abroad between Lebanese or between Lebanese and foreigners[5] in the civil form (civil marriages).

Basically each religious community has jurisdiction among its followers. This can be clearly interpreted for the constitution's article 9 above. So the Maronite Christian community authority has jurisdiction over Maronite Christians, Orthodox Christian religious authority over orthodox Christians; otherwise, Muslim Sunni religious authority over Sunni Muslims, Shia religious authority over Shia Muslims.

So by applying these principles, it is in practice to consider that the matters related to the movement of children within the Lebanese Borders and across these borders matters related directly or indirectly matters related to personal statutes and therefore are subject to the competence of the religious authorities and their courts according to the system explained above. It is jurisprudence within the Lebanese courts that the religious court's jurisdiction is mandatory and is a matter of public policy[6]. So by matter of principle parties even upon entering into marital relationship spouses are not entitled to agree on waiving the competence of the religious courts in favour of the ordinary judiciary in Lebanon or any other jurisdiction in Lebanon or outside Lebanon. They are not also entitled to waive the application of the special law applied by each of the religious courts first because in Lebanon we don't have a general law applicable *erga omnes*, and second because that religious courts , because they are special courts are entitled only the laws, regulations and principles of laws that are assigned to them.

In a dogmatic point of view this would be the system that is considered to be the applicable one whenever we have a matter related to a child including matters of legal custody and responsibility or matters related to the legal or illegal movement of the child within the Lebanese territory or across the borders. But if we want to follow a pragmatic way of think we have other laws that have general nature that might have some interference getting the matter of the mobility of children outside the scope of the religious jurisdictions. There are some special laws, especially having criminal aspects dealing directly or indirectly with the matter such as the criminal code and the law on Children infringing the law or subject to danger protection. This is without saying that in some cases foreign laws finds their way to application either through enforcing foreign court orders or through applying foreign law on matters related child welfare. We shall therefore, for a comprehensive approach of the matter of child mobility from a Lebanese law perspective explain the matter as decided by religious authorities (I) and limitations to the jurisdiction of the Religious authorities whether by some Lebanese statutory laws that has criminal aspect (II) or sometimes in reference to some foreign laws in disputes showing an international component (III).

I- Child abduction and relocation in the laws of the religious courts in Lebanon

As we explained in the introduction of this paper, each religious authority is competent to look over the personal statute matters of the people following it by law. Therefore some of the laws of personal statutes addressed the matters related to the child mobility by application of the applicable personal statute law in regard to parental responsibility and child custody. There is a basic principle in regard of Children movement that the parent holding the parental

[5] Article 79 of the Lebanese code of civil procedure
[6] Mount Lebanon court of Appeal 12th Chamber, 9 May 2007, *Al Adl* 2008 p. 122

authority or has the legal or physical custody of a child cannot move with him/her outside the borders of the Lebanese Republic without the consent of the other parent or the reference to the competent religious court. So as a general rule it is forbidden for a parent or a custodian or anyone having the parental responsibility over of child or legal or Physical custody over him to travel across the borders with him. This is the rule. There are two exceptions to this general rule: 1) the first is with the consent of the other parent, 2) the second is the recourse to the court.

Based on this rule, all courts without exception, even the courts of the ordinary judiciary, adopted, upon request of parents or one of them, the Travel Ban injunctions in a very wide and general way to prevent any movement of children outside the country[7].

This general rule widely applied found its way to legislation. In 1949 in the personal statue law of Christians Catholics (article 127). In 2003 the new law on Personal statutes for the Greek Orthodox addressed this matter too (article 59). Both texts clearly stated that the custodian parent of the one who has parental authority is not allowed to travel with his child or children with the consent of the other parent or obtaining the express approval of the judge or the court[8].

Another example of regulation for the child mobility can be found for Muslims in the decision 46 of the Sharia Supreme Council organizing the family regulations for Muslim Sunni. This text, adopted in 2011, addressed the matter of mobility of children inside and outside Lebanon in an extensive way in accordance with the rules regarding the parental authority and Child Custody.

According to this decision, that have force of law, the mother or any other custodian of the child is not entitled to travel with the child whether living with or separated from the father or the Tutor (holder of the parental authority) without the written notarized consent of this father (or the tutor) or by referring to the court, even if she is taking the child (or children) where she first got married with father of the child. Same rule applies for the father (or tutor) when the child is within the legal custody of the mother. The text give express authority to the Sharia Judge to order a travel ban injunction or to order a permission to leave injunction by reference to the interest of the child

The text that is organizing the movement of children in Muslim Sunni families is even wider. It organizes the internal movement. Although the country is very small, the text of article 23 of the decision 46 clearly states that the child shall remain in the town where his father (turor-holder of the parental authority) is living and the mother is not authorized to taken him/her out unless she is taking him/her to her home town where she has male close relatives.

So even if texts are different there is a common ground in the organization of movement of children living in Lebanon which is the consent of both parents when the children are at young age within the custody of the mother no one can travel with them outside the borders of the

[7] These same travel bans injunctions were widely abused and were used in an international child abduction process into the Lebanon to prevent the abducted child from returning to the country where he was originally abducted from

[8] Article 127 of the Personal statutes Law of the Catholic communities: "In the case *the custodian mother of the child is separated from the father, she is not entitled to travel with the child from a country to another without the prior consent of the father. Same for the father who is not entitled to take the child out of the country of the country of the mother without her prior consent in the case she is a custodian unless otherwise decided by the court on both cases"*. Article 59 of the Orthodox Personal statute law: "*The custodian is not entitled to travel with the child without the consent of the other party or the approval of the court"*

Lebanon without the prior consent of the other parent. The judges have always the right to decide to ban from or grant the custodian parent to travel with a child if it is in the interest of this child

These are the principles of child movement and mobility in the Lebanese legal framework that are applicable which somehow meet the basic interest of children to stay in contact with both parents especially that this a right for the child recognized by international treaties that Lebanon adhered to among them the United Nations Convention on the Rights of the Child (CRC).

But what about the case where children move in to Lebanon? Especially when they were moved unlawfully according to the laws of the country or state where they moved from? Especially that the mechanism of the Hague convention on child abduction is not applicable since Lebanon as most of Middle Eastern countries did not ratify the convention. Outside some bilateral treaties that Lebanon signed with some countries to facilitate contact between children and parents especially when relocated to Lebanon there is no real legal framework organizing the movement of children from abroad to within the Lebanese Territory either lawfully or unlawfully, this not to say that there is no general rule regarding how to consider the legality of the movement of children to within the territories of the Lebanese Republic from abroad. Despite this legal practice has found in some laws and regulations especially laws and regulations of criminal nature a legal framework to try to resist to unlawful inbound child mobility

II- Child abduction and relocation within the jurisprudence of the criminal courts

The Criminal legal framework is not a general tool in matter of unlawful children relocation into Lebanon, despite the chapter in the Lebanese Criminal code dealing with matters of child custody and the wide authority of the Juvenile Judge that can grant interim residence orders by application of Law no 422 and the UNCRC as a child protection measure.

In fact this chapter is general and speaks about removing a child from the parent who ha parental authority whether tutorship or custody or refuses to bring him despite the presence of a court decision (so the texts incriminates both positive acts of removing the child from hi custodian and negative acts of not abiding to court decisions ordering a parent or anyone else to bring a child .

Article 495 of the Criminal code treats with positive removal and kidnapping of a child from his legal custodian. In a theoretical reading of the text of article 495, anyone, even a parent who positively remove a child from the parent who has legal custody of kidnap him from him shall be incriminated. If the removal done by a non-custodian parent cannot be considered as a kidnapping for factual reasons, but could be qualified as an intentional illegal removal or more commonly an abduction and therefore the committing person even if he or she is a parent can be incriminated. Nevertheless, precedents are very strict while applying this texts. In practice it was very difficult to incriminate a parent by application of the article 495 of the criminal code. Despite that nothing in the text shows that it is not applicable to a parent who wrongfully removes a child from the custody of the other parent who has the legal custodial authority courts and judges are not comfortable with incriminating a parent by application of this text. The court of cassation of Lebanon considered for examples that this text is not applicable and could not be used to incriminate a mother who wrongfully removed a child from the jurisdiction of Lebanon without consent of the father considering that the children were within her legal

custody at the time of wrongful removal[9]. In an another decision the 2nd Chamber of the Lebanese Court of Cassation, the Lebanese Supreme court decided that even if the mother was not a legal custodian of the children, she cannot be incriminated for removing the children according to article 495 while removing them to live with her when the father of the children was away[10].

Article 496, on the contrary was widely used in matters of Child wrongful removal. The text of the article 496 incriminates a parent (or a non-parent) who refuses or delays the execution of a court decision ordering the remittance of a child. The text of the application article 496 of the Lebanese criminal code is conditioned by the presence of a court decision. The scope of application of this text is wide. It covers not only the decisions ordering the delivery of the child to his legal custodian, but also decision covering visitation rights. So could be also incriminated the parent who refuses to abide by a visitation order based on the text of article 496. This text was used to incriminate parents who removes children from jurisdiction without prior consent of the other parent especially in the presence of a court order. For example the 3rd chamber of the court of cassation in Lebanon incriminated a mother, while custodian of her two children, removed them from the jurisdiction of the Lebanon to the US infringing to a visitation order that gave the father the right to see his children once a week. Even if it has wide scope of application article 496 can be used only in the presence of a court order to deliver a child for custody or visitation, but unfortunately could not be applied in the absence of such an order.

But what if a custody order or a visitation order was given by a foreign order and, despite this order, one of the parents brought a child to Lebanon? Could he be incriminated based on articles 495 & 496 of the criminal code? If we find it very difficult to incriminate a parent abducting his child in Lebanon according to the rules of the mentioned article 495, it is naturally and logically much more difficult to do it when the positive act of removal has been made in a foreign country. But what for the article 496? Especially in the presence of an order given by a foreign court that he is aware of ?

Foreign orders does not have legal force in Lebanon unless they were given exequatur, an enforcement power ordered by the Lebanese competent jurisdiction without revising the merits of the case. To be granted the exequatur, the foreign decision shall be given by a competent court according to the rules of the country where the decision was issued unless this competence is decided exclusively according to the claimant's nationality…; it shall be res judicata and has enforcement power in the Country under which flag it has been given; that the defendant has been notified the proceedings and due process followed; it shall be given in a country which laws accepts the enforcement of Lebanese decisions and lastly that this foreign decision does not contain anything against Lebanese laws of public policy . The Exequatur shall be refused in the case a decision has been finally issued within the same dispute involving the same parties by a Lebanese court or if a case involving the same dispute and the same parties is filed before the case that led to the foreign decision and is still being seen by a Lebanese court.

The jurisprudence of the court of cassation clearly considered that, when article 1014 stated the condition for the foreign court decision not to be in conflict with Lebanese Public

[9] Crim. Cass. 8th Chamber no 248, 18/10/2000, Sader Crim., p. 278
[1010] Crim. Cass. 3rd ch. No 56, 3rd of March 1999, Sader cim. 1999 p. 58

policy rules, these rules comprises the rules applicable to the merits in one hand and the procedural rules on the other hand and among them the mandatory jurisdiction rules.

I already explained that jurisprudence of the Lebanese courts considers that the religious court's jurisdiction is mandatory and is a matter of public policy. Therefore the risk is always present to have the exequatur refused for any order given by any foreign court in the matter of the child welfare, custody, residence, etc…

If this exequatur is finally granted (after opposition term passes or if an opposition occurs within the legal terms, the opposition is rejected), the foreign court shall be considered as if it was finally given by a Lebanese court and therefore could be enforced and could be used to incriminate an abducting parent.

We can understand from the all the above and from the jurisprudence that Lebanese courts have created what I can call a primitive system related to the movement of Children to try to prevent unlawful removal from jurisdiction (outbound relocation). The easiest way followed by the courts (religious or secular) is the recourse to issue Travel ban injunction immediately enforceable without notification usually given for an indefinite time. We are not exaggerating when we say that claims for travel ban injunctions are granted in the quasi totality of the cases. But by nature this injunction as an interim preventive measure. We saw that victim parents can recourse to the criminal jurisdiction to try to summon the guilty parent through criminal prosecution. We have explained that the outcome of such criminal prosecution is very relative and limited especially that the conditions of the criminal abduction of a child are not easily assembled. There is another way of summoning a guilty parent who wrongfully relocate a child in a more civil way. In the case a child is removed from the Jurisdiction of the Lebanese Republic, the religious courts can take civil sanctions the most famous one being removing custody rights from the guilty parent an automatic sanction according to the Decision no 46/2011 regulating the family matters of Muslim Sunnis (art. 24).

But what would be the situation if any of the Lebanese religious internal laws is applicable to the relationship in the family including matters related to child welfare and residence? Or, How shall we deal in the presence of a foreign court decision ordering a return of the child and deciding about residence of the child? Will we be able to enforce through enforcement mechanism in Lebanon? This shall be the subject that we will be studying herein the last part of this paper.

III- Application of foreign laws and enforcing foreign decisions

We shall deal in this last part with the situations in which a Lebanese Judge or authority will be in touch with a foreign legal component, basically in the presence of a foreign law claiming application or a foreign court decision that we are requesting enforcement

A- Application of a foreign Law by the Lebanese courts

We shall begin by stating that there is no common Lebanese law for personal statutes applicable generally to all situations where specific religious laws are not applicable. Such a situation can occur when none of the parents or the children are Lebanese citizens. But also in the case where Lebanese contracted a civil marriage outside the Lebanon (except the situation where both spouses are Muslims in this case the Sharia court and Sharia Law shall stay in force)

According to the decision no 109 LR (given by the French high commissioner on the 14th of May 1934 and which has force of law and still applicable until nowadays states that:

> *"The civil courts* (the ordinary judiciary) *have exclusive needed competence to look over personal statute cases in relation of one or more foreign national if at least one of them is a national of a country where personal statutes matters are subject to a civil law (contra : religious law) according to their applicable law"*

As for article 10 of the Decision no 60 LR given by the French high commissioner on the 29th of April 1936 as amended by the decision 146 LR of the 18th of November 1938 states clearly that :

> *"…foreign nationals, even if they follow a recognized faith in Lebanon that has an organized regime of personal statute, are subject to their national law in their personal statutes matters"*

Therefore foreigners coming from countries with non-religious family law tradition are subject to their foreign national law in matter of personal statutes as a matter of principle. We can find the *motus* behind such a privilege given to foreign nationals to have the personal statutes law of their home country applicable is because of the absence of a Lebanese general Law dealing with family and personal statutes matters. Religious laws in this situation cannot be logically claim application. We cannot for example apply catholic personal statute law on French catholic nationals just because they are Catholics. The situation in their homeland will never find it's way neither to a religious court and there is no Catholic Law applicable to their personal statutes. There is only one general law related to Family matters we can find in the French Civil Code called to be applied in front of the French Civil Judge. So by application of this law and in absence of a national law in matters of personal statutes and in the presence of amended article 10 of the Decision 60 LR, and whereas both parties are foreigners they shall not be subject to any of the Lebanese religious special laws but to their foreign law. The case would have been easy in the case both parents had same nationality. The applicable law would have been the national law of the country of their common nationality[11].

But in the case where the foreigners involved in the case are from different nationalities (excluding the Lebanese Nationality), the solution is more difficult to adopt. Which foreign Law will have predominance? We can imagine a situation where the father is from a nationality, the mother is from another. The child is assumed having the nationality of one or both of his parents. What law shall be called to be applied? The majority of jurisprudence nowadays refers to the Nationality of the Husband [12] or the father of the Children when the parents are not bonded by a legal marriage. It is the Law of the father according to the Lebanese rules of conflict that shall be called to be applied.

So matters of relocation of Children and their movement across border shall be dealt with according to the national law of the father, this shall include the answer to the question whether a parent needed the consent of the other parent to remove or retain a child permanently or for

[11] Tbl. Mixte No 335, 10 Jul 1940, Rep. de Jur. Mixte Vol II. p. 857, no 26
[12] First Instance of Zahle 16 May 1961, Al Muhami 1962, p.85; Civ 2nd no 1, 20 Jun 1980, *Al Adl* 1980 p. 90

a limited time from the Lebanese jurisdiction to another jurisdiction without this being considered as an abduction.

In the case the Lebanese courts are seized, and they rule that they are competent to look at the case, they shall assess the content of the foreign law and rule in accordance with the latter. Including international treaties and conventions the foreign country has adhered to or ratified such as the Hague conventions, the Luxembourg convention, the Brussels II and Brussels II *bis* conventions. These conventions shall be taken into consideration by the Lebanese courts when applying the foreign Law on the matter of the removal on the children from the Lebanese Jurisdiction or even when children are removed or abducted to the Lebanese jurisdiction.

B- Enforcement of a foreign Court Decision in matter of Child Custody, welfare, residence …

This last part shall deal with the situation where a party upholds a foreign court decision? A decision of immediate return to Jurisdiction, a contact decision, a decision regarding residence and parental authority etc… The question will be whether this foreign decision given by a foreign judge be granted enforceability in Lebanon? As explained quickly above, and according to the Lebanese law of civil procedure, to be able to be enforced, a foreign court decision shall be granted what we call the *Exequatur*. If this exequatur is finally granted (after opposition term passes or if an opposition occurs within the legal terms, the opposition is rejected), the foreign court decision shall be enforced as if it was finally given by a Lebanese court.

To be granted the *exequatur*, the decision shall be given by a competent court according to the rules of the country where the decision was issued unless this competence is decided exclusively according to the claimant's nationality…; it shall be *res judicata* and has enforcement power in the Country under which flag it has been given; that the defendant has been notified the proceedings and due process followed; it shall be given in a country which laws accepts the enforcement of Lebanese decisions and lastly that this foreign decision does not contain anything against Lebanese laws of public policy[13]. The *Exequatur* shall be refused in the case a decision has been finally issued within the same dispute involving the same parties by a Lebanese court or if a case involving the same dispute and the same parties is filed within the Lebanese Jurisdiction before the case that led to the foreign decision and is still in process in front of the Lebanese court.

The jurisprudence of the court of cassation clearly considered that, when article 1014 stated the condition for the foreign court decision not to be in conflict with Lebanese Public policy rules, these rules comprises the rules applicable to the merits in one hand and the procedural rules on the other hand and among them the mandatory jurisdiction rules.

I already explained that jurisprudence of the Lebanese courts considers that the religious court's jurisdiction is mandatory and is a matter of public policy.

According to article 1013 of the Lebanese code of civil procedure the *exequatur* is granted upon filing a claim that can lead either to the acceptance or the refusal of the request. The decision granting *exequatur* can be opposed within a term of 30 days of notification, during that period, the foreign order is not enforceable. The only exception is when the order is immediately enforceable (provisionary executable), without having to wait for the terms of

[13] Article 1014 of the Lebanese code of civil procedure.

recourse, as in the case of a decision given on agreed term. In this latter case the opposition and opposition term does not stop enforcement and foreign court order can be immediately be enforced after *exequatur* is granted without notification to the other party. In this case any opposition in which a matter of public policy is raised such as the presence of a Lebanese order or the mandatory Jurisdiction of the Lebanese Courts cannot prevent the Order of the foreign Court having the *exequatur* from being legally enforced.

Before concluding, I just want to highlight one important condition for a foreign court order to be granted exequatur in Lebanon and therefore acquire legal power to be enforced. This condition is in regards to due process. I shall repeat once again what art. 1014 of the Lebanese code of civil procedure is stating. It states that the defendant shall be notified the proceedings and due process followed as a condition for exequatur to be granted and among the document that has to be shown is documents that proves that proceedings has been legally notified to the parties or that parties are present or represented during foreign proceedings. We know that most contact orders, or orders of immediate return to jurisdiction and sometimes (many times) the residence orders and orders amending parental authority and children custody are given after the abduction has been made, sometimes without even notifying the abducting parent the procedure and we have faced such situations in practice.

Conclusion

The matters related to child movement across the borders does not have in Lebanon fixed rules that are applied. The legal science has to recourse to all kind of laws, religious, civil and criminal laws in addition to International conventions and treaties and bilateral treaties to assemble some primitive elements in relation of child relocation and inbound and outbound unlawful movement of children across the border. We can understand that according to the internal law applicable where religious laws are applicable, the matter of child movement is upon the child father's control in all time. A mother cannot travel with the child unless she has the permission of the child's father. Or she must refer to the court to obtain such a permission that shall theoretically take into consideration while assessing whether to grant or refuse the permission the best interest of the child. The father's right limits is only to the period when the child is within the custody of his mother. During this period the father is not allowed, without the permission of the custodian mother to travel abroad with the child. Sanctions to the unlawful removal from country could be civil (in religious laws) such as the removal of custody rights or criminal according to article 495& 496 of the Lebanese criminal code that incriminates kidnapping, child abduction and refusal to abide by court orders in matter of children. The practice shows how relative could be the solution. And how difficult to obtain real results by following such a system, even in the presence of a foreign court order or when a foreign law is called to be applicable. In our opinion the real solution shall be by drafting a new law special to mobility of children offering real tools to prevent unlawful movements of children and to guarantee the return of the children to their "habitual residence"