

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

Hajed A. Alotaibi¹

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

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Abstract

This study examines the adaptability of Islamic law, concentrating on how it withstands changes in particular legal areas, such as family and criminal law. It contributes to our understanding of how Islamic law evolved and how flexible or resistant it is to change in contemporary contexts. Islamic concepts and teachings serve as the foundation for Islamic law. A state or other legal system, whose population may or may not be largely Muslim and whose legal system may or may not be Islamic, serves as the foundation for the interpretation process that creates Muslim legalities. In contrast, Islamic law is developed through an interpretive procedure based on the canonical Islamic scriptures. Islamic law has occasionally been portrayed as being unchangeable. How Islamic law responds to shifting social, cultural, and legal contexts is a topic of ongoing debate. The applicability of Islamic law to contemporary family, criminal, and business law is examined in this paper. Finding case studies that highlight instances of the Islamic legal system's resistance to change or its potential for adaptation and social change can help to achieve this. 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. An increase in the number of Muslim judges on civil courts would help to overcome the lack of legitimacy in the perspectives of the Muslim minority that is the main reason for shortcomings. Islamic law's ability to adapt and gain acceptance among many legal systems, contributing to the ongoing discussion and advancement of legal laws throughout Western nations, is what permits it to remain powerful.

Keywords: legal courts, Resilience of Islamic law, Shariah tribunals

1. Background and Literature Review

The literature on Islamic law's tenacity is extensive and varied, showing both its historical importance and its current applicability. The development of Islamic legal principles, their interactions with valid Western systems, and their capacity to adapt to contemporary societal changes have all been studied by scholars. Exploration has focused on several facets of Islamic family, criminal, and commercial law, revealing its adaptable principles. Custom or religion-based legal orders are acceptable when individuals are given the right to choose between secular and religious laws to be free of their cultural communities. It was not accepted by the scholars, who categorically rejected the pluri-legal accommodations in any legal system. There is a significant difference in the approaches adopted by different scholars based on the extent and content of the right to either exit or explain the role of state to guarantee the basic rights to group members. In a similar context, a study conducted by Kitromilides (2012) argued that a hands-off policy toward 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 the internal autonomy of nonruling 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.

In some Non-Muslim countries, which have many Muslim populations that require sharia law to their courts'

system, such as UK, USA, and India, two important questions have been completely emphasized in the literature. These questions are the central focal point of this study, which shows the role of secular state institutions to ensure fundamental rights and liberties are respected by religious courts in their decision making. Furthermore, this study assesses whether there exists a relationship between religious or secular law and court presentation in a democratic area.

The transformative and regulatory framework is used to address practical challenges in accommodation for secular and democratic regimes. For example, Hacker (2012) developed strong evidence against the jurisdictional competition of the religious and secular courts under defined conditions. This competition helps to communicate the internal religious reforms concerning its practices and norms. The majority of ethnoreligious groups in the country control civil and rabbinical courts; however, there is no concern for Shariah courts in non-Muslim democracies. Therefore, certain limitations are present with respect to women and children by State-enforced Muslim Family Laws (MFLs). This requires the instigation of changes in Islamic laws and courts for addressing the adverse impact of MFLs on the non-Muslim population.

The present study contributes significantly to explaining the possibilities and challenges faced by multicultural and pluri-legal accommodations. This is accomplished by studying the non-Muslim democracies and the present Islamic law and the institutions within them. To examine how well Islamic law holds up in the areas of family, criminal, and business law in the modern world, this study employs an extensive and complex methodology. The investigation uses qualitative research techniques, considering case studies that highlight the adaptability or resistance of Islamic law to change. a) Case Selection: Three main areas of Islamic law—family, criminal justice, and commerce—are the focus of this study. These are *Akhter v. Khan* (2018), which pertains to family law, British court judgements on bias for criminal law, and important Islamic financing issues for commercial law. To gather main and secondary information, a great deal of in-depth study was done. Court records, decisions, and legal viewpoints from the selected cases are primary sources. Literature on Islamic law, its historical context, and its contemporary applications can be found in scholarly journals, books, and other well-regarded literature. b) Case Brief Analysis: Every case is thoroughly reviewed, considering the social context, the legal arguments put forward, and the rulings themselves. The objective is to identify instances when Islamic law has demonstrated endurance by keeping its ideals or flexibility by accommodating changes to address current societal concerns.

2. Civil-Religious Court Relations

Forum-shop and concurrent jurisdictions can be used by Muslim litigants between the religious and civil laws/courts with less preference to the civil courts. Jurisdictional competition is promoted through forum shopping. When a rival forum individual fails to systematically resolve a specific individual's class, while pro-plaintiff measures are increasingly adopted by the other to increase 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 when competition from the civil courts' increases. Although lower civil courts play a substantial role, they serve as an instrument of internal change. The ruling of religious court review is performed by hierarchical superiors of higher civil courts, though limited and equivocal court. The burden of violating human rights is imposed by superior courts, as well as breaches on at-risk groups and vulnerable groups (Lindsey, 2016). The religious courts share jurisdiction in a majority of non-Muslim countries that are concurrent with lower civil courts. Muslim litigants can take advantage of the concurrent jurisdictions that are present in the religious and civil courts. Promotion of jurisdictional competition through forum shopping was suggested by Shachar (2001). The failure of rival forms to address the certain class of individuals increases competition for authority in text and clientele. However, it may adopt the provision of larger maintenance that highlights the increased pro-plaintiff measures (Klerman, 2014). Religious courts experience pressure to undertake self-reforms to retain their clientele and authority to face competitions from civil courts. For the religious judiciary, the lower civil courts pressure increases 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 a 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 review the ex post constitution concerning the rulings of the court and they are the hierarchical superiors of religious courts. These courts also have a more equivocal but limited role. The allegation of the human rights breaches and violation burden is placed on the vulnerable individuals, who have been pressurized to accept the jurisdiction of religious courts by the superior courts, which review the ex-post adjudication. Therefore, it is suggested to rely on the adoption of additional ex-ante oversight mechanisms, rather than the ex ante review. Shachar (2001) argued that 'change from within' can be brought through continuous usage of ex ante oversight techniques. Moreover, religious judges must exercise self-restraint to avoid a clash with statutory laws and voluntarily internalize the secular norms.

The Shachars' devised ex post review reservations and limitations were suitable for the Shariah courts and secular high courts in the non-Muslim countries. The Muslim litigant finds challenging the religious courts in a setting where the higher civil court was the major regulator of the Muslim minority. Therefore, the Muslim minority setting experiences language and ideological restriction concerning plaintiffs as they challenged the appeal of communal courts. Shachar (2001) research stated ex post judicial review limitation can be overcome through the use of complementary ex-ante oversight techniques, which instigate internal change in the religious courts. MFL democracies use various ex ante oversight mechanisms for controlling the practices of Islamic courts.

3. Case Analysis

This investigation explores the adaptable and enduring nature of Islamic law, focusing on how these principles have persisted in Western nations while addressing contemporary issues. In the *Akhter v. Khan* case, the application of Islamic family law to challenging circumstances, including marital designation, is highlighted. Looking at British court decisions reveals Islamic criminal law's tenacity in conversations about inequality. Finally, research into Islamic finance cases demonstrates how Islamic commercial law may coexist with Western financial institutions. Case Studies Demonstrating the Flexibility of Islamic Law to Adopt and Adopt Western Legal Systems

3.1 *Akhter v. Khan (2018), a Family Law Case*

On November 4, 2016, Nasreen Akhter filed for divorce from Mohammed Shabaz Khan. Khan objected to both the divorce and the marriage itself, arguing that their union was illegal under English law without a civil ceremony. According to the wife, the couple's reputation as married and extended cohabitation should give rise to a presumption of marriage, according to *Akhter v. Khan (2018)*. The central question in the case was whether a nik ceremony constitutes a legal marriage under English law. There are important ramifications to the legal distinction in UK family law between lawful marriages, void or voidable marriages, and invalid or non-marriages. Marriages that adhere to the relevant laws provide a number of benefits and offer the necessary grounds for divorce (Darian-Smith, 2013). Marriages that don't comply with the law can be declared null and void, allowing the couple to divide their assets or deal with maintenance issues after their separation. These advantages are not available to unmarried couples, including those who secretly exchange vows or who have not yet through a marriage ceremony. The court was required to evaluate the 1998 marriage of Akhter and Khan, which was performed in accordance with Islamic law, in light of the hesitation of many Muslim-majority countries to recognize a marriage unless a civil law ceremony is undertaken and the consensus of jurists. It was observed that they had been living together as a married couple for 18 years and had intended to arrange a civil law ceremony and reception but had not yet done so. Additionally, Akhter and Khan shared a home openly, had kids, and were acknowledged as a married couple by their religious and social circles. Additionally, between 2005 and 2011, their marriage in Dubai was recognized by local law. Mr. Justice Williams came to the following conclusion in light of the circumstances and the facts: The relationship was held to be void in light of the circumstances, UK marriage law as applied by the Human Rights Act 1998, and the best interests of the child (*Akhter v. Khan, 2018*). This confirmed Akhter's legal eligibility for the civil law remedies for maintenance and child custody upon separation, which she would not have been able to obtain without the acknowledgment of a genuine marriage.

3.2 Criminal Law: British Court Finds Discriminatory Islamic Law

In a 2008 case involving a refugee who came to the UK from the Middle East to shield her son from his violent parents, the British Supreme Court declared its dislike of Islamic law due to its gender discrimination (Just a Moment, n.d.). The woman known as EM would automatically lose custody of her son under sharia-influenced family law, so the law lords unanimously decided that Sharia does not contain any provisions for equal rights for men and women. They further declared that forcing EM to move to Lebanon with her son would be a "flagrant breach" of the European Convention on Human Rights. Since her son's birth, EM has had self-regulated custody of him because to the father's abuse; she immigrated to Britain in 2004 when he was eight years old. The right against discrimination, according to Lord Hope of Craig, is crucial for preserving human rights. Equal rights are not permitted under Sharia law, which is in effect in Lebanon since it was developed by and for males in a culture that was dominated by men, he declared. Additionally, it was emphasized that Sharia is merely a cultural and religious heritage and that, in contrast to our standards, its laws are rigid and biased against women, forbidding them from raising their children after they reach the age of transfer of custody. The findings of the Court of Appeal, the Asylum and Immigration Tribunal, and the Home Secretary—who believed that returning EM and her son to Lebanon did not violate her right to a family life—were overturned by these court decisions. In this situation, Liberty and Justice intervened (Just a Moment, n.d.). James Welch, Liberty's legal director, highlighted the government's two fronts in the matter by asking, "How can they talk of equal treatment on the one hand while trying to deport a mother and child to the certainty of separation on the other?" In the meanwhile, Lord Carswell explained that even if the Supreme Court is required to uphold domestic law, "we are not judging the law or order of any other nation, nor are we looking to make comparisons or draw stock-takings between sharia and other laws." Justice's Eric Metcalfe praised the court's choice and acknowledged the importance of the Human Rights Act, which has been in effect for ten years.

3.3 Cases of Islamic Finance under Commercial Law

Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Ors (unreported 2002) and Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd (2004) are two instances involving Islamic finance that have been heard by English courts. The Murabaha contract, also known as the "cost-plus-profit" agreement, was primarily used in these cases. Under this type of arrangement, the bank purchases goods on the client's behalf and then sells them to the client for a higher price that is known in advance—exactly the same price the client would have paid for a conventional loan based on *riba* (interest). Even though both contracts were controlled by English law, their authors tried to pass them off as Sharia-compliant (Al-Ali, 2019). This attempt was done in Symphony Gems through a performance, whereas in Beximco, a clause was mentioned. The judge in the case of Beximco determined that it was not conceivable to interpret contract law in a way that would allow Sharia to be the relevant law in certain situations under the Rome Convention, which was implemented into English law by the Contracts Act of 1990. This is because Sharia is not the law of a "country." Thus, the appellant acknowledged that the contract could not be co-governed by English legal systems (Bashayreh, 2019). Instead, he contended that the parties had stipulated that the contract would be enforceable in accordance with Shariah principles, which were "legal rules ascertainable and applicable by an English court." His offer was rejected, however, as the court construed the contract in accordance with its commercial objective and treated it as a loan governed by English law. It was believed that the law represented "the Islamic religious principles according to which the bank holds itself out as doing business." The banking industry therefore welcomed the court's decision since it indicated that English courts could enforce Islamic financing instruments under English law as long as the necessary clauses were utilized".

4. Discussion

The three cases under examination demonstrate the continued influence of Islamic law on Western culture, particularly in the areas of family law, criminal law, and business law. These cases provide as examples of how Islamic law can manage complicated issues including matrimonial identification, gender discrimination, and

economic applications while coexisting harmoniously with Western rules. Islamic law's ability to adapt and win recognition inside many legal systems, contributing to the ongoing discussion and advancement of legal laws throughout Western nations, is what permits it to remain powerful.

5. Sharia Courts and Indian Muslims

The lives of millions of Muslims in India have been regulated by the Shariah application Act of Muslim Personal Law of 1937. It offers an Islamic code that applies to the Muslim community. The act encourages nevertheless any usage or customs in all aspects of rights of inheritance, special property of females, legacies of women, and preferences, which include personal property inherited. Moreover, the dissolution of marriage, maintenance, dower, trusts, 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 to subverting Islamic law and its application to the Indian Muslims to bring into consideration the social reforms.

The Jamiat al-Ulema Hind spearheaded the movement for expressing their resentment alongside the actions of the government in response to the British-Indian Government's move. Government initiatives drew the shape of the leading ulemas or religious scholars of the country who assumed it as their religious obligation to create awareness among the Muslim community of the negative concepts of government for uprooting Islamic law. Therefore, an extremely important campaign was conducted within the country to persuade Muslims to follow Islamic Sharia. Ulemas made parallel efforts to terminate several un-Islamic practices among different sections of the Muslim community in the country along with the campaign alongside the actions of the government (Lemons, 2018). The 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 compared to themselves.

Sharia courts using mediation take into account shared societal interests and reassures social connections because litigation is considered a negative social phenomenon, which leads to the breakdown of social relationships. Improving community peace and larger social harmony through mediation is the perceptible expression of Sharia courts. The institution can be effectively explained as an internal community regulatory mechanism. Today, Sharia courts are essential alternative dispute resolution (ADR) mechanisms and; therefore, their role is harmonizing to the formal judiciary. Sharia courts or dar-ul-qaza is an important forum for dispute resolution for Indian Muslims as they can address disputes cordially and expeditiously. Dar-ul-qaza complements the formal Indian judiciary by settling private disputes of a larger community as that of Muslims. The system is inspired by the ideal service to mankind, in addition to 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 like 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 needs of its community members.

6. Conclusions

Due to its roots in the Quran and the teachings of the Prophet Muhammad, Islamic law has shown to be extremely durable in the face of evolving cultural and legal issues. Islamic law is enduring because it may change along with the needs and circumstances of Muslim-majority communities while still respecting its fundamental principles. Islamic law still meets the different needs of Muslim communities around the world thanks to its adaptable interpretations and incorporation of modern ideas. Islamic legal theories endure because they keep evolving, adapting, and being used in contemporary society while upholding the fundamental principles of justice, fairness, and compassion. The areas of family, criminal, and business law are excellent instances of this. Understanding Islamic law's tenacity is crucial for creating an inclusive legal system that honors the religious and cultural diversity of Muslims.

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