

ILSP

Islamic Legal Studies Program
Harvard Law School



ISLAMIC FAMILY LAW AND
ITS RECEPTION BY THE
COURTS IN ENGLAND

by

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The Islamic Legal Studies Program is dedicated to achieving excellence in the study of Islamic law through objective and comparative methods. It seeks to foster an atmosphere of open inquiry which embraces many perspectives, both Muslim and non-Muslim, and to promote a deep appreciation of Islamic law as one of the world's major legal systems. The main focus of work at the Program is on Islamic law in the contemporary world. This focus accommodates the many interests and disciplines that contribute to the study of Islamic law, including the study of its writings and history.

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Table of Contents

Preface	v
Text, <i>by David S. Pearl</i>	
Endnotes	21

Preface

With this publication the Islamic Legal Studies Program inaugurates a new series of publications, to be called *Occasional Publications*.

The goal of our Program is to advance understanding of contemporary Islamic legal phenomena through deepening the comparative study of the subject. We understand comparative study very comprehensively, as encompassing comparisons among the laws and legal systems deriving from Islamic civilization and those of other great legal traditions, among the myriad manifestations of Islamic law in various regions and eras, and among the various laws and legal orders under which Muslims have lived in the past and in the present.

It is an important part of our activities that through sponsoring publication we augment the body of important scholarly work in these diverse fields. We have begun our publication efforts at various levels. In 1996 we launched the Program's series monograph publications, with the appearance of the volume *Islamic Legal Interpretation: Muftis and their Fatwas*, edited

by M. Khalid Masud, Brinkley Messick, and David Powers and published by the Harvard University Press. We plan soon to publish, again with Harvard University Press, a major work of comparison between Jewish and Islamic law by the well-known scholar Gideon Libson of Hebrew University. Other works will soon follow.

Alongside such major works, however, it is essential that we also bring to light shorter pieces. Of first priority in this regard are the texts of lectures given at our Program, so that the major contributions to learning that we hear presented are given wider dissemination and can exert the impact they deserve. At the same time, a lecture publication series should be able to facilitate the appearance of lectures in print without imposing the requirement of formality and scope demanded by publication in a scholarly journal. These ideas lead us to inaugurate this new series of Occasional Publications. While many of the works in this series will emerge from lectures offered at the Program, shorter articles will also be accepted and produced.

Our Program is grateful to Prof. David Pearl both for offering his important lecture and for submitting its

manuscript for publication in our new series. With his highly learned and well-informed contribution on the important topic of the controversies surrounding the recognition of Islamic family law in the secular legal systems of western countries—we make a superb start in our new series.

I personally extend thanks to Peri Bearman, Assistant Director of the Islamic Legal Studies Program, herself well known in the field of Islamic legal scholarship and publication, for instigating and guiding the Program's first steps in this major new field of activity.

Frank E. Vogel

Director, Islamic Legal Studies Program

Islamic Family Law and Its Reception by the Courts in England

David S. Pearl¹

Introduction

Many scholars have asserted that Muslim law is personal in its application to Muslim believers,² and that it is not affected by the constitution of any particular society. If a Muslim goes from one state to another he is bound by the same religious law. Thus there is a strong allegiance to an entity which is regarded, because of its divine nature, as having a higher status than the state.

From a legal perspective, it has simply been assumed by legal scholars that modern Western state law would prove superior to any cultural form of legal regulation. The purpose of this paper is to illustrate that whilst there has been considerable reluctance on the part of English law to grant any form of official recognition to Muslim law as part of English law, and conflicts and tensions have been evident, it is not true that English law has taken no notice of the large Muslim population.³

Indeed, as long ago as 1969 in *Alhaji Mohammed v Knott*,⁴ some of these conflicts were apparent. In that case, a Nigerian Muslim had contracted in Northern Nigeria an Islamic marriage with a 13 year old girl. The marriage was potentially polygamous. Shortly after the marriage ceremony, the couple came to the UK and they were cohabiting. The matter came before the magistrates on a complaint brought to them under a child protection provision which was then in force, namely, s.62 of the Children and Young Persons Act 1933. This provision enabled the court to declare that the girl was in need of “care, protection and control” and that she was exposed to “moral danger.” The justices formed the view that the girl was exposed to moral danger, regardless of the validity of the marriage. They found that a continuance of the association between her and her husband would be “repugnant to any decent-minded English man or woman.” They found the complaint proved and made what at that time was referred to as a “fit person order.” This enabled the local authority, responsible for the public care and supervision of children living in the area, to admit the girl into its supervised care. At the appeal, the Divisional Court, presided over by the Chief Justice (Lord Parker) reversed the decision. The Chief Justice held the mar-

riage to be valid and continued: “Decent minded English men and women, realising the way of life in which the girl and the man were brought up, would not inevitably say that the continuance of their association, notwithstanding the marriage, is repugnant.”

The language of the case is rather uncomfortable, nearly thirty years on, yet the case survives as an illustration of the interface between principles of Muslim law coming into possible direct conflict with the secular law and mores of the community within which the Muslim couple had to live.⁵

I concentrate in this paper on the family laws of the Muslim community, for it is this area where conflicts and tensions with the host legal system are most apparent. The marriage in *Mohammed v Knott* was recognised as valid by English law. This will, of course, not always be the case. For example, it has been known for Pakistani men, temporarily in the UK as visitors, to contract a Muslim ceremony of marriage (*nikah*) with British girls from the Pakistani community. They then return to Pakistan and seek admission to the UK as a spouse for settlement. The marriages in the UK in these situations are invalid by English law as they do not comply with the provisions of the Marriage Act

1949, even though the parties may consider themselves to be married.

Those examples are perhaps now less likely to happen. Open conflict has been avoided by two factors. First, a tolerant attitude has allowed space for the unofficial development of new hybrid rules. Secondly, Muslims have cultivated numerous avoidance strategies, so that the contact points between the official law and the “unofficial” law have become obscured. In England, a new hybrid form of law has been created, which Menski and I call “Angrezi Shariat.”⁶

Some Muslim scholars have demanded official recognition of the Muslim 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 England, State law has recognised certain characteristics of the dominant Christian family law (especially in the context of recognising that the formalities surrounding permission to marry in an Anglican Church creates a valid marriage if subsequently solemnised in that Church). 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 allowing the 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 in any event has little official or indeed probably also 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 twenty first century multi-cultural and multi-ethnic society. 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 England, to the detriment of harmonious relations.

The trend in English law has been to adopt a secular and universal system of family law; although the development of mediation techniques will, I believe, al-

low Muslim counsellors, and various Shari'a councils to play a leading role in resolving disputes especially involving children and property prior to any dissolution of the marriage under the English law.⁷ Recent reforms to the family law in England, although not yet implemented, will enable informal and more individual adjustment processes within the Muslim communities.⁸ The Family Law Act 1996 was designed both to remove the fault principle in the divorce law and to introduce a system of mediation prior to the final pronouncement of the divorce. Pilot schemes have been less than successful, and the implementation of the reforms has been delayed. The Muslim communities must therefore continue their various schemes independent of an official State scheme.

The campaign for official legal recognition of Muslim personal law has not been fully supported by the Muslim community. It is suggested that the main reason for this reticence is because they have found their own private ways through Angrezi Shariat of reconciling Shari'a and English law. By way of a generalised statement, it is common now for many Muslims in England to marry twice, divorce twice, and so on, in order to satisfy the demands of concurrent legal systems.

But the development of Angrezi Shariat has really gone through a number of stages. 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 *nikah* in England, or they returned to the subcontinent to marry there. Such marriages in England, as we have already seen, were not valid by English law, because they did not comply with the provisions of the Marriage Act 1949. Sometimes marriages solemnised abroad would also not be capable of recognition, perhaps because of the prohibition in English law on polygamous marriages. This prohibition caught de facto monogamous marriages if the husband had the capacity according to his personal law of contracting a second polygamous union. Cases at this time reflected the difficulties that Muslim immigrants sometimes faced.

The first stage led to a second stage when individuals realised that non-compliance with English law may lead to problems, especially over social security and other welfare benefits as well as immigration status. Confusion over legal status mattered little in a close-knit, enclosed and private community, but in a com-

munity which required official acknowledgment, the position was, of course, very different. Thus, and by way of illustration, questions which required legal solutions would be; is the *nikah* equivalent to a legal marriage under English law and does the *talaq* (repudiation of the wife by the husband) uttered in England dissolve the marriage? To meet these requirements, a Muslim couple in England today register their marriage first in accordance with English law and then soon thereafter enter into a *nikah*. This religious ceremony is socially marked as the wedding and is treated as the operative date of the marriage, and normally there is no cohabitation before this religious ceremony.

Informal Muslim dispute settlement processes

There has emerged in England a complex informal network and hierarchy of Muslim dispute settlement mechanisms. In particular, the Islamic Shari'a Council was founded in 1980 and has, since 1982, provided professional conciliation services to couples and given guidance on various aspects of Islamic law. It has been particularly active in resolving disputes relating to the question of the dower.

From time to time the Council has been asked to provide an expert opinion on aspects of Muslim law in ongoing litigation. The English legal system still has no procedure whereby the court itself can initiate this opinion, but it has been possible for such opinions to be obtained sometimes on the initiative of the Judge and at other times by the parties legal advisers, acting together or separately.

The objectives of the Council are stated to be to advise and assist in the operation of Muslim family matters, to establish a bench to operate as a court of Islamic Shari'a and to make relevant decisions, to safeguard the identity of Islamic family laws, and to encourage their recognition for the Muslim community by the English legal system. There is evidence that by the mid 1990s, the Council had dealt with some 1500 cases brought to it, the majority apparently concerning a divorce situation where the wife had obtained a civil divorce but where the husband refused to pronounce a *talaq*. 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 *talaq*, the Council invariably grants a *khul'* divorce to the wife (one initiated by the wife)

and a divorce certificate is then issued to her. 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 subsequent divorce proceedings has the power to adjust the Islamic maintenance and property settlement by taking account of the return of the dower.

There may be conflicting views as to the value of these mediation techniques, but it is my opinion that community mediation fits well into the newly emerging system of family law with mediation and conciliation dispute resolution being very much at the forefront.

Areas of Conflict

Probably the most frequent problem to occupy the courts and tribunals in England concerns the question of the validity of the *talaq* in the context of Pakistan and Bangladesh law. In those countries, although neither in India nor Pakistan Kashmir, an Ordinance of 1961⁹ has introduced certain procedural reforms to the traditional forms of *talaq*, the most important being the requirement that notification of the pronouncement of the *talaq* must be delivered to the

Chairman of a local administrative unit known as the Union Council. It is, however, important to note that there are now cases in Pakistan which tend to undermine the framework of the Ordinance, and that it now appears likely that the procedural requirements available under the Ordinance are no longer of relevance.¹⁰

At the present time, however, English courts and Tribunals do draw a distinction between, on the one hand, Pakistan and Bangladesh *talaqs* which they refer to as “procedural” *talaqs* and the classical form of *talaq* as in India (the “bare” *talaq*).¹¹ As a result of the case law interpreting the relevant legislation, the procedural *talaq* is more likely to be recognised than the bare *talaq*. Even less likely to be recognised is the so-called transnational *talaq* (a man originating from Pakistan pronounces the *talaq* in the UK and then sends a copy of the *talaq* to his wife in Pakistan and sends a notification of the pronouncement to the Chairman of the appropriate Union Council in Pakistan).¹² These complexities of the recognition laws create major confusion within a population accompanied by patterns of migration. People in this context do not necessarily arrange their affairs within one country.

The other area where conflict arises is in the recogni-

tion of polygamous marriages. One decision on a state widow's pension deprived a Muslim widow living in England from being entitled to a state widow pension based on her husband's compulsory National Insurance contributions, because at the time of his death he had living another wife in Pakistan. This other wife had at no time set foot in England.¹³ The Court held that the definition of the word "widow" in the appropriate legislation was restricted to monogamous marriages, and the court refused to entertain the proposition that the payments could be split, that the husband could have elected one of the widows, or that the "English resident wife" alone could benefit.¹⁴

There are two other interesting Social Security appeals which raised the issue of the definition of "widow" in the context of non-curial *talaq* divorce. The first one, CG 17/1992, concerned a pronouncement of *talaq* in what was then East Pakistan. The pronouncement was not accompanied by any notification of the *talaq* to the appropriate Chairman of the Union Council, and the Commissioner decided that in consequence, the *talaq* could not be recognised in this country as it was not valid by the law where it had been pronounced. In the other case, CG/13358/96 [58/99], the *talaq* was pro-

nounced in Bangladesh in 1973 and the Tribunal, and on appeal, the Commissioner took particular account of the expert evidence (Mr. Ian Edge) of the effect of a hiatus in the law of Bangladesh between 1972 and 1982. In consequence, the *talaq* was recognised as valid, and accordingly the second wife was entitled to the payment of the widow's benefit.

In immigration law, a polygamously married foreign husband is allowed to bring only one wife to the UK¹⁵; thus it would seem for that reason alone that it is unduly harsh for the one wife allowed into the country to be denied a state widow benefit in the event of his death.

Quite often, of course, a polygamous Islamic marriage exists only in name because of the reluctance to divorce a first wife. However, in order to comply with English norms, civil divorces do take place to enable the man to marry a second time in accordance with English law. But without the *talaq*, it is possible that the first wife will remain a respected Muslim wife and the husband and his family may well continue to maintain her. Any state entitlement, however, such as a widow's pension, will be available only to the second, and now only wife.

Child Law

Another area of potential conflict is, of course, in relation to child law. Residence and contact disputes arise frequently before the English courts, and religious backgrounds are inevitably going to play some part in the resolution of these disputes. A particularly difficult case arose in the case of *Re J*¹⁶ which required the court to determine whether a child should be circumcised in the absence of parental agreement. The mother applied for an order prohibiting the father from arranging the circumcision of their five year 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, who was the primary caregiver was bringing up the child in an effectively secular Christian environment. She was strongly opposed to irreversible surgical intervention. At first instance, the Judge found that the circumcision was not in the child's best interests and thus he granted the order. The father appealed to the Court of Appeal. The Court upheld the trial judge's decision which it said was "fact dependent."

Difficult decisions need to be made also in relation to problems of international child abduction. Of particu-

lar concern is whether or not to order the peremptory return of children abducted by one of the parents from a country which is not a party to the Hague Convention on Child Abduction (1980). Since that date some 57 states have become parties to the Convention, but no state that settles family disputes according to Islamic law has acceded, although countries with a predominant Muslim population from the former USSR, such as Uzbekistan, are likely in due course to sign and accede. Turkey has signed the Convention but not yet acceded. The Convention applied to children who are aged below the age of 16 who have been wrongfully removed or wrongfully detained outside their countries of habitual residence. The Convention has two underlying principles. First, it is accepted by those countries who have acceded that it is normally in the best interests of an abducted child to be returned as speedily as possible. Secondly, the courts in the state in which return is requested acknowledge that it can trust the authorities, including the courts, of the country of habitual residence to uphold the welfare of the abducted child.

The issue which has exercised the English judges recently is the principle which should determine the

outcome of applications for the return of children abducted from member states. It arose in stark form in relation to Pakistan,¹⁷ the UAE,¹⁸ and most recently in relation to Sudan in Osman.¹⁹

The facts of Osman were as follows. 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 ordered that the children live with the father's family. This decision was taken in compliance with Shari'a law as applied in Sudan 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 her 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 and orders preventing the removal of the children from England and Wales.

There was expert evidence before the High Court Judge on the Sudanese law. The expert (Miss Ragab) told the court: "The most important fact in Sudanese personal law was that once a divorced mother has remarried ... the care of the children moves to the maternal grandmother. If the maternal grandmother is unable ... to care for them, care moves to the paternal grandmother in all cases."

The trial judge made an order for the return of the three children to Sudan. The mother's counsel, on appeal to the Court of Appeal, criticised this approach. She said that the judge had made an order that separated the children from both parents and returned them to a jurisdiction where there can be no discretionary review of all relevant facts and circumstances to determine child welfare, but only the rigid application of Shari'a rules that deprive the children from a natural upbringing.

The trial judge's decision was upheld by the Court of appeal. Thorpe LJ in particular considered the cultural dimension of cases such as these. He 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."

It is useful to compare the result in *Osman* with the result in *Re J*. In both cases, of course, the court had regard to best interest arguments. *Osman* involved Sudanese children who had spent the greater part of their lives in that country. The court refrained from any judgment on the family justice system of the country of habitual residence of the children. In *Re J*, likewise, the practice of male circumcision as a religious obligation for Muslims was in no way commented upon. The decision rested entirely on the fact that the child in this case was being brought up as "a secular Christian" by his mother even though he had a Muslim father. One can imagine circumstances where the decision in *Re J* could have gone the other way and indeed where the decision in *Osman* could be distinguished. But both cases illustrate the importance of balancing all the varying, and sometimes conflicting values, to arrive at decisions in the best interests of the children.

Conclusion

The English way to address this balancing exercise has been to refuse to acknowledge that separate systems of law should control the family law. The Muslims themselves have developed a strategy whereby they operate within the context of both systems, namely, the English law and the religious law. To some extent, and for some individuals, the formalising of Muslim conciliation and mediation bodies has encouraged this development. Courts applying legislative principles have recognised Islamic institutions, such as the dower (*mahr*), the *talaq* and even polygamy, so long as it does not offend public policy. The consequences of such recognition, however, will often fall short of the granting of state benefits and most importantly entitlement to enter the UK.

Endnotes

¹ Circuit Judge (England and Wales); Director of Studies, Judicial Studies Board. This lecture is based on a public lecture delivered at Harvard Law School on October 18, 1999. Some of the observations in this paper were made also at the Congress in Osnabruck, Germany on the 23rd and 24th of October 1998 on “Islamic Law and its Reception by the Courts in the West” (published under the same name (C. v. Bar [ed.]) by Carl Heymanns Verlag KG in 1999.

² See for example Joseph Schacht, *An Introduction to Islamic Law* (1964) p. 1.

³ See the arguments in Pearl and Menski, *Muslim Family Law* (3rd edition) (1998) especially Chapter 3.

[1969] 1 QB 1.

Since this decision, the UK immigration rules have been changed to ban entry into the UK of spouses below the age of 16, even if the marriage is valid by the law of the applicant’s personal law.

Muslim Family Law (3rd edition) Sweet and Maxwell 1998.

The Muslim Law (Shariah) Council (UK) has established standard procedures, forms and certificates. It deals with more than 50 cases a year.

⁸ See in particular the Family Law Act 1996.

⁹ Muslim Family Laws Ordinance 1961.

¹⁰ A recent case is *Kaneez Fatima v Wali Muhammad* P.L.D. 1993 S.C. 901.

¹¹ *Quazi v Quazi* [1980] A.C.744.

¹² *R v Secretary of State for the Home Department, ex p Ghulam Fatima* [1986] A.C. 527.

¹³ *Bibi v Chief Adjudication Officer* (1997) Gazette 94/27.

¹⁴ It may well be that this case will require re-examination as a result of the implementation of the European Convention on Human Rights by the Human Rights Act 1998. Article 8 may well have been infringed by the provisions of the current Social Security Act.

¹⁵ HC 395 paras 278, 279 and 280.

¹⁶ Gazette 96/47 8 December 1999 [CA].

¹⁷ *Re S* [1994] 1 FLR 297.

¹⁸ *Re JA* [1998] 1 FLR 231.

¹⁹ *The Times*, July 7, 1999.