

**Draft**

**Islamic Law and the Muslim Diaspora: A  
Teaching Manual**

**(With particular focus on the United Kingdom)**

Shaheen Sardar Ali  
Ayesha Shahid  
Mamman Lawan  
Zahra Maranlou  
Rajnaara Akhtar  
Musa Abubakar

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## Introduction

Islam and the Muslim Diaspora has recently been a subject of study in various institutions across Europe and North America. These institutions include the University of Edinburgh, Centre for European and Eurasian Studies, University of Warwick, Centre for the Study of Islam in the UK, Cardiff, University of Leiden, Centre for Diaspora and Transnational Studies, University of Toronto, to name a few. However, these studies are mainly biased towards sociological studies of the Muslim Diaspora. There does not seem to be focus on their legal tradition particularly their personal laws. This manual is an attempt to fill in the gap.

The manual has been developed with the aim of supporting teachers interested in Islamic law in general and in particular in the context of a non-Muslim jurisdiction like the UK. It is meant to be an indicative work book for the teaching of Islamic law in the Muslim Diaspora using the UK as case study. The manual is not meant to be watertight but rather flexible regard being had to the time and resources available. The course may be offered at undergraduate and/or postgraduate level *mutatis mutandis*. It is an enrichment of existing working materials developed by various institutions interested in the wider field of the Muslim Diaspora.

The materials herein provided could fit into a half module to be run in a ten-hour lecture sessions in a term. It is projected that a 2-hour weekly lecture session plus 1 hour seminar session every week would be sufficient to cover the outline proposed herein. The seminars will take the form of group work assisted by a tutor to address issues arising from the lectures at a deeper level. It is expected that students would have their reading materials in advance in order to have more participatory seminars. We suggest that for undergraduates, the course be assessed through an end of term essay of 2500 words plus a 2-hour end of course examination. For postgraduates, the essay should be longer with or without end of course examination. The essay could either be theoretical or empirical.

A course on Islamic law and the Muslim Diaspora is important for a number of reasons. The presence of large Muslim communities in the Western world is now a fact beyond doubt. Their migration and subsequent settlement in this part of the world raises many issues of concern to both sides. These issues include multiple identities, citizenship, the relationship between the host and migrant communities, legal pluralism, cultural continuities and sometimes conflict of laws. The purpose of the course is to introduce students to these and other emerging issues in the context of the UK. It is expected that students would be able to identify and analyse the various factors involved in the tension between the need of the Muslim Diaspora to adapt to their new country and their wish to maintain cultural continuity.

One of the main questions therefore that this manual aims to highlight and generate discussion on, is the impact of the Muslim diasporic phenomenon on legal systems in the host countries such as the UK. Likewise, what is the extent of engagement of the host legal system with the religious law of the Muslim diasporic communities and conversely, how these communities relate (as Muslims), to the laws and legal system of their new countries.

## **Course Outline**

As indicated above, we do not wish to be prescriptive in our approach regarding structure, content and delivery of this module. Tutors will find a number of themes to include in a module of this nature and reflecting their own research and teaching interests as well as themes that are topical. The following is a module outline we propose for the present manual:

### **1. Exploring Diaspora**

Conceptualising Diaspora

Theories of Diaspora

Muslim Diaspora and Multiple Identities:

History of Islam and Muslim migration to the UK

Muslim Diaspora and the Host Community: *Dar al-Harb* and *Dar al-Sulh*

Controversy and the Question of Citizenship

Diversity in Unity: Cultural, Ethnic, National, Sectarian and Intergenerational Differences.

### **2. Personal Status Law among the Muslim Diaspora**

Contextualising Islamic Law

Relevance/Irrelevance of *Madhhabs*: Emergence of Hybridity

Some Aspects of Muslim Personal Law

Marriage

Divorce

Property

Child Care

### **3. Engagement of English Law with Islamic Law**

Cases decided by the English Courts

### **4. Dispute Resolution Mechanisms**

Introduction

Concept of Dispute Resolution in Islam

Qur'anic Values of Dispute Resolution

1. Peace

2. Compromised Settlement

3. Family Mediation

4. Arbitration

5. Expert Determination

6. Ombudsman

Muslims Dispute Resolution in Britain

### **5. Debating the Introduction and Recognition of Islamic Law in the UK**

Cultural Relativism Vs Cultural Absolutism

Human Rights Arguments: Gender Question

Absence of Monolithic Islamic Law

### **6. Use of *Fatwas* Among Modern Day Muslims**

## Chapter One Exploring Diaspora

This opening chapter has been arranged with a view to providing tutors with some ideas on the themes that may usefully be included in a module on Islamic Law and the Muslim Diaspora.

Etymologically, two words '*speiro*' (to sow or scatter) and '*dia*' (over) form the term 'diaspora.'<sup>1</sup> Diaspora is a Greek loanword which is the equivalent of 'dispersion' or 'scattering of seeds'. In the ancient time, Greeks were known for their penchant for migration to conquer lands for colonising purposes; as such the term diaspora was used for those citizens of dominant city- states who migrated on such mission.<sup>2</sup>

The term is more popularly associated with the Jews particularly in reference to their historical movements outside Palestine or present day Israel and Judea when they were exiled by the Babylonians and Romans in 607 B.C and 70 CE respectively. The term is often used to refer to either the body of the Jewish communities outside Palestine or modern Israel or simply their migration outside Israel. The historic link of diaspora to the Jews is so significantly personalised that if it is capitalised and used without modifier as in 'the Diaspora' it is taken to mean Jewish Diaspora.

Over the years the term diaspora has undergone transformation by acquiring a wider meaning which transcends the historically known Jewish movement covering movement of other ethno-national migrants for whatever purpose from their land of origin to a foreign country and taking up residence, provided a linkage between the migrants and their countries of origin and other dispersed groups of the country is maintained and there is a longing, hope or desire to return in future to the land of origin.( Mideast and North Africa Encyclopaedia), and/or build a nation-state of their own in the homeland.<sup>3</sup>

Going by this traditional 'ethnonational' construction which is associated with Gabriel Sheffer<sup>4</sup>, diaspora may then be described as a voluntary or forcible migration of large group sharing common national or ethnic identity from their land of origin to another country and taking up residence for any purpose. It is not a linear movement in the sense of migration from a developing to developed nations but could also take the reverse as exemplified by the Ancient Greeks above.

It is on record that at one point or another people moved either voluntarily, transported or dispersed from their place of origin to an alien place for trading and colonising purposes especially from Europe to other places and on the other hand people from other continents moved in large numbers to developing world in search of labour and yet some were forced into migration as a result of slave trade, war, political unrest and political persecution, etc. The migrant groups in most cases

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<sup>1</sup> See Diaspora in Mideast and N. Africa Encyclopaedia at <http://www.answers.com/topic/diaspora> last visited 27/03/09

<sup>2</sup> See Diaspora in Wikipedia, the Free Encyclopaedia at <http://en.wikipedia.org/wiki/Diaspora> last visited 27/03/09

<sup>3</sup> Schumann,C (2007) 'A Muslim 'Diaspora' in the United States?' The Muslim World Vol.97 Jan.2007 pp.11-32 at p. 13

<sup>4</sup> Ibid, p. 12

exhibit strong national or ethnic attachment by their refusal to assimilate the culture of their host community. Thus, European Diaspora, Asian Diaspora, African Diaspora, Jamaican Diaspora etc are commonplace. One striking feature of the diaspora viewed in the classical sense, is the fact that it is a displacement of large group of immigrants from a certain region or country technically removed from their original place but in practice expresses considerable desire to maintain a cultural and sometimes language link with their original place by resisting language change and maintaining the religious practice of the land of origin.

Since the 1950's when the world communities became open and more accessible, the world started experiencing huge international migrations. Statistics have shown that as at 2005, about 191 million people representing 3% of the world population resided outside their lands of origin and 64 millions of them migrated to Europe.<sup>5</sup> This mobility is made possible, inter alia, as a result of the relaxation of assimilation policies by many states and the imperative of trade and commerce.<sup>6</sup> Thus, a more embracing construction was necessary to accommodate the emerging diasporas who though have affiliation to ethnic or national identity but have other identities like religious groups since Gabriel Sheffer's theory of ethnonational identity did not cover them as seems to downplay religious affinity as merely 'secondary'.<sup>7</sup> As according to Gabriel Sheffer et al

'Although religious element may be emphasized in their identity, practically and on a daily basis these Diasporas maintain their ethnonational identity, hence they confront problems and dilemmas similar to those faced by less religious or more secular Diasporas. The argument is that religion only buttresses the affiliation of members in these identities. Furthermore there is no doubt that their connections are with their countries of origin rather than with an abstract Muslim World or a Muslim Diaspora.'<sup>8</sup>

Christoph Schumann identifies scholars like Paul Gibroy, Homi Bhabha, and James Clifford who thought of conceptualising diaspora as in a less restrictive sense, 'hybrid, procedural and multi-focal character of identities' as in words of James Clifford 'Diaspora discourse articulates [...] forms of community consciousness and solidarity that maintain identifications outside the national time/space in order to live inside, with a difference.'(Schumann: 13).

The weakness of the ethnonational construction as identified by Christoph Schumann lies in the fact that it did not take into account the possibility of 'changing forms of identities and interactions'. The theory over emphasised the migrant groups' concern for their homeland as pre-condition to being classified a diaspora. The hope of a migrant community of returning to their home country and establish their own state is also pitfall of this construction given that quite a number of migrant communities have no such political goals.(Schumann:13). The lapses of this theory will clearly be visible if one takes for instance that modern Israel was established in 1948 but the

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<sup>5</sup> Global Migration Group (2008) International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60<sup>th</sup> Anniversary of the United Declaration of Human Rights [http://www.globalmigrationgroup.org/pdf/Int\\_Migration\\_Human\\_Rights.pdf](http://www.globalmigrationgroup.org/pdf/Int_Migration_Human_Rights.pdf) last visited on 29/03/09

<sup>6</sup> Schumann, C op cit p 12

<sup>7</sup> Ibid

<sup>8</sup> Quoted in Schumann, C. op cit

Jewish community outside the country are more than those inhabiting therein. Statistics have shown that as at 2001, 63% of the Jewish population are still in the diaspora.<sup>9</sup>

It can be said that a less restrictive construction as suggested above affords the possibility of accommodating communities with multi-layered identities, like religious identities. Thus using coinage like Muslim diaspora is made possible since it is an umbrella body under it lives collections of divergent identities ranging from personal, sectarian, ethnic, national cultural, etc.<sup>10</sup> It is worthy of note that it is only as late as 1995 that the possible existence of Muslim diaspora started to feature in the writing of European epistemic community. Before then studies of Muslim communities were mainly along ethnic, national and sectarian lines.<sup>11</sup>

The term has been further extended to cover not only cases of 'inter-national' migrations but also 'intra-national' migration e.g. movement of survivors of the Katrina Hurricane from New Orleans to other parts of the United States (Wikipedia).

### **Manifestations of Diasporas**

Diasporic communities manifest themselves in various forms depending on the context one looks at them. Globalization and mobility are some of the enabling factors of international migration of people from one country to another. Generally migration could occur for variety of reasons such as political, religious, commercial and economic reasons. Thus diasporas could result from the following:

Colonising migration: e.g. Greek tribes travel to Mediterranean and Black Sea basins, Southern Italy, Northern Libya, etc; The British people settling in British colonies of Asia and Africa.

Trading migration: Europeans and Arabs settling in Africa during the Atlantic Slave trade,

Job-related/labour/economic migration: Settlement in the United Kingdom of the East Indian Company employees mostly recruited seamen from Yemen, Gujarat, Assam and Bengal widely called 'lascars.'<sup>12</sup> The migration of skilled professionals from mostly Asian and African extraction coming to Western Europe and other developed countries for job seeking. The mass migration of Chinese in the 19<sup>th</sup> Century to 1949 from their land of origin because war and starvation to other places looking for greener pasture;

Religious Migration: dispersion of Jews among the Gentiles as a divine design to spread monotheism throughout the World.<sup>13</sup>

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<sup>9</sup> LeElef, N World Jewish Population <http://www.simpletoremember.com/vitals/world-jewish-population.htm> last visited 02/04/09

<sup>10</sup> Leweling, T.(2005) Exploring Muslim Diaspora Communities in Europe through a Social Movement Lens: Some Initial Thoughts

<sup>11</sup> ibid

<sup>12</sup> Gul Hussain, S 'Muslim in Britain' at <http://www.islamicsupremecouncil.com/muslimbritain.htm> last visited 29/03/09

<sup>13</sup> See Diaspora in Britannica Concise Encyclopaedia) <http://www.answers.com/topic/diaspora> last visited 27/03/09

Political Migration: Asylum seeking migrants from war ravaged lands like Somalia, the Iraqis who fled Baathists dictatorship, Iranians who left Iran with fall of Shah during the 1979 revolution, Indians and Pakistanis moving to other countries as a result of the political unrest during the 1947 partition; movement of Jews to USA and Western Europe as a result of the Nazi's persecution, etc.

Disaster Migration: Hurricane Katrina and Tsunami survivors

Many forms of diasporic communities were created as consequence of these migrations such as the European Diaspora, Chinese Diaspora, Indian Diaspora, Pakistani Diaspora, African Diaspora etc. Further blurring the term some historians have characterised some countries according to their historical and political influence of the communities that formed them as diasporic. Professor Ali Mazrui added the following categories: Sovereign African Diaspora, Mega-Diaspora and Dual Diaspora.<sup>14</sup> He defines the Sovereign African Diaspora as 'those countries outside Africa whose populations are mainly of African descent, and who are currently sovereign independent countries, e.g. Haiti, Jamaica Barbados and host of other Caribbean states.' Mega Diaspora as those ethnic groups though not the majority but a substantial number as to constitute a very formidable group such as the Black Americans and Black Brazilians. While the Dual Diaspora are countries like Guyana and Trinidad and Tobago as they are populated by Africans and Indians.

### **Features of Diaspora**

Some distinctive features of these manifestations are noteworthy which include shared national or ethnic identity such that each diaspora is distinguishable from the other by the nationality, language, cultural practice as discernible from the way they conduct their marriages, dressing, religious rituals like burial and even the nature of food they consume. This national or ethnic affiliation is the basis of the group strength and solidarity. There is often a clamour to identify with the root as evidenced by their continuous contact with their land of origin and their other brothers and sisters who similarly moved to other countries. There is also strong resistance to cultural change a point capitalised upon by the receiving or host countries as major source of friction between them and the migrant communities.<sup>15</sup> Religious identity though not featured in the classical manifestations; appears to create formidable networks of multiple identities with members willing to abandon their ethnicity for religious solidarity.<sup>16</sup> This is observed in relation to the second generation of Muslims in the United Kingdom who prefer to be addressed as British Muslims as opposed to say Arabs, Pakistanis, etc.<sup>17</sup>

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<sup>14</sup> Mazrui, A. A. (2005) 'Uhuru Bado Kidogo: Africa's Condition Of 'Not Yet Uhuru'; The Balance Sheet' [http://igcs.binghamton.edu/igcs\\_site/dirton28.htm](http://igcs.binghamton.edu/igcs_site/dirton28.htm) last visited 29/03/09

<sup>15</sup> Ali, S. S. (2007) "Religious Pluralism, Human Rights And Muslim Citizenship In Europe: Some Preliminary Reflections On An Evolving Methodology For Consensus" In Leonon, T. & Goldschmidt, J. (Eds.) Religious Pluralism And Human Rights In Europe Antwerp: Intersentia, Pp. 57-79 at p 58.

<sup>16</sup> Leweling, T op cit.

<sup>17</sup> Ibid, See also Hussain, S.G op. cit.

## History of Muslims in the United Kingdom

There is huge Muslim presence in the United Kingdom and is said to be the most rapidly increasing population.<sup>18</sup> By the 2001 National census figures there were 1.6million Muslims in the United Kingdom representing 2.8% of the population.<sup>19</sup> And between 2004 and 2008 the population has increased by more than 500,000 bringing the figure to about 2.4 million.<sup>20</sup> Muslims have established a long standing relation with the United Kingdom for several decades. Muslim contact with Britain is traceable to many centuries back. It is reported apart from the mention of many places in Britain by a renowned Muslim cartographer Abu Ga'far Muhammad b. Musa al-Khwarizmi (d.850CE) in his book '*Surat al-Ard*' (The Image of the Earth") finished in the year 833 CE, there is evidence to show that Muslims have been in contact with Britain since the 17<sup>th</sup> century mainly for diplomatic, commercial and scholarly mission.<sup>21</sup> It is on record that during the reign of Queen Elizabeth I (1533-1603) issues of *halal* meat and Muslim burial started to emerge, particularly in 1601 when one of entourage of Moroccan ambassador Mulay Ahmad died in the UK.<sup>22</sup>

Muslims were said to be the first to establish coffee shops in mid-17<sup>th</sup> century and Arabic courses equally started to be offered from 1659 at Westminster School.<sup>23</sup> However, as a result of the colonial encounter with Muslim British colonies, in 1842 about 3000 Muslims seamen popularly known as 'lascars' were said to be the early Muslim settlers in the United Kingdom. They were said to be staffers of the East India Company from Yemen, Gujarat, Assam and Bengal who use to visit the United Kingdom occasionally but gradually settled and even married in port towns and cities like Cardiff, Liverpool, Glasgow and London.<sup>24</sup> By 1860 Muslims from Yemen established small prayer halls performing their religious rituals, ranging from the daily prayers, *nikaah* (marriage), *aqiqah* (animal sacrifice and ceremonies for a newborn child) *khitan* (circumcisions) *janazah* (funeral prayers) etc.<sup>25</sup> In 1889 the first purpose built mosque i.e. Shah Jehan Mosque was established in Woking and in 1977, Regents mosque was completed in London.<sup>26</sup> It is to be noted that the site of this mosque was donated by the British government in 1944.<sup>27</sup>

Similarly, from 1920s to 1970s there was another influx of Muslims from mostly Asia migrated to the UK to complement to labour shortage in many industrial cities like the Midlands, London, Lancashire, Yorkshire, Strathclyde, etc. Again following the

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<sup>18</sup> BBC News Muslims in Europe: Country Guide <http://news.bbc.co.uk/2/hi/europe/4385768.stm> last visited 30/03/09

<sup>19</sup> National Statistics Online Religious Populations: Christianity is main religion in Britain <http://www.statistics.gov.uk/cci/nugget.asp?id=954> last visited 30/03/09

<sup>20</sup> Muslim Population 'rising 10 times faster than rest of the society' [http://www.timesonline.co.uk/tol/life\\_and\\_style/article5621482.ece](http://www.timesonline.co.uk/tol/life_and_style/article5621482.ece) last visited 30/03/09

<sup>21</sup> Mayor of London (2006) Muslims in London <http://www.london.gov.uk/gla/publications/equalities/muslims-in-london.pdf> last visited 04/04/09

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Hussain, S.G op cit ; see also Forum Against Islamophobia and Racism Muslims in the UK <http://www.fairuk.org> last visited 27/03/09

<sup>25</sup> Ibid; see also Hussain, S.G op cit

<sup>26</sup> Ibid

<sup>27</sup> Hussain, S.G



nationalisation policies of Idi Amin of Uganda many Muslims of Asian extraction migrated to the UK. Still in this connection, Muslims from the Eastern Europe in the 1990's left their homelands of Kosovo and Bosnia as a result of ethnically directed persecution and genocide. Somalis were not left behind as they came in large numbers as refugees owing to the political instability and war. By the 2001 national census figures over ¼ of the Muslim population, i.e. 607,083 (301,477 men and 296,606 women) are resident in London and fully active in all professional and commercial activities ranging from finance and legal services, property, academics, media, etc.<sup>28</sup> Indeed, Muslims participate in political affairs and have representation in the UK Parliament and the European Parliament.<sup>29</sup>

From the overview it seems clear that hundreds of years back Muslims have been living in the UK and as observed from their practices in their early contact, they exhibited some resistance to the culture of their host community in maintaining their religious rituals like funerals, naming ceremonies, marriages, form of worship, food, etc. It shows their preparedness to preserve their identity which was threatened as a result of disconnectedness from their homelands and the fear of cultural assimilation. By maintaining this link with their homeland they seem to be transplanting their cultural and religious practices of their homeland something similar to what Schumann considers extending the social environment of *darul-Islam* (the abode of Islam) within non-Islamic environment. i.e. the *darul-harb* (the abode of disbelief).<sup>30</sup> Interestingly however despite their resistance to the host culture the Muslims choose to permanently settle here with no hope of returning to their root apparently the presumed *darul-Islam*.

The overview also shows that notwithstanding the hostility they faced in the UK, they are gradually integrated into the United Kingdom system. Then comes the question; what is the justification for a Muslim leaving *darul-Islam* and migrating to *darul-harb*? How relevant is the classification in modern world? It is interesting to note Schumann made a good point while studying the Muslim organisations in the US. He contrasted their activities from 1950's to 1980's and observed some major shift in that in their early years American society was viewed as abode of disbelief given the challenges they were facing of moral corruption. Therefore the focus was more on preserving their Islamic identity but later the focus changed with time and their homeland i.e. the presumed abode of Islam came under incessant verbal attacks and condemnation since there was not enabling environment for the religion to thrive there. Corruption, political persecution was the order of the day in the Muslim countries which happened to be their land of origin. Schumann conclusion suggests that this classical categorization is hardly tenable.<sup>31</sup>

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<sup>28</sup> Mayor of London, op cit.

<sup>29</sup> Ibid

<sup>30</sup> Schumann, C, op cit, p.17

<sup>31</sup> Ibid, p. 19

## Chapter Two

### Personal Status Law among the Muslim Diaspora

After placing the concepts of diaspora and the Muslim diaspora in context, we can move to arguably, the most important, sensitive and politically explosive area of the Muslim diaspora i.e., personal status law based on the Islamic legal tradition and how it impacts on their lives as Muslims residing in a non-Muslim jurisdiction.

This session will be devoted to an examination of the application of personal status law (*ahwal al-shakhsiyya*) among the Muslim diasporic communities in the UK. Students will be introduced to the experiences of Muslims in the UK in marriage, divorce, inheritance, and child care as aspects which affect their personal lives and which are, in a way, the least perturbed by migration. Despite emigrating from their various indigenous 'Islamic' lands, Muslims in diaspora still religiously stick to these practices as understood traditionally. Thus on one hand, it could be argued that they are applying Islamic law. On the other hand, in the context of the UK and of course any of the Western nations, application of Islamic law is a dream that is yet to come to fruition. In fact, as we shall see in a subsequent session, the voices earnestly calling for 'one law for all' and vehemently resisting any split of the English legal system (which the introduction of Islamic law would amount to) are loud and weighty. What does it then mean to talk about the application of personal law among the Muslim diaspora in the UK? This would, hopefully, be clear when our discussions of Islamic law are contextualised.

#### Contextualising Islamic Law

It is for want of better words that 'Islamic Law' is used to describe the legal system based on Islam as a religion. It is inadequate to describe the system as such particularly when 'law' is viewed from the lens of the conventional 'black-letter' law. This is largely due to the fact that laws in the Islamic sense are traditionally neither codified nor follow the strict rule of judicial precedent as understood in the Common law sense. Sometimes 'Islamic Law' and 'Shari'ah' are used interchangeably. Shari'ah literally means 'a path to a watering place' "provided the source of the water is a flowing stream or spring" (Parwez 1960; Doi 1984). Although it is commonly accepted as representing the Islamic legal system, Shari'ah is much wider than that. It is the over-arching umbrella encompassing the 'dos' and 'don'ts' governing the life of a Muslim either as an individual or in community with fellow Muslims. It also extends to his/her relationship with fellow beings who may or may not subscribe to any religious or other belief. Thus the Shari'ah strictly includes both legal and non-legal/ritual aspects of the life of a Muslim individually and communally (An Na'im 2002). It is for these and other reasons that the phrase 'Islamic legal tradition' is preferred when referring to Islamic law or Shari'ah *qua* Islamic legal aspects (Ali 2000). This manual is concerned with the legal aspects of the Shari'ah i.e. the Islamic legal tradition. However, for its purpose, we shall stick to the expression 'Islamic Law' notwithstanding its inadequacy.

Islamic law as it stands today is derived from many sources. The primary ones are the Qur'an and Hadith. The Qur'an is believed by Muslims to be the *ipsissima verba* of God revealed to Prophet Muhammad through angel Gabriel. The revelation took place

piecemeal within a period of 23 years divided into Meccan and Medinan periods. The legal content in the Qur'an is not much and the bulk of it was revealed in the Medinan period (Kusha 2002). Hadith is the report of the sayings, deeds and approvals of the Prophet. It has authority from the Qur'an (Qur'an 59: 7). Compilations of the Hadith took place long after the death of the Prophet through a scientific process developed by scholars at the time. The process principally verified the chain of transmitters (*isnad*) and the substance of the report (*matn*) in distilling reports accredited to the Prophet. In *isnad* for instance, if transmitter 'A' claims to have heard from 'B' and it is found that 'B' died before 'A' was born, the report will not be reliable as there is a clear break in the chain of transmission. On the other hand, a purported report which contradicts an express provision of the Qur'an will be rejected for failing the *matn* test. This process led to the classification of Hadith into mainly two categories – valid (*sahih*) and weak (*dha'if*) - depending on the degree of its authenticity. The Hadith is relevant both in its provision of independent laws as well as in supplementing Qur'anic legal provisions (Siddiqui 1993).

Neither the Qur'an nor the Hadith is sufficient as source of Islamic law (Rehman 1979). Both were finite content-wise in that addition to them was neither permissible nor possible after the death of the Prophet. Since any good law ought to “grow with the growth of the society” it governs, Islamic law got other sources which ensure its dynamism. These include *Ijma* (consensus of juristic opinion), *Qiyas* (analogical deduction), *Istihsan* (public interest), *Urf* (custom), etc. These are termed secondary sources (Rahim 1995; Kamali 2003). In the use of the first two in particular, the technique of *Ijtihad* (striving to deduce legal rules) is indispensable. It is often classified as a source. It is carried out by qualified jurists and there is a debate as to whether or not its gates have been closed. The arguments that the gates have not been, and cannot in fact be closed seem to carry more weight (al 'Alwani 1991; Hallaq in Masud et al 1996). Discussions on the sources of Islamic law are relevant to the understanding of any field of the law. Students should therefore be introduced to more detailed materials. A separate manual on the sources of Islamic law developed in this series could serve the purpose.

From the foregoing, it is clear that Islamic law is very wide. This is not surprising because it is a law rooted in the religion of Islam. Islam literally means a total submission to the will of Allah. It does not admit of half-heartedness. For being a religious law, Islamic law is therefore bound to be holistic. There is no field of human endeavour that is/should be left unregulated (Rehman 1979; Fyzee 1974; Nasir 1990). The law broadly covers both public and private life. It is when it applies in the public domain in a state that the state is referred to as an 'Islamic state'. Saudi Arabia, Iran and Pakistan are examples of such states. There are countries which are not 'Islamic' per se, but have a majority Muslim population warranting the application of certain aspects of Islamic public law like criminal law. Sudan and Nigeria are typical examples. These countries have in common colonial heritage which brought about both religious and legal pluralisms thereby inhibiting adoption of religious law exclusively.

As indicated in the discussions under the first session, the Muslim diaspora in the UK is a minority group. It is being 'received' by a host community with a long history of established 'secular' legal system. Although it is originally Christian, the scientific revolution of the 17<sup>th</sup> century had diminished the impact of religion in its public nay

private life. It is therefore unimaginable that the Muslim diaspora would aim for the application of Islamic public law at least in the near future. This is notwithstanding the fact that there is strong Islamic identity among Muslim diaspora (Leweling 2005) and that fundamental Islamic teachings require Muslims wherever they are to strive for the establishment of an Islamic social, economic, political and legal order. This is believed to be the order for a successful mundane and sublime life (Khadduri in Ali 2007). The current debate on the introduction of Islamic law in the UK sparked off by the Archbishop of Canterbury, Dr Rowan Williams, does not take the law beyond private lives into the public domain. In other words, it is not about Islamic public law. It is about the need to recognise some aspects of Muslim personal law within the English legal system in a manner similar to the recognition accorded Jewish personal law. To be sure, the current debate merely reinvigorates the claim made for the recognition of Islamic personal law for the Muslim diaspora in Britain in the 1970s (Poulter in Mallat & Connors 1990).

The debate is informed by, and reinforces, the recognition that Islamic personal law has always been part of Muslim life not only in Muslim countries but among Muslim diasporic communities in the UK and elsewhere. Even on inheritance matters where English law applies over immovable property situated in the UK or movable property when the owner dies in the UK, the law does not preclude the making of wills in accordance with Islamic law (Poulter in Mallat & Connors 1990). Unlike public law, Islamic personal law does not necessarily require the state to function. As the name suggests, it applies at personal level. The practices covered by it have all along been practices among the Muslim diasporic communities. UK laws may provide for these practices at a general level but this does not exclude the application of Islamic injunctions on them. Thus while the Muslims apply the religio-legal dictates on one hand, they also comply with UK secular laws on the other hand. This has made the Muslim diaspora subject to dual laws, a situation described as *Angrezi Shariat* (Yilmaz 2004; Pearl & Menski 1998). Of course the state would be a facilitating institution in the application of the Islamic laws e.g. by providing for Sharia courts or the accommodation of Islamic law matters in the conventional courts. It is the absence of arrangements of this nature that led to the establishment of the Sharia Councils and more recently the Muslim Arbitration Tribunal. And it is these arrangements that the calls for the recognition of Islamic law envisage. In short, the discussions on Islamic law in this manual as a whole and within this part in particular revolve around Islamic personal law.

### **The Relevance/Irrelevance of *Madhhabs***

As pointed out above, the primary sources of Islamic law were finite content-wise. Yet they are relevant to all ages. Their relevance transcends providing for specific issues of law. They also make general provisions based on which particular rules of law could be deduced. The secondary sources are therefore dependent upon the primary sources for authenticity. Suffice it to say, the workability of the secondary sources is dependent upon Muslim jurists at all points in time in the history of Islamic law. Law-making involves interpretation of the general principles of the primary sources. Since interpretation is a considered opinion of the person making it, it cannot be divorced from the circumstances surrounding that person. Time, place and of course the orientation of the person would all impact on the interpretation and ultimately the outcome of the law-making process. It is this situation that explains the

emergence of different schools of thought (known as *Madhahib* [plural of *Madhhab*] in Arabic) in Islamic jurisprudence in the second century of Islam. There are four major Sunni Schools named after their founders as Hanafi, Maliki, Shafi'i and Hambali. There are also a number of Shi'a schools. The schools have outlived their founders as they still exist. Each of these schools has a different way of articulation of legal principles and each maintains influence over particular territorial jurisdictions. For instance, the Hanafi is the dominant school in Turkey, Afghanistan, Central Asia and India; Maliki in West and North Africa; Shafi'i in Egypt, East Africa and South East Asia; and Hambali in Syria, Palestine and Saudi Arabia.

It would amount to an understatement to say that the *Madhhabs* are relevant in the formation and application of Islamic law. The details of the law are traceable to them because the primary sources were far from being exhaustive legal codes. For instance, while the Qur'an and Hadith have both required the payment of *mahr* in a marriage contract, none gave specific amount to be paid. Thus the jurists used analogy on the basis of available provisions to make rulings thereon. For instance, Hanafi and Maliki jurists developed a minimum *mahr* considering the minimum value of stolen goods which attract amputation of the hand as punishment. Hanafi fixed 10 *dirhams* and Maliki fixed 3 *dirhams* while Shafi'i and Shi'a Schools fixed no minimum (Pearl & Menski 1998: 179-180). Similarly, on whether or not the consent of a guardian is required in the marriage of an adult Muslim woman, the schools have varying legal rulings there being no specific provision in the primary sources. While Hanafi accepts as valid the marriage of an adult woman without the consent of her guardian, Maliki and Shafi'i schools dispense with the guardian's consent only in case of a *thayyiba* (non-virgin woman) (Ali 1996). On inheritance law, though the field is one of the few areas covered at length by the Qur'an, the schools still got to form rules thereon on certain matters. For instance, the Shi'a school is known for its liberal stand on inheritance to women and grandchildren in the absence of their father. In short, the relevance of the *Madhhabs* cannot be overemphasised.

Could it be said, with the same degree of certainty, that the *Madhhabs* are relevant among the Muslim diasporic communities in the UK? As noted above, these communities did not originate from a single jurisdiction. Admittedly, a good number of them are of Indo-Pakistani-Bangladeshi origin who commonly share the Hanafi *Madhhab*. But there are also Middle Eastern Arabs, African Arabs, other Africans, etc. whose original jurisdictions are either Maliki, Shafi'i, Hambali or one of the Shi'a schools. In short, the Muslim diaspora in the UK is "neither homogenous nor monolithic in [its] composition" (Ali 2007). If you talk about Islamic law in the Muslim diaspora in the UK, which version of Islamic law would you be referring to considering the influence of the *Madhhabs*? Would you simply refer to the majority Hanafi School ignoring the minority Muslims? Or would you choose among the other schools applied by one or more of the minority Muslim groups? Would it be a plausible idea to dump all the *Madhhabs* since there cannot be a common ground for all the diasporic communities? How is this last option possible considering the centrality of the *Madhhabs* to the body and even continuity of Islamic law? It will be interesting to know for instance how the Sharia Councils and the Muslim Arbitration Tribunals deal with this complex issue in their 'adjudicatory' roles.

The case of the Muslim diaspora in the UK can be described as diversity in unity. The Muslims belong to diverse Schools of thought and yet united under the overarching

Islamic umbrella. The situation does not only raise issues of concern regarding the relevance/irrelevance of the *Madhhabs*, it may also be a cog in the wheel of the quest for implementing some aspects of Islamic law within the English legal system as advocated by people like Dr Rowan Williams. Assuming the system is willing to accommodate Islamic law, how relevant or irrelevant would the *Madhhabs* be? These issues are of great concern as pointed out by Poulter in the following words:

A ... problem with the proposal for the introduction of Muslim family law in England is the practical difficulty of working out which system of Muslim family law would be applicable. Apart from the fundamental division between Sunnis and Shi'is there are a number of different 'schools' of Islamic thought. Furthermore, many countries where Muslim law is applied have, during the course of the 20<sup>th</sup> century, modernised and reformed it by means of local statutes or ordinances. Which of these many different versions would be administered in England? Would the choice of law in each case depend upon the nationalities, domiciles or countries of origin of the parties and, if so, what would happen to all those Muslims who were born here or who now possess a British passport and an English domicile?

It seems there are more questions than answers when it comes to Islamic law in the Muslim diaspora in the UK. In this session however, the focus will be introducing students to the issues arising in the application of personal law. This of course will be the most important aspect for the Muslims being an aspect affecting their personal lives. Despite being British citizens who try to comply with the English legal system, the experiences of the Muslim diaspora in these personal matters generally reveal that they have not jettisoned the religious dictates. Exposing students to these lived realities would enhance their understanding of Islamic law in the Muslim diaspora and the following are samples obtained from empirical work across the UK.

### **Some Aspects of Muslim Personal Law**

In order to ascertain the place of Islamic law in the lives of British Muslims and the specifics of the application of Muslim personal law in their lives, students on the Introduction to Islamic Law Module were required to submit an assessment in which they conducted case studies. Titled 'Application of Islamic Law in the Muslim Diaspora: Case Studies from the UK,' students were asked to locate one British Muslim who would be the respondent for their case study. The main objective of the assignment was to allow the students to develop an understanding of the principles of Islamic law and how these are applied by individual Muslims.

The methodology for the research covered a number of different strands. Firstly, students were expected to conduct research into literature on the area including any relevant case studies. They were then asked to conduct interviews with their respondent and analyse the responses received to the application of Islamic law within their lives in a number of key areas. These included the laws of marriage, divorce, polygamy, inheritance, custody and guardianship, adoption, dispute resolution and their understanding of sources of Islamic laws.

In total, 68 case studies were conducted. The writing team for this teaching manual then analysed the findings of the case studies in order to draw out trends that appeared

to emanate from the answers provided by the respondents. Those interviewed constituted a cross-section of British Muslims of varying ages, ethnic origins and Islamic juristic schools of thought. The responses provided a spectrum of opinion and practice, which reflected a diverse understanding of Islamic law within the Muslim Diasporic communities, varying sets of beliefs within the Islamic law code, and differing practices within families.

Three of these case studies have been selected and presented below to draw attention to the differing responses received by the students with some analysis of the same.

### **Case study 1**

A 21 year old female follower of the Hanafi Jurisprudence, who's family was of Pakistani origin but who was born in the UK was the respondent in this case study.

She accepted that the *Qur'an*, *Sunna* and *Hadith* were sources of Islamic law, but she opined that the reality of Islam can only be comprehended with some form of interpretation through the systems of *qiyas*, *ijma* and *ijtihad*. This reflected her support of the idea of using intellectual reasoning in order to develop rules of law and Islamic principles. This reflected the respondent's deeper understanding of *Maqasid Shari'a*, and thus, her view of Islamic laws as more than a stringent set of rules set down to be obeyed, but rather, more as guidelines.

The respondent here suggested that many Muslims do not understand the spirit of the *Qur'an* and the message it is trying to deliver. She also suggested that problems with interpretation may be explained by the norms of patriarchal imbedded cultures, where there is a failure to differentiate between aspects of religion and cultures which are male dominated.

On the issue of marriage, the respondent provided an in-depth explanation of her understanding. In brief, she believed that the methods for proposing marriages were imbedded with cultural traditions in which the family plays a key and often pivotal role. She cited the example of her parents who had decided to marry each other prior to the families being involved which was fairly exceptional for that time period within Pakistani society. She also states that *Mahr*, which is a key aspect of the marriage contract, was not discussed and her mother did not have one. This was due to the wealth of her family which appeared to have negated its need, although there is no basis for this within Islamic law principles. Thus, this provides an example of when Islamic law is put to one side in favour of cultural realities.

The respondent herself goes on to explain that she herself believes that symbolically, the *Mahr* requirement should have been fulfilled, suggesting that her understanding of Islamic law on the issue is that it is a non-negotiable right for women. She goes on to opine that women are given a lot of rights under Islam, but due to cultural restraints, they do not take these rights up or, the writer would suggest, perhaps they are denied them culturally altogether. This presents an interesting point on how personal circumstances and the norms of their societies affect the access women have to their rights under Islamic law.

One conflict for Muslims in Britain is the form of a marriage ceremony. Most *Nikah* ceremonies are not recognised marriage ceremonies in the eyes of the state, thus

requiring a separate civil ceremony for the official registration of a marriage. The respondent here crucially holds the view that one must obey the law of the land and thus, in marriage she believes that Muslims should abide by both religious and civil requirements. This duality reflects the fulfilment of her role as a Muslim and a British citizen.

On the issue of polygamy, the respondent asserted the need for a very high moral standard for this practice to be implemented; reflecting understanding of the specifics of the Islamic law position on the issue. She opined that the modern day failing in practices of polygamy are related to a failure to follow the 'spirit' of Islam, as intended when polygamy was first allowed. The legitimacy of polygamy is also limited in her view, and only applies as an exception and not the rule. This reflects a widening consensus amongst young Muslims on this issue. Contextually, she felt that in the UK polygamy was not needed as women are more independent and were not in need of 'protecting'. However, perhaps this is a narrow perception, as it presupposes that the only reason for polygamy is the need for financial and personal security. A welfare state does of course provide these securities.

The respondent did not believe that the UK could 'handle' the regulation of polygamy, which is an interesting position. Although there is little elaboration on the point, one may suppose this is related to the issue of legal plurality and the lack of recognition for alternatives within the UK legal tradition. She also suggests that Muslims do not need the UK to recognise polygamy, if the education of Muslims on the issue is tackled instead, there would not be a problem. This misses the point about regulating polygamy and ensuring that all affected parties have some legal protection within the marriages.

On the issue of divorce under Islamic law, she showed competent understanding. She suggested that the use of *Talaq al-Bida* disadvantages women and undermines the equality of the relationship. She does not mention the inequality in procedure for obtaining divorce through the other accepted methods however. On the issues of conflict of Islamic and British laws on divorce, she recognised the difficulties which arise when couples who did not obtain civil marriage registrations are getting divorced, due to lack of recognition. Under Islamic law, she expressed dissatisfaction with the manner in which the *khul* is treated and the lack of impartiality in Shari'ah councils which are presided over by men. This right to divorce being instigated by women is looked upon unfavourably in her view. Also, she takes point with the fact that women must forego the dower in this case, as she still considers it their right. There was unfortunately no discussion about how she thought this issue could be dealt with. The respondent's views reflected well thought out opinions and consideration of the realities of living in Britain and being self-regulated by Islamic laws.

On the issue of adoption, the respondent identified the complexities around adoption in Islamic law, although she did not think it was prohibited. The main issues surround treatment of the adopted child as compared with biological children. She identified practical difficulties with separating children when they reach maturity (or puberty) as required due to the degrees of the relationship with the adopted siblings, and other concerns. This concern reflected a strict understanding of the position of an adopted child in a family, and was not impacted on by British culture wherein an adopted child is very much expected to be treated as a real sibling of other children in the family.



Although these are seen as problematic issues, this does not impede adoption, and she still lists it as one of the greatest acts of 'charity' or generosity that a person can undertake.

Finally, on the issue of dispute resolution, the respondent believes that there is no conflict between the UK legal system and Islam on the issue of family matters and divorce specifically. Culturally and practically, she would consult her family first in the event of a dispute. This is perhaps no different to any British individual who would seek counsel from those whom they know and trust. She feels English courts do not have the competency to discuss issues of Islamic laws, a view which is perhaps supported by some of the case law emanating from British courts where Islamic law is under consideration. Interestingly, where issues such as divorce and matrimony related problems were concerned, she would consult the British courts but because she views these as providing her with more protection. On other issues however, she feels the complexity of Islamic law would make the traditional British courts unable to deal justly with the issues. Crucially, she believes that one must be a Muslim to decide on principles of Islamic laws.

In conclusion, it is clear that this respondent had a good level of understanding where Islamic laws are concerned but strongly believes that as a Muslim in Britain, one must find a position where there is fusion between Islamic laws regulating their lives and the laws of the land in which they live, which must be abided by. She appears to find it plausible to pick and choose between the two according to the needs of specific circumstances.

## **Case study 2**

A 50 year old male practicing Sunni Islam, of Palestinian origin but who was raised in Saudi Arabia and Egypt.

On the issue of sources of Islamic law, the respondent stated that he consulted all four of the major schools of thoughts when deciding on a matter of religious practice. The notion that the doors to *Ijtihad* were closed was shocking to him and he believed that this went against the 'whole notion of Islam'. The respondent had experience of '*mujtahids*' combining their opinions to formulate *ijtihad* (albeit in Egypt), and he elaborated on the credentials that the *mujtahids* would need to qualify for the role. Essentiality, they are required to know 'a foreign language' in order to fulfil the criteria for holding this post, reflecting an understanding of the needs that may arise from differing cultures. The respondent showed detailed understanding of the sources of Islamic law, and his responses were broad and in depth. However, this may not reflect the common understanding of the average Muslim within the Diaspora, as he spent a large part of his upbringing in Muslim populated countries.

On the issue of marriage, this respondent and the student appear to be confused between the concept of an 'arranged marriage' and a 'forced marriage'. An arranged marriage requires consent of both parties, but the introductions are usually made by the families. A forced marriage denotes no consent by one or both parties. Arranged marriages are accepted by Islamic law, but the respondent uses the term 'arranged' to denote forced. The process of meeting a prospective spouse was via families for the respondent, which reflects a method that remains popular in Britain even now. The

respondent said he needed to show that he could offer his potential bride a lifestyle akin to what she was used to, or better than that. This, it is suggested, reflects the 'psychological and environmental protection given to women in Islam.'

Much of the marriage customs and traditions seem to reflect cultural norms. For this respondent, the cultural norms of Palestinians were said to be less rigid than Saudi Arabian or Asian families. This issue may have some impact on the norms of Diasporic communities in Britain, many of whom are British Asians. The respondent was also able to distinguish Islamic law requirements where marriage was concerned, with Islamic 'Practice', and a large wedding party was thought to be an Islamic practice. This means that a marriage is not invalidated by the absence of a large wedding party however, the practice of this can be traced back in Islamic history. The *Mahr* is interpreted as a largely symbolic act by this respondent, who negotiated £1 for his sister. He did not consider it as a form of security as he viewed it as the husband's responsibility to provide security for the wife.

He describes Polygamy as a 'restricted right for the Muslim male' intended to counter otherwise illicit relationships. It is seen as the 'exception rather than the rule' and the fundamental requirement of treating all wives equally was brought up. This respondent did feel that the English legal system should allow Muslim men to legally marry more than one wife, as in his opinion this would 'solve problems', as long as it was practiced within strict Islamic law principles of justice and fairness. However, he recognised that it would not be practical or 'straightforward' for the government to implement such an allowance.

On the issue of divorce, the respondent suggested that men were given more power in divorce as women are by their nature more sensitive and therefore may use divorce inappropriately. This is a view that many feminists would take issue with, and on the surface, it gives men an advantage which can be abused. However, ultimately, he believes that there would be equality due to the ultimate justice from God of those who abuse the rights of others. The respondent cites some friends of his who approached the English courts for divorce as they believe the process provides an 'easier' and more 'practical' solution. He cites a female friend with 3 children who approached the British courts to ensure she and her children would obtain their rights. The respondent feels that Islamic law being applied in the UK (with the lack of enforceability) would not provide the same protection to Muslim women as British law. However, on the other hand, he believed that the British courts were expensive, time-consuming and probably gave rise to more tension between couples; however, this is a stereotypical representation.

Crucially, he did not think a British court divorce would amount to an Islamic divorce. The respondent himself says he would use the Shari'ah courts for a divorce. He wrongly asserts that there are no fees for consulting Shari'ah councils, and views them as accessible as there are many across the country. The respondent's view of the Shari'ah councils appears to be idyllic and the student pointed out some realities which possibly made him think again. It is perhaps fair to say that British Muslims who have had little contact with Shari'ah Councils view them as 'religious' institutions and therefore trust them automatically. The respondent's main issue seemed to be the lack of understanding of Islamic laws by judges in British courts, and perhaps a lack

of cultural awareness is to blame, and if this is tackled, the British courts may be more effective for Muslims for whom Muslim personal law is a big issue.

On the issue of inheritance, the respondent stated that he did not have a will (although this is an Islamic requirement) but that when he does write one, it would simply ask that his assets be divided 'according to Islamic law'. Again, this shows that the respondent has a great deal of faith in the Islamic principles that regulate inheritance, but due to the divergence between the schools of thought on how inheritance should be calculated, who inherits, and the 1/3 of the estate that can be disposed of by will, this perhaps reflects a rather naïve understanding of the principles.

Finally, for dispute resolution, the first port of call would be the family and if that failed, he would consult close friends. If these avenues failed to solve the problem, he would then go to the Shari'ah Council.

In conclusion, this respondent was clearly knowledgeable about some areas of Islamic law, but with others, his view reflected a degree of idealism which may not reflect the reality. However, this may be explained by his upbringing in Muslim populated countries and his lack of first hand exposure to Shari'ah Councils etc.

### **Case study 3**

The respondent was a middle-aged Caucasian male, who converted to Islam from being a Quaker. He is married with 4 children and accedes to the Hanafi school of thought.

On sources of Islamic law, he stated that the Qur'an does not call itself a code of law. Rather, he believes it provides general guidelines on Islamic laws. He studied all four schools of thought before coming to a decision about which to follow, and believes that this is necessary in order to follow any one school. He stated that 'the spirit of the law outweighs the letter of the law, and if there is ever a conflict, the spirit of the law should have priority. This reflects a deeper understanding and appreciation for Islam as a religion and its sources as texts.

On the issue of marriage, the respondent described his own experiences with an arranged marriage, with others recommending him and his wife to each other. In terms of *Nikah* and civil ceremony, he believes both are needed and recommended. However, he also quotes the European Council of Fatwa which said 'state registration is enough for a recognised Muslim marriage and this alone amounts to *Nikah*.' On the issue of traditions, he responded that he and his wife wear wedding rings which are more of a British/European tradition, but he also bought her bangles which are her cultural tradition, but she would be more likely to wear the rings. This reflects a cross cultural fusion where the display of marriage is concerned.

The *Mahr* was not a big issue here, reflecting a move away from its traditional role. £100 and £500 in jewellery constituted the *Mahr*. He stated that 'It really doesn't mean that much over here.'

Where polygamy is concerned, he stated that it is referred to in the Qur'an as an exception. He believes that there are very few polygamous marriages in the UK, but

also states that he thinks it may be 'better perhaps if polygamy was allowed.' However, he does not substantiate this. Presumably, if polygamy is practiced in its strict confines, with the agreement of the first wife, then he assumes that there would be no hardship from it for the first wife and it would alleviate suffering if the first wife cannot bear children or is ill, as she remains married to her husband but has help from the second wife.

On the issue of divorce, he states that Shari'ah courts provide women with ways of releasing themselves from marriage, and thus he feels that accusations that Shari'ah erodes women's rights to get a release from marriage are 'bizarre.' For divorce, he believes that a civil marriage requires divorce through the courts, which can be expedited if there is a Shari'ah divorce. He stated that: 'I believe that Shari'ah law enforces the view that if you are permanently living in a country, then you should automatically obey the laws of that country.' This reflects his understanding of his role as a British citizen.

On the issue of adoption, he states that Muslims do not adopt, they foster instead. Adoption, in his view, conceals a child's lineage, which it would be fair to say is the main Islamic law objection to the British version of adoption. He believes that the behaviour of families around adopted or fostered children depends very much on the community and local traditions/customs.

On the issue of inheritance, he explains the huge complexities surrounding it and the vastly differing views between Sunni and Shia Muslims. He explains the philosophy of men inheriting more than woman, where men are expected to care for the women. In Shia societies, he explains that both are given equal shares. He recognises that men are not expected to look after the women in a family as much today as they were in the past. He believes that most Muslims ignore the laws on inheritance and follow the British system. Perhaps this is explained by the differing nature of British society, where equality requires the 'same' treatment? It is surprising that the respondent was readily accepting a digression from strict Islamic principles here, as they are derived from the Qur'an itself.

Finally, for cases of dispute resolution, where divorce is concerned, he states that he does not believe it is necessary to get a divorce with the Shari'ah courts if one has been obtained through the British courts. However, he believes Shari'ah courts are needed in cases of Khul or abandonment. He believes that most British Muslims do not acknowledge the British legal system, and perhaps many men fear that they will lose money by using the traditional courts. Thus many Muslim men do not register their marriages, and the women lose out.

The respondent feels that the 2 systems should be merged so that people cannot 'escape' either. He says he is very attached to British law, and perhaps this reflects his birth in Britain as a 'native' which are reflected in his loyalties to the state. He also stated: 'A lot of Muslims don't realise that huge amounts of Shari'ah are accepted in this country, and there is no reason why you shouldn't resort to British law.' Where the British legal system is concerned, he believes there is a great deal of mistrust as Muslims feel victimised and 'guilty until proven innocent'. This, he believes makes Muslims feel uneasy. Perhaps this is a reason why Muslims are referring more to the Shari'ah courts and less to the British courts.

In conclusion, this case study reflects the position and understanding of a person who was not born into Islam but decided to adopt the faith of his own choosing. His non-Muslim upbringing meant that he was more inquisitive about the rules and regulations of Islam, however, he confesses his deep respect for British law. He does believe that they can be merged and one need not be sacrificed for the other.

### **Seminar Question**

The following is a sample seminar question for this session:

To what extent would you say that Islamic personal law is applied among the Muslim diaspora in the UK?

### **Tips**

1. Define Islamic personal law distinguishing it from other forms of Islamic law
2. Discuss the diversity of the Muslim diaspora in the UK having regard to the relevance of Schools of thought in Islamic jurisprudence
3. Examine the experiences of selected Muslims in the areas of marriage, divorce, inheritance and child care.

### **Readings**

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### **Chapter Three**

#### **Engagement of English Law with Islamic Law**

In the past two decades courts and tribunals in the United Kingdom have come across some interesting and very complex issues about validity of marriages and divorces among Muslim Diaspora in the United Kingdom. In this context questions relating to the recognition of the Muslim forms of divorce, position accorded to arranged marriages, enforcement of the dower and other aspects of the Muslim marriage contract, marriage registration arrangements, spousal maintenance, the custody and care of children, and inheritance rights of heirs are of major significance. Such problems have arisen with regularity in recent years, in the context of Social security, Pension law and Immigration law in particular. It can thus be argued that there is a phenomenon of legal pluralism emerging where we can see an interplay between Muslim Personal law, customary practices and English law. This session focuses on the application of Islamic law by the English courts.

#### **Cases decided by the English courts**

*Alhaji Mohamed v Knott* [1968] 2 WLR 1446

Court: Divisional Court

Facts: A man aged 26, a Nigerian Muslim, entered into a potentially polygamous marriage in Nigeria with a Nigerian girl aged 13. Both parties were domiciled in Nigeria and the marriage was valid according to Nigerian law. Shortly thereafter they moved to and cohabited in England. A complaint was preferred before justices sitting

as a juvenile court that the girl was in need of care, protection or control in that she was not receiving such care and guidance as a good parent might reasonably be expected to give and was exposed to moral danger within Section 2 of the Children and Young Persons Act 1963. The justices were of opinion that whether or not the marriage was recognised as valid by the court, the girl was exposed to moral danger, that a continuance of the association between her and the man notwithstanding the marriage would be repugnant to any decent-minded English man or woman, and found the complaint proved; accordingly the justices ordered the girl to be committed to a local authority as a fit person under Section 62 of the Children and Young Persons Act 1933.

Issues: (1) Whether they were considered married under English law; (2) Whether the girl was exposed to moral danger; (3) Whether sexual intercourse between them was illegal.

Held: The appeal was allowed. (1) The marriage was valid and recognised under English law. (2) In light of this, and the relationship between them, she was not exposed to moral danger. (3) Sexual intercourse between them was not 'unlawful' within the meaning of Section 6 of the Sexual Offences Act 1956, as she was his wife.

### *Qureshi v Qureshi* [1971] 2 WLR 518

Court: High Court

Facts: In 1966, the parties, who were Muslims, were married at an English register office. The register office ceremony was followed by a Muslim ceremony, in connection with which *sadaqa*, a type of dower, was arranged for the sum £788. The parties continued thereafter to reside in England. On April 27, 1967, the husband, who claimed to be domiciled in Pakistan, sent a letter to the wife in compliance with the Islamic law of *talaq*. The divorce was pronounced absolute by the London office of the High Commissioner for Pakistan on 1 August 1967.

The wife petitioned the court for a declaration that the marriage still subsisted and for maintenance or alternatively, if the marriage had been validly dissolved, that she was entitled to dower in the sum of £788. The husband asked for a declaration that the divorce by *talaq* was valid, contending that the claim for maintenance was not maintainable in a petition for a declaration and that the court had no jurisdiction to adjudicate upon the claim for dower.

Issues: (1) Whether the husband was domiciled in Pakistan at the time of divorce – this had implications regarding whether Pakistani law would apply; (2) Whether the divorce was effective; (3) Whether the court had jurisdiction to hear the claims and make the desired judgments.

Held: The factual scenario indicated that the husband was of Pakistani domicile. Therefore, the divorce was effective under Pakistani law and there was no English rule of law to prevent it from being recognised. The court had jurisdiction, as the



parties had been resident in England for some time. The wife was denied her claim for maintenance, but granted the £788 dower. The Judge refused to exercise his residual discretion in favour of the wife; the *talaq* divorce was not unconscionable.

Hashmi v Hashmi [1972] Fam 36

Court: Leeds Assizes

Facts: The husband, a Pakistani man, married W1, a Muslim, in Pakistan in 1948. In 1957 whilst his first marriage was subsisting, he went through an English marriage ceremony with W2, who subsequently bore him three children. In 1968 W2 petitioned for divorce on the grounds of cruelty and adultery. The husband stated that the marriage should be declared void – it was polygamous – but that the children should be declared legitimate.

Issues: Whether the children were legitimate.

Held: The children would be legitimate whether the marriage was valid or not. If the marriage was valid in English law, they would obviously be legitimate. If the marriage was invalid in English law, it would remain valid in Pakistani law and therefore the children would still be legitimate.

Mr Commissioner Stabb QC: “The only difficulty that arises in this case is whether the law of the domicile of the respondent would recognise the ceremony of marriage that he went through in this country as being a valid marriage. If that were so, then plainly the courts of this country would recognise that marriage also as being a valid marriage, notwithstanding its polygamous nature, and would accord...the status of a married man to the respondent, and presumably the status of legitimate children to the children of that union. There has been placed before me the affidavit of Mr. Ali Mohammad Azhar as an expert in the laws of Pakistan, and quite apart from what he says as to positive proof of that first marriage by the respondent to Halima Khatoun and its proof for the purposes of these proceedings, he goes on to say at paragraph 13 of that affidavit that the marriage between the respondent and the petitioner would be accepted by a court of competent jurisdiction in Pakistan as a valid second marriage between the parties, even if the marriage took place without the petitioner having known that the respondent was previously and lawfully married to Halima Khatoun and that that previous marriage was still subsisting at the time when the respondent went through that second ceremony of marriage with the petitioner. If that is the position, and if in fact the respondent's domicile remains that of Pakistan, then in my view it plainly follows that that second ceremony of marriage, although it may well be void for the purposes of the law of this country, as being a marriage which this country cannot recognise, nevertheless is recognised as being a valid marriage by the law of the respondent's domicile. It seems to me to follow automatically on that, that the courts of this country would recognise as being legitimate the children of that union, even though this country's courts could not recognise it as being a valid marriage for the purposes of dissolution.”

Chaudhry v Chaudhry [1976] Fam 148

Court: High Court

Facts: In 1959 the parties were married under Islamic law in Pakistan. In 1972 the parties, having moved to England but the husband retaining a Pakistani domicile, obtained a divorce by pronouncing talaq at the Pakistani Embassy in London. The wife subsequently applied under Section 17 of the Married Women's Property Act 1882 for a declaration of her interest in the former matrimonial home. Before the registrar it was contended on behalf of the husband that there was no jurisdiction to hear the summons because the words "husband and wife" in the Act did not apply to parties to a polygamous or potentially polygamous marriage.

Issues: The registrar ordered the trial of a preliminary issue as to whether the wife was entitled to proceed under the provisions of the Married Women's Property Act 1882.

Held: Dunn J: "In my judgment, the parties having been married according to the law of their domicile, the English court would regard them as husband and wife for the purpose of deciding any application by either of them under Section 17 of the Married Women's Property Act 1882. Any other conclusion would, in my judgment, be most impractical and an affront to common sense, because one would have the highly inconvenient situation that parties to a polygamous marriage could apply for transfers and settlement of property under the Matrimonial Causes Act 1973 but could not apply for their rights to be determined or for sale under Section 17 of the Married Women's Property Act 1882.

Appeal to the Court of Appeal: Dismissed.

*Radwan v Radwan (No. 2)* [1973] Fam 35

Court: High Court (Family Division)

Facts: In 1951, the parties, an English woman and an Egyptian, entered into a contract of polygamous marriage according to Muslim law at the Egyptian Consulate in Paris. At that time, the husband had one wife living in Egypt whom he divorced by talaq in 1952. The matrimonial home was established in Egypt. In 1956 the parties left Egypt to live temporarily in England but by 1959 the husband had decided to live permanently in England and acquired a domicile of choice in England. In 1970 the wife filed a petition of divorce on the ground of cruelty and the husband by his answer denied the cruelty and cross-prayed for a decree of divorce on the ground that the marriage had irretrievably broken down under section 2 (1) (b) of the Divorce Reform Act 1969.

Issues: Whether the marriage was to be recognised in England.

Held: The marriage subsisted. There were problems with the interpretation of French law and the necessary domicile of the parties. However the judge considered that as Egypt was the intended place of the matrimonial home, and Egyptian law would recognise the marriage, English law would recognise the marriage also.

Cumming-Bruce J: “[M]y conclusion is that Miss Magson had the capacity to enter into a polygamous union by virtue of her prenuptial decision to separate herself from the land of her domicile and to make her life with her husband in his country, where the Mohammedan law of polygamous marriage was the normal institution of marriage. I recognise that this decision may make it necessary for Parliament to consider a further amendment to the Nullity of Marriage Act 1971, if it is indeed the policy of Parliament to prevent such unions on the part of domiciled Englishmen and women, and to require a change of domicile before there is capacity to enter into them. But this court is only concerned with the common law rights of Miss Magson, as she was in 1951, and with the status, if any, that she acquired as a result of her decision to enter into a polygamous union with a domiciled Egyptian. My decision is that by that contract she became the wife of the respondent. Nothing in this judgment bears upon the capacity of minors, the law of affinity, or the effect of bigamy upon capacity to enter into a monogamous union. Having had the benefit of argument, I do not think that this branch of the law relating to capacity for marriage is quite as tidy as some very learned authors would have me believe, and I must face their displeasure with such fortitude as I can command.”

*Radwan v Radwan (No. 1)* [1973] Fam 24

Court: High Court (Family Division)

Facts: Same facts as above, except that the husband tried to obtain a divorce by pronouncing talaq at the Consulate General of the United Arab Republic in London.

Issues: Whether the premises of the Consulate General were within or without England.

Held: The talaq divorce could not be recognised as it did not take place in judicial or other proceedings outside the British Isles; diplomatic premises were part of the territory.

*Quazi v Quazi* [1979] 3 All ER 897

Court: House of Lords

Facts: The husband and the wife were both born in India and were married there in 1963. Both were Pakistani nationals and Muslims. In February 1973 they moved to Pakistan. The marriage deteriorated and in March 1973 the husband came to England where he bought a house. The wife continued to reside in Pakistan. In June 1974 the wife came to England temporarily and lived separately. In July 1974 the husband went to Pakistan and pronounced a talaq divorce by formally repeating 'talaq' three times. The husband gave notice to a public authority and supplied a copy of the notice to the wife. The effect of the talaq was suspended for 90 days to enable the authority to constitute an arbitration council for the purpose of bringing about reconciliation

between the parties. The husband returned to England and in 1975 presented a petition for a declaration, pursuant to the Recognition of Divorces and Legal Separations Act 1971, that the marriage was lawfully dissolved by the talaq. The judge granted the declaration. He held that the talaq divorce had been obtained by means of 'judicial or other proceedings' in Pakistan and was 'effective under the law' of Pakistan and thus could be recognised as valid under Section 2(a). The Court of Appeal reversed his decision.

Issues: Whether the talaq divorce was obtained by 'other proceedings' within the meaning of Section 2(a) of the 1971 Act and was effective under the law of Pakistan. The wife contended that the words 'other proceedings' must mean proceedings which, by application of the *ejusdem generis* rule, were quasi judicial.

Held: Decision of the Court of Appeal reversed. The expression 'other proceedings' could not be read as referring only to 'other quasi judicial proceedings' by means of applying the *ejusdem generis* rule, because that rule applied to limit the generality of the term 'other' only where it was preceded by a list of two or more expressions having specific meanings and common characteristics from which a common genus could be identified. Accordingly, having regard to the policy of the 1971 Act as a whole and the purpose for which it was enacted, the words 'or other proceedings' in Section 2(a) included all proceedings for divorce, other than judicial proceedings, which were legally effective in the country where they were taken. The talaq divorce followed the acts of pronouncing a talaq and giving of notice to the authority and the wife, which fell within the description of 'other proceedings' for they were acts officially recognised by the law of Pakistan as leading to an effective divorce. It followed therefore that the husband was entitled to a declaration.

Lord Diplock: "My Lords, the presumption is that the draftsman of the Recognition Act, by his use of the phrase 'obtained by means of judicial or other proceedings in any country outside the British Isles', intended to provide for the recognition of all divorces to which the Recognition Convention applies, for to fail to do so would be a breach of that convention by this country."

Lord Scarman: "Under the law of Pakistan, therefore, talaq is the institution of proceedings officially recognised as leading to divorce and becomes an effective divorce only after the completion of the proceedings and the expiry of a period laid down by statute. The proceedings in this case were, therefore, officially recognised, and led to a divorce legally effective in Pakistan. Further, the trial judge was correct in holding that the effective divorce was obtained *by means of* these proceedings; for without them there would have been no effective divorce."

Viscount Dilhorne and Lord Scarman were of the view that the law should be changed to enable a UK resident whose divorce has been recognised here to claim under the Matrimonial Causes Act 1973.

*Abbassi v Abbassi & Anr* [2006] EWCA Civ 355

Court: Court of Appeal

Facts: The wife presented a divorce petition, but her husband asserted that their marriage had already been dissolved by talak in Pakistan in 1999, which would have meant that they had been cohabiting out of wedlock. The wife insisted that the documentation was improper. Wood J held that the court in Islamabad should decide as to the validity of the talak divorce and gave directions accordingly.

Issues: (1) Whether Wood J had exercised his discretion properly – it was argued that he had placed too much emphasis on the availability and convenience of witnesses in Pakistan; (2) Whether Wood J had acted properly in having regard to Article 6 of the ECHR.

Held: The appeal was dismissed. Wood J had exercised his discretion properly. He had a responsibility to adjourn the proceedings to await the outcome of a case in another jurisdiction at his own motion, even if that was not initially sought by either of the parties. He had a wide discretion and it was perfectly legitimate for him to take into account the availability of witnesses in Pakistan. Lord Justice Thorpe: “in family proceedings with an international dimension, it is becoming increasingly common to have regard to the sensible transfer by the court...it is worth emphasising that there are particularly strong relationships between the judges of the family division and the judges of the courts of Pakistan”. Further, it was considered that as the Article 6 argument was for the favour of the wife, that issue was a nonstarter.

Ramsamy v Babar [2005] 1 FLR 113 (not particularly relevant)

Court: Court of Appeal

Facts: Before the husband and wife’s divorce was finalised the husband underwent a marriage ceremony with a second wife in Pakistan. In respect of the first marriage, the husband occupied the wife’s home and the wife occupied the husband’s home. The husband’s new wife lived in the property with the husband. The husband very shortly moved out and told his first wife to rent it out; the second wife was still living there. Upon applying to the court for a possession order, the court refused on the grounds that the second wife occupied the property as her matrimonial home. The recorder avoided the issue of whether the second marriage was valid under UK law; if it was not then the second wife would not be occupying the matrimonial home. The first wife appealed.

Issues: Whether the recorder had been right in dismissing the issue of validity.

Held: The recorder should have either looked into validity, or alternatively undertaken an investigation under Section 30 of the Family Law Act 1996. Case remitted to the recorder.

Sulaiman v Juffali [2002] 1 FLR 479

Court: High Court (Family Division)

Facts: The husband and wife were both Saudi nationals, both were Muslims and they were married in Saudi Arabia in accordance with Sharia law in 1980. The husband

pronounced a bare talaq in England in 2001 and this was registered with the Sharia court in Saudi Arabia shortly thereafter. It was accepted by the expert witnesses that the talaq divorce would irrevocably dissolve the marriage in Saudi Arabia. The wife petitioned for divorce in the English courts and the husband replied that the talaq divorce was effective.

Issues: (1) Whether the court had jurisdiction; (2) Whether the divorce was to be recognised.

Held: (1) The Court clearly had jurisdiction under Section 5 of the Domicile and Matrimonial Proceedings Act 1973; the wife was found to be habitually resident in England. (2) The divorce was not to be recognised in England because it had not taken place in proceedings outside of the British Isles.

Munby J: “The simple fact in light of all the expert evidence is that *this* talaq...was ‘obtained’ in this country, it was not ‘obtained’ in Saudi Arabia. It was obtained in this country because, as explained by the experts, the effect of *this* talaq, pronounced by the husband on 23 June 2001, was, as Dr Al-Sawwaf put it, to dissolve the marriage ‘as soon as’ the talaq was pronounced. ‘The validity of *this* talaq was ‘not dependent in any way upon...the participations or authorisation of judicial authorities’.”

*A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6

Court: High Court (Family Division)

Facts: The husband was domiciled in Iraq and the wife in Syria, Saudi Arabia or Lebanon until taking English domicile in 1992. They had lived together for 20 years and had two children. They went through two marriage ceremonies. The first one was in a London flat and was an Islamic service. The wife knew that the husband was already married to S and therefore that the marriage was polygamous. Some years later the husband’s lawyer advised that the marriage was not valid in English law. Therefore the husband divorced the wife in Sharjah, an Islamic country and the divorce was revoked (i.e. they were remarried) three days later. Eventually the marriage broke down and the husband obtained a divorce in Sharjah. The wife sought divorce in England; the husband replied that there was no valid marriage and therefore the English court had no jurisdiction.

Issues: Did either of the two marriages constitute an effective marriage?

Held: The first marriage did not fall within Section 11 of the Matrimonial Causes Act 1973 and was therefore not a valid marriage in English law. The second marriage was merely a divorce and revocation of divorce, therefore the original invalid marriage continued to subsist. However, interestingly, the court found that there was a marriage in existence. The wife was entitled to rely on the rule that cohabitation and reputation of being man and wife together amounted to strong evidence that a lawful marriage had taken place, which only strong evidence that such a marriage had not taken place would rebut. The probable polygamous marriage may have taken place in an Islamic country without the presence of the wife; she had signed various documents for her

husband and had not known what they were. The husband's Shariah divorce was therefore ineffective in England and the court could make the order.

Hughes J: "The rule is well established that the law will wherever possible presume a lawful basis for long cohabitation between man and woman in the capacity of husband and wife. The rule is conveniently put in *Rayden and Jackson's Law and Practice in Divorce and Family Matters* (Butterworths, 17th ed, 1997) at 4.11 thus: 'Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, though there may be no positive evidence of any marriage having taken place, particularly where the relevant facts have occurred outside the jurisdiction; and this presumption can be rebutted only by strong and weighty evidence to the contrary'."

### **Seminar Questions**

Q1) Critically evaluate the impact of 'bare talaq' and 'limping marriages' on Muslim women in Diasporic communities.

Q2) "*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.*" Sebastian Poulter<sup>32</sup>

Discuss in light of the above statement to what extent should English courts accommodate Islamic Family law.

Q3) Courts in the United Kingdom have adopted a mixed trend in deciding cases that involve application of Islamic law. Discuss this statement with reference to relevant case law.

Q4) Can a divorce granted by an English Court considered as valid under the Islamic law?

### **Reading List:**

Ali, S. S. (2007) "Religious Pluralism, Human Rights And Muslim Citizenship In Europe: Some Preliminary Reflections On An Evolving Methodology For Consensus" In Leonon, T. & Goldschmidt, J. (Eds.) Religious Pluralism And Human Rights In Europe Antwerp: Intersentia, Pp. 57-79

Yilmaz, I (2001) 'Law as Chameleon: The Question of Incorporation of Muslim Personal Law into the English Law', *Journal of Muslim Minority Affairs*, Vol 21, No2.

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<sup>32</sup> Sebastian M. Poulter, *Ethnicity, Law and Human Rights: The English Experience*, Supra note 94, at p. 391.

Leweling, M (2005) 'Exploring Muslim Diaspora Communities in Europe through a Social Movement Lens: Some Initial Thoughts', *Strategic Insights*, Volume IV, Issue 5.



## Chapter Four

### Dispute Resolution Mechanisms

#### I. Introduction

A new trend about dispute resolution has emerged during last decade and a half to react to the failure of various legal systems in providing equal access to justice. The key characteristic of this movement is an emphasis on human rights values, social justice and interdisciplinary approach to legal system. *“It is the result of a synthesis of a number of new disciplines within law and legal practice that have been rapidly gaining visibility, acceptance, and popularity in the last decade and a half. These disciplines represent a number of emerging, new, or alternative forms of law practice, dispute resolution, and criminal justice. The converging main “vectors” of this movement are (1) collaborative law, (2) creative problem solving, (3) holistic justice, (4) preventive law, (5) problem solving courts, (6) procedural justice, (7) restorative justice, (8) therapeutic jurisprudence, and (9) transformative mediation.”*<sup>33</sup> It has been argued that the dispute resolution mechanisms have been developed based on culture, religion and local institutions including religious association<sup>34</sup>. The Islamic dispute settlement methods are driven from Qur’anic values and the Sunnah. Islamic dispute resolution which shares similar idea of Western alternative dispute resolution’s debate has been practiced by Islamic legal tradition and now widely rules Muslims disputes within the formal justice system of Muslim countries.

#### II. Concept of Dispute Resolution in Islam

Islam does recognize adjudication and reconciliation-based dispute resolution processes. Adjudication is used as a rule in *hudud* offences, which refers to offences specified in the primary sources of Sharia (Qur’an and Sunnah) and their punishments are fixed therein. Also, Islamic legal system has introduced a wide array of reconciliation-based dispute resolution mechanisms which in modern terms are called Alternative Dispute Resolution (ADR). The following table illustrates major distinctions between court-based and reconciliation-based dispute resolution in Islam:

Court Based Dispute Resolution	Reconciliation-Based Dispute Resolution
Adjudication	Mediation
Formal process	Non- formal process
Fact oriented reasoning	Prospective oriented reasoning
Coercive power of the judge	Non- coercive power of the mediator/ arbitrator

<sup>33</sup> Daicoff, Susan, The "Comprehensive Law Movement", Dispute Resolution Journal law, [Vol. 6: 1, 2006]

<sup>34</sup> Merry, S, (1982), ‘The social organization of Mediation in Non- Industrial Societies: Implication for informal Community Justice in America’, in R. Abel, ed., The Politics of Informal Justice, vol. 22,17-45. New York, Academic Press

Judge knowledge-based resolution process	Parties agreement- based resolution process
Excluding	Compromising
Need for legal scholarship	No need for legal scholarship
Binding verdict	Non- binding opinion

One of the major distinctions between Islamic court- based and reconciliation- based dispute resolution is relating to methodology and process of reasoning. In adjudication system, the court refers to Islamic source of law including the Qur'an and Sunna, as primary sources of Shari'a, and reasoning by analogy (qiyas in Sunni tradition or reason (aqhl) in Shiite theology) and consensus (ijma), as secondary sources of Shari'a. The reasoning methodology is called Usul al-fiqh which determines the substantive regulations or practical jurisprudence (fiqh). In contrast, in reconciliation-based dispute resolution, the mediator/arbitrator might refer to Islamic law in particular Qur'an and Sunna to encourage parties to reconcile but the primary source for settlement is application of reason (aqhl) over the dispute for parties to compromise. Also, it needs to be cited that the Judge (Qadi), within the Islamic legal system balances the 'rights' owed to God with the rights of individuals based on Islamic law but the mediator/arbitrator balances the rights of individuals based on their own interest and consent.

The Islamic legal tradition comprised practicing of alternative dispute resolution mechanisms. During the Ottoman Empire all judges (Qadi) were facilitating sulh between parties<sup>35</sup>. In our time, most of Muslim countries are practicing dispute settlement mechanisms based on Qur'an and Sunna, as primary sources of Shari'a. In Islamic Republic of Iran, as an example of a Muslim- Shi'a country, the legal system does acknowledge Islamic reconciliation- based dispute resolution mechanisms through disputes settlement councils, arbitration, family mediation and compromised settlement<sup>36</sup>. In Saudi Arabia, as a case of a Muslim- Sunni society, the legal system principally most civil cases settle in reconciliation, following Qur'anic verse "sulh is best". [4:128]

### III. Qur'anic Values of Dispute Resolution

The faith-based approach to dispute resolution rooted in Qur'an verses promote compromised resolution and reconciliation; "you who believe! Be decent for Allah, bearers of witness with justice, and let not hatred of a people provoke you not to act equitably; act equitably, that is nearer to faithfulness, and be careful of (your obligation to) Allah; without doubt Allah is Aware of what you do;" [5:8], "Walk on the earth in modesty, and when the ignorant address them, they say: Peace." [25:63] or "These hasten to good things and they are leading in (attaining) them;" [23:61].

<sup>35</sup> Walid Iqbal, "Courts, Lawyering, and ADR: Glimpses into the Islamic Tradition," 28 Fordham Urb. L.J. 1035, 1037-38 (2001).

<sup>36</sup> According to Article 752 of Iranian civil code 'A settlement of account is possible either in the case of the adjustment of an existing dispute, or for avoidance of a possible dispute, or in the case of a transaction and the like.' There is no legal limitation for parties to construct a legally accepted settlement unless to have "capacity for the transaction and "an interest in the subject of the settlement

One of primary Qur'anic values regarding dispute resolution is forgiveness (Afv) which encourages Muslims to take to forgiveness [7:199], and Allah promises those who avoid the great sins, and whenever they are angry they forgive a highest reward [42:37] Some scholars argue that Qu'ran encourages forgiveness in three different ways: first is forgetting a wrong done, second ignoring an offensive act or person, and third one refers to Allah's divine forgiveness.<sup>37</sup> Other Qur'anic core principles including *Adl* (Justice), *Solh* (negotiated settlement), *Musalaha* (reconciliation), *Hakam* (arbitration), *Hikmah* (Wisdom), *Ihsan* (Beneficence) and *Salam*(peace) are constructing Islamic framework for dispute resolution.<sup>38</sup>

In addition, Islamic human rights values can be considered as related source for reconciliation-based dispute resolution. Islamic scholar 'Majid Khadduri' has illustrated the five most important principles of human rights in Islam: 1) *dignity and brotherhood*; 2) *equality among members of the community, without distinction on the basis of race, colour, or class*, 3) *respect for the honour, reputation, and family of each individual*; 4) *the right of each individual to be presumed innocent until proven guilty*; and 5) *individual freedom*.<sup>39</sup> The association of role of individual, honour and brotherhood with Islamic dispute resolution should be examined as Islamic dispute settlement practices include structuring two individuals consent motivated by honour and brotherhood to settle the dispute. Also, there is need to appreciate Islamic style of communication, negotiations, mediations, forgiveness, and code of honour (and its opposite meaning, shame) in analyzing Islamic dispute resolution.

## 1. Peace

The Qur'an values peace as a fundamental component of the well-being of human beings.<sup>40</sup> The Qur'anic term for peaceful settlement of disputes is often *silm* and its derivatives such as *salam* which means peace, security, and acceptance. The alternative Qur'anic word for peace is *sulh* which will be reviewed in following section.

## 2. Compromised Settlement

The alternative expression, which the Qur'an uses to advocate compromised settlement of disputes, is *sulh* meaning peace and reconciliation. The Qur'an appreciates *sulh* and says: '*compromise is better*'.<sup>41</sup> In Islamic law, *Sulh* is a self-governing arrangement and may be effected in exchange for wealth or in exchange for

<sup>37</sup> Gopin, Marc Holy War, Holy Peace: How Religion Can Bring Peace to the Middle East, Oxford University Press: Oxford, 2002.

<sup>38</sup> The principles of Adl, Ihsan and Hikmah also have been referred as core values of Islamic peacemaking framework: 'Islam yields a set of peace building values that if consistently and systematically applied can transcend and govern all types and levels of conflict, values such as justice (adl) beneficence (Ihsan) and wisdom (Hikmah) which constitute core principles of peacemaking strategies and framework.' see Mohammed Abu-Nimer, Framework for Nonviolence and Peace building in Islam, Journal of Law and Religion, Vol. 15, No. 1/2 (2000 - 2001), pp. 217-265

<sup>39</sup> M. Khadduri, (1984), *The Islamic Concept of Justice*, Baltimore: John Hopkins University Press, pp. 236-37

<sup>40</sup> See Hadji Haidar, Hamid, The Qur'anic Idea of Peace, Paper for: Political Studies Association 56th Annual Conference, 4th-7th April 2006, access at <http://eprints.ucl.ac.uk/5190/1/5190.pdf>

<sup>41</sup> The Qur'an, chapter 3, verse 128

benefits. In accordance with Islamic Law (Shari'a), "the purpose of *sulh* is to end conflict and hostility among believers so that they may conduct their relationships in peace and amity....In Islamic law, *sulh* is a form of contract (*'akd*), legally binding on both the individual and community levels."<sup>42</sup> Like the private *sulh* between two believers, "the purpose of public *sulh* is to suspend fighting between two parties and establish peace, called *muwada'a* (peace or gentle relationship), for a specific period of time."<sup>43</sup> According to Article 752 of Iranian civil code 'a settlement of account is possible either in the case of the adjustment of an existing dispute, or for avoidance of a possible dispute, or in the case of a transaction and the like.' There is no legal limitation for parties to construct a legally accepted settlement unless to have 'capacity for the transaction' and 'an interest in the subject of the settlement'.<sup>44</sup> As said by Article 754 *Sulh or comprised settlement* legally is enforceable except that which relates to an unlawful matter.

In Pakistan the section 89-A of the Civil Procedure Code, 1908 (as amended in 2002) includes *sulh* as one of alternative dispute resolution methods.

### 3. Family Mediation

Mediation is a negotiated dispute resolution mechanism in which a neutral intervener facilitates disputing parties agree on a jointly dispute settlement.<sup>45</sup> On the word of Qur'an: "If a couple fears separation, you shall appoint an arbitrator from his family and an arbitrator from her family; if they decide to reconcile, GOD will help them get together"<sup>46</sup> In Shia tradition as well as Sunni (with the exception of Malaki law) the arbitrators have no power to decide that a marriage shall be terminated. Their function is over once they have made their attempt to reconciliation. The principle of family mediation, known as 'Hakam' has been instructed within the family law statutes in most of Muslim countries.

Iranian Family Protection Act has emphasized on reconciliation based on Shari'a. The responsibility of mediator/arbitrator is to settle the family dispute. According to the Act, the Family Court is bound to ask divorce parties to appoint a mediator. The mediator should primary attempt to reconcile the parties but if parties fail, the mediator must submit his/her opinion to the court. This finding will be shared with the parties within a specified period which will be put into implementation except parties make an objection. In the case of objection, the court will examine the matter and give judgment.

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<sup>42</sup> M. Khadduri, "Sulh" in C.E. Bosworth, E. van Donzel, W.P. Heinrichs, and G. Lecomte, The Encyclopedia of Islam, Volume IX, (Leiden, Holand: Brill, 1997), p.845-846

<sup>43</sup> Ibid.

<sup>44</sup> Article 753 of Iranian Civil Code

<sup>45</sup> See also 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles', Lois Vanderkool and Jessica Pearson, *Family Relations*, Vol. 32, No. 4 (Oct., 1983), pp. 557-566, National Council on Family Relations

<sup>46</sup> The Qur'an, chapter 4, verse 35

#### 4. Arbitration

As said by Qur'an: "Allah command you to render back your trusts to those to whom they are due; And when ye judge Between man and man, That ye judge with justice: verily how excellent is the teaching which he gives you"<sup>47</sup> Although there has been no exact definition of *Tahkim* or arbitration, in the early history of Islam,<sup>48</sup> the Treaty of Medina of 622 A.D. called for arbitration of any disputes.<sup>49</sup> This concept of reconciliation also can be found in the traditions of the Prophet Muhammad (Sunna) in reconstruction of the Ka'ba. There was a dispute over the placing of the Black Stone (Hajr al-Aswad) into the building between tribes of the Quraysh who wanted to have the honour of placing the stone. The Prophet asked each of the tribes to introduce a representative. He then placed the stone in a sheet of cloth, asking all representatives to hold it and raise it together. The Prophet Muhammad had taken action as an arbitrator over several disputes. Another incidence reported in Sahih a-Bukhari is that Prophet Muhammad had conciliated between litigants on dispute of debt. He was report to have cut the claim of a creditor in half in order to reach a rapid settlement.<sup>50</sup> In relation to the Shia tradition, Imam Hassan defines arbitration in accordance with the Shi'i School as a voluntary procedure whereby a neutral qualified jurist is chosen in a case by opposing parties to settle their dispute according to Islamic law.<sup>51</sup> This definition is in line with the Sunni School, which defines arbitration as an agreement by the disputants to appoint a qualified person to settle their dispute by reference to Islamic law.<sup>52</sup>

The Iranian International Commercial Arbitration Act, including nine Sections and thirty six Articles, has been enacted on 17 September 1997 by the Iranian Parliament and affirmed by the Guardian Council on October 1997. In accordance with this Act, arbitration "means the settlement of disputes between litigants out of court by mutually agreed natural or legal persons and/or appointed ones."<sup>53</sup>

#### 5. Expert Determination

*Fatwa* which is issued by a recognized religious authority in Islam can be referred as one of the Islamic dispute resolution mechanisms. This is a non-binding mechanism which can be compared with expert opinion in the modern term. However, because of high respect and high standing of a Mofti in Islamic society, the parties who have referred to seek *Fatwa* over their dispute will comply with the scholarly opinion on a matter of Islamic law.

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<sup>47</sup> The Qur'an, chapter 4, verse 31

<sup>48</sup> See Abdul Razak Ibrahim. 1991. The Institution of Arbitration

<sup>49</sup> See ABDUL, HAMID EL-AHMAD Arbitration with the Arab Countries 13(2d ed, 1999) *Arab Law Quarterly*, Vol. 6, No. 1 (1991), pp. 114-115

<sup>50</sup> Sahih al-Bukhari, vol. 3 by Muhammad Muhsin Khan.

<sup>51</sup> Halili, Hassan, Employment Dispute Resolution Mechanism from the Islamic Perspective, *Arab Law Quarterly*, Volume 20, Number 2, 2006 , pp. 181-207

<sup>52</sup> Ibid.

<sup>53</sup> Article 1.a of the Iranian International Commercial Arbitration Act

## 6. Ombudsman

*Muhtasib* in earliest Islamic history was a learned jurist who functioned like a public inspector, complaint's receiver and enforcer. The notion of *Muhtasib* is driven from the duty of promoting good (*ma`ruf*) and preventing wrongdoing (*munkar*) in Islamic law. This concept can be compared with community advocates in modern context which function to settle dispute in the community level.

## IV. Muslims Dispute Resolution in Britain

In 2008, British legal system officially gave power to the shari'a courts to rule on Muslim civil cases including divorce, financial disputes and also domestic violence cases. Accordingly, the judgments made by a network of the sharia courts, are recognized and enforceable within the justice system, through the county courts or High Court. In the past, the ruling of shari'a courts depended on voluntary compliance among Muslim community and there was not enforcement. Therefore shari'a courts could provide ruling only to those Muslims who wanted to abide by an orthodox interpretation of their religious jurisprudence<sup>54</sup>.

The new development has been made under the Arbitration Act 1996 which classified the sharia courts as arbitration tribunals. Sheikh Faiz-ul-Aqtab Siddiqi who established the Muslim Arbitration Tribunal panels said that: "*we realized that under the Arbitration Act we can make rulings which can be enforced by county and high courts. The act allows disputes to be resolved using alternatives like tribunals. This method is called alternative dispute resolution, which for Muslims is what the sharia courts are.*"<sup>55</sup> Although, Jewish Beth Din courts are ruling civil cases under the same Act (they were operating under a precursor to the act for more than 100 years), the issue of enforcing ruling of the Sharia courts emerged into a major controversy. The main concerns stated were about unequal approach to women rights under Islamic law. Nevertheless, most of British Muslim's disputes never come either before the British official courts or the sharia courts.<sup>56</sup> Researches show that numerous numbers of British Muslims' disputes are resolved by family or community conciliation: '*senior members of the community or religious leaders are sometimes brought in to manage these obligations and regulatory procedures but there is also much informality and a search for 'righteousness' on a case-by-case basis.*'<sup>57</sup> The role of informal groups such as family members and community groups has been highlighted in settling disputes among the ethnic minority groups: '*Ethnic minorities have understandably responded to the lack of appreciation of their customs by closing in on themselves and*

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<sup>54</sup> See Yilmaz, Ihsan (2001) 'The Question of Incorporation of Muslim Personal Law into the English Law and Law as Chameleon' *Journal of Muslim Minority Affairs*. Volume 21, No. 2 : 303–304.

<sup>55</sup>The Sunday Times, September 14, 2008, ULR

source: <http://www.timesonline.co.uk/tol/news/uk/crime/article4749183.ece>, Accessed at April 17 2009

<sup>56</sup> See Menski, Werner F. [1988] 'English family law and ethnic laws in Britain'. In: N. 1 Kerala Law Times, Journal Section. 56-66, at 58 and also Menski, Werner F. [1993] 'Asians in Britain and the question of adaptation to a new legal order: Asian laws in Britain'. In: Milton Israel and Narendra Wagle (eds) *Ethnicity, identity, migration: The South Asian context*. Toronto: University of Toronto. 238-268, at 253

<sup>57</sup> Richard Jones and Welhengama Gnanpala, *Ethnic Minorities in English Law*, (Trentham Books, 2000), p. 103.

*operating outside the traditional legal system... Over time, this process has resulted in the organic development of customs and specific personal laws of ethnic minorities in Britain, which may avoid official channels and the official legal processes...Though customary arbitration procedures may not fit in with western legal system, their decisions are generally honoured and implemented through a mix of sanctions and ostracism.*<sup>58</sup>

It has been argued that the disputes in the field of family laws in particular marriage and divorce are the most critical areas for British Muslims; *'A common problem was that you get a woman seeking a divorce in the courts and obtaining it. She becomes, therefore eligible for re-marriage in accordance with the civil law, but her husband has not given her a talaq which is the prerogative of the husband within an ordinary contract of marriage so that the woman becomes unmarried according to the civil law but still married according to the Shari'a law.'*<sup>59</sup>

### **Seminar Question**

By the end of this seminar students should be able to address the following questions:

What is meant by the concept of Islamic dispute resolution?

What Qur'anic values are involved with Islamic dispute resolution?

How are the Islamic dispute resolution mechanisms applied for British Muslims?

### **Readings**

1- M. Khadduri, (1984), *the Islamic Concept of Justice*, Baltimore: John Hopkins University Press

2- Yilmaz, Ihsan (2001) 'The Question of Incorporation of Muslim Personal Law into the English Law and Law as Chameleon' *Journal of Muslim Minority Affairs*. Volume 21, No. 2 : 303–304.

3- Yilmaz, Ihsan (2003), 'Muslim Alternative Dispute Resolution and Neo-Ijtihad in England', *Alternative, Turkish Journal of International Relations*, Volume 2, number 1, Accessed at <http://www.alternativesjournal.net/volume2/number1/yilmaz.htm>

4- Samia Bano, 'Muslim and South Asian Women: Customary Law and Citizenship in Britain', in *Journal of South Pacific Law*, 2000, Vol. 4.

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<sup>58</sup> Ibid

<sup>59</sup> Zaki Badawi (1995) 'Muslim justice in a secular state', In: Michael King (ed), P.77

## Chapter Five

### Debating the Introduction and Recognition of Islamic Law in the UK

#### Introduction

The introduction of 'Islamic Law' in the UK gives rise to a quagmire of issues. The questions of legal pluralism and cultural pluralism arise and the theoretical frameworks in which a separate law for minorities can be integrated or accepted as part of the British legal system need to be considered. Perhaps a starting point is to consider whether or not there is a need for plurality in law in Britain, or is it more favourable to maintain a uniform legal system applicable to all?<sup>60</sup>

Particular concerns about some rules of Islamic law which are deemed to contradict British laws or provide cause for concern, including perceived inequalities in treatment of men and women, and perceived unequal rights, also make the issue of introduction of Islamic law in Britain complex. The common thread of non-academic discourse on the issue surrounds the subject of the Islamic penal code and perceptions of repressive treatment of women.

Negative views of Islamic laws were starkly brought to the fore when the Archbishop of Canterbury, Dr Rowan Williams presented a lecture: 'Civil and Religious Law in England: A Religious Perspective,'<sup>61</sup> where he discussed the "degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes."

There was a strong negative response to his lecture within the mainstream British media. The reasons for this included:

- A misunderstanding of the term 'Shariah law'
- Preconceived ideas about what Islamic law would entail
- A lack of knowledge about the existing Islamic laws already regulating the lives of Muslims in Britain (Muslim Personal Law)

The issue of Islamic law and its introduction in Britain (for the benefit of Muslims who voluntarily wish to conform to it) also brings up human rights issues such as freedom of religion and whether this freedom is being contravened by disallowing Islamic religious practices. The place of Shariah Councils and Tribunal needs to be considered necessarily, as this indicates the level and degree to which Islamic law is already being implemented in Britain whether formally or informally. The implications of this on legal pluralism link back to considerations of the frameworks within which such dispute resolution forums can exist in the UK. The problems posed by the absence of a monolithic Islamic law that regulates all followers of the faith also needs to be considered in order to assess the viability of actually incorporating Islamic law in Britain, and the likely issues which would require resolving in order to make it a possibility.

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<sup>60</sup> A general discussion is held by: Yilmaz, I., 'Law as Challenge: The question of incorporation of Muslim Personal Law into the English Law', *Journal of Muslim Minority Affairs*, (2001) Vol. 21 No. 2.

<sup>61</sup> Williams, Rowan, 'Civil and Religious Law in England: a Religious Perspective', available at <http://www.archbishopofcanterbury.org/1575> (Last visited 17 April 2009)



The hostility towards Islamic law in Britain, however, remains a reality which must be borne in mind when considering all of these relevant elements. The launch of the ‘One Law for All – Campaign Against Shariah Law in Britain’<sup>62</sup> forms a stark reminder of the charges levelled against Islamic law, and this campaign, launched at the House of Lords, is intended to oppose the ‘discriminatory, unfair and unjust’ nature of Islamic law. On the other hand, there are academics such as Professor Tariq Ramadan who states: “In the West the idea of Shariah calls up all the darkest images of Islam...It has reached the extent that many Muslim intellectuals do not dare even to refer to the concept for fear of frightening people or arousing suspicion of all their work by the mere mention of the word.”<sup>63</sup> Thus, there is recognition that the fear of ‘Islamic law’ needs tackling.

### **Legal Pluralism and Cultural Pluralism**

Muslims in Britain who choose to adhere to Islamic laws in their personal lives have a host of concerns about recognition of these practices within British law. Issues relating to religious dress codes and rules which seem to provide for unequal treatment of men and women and are rejected by British courts. In addition, the British judiciary at its upper echelons seems to fundamentally misunderstand Islamic laws and hold a negative view of its principles.<sup>64</sup>

Considerations of legal pluralism in a domestic or global setting throws up a multitude of issues for deliberation. It may be viewed in terms of Niklas Luhman’s autopoietic systems theory on the one hand, or perhaps socio-legal theories which consider more traditional ‘systems’ of law when considering the impact of global rights such as the human right to religious freedom, to which this topic is specifically applicable.

One may argue that the need for legal pluralism is directly impacted on by the reality of cultural Pluralism in Britain. However, the extent to which this pluralism should be translated within the law could be heavily disputed. On the issues of dress, family law (marriage, divorce custody and inheritance) and special observances (such as halal slaughter), the arguments are more compelling.<sup>65</sup> However, where the criminal code is concerned, there is little room for challenging the need for a single and uniform approach for all.

When looking at Cultural Pluralism, one must necessarily also consider citizenship and the obligations it imposes on Muslims within Britain. British law does allow for an array of rights for minority groups, which include the slaughter of animals according to Judaic and Islamic beliefs,<sup>66</sup> the exemption of followers of the Sikh religion from wearing motorcycle crash helmets,<sup>67</sup> to name but a couple. In addition, Poulter<sup>68</sup> suggests that the reality of cultural diversity can be dealt with through “legal

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<sup>62</sup> 1 December 2008, Campaign organiser Maryam Namazie.

<sup>63</sup> Ramadan, Tariq, *Western Muslims and the Future of Islam*, (2004) Oxford University Press, at 31.

<sup>64</sup> This was apparent in the *EM (Lebanon) (FC) v Secretary of State for the Home Department* (Respondent) (2008) UKHL 64 decision.

<sup>65</sup> Poulter, Sebastian, *Cultural Pluralism and its Limits: A Legal Perspective* (1990), at 5-9.

<sup>66</sup> The Slaughterhouse Act 1979

<sup>67</sup> Motorcycle Crash Helmet (Religious Exemption) Act 1976

<sup>68</sup> Poulter, *Supra* note 6 at 11.

channels of judicial interpretation and statutory enactment.”<sup>69</sup> Thus, one assumes, there can be reliance on judges and the court system to take account of cultural differences when upholding the law. However, the practical variances in understanding cultural diversity and responding to it appropriately from court to court, and judge to judge, is obviously very wide and thus not a reliable procedure. There have already been plenty of examples of stark misunderstandings of Islamic law, as stated above.

On the other hand, allowing cultural pluralism to impact deeply on the legal system will open up scope for abuse where it is allowed to prevail without restraint or the constraint of recognised laws in any country. In Britain in particular, there are specific statutory protections for women, children, religious freedoms, etc, all of which, some may perceived, are threatened by Islamic law. However, a voluntary code of Muslim Personal Law does not, arguably, endanger these laws, as they are voluntarily acceded to, and only pertain to matters where individuals are given free choice under the law of the land in any event, such as the manner in which one bequeaths his/her property, enters into/dissolves a marriage, views an adopted child, etc. However, one the other hand, the existence of an alternative system may lead to Muslim communities putting social pressure on vulnerable individuals to accede to these systems and thus take away their free choice covertly.

A further question to consider is whether cultural pluralism necessarily leads to a requirement for legal pluralism. Is it in the long term interests of British society to allow for differences in rules of law, or press for a homogenous system that caters for all? On the issue of loyalty to a state/jurisdiction, scholars such as Shaheen Sardar Ali state that European Muslims who are settled in non-Muslim jurisdictions “owe allegiance of loyalty to the jurisdiction they have chosen to make their home.”<sup>70</sup> From the Islamic law perspective, indeed, Muslim citizens are expected to abide by the law of the land in which they live. Thus, there arises some complexity about the applicability of Islamic law to the lives of Muslims outside of Muslim jurisdictions. However, it is fair to assume that where Muslim personal law is concerned and where there is no conflict between it and British law, then it can be applied voluntarily by the Muslim citizens.

### **Shariah Courts and Tribunals; existence and limitations within the British legal system**

Without going into the specifics of the existence of Shariah Councils and Tribunals which exist in the UK (as this is covered in a separate session), the focus here will be a short summary of the limitations of this alternative dispute resolution system. The idea of Shariah Councils/Tribunals is to provide a dispute resolution forum similar to that which have operated historically in Muslim countries. However, their shortcomings in Britain are many, including the lack of an overall Muslim ‘leader’ (or head of state) who bears responsibility. Thus, these institutes become affected by numerous factors such as cultural considerations; a lack of binding procedural

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<sup>69</sup> Ibid.

<sup>70</sup> Ali, Shaheen S., ‘Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Reflections on an Evolving Methodology for Consensus’, in Leonon, T. Et al (Eds) *Religious Pluralism and Human Rights in Europe*, (2007), p57-79, at 70.

obligations; a lack of qualified legal representation; and most cannot implement their decisions as they do not comply with the Arbitration Act 1996.

There are now, however, some better constituted Arbitration Councils which seek to implement Muslim Personal law (such as the Muslim Arbitration Tribunal)<sup>71</sup> which are constituted according to legitimate legal frameworks within the UK, and which abide by the necessary procedural requirements to allow enforcement of decisions under the Arbitration Act. This new forum provides Muslims, for the first time, with the opportunity to ‘self-determine disputes according to Islamic law’.<sup>72</sup>

Thus, this is a shift towards integrating Muslim Personal Law into the British legal system, albeit as an ‘alternative’ but legitimate, dispute resolution system.

Human Rights issues challenging the adoption of Islamic law in Britain; gender issues; individual and group rights

Britain is a multi-cultural society and therefore questions of the applicability, viability and suitability of legal pluralism will necessarily arise. The human rights arguments for religious freedom can be cited where specific religious practices are concerned, such as manner of dress, as well as the group rights which may allow Muslim Personal Law to be implemented.

Discussion of human rights within Islamic law will not be discussed here as a separate module exists on that very topic.<sup>73</sup> Rather, we will consider the rights Muslims are entitled to in this jurisdiction. Religious freedoms are guaranteed in the UK by virtue of two main conventions as set out below.

The European Convention on Human Rights 1953 (including Protocols), Article 9:  
‘1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.  
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

The International Covenant on Civil and Political Rights 1966, Article 27:  
‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’

Human rights which provide for religious freedoms do so, on the basis of a form of ‘group rights’ which are intended to protect minority communities. Laws such as that related to non-discrimination are intended to ensure that all citizens are treated equally.

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<sup>71</sup> [www.matribunal.com](http://www.matribunal.com)

<sup>72</sup> Ibid.

<sup>73</sup> An interesting discussion of Human Rights and secularism is presented by: Freeman, Michael, ‘The Problem of Secularism in Human Rights Theory’, in *Human Rights Quarterly*, (2004) 26, 375-400.

But as stated by Samia Bano, “However objective or neutral the apparatus of the law may appear, its implementation will always reflect the norms and values of society.”<sup>74</sup> Thus, in a society that is hostile to Islamic laws (regardless of the origins of that hostility) may not implement the rights that are afforded to its citizens by the law.

This issue was starkly brought to the fore by the debates surrounding Muslim women and dress. The *Hijab* (head covering), *niqab* (face covering) and *Jilbab* (long robe) have all been the subject of litigation.

The following cases can be cited which involved Muslim women and dress: *Niqab: Azmi v Kirkless MBC*, was heard by the Employment Tribunal (2006) which found that there was no case for religious discrimination, although she was awarded £1000 damages for victimisation. Azmi then appealed to the Employment Appeals Tribunal (2007) which dismissed the appeal on the grounds that she was not directly discriminated against on the ground of religion or belief. However, crucially, the Appeal Tribunal held that although indirect discrimination had occurred, this was deemed to be acceptable on the facts of this particular case because it was an appropriate way of raising educational standards. Thus, for the first time, it was held that an employer could discriminate against an employee where an external manifestation of belief (such as a veil) was concerned if ‘lawful justification’ was proven.

*Hijab*: Many cases concerning the *Hijab* have been heard mainly before the European Court of Human Rights. The *Hijab* issue has been of lesser concern in the UK as there has been limited litigation on the issue. Challenges to *Hijab* bans were brought before the national courts of Switzerland, Turkey and Germany and in each of these states, the courts decided that the ban adhered to the state constitution. A woman seeking to challenge a ban on the *Hijab* within Europe can do so under the following treaties: the European Convention on Human Rights, the First Optional Protocol to the International Convention on Civil and Political Rights, and the Optional Protocol to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979.

In 2004, the ECHR heard the case of *Leyla Sahin v Turkey*<sup>75</sup> where Sahin, a Turkish student challenged the ban on the *Hijab*. Sahin was a university student who suffered discrimination when she continued wearing the *Hijab*, and was denied entry into lectures and exams at her university. The arguments put forward by Sahin included that her rights and freedoms enshrined in Articles 8, 9, 10 and 14 of the European Convention on Human Rights were infringed by the ban.

The ECHR ruled in favour of the state of Turkey in its judgement on 29 June 2004. The Turkish government had argued that there was a difference between what could be termed a religious duty and the notion of freedom of religion, and the two were not necessarily synonymous. The apparent different interpretations for the veil across the Muslim world were cited to reflect a lack of uniformity in dress derived from the same religious doctrine, which they concluded could not be reconciled with the secular principle of neutrality within state education. The writer feels compelled to

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<sup>74</sup> Bano, Samia, ‘Muslim and South Asian Women: Customary Law and Citizenship in Britain’, in *Journal of South Pacific Law*, 2000, Vol. 4.

<sup>75</sup> ECHR Application No 44774/98.

question this reasoning on the grounds that religious principles of a universal religion such as Islam will by their very nature draw differing interpretations according to cultural norms in different parts of the world. This fluidity is a defining characteristic of some principles of Islamic practice and for it to be cited as the very reason to place a curb on that religious practice lacks conviction.

On the issue of the *Jilbab*, 16 year old school girl Shabina Begum<sup>76</sup> fought a legal battle from the High Court (lost case), Court of Appeal (won appeal), to the House of Lords (Lost). Interestingly, Lord Bingham stated in his decision that “The House is not, and could not be, invited to rule on whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country”. The decision reached was on the basis that although a person’s right to hold a particular religious belief was absolute (i.e. could not be interfered with), the right to manifest a particular religious belief was qualified and could be interfered with if there was a justification. In this case, the 5 Law Lords were not unanimous, with 3 holding that her rights had not been interfered with and the remaining 2 holding that it had. The Lords were all in agreement, crucially, on the point that in this particular case, the interference was justifiable.

Thus, on the issue of Islamic law and human rights, there is an acceptance of the prevailing nature of religious freedom; however, its implementation in practice has proved to give way to other considerations which one could argue are the result of cultural norms.

Where there is acceptance, at least theoretically, of the applicability of Muslim Personal Law in Britain which does not impact on those who do not follow the religion, the Question of human rights for ‘Groups’ emerges. There are different classifications of ‘Groups’ and issues would arise regarding the identification of the ‘group’; questions on whether British citizens who belong to the Muslim ‘Group’ may be compelled, against their will, to abide by Islamic laws in Britain if they do not wish to; and how a plural system would operate.

Montgomery<sup>77</sup> provides a useful categorisation of ‘groups’ and places them in four possible classes.

Membership based categorisation where belonging to the group is established and followed by the acquisition of rights.

The group rights within a ‘private space’ wherein “a self-contained parallel system of rules would operate”<sup>78</sup> for an identifiable group. Samia Bano<sup>79</sup> refers to the use of the Ottoman system of *dhimmi*s which allowed a plural system of implementing family law within the Empire. This is the basis upon which Muslims within Britain would wish to draw Islamic family law within a private system with voluntarily application. This would require identification of the religious group to which this would apply.

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<sup>76</sup> *R v Headteacher and Governors of Denbigh High School* (2005) 1 All ER 396.

<sup>77</sup> Montgomery, M., ‘Legislating for a multi-faith society: Some problems of special treatment,’ in Hepple, B. and Szyszczak, E (Eds) *Discrimination: The Limits of Law* (1992)

<sup>78</sup> *Ibid*, at 195.

<sup>79</sup> Bano, *supra* note 14, at 166.

In certain instances, members of the group may have rights which fall outside of particular rules of law via dispensation or by refusing entitlement. Samia Bano<sup>80</sup> provides the example here of the Sex Discrimination Act 1975 which allows discrimination against one gender on the grounds of religious doctrine. This issue would be of specific application to Islamic laws concerning, for example, procedures for divorce.

Provides for special privileges for some identifiable members of the group based on their membership of the group. Samia Bano<sup>81</sup> cites the example of certain Muslim and Jewish individuals being given responsibility for Halal/kosher slaughter of animals. Those carrying out the slaughter are the identifiable individuals within the group who are given the special privilege.

With all of these categorisations, one must consider the implications of clashes between group and individual rights, especially where individuals do not wish to be governed by a plural system.

There are also specific aspects of Islamic family laws that have drawn criticism which will need to be addressed in order for a plural system to be successful. These issues include: inequality in procedure for obtaining divorces for men and women, the lack of a right to contract a marriage without the consent of a guardian for an adult women (under certain Schools of thought), custody of children upon divorce and the unequal distribution of assets within Islamic laws of inheritance.

Instead of addressing these issues specifically, perhaps it would be more prudent to consider the issue of reform of Islamic laws and the need for a new or revised interpretation to take into account the different social circumstances in which the rules are attempting to be applied in the UK. This does not mean, and cannot mean, moving away from Islamic principles which have been derived from the Qur'an and strong Hadith sources; rather, it means looking at the areas where flexibility may be adopted to take care of these concerns. Professor Tariq Ramadan is one scholar who suggests there is need for consideration of such reform.<sup>82</sup> However, it should be noted that there are numerous potential pitfalls in reform, and several previous attempts have failed to win over Muslim communities due to a lack of credible alterations to well established rules of Islamic law. For example, the Muslim Marriage Contract was produced by the Muslim Institute which sought to revise and modernise the standard Nikkah contract. However, this document was extensively criticised due to several contradictions of the Quran and accepted Hadith.

### **The absence of a Monolithic Islamic Law**

One of the fundamental objections to Islamic law remains the question of 'which version'? British Muslims cover a diverse spectrum of cultural origins, each with its own brand of Islamic law; each legitimate in its own right. As Islamic laws have historically evolved to allow, even encourage, these differences in the interests of maintaining the universalism of the religion; formulating Monolithic Islamic Laws in

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<sup>80</sup> Ibid at 167.

<sup>81</sup> Ibid.

<sup>82</sup> Ramadan, Tariq, 'In the West: First Attempts at Reform', in *Western Muslims and the Future of Islam*, (2004) Oxford University Press, p.62 – 101.

Britain presents many pitfalls. However, some opinions, including Professor Tariq Ramadan, suggest that “To reread, reconsider, and “revisit” our understanding of the teachings of Islam... appears to be necessary.”<sup>83</sup>

Perhaps there is now a need for Diasporic communities to form a new identity as British Muslims and formulate a new understanding of Islamic laws according to the new environment and social realities of modern Britain.

Shaheen Sardar Ali<sup>84</sup> suggests that “The host communities have to be aware of the multiplicity of interpretations and diversity within Muslim communities and *vice versa*. Often the numerically dominant (Muslim) group attempts to impose their views on other Muslim migrant communities.”<sup>85</sup>

It is clear from the discussion above that the introduction of Islamic Law in Britain is a long way off, and many pertinent questions still need to be addressed in order to ascertain whether it is necessary, and if so, to facilitate it.

### **Seminar Questions**

What is the difference between Legal Pluralism and Cultural Pluralism, and whether they are mutually exclusive or inter-reliant in the context of applying Islamic law in Britain?

Do the Shariah Courts and Tribunals already implement Islamic law in Britain? What are the limitations?

What are the Human Rights issues which challenge the adoption of Islamic law in Britain?

Is there a Monolithic Islamic Law which can be implemented in Britain?

### **Readings**

Poulter, Sebastian, *Cultural Pluralism and its Limits: A Legal Perspective* (1990)  
Freeman, M, ‘The Problem of Secularism in Human Rights Theory’, *Human Rights Quarterly*, 2004, (26)2, 375-400.

Samia Bano, ‘Muslim and South Asian Women: Customary Law and Citizenship in Britain’, in *Journal of South Pacific Law*, 2000, Vol. 4.

Barbeiri, W ‘Group Rights and the Muslim Diaspora’, *Human Rights Quarterly* 21.4 (1999) p. 907-926 [http://muse.jhu.edu/journals/human\\_rights\\_quarterly/v21/21.4\\_barbeiri.html](http://muse.jhu.edu/journals/human_rights_quarterly/v21/21.4_barbeiri.html)

Montgomery, M., ‘Legislating for a multi-faith society: Some problems of special treatment,’ in Hepple, B. and Szyszezak, E (Eds) *Discrimination: The Limits of Law* (1992)

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<sup>83</sup> Ibid, at 69.

<sup>84</sup> Ali, Supra note 11.

<sup>85</sup> Ibid at 59.

Ramadan, Tariq, 'In the West: First Attempts at Reform', in *Western Muslims and the Future of Islam*, (2004) Oxford University Press, p.62 – 101.

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Freeman, Michael, 'The Problem of Secularism in Human Rights Theory', in *Human Rights Quarterly*, (2004) 26, 375-400.



## Chapter 6 The Use of *Fatwas* Among Modern Day Muslims

*Fatwa* is an Islamic religious ruling or a scholarly opinion on a matter of Islamic law issued by a recognized religious authority in Islam. Those who pronounce these rulings are supposed to be knowledgeable, and need to supply the evidence from Islamic sources for their opinions. It is not uncommon for scholars to come to different conclusions regarding the same issue. But as there is no hierarchical priesthood in Islam, a *fatwa* is not necessarily "binding" on the faithful. In recent years there has been an increasing trend of using the cyber space for issuing *fatwas*. The use of internet technology has brought about a revolutionary change in the process of *Fatwas*. A number of websites and online forums have been developed for this purpose and an increasing number of Muslims in particular in Europe, Canada, America are using the cyber space to seek advice from religious scholars on socio-legal and political issues faced by the Muslim diasporic communities. Religious scholars belonging to different sects and schools of thought respond to questions posed and discuss a wide range of issues. However, even within the same sect, there can be fundamental differences in interpretation of the *Quran* and the *Hadith* and rival *muftis* from the same sect can issue contradictory *Fatwas*. As a result the credibility of such *fatwas*, is being questioned by scholars and academics as conflicting opinions are being issued, based on literal interpretations of the Qur'an.

### **From Individual to Collective *Fatwa*? Institution of *Ifta* As Transformative Vehicle in the Islamic Legal Tradition<sup>86</sup>**

One of the most powerful vehicles of interpretative and transformative processes within the Islamic legal tradition lies in the role played by the institution of *ifta*. The *fatwa* or non-binding opinion of a *mufti* given in response to a question (posed by a *qadi*, a private person or an institution), 'formed the vital link between academic theories of pure scholarship and the influences of practical life, and through them the dictates of the doctrine were gradually adapted to the changing needs of Muslim society.'<sup>87</sup>

Over 1400 years of Islam's legal history, public institutionalised application of Islamic law has existed side by side with private and autonomous initiatives of legal interpretation. The *fatwa* is perceived by many as the 'meeting point between legal theory and social practice'<sup>88</sup> serving a number of functions ranging from a legal tool assisting the adjudication process (employed by a *qadi*), to *fatwas* as social instruments (in the form of questions by private persons in the community), political discourses (seeking a *fatwa* in relation to an act of state or government either within the state or to another state or states), and as devices for reform (where a *mufti*, in response to a question, presents his viewpoint for reform in existing practice).

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86 These extracts have been taken from Professor Shaheen Sardar Ali's Key note address on 'Systemically closed, cognitively open'? A Critical Analysis of Transformative Processes in Islamic Law and Muslim State Practice' delivered at a conference in Copenhagen.

<sup>87</sup> Coulson, 142.

<sup>88</sup> A. Caeiro, "The Shifting Moral Universes of the Islamic Tradition of *Ifta*: A Diachronic Study of Four *Adab al-Fatwa* Manuals" (2006) 96 *The Muslim World* at p. 661

Although not mutually exclusive, this interpretative exercise falls under binding judgements issued from within an institution of the state by judges (*qadi*), and non-binding advisory opinions (*fatwa; fatawa*) by juris consults (*mufti*) in response to an individual question as well as formal requests of opinions by *qadis*. Hallaq defines a *Fatwa* as: “. . . consists of a question (*sua-al, istifta*), addressed to a juris consult (*mufti*), together with an answer (*jawab*) provided by that juris consult.”<sup>89</sup> He states that there exists strong evidence to indicate that *Fatwas* went beyond simply responses to individual questions and played a considerable role in the growth and evolution of Islamic substantive law.<sup>90</sup> This is likely to have been the case as *fatwas* issued by leading jurists were often collected and published and used as authoritative precedents.<sup>91</sup> The history of *fatwas* is therefore a uniquely placed within the Islamic legal tradition as it stands at the crossroads between theory and practice of Islam, the formal and non-formal structures of authority and their relational location within Muslim communities. It thus provides both ‘text’ (the *fatwa*) and context (the space within which the question is posed and to which it applies) as well as the link between the two.

Ali argues that whilst *Fatwas* contributed to legal discourse within the Islamic legal tradition it was also an important social instrument and helped in shaping societal views on issues from the mundane to the sublime. This point is significant in the transformative processes of the Islamic legal tradition and contrary to assumptions that statute laws would eventually marginalise this genre leading to its extinction. In particular it is important to bear in mind that in view of the high rates of illiteracy among Muslim populations and their dependency on the mass media (radio and television), reliance on ‘verbal’ *fatwas* delivered to an audience has increasingly become a popular offering of radio and television channels. It is this aspect of the transformation of the fatwa as a response by an individual mufti to an individual question that appears to have taken a grip on the institution of *ifta* in contemporary times.

*Fatwa* represents a bottom-up approach to informing and influencing the formal legal system and is representative of the ordinary Muslim’s concern regarding ‘Islamicness’ of actions and issues around her/him (legal and non-legal). The *qadi* pronounces binding judgements in response to questions arising from the litigant public and at times with assistance of *muftis*. *Fatwas* on the other hand have a wider and more informal remit in responding to questions that were not necessarily litigational (in the legal sense). They could be clarifications of existing circumstances and/or legal rules, moral or social, ethical, political and economic questions.

*Fatwas* have acquired a different legal complexion in diverse Muslim populations and jurisdictions and in today’s era of globalisation, the common Muslims’ short cut access to ‘Islamic’ knowledge on a range of subjects. In particular, *fatwas* appear to be acquiring increasing popularity as scores of troubled Muslim young and old, lose faith in their respective governments and turn towards an ‘*Ummatic*’ response from scholars anywhere in the world so long as they belong to the Muslim *Ummah*.

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<sup>89</sup> W. B. Hallaq, “From *Fatwa* to *Furu*: Growth and Change in Islamic Substantive Law” (1994) 1 *Islamic Law and Society* 29 at p. 31.

<sup>90</sup> *Ibid*

<sup>91</sup> The list of such fatwa collections is too numerous to be included here. For some of the most prominent fatwa collections, see *Ibid*.

Summing up this discussion on the structure, evolution and dynamics of the institution of *ifta*, it is fair to state that a number of parallel normative developments have emerged. On the one hand, there exists the definitiveness of divine text (the *Qur'an*) and divinely inspired text (*Hadith*) that remains the foundational basis of the structure of the legal edifice. Simultaneously, individual and collective autonomy of thought and action through *fatwas* have contributed to responsiveness within Islamic law and jurisprudence. Ali is of the view that there appears to have evolved, an invisible hierarchy within the Islamic legal tradition regarding its sources and techniques. The top down sources appear to remain incognisant of initiatives from below (i.e., through *urf* or *fatwa*) despite the fact that both these institutions feed and enrich its evolution and make it contemporary. Conversely, *Fatwas* challenging and undermining the prerogative of governments in Muslim jurisdictions appear to have created parallel institutions appealing to the Muslims in cities, towns and the rural areas over and above the head of governments. These opinions have also brought into prominence the ever present fluidity of concepts including *as-Siyar* and *Jihad* within 'formal' legal writings on Islamic law, and how these concepts understood and internalised by the resistance movements (for instance in Iraq and Afghanistan, in Palestine and in Pakistan), as tools for liberation.

In light of the above discussion this seminar aims to explore the validity of fatwas issued by using the internet websites and online forums.

### **Seminar Questions**

- Q1) Discuss the legal significance of fatwa in developing Islamic jurisprudence?
- Q2) Who is authorized to issue *Fatwas* and is it obligatory on Muslims to follow a Fatwa?
- Q3) Should the state extend legitimacy to the issuance of *Fatwas*?
- Q4) Critically evaluate the role and use of *Fatwas* via cyber space in contributing to the development of Islamic Jurisprudence by using the example of two internet websites on *Fatwas*.

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