

Islamic Law for Family Lawyers

Ahmad Thomson explores the interaction between English Law and Islamic Shari'a Law in the context of Family Law.

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Introduction

Family Lawyers are often concerned, to paraphrase *Hey Jude*, with taking a sad story and making it better. It helps therefore to be able to empathise with your clients in order to help them, which means understanding what they believe in and how they view existence, even if you do not agree with them. Since Islam is a relatively new feature in the English landscape, empathising with Muslim clients may seem a challenge to those who know little about Islam, but in fact even a little elementary knowledge goes a long way and need not be a dangerous thing. If you are in a position not only to understand but also to advise your Muslim client as regards the Shari'a as well as English law, all the better for you and for your client.

Contrary to many popular misconceptions and false stereotypes, the Shari'a of Islam, like any system of law, deals with all aspects of life, including marriage, divorce, maintenance, care and custody of children and property rights. Most practising Muslims will wish to marry in accordance with the Shari'a and, should that marriage have all too short a date, divorce in accordance with the Shari'a. In the event of there being children and property as part of the equation, they will want any arrangements to be made or any disputes to be settled in accordance with the Shari'a. Muslims believe that the Shari'a is not in any need of alteration or reformation, because they believe that God got it right first time. Differences of opinion only arise, as with all laws, when it comes to human interpretation. Manmade law is sometimes in harmony with the Shari'a and sometimes at variance with it.

How therefore does English law view Shari'a law and vice versa? Where are they similar and where are they different? When is Shari'a law taken into consideration by English law and when is it ignored? It is not possible to answer these questions in great detail in a short article, but here are some of the most salient features:

Marriage

Marriage is viewed as a contract by the Shari'a, to live as man and wife in accordance with the guidance contained in the two primary sources of the Shari'a, the Qur'an and the Sunnah of the Prophet Muhammad, blessings and peace be on him, who could not read or write. The Qur'an is the revelation which was revealed to him through the angel Jibril (Gabriel). The Sunnah is his way of life, his behaviour – much of which is recorded in the Hadith, the authenticated records of what the Prophet Muhammad and his immediate companions and followers said and did.

One of the essential elements of the Islamic marriage contract is that the husband pays an agreed dowry (in Arabic, *mahr*) to the wife. This can be in the form of any kind of wealth and it can be immediate or deferred or a combination of both. The part of the *mahr* which is immediate is paid immediately or shortly after the marriage ceremony (in Arabic, *nikah*)

has taken place. The wife can do whatever she wants with it. The part of the *mahr* which is deferred may become payable in the event of a specific situation arising in the future – for example, when the husband is able to pay it, or if he divorces his wife.

In this context, if, on divorce, the husband refuses to pay what he has agreed, the wife can sue him for breach of contract in an English civil court. This is because the marriage contract (in Arabic, *'aqd*) is not a pre-nuptial settlement. It is a contract.

Just because the *'aqd* is a valid contract, however, this does not make it a valid marriage in the eyes of English law, unless that is, the *nikah* marriage has taken place overseas in a jurisdiction where it is recognised as a valid marriage, for example, in Pakistan – or where it has taken place in a mosque registered in accordance with *section 26(1)(A)* of the *Marriage Act 1949*.

Although Muslims believe that a *nikah* ceremony which is performed in the UK is valid in the eyes of God, it is not regarded as a valid marriage by English law. The parties are simply regarded as co-habitees. In order to make life simpler, therefore, Muslim couples often have a civil registry marriage as well as a *nikah* marriage. In the event of the marriage ending in divorce, the English courts can bring the civil registry marriage to an end by pronouncing the decree absolute. However, since Muslims believe that no human jurisdiction can supersede divine jurisdiction, a recognised form of Shari'a divorce must also take place in order to terminate the *'aqd* contract.

It is therefore essential for a family lawyer to ascertain what forms of marriage and divorce his or her client have gone or should go through. A client married in accordance only with the Shari'a in the UK is not "married" in the eyes of English law and cannot therefore petition for divorce in an English court. A client who has gone through both forms of marriage ceremony in the UK and who wishes to divorce, will have to go through both forms of divorce. A client whose Shari'a marriage took place in a jurisdiction in which it is legally recognised, or in a registered mosque, can petition for and be granted a divorce in an English court, since that marriage is recognised as a valid marriage by English law – and yet the client may still wish to secure a valid Shari'a divorce as well, for complete peace of heart.

Divorce & Maintenance

As regards Shari'a divorces, there is more than one form, but primarily there is an emphasis on striving to achieve a reconciliation, either directly between the parties, or through family representatives or friends. The Prophet Muhammad, blessings and peace be on him, said that of all the things which Allah (the Arabic name for God) has permitted, divorce is the most disliked by Him. As we all know, either through experience or by observation, sometimes it is inevitable, sometimes it is a mercy – and usually it is painful.

When divorce comes from the husband (in Arabic, *talaq*) he can pronounce it up to three times on three separate occasions. He should not pronounce it while his wife is menstruating. Once it is pronounced, the wife enters what is known as the *'idda* period which lasts for three menstrual cycles. If they reconcile within the *'idda* period, the marriage continues. If they have not reconciled within the *'idda* period, the marriage is at an end. The wife is then free to remarry another man, including her former husband, provided she is not pregnant. If she is pregnant, she has to wait until the child is born, before she can marry again.

This ensures that the identity of the man responsible for the maintenance of the child is known, since the father of a child is always responsible for the maintenance of the child, whether the marriage continues or ends – the son until he can earn his living, the daughter until she marries.

Once the marriage is over, the husband is no longer responsible for the maintenance of his former wife, unless she is pregnant by him, in which case he is responsible for her maintenance until she gives birth – and thereafter only for the maintenance of the child. The Qur'an does however command the husband to give his former wife a gift when they cease to be married, according to his means.

The same criteria apply if the husband pronounces a second *talaq*.

If the situation is reached where the husband pronounces a third *talaq*, then the marriage is at an end and after her *'idda* period is over the former wife can marry another man, but not her former husband – unless and until she has been married to another man and that marriage has come to an end, either through divorce or death.

The husband can pronounce all three *talaqs* on the same occasion, but this form of irrevocable divorce is not encouraged and is not as common as some people think, especially those critics who assert that the Shari'a makes divorce too easy.

Usually it is those Muslims who do not honour the Shari'a who find themselves in difficulty. The Shari'a is primarily for those who are aware that they are constantly in the presence of Allah and who realise that their intentions and actions will take them either to the Garden or to the Fire in the next world which awaits all of us on the other side of death. This awareness (in Arabic, *taqwa*) makes believing Muslims careful about how they behave. It distinguishes them from those who believe that they are free to do whatever they want.

When divorce comes from the wife, she may not pronounce the *talaq* herself. She can ask the husband to pronounce the *talaq*, but if he refuses to do so, she must ask a judge (in Arabic, *qadi*) to grant her what is known as a *khulla* divorce. It is not necessary to prove that the marriage has broken down irretrievably. It is enough for her to say that she no longer wishes to be married to her husband. She may have to return her *mahr* to her former husband, but not if, for example, he has not been fulfilling his responsibility of maintaining the children of the marriage.

The Qur'an commands men and women to divorce "*bi'l-ma'rouf*", with wisdom, but since humans are human, their actions are sometimes far from wise and in divorce, they can sometimes be decidedly acrimonious and even vindictive.

Shari'a Councils

In the modern UK context, for example, it sometimes happens that the husband ceases to live with his wife and ceases to maintain their children – and yet refuses to grant his wife a divorce in order to ensure that she is not free to marry anyone else. Since he is entitled under the Shari'a to marry up to four wives, provided he treats them as equally as possible and maintains their children, he may even have married another woman and, ignoring these two very important provisos, started a new life. What does the Muslim ex-wife do in this situation, especially when there is no *qadi* in a Shari'a court to grant her a *khulla* divorce?

The answer is that she goes to a Shari'a Council, of which there are several in England. Having investigated her request, and if achieving reconciliation is impossible, the Shari'a Council will grant her the *khulla* divorce and the marriage will be ended. If there have been parallel civil proceedings, the *khulla* divorce is far more likely to be granted swiftly if a decree nisi or absolute has already been pronounced, since this clearly demonstrates that reconciliation is highly unlikely. On the whole, the Muslim community (including the ex-husband, whether he likes it or not) accepts the validity of a *khulla* divorce pronounced by a Shari'a Council, since it deals sensitively with a real need.

Current Legislation

There has been a recent proposal that Lord Ahmed Nazir of Rotherham and members of the Islamic Shari'a Council based at the Regents Park Mosque and Islamic Cultural Centre should meet with the Lord Chancellor in order to formally petition on behalf of the UK Muslim community that the provisions of the *Divorce (Religious Marriages) Act 2002*, in conjunction with the *Family Proceedings (Amendment) Rules 2003*, be extended so as to apply to the Muslim community (at present they only apply to the Jewish community) so as to make it easier for an application to be made to an English civil court requesting that a decree absolute not be granted until the husband has pronounced a religious divorce.

This would certainly add another string to a wife-in-limbo's bow – although since a Shari'a Council can pronounce a *khulla* divorce whether the husband likes it or not, there are not the same constraints as apply to a Jewish divorce, where the *get* must be freely given and freely accepted. (The helpful and concise publication *Getting your Get* by Sharon Faith BA (Law)(Hons) and Deanna Levine MA LLB provides more details about this and is accessible via <http://www.gettingyourget.co.uk>.)

Children

As regards custody of children, there are various opinions depending on different schools of thought, but the main principles are that while children are young, they should be with their mother, and when they are older, the daughter should be with the mother and the son should be with the father. The wishes of a child should always be taken into account, once he or she is old enough to express them. As with English law, what is in the best interests of the child is paramount.

There is an overriding principle, however, that Muslim children should be brought up as Muslims. Therefore if a Muslim father was married to a Jewess or a Christian (which is permitted by the Shari'a) or to someone who embraced Islam but then abandoned it, he will be very concerned about how his children will be brought up and will usually strive to obtain custody even if they are very young in order to ensure that they are brought up as Muslims. From a believing Muslim's perspective, this is in the best interests of the child.

Couples in 'mixed' marriages, where the husband is a Muslim and the wife is not a Muslim, who possess foresight have usually agreed at the time of their marriage how their children will be brought up and educated, both during the marriage and in the event of divorce. Not everyone has foresight, however, and accordingly the Molly/Misbah scenario does unfold from time to time.

In fact where there is an extended family, the father comes quite low in the pecking order of who is best suited to have custody of minors (in Arabic, *hadana*) which is: mother, maternal grandmother, maternal aunt, paternal grandmother, **father**, sisters, paternal aunts, nieces, male relatives from paternal lines, male relatives from maternal lines.

Different schools of thought do vary slightly in this order, but all are agreed that where possible, the love of a close female relative is more important for the welfare of a young child than that of the father. The Prophet Muhammad, blessings and peace be on him, said, “Paradise lies at the feet of the mother,” and “The mother is a school.” How can anyone love, if they have not been loved?

Possible Future Developments

Although Shari’a Councils as presently constituted have the power to pronounce a *khulla* divorce – simply because their authority is recognised by the Muslim community in the UK, they are only able to make recommendations as regards maintenance, custody and access to children – simply because they have no powers to enforce their decisions. It is up to the parties concerned, depending on their level of *taqwa*, whether or not these recommendations are actually followed.

At present an English civil court may take into consideration but is not bound by the cultural and religious beliefs of the parties. This is convenient for our judges, but not always appreciated by the parties concerned. In my opinion there is a case for arguing that in personal law matters (marriage, divorce, inheritance) each bona fide religious group should be entitled to be governed by the laws in which its members believe – the Jews, for example, by their Beth Din, the Christians by their Ecclesiastical Courts and the Muslims by their Shari’a Councils. They would then enjoy the same equal right in spite of their cultural diversity as those fundamentalist secularists who are happy to be governed by secular law.

If the decisions and judgements of these religious courts were recognised as valid by English law – but only enforceable through the civil courts, then a great case load burden would be lifted from the civil courts – and Muslims, for example, would no longer have to go through two marriage ceremonies and possibly two divorce proceedings. This would mean that a very significant form of alternative dispute resolution would be recognised not only in principle, but also in practice.

At a recent interfaith seminar on the dissolution of marriage held on the 9th September 2006 at Regents Park Mosque, Lord Justice Thorpe, one of the invited speakers, expressed the view that, “*Section 26(1)(A) of the Marriage Act 1949* affords to a religious marriage immediate legal effect provided it is conducted “in a registered building according to such form and ceremony as the persons married see fit to adopt.” This provision is there for any religious minority to embrace. All that is necessary is that the mosque, church or temple must be duly registered.”

In response to this observation, Lord Justice Thorpe was asked what would happen in the event of a Muslim man marrying two women in accordance with the Shari’a in a registered mosque. Could he guarantee that the man in question would not be charged with bigamy, since everyone involved had been married “according to such form and ceremony” as the persons married had seen “fit to adopt”?

At that very moment, Lord Justice Thorpe was saved from answering by the call to prayer – but it is clear in fact, if I may answer on his behalf, that since a Muslim man is legally entitled to be married to up to four women simultaneously (but may not have any mistresses), the law of bigamy will have to be changed if Muslim personal law is to be recognised and accommodated by English law in its entirety.

At present, because a Muslim marriage is not recognised as a valid marriage, no offence of bigamy is committed by a Muslim man who has married more than one wife in accordance with the Shari'a. The danger is, that where a Muslim husband does not honour the Shari'a in his marriages or in any divorce, or if he suddenly dies, then his wife or wives and their children may be left in a vulnerable position if they are not legally recognised as having been married in the first place, especially where they were married for less than two years, and especially where there was more than one matrimonial home and especially in the event of death, if the husband did not leave an Islamic Will which made provision for all of his dependants in accordance with the Shari'a.

It will be interesting therefore, to see how the proposed new law on cohabitation will affect Muslims who have only been married in accordance with the Shari'a in this country – as long, that is, as English law continues to view them only as co-habitees. The Law Commission has consulted with representatives from the Association of Muslim Lawyers and it will be interesting to see what the Law Commission's recommendations are as regards these issues in its forthcoming report – and perhaps more significantly, what form the new law on cohabitation which follows will actually take.

The challenge, in our multi-cultural, multi-faith society is to ensure that diversity is recognised and respected by all and sundry and that equality in the eyes of the law is a reality and not merely a figure of speech.

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