

THE DISCRETIONARY RIGHT OF THE JUDGE TO USE A RELIGIOUS FATWA

¹ASSIST. PROF. DR. AQEEL MAJEED TAHA, ²YASMINE SAMI MIKHLIF

¹College of Law / University of Tikrit

aqeel.1985@tu.edu.iq

+9647717180778

²Master's student in the Faculty of Law

yasmisamimukhlif@gmail.com

+9647721765809

Abstract: *The law gives the trial judge the right to issue fair and appropriate rulings that are consistent with the provisions of the law when there is a case before him. This right is consistent with Article 1 of the amended Iraqi Law of Evidence No. 107 of 1979, in which the court has a role in cases not stipulated in the law. Thus, it is left to the discretion of the judge. Therefore, the judge in charge has the right to seek the assistance of a religious fatwa when there is no legal text related to the dispute presented in front of him. The first article does not oblige the judge to seek the help of a specific doctrine, especially in cases of halal and haram (permissible and forbidden according to an Islamic religious point of view) that require knowledge of Islamic jurisprudence. As for the non-Muslim cases that are difficult for the judge to comprehend their rulings due to the diversity and multiplicity of religions and sects, the judge should ask non-Muslim religious references to know the jurisprudential ruling on the dispute in order to issue an appropriate ruling on the case presented before him.*

Key words: *Iftaa, religious, the authority of the judge, refer to fatwa.*

INTRODUCTION

The religious fatwa is one of the topics of special importance in the Islamic community because the need for it increases due to development and progress witnessed in all areas of life. The Holy Quran says {O eminent ones, explain to me my vision, if you should interpret visions.} Surah Yusuf: verse (43).

The personal status courts were previously known in Iraq as Sharia (religious laws) courts, as they ruled according to the personal doctrine of the plaintiffs, and issued their decisions in accordance with what was stipulated in the fatwas and decisions of the doctrine by referring to the texts recorded in the books of jurisprudence, or religious fatwas (the answer to any questions in religious or legal law) in matters not stipulated. However, naming the courts as personal status courts occurred for the first time after the establishment of the Iraqi national state in the early twenties of the last century, when the first constitution of Iraq was issued in 1925. Article (75) of that constitution included the division of the Sharia judiciary into: Sharia (What God has legislated for His servants of beliefs and rulings) courts for Muslims and spiritual councils (Non-Muslims) include Christians and Jews. During the republican era, especially after the revolution of July 14, 1958, a committee was formed in the Ministry of Justice, which concluded with the drafting of the Iraqi Personal Status Law No.188 of 1959.

RESEARCH IMPORTANCE:

The importance of the research lies in the license and the broad authority granted by the law to the trial judge in order to reach the appropriate judgment, especially in matters of personal status related to the permissible (allowed) and forbidden, by referring to the religious fatwa, and not restricting the judge to a specific doctrine.

RESEARCH PROBLEM:

The problem that the research deals with lies in the mechanism of the court's use of religious fatwas for Muslims and non-Muslims, in order to reach a fair judgment in the absence of a text

governing the dispute before it without restricting the court to a specific doctrine. Because the law was limited to organizing generalities and leaving their details to Islamic jurisprudence, the difficulty of understanding all personal status issues and knowing the ruling on new cases emerged on the one hand, on the other hand, the lawmakers are confident that sound solutions are present in Islamic law and other holy books, which are characterized by an abundance of jurisprudential opinions and fatwas approved by many Islamic jurisprudence and jurists of other religions. In addition, knowing the Islamic law and the opinions of churches is not without difficulty for most professionals working in law, including judges.

RESEARCH METHODOLOGY:

The study adopted a comparative method by comparing the texts of Iraqi law with the texts of Egyptian and Jordanian laws.

SEARCH PLAN:

The research plan was in two sections, the first section: the judge's use of religious fatwa though there is a legal text, and the second section: the judge's use of religious fatwa when there no legal text.

FIRST SECTION

The judge's use of religious fatwa though there is a legal text

The court is not allowed to use religious fatwas when there are written rulings, as there is no place for fatwas in the presence of the written law according to the first clause of the first article of the Personal Status Law "The lawmaking texts in this law are enforceable on all issues that these texts deal with in their wording or content"(1) The religious fatwa is not used except in two cases:

The First:

In the event that there is a text that authorizes the court to consult a religious fatwa as the trial judge who examines the matter or dispute does not have the right to consult a religious fatwa unless there is a text that authorizes him to refer to the Sharia to find the clarified practical fatwa that helps him to rule the presented case, In the event that there is a text that authorizes the court to refer to a religious fatwa, then the subject judge who is considering the matter or the dispute is not entitled to refer to the fatwa unless there is a text that authorizes him to refer to the Sharia. To find the clarified practical fatwa that helps him to rule in the presented case, because the judge is bound by the written text (2)

Note that the discretionary right of the judge, which allows him to refer to Islamic Sharia, is restricted according to certain controls, that is, when there is no text governing the issue presented, as stated in the second clause of Article 1, which stipulates" If there is no legislative text that can be judged according to it, then it shall be judged in accordance with the principles of Islamic law that are most appropriate to the provisions of this law." (3),

This text allows the judge to refer to Islamic jurisprudence without being bound by a specific school of thought to choose the appropriate solution to rule the dispute presented before him (4).

Accordingly, the principles of Islamic law are considered the first alternative reference for the Iraqi Personal Status Law, and the second reference for Iraqi legislation, in order to complete what is not mentioned in a text (5), and the Iraqi constitution confirmed this principle: "Islam is the official religion of the state and it is a basic reference For legislation, it is not permissible to enact a law that contradicts the constants of the provisions of Islam..." (6).

It is established that the Iraqi law restricts the judge to the obligation that those principles that he refers to in the text of (the second clause of the first article) be the most appropriate to the texts of the Personal Status Law, and that appropriateness was left to the judge's diligence and discretion (7), in the same regard, "if the provisions of this law do not agree With some Islamic sects, the judge rules according to the law because there is a legal text" (8).



THE SECOND:

The judge uses the religious fatwa in the case of the ambiguity of the presented case, even if it is stipulated in the law, because his task in using the fatwa is to match the provisions with the case he is considering, otherwise he will be considered as abstaining from achieving the right (9). The Federal Court of Cassation decided in one of its decisions: "The court must verify the fatwa of one of the sheikhs regarding the husband's return to his wife (re-marriage her) after the third divorce, because the husband was nervous when he initiated the divorce, in order to determine the validity of the three divorce cases in light of the jurisprudential rulings in respect of which the lawsuit is filed" (10).

It is clear that the judge's use of the principles of Islamic law is not by his will, but rather the Iraqi law maker specified that by text, stipulating that the case presented to the judge is not governed by a text in the law or is ambiguous, and those principles are more appropriate to the provisions of the Personal Status Law, meaning that the judge does not refer to a fatwa or a reference. The religious doctrine of the two litigants contradicts a text of the law or opposes it. Otherwise, the work of the law would be an application of the Sharia principles of the texts, especially in matters of personal status, which requires knowing the position of Iraqi law towards the non-Muslim Iraqi sects.

Based on this, it is stipulated (the first paragraph of Article 2) of the Personal Status Law:

"The provisions of this law apply to Iraqis, except for what is excluded of them by a special law"(11)

This article specified that the Personal Status Law is the general law that applies to all Iraqis, except for what is excluded from them by a special law. Here, the special laws are the laws for the Iraqi non-Muslim sects that are officially recognized in Iraq, where the Personal Status Law does not apply to them, but rather their own regulations according to their religions. And their laws concerning divorce, separation, dowry, and alimony, as in the case of Christians and Jews, as a special law applies to them, which is the law regulating religious courts for Christians and Jews. As for other than that, the civil courts are the ones concerned with examining personal status cases of all non-Muslim sects and issuing judgments in accordance with the law (12). In line with what has been mentioned, Article (33) states: "The Court of First Instance is concerned with looking into personal status articles for non-Muslims and for foreigners who are civil law applied to them in their personal status, and the ruling of the Court of First Instance in what was mentioned lastly is subject to cassation"(13) As an explanation for this, the courts of first instance are considered as personal courts and are competent to consider cases of non-Muslim religious components (14).

As for the position of the laws that we compare with regard to the judge's referral to the religious fatwa when there is a text, it was stated in the Egyptian Personal Status Law, specifically in the first clause of Article 3: "Judgments are issued in accordance with the personal status and endowment laws, and unless it is mentioned in those laws, it is most likely that the sayings of the doctrine of Imam Abu Hanifa will be relied upon"(15). The Egyptian law "applies Islamic law to Muslims, and specifically intends to apply the sayings of the Abu Hanifa school of thought when there is no law making text governing the dispute before the judiciary (16).

As for the cases concerning which special laws were mentioned in matters of personal status and endowment, the second clause of article three states: "However, judgments are issued in disputes related to personal status between non-Muslim Egyptians that united in sect and denomination who had organized religious bodies until December 31.1955 - according to their law - as long as it does not contravene public order" (17),

The meaning of this text is the application of the special law for non-Muslim Egyptians, and we do not mean by that the heavenly books only, but rather it extends to everything that was applied by the religious judiciary authorities as an effective law, and it is required for the application of their special law to be united in sect and religion (18).

In this regard, the Egyptian Court of Cassation ruled in a decision:

(The Islamic law should be applied to non-Muslim Egyptians of different sects and denomination, changing sects during the course of the case has no effect) (19) The family courts, on the

procedural level, have qualitative jurisdiction over all personal status issues over which the jurisdiction of both partial and first instance courts, as they were established under Law No. (10) of 2004(20)

In Jordan, the lawmakers of the new Personal Status Law No.15 of 2019 did not address a provision indicating that a judge would adopt a religious fatwa, contrary to what was previously practiced in the old Personal Status Law, as Article (183). States:

“What is not mentioned in this law is due to the most correct of the Abu Hanifa school of thought” (21). The reason behind this statement may be due to the existence of a Jordanian fatwa law that regulates this matter (22), although, the Jordanian civil law restricted the judge to a fixed reference for understanding and interpreting legal texts, especially texts that are ambiguous and lack of clarity (23), that is stipulated in the third article of the civil law: “To understand, clarify, interpret, and know the significance of the text, the judge must refer to the principles of Islamic jurisprudence” (24), because Sharia courts are competent to consider personal status issues for all Jordanian Muslims (25).

It is noted that the Jordanian law did not suffice with referring to the fatwa in the absence of a text, but even if the text was ambiguous, especially with the presence of the Jordanian General Ifta (fatwa) House and the Jordanian Ifta Law, which regulated the functions of the fatwa by legal texts.

As for non-Muslim sects, Article 2 Claus A states: “Christian sects in the Kingdom included in the table attached to this law have the right to establish courts called councils of Christian sects that have the power to consider cases within their jurisdiction” (26) meaning that, the court applies the law of the two litigants headed by the Supreme Spiritual President (27). However, when the sect differs, Clause B of Article 4 states: “If one of the parties to the case is a Muslim and the dispute is related to personal status issues, then the jurisdiction in hearing the case is convened to the Regular Court of First Instance, unless the parties agree to accept the jurisdiction of the Sharia courts” (28).

SECTION TWO

The judge's use of religious fatwa when there is no legal text

Iraqi law did not specify the formula in which divorce takes place in terms of words. The second clause of the first article of the Iraqi Personal Status Law states: Most of the cases of the judge's recourse to religious fatwas in matters of personal status related to dissolution and sanctity, that is, hisba (Promotion of Virtue and Prevention of Vice) lawsuits, which are not subject to the procedures stipulated in the Civil Procedure Law No. 83 Of 1969, because they are lawsuits that have privacy and a sacred status, the law has given the judiciary a wide authority to carry out its duties, which is included in Article 299 of the Civil Procedure Law” The following provisions apply to Sharia cases. If there is no text, then the provisions of the pleadings set out in this law shall be applied in a manner consistent with the nature of the Sharia cases”(29) As there is no legal regulation for cases of dissolution and inviolability of their own in terms of procedures, because Iraqi law distinguished them from other cases and made them subject to obligatory or not mandatory discrimination even if the period prescribed for discrimination had passed (30),

Among the cases of halal and haram are the annulment of the marriage contract, separation, divorce, and the assignment of the illegitimate son to his father or mother and others (31)

With regard to the non-Muslim Iraqi sects, their cases are heard by the Court of First Instance, which is authorized by law to consider personal matters claims for non-Muslim Iraqis

Hence, the provisions of the Courts Statement 1917 are applied in matters of personal status for non-Muslims, by referring the judge to the jurisprudential opinion of the religion of the two litigants or asking the religious authority of the sect, especially in cases of marriage and divorce (32).

When referring to the laws that we are comparing (Egyptian and Jordanian), we review the position of the Egyptian law in the case of the judge's use of a religious fatwa in the absence of a text. The first clause of Article Three stipulates "Judgments are issued in accordance with the personal status



and endowment laws, and unless it is mentioned in those laws, it is most likely that the sayings of the doctrine of Imam Abu Hanifa will be relied upon"(33).

The Egyptian law established the principle that judgments in personal status articles are issued in accordance with the personal status and endowment laws, but if a dispute is presented to the judge about which there is no provision in those laws, then the court must refer to the Egyptian House of Ifta (Fatwa issuance center) by requesting a fatwa to choose the most likely sayings from the doctrine of Imam Abu Hanifa (34). And when a dispute occurs between non-Muslim Egyptians, reference is made to their own Sharia to rule on their disputes brought before the judiciary, by asking the religious reference of the sect or denomination. The authority of the clergy does not control the judiciary and legislation after the abolition of the religious courts (35).

With regard to Jordanian law, it did not refer to the religious fatwa in the new Jordanian Personal Status Law, unlike the previous law, which obligated the judge to refer to the most likely sayings of the Hanafi School if there is no text (36).

In the event that no text is provided for a specific case, the court returns to the Jordanian Dar Al Iftaa (37), and the tasks of the Dar Al Iftaa are regulated by the Jordanian Ifta Law (38), in application of the rule "the judge has no right to be jurisprudential (interpretative) when there is a text" (39) As for the non-Muslim Jordanian sects, the judge resorts to their own law to rule on the dispute before him, as the court applies the law of the two litigants headed by the supreme spiritual president (40).

In the event that no provision is made for a specific case, the court will refer to the Jordanian Dar Al Iftaa ([iv]), and the tasks of the Dar Al Iftaa are regulated by the Jordanian Ifta Law ([v]), in application of the rule of "no diligence in the existence of source text" ([vi]),

As for the non-Muslim Jordanian sects, the judge resorts to their own law to rule on the dispute before him, as the court applies the law of the litigants under the leadership of the supreme spiritual president ([vii]).

We note that the Egyptian and Jordanian laws were more successful than the Iraqi law in explaining the provisions of non-Muslims regarding their personal status.

We see that the judge's use of the provisions of Islamic law, including religious fatwas, in matters of personal status for Muslims in the absence of a written text is easy due to the great efforts of Islamic law jurists in order to explain its rules and clarify its provisions. This matter becomes clear when compared to the issues of personal status of non-Muslims because of the multiplicity of their religious laws that the judge wants to rule according to, as it is difficult to know all its provisions.

CONCLUSION

The conclusion includes the most important findings and recommendations

Findings

- 1) The mechanism for the judge's use of Islamic Sharia is not by his will, but rather the Iraqi law specified that by a text whereby it is required that the presented case be not dealt with by a text or that it is ambiguous, and the provisions of Sharia are more appropriate to the texts of the Personal Status Law, meaning that the judge's use of fatwa or religious reference of the doctrine of the litigants would not contradict or oppose a text of the law, otherwise the work of the law would be in application of the compatibility of the Sharia principles of the texts.
- 2) The court's use of the provisions of Islamic law, including religious fatwas, in matters of personal status for Muslims in the absence of a written text is easy due to the great efforts of Islamic law jurists in order to explain its rules and clarify its provisions. This matter becomes clear when compared to the issues of personal status of non-Muslims because of the multiplicity of their religious laws that the judge wants to rule according to, as it is difficult to know all its provisions..

RECOMMENDATIONS:

1-We recommend that the Iraqi legislator clarify the rulings of non-Muslims more accurately to avoid the issuance of rulings that are inconsistent with each other

2- We recommend to the Iraqi legislator to clarify the mechanism for the judge's return to the religious fatwa and the establishment of a specific fatwa house (issuing rulings according to religion) that includes all sects in order to reach a just ruling and achieve the appropriateness that the law intends.

SOURCES

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- [18] Appeal No. 12 of 67 BC Personal Status - Session 5/26/2001.
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- [32] The text of Article (309): (1- The annulment of the marriage deed, as well as the arguments considered as provisions such as the arguments related to the replacement of endowments and permission for the consensual division, if it is not appealed against by the concerned parties, then the judge must send the file as soon as possible to the Court of Cassation to conduct cassation audits 2- The provisions and arguments mentioned in the previous paragraph shall not be enforced unless ratified by the Court of Cassation) of the Civil Procedure Law No. (83) of 1969. See: Mohammed Saeed Al-Saadawi, the procedural legal regulation of cases of halal and haram, research published in the Journal of Educational and Human Sciences (Study in Iraqi Law), No. 3, 2020, p. 75.
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