CHAPTER SEVEN

CURRENT APPLICATION OF PERSONAL ASPECTS OF DHIMMAH

7.1. RECOGNITION OF MARRIAGE AND PERSONAL LAW OF MINORITIES

While marriages performed by recognized religious groups are recognized and registered in all Muslim states, the practices of other states are not the same. In the Federal Republic of Germany, for instance, as in other European states, marriages of Gypsies performed according to their traditional laws are not recognized by the state. In Australia, while official policy is not to interfere with traditional aboriginal laws and customs, it has generally been considered inappropriate to accord formal recognition to them. Thus while the form of aboriginal marriage has not been officially restricted, neither has it been officially recognized.228

In this sense, the practices of states with regard to the recognition of personal laws of minorities differ as well:

In Africa and Asia, particularly in those countries in which customary law is an integral part of the general legal system, various ethnic groups are still governed in matters of personal status and other fields of private law by their own rules. Also Gypsies in Europe and indigenous population in some countries are allowed under certain conditions to apply their own customary laws in the field of private law.229

With regard to Canada, according to a report submitted by its government, “religious laws and customs do not receive any recognition except insofar as they are embodied in a statute.”230 The policy in the United Kingdom as Jones-Pauly argues is based on the principle of territoriality:

228 The source of information included in this paragraph is Capotorti Study, supra note 41, p. 67.
229 Ibid.
230 Ibid., pages 70 and 105. Since 1991, in Ontario, the most populous province in Canada, an arbitration law has allowed Catholic and Jewish faith-based tribunals to settle family law matters on a voluntary basis. As these courts have been contributing to the peaceful settlement of civil disputes government of Ontario considered a report which recommended that this law be extended to Muslim religious law arbitration. Yet, this proposal was resulted to a debate
Today in family law the principle of territorality means that every person domiciled in Britain is subject to the general family law, regardless of religious belief. Culture is taken into account only when evaluating evidence of consent, such in the case of petition for nullity of marriage on the grounds that the Muslim father under Islamic law must co-sign a marriage contract with his adult daughter.\textsuperscript{231}

Similarly in other parts of Europe, minorities and in particular Muslim minorities generally have no authority over their family law; Jones-Pauly continues: “Although Europe proclaims to be a pluralistic society and tolerates pluralistic religious beliefs, it still does not grant the right to one’s own legal culture in intimate family areas for Muslims non-citizens or citizens. In other words, it is religiously pluralistic, but not legally . . . non-European societies are religiously and legally pluralistic.”\textsuperscript{232}

In addition to the institution of marriage, in Muslim countries the personal law of recognized religious groups is also recognized. In this connection the representative of Iran points out:

The important point was to know what were the effects of the recognition or non-recognition of a religion for its followers. In the Islamic Republic of Iran no distinction was made between the recognized religions and others, and the rights of all individuals to pray and worship were respected. The consequences of recognition, which some might call ‘concessions’ or ‘privileges,’ were simply that, in matters of personal status and inheritance, marriage and divorce, the social rules of the religion professed by the individual were applicable; in the event of conflict, Iranian judges referred to the relevant codes or sought the opinion of the leaders of the religion in question.\textsuperscript{233}

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  \item between supporters of the proposal and those who believed that Muslim law would violate women’s rights. This debate faced officials in Canada, where multiculturalism is a deeply held value, to decide whether to exclude one religion or whether they should scrap the religious family courts altogether. On this debate see for example, Ayelet Shachar, ‘Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies’ 50 McGill Law Journal (2005).
  \item Jones-Pauly, supra note 117.
  \item Ibid.
  \item Human Rights Committee: Summary record of the 1252nd meeting (Iran), para. 40, U.N.Doc.CCPR/C/SR.1252 (27 June 1994). Also see Abdelfattah Amor, Visit to Iran, supra note 161, para. 37.
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