I am delighted to be speaking to you one day before Ramadan starts. So Happy Ramadan! And on the 11th day of Ramadan, the Iraqi people will be voting on the new Iraqi constitution. And I think it is very significant.

The constitution, like 21 other Arab and Moslem constitutions, declares Islam as the official religion of the State and like 11 other constitutions, recognizes Islamic Sharia as a main source of legislation.

This is what we call the establishment clause, which has a special meaning in the constitution, as the supremacy clause, the sovereignty clause and the morality clause all have special meanings in the new Iraqi constitution.

- Article 90 establishes a Supreme Federal Court to review the constitutionality of the ordinary law and it will include not only jurists of the law but jurists of Islamic law.
Article 39 allows Iraqi to choose their personal status law and perhaps that will mean the establishment of religious courts.

But for the purpose of this session, I would like to discuss with you not the establishment clause in Iraq but the establishment clause in the United States.

And the latest assertion was made by the respectable Islamic organization CAIR that the exclusive use of the Bible in administering oaths is an inappropriate “state endorsement of religion.” After, a judge in North Carolina did not allow the use of the Quran in the courtroom stating that “An oath on the Quran is not a lawful oath under our law.”

And I would like to limit myself to cases where Islamic law has been debated in American courts and there has been an increase in the number of cases decided by the courts that involve Islamic Law due to

- the rising number of Moslem immigrants to the United States.
- And the rising number of African Americans converting to Islam.

African Americans make up about 25% of the Moslem population of the United States. Some of those are members of the nation of Islam.

I am not sure that we have the accurate numbers. Some say we have between 5 and 8 million Moslem living in this country.

And Islam is all over the place, especially after September 11th

1) The Washington Times was careful to publish in the cover page something about “An Islamic Guide on How to Beat Your Wife”, covering the story of the Imam of a mosque in Madrid, Spain, who wrote a book on the right of a Moslem man to discipline his wife and he was sentenced to fifteen months in jail on charges of inciting violence against women.

2) And talking about The Washington Times, a recently published book by Tony Blankley of the Washington Times argues in The West’s Last Chance: Will We Win the Clash of Civilizations? (made the national bestseller list alongside Thomas Freidman’s The World is Flat.)

“What we need is a clear congressional declaration of war, as prescribed by the Constitution. Congress should declare war on the Islamist jihadists.

I prefer Tariq Ramadan’s Western Moslems and the Future of Islam (published in August, 2005) where Ramadan argues that the principles of Islam are universal, that these principles allow Moslems to integrate themselves into western society and that Moslems may still remain faithful to these principles, even while participating in secular western society.
3) And of course you are all familiar with what happened to Michael Graham on the 630 Radio when he made the statement that “Islam is a terrorist organization.” The guy is no longer on 630.

But anyway, and in many cases when Moslems practice the different aspects of the Islamic religion a conflict arises between

§ An interest that the state would like to protect

§ And an aspect of Islam that a Moslem insists on following

Let me mention some examples that I would like to discuss with you.

1. In Freeman V. Florida, a case decided in 2003, Sultana Freeman, who converted to Islam refused to have her photo retaken with her face uncovered.

So the good state of Florida revoked her driver’s license after September 11, that created fear of security threats, although in 14 states a driver’s license can be obtained without a photograph and she could prove her identity with a social security card or a birth certificate.

2. In the Petition for Kassas’ Naturalization, Mahmoud Kassas asserted that he would not bare arms on behalf of the United States and would not go to war against a Moslem country, whether this country is Iran or Iraq.

And, now is not the time to talk about the Axis of Evil or the wisdom of going to war to spread democracy in the Moslem world.

3. In the good state of Michigan a city council approved the right of a mosque to send out a call for prayer to Moslems five times a day on a loudspeaker as long as the Mosque does not cause “nuisance”, and does not air the call before 6 a.m. or after 10 p.m.

4. In Equal Employment Opportunity V. Reads, a Moslem woman applied for a counselor position at a school where the Pennsylvania law stipulated that

“No teacher in public school may wear any dress or mark indicating that she is a member of a certain religion”

During her interview for the job she wore a scarf and she told her employer that she covered her head because she was a Moslem. She was denied the job.

5. In Darab V. United States, a number of Moslems disrupted Eid-al-Fitr prayer, while Moslems were celebrating the feast of breaking the fast following Ramadan.
They were arrested.

While the court was deciding the issue of unlawful entry and trespass to land, they argued that they had a reasonable belief in their right to remain in the mosque, based upon a “fatwa” they obtained from Al-Azhar University in Cairo, Egypt, that once a land is endowed for the purpose of constructing a mosque upon it, then it is not permissible for anyone to own that mosque. The mosque belongs to God.

6. In the Moslem prisoner’s cases, courts have upheld the right of a Moslem prisoner to:

· Halal food the same way Jewish inmates are entitled to a Kosher Kitchen.

Although Courts questioned whether a vegetarian diet would violate Islamic law.

They also questioned whether a prison is obligated to allow for Halal food for members of the Nation of Islam who fast Ramadan only in the month of December.

Also questionable whether you can do two Friday prayer services or does Islamic law require one service. This was a case that involved more than a hundred Muslim prisoners and the prison official feared that holding that massive prayer would constitute threat to security.

· Courts have also upheld the right of a Moslem prisoner to wear white prayer robes that are loose fitting and bulky during prayers five times a day in the prison chapel, but not outside.

· Courts have also upheld the right of a Moslem prisoner to grow a beard up to ¼ inch so that they adhere to their religious Sunni practice without endangering the security of the prison by smuggling illicit materials.

7. In Alkhatib V. Dunkin Donuts, a case decided in 2004,

· A Palestinian Moslem purchased his first franchise of Dunkin Donuts in 1979 in Illinois because his religion forbids him from handling pork.

· In 1984, Dunkin Donuts began offering breakfast sandwiches with bacon, ham, and sausage, and it allowed Alkhatib to sell breakfast sandwiches without meat products, something that my three children find unappealing.

· In 2002, however, Dunkin Donuts refused to renew his franchise agreements because of his failure to carry Dunkin Donuts full breakfast sandwich product line.

2.

And for the purpose of this session I would like to address how does the concept of “public policy” affect such application. And I want to address “rules of public policy” in
two different ways. Islamic rules that are part of the Islamic public policy or Islamic public order, on the one hand, these are immutable, they are not subject to change.

1. Take for instance the Prohibition of Adoption. It is a prohibitive rule that falls within Islamic Public Policy or Islamic Public Order.

In a recent case decided in the U.K. in 2002, a British couple removed an orphan child who was abandoned in Jordan when he was 10 days old, with the intention of adopting him in England.

While the Jordanian Ministry of Social Development approved the removal and issued a passport for the child, the Ministry refused to give consent to the proposed adoption as required by the English adoption proceedings before an order of adoption is made by the courts.

Islamic jurisprudence recognizes the concepts of “Kafala” resulting in placing the child with a caring family without changing his lineage.

And that is why when Moslem countries ratified the Convention on the Rights of the Child, and they all did, as you know the only two countries that did not ratify the CRC are Somalia and the United States.

Moslem countries made reservation regarding article 21 that allows for adoption, including inter-country adoption.

Interesting, Article 20 of the convention explicitly recognizes the institution of “Kafala” of Islamic Law.

Other examples of Islamic rules that are public order rules include rules the application of which when argued may give rise to a fear of persecution and thus constitute grounds for granting asylum.

2. A number of American cases involved Iranians seeking asylum on the basis of fear of persecution because of homosexual practices.

   • Similarly, In an Australian case, an applicant from Bangladesh claimed that it was discovered that he had a sexual relationship with a male servant.

   • A similar application was made in Canada where an Iranian claimed that she entered into a lesbian relationship with her friend in high school and that she was arrested.

Sexual intercourse between people of the same sex is considered a criminal offense in Islam, And this is a rule of public policy.

In none of these cases did the Court grant asylum.

3. Another popular claim of asylum is based on allegation of conversion from Islam to Christianity; and this constitutes the crime of apostasy in Islam.
The Moslem in these cases either was formally baptized
Or joined the Church of Jesus Christ
Or started to eat pepperoni pizza instead of Anchovies
Or his house was searched wherein the police found Bibles and Christian videos instead of the Quran and Osama bin Ladin videos

These cases involving applicants who made these claims, come from countries of:

Iran, Egypt, Nigeria, Sudan, Kazakhstan, Bangladesh, Pakistan

In 1993, Nasr Abu Zaid, a professor of Arabic Literature in Cairo Egypt, was declared an apostate and an Islamic court ordered that he be separated from his Moslem wife. I believe that Abu Zaid is now in Holland.

4. These are countries with poor human rights records, and in accordance with the Report issued by the State Department in compliance with the International Religious Freedom Act of 1998, they are all countries that are "of particular concern", they have no respect for religious freedoms, freedom of practicing other religions, or other sects of Islam that are unacceptable.

And in many asylum cases, fear of persecution of a Shi’a Moslem or a Baha’i Moslem, or an Ahmadi Moslem, was asserted.

5. And President Bush just waived sanctions against Saudi Arabia, although it was listed on Tier 2 of the 2005 Trafficking in Persons Report that was issued by State Department in compliance with The Trafficking Victim Protection Act of 2000.

6. And in many asylum cases, fear of persecution is based on interfaith marriage that is prohibited under Islamic law that does not allow a Moslem woman to marry a non-Moslem man, and this is a rule of public policy.

Nonetheless, in none of these cases an applicant was granted asylum.

How much of these rules may be subject to change? Especially the rules that arguably constitute sex discrimination or gender inequality.

The list includes:

Ø The double inheritance rule.
Ø The double witness rule.
Ø The double compensation rule in murder cases.
Ø The right of a husband to discipline his wife.
Ø The prohibition against women who are Moslem to marry a Christian or
Jewish man.

Ø The right of Islamic women to divorce their husbands.

Ø The prohibition against women serving as judges.

3.

On the other hand, American public policy may constitute a basis for denying the application of Islamic law in American courts as a Foreign Law.

And Islamic Law may be applied as a foreign law in accordance with the rules of conflict of law and the choice of law.

Take for instance the most recent case of National Group for Communications and Computers V. Lucent Technologies that was decided in 2004.

The national group was a Saudi Arabian corporation that entered into a contract with Lucent Technologies. The choice of law clause provided that:

“This subcontract is subject to the regulations in force in the Kingdom of Saudi Arabia…”

In applying the Saudi law, the court recognized that:

· “The Saudi Arabian Legal System is governed exclusively by what is known as the Sharia, or divine law.”

· That “A key doctrine within the Sharia is the prohibition of ‘gharar’ meaning risk or uncertainty…”

· That “under Saudi Arabian law, damages for breach of contract are generally limited to these losses which are actual and direct.”

· That “because of the principle of gharar, Saudi law does not permit…recovery of expectation damages”.

4.

Two important principles are worth mentioning here:

First—The fact that the Saudi law based on Islamic law is different than American law was not a sufficient ground for the exclusion of the application of the foreign law.

This premise was emphasized in McGhee V. Aramco where the court stated that:

“Absence of a remedy for defamation and intentional infliction of emotional distress under Saudi Law does not warrant the invocation of the public policy exception…This exception applies only when foreign law is so offensive to public
policy as to be prejudicial to the recognized standards of morality and to the general interests of the citizens.”

Second—The fact that the foreign law incorporates elements of religion is also not enough to invoke the public policy defense.

5.

But the question here is whether the contracting parties may chose Islamic law as the applicable law with no reference to the law of a particular country such as Saudi Arabia.

In other words; can the contracting parties choose “Sharia” as the governing law?

This was the issue in Shemil Bank of Bahrain v. Beximco Pharmaceuticals, an English case that was decided in 2004.

Where the claimant bank that was incorporated in accordance with the laws of Bahrain entered into financing agreements based on Murabaha, or a cost plus form of Finance that avoids or attempts to avoid the Islamic prohibition of Riba or interest based transactions.

The financing agreements contained a choice of law clause that provided that “subject to the principles of the Glorious Sharia, the agreements should be governed and construed in accordance with English law.”

The court held that the financing agreements were governed by English Law alone, especially that, as the court stated “Sharia” does not constitute a law of a country.

The court went further to question whether Sharia is a Law at all. The court states that:

· “The principles of the Sharia are not simply principles of law but principles which apply to other aspects of life and behavior.”

The court went even further to conclude that:

· “...the application of such principles in relation to matters of commerce and banking were plainly matters of controversy”

· “…and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set as religious and moral codes, but because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle of rule in dispute.”

6.

The difficulty in defining the concepts of Islamic law was again expressed by an English court in Saudi Basic Industries Corporation V. Mobil, a case decided in 2003, where the court struggled with defining the Islamic Tort of misappropriation or “ghasb”, stating
that:

“This difficulty was caused, in large part, by the fact that the concept of stare decisis has no place in Saudi law... The Islamic legal system in Saudi Arabia is based on “justice or scholarly opinion, rather than on the...authority of court decisions or an extensive legislation or codification.”

This difficulty of understanding Islamic law should not be a reason for excluding its application as a foreign law. Only when the foreign law is offensive to the public policy, it may be excluded in courts.

7. The Question becomes: When do American courts consider rules of Islamic offensive to the public policy of this country?

Courts have been reluctant to recognize rules of Islamic Family law.

1. “In refusing to enforce a Mahr agreement by which a husband pays the wife a sum of money at the time of the execution of the marriage contract, and a deferred sum at the time of divorce or death, the court in Dajani V. Dajani held that:

“Prenuptial agreements which facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy.”

2. In Quraish v. Quraish, an English court stated that:

“Although under Muslim law the husband could contract a valid second marriage and the first wife had no legal right to complaint against her husband, it did not follow that under English law the wife would have no right to decline to continue to live with him after his second marriage, or that an English court was restricted to a precise application of Islamic law.”

3. Similarly American courts find difficulty in recognizing the non-judicial divorce, the “bare” divorce, the “Talaq” of Islamic law.

As stated by Seth v. Seth:

“The harshness of such an action runs so counter to our notions of good morals and natural justice that we hold that Islamic law in this situation need not be applied.”

4. Islamic child custody which is based on gender, or sex-based presumptions as a mechanical formula, instead of the best interest of the child, is another area that American courts are uncomfortable with, to say the least.

In Ali v. Ali, the court refused to recognize a child custody decree issued by the Sharia court in Gaza, stating that:
“The Shari’a Law in regard to custody determinations offends the public policy of New Jersey. It is undeniably arbitrary and capricious and cannot be sanctioned by this court.”

And that is why the Moudawana of February 5, 2004 is significant. Article 166 of the Moudawana states: “Custody is exercised until both the boy and the girl reach the age of legal majority. Following the termination of his or her parents’ marriage, a child who completes fifteen years of age has the right to choose either the father or mother as custodian. A child without parents may choose one of the relatives cited in following article 171, provided that his or her interests are not jeopardized and that the legal tutor consents. In the absence of agreement, the case shall be presented to the judge to settle the matter according to the interests of the minor.”

Article 171 states: “Child custody shall be awarded first to the mother, then to the father, than to the maternal grandmother of the child. If this proves difficult, the court shall decide, in light of the evidence before it and in view of what would serve the interests of the child, to award custody to the most qualified of the child’s relatives, while guaranteeing the child suitable lodging as one of the custody obligations.”

I want to leave you with five thoughts.

1. I am not sure that some of these cases are properly decided, especially that courts reach different conclusions in cases involving rules of Islamic law.

2. Public policy must be narrowly construed.

   In judge Cardozo’s classic formulation courts should not refuse to apply a foreign law unless such application “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of common weal.”

   In the words of another court, the exclusion of a foreign law must be narrowly restricted to instances where it would be “inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense.”

3. The differences in culture, practices, customs and religious beliefs between Moslems and people of other faiths must be appreciated and recognized in the application of Islamic law in American courts.

4. Perhaps we should consider allowing for the formation of special Islamic forums that may have the competence to decide cases of marriage, divorce and child custody
outside the court system.

This is the case under the Ontario’s Arbitration Act of Canada that provides for voluntary faith based arbitration that allows Moslems, Jews and believes of other religions to resort to their religious rules in settling family disputes, especially that the Quaranic legislation explicitly recognize arbitration as means of settling disputes.

5. And perhaps arbitration should be utilized in other types of disputes as well. A similar approach is suggested by the US Institute for Christian Conciliation. A typical arbitration clause offered by the Institute reads:

“The parties to this agreement are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian church (see Matthew 18:5-20, Corinthians 6:1-18). Therefore, the parties agree that any claim or dispute arising from or related to this agreement shall be settled by biblically based mediation...”

Courts have frequently enforced this arbitration clause.

Thank You

Copyright © The Protection Project 2005. All rights reserved.