ISLAM AND ISLAMIC LAW IN THE UNITED KINGDOM

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As elsewhere in western Europe, the settlement of populations of various Muslim backgrounds in the United Kingdom has been a phenomenon of the decades since 1945, although there was some earlier settlement[1]. The development of Muslim agendas in Britain since then, especially since the mid-1970's, has been strongly characterised by the fact that the largest parts, perhaps two-thirds, of the one million or so Muslims originate directly or indirectly in the Indian subcontinent - and half of them from Pakistan. The remaining third includes Arabs from North Africa, The Middle East, and Yemen, Turkish Cypriots, West Africans, Malaysians etc. Numerically, therefore, it is hardly justified to think of Islam in Britain being Pakistani. On the other hand, it is clear that it is the Pakistani visage of Islam, and organisations based in the Pakistani communities, which determine the image of Islam among the wider public and the political agendas placed before the British structures by Muslims.

In one sense, this Pakistani domination is no coincidence and does not rely primarily on being the largest community among a variety of communities - it hardly has the internal cohesion which would allow it to use its sheer size to enforce its agendas. The Muslim populations of Pakistani origin represent a continuum of an historical relationship between Britain and the Muslims of India which can be traced back two or more centuries. The first crisis in this relationship came in 1857-8 when the Indian uprising (Mutiny) led to the abolition of formal Mughal, and therefore Muslim, sovereignty to be replaced by the non-Muslim Queen-Empress. The religious and political movements which appeared in response to this change, and to subsequent developments in British India leading towards independence ninety years later, are still at the root of most Indian subcontinent Muslim movements and attitudes today. Pakistan crystallised this assertion of Muslim identity without, however, achieving any consensus on the implications for social and political organisation or programme of being explicitly Islamic in identity. It would seem, from all the evidence which we have seen over the years in Britain[2], that the Muslims of Pakistani background who have settled here are, at least in part, representative of a continuation of the developing Islamic agenda determined by the period of the British Raj. It is as if they have returned to the concerns of the period before 1947, while at the same time linking closely to the Pakistan of post-1947.

[1] For the details see my Muslims in Western Europe (Edinburgh: Edinburgh University Press, 1992), pp. 4ff. and chapter 4.

In this perspective, they find in Britain a confusing context in which to continue the process. On the one hand there is an element of the imperial tradition which still survives in the English "establishment" (or at least the part which finds it difficult to cope with Europe!), and with this part there is an element of understanding even when there is no agreement. On the other hand, there is the "new Britain" of the post-colonial period and socialist-labour Britain, neither of which the leaders of the Pakistani-Indian immigrant generation had any experience of dealing with. The confusion has arisen in the alliances which began to be formed between Muslim leaders and British structures, as they had to face the practical necessities of integration at the local level. On the one hand, Muslim leaders and lobbyists found a generally dismissive attitude at the national level and in Conservative circles. On the other hand they found increasing cooperation from local government and from Labour circles, which tended to express themselves more positively on immigration policy and, more recently, also on explicitly Muslim issues like education - of course, Labour politicians were the ones who had to satisfy large groups of Muslim voters in the inner cities. Events in recent years have changed this situation quite dramatically, but that is outside the scope of this paper[3].

For the purposes of this conference it is not without significance that it is, arguably, the judiciary which of all establishment institutions has shown

[2] Two annotated bibliographies are in existence on this subject: D. Joly and J. Nielsen, Muslims in Britain: An annotated bibliography 1960-1984 (University of Warwick: Centre for Research in Ethnic Relations, 1985), and an unpublished update by Steven Vertovec, School of Geography, University of Oxford.

[3] For a more detailed discussion of this see my paper "Islam, Muslims, and British local and central government", to be published by the Agnelli Foundation, Turin, edited by Felice Dassetto; an English version is available in CSIC Papers: Europe.

the greatest degree of practical flexibility. One can speculate as to why this should be so. On the one hand, the nature of English law with its strong element of common law principles and the role of case law (precedent) induces an element of flexibility and a fundamental expectation of law as a living entity developing to deal not only with new specific cases but also with new social and cultural contexts. This judicial tradition is one which has always preserved a very close relationship between the practice of law and the study of law, so that academic accounts of the law of a particular field, eg. international private law, are not only concordances of existing law but also syntheses of developing underlying theory and suggested extrapolations for a new current situation. The spread of the English legal system, with its foundations in common law, equity and precedent, through the empire has also meant that the legal experience of "common law" countries has been fed back into England, in the past through the Judicial Committee of the Privy Council and still today through the procedures of precedent and through the work of academic lawyers. Thus the English legal system listens not only to the experience of North America, Australia and New Zealand, but also to India, Pakistan and other "non-white" countries in the system. This is a factor of particular importance when communities from such countries settle in Britain.

In the following I shall outline first how the English legal system has adapted to the presence of communities of Muslim background, with reference both to international private law and to the development of domestic law. Secondly, I shall discuss the specifically Muslim agenda concerning the question of a place for Islamic law in the domestic legal system of England and British reactions to this - this is, of course, an issue which is being played out in a context which goes way beyond the narrowly legal.

As is presumably well-known in legal circles, English international private law differs from the mainland European variety in one important aspect: it is based not on nationality but on domicile[4]. The basic definition of domicile is the permanent home, which is not necessarily the same as the country of nationality or even the country of legal residence. During the imperial era English courts tended to interpret domicile in such a way as

[4] The two main textbooks in this field are Cheshire and North, Private International Law, 10th ed. 1979, and Dicey and Morris, The Conflict of Laws, 6th ed. 1981.

to preserve the English domicile of "imperial adventurers". In recent decades, the courts have tended to interpret domicile in such a way as to hasten the judicial integration of immigrants. In the former case an English domicile could be considered to have been maintained after decades of uninterrupted absence even outside the confines of the empire, while in the latter instance an English domicile could be judged to have been acquired within a very few years of immigration.

The nature of international private law and the process of immigration have conspired to create an almost fiendishly complex situation for English lawyers, courts and litigants, especially in the field of family law. The rules of international private law do not, of course, directly provide an entry for Islamic law *pure et simple*. What they do provide an entry for its matters of personal status and relations within the family according to the law of the domicile. In other words, the English courts will refer to the law of Pakistan, or Lebanon, or India, or Morocco, and only indirectly to Islamic law insofar as the law of the relevant domicile does so. So it is clearly useless for someone whose domicile is Turkey to appeal to Islamic law; they can only appeal to Turkish law. However, in recent years the law has introduced another criterion for determining the substantive law governing a marriage, especially mixed marriages, namely the concept of the intended matrimonial home.

However, even by this indirect means English courts have not found it excessively difficult to take on board aspects of Islamic family law[5]. Certainly the marriage contract in some of its manifestations has been found to be acceptable. It seems clear, for example, that the *mahr* (dower) specified in such a contract will be enforced by English courts. The issue of polygamy has been a special issue. On the one hand, the 1866 decision in *Hyde v. Hyde* determined that English courts could not grant any form of matrimonial relief in cases where the marriage had been formalised in a polygamous system - even if the marriage itself was not polygamous. The deconstruction of this rule started substantially by act of parliament in 1972. On the other hand, English law continued to recognise the validity of polygamous marriages - whether actual or potential - in, for example, recognising inheritance rights of wives and

[5] For detailed references in this and following areas, see David Pearl, A textbook on Muslim personal law, 2nd ed. London: Croom Helm, 1987, and S.M. Poulter, English Law and Ethnic Minority Customs, London: Butterworths, 1986.

children of polygamous marriages formalised legally in polygamous systems by individuals domiciled in those systems.

In divorce cases, the key question has always been and remains whether the formalities of a divorce take the form, even remotely, of a form of judicial procedure. Thus the traditional *ṭalāq* as still practiced, for example, in Morocco would not be recognised while it seems clear that arbitration procedures of Pakistan are - especially in the light of recent developments in England's own domestic divorce procedures, which are becoming ever less judicial in nature, at least as regards uncontested cases.

The custody of children is another area where there are instances of conflict. Muslim expectations are quite clearly that children after a certain age belong with the father while the majority of English court decisions favour the mother. In fact, the cases of actual clash are few and far between and only arise when one party, usually the husband, takes the children abroad. But here again we are in an area where there is uncertainty as to whether we are dealing with a difference of expectations between English law on the one hand and, on the other, some form of classical Islamic law, modern national statute law, or local customary law. If it were classical Islamic law there is at least the possibility of reaching some degree of accommodation for children under the age of puberty. More often, one suspects, we are dealing with the expectations of local custom, to which local courts may bow, and this is much more difficult to come to grips with through legislation or international treaty.

Questions of inheritance have not yet become a major issue, given the demographic structure of the populations concerned, but it is likely to become more important quite soon. Indeed, there will remain a number of the immigrant generation about whom the courts are likely to decide that they have retained their domicile of origin. Their moveable properties will thus be subject to the law of inheritance of the country of their domicile, which will usually be Islamic with a minimum of reform. It has been made quite clear by a number of legal commentators that a precisely formulated will requiring an estate to be divided according to some form of Islamic law is quite acceptable to English law. However, it is equally clear that there will be circumstances in which a widow could ask the court to amend such a will in her favour, particularly if she were to be awarded only the normal one eighth of the estate in the presence of children.

Of course, whichever aspect of the law we may be dealing with under the heading of international private law, English law does not regard law imported in such a manner as Islamic. It is to be viewed as the law of a foreign state and only Islamic to the extent that the law of that foreign state admits it so to be. This does not satisfy those Muslim leaders in Britain who have been arguing for the domestication of Islamic family law. This demand was first put forward by the Union of Muslim Organisations (UMO) in 1975. Although some Conservative MPs expressed mild interest, as did a few academic lawyers, the proposal was generally dismissed out of hand without discussion. It did not excite much attention among the Muslim community either at the time. During the 1980's, however, the wish for a domesticated Islamic family law has been voiced more and more often from a variety of quarters in the Muslim community, although it is difficult to judge how closely in touch with the community the leadership is on this point. The context for this change has been the increasing self-awareness of the community leadership and its growing activity in the public domain. Adding the demand for Islamic family law to the agenda is thus, in part, one aspect of a phenomenon which includes Muslim political activity around the Rushdie affair, the Gulf War, and educational changes.

This does not mean, however, that the question can be dismissed solely as an expression of self-serving manipulation by leaderships interested in political power. There are questions of principle being raised to our accumulated European traditions[6]. Our legal definition of religion is essentially one which is limited to the privately individual, at one level, and to the institutional expression, on the other. Freedom of religion as defined both by national laws and by the European Convention on Human Rights does not extend so far that, for example, Quakers can be exempt from paying the military proportion of their taxes by appealing to religious rights. Nor does religious freedom cover the right under civil law to recognition of a different religious family law, as the Roman Catholic church is regularly reminded. Both Quakers and Muslims would, from their points of view, be entitled to say that we are here faced with a

[6] For a discussion of these issues, see Churches' Committee for Migrants in Europe (CCME), Islamic law and its significance for the situation of Muslim minorities in Europe (published in Research Papers: Muslims in Europe, 35 (Sept. 1987); a French translation was published by the CCME, and a German translation in EPD Dokumentation, 34/87 (3 August 1987).

restriction of religious freedom. Or as one of my Muslim colleagues regularly espresses it, "What right does the state have to interfere in the internal arrangements of the family?"

Having made these points it is, of course, clear that to accept a plurality of domestic legal systems of personal satus would be a major change. The experiences of countries with such systems do not always commend themselves, as in the case of countries like Lebanon or Nigeria. However, it has to be said that the very political authorities which are rejecting or ignoring the proposals have themselves in the not too distant past governed in plural systems. Muslims in Britain are quick to point out that the judiciary seemingly found little objectionable in presiding over the plural system of British India, and that the corporate knowledge of that tradition is still very much alive especially among academic lawyers.

A series of seminars bringing together legal practitioners and community leaders during the mid-1980's in England, in which I was involved, suggested that there were ways forward which could meet many of the Muslim concerns while not breaking the essential unity of the existing system[7]. Firstly was a recognition that much of existing English family law does not contradict Islamic law. Even the insistence on *de jure* monogamy does not prevent *de facto* polygamy, if the parties concerned wish to enter into such a relationship and if they accept that, in the event of dispute, the courts can grant only limited relief. There was a major concern over the traditional adversarial process of adjudication which tended to polarize the parties in defence of their own interests. To meet this, participants in the seminars agreed that the introduction of family courts operating with conciliatory procedures would represent a major advance, as this would allow for Muslim parties to reach a mutually acceptable agreement leaving the courts the role primarily of endorsing an agreement rather than imporing one. To a certain extent the Childrens Act of 1991 has gone a long way towards changing the system in this direction.

While it was possible for some of the Muslim participants in these meetings, including the general secretary of the UMO, to see the possibility of achieving much of what was desired within the existing system

[7] The meetings were preparatory to the report mentioned in the previous note, and texts are available from the CSIC in Birmingham.

through a step-by-step approach, there remains a fundamental question of principle, namely of whether it is possible for Muslims to recognise as satisfactory the practice of Islamic family law through such an approach, or whether only a system explicitly recognised as Islamic and run by Muslims is satisfactory. The response here is not so much legal as it is theological and political, not to mention constitutional.

Family law is, of course, not the only area in which Muslim concerns and wishes impinge on the law in general. In the book noted above, Sebastian Poulter touches on areas as wide ranging as education, judicial oaths, burial and cremation, freedom of worship, criminal law, employment, and planning. One could add further subjects, such as blasphemy, access to correct methods of slaughter, and the taking and charging of interest. Education is one particularly crucial agenda, which has constant political repercussions[8]. However, it is debatable whether this and a number of other matters should, at least for the time being, at all be considered under the heading "Islamic law". While Muslim organisations are presenting their demands under an Islamic banner, their use of the term Islamic law or even Shariʿa is almost exclusively restricted to the questions of family law. In one sense this reflects the historical experience of the Muslim community, especially under colonial rule, where family law was often the only part of the Shariʿa complex which remained active. Whether this will change in years to come is difficult to say, depending as it does on numerous factors and processes within the Muslim community and as between the community and the wider society both in the countries of settlement and in the Muslim world generally.

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[8] See my "Muslims in English schools", Journal: Institute of Muslim Minority Affairs, 10, 1 (January 1989), pp. 223-245, and K. Wagtendonk, "Islamic schools and Islamic religious education: A comparison between Holland and other West European countries", in: W.A.R. Shadid and P.S. van Koningsveld (eds.), The integration of Islam and Hinduism in Western Europe (Kampen: Kok Pharos, 1991), pp. 154-173.