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Democratizing “Shari‘a”: The Regulation and Application of Muslim Family Laws in Israel, India, and Greece

Yüksel Sezgin

Syracuse University

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ysezgin@maxwell.syr.edu

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A recent study by [PEW Research Center](http://www.pewresearch.org) (2013) on Muslim attitudes towards religion and politics has found that a strong majority of Muslims globally want “shari‘a” to be the law of their lands with respect to family relations. In other words, most Muslims around the world reportedly want religion-inspired family laws to be officially recognized and applied by their states. The same report also shows that besides their desire for religious family laws, most Muslims also express strong support for “democracy”. Survey results thus suggest that the majority of Muslims globally want both democracy and “shari‘a” at the same time. The report does not explain what people mean by “democracy” or “shari‘a”, or whether there is a universally accepted understanding of either concept.

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Yüksel Sezgin is the director of the Middle East Studies Program and an assistant professor of political science at Maxwell School of Public Affairs, Syracuse University. He received his undergraduate and graduate degrees from University of Ankara, the Hebrew University of Jerusalem, University of London (SOAS), and the University of Washington. He previously taught at the University of Washington, Harvard Divinity School, and the City University of New York, and held research positions at Princeton University, Columbia University, University of Bielefeld, American University in Cairo, and the University of Delhi. He is the author of *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India* (Cambridge University Press, 2013) which awarded the 2014 Gordon Hirabayashi Human Rights Book Prize by American Sociological Association.

These are very important questions which I will address later during my talk. However, for the sake of argument, let's put them aside for a moment, and suppose—as many observers and policy makers often do in the West—that there is one universally accepted version of Muslim family law. Moreover, let's also assume that when people say “democracy” they mean not only free and fair elections but also constitutionalism, rule of law and human rights. With this in mind, and considering the detrimental effects of state-enforced religious family laws on human and especially women's rights, which are widely discussed in the literature, some of us may be inclined to dismiss the survey results about Muslims' desires to have both democracy and religion-based family laws as an oxymoronic demand because the two, as often claimed, cannot co-exist or be reconciled.

There are 50 countries (33 Muslim majority, 17 non-Muslim majority) around the world that officially recognize and apply Muslim family laws (MFLs) within their legal systems. In fact, four of these countries (excluding countries with less than 2 million population) are consistently categorized as full or liberal democracies by both Freedom House and Polity IV, the two most-frequently used democracy indices in the field. These countries are Israel, India, Greece and Ghana. These four countries have a long tradition and experience of regulating and enforcing Muslim family laws within democratic and largely secular legal and political systems. In other words, one may view these four countries as test cases to examine some of those oft-repeated assumptions about “(in)compatibility” of Muslim family laws with certain liberal democratic institutions and values such as gender equality and freedom of religion.

In fact, this is what I plan to do during the rest of the talk tonight. I will focus on Israel, India and Greece (I am leaving out Ghana due to time constraints). In doing so, I will try to answer the following questions:

- 1) What aspects of Muslim family laws were deemed in need of reform by these three governments? How did they go about reforming religiously inspired laws? What challenges did they encounter in the process, and to what extent they succeeded in rendering these laws compatible with principles of constitutionalism as well as rule of law and basic human rights?
- 2) How does their performance of rights-based accommodation of Muslim family laws compare to that of non-democratic Muslim and non-Muslim majority countries? Are Muslim family laws more women- and human rights-friendly in democratic or non-democratic countries? If so, why?
- 3) And lastly, what lessons, if any, can democratizing countries that implement MFLs could learn from the experiences of these three nations?

In the first part of the talk, I will briefly discuss my case selection and the methodology employed in the study. Then I will turn my attention to common human and women's rights issues under state-enforced Muslim family laws. Against this background, I will discuss what steps a liberal democratic state needs to take in order to balance accommodation of Muslim family laws with basic rights and freedoms, rule of law and constitutionalism. Based on ten principles detailed in this section, I will then introduce the Index of Rights-based Accommodation of Muslim Family Laws (IRAMFAL). The index ranks 50 MFL-applying countries in terms of their performance of rights-based accommodation of Muslim laws. Comparing Israeli, Indian and Greek governments' performances as well as those of other Muslim and non-Muslim majority countries, in the last part of my talk I will explain the variation across the three countries and investigate whether their performance as free democratic regimes were any better than those of non-democratic regimes. I will also sum up policy-relevant findings and lessons that other MFL-applying governments could learn from these three countries.

I. Methodology and Case Selection

As noted earlier, there are 50 countries that officially recognize and apply Muslim family laws within their legal systems. But only four of those countries (with 2+ million population) have for all of the past five years (2009-2014) been classified as "democracies" by both Freedom House and Polity IV (i.e., Israel, India, Greece and Ghana). Since my particular interest is to understand how relatively mature or consolidated democracies regulate Muslim family laws, I choose these four countries as my cases studies, while leaving out those which are not consistently deemed "full" democracies.

II. Common Human Rights Concerns under State-Enforced Muslim Family Laws

There is a great variance of legal interpretation across the 50 nations that officially recognize and apply Muslim laws. In some countries such as Tunisia or Morocco, laws are interpreted more liberally than in others that adopt more conservative and gender-discriminatory readings of religiously inspired family laws (e.g. Saudi Arabia, Egypt etc.). However, despite this great variation, we can identify some human, especially women's rights issues that are common to

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most national systems. As I explain this elsewhere in detail ([Sezgin 2013](#)), state-enforced religious family laws violate four group of rights in particular: freedom of religion, equality before the law, marital and familial rights, and procedural rights. In this respect, the following practices are commonly identified as in violation of these rights: polygyny, underage marriages, *talaq* (husband's right to unilateral and extrajudicial divorce), and inheritance and custody rules that discriminate on the basis of gender and religion.

III. What should a democratic government do in order to balance the accommodation of MFL with rule of law, basic human rights and constitutionalism?

In this study I adopt a liberal democratic notion of democracy, which Zakaria ([1997, p.22](#)) defines as “a political system marked not only by free and fair elections, but also by the rule of law, [constitutionalism], separation of powers, and the protection of basic liberties of speech, assembly, religion, and property.” With this in mind, the question is whether a liberal democratic state can recognize and apply (not only Muslim but any) religious laws?

Perhaps an ideal typical democratic state should not apply any religious laws at all. However, the reality is far from ideal. Regardless of whether or not it is desirable from a liberal point of view, many countries (both democratic and democratizing) have had to deal with religiously inspired family laws (mostly Muslim), and strike a balance between democratic promises on the one hand, and multicultural demands of their populations, international obligations and socio-political and historical realities on the other.¹

So, what should a liberal democratic regime do in order to balance the accommodation of Muslim family laws with rule of law and respect for fundamental rights and liberties? Put it another way, in [Prof. Stepan's](#) words: what are the “minimal political and institutional arrangements” that would protect basic rights and freedoms such as freedom of speech, religion and equality before the law, with minimum intrusion and

¹ Also given the strong support among Muslim populations for maintaining “shari’a” at least in the field of

intervention into religiously inspired family laws to prevent erosion of their normative legitimacy in the eyes of the believers and observant citizens?

Over the last ten years I have studied reform movements in many countries where religion-based family laws of various sorts (Muslim, Jewish, Hindu, Christian etc.) were directly applied by the state. In those countries, I have interviewed policy makers, human and women's rights activists from religious, conservative and secular backgrounds, as well as members of judiciary, and carefully analyzed the secondary literature dealing with religious accommodation, difference and multiculturalism in democratic societies. Based on my findings, I have identified the following principles as minimal necessary conditions that may satisfy principles of constitutionalism, rule of law, respect for basic human rights, while resulting in minimal intrusion into religiously inspired Muslim family laws. Some of the principles are concerned with procedural or rule of law issues, while others are concerned with more substantive aspects of the law applied in the state (religious or secular) courts.

- 1) *Demarcation of Jurisdictional Boundaries*
- 2) *Ascertainment of Substantive Laws*
- 3) *Publication of Court Rulings*
- 4) *Right to Legal Counsel*
- 5) *Appointment of Judges*
- 6) *Female Representation*
- 7) *Establish Constitutional Review/Oversight*
- 8) *Freedom of Religion and Consent*
- 9) *Regulation of Polygyny, Underage Marriages, and Talaq*
- 10) *Empowerment and Protection of Cultural Dissenters*

IV. The Muslim Family Law Establishments in Israel, India, and Greece:

All three countries have sizeable Muslim minorities (18% in Israel, 15% in India, 5% in Greece), and recognize and apply Muslim family laws within their legal systems—Israel (1948) and India (1947) since their independence, Greece since 1913.

Israel inherited a religion-based family law system (known as *millet*) from the Ottoman Empire, which had ruled Palestine from 1517 until 1917. Under the *millet* system eleven (nowadays fourteen) state-recognized communities were granted autonomy to have their laws and courts in the field of family law. Muslim law and courts were integral parts of the system that was also preserved under the British rule (1917-1947).

India also inherited a *millet*-like family law system from the British upon independence in 1947. There is a major difference between the Israeli and Indian systems, however. Under the Indian system, the Muslim family laws (along with Hindu, Christian and Parsi laws) are applied directly by secularly trained judges (who are often non-Muslims) at civil family or magistrates' courts.

Greece won its independence against the Ottoman Empire in 1829. In the next century, Greeks continued to fight against the Ottomans and gain further territorial concessions. In the territories handed over by the Ottomans, there were sizeable Muslim populations. In order to protect cultural and religious rights of Muslim populations, which became Greek subjects, Greek and Turkish governments signed two treaties, the Convention of Athens (1913), and the Treaty of Lausanne (1924). Under these treaties, the Greek government agreed to take measures to enable Muslims residents of the Western Thrace region to regulate their personal status or family affairs in accordance with Muslim usage and customs. Since then Greece continues to recognize the jurisdiction of three Muslim *muftis* in Thrace to adjudicate family matters (marriage, divorce, inheritance, etc.) of local Muslim communities.

V. Rights-Based Accommodation of Muslim Family Laws in Israel, India, and Greece: A Comparative Analysis

Based on the ten principles detailed in Section III, I have built an index called “the Index of Rights-based Accommodation of Muslim Family Laws” (IRAMFAL), which measures the extent to which 50 MFL-applying countries have integrated rule of law procedures, and substantive rights standards into their implementation of Muslim family laws. IRAMFAL assigns each country a score ranging from 0 to 100. The higher the score, the more “rights-based” the application of MFL in that particular jurisdiction is. One may also interpret higher scores as higher degree of possible (*de jure*) compliance with constitutionalism, rule of law and basic human rights. Index scores of Israel, India, and Greece are 51, 66 and 23 respectively.

The question that I would like address in this section is: what explains the variation in the IRAMFAL scores of these three democratic countries? Why are there such considerable discrepancies in their IRAMFAL scores?

In the literature, no one has yet asked these questions, and so there are no direct answers. However, we can draw three indirect hypotheses from the literature that may prove useful to explain the variation.

(H1): The more secular the political system, the higher the country's IRAMFAL score.

(H2): The more responsive the state to women's rights issues, the higher the country's IRAMFAL score.

H3: The more persecuted the minority group (i.e., Muslims), the lower the country's IRAMFAL score.

“Mode of integration matters...”

My quantitative and qualitative analyses demonstrate that in the case of Israel, India, and Greece none of these explanations holds true. Instead, the following three variables is a better explanation of the variation across these three non-Muslim democracies:

- 1) *The mode of integration*: the way and extent to which MFLs have been integrated into national legal system of each country
- 2) *Majority religious laws*: the extent to which family laws of majority community are reformed and rendered human rights and rule of law compliant.
- 3) *Colonial patterns of integration/regulation*: Institutional rules and practices established under the colonial rule seem to also play an important role in determining the extent to which postcolonial regimes have reformed MFLs within their jurisdictions.

VI. Conclusion: What lessons, if any, can other MFL-applying governments learn from these three countries?

Granted, the experiences of non-Muslim countries may not be fully applicable to democratizing Muslim regimes. But there are still some important lessons:

- 1) Mode of integration matters: Although it may sound paradoxical (especially in the background of debates over shari'a- debates in the UK and elsewhere), religious family laws should be fully integrated into the national legal system for the judicial and political authorities to exercise their supervision and review powers over it... In other words, the more MFLs are integrated into national systems, the greater the likelihood that they will be reformed or rendered HR compliant (provided that there is rule of law, that constitutional review is recognized, that there is a bill of rights guaranteeing fundamental rights and liberties, and that the legal system is largely secular in its orientation and sources).
- 2) In non-Muslim majority settings, reform of MFLs—albeit extremely limited—could come about as a by-product of reforms introduced in the religious laws of the majority for the benefit of majority women etc. (spillover effect).
- 3) Colonial legacy is also an important factor for establishing necessary institutional infrastructure and processes to further render MFLs human/women's rights- and rule of law-compliant.

- 4) In Muslim-majority nations, the ability of governments to reform MFLs is strongly correlated with the legislative capacity of the state and the number of women representatives in the parliament
- 5) It should not be forgotten that reforming religion-based laws (not only Islamic but any religious law) is a tremendously challenging task for even democratically elected majority governments (e.g., Hindu code bill reforms of 1955-56)
- 6) As discussed in Section III above, MFL-applying governments must also enact secular family laws and apply MFLs on a consensual basis, set up constitutional review over courts applying these laws, and regulate polygamy, underage marriages etc. A close analysis of the three countries clearly demonstrates the challenges democratic governments encounter in meeting these demands.
- 7) Lastly, findings also demonstrate that in terms of rights-based accommodation of MFLs, performances of democratic regimes are not superior to those of non-democratic regimes.