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Mansour A. Alhaidary

Kansas University School of Law, S.J.D. candidate, malhidar@gmail.com

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In Light of Oklahoma SQ 755: How Islamic Law Antecedes in Solving Minorities' Personal Law Issues?

Mansour A. Alhaidary

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In Light of Oklahoma SQ 755: How Islamic Law Antecedes in Solving Minorities' Personal Law Issues?

Mansour A. Alhaidary¹

In November 2010, a proposal was passed to amend Section 1 of Article VII of the Oklahoma State Constitution to be read:

The Courts ... when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include *Sharia Law*, in making judicial decisions. The court shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or *Sharia Law*. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.

¹ S.J.D. student at Kansas University School of Law (expected graduation 2013) and a Lecturer of Law in the Legal Policy Department (Laws Division) at the Higher Judicial Institute, Imam University, Riyadh in the Kingdom of Saudi Arabia.

This amendment is being challenged in the court by Muslims and a temporary restraining order and a temporary injunction have been granted.²

Can a country within its own sovereignty provide freedom to religious minorities not only to practice their religion, but more broadly to have their own legal and court systems in regard to their personal law? Does such freedom lead to a contradiction between the law of the land and that law of religious minorities? Although some ancient countries provided some type of freedom to some religions at given times depending on the governing kings,³ Islamic law provides such freedom from its inception and there since.

This article will provide a brief introduction to how Islamic law treats issues pertaining to personal law of religious minorities in the Islamic country, and how the legal system of religious minorities can be set.

The second part will summarize how Islamic law treats the family law system of religious minorities, including marriage and divorce laws. The third part will show how Islamic law treats religious minorities' laws regarding wills. The fourth part will show how Islamic law deals with religious minorities' inheritance laws. The fifth part will present how Islamic law exempts religious minorities from punishment for participating in religious-related acts, even if those acts are crimes in regard to Muslim citizens. Although the prevailing opinions among Islamic jurisprudential schools will be presented, any disagreements will be mentioned in order to draw a comprehensive view of Islamic law.

² <http://www.cair.com/Portals/0/pdf/argument.pdf>

³ WILLIAM AINGER WIGRAM, An Introduction to the History of the Assyrian Church 100-640 A.D., London, U.K, Society of Promoting Christian Knowledge, (1910) at 23, 89, 95. According to the author, the Sassanid Empire was tolerant with the Assyrian Church, which gave them the power to hold an education system of their own, become a *melet* in the Persian Kingdom, have its own ruler, and make its own laws in its own way with the approval of the State.

i. Introduction

Access to justice⁴ is an essential element in any society. All citizens of any country must be treated equally in regard to public law. On the other hand, justice entails treating people differently in regard to their personal law according to their beliefs. Personal law issues are considered part of an individual's belief. Thus, personal law is associated with freedom of religion, which many legal systems provide protection for.

Islamic law provides non-Muslim citizens, in regard to their personal law, two options in its judiciary system. First, non-Muslim citizens of Muslim countries may bring their cases forward in Islamic courts. The Islamic courts then apply Islamic law rules as the law of the land. Second, non-Muslim citizens may choose to bring their cases before their special court, either official or unofficial depending on the level of provided liberty of any given country, to resolve the dispute according to their religion. The authority of such rule is mentioned explicitly in the Holy Quran, which is the constitution of Muslims. The Quran states:

*“So if they come to you (Muhammad), either judge between them, or turn away from them; if you turn away from them, they cannot hurt you in the least. And if you judge, judge with justice between them. Verily, Allâh loves those who act just.”*⁵

If a Muslim judge turns away from non-Muslims and refuses to judge between them, they have no option but to settle the situation among themselves. It is noteworthy that such a rule applies only to personal law issues. Non-Muslim citizens will be exposed to the same criminal system

⁴ The meaning of justice and equality needs to be clarified. They are not synonyms or interchangeable in Islamic law, although they may overlap. Justice is differentiating between dissimilarities and equating between similarities. On the other hand, equality is equating between similarities (which will be justice) or, in some cases, dissimilarities (which is injustice) even if there is valid reason to differentiate. For instance, when two people apply for jobs with different qualifications, justice is to pay them differently, while equality requires paying them similarly regardless of their different qualifications.

⁵ Holy Quran, 5:42.

although Islamic law excludes special criminal acts that may endanger their religious practice, as will be explained.

Although the procedure of establishing private courts or allowing non-Muslims to judge their affairs among themselves is not clearly discussed,⁶ it is well established that they practiced this judiciary amongst themselves. In Islamic history, non-Muslims dealt with transactions, marital disputes, and other issues. Thus, it is unlikely that they did not judge their affairs through one of their people. Adam Metz states that:

Since the Islamic Law was applied to Muslims, the Islamic state allowed the people of other religions to have their own courts. What we know about these courts is that they were church courts and prominent spiritual leaders were the chief justices. They wrote a great number of books on canon law. Their rulings were not confined to matters of personal law. Spiritual leaders dealt with such problems as inheritance and much of the litigations between Christians that did not involve the state.⁷

Islamic Sunni schools⁸ differ in regard to appointing non-Muslim judges to judge the affairs of their people. The dominant view is that a non-Muslim cannot be appointed as a judge.⁹ The HANAFI School, however, approves appointing non-Muslim judges to adjudicate issues between their people. Nevertheless, such appointment can be considered an honorable judge or

⁶ Most classic jurisprudential books deal with substantive law more than procedure.

⁷ ADAM METZ, Islamic Civilization in the Fourth Century of the Hegira, (Muhammad Abu Riedah trans., Arabic book House 5 ed.) at 93. The original book was written in German and translated to English, Spanish, and Arabic. I could not find the English version so I relied on the Arabic translation.

⁸ Hanfi, Malki, Shafi, Hanbli, and Zahiri schools are the living schools among Sunni.

⁹ Muhammad Alsharbini, Mughnee Almuhtaj Ila Ma'ni Alfath Alminhaj, Mustafa Mahmoud Press, Cairo, (No date), 4/375, Ibn Qudamah al-Maqdisi, Al-Mughnee, Dar Almanar Press, Cairo, (3d edition 1367 A.H), at 9/184.

arbitration as he has no jurisdiction over his people if they choose to bring their cases before Islamic courts.¹⁰

One must differentiate between appointing non-Muslims as judges and unofficial judicial practice. Even the dominant view does not approve appointing non-Muslims as judges because they allow the unofficial judicial practice, just as “turning away from them” entails self-judgment.¹¹ History tells us that when the Muslims conquered Egypt, the affairs of the Copts were left to them. Amr, son of Al-Asi, told patriarch Benjamin: “Resume the government of all your churches and of your people, and administer their affairs.”¹²

ii. Family Law

Islamic law recognizes that many aspects of life are driven by religion. Thus, no freedom of religion is fully granted without allowing religious minorities to practice their own family law inside the Islamic law system. Islamic law, for example, does not step in to prevent some religious groups from concluding marriage contracts that are illegal under it. Some religious groups, especially during first-generation Muslims, believe that incest marriage (marrying sisters, aunts, or other family members) is permissible. Although this is strictly prohibited under Islamic law,¹³ the marriage contracts remain valid and the affinity of the children will ensue in

¹⁰ ALI ALMAORDI, *Alahkam Alsultaniah*, Scientific books House, at 84.

¹¹ MUHAMMAD IBN JARIR ALTABARI, *Jami Albyan an tafsir ay Alquran*, Dar Hajar, (1st edition 2001), at 8/440. Altabari narrated what an Alshabi scholar had said and explained the meaning of the verse: “when the people of the book come to you, judge between them as you judge between Muslims, or leave them to their religion’s people to judge between them except in murder or theft cases.”

¹² PAUL HALSALL, *Internet Medieval Sourcebook*, Fordham University Center for Medieval Studies, at <http://www.fordham.edu/halsall/source/642Egypt-conq2.html>. as 01/18/2011.

¹³ Holy Quran, 4:23. Islamic schools differ in regard to the punishment of someone who marries or has incestuous intercourse. Such punishments range from lashing to the death of the individual.

most Islamic jurisprudential schools as long as non-Muslims believe it valid in their religion and the case is brought under their own court system.¹⁴

The bride's dowry must have a value according to Islamic law.¹⁵ Thus, pork and alcohol cannot be a dowry as these have no value in Islamic law.¹⁶ Nevertheless, if these are given as dowry for a Christian bride, for instance, they will be considered as valid if they do not bring the dispute before the Islamic law, or if they bring it after the receipt of such dowry.¹⁷ Disagreement among Islamic schools arises if a Christian bride brings the action before the receipt of the dowry.

One approach is that this kind of dowry is illegal under Islamic law. A bride therefore does not have the right to claim pork or alcohol as dowry, but is entitled to the ideal dowry as would a bride similar to her receive.¹⁸ The other approach tends to accept such dowry as these kinds of dowries have value in the minorities' religions.¹⁹ Finally, if the dowry is not required under the minorities' religions, Islamic law will honor that and, in one approach, and the bride will deserve nothing.²⁰ The other approach considers dowry as one of the requirements of

¹⁴ There is a disagreement in the Hanfi School as to what extent non-Muslims are permitted. See: ALADDIN ALKASANI, Badai' Alsanai' Fe Tarteeb Alshara'i, Jamalyah Press, Cairo, 2/311, ABU BAKER ALSARKHSI, Almabsoot, Saadah Press Printing, Cairo, 5/38 (1324 A.H). In Malki School: MALIK IBN ANAS, Greatest Mudawana, Saadah Press Printing, Cairo, 4/162 (1323 A.H). Shafi School: IBN HAJAR ALHAITHMAI, Tuhfat Almuhtaj Bi Sharh Alminhaj, 7/332,335, ALSHARBINI, *supra*, note 8 at 3/196. In Hanbli School: AL-MAQDISI, *supra*, note 8 at 6/613,638, MANSOUR ALBAHOTI, Kashaf Alqina 'an Matn Aliqna, Eastern Press, Egypt, (1st edition 1319 A.H), 3/67, AHMAD IBN TAYMIYYAH, Jurisprudential Choices, p132.

¹⁵ AL-MAQDISI, *supra*, note 8 at 10/101.

¹⁶ *Id.* at 6/687.

¹⁷ Hanfai School: ALKASANI, *supra*, note 13 at 2/313-14. Malki: IBN ANAS, *supra*, note 13 4/147. Shafi School: ALIMAM ALSHAFI, Alum, Polaqa Press, Cairo, 5/50 (1325 A.H), IBRAHIM ALSHIRZI, Almuhadab, 2/59 (1343 A.H). Hanbli School: ALBAHOTI, *supra*, note 13 at 3/69.

¹⁸ In Malki School: IBN ANAS, *supra*, note 13 at 4/147. Shafi School: ALSHAFI, *supra*, note 15 at 5/50,191, ALSHARBINI, *supra*, note 8 at 3/194. In Hanbli School: ALBAHOTI, *supra*, note 13 at 3/69.

¹⁹ Hanfi School: ALKASANI, *supra*, note 13 at 2/313, ALSARKHSI, *supra*, note 13 at 5/41.

²⁰ Hanfi School: MUHAMMAD IBN ABDEEN, Rad Almuhtar ala Aldur Almukhtar Sharah Tanwair Albsar, Othmanic Press, 2/506 (1324 A.H)

marriage. Thus, the bride is entitled to the ideal dowry even despite the parties agreeing upon no dowry.²¹

In the majority of Islamic schools, divorce will be applied as religious minorities believe it to be applied. Thus, divorce voluntarily has no effect if it is prohibited and ineffective in any given religion, for example, the Catholic Church.²² On the other hand, divorce or separation will be effective in accordance with religious minorities law.²³

iii. Wills

Every person likes to reward after his or her death those whom he or she loves. Religious minorities under Islamic law may execute wills according to their religion if they bring them before their court system. Religious minorities may execute wills either if the beneficiary of the will is a Muslim or a non-Muslim, as wills are contracts that religion does not affect.²⁴ This freedom, however, is limited to a third of his or her wealth as Islamic law supplies.²⁵ Islamic schools are in disagreement in regards to the wills of illegal items such as pork or alcohol, or wills that share the legacy of one of his or her heirs in addition to his or her own inheritance share. While some schools effectuate such wills,²⁶ other schools decline to consider them valid.²⁷

iv. Inheritance

²¹ In Shafi School: ALSHIRZI, *supra*, note 15 at 2/59. Hanbli School: ALBAHOTI, *supra*, note 13 at 3/69.

²² A. LEHMKUHL, *Divorce (in Moral Theology)*, New York: Robert Appleton Company (1909), reprinted at www.newadvent.org/cathen/05054c.htm as 01/23/2011, *Divortium plenum or perfectum* cannot be effective unlike *divortium imperfectum*, which is applicable in Catholicism.

²³ Hanfi School: ALKASANI, *supra*, note 13 at 3/100, ALSARKHSI, *supra*, note 13 at 5/42. Shafi School: ALSHAFI, *supra*, note 15 at 4/131, ALSHARBINI, *supra*, note 8 at 3/279. In Hanbli School: AL-MAQDISI, *supra*, note 8 at 6/638, ALBAHOTI, *supra*, note 13 at 3/67.

²⁴ Hanfi School: ALKASANI, *supra*, note 13 at 7/341. Hanbli School: AL-MAQDISI, *supra*, note 8 at 6/103.

²⁵ Shafi School: ALHAITHMAI, *supra*, note 13 at 7/4. Hanbli School: AL-MAQDISI, *supra*, note 8 at 6/103.

²⁶ Hanfi School: IBN ABDEEN, *supra*, note 18 at 5/611: "wills of pork or alcohol is valid as non-Muslims believe it to be so."

²⁷ Hanbli School: AL-MAQDISI, *supra*, note 8 at 6/103.

Inheritance is a method of involuntary conveyance of ownership from one person to another. There are forms of inheritance under Islamic law in which kinship and marriage are the main causes.²⁸ Inheritance is one of the effects of the recognition of religious minorities' marriage under Islamic law. Kinship resulting from such a marriage is a valid cause of inheritance.²⁹

All Islamic schools agree regarding inheritance through valid marriage. Consequently, inheritance is one of those effects that will be enforced.³⁰ On the other hand, Islamic schools disagree with regard to inheritance by the surviving husband or wife if the marriage was illegal under Islamic law, such as in the case of incestuous marriage. The first approach tends to effectuate the inheritance regardless of the validity of the marriage under the principles of Islamic law. Thus, heirs will inherit from the deceased as long as they did not bring the dispute to an Islamic court. This approach is built on the recognition of the marriage contract in the first place and, thus, the effects of such recognition follow.³¹ The other approach tends to invalidate such cause, and therefore the surviving husband or wife of an illegal marriage will not inherit.³²

v. Criminal law

Although Islamic law holds the right to criminalize whatever acts may be against its values and principles, it chooses to provide more liberty for some types of actions for religious minorities even if such acts are considered crimes if committed by Muslims.

However, this liberty is restricted rather than open-ended. Islamic law permits religious minorities to drink alcohol or eat pork, although these actions are considered violations of

²⁸ ALSHARBINI, *supra*, note 8 at 3/5.

²⁹ IBN ABDEEN, *supra*, note 18 at 5/700.

³⁰ AL-MAQDISI, *supra*, note 8 at 6/637. He said: "non-Muslims' marriages ensue the effects of valid marriage."

³¹ IBN ABDEEN, *supra*, note 18 at 5/700.

³² IBN ABDEEN, *supra*, note 18 at 5/700, AL-MAQDISI, *supra*, note 8 at 6/303, ALBAHOTI, *supra*, note 13 at 2/602.

Islamic law. Islamic law criminalizes alcohol consumption, which is considered one of the main crimes (Hudud), and provides a specific punishment.³³ However, Islamic law also balances the freedom of religious minorities to practice acts related to their faiths against the interests of the Islamic state in keeping such crimes out of Islamic society. This balance results in an exemption of religious minorities from punishment as long as they do not drink alcohol in public or become intoxicated. This restriction is logical because it keeps Islamic society safe from an illegal practice and allows religious freedom for minorities. All of the main schools of Islamic law exempt religious minorities from the criminalization of alcohol consumption.³⁴

vi. Conclusion

Islamic law allows religious minorities freedom in establishing their own legal system within the Islamic system. In addition, the appointment of non-Muslim judges to adjudicate individual minority issues is possible according to one Islamic school. The personal law pertaining to religious minorities, which include family law, wills, and inheritances, are applied under Islamic law. In addition to these personal laws, Islamic law also provides more freedom in criminal law, which exempts religious minorities from certain crimes on the basis of religious belief. The United States, a leading country in liberty and freedom of religion, will be following its principles of freedom and liberty by giving religious minorities extra freedom in their personal laws.

³³ Islamic schools do not differ in the criminalization of drinking alcohol or providing punishment for it. However, the disagreement among Islamic schools concerns whether the punishment is fixed or discretionary.

³⁴ ALKASANI, *supra*, note 13 at 7/39, MUHAMMAD ALKUHRASHI, *Sharah Alkuhrashi*, Polaq Press, Cairo, (2d edition 1319 A.H), 8/108, ALBAHOTI, *supra*, note 13 at 4/55, ALSHARBINI, *supra*, note 8 at 4/187.