

AMSS (UK) 5th Annual Conference – Fiqh Today
Sunday 22nd February 2004

Incorporating Muslim Personal Law into UK Domestic Law

Hajj Ahmad Thomson – Notes

Introduction

- At present Muslims in the UK face hardship in that their personal law is not recognised by the secular civil courts. Marriages and divorces conducted in accordance with the *Shari'a* of Islam are not recognised as valid by the law of the land even though they are acceptable in the sight of God.

This state of affairs leads to difficulties, especially as regards the duties and rights between spouses and divorcees, the legal status of their children, ownership of property, eligibility to state benefits and dealing with public authorities in general, especially when travelling abroad and when death occurs.

- Similarly, if a Muslim dies intestate, his or her estate is not distributed in accordance with the *Shari'ah* of Islam. This leads to difficulties as regards the entitlement to and ownership of shares in the deceased's estate.
- One way of overcoming these difficulties would be to incorporate Muslim personal law into UK domestic law. There is a legal argument and a utilitarian argument to support this proposition.

The Legal Argument

- The *Human Rights Act 1998* incorporates the *European Convention of Human Rights* into UK domestic law. *Article 9* of the ECHR guarantees Muslims the right to believe and live as Muslims and to educate their children as Muslims.

Although *Articles 1 and 13* have been intentionally excluded from the *Human Rights Act 1998* – and therefore from English domestic law – since it has signed and ratified the *European Convention of Human Rights*, the government remains by virtue of *Articles 1, 13 and 14* of the ECHR under an international legal duty to secure these rights by providing a legal remedy if a Muslim's religious rights are violated.

Up to now the government has only partly fulfilled this duty, whenever prodded by a European Directive.

It is arguable that this international legal duty also includes the duty to secure these rights by incorporating Muslim personal law into UK domestic law, including the legal recognition of Muslim marriages, divorces and inheritance.

- Clearly the same arguments apply to other minority faith-based communities, such as, for example the Jews, the Hindus and the Sikhs who are all just as much entitled as the Muslims to be treated as equally by the law as Christians and secularists.

If everyone in our present multi-ethnic, multi-cultural, multi-faith society is to be treated equally by the law, then recognition of the various religious communities' personal law is necessary in achieving a balance between equality and diversity.

The Utilitarian Argument

- This approach to treating the members of our multi-faith society equally would not only be welcomed by the parties involved and reduce the work load of the civil courts, but also it would resolve the contradictions faced by civil judges at present whereby they are legally bound to treat the personal law of different faiths equally by 'recognising' all of them – and applying none of them!

At present witnesses in the secular courts are permitted to hold their holy book in their right hand when swearing to tell the truth, but lawyers cannot base their legal argument on what the holy books say – and judges cannot give judgement in accordance with the criteria or commands and prohibitions which these holy books contain.

- How much simpler life would be for Muslims and members of the other minority religious groups – and for lawyers! – if the law recognised their marriages as legally valid in English law (giving the parties the status of married persons) and their divorces as legally valid in English law (giving the parties the status of divorced persons who are free to remarry).

As a matter of practicality it is clear that the appropriate place for such religious argument and judgement is not the secular courts but in appropriately constituted religious courts.

Religious Courts

- It should be emphasised that it is *not* being proposed that County Court and High Court judges should become fully conversant with the personal law of all the *bona fide* religions and apply whichever one was most relevant to the parties involved. This would make life far too complicated for our secular judges who are, after all, human.

What *is* being proposed is the recognition by the law of not only the personal law of the *bona fide* religious groups but also legal recognition of the decisions and rulings of their religious courts. The Christians have their Ecclesiastical Courts, the Jews have their Beth Din, the Muslims have their *Shari'a* Council, but their judgements are not usually recognised as binding or enforceable in the secular courts.

- There should be a system of registration of *bona fide* religious courts, including civil *Shari'a* Courts for the Muslims, in order to ensure that standards are maintained and imposters are excluded. Once registered as a religious court, the decision of any of these courts should be recognised as legally binding on the parties and legally enforceable in the County Courts and High Courts.

Given the differences between Sunni and Shi'a *fiqh*, and also the differences of *fiqh* between the different madhhabs within these two main groupings, ideally it should be possible to have *Shari'a* Courts which represent all the madhhabs.

This would involve having a statutorily defined presumption that the fact that the religious court had dealt with the parties was conclusive proof that the parties had voluntarily agreed to submit to the religious court's jurisdiction and to be bound by its decision whether they agreed with it or not.

For example, the agreement to submit to an appropriate religious court in the event of a serious dispute could be made an express condition of a Muslim marriage contract – just in the same way that parties to a commercial contract can agree that in the event of a dispute the parties will go to arbitration before an agreed arbitrator rather than battling it out in a civil court.

- Any right to appeal a decision of a religious court would have to be determined by that particular religious court's terms of reference – not by a secular civil court, otherwise disgruntled parties would be tempted to play one system off against the other.
- As regards non-contentious matters, for example the registration of marriages and divorces and the granting of probate, it would not be difficult to amend the relevant regulations so that these matters could be administered by the current registration and probate court systems.

Implementation

- Provided that this matter is approached and dealt with in the right way, it is feasible for legislation to be enacted so that:
 - (i) Muslim marriages (including polygamous marriages up to the maximum of four wives as permitted by the *Shari'a* of Allah) and divorces are recognised as legally valid by the law of the land.
 - (ii) since the *Shari'a* of Islam permits a Muslim man to marry up to four wives provided that he maintains them and their children as equally as is possible, the law of bigamy is amended so as to make allowance for valid Muslim marriages;
 - (iii) the wealth of a Muslim who dies intestate is automatically distributed in accordance with the *Shari'a* after his or her death – which would mean that it was no longer necessary to leave an Islamic Will expressing this wish, which is the case at present.
- Similar provision would also have to be made in the enabling legislation for the personal law of other religious groups to be legally recognised. Since the secular legal system already caters for Christians and people of no faith, the enabling statute could be called the *Religious Toleration (Personal Law) Act*.

Polygamy and Bigamy

- We live in a society where princes, prime ministers and football managers are given a hard time in the media for committing adultery, whereas if they had been Muslims they could have been married to both women without any need for secrecy or dissimulation and without having to divorce or reject one in favour of the other – and without attracting salacious media attention.

We live in a society where according to the latest census women outnumber men by approximately 2 : 1. If every man only had one wife, this leaves many women who will never enjoy the comforts of a balanced marriage.

If Muslim marriages conducted in the UK are to be recognised as valid marriages in the eyes of the law, this means that the laws affecting bigamy will have to be amended to permit a Muslim man to have up to four wives at any one time without being charged with and convicted of a criminal offence – even if the number of men who actually exercise this right are relatively few.

This dispensation could be extended to any other *bona fide* religious group (such as for example the Sephardim) which permits a man to have more than one wife – although in my opinion (and bearing the Mormon community in mind), it would be wise not to exceed the divinely revealed upper limit of four.

As regards those Christians and Secularists who believe that a man should only have one wife, as well as any other *bona fide* religious group (such as for example the Ashkenazim) who think the same, the law can continue to be applied as it is at present, including liability to a charge of bigamy where a person is legally married to two partners.

Concluding Observations

- This approach can be viewed simply as providing an effective mechanism for multi Alternative Dispute Resolution by means of religious arbitration which, as is the case with existing ADR systems, would lessen the strain on the main judicial system.
- There are some who assert that it would not be possible to have a plurality of laws being applied simultaneously in the realm, when in fact this is already the case in the UK: England, Scotland, Wales and Northern Ireland already have their own laws as well as having shared laws.

The example of modern Malaysia, where this arrangement works well, should also be considered. The country is a modern technologically advanced multi-cultural, multi-ethnic, multi-faith society. Its legal system is comprised of criminal courts, civil courts and, for the Muslims, *Shari'a* courts whose jurisdiction is concerned with Islamic personal law.

- The Ecclesiastical Courts and the Beth Din have exercised their distinct jurisdictions for centuries – while the *Shari'a* Council, although much younger, works to a limited extent which could be expanded.

Clearly a major consideration is the training and selection of *qadis* – who would probably need to be bilingual, ideally trilingual – with a knowledge between them of all the *maddhabs*. Madina al-Munawarra was not built in a day – but it happened!

In effect all that I have suggested is that the *Shari'a* courts – together with any other emerging *bona fide* religious courts – should be granted an enhanced status by the English legal system. Their decisions should be recognised as binding on the parties who have submitted to their jurisdiction and enforceable in the civil courts.

- This means that the religious courts would complement and assist the existing secular courts, but not supplant them – and in the process assist in securing those *Article 9* rights which the existing judicial system has up to now promised in theory but failed to deliver in practice.

The Relevant Articles and Protocols of the European Convention on Human Rights

As regards the religious rights of Muslims and other religious groups, *Article 9* of the *ECHR* guarantees everyone living in Europe including the UK the right to *choose* their religion and the right to *practise* their religion:

- (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.

Furthermore, *Article 2* of the *First Protocol* to the *ECHR* guarantees everyone living in Europe including the UK the right to have their children educated in accordance with their religious beliefs:

- 2 No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

As a signatory to the *ECHR*, the United Kingdom government is under a duty (under *Article 1*) to secure the rights which the Convention seeks to uphold and protect, and it is also under a duty (under *Articles 13 & 14*) to ensure that there is an effective remedy before a national authority for *everyone* whose Convention rights are violated:

Article 1 of the *ECHR* states:

- 1 The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 13 of the *ECHR* states:

- 13 Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 of the *ECHR* states:

- 14 The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.