Can Non-Muslim Courts Bring Legal Change in Sharia Laws?

Hajed A. Alotaibi

1 Department of Islamic Contemporary Studies, College of Science and Humanities at Hotat Sudair, Majmaah University, Riyadh, Saudi Arabia

Correspondence: Hajed A. Alotaibi, Department of Islamic Contemporary Studies, Faculty of Science and Humanities at Hotat Sudair, Majmaah University, 11952, Riyadh, Saudi Arabia. Tel: 966-5-8002-8990. E-mail: h.alotaibi@mu.edu.sa

Received: September 5, 2019      Accepted: October 9, 2019      Online Published: October 30, 2019
doi:10.5539/jpl.v12n4p1                  URL: https://doi.org/10.5539/jpl.v12n4p1

Abstract

The transformative and regulatory accommodation model addresses practical challenges to accommodate religious laws and courts in the secular and democratic regimes. There is a strong evidence against the jurisdictional competition between secular and religious courts under defined conditions. There is no concern regarding the Shariah courts in the non-Muslim democracies, as majority of the country’s ethno-religious groups control the civil and rabbinical courts. In this regard, there is a need to mitigate the negative impact of Muslim Family Laws (MFLs) by the civil courts in non-Muslim majority countries because MFLs imply certain disabilities and limitations upon the displayed rights of women and children. To address these issues, the present study aims to discuss the possibilities and challenges faced by the multicultural and pluri-legal accommodations by focusing on the Islamic law and institutions within the non-Muslim democracies. The results have shown that the reformation of rules and procedures internalize certain principles and discourses due to increased compliance of religious courts with the high court rulings. Increase in the number of Muslim judges on civil courts would help to overcome lack of legitimacy in the perspectives of the Muslim minority that is the main reason of shortcomings of both ex post and ex ante oversight mechanisms.

Keywords: family courts, family law, Islam, legal courts, Shariah law

1. Background

Multicultural accommodations confer upon positive rights of minimal groups for protecting their different religion-legal traditions specifically when the rights of individuals are associated with well-intended group throughout the communities. The significance of the right to exit and the role of the state to confirm fundamental rights to group members varies with respect to the content and the degree. For instance, a hands-off policy should be adopted by a liberal state toward illiberal minority cultures to retain a right for group members (Sezgin, 2017). The significance of the internal autonomy of non-ruling minority groups is emphasized for making recommendations for justifying severe physical violence through state intervention communal affairs. These contributions are removed or are largely abstract from the challenges of accommodating religious laws and practices throughout a democratic framework. These contributions understand the multiculturalism to identify and formally conceptualize religious courts or laws throughout their legal systems, precisely (Sezgin, 2018).

Custom or religion-based legal orders are acceptable, when the individuals are given the right of choosing between secular and religious laws to get free from their cultural communities. It was not accepted by the scholars, who rejected the pluri-legal accommodations in the family law, categorically. There is a significant difference in the approaches adopted by different scholars based on the extent and content of right to either exit or explain the role of state to guarantee about the basic rights to group members. In a similar context, a study conducted by Kitromilides (2012) argued that hands-off policy towards illiberal minority cultures should be adopted by a liberal state, so that the right of group members to exit is retained. Similarly, the significance of internal autonomy of non-ruling minority groups was emphasized by Barzilai (2010), who suggested that there are only rare instances of severe physical violence justifying the state intervention in communal affairs.

Four countries have made efforts to bring sharia law to their system, which include Ghana, Israel, India, and Greece. In this regard, two important questions have been emphasized completely in the literature. These questions are the central focal point of this study, which show the role of secular state institutions to ensure
fundamental rights and liberties are respected by religious courts in their decision-making. In addition, this study will address whether the association of secular and religious laws and courts is related within a democratic area.

The practical challenges in accommodation of religious laws and courts in the secular and democratic regimes are addressed by using the transformative and regulatory accommodation model that is developed over the last two decades. For instance, Hacker (2012) developed strong evidence against the jurisdictional competition between secular and religious courts under defined conditions. This competition is likely to help in conveying internal reform in religious norms and practices. Majority of the country’s ethno-religious groups control the civil and rabbinical courts; however, there is no concern regarding the Shariah courts in the non-Muslim democracies. Therefore, State-enforced Muslim Family Laws (MFLs) tend to place certain disabilities and limitations upon the displayed rights of women and children. There is a need to mitigate the negative impact of MFLs by the civil courts in non-Muslim majority countries through either direct or indirect changes in the Islamic laws and courts.

The present study significantly contributes towards explaining the possibilities and challenges faced by the multicultural and pluri-legal accommodations by focusing on the Islamic law and institutions within the non-Muslim democracies. This study is primarily based on secondary data extracted by the researcher through observations and rulings of litigants, experts, lawyers, and judges in three non-Muslim countries including Greece, Israel, and India between 2004 and 2015. The researcher has investigated several published and unpublished court decisions for this study. Electronic subscription-based databases were used to obtain civil court decisions. The rulings of judges and civil courts were extracted by using keyword searches such as Hadith, Nikah, Faraiz, Quran, Sharia, Muslim Family Laws, Civil Courts, and Sharia Courts.

The article is organized as follows. Section 1 presents general insights on the civil-religious court relations, presenting insights of both civil courts and Muslim courts. Section 2 presents information about the civil courts and Muslim family law practiced in non-Muslim countries. In the 3rd section, jurisdictional competition and internal reforms are explained for both Greece and Israel civil courts. Civil court rulings and decisions of judges are discussed in this section, too. Section 4 presents the regulations of sharia courts from the perspective of Indian Muslims. The rulings and decisions, in this section, are presented in general and practical aspects. In conclusion, the overall experience of non-Muslim countries selected in this study towards civil courts and sharia courts has been summarized. Lessons learnt from the cases have been discussed for future implications.

2. Civil-Religious Court Relations

Muslim litigants can take advantage of forum-shop and concurrent jurisdictions between religious and civil laws/courts with lower civil courts. Jurisdictional competition is promoted through forum-shopping. When an individual of the rival forums systematically fails to address the issues of a specific individual’s class whereas pro-plaintiff measures are increasingly adopted by the other for increasing the competition for textual and clientele authority (Bowen, 2018). The pressure might be felt by religious courts for undertaking self-reform to retain their clientele and authority in the face of such competition from civil courts. In religious law and institutions, lower civil courts are an essential but indirect source of internal change. Ex-post constitutional review of religious court rulings is conducted by hierarchical superiors of higher civil courts based on a limited and equivocal role. Superior courts impose the burden of reporting alleged human rights violations as well as breaches on at-risk groups and vulnerable groups (Lindsey, 2016).

The religious courts share jurisdiction in majority of the non-Muslim countries that is concurrent with lower civil courts. It is possible that Muslim litigants are able to take advantages from the concurrent jurisdictions that are present in the religious and civil courts. The promotion of jurisdictional competition through forum shopping was suggested by Shachar (2001). The failure of rival forms to address the concerns of a certain class of individuals increases the competition for clientele and textual authority. However, it may adopt provision of larger maintenance that highlights the increased pro-plaintiff measures (Klerman, 2014). Religious courts experience pressure for undertaking self-reforms to retain their clientele and authority to face competitions from the civil courts. The pressure of lower civil courts increased on the religious judiciary, when there is an increase in the jurisdictional competition, which is likely to impose greater chances of adopting market-induced reforms in the MFLs.

The lower civil courts are considered to be significant but indirect source of bringing about internal change in the religious laws, based on the conceptualization provided by Shachar (2001). In contrast, the higher civil courts including the constitutional courts and supreme courts have the authority to conduct ex-post constitutional review of the religious court’s rulings and they are the hierarchical superiors of religious courts. These courts also have more equivocal but limited role. The burden of reporting alleged human rights breaches and violations
is placed on the vulnerable individuals, who have been pressurized to accept the jurisdiction of religious courts by the institution of ex post judicial review conducted by the superior courts. Therefore, it is suggested to rely on the adoption of additional ex ante oversight mechanisms, rather than the ex post review. Shachar (2001) argued that ‘change from within’ can be brought through continuous usage of ex ante oversight techniques. Moreover, religious judges need to exercise self-restraint to avoid clash with statutory laws and internalize the secular norms, voluntarily.

The reservations regarding the limitations of ex post review made by Shachar were suitable for the Shariah courts and secular high courts in the non-Muslim countries. The Muslim litigant finds it tough to challenge the decision of religious courts in a setting where majority controlled the higher civil court reviewed by the Muslim minority. Therefore, Muslim-minority setting experiences linguistic and ideological constraints on individual plaintiffs as they appeal against the rulings of communal courts. According to Shachar (2001), the limitations of ex post judicial review can be overcome through the adoption of complementary ex ante oversight techniques that would bring internal change in the religious courts. Different sorts of ex ante oversight mechanisms have been adopted by the MFL democracies for controlling the practices of Islamic courts.

3. Civil Courts and Muslim Family Law

Infringement of the natural justice principles and disregard for binding statutory rules are involved in sharia justices of the higher court of justice in almost every case that their disruption is restricted to cases involved in *ultra vires*. For instance, the HCJ ruled that it will be acting ultra vires, if a sharia court restricts itself to the religious law regardless of the secular legislation. The court continues to stop the application of secular laws responsible for sharia courts and reminded them that statutory laws will be ignored under their rulings (Mohammad & Kusrin, 2017). A pragmatic approach toward the HCJ is embraced by the first two generations that usually comply with secular laws for avoiding the civil judiciary relationship with direct conflict.

MFLs have been integrated in the legal systems of around 53 countries in the recent time (Sezgin, 2017). However, there is a significant variation in the manner and extent to which a country tends to incorporate MFL into its legal system. These countries might adopt either the conservative interpretations or liberal interpretations. Based on this variation, countries incorporating MFL can be grouped into three scenarios;

- Countries that integrate religious laws in the national system and also applicable at the civil courts with the approval of secularly trained judges.
- Countries that apply the specialized Shariah courts.
- Countries that apply the state-recognized religious authorities without the involvement of any formal court system.

Previously, the application of MFL in the legal system might affect the human rights of women and children (Esposito and DeLong-Bas, 2001). The members under constitutional and international law allowed the application of group-based rights based on the Muslim communities as there is often clash with the liberties and individual rights. Based on the transformative accommodation, the secular as well as religious courts are likely to share the jurisdiction through the establishment of specific subject-matter over separate complementary sub-matters. For instance, family matters that include alimony, custody, and property matters fall under the jurisdiction of civil courts; whereas the matters related to marriage and divorce are under the purview of religious courts. Individuals are offered concurrent jurisdictions by the religious and civil courts for transferring their disputes from one court system to another. This usually happens, when individuals know that the system of prevailing jurisdiction has failed to address their concerns. The civil courts are responsible for administrating MFLs and interacting with religious courts based on two types;

- Lower courts that are specialized family courts responsible for sharing the concurrent jurisdiction with the religious courts.
- High courts that are at supreme level and are engaged with the supervisory powers.

The model of transformative accommodation helps to analyze the relations that exist between the lower civil and Islamic courts. With respect to the regulation and administration of MFLs, transformative accommodation model helps to identify the direct as well as indirect role played by the civil courts. The religious courts in majority of the non-Muslim countries are likely to share jurisdiction that is parallel to the civil courts. This might be advantageous for the Muslim litigants because of synchronization between the jurisdictions of civil and religious courts. Jurisdictional competition is likely to be promoted through forum-shopping as stated by Shachar (2001). The failure of one of the rival forums addressing the concerns of certain individuals results in increased competition for clientele and textual authority. This allows the adoption of pro-plaintiff measures; for instance,
the child support awards and granting of large maintenance (Klerman, 2014). The arousal of competition among the civil courts is likely to pressurize the religious courts for undertaking self-reform for retaining their clientele and authority. The chances of market-induced reforms in MFLs increased as a result of increased jurisdictional competition.

Accomplishment in finding off the intervention of HCJ consequently relies on the correct interpretation of the sharia courts and whether they follow the correct procedure mentioned in the civil law. Apostasy outcomes leads to a parent’s loss of his or her children’s custody based on the sharia. The regional sharia court in Haifa revoked the custody rights of the two mothers who reportedly converted from Islam to Christianity. The HCJ reversed the decisions of SCA claiming that the religious court had failed to take into consideration the welfare officers reports regarding the wellbeing of the children and rather based its decision only on religious considerations, even though the SCA upheld the rulings of Haifa court in both cases (Sezgin, 2018).

To be precise, the HCJ has rejected the religion-based interpretation of the court in the absence of a subsequent professional justification, even though the sharia court employed the principle in the best interests of the child (Ramadan, 2015). In contrast, the High Court rarely tolerates religion-based interpretations of secular selections and principles not to intervene, in cases in which ruling of a religious court complies with the normative outcomes and the procedural requirements sought by the HCJ. For example, the HCJ chose not to intervene as the decision was consistent with the recommendations of the welfare officer, although the Taibe court issued its decision merely on religious considerations (Sandberg & Sandberg, 2017).

4. Jurisdictional Competition and Internal Reform

Sharia courts enjoy several structural advantages over their civil counterparts in this competition. Muslim litigants are concerned by all sharia court judges who are Muslims and speak Arabic as well as are well-recognized with their culture. Nearly all judges are Hebrew-speaking who are not fundamentally recognized with cultural and religious practices and Muslim customs in family courts. The Arab citizens are not provided with pro bono translation services by the family courts. Shariah courts cases to execute the proceedings and claim submission. At religious courts, the duration of proceedings is not very long and thus automatic exemption from applying and filing fees in alimony and child maintenance cases is granted to the women. However, this application requires formal approval to be exempted from the family courts (Kayan, 2011). In addition, pro bono translation services are not provided by family courts for Arab citizens. Secondly, sharia courts easily claim submission and the proceedings of the court.

The comparative advantage with respect to the pecuniary awards keeps the family courts within the game. As compared to the awards made by the Shariah courts, the spousal alimony and child support awards made by civil family courts tend to be larger and more effective. This difference encourages female Muslim litigants for choosing civil family courts over Islamic courts; although, they find difficulty in accessing the civil family courts. Civil and Islamic courts compete concerning the clientele and interpretation of the divine law concerned with the child custody and maintenance cases. There is an increased reliance of Jewish judges on Hebrew textbooks and English sources. These judges are normally not trained in the Arabic and Islamic law. Muslim law was applied by the civil family court judges in 2001 after applying Jewish law since 1953.

In the Muslim marriage, the institution of ihtibas provides foundation of the spousal obligations and duties. Basically, ihtibas is the wife’s duty for devoting herself towards her husband. According to the judges, the woman is declared to be disobedient if she leaves her husband’s home without his permission. A woman loses her right to maintenance, if she is determined to be disobedient. The judges mainly focus on the burden on the husband concerning all the decisions dealing with ihtibas. However, the wife is responsible for proving herself, if she had left his home. She needs to clarify that she was not involved in any of the violating act and that her departure was totally justified. The Shariah laws overlooks certain types of violence; for instance, occasional violence by the husband to educate and discipline the wife. A case appearing in the family court declared wife to be disobedient as she had left home because of alleged verbal assault by the husband. The Shariah law declared that verbal abuse does not qualify as a ground for violating the duty of confinement because it allows the husband to abuse his wife by light beatings.

The child support cases are represented with similar conservative and patriarchal tone. The Islamic law has made father responsible of his children and no contribution has to be made by the mother for upbringing her children, even if she is wealthy and capable. The family courts have overlooked the analogous inequality in Islamic law and continued to hold Muslim men solely responsible towards the essential needs of children under eighteen years of age; although, they have challenged the inequality among the child support laws. The courts need to uphold conservative and patriarchal view of Shariah for awarding more child support and alimony. Since the last
two decades, this dynamic is known to be an important aspect of competition between family courts and Shariah laws (Shahar, 2016). The Working Group for Equality in Personal Status Issues (WGEPISI) made 2001 amendment possible that reduced the jurisdiction of Shariah courts from exclusive to concurrent over matters of custody, maintenance, and child support. There was immediate lobbying for a new law that would reduce the jurisdiction of religious courts after the foundation of coalition in 1995. According to Shahar (2016), Shariah courts have realized that business would make them lose their jurisdiction. Therefore, a new judicial decree was issued after getting engaged in the self-reform, which resulted in increased appeal of courts for the female litigants. This allow to raise the amount of maintenance awards via procedural innovation. The spousal maintenance awards by the Shariah courts increased by 50% following the issuance of the new judicial decree (Shahar, 2016). However, substantive and procedural reforms in other areas were undertaken by the Islamic judiciary for increasing its appeal and competitiveness through civil courts.

From theoretical perspectives, Greek civil courts have been very conservative in their rulings with muftis and Islamic law. The legal independency of the muftis was developed and confirmed by international treaties as an important element of a reciprocal minority protection regime between Greece and Turkey (Turner & Arslan, 2015). Questions related to Islamic law was not only based on legality, but also on diplomatic, security, and political concerns. Turkish-Greek relations entered a new stage of agreement as the European Union commenced accessed negotiations with Turkey, in the late 1990s and 2000s. In the context of the minority protection policies, the Greek government, at the same time, took multiple steps for improving the socio-economic status of Muslims in Thrace (Grigoriadis, 2008; Memisoglu, 2007).

Similarly, the ruling of Appeals Court of Thrace revealed that managing parent-child relations does not fall throughout the jurisdiction of the mufti, but instead is under the purview of the civil courts (Tsavousoglou, 2015). The same court ruled that spousal property relations should be excluded from the mufti jurisdiction. Civil courts ruled that child custody is no longer under the jurisdictional competence of muftis, which usually base their decisions on a narrow interpretation of the concept of parental authority (Sezgin, 2017). Likewise, inheritance from mufti jurisdiction was excluded from regional courts, which subjected all Greek citizens to the civil courts, irrespective of religion.

5. Sharia Courts and Indian Muslims

The life of millions of Muslims in India has been regulated by the Muslim Personal Law Shariah Application Act of 1937. It offers Islamic code application to the Muslim community. The act encourages nevertheless any usage or customs in all aspects about rights of inheritance, special property of females, legacies of women, and preferences, which include personal property inherited. Moreover, dissolution of marriage, maintenance, dower, trusts and trust properties, and wakfs are regulated in the act (Rani, 2014). The Shariah Application Act 1937 emerged when the British-Indian Government was making efforts for subverting Islamic law and its application to the India Muslims to bring into considerations the social reforms.

The Jamiat al-Ulema Hind spearheaded the movement for expressing their resentment alongside the actions of government in response to the British-Indian Government’s move. The initiatives of government drew shape of the leading ulemas or religious scholars of the country who assumed it as their religious obligation for creating awareness among the Muslim community of the negative concepts of the government for uprooting Islamic law. Therefore, an extremely important campaign was conducted within the country for persuading the Muslims to follow Islamic Sharia. Parallel efforts were made by ulemas to terminate a number of un-Islamic practices among different sections of the Muslim community in the country along with the campaign alongside the actions of government (Lemons, 2018). Access to justice delivery was improved by the sharia courts through cost-reduction strategies with bureaucratic delay and with the requirement for professional help, and lowering the discouragement of possible stakeholders who are challenged in regular courts by lawyers and judges of higher social status as compared to themselves.

Sharia courts using mediation bring into consideration shared societal interests and reassures social connections because litigation is considered as a negative social phenomenon, which leads to the disruption of social relationship. Improving community peace and larger social harmony using mediation is the perceptible expression of sharia courts. The institution can be effectively explained as internal community regulatory mechanism. Today, sharia courts are essential alternative dispute resolution (ADR) mechanisms and; therefore, its role is harmonizing to the formal judiciary. Sharia courts or dar-ul-qaza is an important dispute redressal forum for the Indian Muslims as they are able to address disputes cordially and expeditiously. The dar-ul-qaza is complementing the formal Indian judiciary by settling private disputes of such a larger community as that of the Muslims. The system is inspired by the ideal service to mankind, apart from its complementary role. The
dar-ul-qaza create a more flexible and precise instrument for dispute adjudication using its formal approach, in a
developing country as India, and lower the insecurity and uncertainty that appear from the formal legal system
rigidity. The sharia courts are comprehensively adapted to the profile and need of its community members.

6. Conclusion

The lack of necessary moral authority results in failure of the civil courts to bring direct changes in MFLs in the
non-Muslim countries. Self-reforms are undertaken as a result of influence of the civil courts that pressurize the
religious courts and judges indirectly. Despite their public opposition to interventions of HCJ into Islamic
jurisdictions, sharia courts will subtly and selectively be complied with rulings of high court, specifically those
for which they can reveal an Islamic justification. Sharia courts further operate under lateral burden from civil
family courts to the top-down pressure of HCJ. The pressure on religious courts for complying with their
decisions is exerted by the high courts; whereas, the religious courts comply with decisions of higher civil courts
by undertaking necessary changes in their substantive and procedural rules. The conflicting relationship between
the two court systems does not favor changes in the substantive and procedural rules. There is an increased
compliance of religious courts with the high court rulings, which results in the reformation of rules and
procedures to internalize certain principles and discourses. The civil judiciary’s lack of legitimacy in the
perceptions of the Muslim minority is among the main reasons of shortcomings of both ex post and ex ante
oversight mechanisms. However, increase in the number of Muslim judges on civil courts would help in
overcoming this hurdle.

Acknowledgements

The author is very thankful to all the associated personnel in any reference that contributed in/for the purpose of
this research. The author would also like to thank Deanship of Scientific Research at Majmaah University for
supporting this work under Project Number No. R-1441-6 I would additionally like to thank the editing board
and reviewers for their valuable responses and fast reply.

References

https://doi.org/10.3998/mpub.17817

https://doi.org/10.1093/oso/9780198829591.003.0013


Law and Religion, 27(1), 59-81. https://doi.org/10.1017/s0748081400000527

http://www.kayan.org.il/Public/ER20110101_5%20Year%20Legal%20Aid%20Report.pdf

https://doi.org/10.1111/j.1469-8129.2012.00546_2.x

https://doi.org/10.1093/jla/lau007

Society Review, 52(3), 603-629.


Memisoglu, F. (2007). The European Union's minority rights policy and its impact on the development of
minority rights protection in Greece.

https://doi.org/10.24090/ijtimaiyya.v2i2.1638

of Levantine Studies, 4(2), 39.

Social Sciences and Education, I(9), 2.


Copyrights
Copyright for this article is retained by the author(s), with first publication rights granted to the journal.
This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (http://creativecommons.org/licenses/by/4.0/).