

DISPUTE SETTLEMENT AMONGST THE MUSLIM COMMUNITY IN THE UK

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Diversity and the Law

Many observers have commented on the fact that both English law and Scottish law, make relatively few concessions to the existence of ethnic pluralism within UK society. A good example would be the remark by the late Dr. Sebastian Poulter:

“While English law should broadly approach other cultures in a charitable spirit of tolerance and, when in doubt, lean in favour of allowing members of minority communities to observe their diverse traditions here, there will inevitably be certain key areas where minimum standards, derived from shared core values, must of necessity be maintained if the cohesiveness and unity of English society is to be preserved intact.”²

Roger Ballard, an anthropologist from the University of Manchester, has commented critically on this approach in his various writings.³ He draws attention in particular to the “corporate character of South Asian extended family structures, to the transnational connections, to considerations of *‘izzat* “honour” and *sharm* “modesty” and to the need felt by the community in sustaining religious beliefs and practices. Failure to take account of these matters has to his mind led English courts into unfortunate errors.

The purpose of this presentation is to attempt to show how this need has led to the development of what has been called *Angrezi Shariat* (‘English *shari‘a*’), as well as encouraging an informal network of Muslim dispute settlement mechanisms.

The Development of *Angrezi Shariat*

Muslim communities themselves have cultivated numerous avoidance strategies so that the contact points between the official law and the “unofficial” law has become obscured. In England, a new hybrid form of

law has been created, which Werner Menski and I call *Angrezi Shariat*.⁴ We suggest that there is now significant evidence that Muslims in UK, both in England and in Scotland, now marry twice, divorce twice, and do many other things several times in order to satisfy the demands of concurrent legal systems.⁵

The Muslim Law (Shariah) Council

Linked to this is the development of alternative processes to resolve disputes. The most influential Muslim organisation that has involved itself in dispute settlement is the Muslim Law (Shariah) Council UK, founded in 1978, reconstituted in 1985 and based in Ealing, West London. The Council has three main functions; to resolve disputes between Muslims in UK, to give *fatwās* in answer to questions submitted by organisations or individuals, and to resolve the conflicts of law between the civil and the *shari'a* law with particular reference to family law.

Muslims from all over the country use the services that it provides, primarily to facilitate a divorce in accordance with Muslim law, and to resolve all manners of matrimonial disputes. There is evidence that by the mid 1990's the Council had dealt with some 1500 cases brought to it, the majority concerning a divorce situation where the wife had either obtained a civil divorce or was about to begin that process but where the husband refused to pronounce a *ṭalāq*. What the Council attempts to do in this situation will of course depend on all the circumstances. But where the husband persists in refusing to pronounce a *ṭalāq*, the Council invariably grants a *faskh* divorce to the wife and a divorce certificate is then issued to the wife.⁶

A wife who is faced with this situation may have to incur financial penalties such as the return of the dower, although of course the secular court in any subsequent proceedings has the power to adjust the maintenance and property settlement by taking account of the return of the dower. These are matters that must be drawn to the attention of the civil Judge when the matter is dealt with in court, for he may well wish to impose other arrangements unless he is apprised of the situation.

The difficulty however is that the dispute may never reach a civil court, and a woman may find herself in the unfortunate position of having to forgo her rights in the dower (*mahr*) in return for the marriage being brought to an end in an Islamic manner. Indeed there have been some who have commented on the work of the Council and other similar

bodies as upholding a "disturbing reaction on the part of what might best be termed the spokesmen of Muslim male interests."⁷

The Nuffield Foundation sponsored research into the work of the Council by Sonia Nurin Shah-Kazemi, and her findings, based on detailed interviews with women⁸ who have used the Council's facilities have been published as "Untying the Knot: Muslim Women, Divorce and the *Shariah*" (2001). One important conclusion that she draws from her research is the suggestion that the term *Angrezi Shariat* requires refinement. Out of the case files she examined, she states that a significant 57 percent of the women did not register their marriages in the UK according to civil law at all, although they did go through a *nikāh* ceremony. Some of these marriages were solemnised in Islamic form abroad, and therefore it would not have been necessary to go through another civil ceremony in the UK because the marriage may well have been recognised. However, there was still a group of women who had gone through a *nikāh* in UK and not solemnised a civil marriage. Such unions would not be recognised, and these people of course had conducted their lives totally away from the requirements of English law. *Angrezi Shariat* had not touched them.

Some Muslim scholars have demanded official recognition of the Muslim family law, arguing that in the context of a secular state there is ample space for religious personal laws to operate side by side and in a position of equality, one with the other. In any event, so it is argued, in a country such as the UK, State law has recognised certain characteristics of the dominant Christian family law. Then analogies are drawn to the experience of the British Empire where a system of personality of laws prevailed, and where indeed successor states have continued the regime of allowing individual citizens to be governed by their own religious laws. This is the case, in varying degrees, in the Islamic State of Pakistan as well as in the secular state of India. Bangladesh too follows this principle.

I am not in favour of this approach, which has little official or indeed popular support. The historical analogy is not an apt one. For one thing, the experiment was not a resounding success, and the experience of nineteenth-century imperial India should not be a precedent for a multicultural and multi-ethnic society of the twenty-first century. Secondly, there will be in any event immense difficulties in identifying the specific family laws of the Muslim community, varying as they do between schools and between origins. There may be common denominators but by definition such principles will not be acceptable to

all. Old struggles over the definition of *shari'a* and its practical application would be revived in UK, to the detriment of harmonious relations within the communities themselves.

Sonia Shah-Kazemi discovered that most of her sample of Muslim women who had used the services of the Muslim Law (Shariah) Council were against any official recognition of *shari'a* law in UK. What her respondents were supportive of was third-party intervention in family disputes by Muslim mediators.

Interestingly, the Scottish Executive has already begun work in trying to develop such initiatives within the framework of State supported Family Mediation Services, set out in the paper "Family Mediation Services for Minority Ethnic Families in Scotland."⁹ There are however problems of confidentiality. The suggestion is that mediators from a different town should be involved in direct dispute settlement so as to overcome the considerable reticence of the parties and their families, who understandably do not want their community to know that they are using such a service. The Scottish paper concludes that while women may be more willing to use family mediation services, men would be more resistant, and that gender impartiality of family mediation services needs to be emphasised.

The approach of the English Court

The development of *Angrezi Shariat* and the existence of Muslim dispute settlement organisations, either from within the community or State sponsored, has not prevented of course the continuing involvement of the secular courts in adjudicating on Muslim family disputes. A recent example is the case of *Basma Sulaiman al Sulaiman v Walid Ahmed Al Juffali* decided in the High Court on 9th November 2001. The case is interesting not only for its factual issues, which were concerned with whether the English court would recognise a traditional *talāq* pronounced in England by a Saudi national, but also for the way in which the Judge made clear that he was sitting as a secular Judge "serving a multi-cultural community of many faiths in which all of us can now take pride, sworn to do justice "to all manner of people". The Judge said that the starting point of the law is an essentially agnostic view of religious beliefs and a tolerant indulgence to religious and cultural diversity.

Probably the most frequent problem to occupy the courts and tribunals in England and Wales concerns the question of the validity of an

Islamic divorce, in particular the *talāq*. At the present time, English courts and tribunals draw a distinction between, on the one hand those *talāqs* that are accompanied by certain procedural steps, and those that are not (the so called "bare" *talāq*). As a result of case law interpreting the relevant legislation¹⁰ the procedural *talāq* is more likely to be recognised than the "bare" *talāq*. Even less likely to be recognised is the "transnational" *talāq*. An example of this last scenario would be of a Muslim husband, who originated in Pakistan, pronouncing a *talāq* in UK, and then sending a copy of this *talāq* to his wife in Pakistan with notification to the Chairman of the appropriate Union Council as required by the Pakistan Muslim Family Laws Ordinance of 1961. These are the facts of *R v Secretary of State for the Home Department ex p Ghulam Fatima*.¹¹ They also are the facts of *Sulaiman*, except that the parties were Saudi and the *talāq* pronounced in UK was registered in Saudi Arabia. The Judge in that case made clear that he was conscious that the rule of law by which the husband proceeded "has the authority of the holy scriptures of the common faith of himself and his wife." However, as it was obtained in England otherwise than in accordance with the English secular law of divorce, he could not give effect to it. As he said: "I have to give effect to the policy declared by Parliament. (...) This policy is that, irrespective of the parties' domicile and religion, informal divorces obtained in this country (...) are not to be recognised. (...) The policy applies indiscriminately to all informal divorces, the religious as much as the non-religious, irrespective of the nature of the parties' religious or other beliefs."

Another area where conflict has been known to arise is in the recognition of potential and actual polygamous marriages. One decision deprived a Muslim widow living in UK from being entitled to a state widow's pension based on her husband's compulsory National Insurance contributions because at the time of his death he had living another wife in Pakistan.¹² This other wife had at no time set foot in UK. It was decided that the definition of the word "widow" in the appropriate legislation was restricted to monogamous marriages, and that it was not possible to entertain the proposition that the payments could be split, that the husband could have elected one of the widows, or that the UK resident wife alone could benefit.¹³ It has been suggested that the scenario will require re-examination in the light of the Human Rights Act 1998 incorporating the direct application of the European Convention of Human Rights into UK law.¹⁴ However, this re-examination has not yet occurred, and its success is problematic. But in immigration law, a

polygamously married foreign husband is allowed to bring only one wife into the UK for settlement; thus it would seem for that reason alone that it is unduly harsh for the one wife allowed into the country to be denied state benefit in the event of his death.¹⁵

Another area of potential conflict is in relation to child law. Residence and contact disputes arise frequently before the English courts. Additional issues which have been before the courts arise less frequently but always create difficulties; namely the requirement or otherwise to circumcise a male child.¹⁶ In *Re J*,¹⁷ the mother applied for an order prohibiting the father from arranging the circumcision of their five years old son. They had been married at the time of the child's birth, but the marriage had subsequently broken down. The father was Muslim although the mother, as the primary carer, was bringing up the child in a secular environment. She was strongly opposed to circumcising the child. Both the trial Judge and the Court of Appeal found that the circumcision was not in the interests of the child and therefore the mother's application succeeded. The Judge at first instance, approved on appeal, made it clear that it would be unusual (although of course not impossible) for a court to order that a child should be brought up in a religion not practised by the parent with whom the child resides. In *Re S (Change of Names: Cultural Factors)*,¹⁸ the Judge was faced with an application by a Muslim mother who had married and had a child with a Sikh man to change the child's three Sikh names to two Muslim names. The child was living with the mother who had been reconciled with her observant Muslim family on the breakdown of her marriage. The Judge directed that there may be an informal change of name, and that the child may be brought up in the Muslim faith. He said that "Islam was so central to the life of the Muslim community that the reality was that the child must be brought up in the Muslim faith" and that this would mean circumcision for the child by the age of 10.

Difficult decisions have to be made also from time to time in relation to alleged child abduction cases. The issue that has exercised the English Judges is the principle that should determine the outcome of applications for the return of children abducted from Muslim countries. It arose in stark form in relation to Pakistan,¹⁹ the UAE,²⁰ and the Sudan.²¹ The facts of the last case are instructive. There are three boys, born in 1989, 1991 and 1993. The parents are Sudanese Muslims and they married in Sudan. They lived in the UK from 1987 to 1991 when the parents and the two children born at that time returned to Sudan. In May 1993, the father came to the UK and in December the mother came to the UK with the by

now three boys. She did not remain in the UK for long and she returned to the Sudan with the boys in April 1994. The marriage ended by divorce in Sudan in 1995. The mother remarried a Mr M and a Sudanese court directed that the children live with the father's family. This decision was taken in compliance with the *shari'a* law as applied in Sudan to the effect that the mother was no longer qualified to have the care of the children by reason of her remarriage. The mother's mother was unable to care for the children in any event. The mother was given contact with the children. The mother then came to the UK in May 1999 with her second husband, a fourth child who was her child with the second husband, and the three children. She sought asylum in the UK and applied also for residence orders preventing the removal of the children from England and Wales. The trial judge made an order for the return of the children to Sudan. The mother's counsel, on appeal to the Court of Appeal, criticised this approach. Counsel argued that the decision of the trial judge resulted in an order that would separate the children from both parents. It would return them to a jurisdiction where there could be no discretionary review of the relevant facts and circumstances to determine child welfare, but only the rigid application of the *shari'a* rules. Notwithstanding this submission, the trial judge's approach was upheld on appeal. Thorpe LJ considered the cultural dimension to the case and referred to the importance of "according to each state liberty to determine the family justice system and principles that it deems appropriate to protect the child and to serve his best interests." He went on to remark that there is an obvious threat to comity if a state whose system derives from Judaeo-Christian foundations condemns a system from an Islamic culture: "when that system is conceived by its originators and operators to promote and protect the interests of children within that society and according to its traditions and values."²²

The Old Values and New Awareness

In a paper recently published,²³ I argued that it was no part of the Judge's responsibility to change the world or indeed to change society. However, I did say that the judicial decision-maker has to understand the society in which he or she operates. It is the duty of the Judge to ensure that disputes are adjudicated in a fair and honest manner, sensitive to the particular cultural dimension of the case.

I think that we are getting better at serving the needs of a

multicultural society. But at the same time there is no room for complacency because there is much that still needs to be done. Judges in England and Wales now have the benefit of a Bench Book which provides information on issues relating to equal treatment, and describes the most important aspects of the religious communities living in this country.²⁴ Indeed, the Bench Book devotes an entire chapter to ethnic minority families. It looks, first, at the areas of practice in which family issues are likely to be of particular importance and, secondly, at family patterns and practices. The Islamic law of divorce is described in some detail. Importantly in this section, Judges are informed about the social change that has affected the dynamics within the traditional family structures.

In serious criminal cases it is of course the Jury who decide on guilt, and the Jury are selected at random. The Judge however has an essential role, to direct the Jury so that they arrive at a true verdict, and this may well include considerations of the cultural framework if this is relevant to the facts of the particular case. Research needs to be done on the role of the expert who may be able to help both the Judge and the Jury in reaching a true verdict in criminal cases involving the Muslim community.

In an extreme case, the Judge may have to stop a case from being put before a Jury. A recent highly publicised case where this happened is *R v Choudhry Majid Ali*. His wife Uzma Shaheen and their child Sana were burnt to death in a horrifying house fire in Bradford in March 1999. The husband was charged with the murder of his wife and child. The Judge directed the Jury to return a verdict of not guilty after legal submissions, after he had read witness statements that suggested that Uzma had contemplated suicide, and after he had heard the evidence of a consultant anthropologist called on behalf of the defendant.²⁵

Whatever one may say about the facts of that case, it highlighted the growing concerns of police and social workers for the safety of many British Muslim women married in circumstances that in the extreme situation might be seen as "forced marriages."²⁶ Judges and indeed politicians need to be aware of the existence of forced marriages and to be able to distinguish these sad cases from arranged marriages.²⁷ An example of the way in which a Judge may be able to tackle the issue is the story of a Sikh family in *Re KR*.²⁸ The Judge made it clear that child abduction remained child abduction even where the abductors were the parents of the child and the child was almost an adult. He went on to say that although the English courts were not insensitive to considerations of

traditional values and concepts of family authority held by communities, such sensitivity would usually give way to the integrity of the individual child or young person. In response to these cases, the Home Office established a Working Group chaired by Baroness Uddin and Lord Ahmed. The Report "A Choice by Right" was published in June 2000 and recommended that victims should be able to access mediation as a means of conflict resolution. This is a controversial area, and indeed one member of the Working Group resigned on the issue.²⁹ It is likely that mediation from within the community may be as ineffective as mediation by a State organisation regardless of whether the mediator is a member of the community or not. Mediation in this area should be seen as only one of the possible tools available, and more effective inevitably is going to be education and awareness programmes amongst the Muslim teenagers. In a parallel development, the Foreign and Commonwealth Office has now established a dedicated "forced marriage desk" to work directly with the ethnic minority communities and progress is certainly being made.

Conclusion

In conclusion, what is absolutely vital is for Judges, both in England and in Scotland, to be aware just how profoundly one's own personal understanding may be culturally conditioned. What Judges must demonstrate by their judgements is that they have taken active steps to counter any impact of ethnocentricity. Diversity is a challenge, which must be handled in a sensitive way. I personally believe that the UK Judiciary is now being prepared to deal with this challenge. But in addition, it is important that the Muslim community itself continues to develop its mediation and dispute settlement strategies and to counter any suggestion that such strategies are no more than continuing the male dominated values. State sponsored mediation schemes also have a place to play. There are inevitably difficulties ahead; for example to resolve the issues of confidentiality, and whether all Mediators appointed by State schemes should be Muslims. For the UK, as well as for Europe in general, failure will only increase a sense of alienation amongst the Muslim population that in its turn will lead inevitably to ethnocentricity and intolerance. These trends need to be avoided at all costs.

Notes

- 1 MA LLB PhD (Cantab); President, Care Standards Tribunal; Circuit Judge; Life Fellow, Fitzwilliam College, Cambridge.
- 2 Sebastian Poulter, *Ethnicity, Law and Human Rights: the English experience*, Oxford: Oxford University Press 1998, at p. 391.
- 3 See in particular Roger Ballard and Desh Pardesh: *The South Asian Presence in Britain*, London: C. Hurst and Co. 1994.
- 4 See David Pearl and Werner Menski, *Muslim Family Law*, 3rd edition, London: Sweet and Maxwell, 1998, especially pp. 74ff.
- 5 We suggest that the evolutionary process to the development of *Angrezi Shariat* has developed in three stages (Pearl and Menski, pp. 75-77). First, when the Muslim immigrants arrived in the country, they did not normally know about the official laws of their new home. Thus, Muslims would get married at this early stage by simply contracting a *nikāh* in England, or they returned to the sub-continent to marry there. Subsequently, in a second stage, when it was realised that non-compliance would lead to problems; thus both English law and Muslim law were complied with. The third stage, a hybrid British Muslim law, points to a process of consciously building the English legal requirements into the framework of *shari'a* rules.
- 6 It is for this reason that the Muslim community was not expressly made the subject of the Divorce (Religious Marriages) Bill 2002. This Bill deals exclusively with the Jewish law, and enables a court to order that a civil divorce be not finalised until a declaration by both parties that they have taken such steps as are required to dissolve the marriage in accordance with Jewish law. There is however a provision that this procedure can be extended to any other religion if an Order is made by the Lord Chancellor to that effect. In the debates in Parliament, it was said by the Government spokesman that no such Order would be made unless the Muslim community sought it, and that the understanding of the Government on the basis of the work by Sonia Shah-Kazemi was that the position of Muslim women was very different to that of orthodox Jewish women. In the case of a Muslim woman denied a get from her husband, she would be able to go to the Council and obtain a *faskh*.
- 7 See Lucy Carroll, "Muslim women and 'Islamic divorce' in England", *Journal of Muslim Minority Affairs* 17 No 1 (1997), pp. 97-115, referring to other organisations.
- 8 She considered 287 case files and conducted 21 in depth interviews.
- 9 See <http://www.scotland.gov.uk/cru/kd01/purple/mediation-07.htm>.
- 10 Now the Family Law Act 1996.
- 11 [1986] AC 527 [House of Lords].
- 12 *Bibi v Chief Adjudication Officer* (1997) *Gazette* 94/27.
- 13 There has been a series of cases dealing with widow's benefits where the

- application from the surviving spouse has been denied on the basis that there is a pre-existing marriage that has not been dissolved. See CG/17/1992 and most recently CG/13358/1996. These cases turned on the details of the law of *talāq* in what was then East Pakistan and in Bangladesh.
- 14 In particular Article 8 and Article 1 of the First Protocol to the European Convention on Human Rights.
 - 15 HC 395 paras 278, 279 and 280 as amended by CM 4851 paras 27, 28 and 29.
 - 16 So far as female circumcision is concerned, this has been made the subject of criminal sanctions by the Female Circumcision Act 1985 if performed in the UK. See S. Akers, "Female genital mutilation: cultural or criminal?" *Journal of Child Law* 27 (1994) 6.
 - 17 [1999] 2 *FLR* 678 (Wall J) approved [2000] 1 *FLR* 571.
 - 18 *Fam Law* [2001] 728.
 - 19 Re S [1994] 1 *FLR* 297.
 - 20 Re JA [1998] 1 *FLR* 231.
 - 21 Re E [1999] 2 *FLR* 642.
 - 22 See also *Fotheringham v Al Habtoor* (Court of Appeal) [2001] *All ER (D)* 172 (Feb).
 - 23 S. Cretney (ed.) "Ethnic Diversity and English Family Law", in: *Family Law: Essays for the New Millennium*, Bristol: Family Law, 2000, pp. 79-88.
 - 24 The Bench Book is published by the JSB and is distributed to all full time and part time Judges in England and Wales. It is published on the JSB Website (www.jsboard.co.uk).
 - 25 For a report of this sad case see *The Times*, August 7th 2000.
 - 26 Another tragic case is that of Rukhsana Naz who was murdered by her mother and brother after they discovered she had been unfaithful to her Pakistan husband. She had been married to her husband in Pakistan after being tricked into accompanying her family there. A joint submission to the Home Office Working Group on Forced Marriages (30 March 2000) by Interights, Ain O Salish Kendra and Shirkat Gah draws attention to the problem: "Typically, in such cases, a young woman or girl, often a teenager, is induced or forced by her immediate family members to travel to Bangladesh or Pakistan, ostensibly for a holiday or to visit an ailing relative. She fails to return to the UK - to school, college or work - as scheduled, and loses contact with friends, classmates and colleagues. In some cases, she may reappear, months, or years later, often with a new husband. In others, she joins the ranks of the 'vanished'." Their Appendix summarises the case histories of six young girls to give some indication of the specific strategies used by voluntary organisations, as well as the assistance available through the British consular offices and the courts on the subcontinent in such cases.
 - 27 See Sebastian Poulter, *Asian Traditions and English Law: A Handbook*, Trentham, 1990, p. 60.
 - 28 [1999] 4 *All ER* 954. (Singer J). The Judge spoke at length about the subject in a paper entitled "When is an arranged marriage a forced marriage?" at a

Conference in Cape Town 14 April 2000. He said: "It may be hard to define comprehensively, but the absence of consent sticks out just as unmistakably as the horn of a rhinoceros. Of course there are grey areas where young women resignedly allow themselves to be locked into a marriage they do not welcome. That may fall one side or other of the line. That may indeed be ultimately a cultural question, or a question of education, or even a question of demonstrating to girls in that situation that they do have a choice which they should indeed be free to exercise."

- 29 See the submission in "A Choice by Right" by Southall Black Sisters (22 March 2000) where they say: "(...) mediation and reconciliation services must not be considered an option in cases of forced marriage", and a similar view by Newham Asian Women's Project in their submission to the Working Group.