

DISSOLUTION OF MARRIAGE

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“Accommodating the Islamic Dissolution of Marriage Law within English Law”

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BASIC SHARI'A PRINCIPLES

INTRODUCTION

1 The Basic Meanings of *Shari'a* and *Deen*

Shari'a literally means 'a road', a way you travel along, not an end in itself. How you travel that road is your way of life. This is your life transaction. In Arabic this is called *deen* – which is sometimes mis-translated as 'religion' – when in fact a religion is what becomes of a *deen* once it has been changed and systematised.

Those who understand that the way of Islam is a *deen* (freely followed, not imposed) voluntarily follow the *Shari'a* (freely accepted and applied). For practising Muslims policing is mainly from within, not from outside.

The *Shari'a* is concerned primarily with defining relations towards God and secondly with governing relations between people – marriage, children, divorce, commerce, crime and punishment, governance, international relations, war and peace, death and inheritance.

There is a distinction between the Islam which was originally revealed and what some at a later stage have changed it into. Thus today people talk of 'Muslim countries' – but none of them are being ruled fully in accordance with the *Shari'a* and not all of their inhabitants have a sound understanding and practice of Islam.

This has to be remembered when advising Muslims who often find themselves in trouble precisely because they have *not* been following the *Shari'a* in their transactions with other people.

This also has to be remembered when dealing with foreign 'islamic' jurisdictions whose legal systems are often the result of an uneasy marriage between 19th and 20th century European colonial legal systems, current financial systems and a redefined form of Islam.

It is also important to be aware of the interplay between *deen* and culture. Islam when it first comes to a country acts as a filter of culture, rejecting what is unacceptable to the *Shari'a* and retaining what is acceptable to the *Shari'a*. Sometimes cultural traditions are so deeply embedded that the reverse takes place and cultural practice to a greater or lesser extent alters the *deen* of Islam. Thus 'culture' can have both negative and positive influences on the *deen*.

2 The Sources of *Shari'a*

The *Shari'a* derives from the *Qur'an* – the original revelation which was revealed to the Prophet Muhammad, blessings and peace be on him, from God through the angel Jibril (Gabriel) – and the *Hadith* – the transmitted eyewitness accounts of what the Prophet Muhammad and his companions, blessings and peace be on him and them, said and did.

The Arabic for God is *Allah* – which literally means "the God".

It is interesting to note that the Prophet Muhammad was illiterate. He could not read or write and received no formal schooling. The style of pure Arabic in which the *Qur'an* was revealed is different to the spoken Arabic of the Prophet Muhammad.

3 The Development of *Fiqh* (Jurisprudence)

After the deaths of the Prophet Muhammad and his Companions, what they had learned was transmitted by a combination of action and memorisation. Inevitably situations arose which had not been encountered by the early Muslim community. Those who had to make legal judgements in such situations therefore had to struggle to arrive at a decision based within and on the basic parameters and principles of the *Shari'a*. This process is known in Arabic as *ijtihad*.

For example : Drinking wine is forbidden because it intoxicates and when a person is intoxicated they are unable to pray and may do and say what is unacceptable. Smoking opium has the same effects. Therefore smoking opium is forbidden – even though this is not specifically mentioned in the *Qur'an* or the *Hadith*.

A *faqih* (plural, *fuqaha*) is someone who has sufficient knowledge of the *Shari'a* to be able to make a judgement in accordance with it. A *fatwa* is a legal opinion. A *qadi* is a judge who is able not only to make a judgement, but also to see that it is carried out.

As with today's judges, some *fuqaha* were better at reaching an informed and reliable decision than others. In the second and third generations of Muslims, leading *fuqaha* emerged and schools of jurisprudence formed.

Although the essential blueprint remained the way of the first Muslim community of Madina, different forms of *ijtihad* developed, often in different geographical locations, each within the parameters of the *Shari'a*, although not necessarily identical. These are known as *madhhabs*. The word '*madhhab*' literally means 'the way he went' – so it is linked primarily to behaviour and action, not to thought and speculation.

One of the main differences in *madhhab* was that between the two groups who came to be known as the Sunni and the Shi'a. This arose out of a difference of opinion as to who should have become the leader of the Muslim community after the death of the Prophet Muhammad, blessings and peace be on him. There are also different *madhhabs* within these two main groups.

The main Sunni schools of law which have survived up until today are the Maliki, Hanifi, Shafi'i and Hanbali schools. The main Shi'a school is the Jafari school.

These notes deal with the *Shari'a* as understood by Sunni Muslims.

It is possible to trace the historical development of *madhhab* as well as identifying the present day geographical aspects of *madhhab*. So, for example, most Muslims who originate from the Indian subcontinent are Hanifi, most Muslims from Malaysia and Indonesia are Shafi'i, most Muslims from northwest Africa are Maliki, most Muslims from Arabia are Hanbali.

4 Some Basic Definitions

One of the most important concepts which it is necessary to grasp is that of the different degrees of obligation within the *Shari'a*, ranging from what is permitted to what is forbidden – and from what is obligatory to what is a matter of personal choice:

- *Halal* means permitted.
- *Makruh* means disliked, but not forbidden.
- *Haram* means forbidden.
- *Fard* means obligatory.
- *Wajib* means necessary, but not obligatory.
- *Mustahab* means recommended, but not necessary.
- *Sunna* means what the Prophet and his Companions usually did although not obliged to do so.
- *Nawafil*, the plural of *nafila*, means voluntary, but well-rewarded.

For those who are interested, more detailed definitions of the Arabic terminology used in these notes appear in the attached *Glossary of Arabic Terms*.

Bearing this overview and these basic concepts in mind we can now begin to approach how the *Shari'a* deals with marriage, divorce, maintenance and custody of children.

5 Understanding Both Worlds

In this more specific context, it is important to remember that not all Muslims have the same understanding of Islam, but usually they will have married in accordance with the *Shari'a*. They may have also married in accordance with English civil law. They may have married abroad in accordance with the law of the land. If the marriage has broken down, they may or may not have been divorced in accordance with either the *Shari'a*, or English civil law, or the law of a foreign jurisdiction, or a combination of these. More often than not, one spouse will have been making life difficult for the other spouse.

A common scenario is that a couple who have had both a religious and a secular marriage are divorced under one system but not under the other – which can mean that neither party is free to marry someone else, even though their relationship is existentially over.

This is an impossible state of affairs which may drive either or both parties to marry someone else anyway under the system in which they are divorced – even though this constitutes adultery under the system in which they are still married. They may be so fed up that they do not even bother to get married under either system and enter an extra-marital relationship – which, again, is committing adultery, especially if it is the religious marriage which has not been terminated by means of a *talaq* or *khul* divorce or *faskh*.

Although some regard adultery as a sign of freedom and upward social mobility, it is considered a major wrong action by all *bona fide* religious communities since it usually involves deception and betrayal, breaks hearts, destroys trust, divides families and disobeys God.

In this situation, if someone seeks your advice, you will need to be able to see how to resolve the situation satisfactorily. It will help him or her if you can identify what has to be done in accordance with the *Shari'a* as well as what has to be done in accordance with English civil law. It may well be that you can help them secure their Islamic

matrimonial rights through applying English law. This is because marriage in accordance with the *Shari'a* is a contract – and is capable of being recognised as such by English law.

It should be appreciated that many Muslims apply the *Shari'a* in their lives even though the *Shari'a* is not the law of the land, either here in England and Wales or in a so-called Muslim country whose legal system is in all probability a curious hybrid of some aspects of the *Shari'a*, the results of the European colonial era and the present dominance of neo-colonial European and American financial systems.

It should also be appreciated that many nominal Muslims do not apply the *Shari'a* in their lives, even though they are from a Muslim country. Although relationships are often a matter of personal chemistry, problems within Muslim marriages usually arise if the parties are not following the *Shari'a* and the *Sunna*. Therefore Muslims may need to be tactfully reminded of this, depending on the circumstances and the egos involved!

THE REQUIREMENTS OF *SHARI'A* FOR A VALID MUSLIM MARRIAGE

1 General Considerations

As we have already noted, there can be a combination of culture and *Shari'a* in traditional customs – and this is especially evident in Muslim marriages around the world. The aspect of *Shari'a* is predominant in the way in which the marriage is solemnised. The cultural aspect is especially apparent in the way in which the marriage is celebrated. As regards compliance with the requirements of *Shari'a*, practising Muslims will seek not only to observe what is obligatory, but also try to follow what is the *Sunna* and what is recommended.

In Islam, marriage is a contract between a man and a woman to live together as man and wife. There are various rights and duties that are automatically part of the contract. There are also various conditions which can be agreed as forming part of the contract if the parties so choose.

2 The Essential Elements of a valid Muslim marriage

In Arabic the marriage contract is called *Nikah* (from the verb NKH, meaning 'to perforate'), or *Aqd* (from the verb 'AQD, meaning 'to tie a knot'). The essential elements of a *Nikah* are:

Consent of both parties – A forced marriage is not permitted by the *Shari'a*. An arranged marriage is permitted by the *Shari'a* and these are still relatively common amongst Muslims.

Parents and relations often assist in finding a good match, since marriage involves relations between families as well as between husband and wife. Support rather than opposition from an extended family often has a very positive effect on the marriage.

The *Khatib* – This is the person who conducts the marriage. In Islam a marriage can be performed by any adult sane Muslim male, although in practice the marriage is usually conducted by the *Amir*, the leader of the community, or by the *Imam*, the person who leads the congregational prayer.

The Wali of the Bride – This is the guardian of the bride who must be an adult sane Muslim male, usually the father or other close relation.

If, for example, the bride has embraced Islam and has no male Muslim relations, then a member of the Muslim community (usually someone who knows both parties) will act as the *wali*. If the bride has been married before, she can act as her own guardian if she wishes.

It is the function of the *wali* as well as the duty of the *khatib* to ensure that the bride has been looked after properly and that all the necessary requirements of the *Shari'a* have been fulfilled.

Under *Shari'a*, the *wali* can represent the bride and conclude the marriage on her behalf. This means that she does not have to be physically present at the ceremony for the marriage contract to take place. In other words, she can be in a different room, or in a different house, or even in a different country, while her *wali* makes the contract of marriage on her behalf.

This often occurs in Muslim countries, but can also occur in the UK and Europe. Where this does occur, the bride must be aware of the arrangement in advance and the *wali* can only act in this way on her behalf with her permission.

The public celebration of the marriage (the *walima*, or wedding feast), at which the newly wed husband and wife are both usually present, together with their invited guests, usually takes place soon after the *nikah*, but depending on the circumstances can take place days, weeks or months later.

The Mahr – This is the dowry, paid by the husband to the wife. There are two different types, immediate (*mu'ajjal*) and deferred (*muwajjal*). The *mahr* must have been agreed in advance and be acceptable to the bride. It can take any form – including property or teaching knowledge – although part or all of it is usually a sum of money, preferably gold *dinars* or silver *dirhams* or jewellery.

Immediate *mahr* is handed over (often via the *wali*) as soon as the marriage is concluded. Deferred *mahr* should be handed over as and when agreed, for example within a certain period, or in the event of divorce by the husband, or the death of the husband.

It should be emphasised that the *mahr* is not a dowry which the wife gives to the husband, nor is it a payment which the husband's parents give to the wife or to the wife's parents, nor is it a payment which the wife's parents give to the husband or to the husband's parents – all of which are practices alien to the *Sunna*.

The *mahr* belongs to the wife. She is free to do whatever she wants with it.

The Two Witnesses – There must be a least two witnesses for the marriage to be valid. Often, there are more, especially if the wedding feast (known as the *walima*) follows immediately after the marriage has taken place.

The Contract – There is no fixed wording, but basically both parties verbally agree to be married in accordance with the *Shari'a* of Allah and the *Sunna* of the Prophet Muhammad, may Allah bless him and grant him peace, at which point the *khatib* pronounces them married.

Agreed Conditions – As well as agreeing to be married in accordance with the *Shari'a* of Allah and the *Sunna* of the Prophet Muhammad, may Allah bless him and

grant him peace, the parties may agree or stipulate one or more conditions which will form part of the marriage contract, provided that they are permitted by the *Shari'a*.

For example a wife may stipulate that the husband should not marry any additional wives during the subsistence of the marriage and that she can divorce him if he does, or that the husband will provide servants to do the housework, or that the husband will pay her a certain amount of money if he ever divorces her, or that she has the right to divorce the husband if she is not happy with the marriage.

The husband may wish to stipulate the opposite – but, for example, may not stipulate that she cannot apply for a *khul* divorce, should she ever wish to divorce him against his wishes.

The bottom line is that the contract of marriage can include any additional condition which the parties have agreed should form a part of their marriage contract, provided of course that it does not contradict the *Shari'a*.

3 The Recommended Elements of a Muslim marriage

It is the *sunna* for the *khatib* to give a talk about marriage to those who are present before marrying the two parties.

In a world which increasingly demands documentary 'proof', it is wise to have a written record of the marriage, detailing the parties, the *wali*, the *khatib*, the witnesses, the *mahr* and any additional agreed conditions. This is not obligatory or required, but it is advisable. It helps to prove that the parties have been married in accordance with the *Shari'a* whenever this is necessary, as well as detailing what has been agreed between them – which may become very relevant in the event of the marriage breaking down. Most Islamic legal systems in Muslim countries require this written record of the contract of marriage.

It is the *Sunna* to have the *walima* – a feast however humble or pretentious to which rich and poor are all invited – thereby making the marriage public as well as celebrating it:

Yahya related to me from Malik from Ibn Shihab from Al-'Araj that Abu Hurayra said, "The worst food is the food of a wedding feast to which the rich are invited and the poor are left out. If anyone rejects an invitation, he has rebelled against Allah and His Messenger." (Al-Muwatta' of Imam Malik: 28.21.50)

It is customary to exchange gifts between husband and wife (with no strings attached) and for friends and relatives to give the couple gifts (also with no strings attached).

4 The Rights and Duties inherent in a Muslim marriage conducted in accordance with the *Shari'a* of Allah and the *Sunna* of the Prophet Muhammad, may Allah bless him and grant him peace

Duties of the Husband – towards wife and children – are to provide them with shelter, clothing and food, according to his means – the daughters until they marry, the sons until they start work. In Arabic this is called *nafaqa*, maintenance. The Prophet said that the best of you is the one who is most gentle to his wives. The Prophet never hit his wives or his children.

Yahya related to me from Malik that he had heard that Sa'id ibn al-Musayyab said, "If a man does not find the means to spend on his wife, they are to be separated." (Al-Muwatta' of Imam Malik: 29.29.82)

Duties of the Wife – towards husband and children – are to protect her husband's property and his reputation and not to see people of whom he disapproves; to look after their children and teach them. The Prophet said, "Paradise lies at the feet of the mother," and "The mother is the school."

Rights of Husband and Wife over property – each can do as they wish with their own personal property; each can do as they mutually agree with their shared property.

Rights of Husband and Wife to sexual intercourse with each other – if either party unreasonably refuses sexual intercourse for more than four months against the other's wishes, this can be a ground for divorce.

Clearly this is more a matter of nurturing intimate relations, where most couples would wish to make love out of love and mercy for each other, rather than in the context of invoking and insisting on a legal right. The Qur'an states that the husband is a garment for the wife, and the wife a garment for the husband. (*Qur'an 2.186*)

5 Protecting a Marriage

The state of being married is recognised in terms of precise legal definition by the *Shari'a*. The husband is described as being *muhsan* and the wife as *muhsanat* – meaning that their marriage is a fortress. If that fortress is breached, the consequences for the family can be severe, which is why the fortress is well protected:

If a *muhsan* or *muhsanat* commits adultery (*zina*), the proscribed penalty is death by stoning by the members of the community of which they were a part.

If an unmarried Muslim, man or woman, has sexual intercourse outside marriage (*anat*, but also generally referred to as *zina*), the proscribed penalty is 100 lashes and exile from the community for a year.

Proof of *zina* is either by voluntary self-confession, or by four witnesses who actually saw the act of illicit sexual intercourse take place.

If anyone accuses a Muslim of committing *zina* and does not produce four witnesses then the prescribed penalty is 80 lashes for slander (*qadhf*).

These penalties are known as *hadd* punishments. The very thought of them is horrifying – and as such, they act mainly as deterrents. In a community whose members follow the *Shari'a*, *zina* is rare and so death by stoning is rare, lashings and exile are rare, illegitimate children are rare, broken marriages are rare – and broken hearts are rare.

Temporary marriage (that is, for a pre-agreed term) and same sex marriages (that is, where there are sexual relations between two men or between two women) are not permitted in Islam.

If a woman is raped, the rapist has to pay her the equivalent of what she has received or would receive as *mahr*, before the appropriate *hadd* punishment is inflicted on him. The woman is not punished since she did not agree to being raped.

6 Polygamy – having more than one wife

Although a Muslim man is not permitted to have any mistresses, he is allowed to have up to four wives provided that he takes full responsibility for their maintenance and welfare and treats them and their children as equally as possible. The *Qur'an* states:

*If you are afraid of not behaving justly towards orphans,
Then marry other permissible women,
two, three, four.
But if you are afraid of not treating them equally,
Then only one, or those you own as slaves.
That makes it more likely that you will not be unfair.* (Qur'an: 4. 3)

Although every Muslim man is permitted four wives, many find that one is quite enough! The influence of culture is apparent in this sphere. In Nigeria, for example, it is common for a man to have more than one wife. In Malaysia, for example, it is exceptional to have more than one wife.

The influence of European colonial legal systems is also apparent in this sphere. Many so-called Islamic legal systems have introduced absolute prohibition or qualified permission of polygamous marriages, thereby redefining the *Shari'a* in the process. For example, the *Qur'an* states:

*You will not be able to be completely fair between your wives,
however hard you try.
But do not be completely partial so as to leave a wife,
as it were, suspended in mid-air.
And if you make amends and have taqwa,
Allah is Ever-Forgiving, Most Merciful.* (Qur'an: 4. 128)

Although the meaning of these words is clear, misguided people misinterpret them to mean that since it is impossible to treat two people exactly the same, therefore a man should only have one wife.

At present, most married Muslim men in the UK do only have one wife, but there is a small but growing proportion who have more than one wife.

At present, because Muslim marriages are not recognised as valid marriages by UK civil law, Muslim men are free to marry up to four women in accordance with the *Shari'a* without being charged with bigamy, because in the eyes of the law their wives are no more than 'common law' wives and categorised as 'unmarried partners'.

This is an unsatisfactory state of affairs which will only be put right if Muslim personal law is recognised by the English legal system (which means that the law of bigamy will have to be redefined as far as Muslims are concerned). At present, second wives and their children could be in a vulnerable position if the husband deserts the family, or divorces the second wife, or dies.

7 Rights of Inheritance

In accordance with the *Shari'a*, spouses and their children are automatically entitled to inherit fixed shares from the estate of any one of them who dies.

Since English law does not recognise Muslim personal law, it is prudent for Muslim spouses to make an Islamic Will stipulating that their estate should be distributed in accordance with the *Shari'a*.

This is especially important for a second wife, since if the husband dies intestate, the English law will probably not recognise her Islamic right to a fixed share of her former husband's estate.

Under the *Shari'a*, a Muslim may leave up to a third of his or her estate to anyone – except to relatives who are automatically entitled to fixed shares as defined by the *Shari'a* of the remainder. If no bequests are made out of the third, then the whole estate is automatically distributed in accordance with the fixed shares.

If a husband dies, his widow is free to remarry after a period of 4 months and 10 days – unless she is pregnant, in which case she is free to remarry after she has given birth.

8 'Mixed Marriages' – what is permitted by the *Shari'a*

A Muslim woman may only marry a Muslim man. A Muslim man may marry a Muslim woman or a woman from the *ahlu'l-kitab*, the 'people of the book' – meaning a woman who follows a religion which derives from an earlier revelation from God to mankind, and who accordingly believes in God and in the Next World.

This allowance means that there are sometimes 'mixed marriages' whereby a Muslim man marries a Jewish or Christian woman.

In this situation, the two spouses will not share the same view of existence, but their marriage can nevertheless be very successful – or disastrous, especially when they come from different cultures and have different expectations of each other.

For example, a Muslim man from Yemen may expect his new English Christian wife to behave like his mother does towards his father, only to find that she does not! – and vice versa.

Even where both spouses are Muslim, there can be very significant differences of expectation between the two which arise out of different cultural backgrounds, especially where one of the spouses is from a 'non-Muslim country' and has only recently accepted Islam.

It is prudent for such a couple to agree in advance how any children of the marriage are to be educated and brought up, and this can even be made a condition of the marriage contract.

In the absence of such forethought couples sometimes overlook such practicalities – only to find a few years later that they have serious differences of opinion and disagreements about such matters which may bring the marriage to an end.

The Prophet, blessings and peace be on him, said that foresight is half of wisdom.

9 Conversion to Islam

At the present time many people in Europe and America are embracing Islam. What happens to a couple if one of them accepts Islam and the other does not?

If the wife accepts Islam first, she should separate from her husband completely if he does not also accept Islam within three months:

Malik said, "What is done among us is that if a woman becomes a Muslim while her husband is a kafir and then he becomes Muslim, he is entitled to her as long as she is in her 'idda. If her 'idda is finished, he has no access to her. If he re-marries her after the end of her 'idda, however, that is not counted as divorce. Islam removed her from him without divorce." (Al-Muwatta' of Imam Malik: 29.25.71)

If the husband accepts Islam first, he should separate from his wife if she does not accept Islam when he presents it to her:

Malik said, "If a man becomes Muslim before his wife, a separation occurs between them when he presents Islam to her and she does not become Muslim, because Allah, the Blessed, the Exalted, said in His Book, 'Do not hold fast to the ties of women who are kafirun.'" (Al-Muwatta' of Imam Malik: 28.20.46)

Of course if his wife is a Christian or a Jew, he is permitted to remain married to her.

Whatever the basis of the marriage before accepting Islam (for example, if the couple previously had a Jewish or a Christian or a civil wedding or are just living together), it is advisable for a couple who have recently accepted Islam to have a *nikah* marriage, so that it is clear to both that the basis of their marriage contract is now the *Shari'a* of Allah and the *Sunna* of the Prophet Muhammad, may Allah bless him and grant him peace.

10 General Observations

The primary purpose of this summary is not to make a sociological comparison between the social consequences in societies which encourage or tolerate *zina* and in communities which follow the *Shari'a*, although most thinking people cannot help reflecting about it.

It may be possible to conclude that the former are more likely to be characterised by unwanted children, a high abortion rate, single parent families dependent on state benefits, a higher incidence of sexually transmitted diseases, a high divorce rate, and a rape taking place every few seconds throughout the year – whereas the latter are more likely to be characterised by more stable families, a lower divorce rate and a lower incidence of sexual abuse, abortion and sexually transmitted diseases.

HOW DOES SHARI'A LAW DEAL WITH DIVORCE – TALAQ?

1 General Observations

As regards marriage in general, someone once remarked that marriage is like a fortress – where the people outside the fortress want to get in and the people inside the fortress want to get out!

A Chinese sage remarked that the relationship between a man and a woman is like walking along the edge of a cliff. For whatever reason, some couples fall apart and some couples go too far inland and lose the excitement and the view.

Most family law practitioners are aware that the divorce rate in the UK has never been higher, amongst people of every belief and persuasion, Muslims included.

The Prophet Muhammad, may Allah bless him and grant him peace, said, “Of all the actions which are permitted, the most disliked by Allah is divorce.”

Sometimes divorce is the best course to take in the situation – and sometimes this can become apparent very soon after the marriage has taken place. Under the *Shari'a* there is no minimum period of time which must elapse before a pronouncement of *talaq* can be made. It can even be made five minutes after the marriage has taken place, although this is rare, since marriage is not entered into lightly.

Sa'id ibn al-Musayyab, an early *faqih*, may Allah be pleased with him, said, “There are three matters about which there is no joking: marriage, divorce and setting free.”

Divorce in accordance with the *Shari'a* is structured in such a way that reconsideration and reconciliation are encouraged and facilitated wherever possible and at every stage.

Every marriage has its difficult patches, so if there is a major disagreement or misunderstanding the *Qur'an* encourages the couple to seek reconciliation, through mediation via family members or friends if that is easier:

Yahya related to me from Malik that he had heard that 'Ali ibn Abi Talib said about the two arbiters about whom Allah, the Exalted, said, "If you fear a breach between the two, appoint an arbiter from his people, and an arbiter from her people. If they desire to set things aright, Allah will make peace between them – surely Allah is Knowing, Aware," (Qur'an: 4. 35), that the separation and the joining were over-seen by the two of them.

Malik said, "That is the best of what I have heard from the people of knowledge. Whatever the two arbiters say concerning separation or joining is taken into consideration." (Al-Muwatta' of Imam Malik: 29.26.72)

2 Divorce Coming from the Husband

If reconciliation cannot be achieved, then if the husband wants to divorce his wife, he can make up to three pronouncements of divorce (*talaq*), which are usually pronounced on different occasions – but which can be pronounced all at the same time, although this is discouraged.

After a single pronouncement of *talaq* by the husband, the wife enters what is known as her *'idda* period, which is three menstrual cycles. If the couple achieve a reconciliation within the *'idda* period, the marriage continues. If they do not, the marriage is ended and the woman is free to marry any Muslim man – unless she is pregnant, in which case she cannot marry until the baby has been born.

This means that paternity – and therefore the identity of who is responsible for the maintenance of any child – is easy to establish.

At this point in time, after the first *'idda* period has ended, the divorced couple are free to remarry each other. If they do remarry, and if they again fail to achieve a balance in their relationship, then the whole process can be repeated again, with a second pronouncement of *talaq* by the husband and a second *'idda* period for the wife. If the couple achieve a reconciliation within the *'idda* period, the marriage

continues. If they do not reconcile during the second *'idda* period, then they are still free to remarry.

If they do reconcile during the second *'idda* period or remarry after it is over and if there is then a third pronouncement of *talaq*, then the marriage is at an end. There is a third *'idda* period but reconciliation is not possible during it, as it was during the first and second *'idda* periods. When the third *'idda* period has been completed the woman is free to marry someone else – but not her former husband who pronounced the three *talaqs*.

If the woman does marry another man, and then that marriage comes to an end as a result of divorce or his death, only then is she free to remarry the former husband who pronounced the three *talaqs*.

If all three *talaqs* are pronounced on the same occasion with the intention of making the divorce irrevocable, then this is binding and the state of affairs which would otherwise only arise after three separate pronouncements of *talaq* arises immediately – which means that after the single *'idda* period of three menstrual cycles is ended, the woman is free to marry any Muslim man she wishes – but not her former husband.

Combining three *talaqs* in one is not the norm, but does occur where the husband is either very angry or convinced that what has been lost can never be restored.

This approach to divorce which encourages and facilitates reconciliation but which also permits divorce where reconciliation is impossible is both realistic and responsible.

This approach also means that a man cannot play games with a wife to whom he no longer wishes to be married:

Yahya related to me from Malik from Hisham ibn 'Urwa that his father said, "It used to be that a man would divorce his wife and then return to her before her 'idda was over, and that was alright, even if he divorced her a thousand times. The man went to his wife and then divorced her and when the end of her 'idda was in sight, he took her back and then divorced her and said, 'No! By Allah, I will not go to you and you will never be able to marry again.' Allah, the Blessed, the Exalted sent down, 'Divorce is twice, then honourable retention or setting free kindly.' (Qur'an: 2. 227) People then turned towards divorce in a new light from that day whether or not they were divorced or not divorced. (Al-Muwatta' of Imam Malik: 29.29.80)

3 General Observations on the *'idda* Period

Since a Muslim woman can only have one husband, she is not free to remarry until after her *'idda* period is over or, if she is pregnant, until she has given birth. During her *'idda* period, she is free to remain in the matrimonial home and the husband must continue to provide for and maintain her. This makes reconciliation easier to achieve.

Since a Muslim man is permitted up to four wives, he can, for example, marry a second wife while his first wife is in an *'idda* period – and then subsequently continue with the first marriage if they reconcile within the *'idda* period as well as the second marriage. If he has four wives, and he divorces one of them, he cannot marry another woman during the *'idda* period – unless he divorced her irrevocably.

Once an *'idda* period is completed without there having been any reconciliation, the

marriage is at an end – the husband no longer has access to his former wife and there is no inheritance between them if one of them subsequently dies.

If, however, a husband divorces his wife on his deathbed, she still inherits a wife's share from him after his death, even if this occurs after the end of her *'idda* period.

Although it is very easy to pronounce a *talaq*, especially a foolish or angry *talaq*, it must be remembered that practising Muslims who believe in Allah and in the Last Day, and who know that they are answerable to God for their actions, and who know that their actions and intentions will take them either to the Garden or to the Fire in the Next World – are more likely to exercise self-restraint in how they behave towards others, especially the members of their family, and are more unlikely to pronounce a *talaq* without first having thought very carefully about it.

This state of being aware – that God is present at all times and in all places, and that the Garden is true and the Fire is true, and that either the Garden or the Fire will be our final destination in life's journey, and that therefore one must be careful – is called *taqwa*.

Even the most God-fearing of people can become angry and say things that they may later regret. The *'idda* period enables repairs to be made to what has been damaged in the heat of the moment.

4 Divorce Coming from the Wife

Where it is the wife who wants to divorce the husband, she can ask him to pronounce the *talaq*. If he agrees to do so, then the same pattern applies as if it had been the husband who had initiated the divorce. Where they both recognise that the marriage has no future, the husband will usually agree to pronounce the *talaq*.

Although the Qur'an tells those who divorce each other to behave *bi'l-mar'uf* – with courtesy and common sense – unfortunately there are husbands who refuse to pronounce the *talaq* even though the marriage is clearly over, with the parties living separate lives and possibly even the husband having married a 'second' wife.

If the husband refuses to pronounce the *talaq*, then in a Muslim country, the wife can petition a *qadi* (a judge) in a *Shari'a* court either to grant her a divorce or to annul the marriage. In the UK, where *Shari'a* courts have not yet been established, she can ask a *Shari'a* Council to grant her a divorce.

This form of divorce is known as the *khul* divorce and will normally be granted by a *Shari'a* court or *Shari'a* Council, even where there is no other reason than the fact that the wife no longer wishes to live with the husband. There is no requirement in *Shari'a* to prove that the marriage has broken down irretrievably.

Once a *khul* divorce has been granted, the wife has the same *'idda* period as a woman who has been divorced by *talaq* : three menstrual cycles – or if she has ceased to menstruate, three months.

Where there is 'damage', which is known as *darar* (for example where the husband has refused her sexual relations for more than 4 months, or has failed to maintain her and any children, or has treated her unequally, or has been violent towards her, this makes the need for a divorce more compelling, but it is not a prerequisite to the granting of a *khul* divorce.

Similarly, where an essential element of the contract has not been fulfilled, (for example, non-consummation by the husband), or where the marriage has been corrupted (*fasad*) – for example the husband has been absent or sent to prison for more than four years – then the *qadi* can annul the marriage. This is known as *faskh*, or *naskh*.

If a woman's husband has been absent for 4 years and she does not know where he is, then she has an *'idda* period of 4 months, after which she is free to remarry.

If, in these circumstances, she remarries and the missing first husband then shows up, he has no access to her – whether the second husband has consummated the marriage or not.

5 Recommended Practice

In a world which increasingly demands documentary 'proof', as with the marriage contract, it is wise to have a written witnessed record of the divorce, especially once it has become final – whether or not there is a decision of a *Shari'a* court or *Shari'a* Council – detailing the parties and, where relevant, any financial arrangements and any arrangements relating to the children. This is not obligatory or required, but it is advisable. It helps to prove that the parties have been divorced in accordance with the *Shari'a* whenever this is necessary, as well as detailing what has been agreed between them – which may become very relevant in the event of either or both parties being uncooperative, or if there are also concurrent civil proceedings under another jurisdiction. Most Islamic legal systems in Muslim countries require this.

6 Li'an – Mutual Cursing

It sometimes happens that a husband strongly suspects that his wife has committed adultery, but – in the absence of a confession by his wife or four witnesses to the act – cannot prove it.

In this situation, the husband swears by Allah four times that he is being truthful, and a fifth time, that the curse of Allah will be upon him if he is lying. If the husband subsequently retracts his accusation, he is given the *hadd* punishment of 80 lashes for slander.

The wife will avoid the *hadd* punishment of being stoned to death if she swears by Allah four times that she is being truthful, and a fifth time, that the curse of Allah will be upon her if she is lying.

The couple are then divorced and may never remarry. If the woman is pregnant she keeps the child.

If it is the wife who is accusing the husband of adultery, in the absence of a self-confession by the husband or four witnesses, she is given the *hadd* punishment of 80 lashes for slander.

Li'an is not a common occurrence within Muslim communities, but the fact that the *Shari'a* makes provision for this situation reflects the gravity with which adultery is viewed. The Qur'an further warns people not to even come near it, since it is punished in both worlds.

7 Financial Consequences of Divorce

Where the husband divorces the wife *bi'l-marouf*, with courtesy and common sense, it is the *Sunna*, although not obligatory, to give her some form of gift or compensation according to his means. A satisfactory settlement can be assisted by means of negotiation and mediation through other family members or friends:

Yahya related to me from Malik that Ibn Shihab said, "Every divorced woman has compensation."

.....

Malik said, "There is no fixed limit among us as to how small or large that compensation is." (Al-Muwatta' of Imam Malik: 29.17.46)

If the marriage was not consummated, then the woman receives half of the agreed *mahr*.

Where the wife obtains a *khul* divorce for no particular reason, it is the *Sunna*, although not obligatory, for her to return the *mahr* to the husband. This is a matter of negotiation. Sometimes the husband insists on the *mahr* or even more than the *mahr*; sometimes he is heartbroken and refuses to accept even a penny.

Where there has been *darar* (damage), or *faskh* (non-performance), or if a condition in the marriage contract stipulated a payment to be made in the event of divorce, a *Shari'a* court or *Shari'a* Council will usually order that any agreed payment or deferred *mahr* be paid by the former husband.

No maintenance is due to the ex-wife from the ex-husband once the *'idda* period is over – except when she is pregnant or suckling, in which case the husband must continue to maintain her until the baby is born and/or has been weaned:

Yahya related to me from Malik from 'Abdullah ibn Yazid, the mawla of al-Aswad ibn Sufyan from Abu Salama ibn 'Abd ar-Rahman ibn 'Awf from Fatima bint Qays that Abu 'Amr ibn Hafs divorced her absolutely while he was away in Syria. His agent sent her some barley and she was displeased with it, saying, "By Allah, I don't expect anything from you." She went to the Messenger of Allah, may Allah bless him and grant him peace, and mentioned it to him. He said, "You have no maintenance." He then ordered her to spend her 'idda in the house of Umm Sharik. Then he said, "This is a woman whom my companions visit. Spend the 'idda in the house of Ibn Umm Maktum. He is a blind man and you can undress at his home. When you are free to remarry, tell me."

She continued, "When I was free to remarry, I mentioned to him that Mu'awiya ibn Abi Sufyan and Abu Jahm ibn Hisham had asked for me in marriage. The Messenger of Allah, may Allah bless him and grant him peace, said, 'As for Abu Jahm, he never puts down his stick from his shoulder (i.e. he is always travelling), and as for Mu'awiya he is a poor man with no property. Marry Usama ibn Zayd.' I objected to him and he said, 'Marry Usama ibn Zayd,' so I married him, and Allah put good in it and I was content with him."

Yahya related to me from Malik that he heard Ibn Shihab say, "The woman who is absolutely divorced does not leave her house until she is free to remarry. She has no maintenance unless she is pregnant. In that circumstance the husband spends on her until she gives birth."

Malik said, "This is what is done among us." (*Al-Muwatta' of Imam Malik: 29.23.67-68*)

The ex-wife is never under any duty to maintain the ex-husband, even if she is wealthy and even if he has custody of any of their children.

After a divorce has taken place, the father remains under a duty to maintain any children of the marriage – a daughter until she marries, a son until he can earn his own living.

SHARI'A LAW RELATING TO CUSTODY, MAINTENANCE AND CONTACT

1 General Observations

This is very much a question of what is in the best interests of the child. Children are not regarded as and should not be treated as personal possessions. Since Muslims believe that everything comes from and returns to Allah, they understand that their children come through their parents – but 'belong' to Allah.

Custody of children pre-puberty – is generally with the mother, especially if very young.

See the story of the Prophet Sulayman's (Solomon) judgement concerning the two women who both claimed that a child was theirs. Sulayman, peace be on him, drew a circle in the sand, gave an arm of the child to each of the woman and told them to decide the matter by a tug-of-war. One of them immediately let go of the child, saying she could not bear to hurt her child. "You are the true mother," said Sulayman, "so you keep him."

Where a mother is unable to have custody of any minor children or dies, the *Shari'a* stipulates that other female relatives should have guardianship (*hadanah*) in preference to the father, in the following order of preference : mother's mother, father's mother, mother's grand-mother, father's grand-mother, full sister, uterine sister, daughter of full sister, daughter of uterine sister, full maternal aunt, uterine maternal aunt, full paternal aunt.

If there are no female relatives, then the guardianship devolves on the male relatives in the following order of preference : father, nearest paternal grand-father, full brother, consanguine brother or any other paternal relative within the prohibited degree.

If there are no male relatives, then the qadi will appoint a guardian of any minor children.

Custody of children post-puberty – boys are generally with the father, girls are generally with the mother since they need appropriate role models.

In deciding who should have custody, the wishes of the child are to be taken into consideration.

See the example of Zaid, who was kidnapped as a young boy and sold to Khadija, the wife of the Prophet Muhammad, blessings and peace be on them, who gave him to the Prophet Muhammad as a gift, who freed him and treated him as his son. Some years later Zaid's parents tracked their son down and wanted him back. The Prophet, blessings and peace be on him, said that Zaid should decide. Zaid chose to remain with the Prophet.

Where the former husband denies being a child's father, the child stays with the mother and he is not under a duty to maintain the child. In the event of death, the mother and child inherit from each other, but the former husband and child do not inherit from each other.

2 'Mixed' Marriages

Difficulties often arise where one parent is a practising Muslim and the other is not. Each will usually want their children to be like them. If the marriage contract has already made it clear how any children of the marriage are to be brought up and educated, this may help. Otherwise the children will usually follow the lifestyle of the parent with whom they are living.

Where one parent is a practising Muslim and the other is not, the practising Muslim parent will often strenuously seek having custody of the children, however young, because it is the duty of Muslim parents to bring up their children as Muslims.

This religious duty is not always recognised by a secular court.

3 Contact with Children

Where the child loves both parents and both parents love the child, contact is very much a matter of negotiation between practising Muslims – and very much a matter of possession between unreasonable parents.

The *imam* or the *qadi* or a friend of the family may be able to assist in negotiating a working arrangement by means of mediation.

Since policing for a Muslim comes more from within rather than being imposed from outside, more reliance is placed on the parties having *taqwa* than on the threat of their being found in contempt of court and punished accordingly.

The less *taqwa* either or both of the parties have, the more difficult it will be to agree a working arrangement.

4 Maintenance

As already noted, the father remains under a duty to maintain any children of the marriage – a daughter until she marries, a son until he can earn his own living.

SHARI'A LAW RELATING TO SHARED PROPERTY AND PERSONAL PROPERTY

1 Mahr

As we have already seen, the *mahr* – immediate (*mu'ajjal*) and deferred (*muwajjal*) – may become returnable or payable depending on what kind of divorce or annulment it is and whether or not there were any agreed stipulations in the marriage contract about what payments should be made and by whom in the event of a divorce or annulment.

2 Personal Possessions

Personal possessions, including jewellery and passports, are retained by their owner. The right of both wife and husband to have their own possessions and to do whatever they want with them – before, during and after marriage – has been recognised by the *Shari'a* for more than fourteen centuries.

3 Shared Property

Shared property should be divided *bi'l-marouf* – courteously and equitably – in proportion to the couple's contribution towards its purchase. If the couple cannot agree how this is to be done, the *Shari'a* court or *Shari'a* Council will have to decide.

As regards the former matrimonial home, there are many different scenarios and variables – and difficulties if both parties have contributed towards the cost of the house, or if ownership of the house is subject to a joint mortgage agreement which may or may not reflect their individual contributions to the purchase of the house. Possible ways of dealing with this situation include the following (but are by no means exhaustive):

option (i) The house can be sold and the proceeds of sale divided in proportion to the respective shares of the parties. This would make sense, for example, if any children of the family have grown up and left home – or if there are no children – and both parties want to move on and make a fresh start.

option (ii) Where, for example, there are young children who will be living with their mother who wishes to remain in the house: the market value of the house can be ascertained (on the day the divorce becomes final); the value of the respective shares of the parties can be calculated; the mother can buy the father's share, so that she then owns the house completely.

option (iii) Where, for example, the mother wishes to remain in the house with the children, but does not have sufficient means to buy the father's share, the father can agree that whilst retaining his share of ownership of the house, she can continue to live in the house *either* until they decide on *option (i)* or until *option (ii)* becomes possible.

option (iv) The father is always free to give part or all of his share to the wife and/or on trust to the children. This could help make *option (ii)* possible. It could also be agreed to be part of the fulfilment of the father's duty to house and maintain his children.

Where the parties wish to separate as amicably as possible, it is of course much easier to reach a reasonable and practical agreement, whatever the circumstances. Allah says in the Qur'an :

*If a couple do separate,
Allah will enrich each of them
from His boundless wealth.
Allah is All-Encompassing, All-Wise.* (Qur'an: 4. 129)

Where there is considerable acrimony between the parties and if either or both do not have *taqwa*, then it is very difficult to conduct financial arrangements *bi'l-marouf* – courteously and equitably.

In the absence of an intermediary being able to negotiate an agreement, the *Shari'a* court or *Shari'a* Council will have to decide.

It should always be remembered that the various English *Shari'a* Councils are voluntary based organisations set up to assist Muslims in resolving disputes which includes disputes concerning marriage and divorce. Like the Beth Din, the religious court of the Jewish community, they have no officially recognised judicial role and they have no means of enforcing their judgements – which is why they have chosen not to become involved in custody and financial matters.

The authority of the English *Shari'a* Councils is nevertheless recognised by the majority of Muslims living in the UK who recognise the valuable work which they do in resolving disputes within the community.

4 Inheritance Considerations

As regards rights of inheritance, any children of the marriage will automatically be entitled to inherit a fixed *Qur'anic* share from their parents if they die first.

An ex-spouse is not entitled to a fixed *Qur'anic* share – but in accordance with the *Shari'a*, a Muslim can make a bequest to an ex-spouse out of and up to *one third* of the estate, provided that this does not exceed the fixed share he or she would have received had they still been married at the time of death.

In the normal course of events, if a Muslim dies in a Muslim country without making a Will, then the entire estate is automatically distributed between surviving relatives in the fixed shares which are stipulated in the *Qur'an*. In the event of there being no surviving relatives, the estate devolves to the Bayt al-Ma'l (the equivalent of the Treasury), to be spent on social welfare.

If, however, a British Muslim dies intestate in England or Wales, then the laws of intestacy are applied as regards the distribution of his or her estate – and the shares stipulated by these laws are different to the shares prescribed by the *Shari'a*, especially when the surviving relatives include wives and children from Muslim marriages not recognised as valid marriages by English domestic law.

Under the laws of intestacy, for example, a second or third wife who was happily married to the deceased for twenty years and her three children might be entitled to nothing – while a former wife who has been divorced under *Shari'a* law but whose civil divorce has not been made absolute before her former husband's death might inherit a great deal. If, in the eyes of the law, there are no surviving heirs, the estate goes to the Crown.

It is of course always open to any adult Muslim in England and Wales, male or female, single or married, to execute an Islamic Will which fulfils the technical requirements of the law, and which will therefore be treated as a valid Will by the law – and in which the testator makes provision for his or her estate to be distributed in accordance with the *Shari'a*.

This is an option which an increasing number of Muslims are now choosing.

[In this context the book by Hajj 'Abdalhaqq and 'A'isha Bewley and Ahmad Thomson entitled *The Islamic Will* published in 1995 by Dar Al Taqwa Ltd (ISBN 1 870582 35 7) is useful.]

INTERACTION BETWEEN ENGLISH LAW AND SHARI'A

HOW DOES ENGLISH LAW VIEW ISLAMIC MARRIAGES?

1 *Nikah* Ceremony which Takes Place Abroad

A *Nikah* ceremony which takes place abroad is accepted as a valid marriage provided it is regarded as a valid marriage in the country in which it was performed.

Each country has its own rules and regulations as regards the validity of a marriage. These rules must be complied with – otherwise the marriage will be deemed as invalid in the country in which it was performed and therefore void under the English legal system.

For example, the parties must be 16 years of age or over for the marriage to be valid in Pakistan and it must be performed in accordance with *Shari'a* law (which in fact does permit marriage to someone less than 16 years old in certain circumstances), including two independent witnesses being present during the ceremony.

General considerations for *Nikah* ceremonies which take place abroad are as follows:

(1) age of parties – if the marriage of a young woman of 15 years old is recognised as valid in the country in which it was conducted, then that marriage will be recognised as valid in England, even though such a marriage would be considered void if conducted in the UK.

(2) consent of both parties – the term 'forced marriage' is often used when one party entered into the marriage unwillingly and under duress, in which case he or she can apply for an annulment of the marriage.

An annulment declares that the marriage is void and therefore did not exist. Annulment Petitions should be filed within three years of the date of the marriage and can be issued any time following the date of the marriage.

(3) mental capacity of both parties – to enter into marriage – if one party did not know what was happening, he or she can apply for it to be annulled.

(4) habitual residence – is not a pre-requisite for a marriage to be valid in the country in which it is performed.

For example, many people travel to Islamic countries and marry their spouses who are domiciled and resident in that country, and then they return back to England. The marriage is valid so long as it has been performed in compliance with the necessary requirements of that country.

Where there is an issue or doubt as to whether or not the *nikah* ceremony which has taken place is valid or not, a declaration can be sought under Part 3 of the *Family Law Act 1986*.

(5) marriage certificate – a frequent difficulty of a recognised marriage that has taken place abroad is that there may not be a marriage certificate. An Islamic marriage does not have to be committed to writing and therefore, there may be cases where there is no marriage certificate available.

The English court procedure requires that the original marriage certificate be lodged so that there is evidence that the parties are in fact married (see *Family Proceedings Rules 1991 r2.6(2)*). In the absence of a marriage certificate, the petitioner will have to obtain other evidence to confirm that there was a marriage. This could be in the form of sworn evidence from the witnesses at the ceremony. Providing the petitioner lodges satisfactory evidence at court as to why he or she cannot lodge the original or a certified copy of the marriage certificate, permission can be granted to proceed in the absence of the same.

2 Nikah Ceremony takes place in England – but No Civil Ceremony

A *nikah* ceremony which takes place in England is not recognised as a valid marriage under English Law.

The status of the parties is that of cohabitants – who have no Matrimonial Homes Rights.

If there is any property the *Land and Appointments of Trustees Act 1996* will apply in respect of interests in property.

If there are children then Financial Provision is available under the *Children Act 1989* and the *Family Law Act 1996*.

Also power of maintenance is available via the Child Support Agency which has jurisdiction in all cases where a couple have children irrespective of whether their status is that of cohabitants or a married couple.

The *Child Support, Pensions and Social Security Act 2000* regulates financial provision which can include payment of school fees, a lump sum payment for the provision of education, housing and other needs. Also there can be provision during the duration of the child's minority.

There is no financial provision for a cohabitee in terms of maintenance payments, even though she (usually the mother) is at home bringing up the children and is unable to work.

3 Nikah Ceremony and Civil Ceremony both take place in England

Many Muslims in the United Kingdom choose this option because of the recognition of the status of being married which the civil ceremony bestows, as well as the (usually enforceable) protection which the domestic law provides in the event of a breakdown in the marriage.

Although the *Shari'a* makes provision as regards financial settlement, maintenance and custody of children, at the moment these are largely unenforceable in the civil courts – and are therefore only honoured by those who impose these provisions on themselves.

Usually the *nikah* ceremony (which can be solemnised anywhere) and the civil ceremony take place in different places and often on different days.

Although Muslims regard the *nikah* as obligatory and the civil ceremony as helpful, in this scenario it is the civil ceremony which is recognised as the valid marriage by English law, not the *nikah* ceremony.

The Marriage (Registration of Buildings) Act 1990 and the *Marriage Act 1994* amended the *Marriage Act 1949* so that now, so long as a mosque is registered as an 'approved premises', a civil marriage can take place in the mosque which means that both ceremonies can be solemnised together – provided that:

- (1) the marriage is performed by a person authorised to conduct civil ceremonies;
- (2) in a place registered as a place where civil marriages may be performed;
- (3) the ceremony is in accordance with English Law.

There is in fact an inherent contradiction between the two ceremonies since the civil ceremony specifically excludes the husband's freedom to have up to four wives as permitted by the *Shari'ah* of Islam.

4 Significance of having a Civil Ceremony

During the Marriage

Any children are regarded as legitimate – whereas children of cohabitees are regarded as illegitimate.

The parental responsibility of the father is automatic if the children are born during the marriage.

However, it is also to be noted that new legislation is due to be in force soon which will give automatic parental responsibility to a father if he is named on the birth certificate.

If the Marriage Breaks Down

Matrimonial laws designed to deal with property matters and custody and contact with children apply automatically.

Upon Death

A wife is eligible for a widow's pension, provided that the marriage has been recognised as a valid marriage by the English Legal System.

In the course of divorce proceedings, Pension Sharing Orders can be made which in some cases means that a wife is entitled to half of her husband's pension. The pension is split and transferred into the wife's name and becomes hers. Generally the pension is considered in ancillary relief proceedings and the wife's rights to the pension can be traded off against other assets.

Where the State pays the wife a pension based on the husband's contributions, quite clearly it is important for there to have been the recognition of the marriage under the English legal system.

The *Intestacy Rules* also become relevant upon death if there is no Will. As we have already seen, a legitimate spouse has greater rights under the Intestacy Rules than someone who is a cohabitee.

Cohabitees can apply under the *Inheritance Dependents Act 1976* for financial provision – however, this is on the basis that the parties had been living together for at least two years preceding the death. Technical difficulties can arise where there was more than one 'matrimonial home' – for example, where the husband had three wives, each living at a different address. The 'legitimate' wife might argue that hers was the only matrimonial home, at which the other two claimants did not live.

5 Where there is More Than One Wife

Under the *Matrimonial Proceedings (Polygamous Marriage) Act 1972* a second wife whose marriage abroad is recognised as a valid marriage can apply for matrimonial relief and a declaration of validity of marriage.

When applying the *Matrimonial Causes Act 1973 S.47(1)* a court in England and Wales should not be precluded from granting matrimonial relief or making a declaration concerning the validity of the marriage by reason only that the marriage in question was entered into under a law which permits polygamy.

These provisions apply, for example, to a man living in a Muslim country who marries 2 wives in accordance with the law of the land – and then they all come to the UK to live in London, (*Foreign Marriage Act 1986*).

These provisions do not apply if he then marries a third wife in the UK by going through a *Nikah* marriage with her. She would simply be regarded as a cohabitee.

If he were to have a civil marriage with her in the UK, this would constitute the crime of bigamy and the civil marriage would be regarded as void, because English law does not permit a man to be legally married to two women simultaneously.

HOW DOES ENGLISH LAW DEAL WITH ISLAMIC DIVORCES?

1 Does obtaining an Islamic Divorce mean there is no need to apply for a Divorce in an English Civil Court?

If the divorce takes place abroad and is recognised as valid in the country in which it was obtained, then it is recognised as a valid divorce under English Law. In other words, a *talaq* or *khul* divorce pronounced in countries other than the UK are recognised as valid in the UK if they are recognised as valid in the country in which they were pronounced.

For example, the parties marry in Malaysia following the husband's visit to Malaysia from England. The wife is habitually resident and domiciled in Malaysia. The wife returns with the husband to England, but after 18 months she returns to Malaysia and files for a Divorce in the Malaysian Courts. The Divorce is granted in accordance with *Shari'a* Law and within the legal system of Malaysia. English Law will recognise this as a valid Divorce. This will bar any petition for divorce being granted in an English court.

Any religious divorce taking place abroad in the absence of any officially recognised proceedings will not be recognised by the English courts. However, such a divorce could be used as evidence of the date the relationship ended if this is disputed in later court proceedings, especially if there is sufficient evidence of the same – for example, the sworn statement of a witness to a verbal *talaq*.

The case of *El Fadl v El Fadl [2000] 1FLR 175* confirms that if a domestic overseas court requires a *talaq* to be recorded with the *Shari'a* court of that foreign country, that registration process will be construed as 'proceedings' for the purposes of s46(1) *Family Law Act 1986*, although a judicial decision has not been obtained.

If the parties are living in Britain and are habitually resident and/or domiciled here, then the criteria is satisfied which gives jurisdiction for a petition for divorce to be filed

in this country. Providing there is no legally binding divorce from any other country, it will be necessary to file a petition for divorce in the courts in the UK.

A *talaq* or *khul* divorce pronounced in this country does not dissolve the marriage in the view of the English legal system, even if provided by a *Shari'a* Council, since they are not recognised as legitimate divorces by the English legal system.

This often means that Muslim couples have to go through two forms of marriage – and if they divorce, they have to obtain two forms of divorce. Until divorced under both *Shari'a* and English civil law, a woman will not be free to marry again.

Unfortunately Muslim men sometimes refuse to give the *talaq*, even though a decree absolute has been granted in the civil court and even though there is no prospect of reconciliation. In this situation, the wife can apply to a *Shari'a* Council for a *khul* divorce.

In practice, the *khul* divorce process will be swifter if the decree absolute ending the civil marriage has already been granted since this will be regarded as proof that reconciliation is no longer possible.

As regards an Islamic marriage which was performed abroad and is recognised as a valid marriage by English law, if this marriage is ended by a decree absolute in an English court, it is still advisable to obtain a pronouncement of *talaq* or a *khul* divorce as well, since as far as the *Shari'a* is concerned, there is no jurisdiction over and above the *Shari'a* – just as English law does not accept any jurisdiction over it (unless recognised by treaty or statute).

If the former husband will not maintain any children of the family, the mother may have to seek ancillary relief through the English courts. In so doing, she may be tempted to seek more than what she is entitled under the *Shari'a*.

The only sensible solution to this unsatisfactory state of affairs is to have the jurisdiction of UK *Shari'a* Courts and their decisions recognised by English law.

2 When is there a need to apply for Divorce in the UK Courts?

If a marriage is legally recognised by English law then it can only be dissolved in accordance with English law – unless the marriage took place abroad, in which case divorce can be obtained in the country in which the marriage was performed.

It is only possible to petition for divorce in the UK one year after the date of the marriage.

However, there is no restriction on the presentation of petitions for judicial separation in the first year of marriage.

A petition for divorce in an English court may only be granted if the marriage has irretrievably broken down on one of five grounds :

- (1) Adultery.
- (2) Two Years Desertion.
- (3) Two Years Separation and the parties agree to the divorce.
- (4) Five Years Separation – in which case there is no need for the other party to agree to the divorce.
- (5) Unreasonable Behaviour.

In certain limited circumstances, it is possible to petition for a decree of nullity (which once pronounced means that there never was a valid marriage in the first place).

A marriage is void for the following reasons :

- (1) Prohibited relationship (e.g. brother and sister).
- (2) Either person was under 16 at the time of the marriage.
- (3) Necessary legal formalities not fulfilled.
- (4) The husband and wife are not male and female.
- (5) Either the husband or wife was lawfully married at the time of the marriage.
- (6) In the case of a polygamous marriage (more than one wife) entered into outside England or Wales, that either party was living in England or Wales at the time of the marriage.

A marriage is voidable on the following grounds :

- (1) Non-consummation owing to incapacity.
- (2) Non-consummation owing to wilful refusal.
- (3) Absence of consent to the marriage.
- (4) Mental disorder of such a kind or extent as to be unfit for marriage.
- (5) One party was suffering from venereal disease – of which the other party was unaware at the time of the marriage.
- (6) The bride was pregnant by another man – of which the bridegroom was unaware at the time of the marriage.

CUSTODY, MAINTENANCE & CONTACT WITH CHILDREN UNDER ENGLISH LAW

1 If a Marriage breaks down irretrievably, what provisions of English Law apply to custody, maintenance and contact with children?

As with the *Shari'a*, what is in the best interests of the child is deemed paramount.

Children Act 1989, Section 8 applications

- (1) Residence Order : determines with whom a child should live.
- (2) Contact Order : sets out when the person with whom the child lives should make the child available to spend time with another person – includes visiting and staying.
- (3) Prohibited Steps Order : prohibits a person from doing something, for example, removal of children.
- (4) Specific Issue Order : necessary when the parents cannot agree on an aspect of their child's upbringing, for example, whether or not a child should be educated in a religious school. A child's religious upbringing can also be considered here, especially where there are religiously mixed marriages. The welfare of the child is paramount in all such applications – and the courts do sometimes recognise cultural and religious factors as being important when making such decisions.

The following welfare checklist is applied when considering what is in the child's best interests :

- (1) the wishes and feelings of the child (considered in the light of age and understanding);
- (2) the child's physical and emotional needs;
- (3) the likely effect of any change in circumstances;
- (4) the child's age, sex and background – and any other characteristics that the court considers relevant;
- (5) any harm the child has suffered or is at risk of suffering;
- (6) how capable each of the parents (and any other person the court considers to be relevant) is of meeting the child's needs;
- (7) the range of powers available to the court under the *Children's Act 1989*.

Children Act 1989, Schedule 1

A resident parent, or a child through their resident parent or guardian, or a person who has a residence order in their favour, can make an application against a parent (usually the absent parent) for an order for maintenance, a lump sum, or a settlement or transfer of property.

Family Law Act 1996

This is usually used when a party has suffered from domestic violence and the remedies are available to both married and un-married couples. The law allows for the court to make an order in respect of property, and therefore is available to a party who has only undergone a religious ceremony. This can include an order allowing a party to restrict the other party's rights to occupy a property for a specified time together with an order requiring the discharge of the mortgage or rental payments. Unfortunately, if a party does not pay the mortgage or rent, those orders cannot be enforced by way of committal for contempt of court. (See *Nwogbe v Nwogbe* [2000] 2 FLR 744)

Local Authorities

If a local authority has concerns about the care of a child resident in its borough, it has a duty to investigate and the power, in certain circumstances to intervene. It can apply for:

- (1) Education Order;
- (2) Child Assessment Order;
- (3) Emergency Protection Order;
- (4) Supervision and Care Orders

A parent still has a right to reasonable contact with the child when any of these orders are in force.

In care proceedings it is the duty of the local authority to consider the religious and cultural needs of the children concerned and of the parents at all stages of the proceedings and placement of the children.

Where Muslim children have been taken into care, the daily requirements of the children such as dietary requirements, halal food, religious education and attending religious classes, must be considered by the local authority.

Local authorities are not always compliant with these requirements on the basis of lack of funding and limited access to these facilities. In a multi-cultural environment, it is being recognised that the diversity in culture should be considered appropriately when making decisions relevant to children.

A local authority can also apply for :

(5) Adoption Order

An adoption order transfers parental responsibility to the adopters.

ANCILLARY RELIEF

1 Division of Wealth and Maintenance on Divorce

If the parties cannot agree, the court will decide how their wealth is to be divided and whether or not one party must continue to maintain the other.

It is sometimes possible to secure what is due under the *Shari'a* – and sometimes to secure in excess of what is due under the *Shari'a*, which means both parties should have *taqwa*.

2 If there has only been a Muslim *Nikah* ceremony in the UK

Matrimonial Causes Act 1973 ancillary relief proceedings are not available. However it is sometimes nevertheless possible to recover what is due under the *Shari'a* by means of English law :

(1) *Mahr*

***Mahr* as a Part of a Contract**

It is quite usual for there to be monetary consideration as part of the marriage contract in Islamic marriages, since the *mahr* (whether immediate or deferred) is an essential element of the marriage contract and at least some of it is often in the form of money. (See *Shahanaz v Rizwan* [1964])

If there is such a provision, and the husband refuses to honour what he has agreed, it is possible to apply under Contract law for the enforcement of this provision. The usual rules of Contract law apply when determining whether or not the contract is binding. If it is found to be binding then it can be enforced by way of an order for specific performance. Depending on the amount an appropriate application can be made to either the County Court or the High Court. Sometimes the initiation of legal proceedings will be sufficient to result in a settlement.

Where a *nikah* marriage is not recognised as valid by the court, this is the best strategy to adopt in order to secure compliance with the marriage contract.

***Mahr* as a Part of a Pre-Nuptial Agreement**

The *mahr* can sometimes be regarded as a pre-nuptial agreement rather than as part of the marriage contract. English courts sometimes favour this approach, because if they recognise the marriage contract as a valid binding contract, then logically this should mean that the *Nikah* marriage itself is valid – which at present the courts do not wish to recognise.

Strictly speaking *mahr* is not a pre-nuptial agreement, since such an agreement is often concerned with what happens to future assets and future wealth – which the *Shari'a* prohibits for uncertainty. Since a marriage is not considered valid if the *mahr* has not been agreed, it is clear that the *mahr* is an essential element of the marriage contract.

Matrimonial Causes Act 1973, Section 25

There is scope under this section for pre-nuptial agreements to be taken into consideration. However, it should be noted that there is no provision for a pre-nuptial agreement to oust the jurisdiction of statute. (See *K –v- K* [2003] 1 FLR 138)

If the *mahr* is regarded as a pre-nuptial arrangement for the sake of convenience, then this is only one of many factors which could be considered under Section 25.

Where the marriage has been a long marriage and there are children, less weight is attached to pre-nuptial agreements.

A *mahr* which has been paid can be claimed back, if it was a short marriage and there are no children. ‘Short’ marriages are usually less than five years in length. Again, in this particular context, the *mahr* is just one of many factors to be taken into account under Section 25.

(2) Jewellery

This is usually divided between the parties by agreement; or it goes back to the person who purchased it; or it is all sold and the proceeds divided between the parties.

(3) Personal possession including Passport

- It is a crime to hold or take someone’s passport – so the police can be informed. Personal possessions should be returned to their owner.
- The *Torts (Wrongful Interference With Goods) Act 1977* can be invoked to enable the return of personal possessions.

(4) Property

An application can be made for the return of property.

Section 17 of the *Married Women’s Property Act 1882* provides a procedure for determining the property rights of spouses, of formally engaged couples and where spouses do not want or cannot obtain a decree for divorce, nullity or judicial separation.

Section 17 empowers the Court to determine in a summary way what the parties’ rights in particular property are as a matter of strict law and to declare them accordingly. There is no power under Section 17 to make orders adjusting property rights as the Court can make under Section 24 of the *Matrimonial Causes Act 1973* – which is not available to those parties whose marriages are not recognised by the English courts.

The Court does, however, have power to order a sale of disputed property. This could be one way to raise a lump sum to satisfy any deferred *mahr* which is due.

When considering property rights, consideration must be given under the *Trusts of Land and Appointment of Trustees Act 1996*. Orders can be made by the court to determine a party’s interest in the disputed property and make a property adjustment order and an order for sale.

3 Where a Muslim *Nikah* ceremony solemnised abroad is recognised as a Valid Marriage in the UK

The financial aspects of a marriage breakdown will be entertained by the English courts under *section 25* of the *Matrimonial Causes Act 1973* if the marriage took place

abroad in accordance with the foreign laws and therefore is a valid marriage in the foreign country – or if a civil marriage took place in the UK as well as the religious marriage.

Where a *nikah* marriage has been validly solemnised abroad and there has been a valid *talaq*, the wife can still recover deferred *mahr* by way of an action for breach of contract. (See : *Qureshi –v- Qureshi* [1972] FAM173, [1971] 1AER 325)

Where divorce proceedings are initiated in England, what has been agreed between the parties as part of their marriage contract can be taken into consideration as one of the *Matrimonial Causes Act 1973, Section 25* factors as part of the ancillary relief proceedings, but is not binding on the judge.

See : *A –v- T* [2004] EWHC 471 (*Fam*); (2004) 1 FLR 977, where the order took the agreed *mahr* into account but awarded less than that sum, bearing in mind the brevity of the marriage and the size of the husband’s assets – as well as making a conditional order requiring the husband to divorce the wife by way of *talaq* on pain of his having to pay the agreed amount in full if he did not.

This is a very useful tool for practitioners to keep in mind, as the amended *MCA 1973, s10A by the Divorce (Religious Marriages) Act 2002* is at present limited to assisting Jewish spouses only.

In *A -v- T* Mrs Justice Barron in her judgement referred to *Otobo -v- Otobo* [2003] 1 FLR 192, citing the need for the court to have regard to the parties’ cultural mores.

It should always be remembered that a wife who initiates divorce proceedings will only be entitled to receive the deferred *mahr* if the divorce has been initiated due to harm (*darar*) or because the marriage has been corrupted (*fasad*).

CASE LAW

Useful cases

1. *Fatima –v- Secretary of State for the Home Department – A* [1986] 2AER
2. *El Fadl –v- El Fadl* [2000] 1FLR 175
3. *Berkovits –v- Grinberg (Attorney-General intervening)* [1995] 2 WLR 553; (1995) 2 All ER 681
4. *Sulaiman –v- Juffali* [2002] 1FLR
5. *Qazi –v- Qazi* [1980] 744 AC, [1979] 3WLR 833, [1979] 3AER 897, HL
6. *Qureshi –v- Qureshi* [1972] FAM173, [1971] 1AER 325
7. *Chaudhary –v- Chaudhary* [1985] FAM19

FURTHER STATUTORY PROVISIONS WHICH MAY NEED CONSIDERATION

Trans-National Divorce and Jurisdictional Issues

1. Recognition of Divorces and Legal Separation Act 1971, Section 2 (A)
2. Domicile and Matrimonial Proceedings Act 1973, Section 5(16)
3. Family Law Act 1986, Section 44, 45, 46, 51 Part II
4. Matrimonial and Family Proceedings Act 1984, Section 12

ENGLISH SHARI'A COUNCILS

INTRODUCTION

The English legal system, being largely the creation of humans, is in constant need of repair. It is always being developed. As social situations change, it has to adapt. It is continually in the process of trying either to catch up with social change or to bring about social change in society.

Part of the *raison d'être* of Parliament is that where current laws are either inadequate or outdated or non-existent, balance in society must constantly be achieved or restored by passing new laws.

Bearing this in mind, the possibility of incorporating Muslim Personal Law into English domestic law – so that Muslim marriages, divorces and laws of inheritance are legally recognised by English civil law – is a proposal which has been presented to and is being considered by the present government.

If this proposal is to be viable, the role of *Shari'a* Councils to which reference has already been made will need to be co-ordinated, expanded and unified. At present there are several *Shari'a* Councils in the UK which function independently of each other – just in the same way that there is more than one Beth Din for the Jewish community in the UK. For example, in London the main *Shari'a* Councils are:

- The Muslim Law (Shariah) Council, London –
<http://www.muslimcollege.ac.uk/index.asp?id=170&type=detail>
- Islamic Shari'a Council, London –
<http://www.islamic-sharia.co.uk/main.html>
- Shariah Council, Darul Uloom London –
<http://www.darulloomlondon.co.uk/sharia.htm>

If *Shari'a* Councils are to function more comprehensively than at present, there will need to be a process of systematisation and standardisation, just in the same way that the Employment Tribunal system has been designed to provide a recognisably similar service throughout the UK wherever there is an Employment Tribunal. In order to ascertain how this transition can be achieved, the present and possible future roles of *Shari'a* Councils will be considered:

THE PRESENT ROLE OF ENGLISH SHARI'A COUNCILS

1 Giving *Fatwa*

Shari'a Councils will give a *fatwa* (legal opinion) in answer to any question concerning the *Shari'a* of Islam. For example, a person may ask, "In the present circumstances and as a matter of necessity, am I permitted to purchase a house by way of a mortgage even though this involves borrowing money on interest, which is normally forbidden in Islam?"

[There are varying responses to a question such as this, depending on which principles of *fiqh* are applied.]

2 Mediation and Granting *Khul* Divorces

As we have seen above, at present the role of the *Shari'a* Councils is concerned mainly with either providing a mediation service in order to save marriages or granting *khul* divorces in situations where a *nikah* marriage is effectively over but the husband refuses to grant a *talaq*. Once the *khul* divorce has been granted, it is regarded as a valid divorce which terminates the marriage and releases the wife, whether the husband likes it or not.

Since the *Shari'a* Councils have no enforcement mechanism, they usually refrain from making any order as regards payment by the husband after a *talaq* divorce, or payment by the wife after a *khul* divorce, or maintenance of the wife while she is pregnant and/or suckling, or maintenance of any children of the marriage – although they may try to negotiate an arrangement which will be honoured by the person on whom there is an obligation in accordance with the *Shari'a*.

The present limited role of the *Shari'a* Councils, therefore, is primarily to free an abandoned or unhappy wife from limbo, so that she is free to remain single or to marry someone else, as she pleases.

3 Contrasted with the Beth Din in the Jewish Community

This situation can be contrasted with Jewish religious marriages which can only be dissolved by means of divorce if the Jewish divorce document, called a *get*, is freely given and freely received. Where the husband refuses to freely give the *get*, or the wife refuses to freely accept the *get*, the divorce is invalid. The Beth Din (the religious court of the Jewish community) is not in a position to order the husband to give the *get*, or the wife to accept the *get*, (since such coercion would mean that either the *get* was not freely given, or that the *get* was not freely accepted) – nor is the Beth Din in a position to pronounce the marriage at an end at the wife's request, since there is no equivalent of the *khul* divorce in Judaic law.

This situation has been ameliorated by the *Divorce (Religious Marriages) Act 2002* which came into force on the 24th February 2003, in conjunction with *The Family Proceedings (Amendment) Rules 2003*.

These provisions (which appear as *section 10A* of the *Matrimonial Causes Act 1973*) make it possible for a Jewish husband or wife to apply to a court in which they are involved in current civil divorce proceedings for an order that a decree of divorce is not to be made absolute until they have both produced to the court a declaration that they have taken such steps as are required to dissolve the marriage in accordance with Jewish law. In effect this is an indirect way of ensuring that *neither* party is free to remarry in a legally recognised manner until the *get* has been given and accepted – and although such an order does involve a certain degree of indirect pressure, the Beth Din does not consider this sufficient to nullify a *get* induced by this means.

[The helpful and concise publication *Getting your Get* by Sharon Faith BA (Law)(Hons) and Deanna Levine MA LLB provides more details and is accessible at <http://www.gettingyourget.co.uk>.]

Although at present the *Divorce (Religious Marriages) Act 2002* applies solely to the Jewish community, in fact the wording of the Act is such (*sub-sections 10A(1)(a)(ii)*)

and (6) MCA 1973) that a recognised representative of the English Muslim community is at liberty to apply to the Lord Chancellor to make an order by way of statutory instrument that “the usages of the Muslims” should also be recognised as coming within the ambit of section 10A – thereby enabling the Muslim community to benefit from this mechanism for inducing a religious divorce.

Since, however, a *talaq* divorce can be pronounced by the husband and be considered binding even though the wife is not happy with it – and since a *khul* divorce can be granted by a *Shari’a* Council and be considered binding even though the husband is not happy with it, this means that Muslims are not restricted by “divorce freely given/freely accepted” criteria – and therefore there is in fact no pressing need to make such an application to the Lord Chancellor.

4 Applying Islamic Fiqh within UK Arbitration Law

It is always possible for two Muslims who have an agreement or contract to voluntarily agree that in the event of a dispute, it should be settled in accordance with the *Shari’a* and that they will accept and submit to the judgment of a particular *‘alim* (scholar) or *Shari’a* Council.

Human nature being what it is, however, what happens if one of the parties subsequently does not wish to keep to this agreement? How can the *‘alim* (scholar) or *Shari’a* Council enforce the judgment, when it is not recognised as a valid judgment by the UK civil law – which means that any use of physical force could be prosecuted as an assault and any appropriation of property could be prosecuted as theft under UK criminal law?

Depending on the circumstances, the judgment can still be enforced indirectly by means of English law. For example :

Commercial Contracts

The parties to a commercial contract can ensure that its terms are in accordance with the *Shari’a* – and they can agree that in the event of a dispute the parties will go to arbitration before an agreed arbitrator (an *‘alim* or *Shari’a* Council) who will decide the matter in accordance with the *Shari’a* (rather than battling it out in a civil court in accordance with UK law).

In the event of a dispute arising, the parties can sign an arbitration agreement before the hearing, agreeing that in the event of any subsequent refusal to honour the arbitrator’s decision, that decision will be enforceable as an arbitration award in the appropriate civil court. (This procedure is sometimes followed by the Beth Din.)

As regards any right to appeal a decision of a *Shari’a* Council, this will have to be determined by the *Shari’a* Council’s terms of reference, not by a secular civil court – otherwise disgruntled parties might be tempted to play one system off against the other. Details of any rights of appeal and the procedures involved have therefore to be contained within the arbitration agreement and must be in accordance with the *Shari’a*.

Marriage Contract (*Nikah*)

As we have already seen, the basic Muslim marriage *nikah* contract involves the acceptance by both parties that the marriage will be in accordance with the *Shari’a* of Allah and the *Sunna* of His Messenger, may Allah bless him and grant him peace.

Specific conditions can be included as part of the marriage contract provided they do not contradict the *Shari'a* and the *Sunna* – for example, that the wife will have the right to a *khul* divorce if the husband takes a second wife, or that a certain sum will be payable by the husband to the wife if he divorces her, or where the wife is from the *ahlu'l-kitab* that the children will be brought up as Muslims.

Details of the *mahr*, whether immediate (*mu'ajjal*) and deferred (*muwajjal*) or both, are usually included in the marriage contract.

As we have already seen, it is prudent in the modern world to have a written record of the contract, signed by the husband and wife, the *wali* of the wife, the *khatib* and the two witnesses. In the event of a dispute, the written record of the marriage contract is clear proof of what was agreed.

The agreement to submit to the decision of an appropriate *'alim* or *Shari'a* Council in the event of a serious dispute can also be made an express condition of a Muslim marriage contract.

In the event of a dispute arising, the parties can sign an agreement before the hearing agreeing that in the event of any subsequent refusal to honour the arbitrator's decision, that decision will be enforceable as an arbitration award in the appropriate civil court.

Pre-nuptial Agreements

As we have already seen, in English law a pre-nuptial agreement is viewed as an agreement made with marriage in mind. It is not a marriage contract – whereas a Muslim marriage *nikah* contract is not a pre-nuptial agreement – it is a contract.

This means that, unlike a pre-nuptial agreement, some terms of the marriage contract can be enforced in the English civil courts as a contract – or by way of an arbitration agreement signed before a *Shari'a* Council hearing as outlined above.

However, the marriage contract cannot be used to oust English law. For example, it cannot be used to assert that the marriage contract has resulted in a marriage which is to be regarded as a valid marriage for the purposes of English law.

Deferred Mahr

On the other hand, the terms of a marriage contract which deal, for example, with deferred *mahr* or financial provision in the event of divorce, are enforceable terms of the contract, since they are not concerned with the status of the marriage in the eyes of English law, but rather with what should happen if certain events take place.

Custody of Children

The issue of custody of minor children usually arises either when both parents are dead, or in the event of divorce, or if the parents are unable to care properly for their children.

Again, arbitration cannot be used to oust the jurisdiction of the English courts. This means that where custody is disputed in matters of divorce or unfitness to have custody, the English courts may take into account what has been agreed between the parties or decided by a *Shari'a* Council, but in the end it will be the judge who decides what is in the best interests of the child, applying English law.

As regards death, if a testator has named a guardian in his or her Will to look after any surviving minor children, this will not be binding on an English court if the choice is disputed – but the testator’s choice will be taken into account by the English court.

Inheritance

As long as a Will fulfils the technical requirements of UK law, it is possible for the testator to ensure that his or her estate is distributed in accordance with the *Shari’a*.

Where the estate is large or the calculation of the shares prescribed by the Qur’an is difficult, an *‘alim* or *Shari’a* Council can assist with the correct division of the estate.

Since there are a plethora of unjust tax laws in the UK, including Inheritance Tax, it is advisable for wealthier Muslims to take expert legal advice so as to minimise tax liability as far as is legally possible while still complying with the *Shari’a*.

[These matters are considered in more detail elsewhere (for example, at : <http://www.wynnechambers.co.uk/specialisations.php?page=specialisation>).]

5 Conflict of Laws

As we have seen earlier, it is a basic principle of most jurisdictions that in the event of conflict between jurisdictions, the governing jurisdiction will not grant any other jurisdiction precedence over it.

Where there is no conflict between the two, the governing jurisdiction may well accommodate another jurisdiction, especially if it considers that this will be beneficial for the parties.

This is why arbitration as a means of alternative dispute resolution is only available within a single territorial jurisdiction where there is no conflict between the two jurisdictions – whereas recognition of *Shari’a* courts by the English legal system would provide the Muslims with far more scope to regulate their personal affairs in accordance with the *Shari’a*, even where there are significant differences between the two jurisdictions.

It is interesting to note that the Pakistan Protocol, which is an informal agreement made between the governments of England and Pakistan, provides that if minors who are subject to English jurisdiction are removed from England to Pakistan, then the authorities in Pakistan will return them to England for the English courts to decide who should have custody – and vice versa.

This is the kind of arrangement and degree of autonomy which it is necessary to have between the English legal system and any future *Shari’a* courts.

It should always be remembered that by virtue of the Human Rights Act 1998, the Muslims in the UK do have the right in theory to live as practising Muslims.

6 Concluding Observations

There is scope at present for *Shari’a* Councils to utilise arbitration procedures in order to apply Muslim *fiqh* – especially where both parties agree to this approach and to any decision which is made as a result of arbitration.

Even where one of the parties refuses to abide by an arbitration decision, that decision can still be enforced in the UK civil courts as an arbitration award, provided that the necessary formalities have been fulfilled. This approach is sometimes utilised by the Beth Din when settling disputes within the Jewish community.

The key to the success of this approach is that both parties must voluntarily agree to submit to the arbitration and to the decision of the arbitrator.

It should however be possible for Muslims in the UK to progress from the presently constituted *Shari'a* Councils to having their own *Shari'a* Courts. These can operate to begin with as a means of achieving alternative dispute resolution through mediation or arbitration – but once they are operating effectively and efficiently, it should be possible then to pursue more effectively proposals to have Muslim personal law recognised and accepted by English law – which would involve granting the *Shari'a* Courts a well defined jurisdiction concerning Muslims' internal affairs with which the civil domestic courts would not lightly interfere.

What is the justification for such a proposal, how would it work and how could it be implemented effectively with beneficial and not detrimental consequences?

INCORPORATING MUSLIM PERSONAL LAW INTO UK DOMESTIC LAW **– THE FUTURE ROLE OF ENGLISH SHARI'A COURTS**

1 Introduction

As we have seen, 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.

As we have already seen, if a Muslim dies intestate, his or her estate is not distributed in accordance with the *Shari'a* 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.

It should perhaps be pointed out that these arguments apply equally to all *bona fide* religious faith groups – whilst those of no faith already have a secular system of law in place.

2 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 the United Kingdom has signed and ratified the *European Convention of Human Rights*, the government of the day 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, usually 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 order to achieve a true balance between equality and diversity.

3 The Utilitarian Argument

This approach to treating the members of our multi-faith society equally (by granting them the freedom to conduct their internal affairs in accordance with their respective faiths) 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 refer to these holy books as constituting binding authority – and judges cannot give judgement in accordance with the criteria or commands and prohibitions which these holy books contain, even when, for example, judge, claimant and respondent are all Muslims.

How much simpler life would be for Muslims and members of the other minority religious groups – and for their 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) and if it automatically applied their respective laws of intestacy in the absence of a valid written will.

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.

4 Religious Courts

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 is 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 *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 the judgments of these courts are not usually recognised as binding or enforceable in the secular courts – but they could be and they should be.

In this proposed diversification, it would of course be necessary to have a system of registration of *bona fide* religious courts, including civil *Shari'a* Courts for the Muslims, in order to ensure the maintenance of standards and the exclusion of cowboy and kangaroo courts.

Once registered as a religious court, a decision of the court would be recognised as legally binding on the parties and if necessary legally enforceable in the County Courts and High Courts, just in the same way that an award made in an Employment Tribunal is enforceable in a County Court.

As regards the Muslim community, given the differences between Sunni and Shi'a *fiqh*, and also the differences of *fiqh* between the different *madhhabs* within these two main groupings, it should be possible to have *Shari'a* Courts which can apply the *fiqh* of all the *madhhabs* as required.

It would also be necessary to have either a statutorily defined presumption (or a contemporaneous sworn statement by the parties) 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 subsequently agreed with it or not.

For example, whereas at present the agreement to submit to an appropriate *Shari'a* Council in the event of a serious dispute can 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, in the proposed new system any dispute involving a Muslim marriage contract would automatically be dealt with by a *Shari'a* court, whether or not the contract referred to this possibility – and furthermore, any decision of that *Shari'a* court would be binding on the parties and if ignored, enforceable 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.

As regards contentious matters, in the absence of an agreement to disagree, there might be difficulty in achieving rapport between legal systems where the criteria applied within a religious legal jurisdiction differ significantly to the criteria currently

applied by the civil legal system – for example, as regards what sexual mores are defined as legally permitted and what partnerships are legally recognised.

This difficulty could be overcome provided that the respective jurisdictions are mutually exclusive and provided that the criteria applied in the subsidiary jurisdiction are neither unethical nor immoral.

Although, as we have already seen, civil partnerships are not permitted by the *Shari'a*, perhaps the greatest difference between the religious and the secular is the issue of multiple marriage. The secular law permits mistresses and forbids bigamy whereas the *Shari'a* permits up to four wives but forbids mistresses.

5 Polygamy and Bigamy

We live in a society where royalty, politicians and football (but not pop) stars 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 last 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 secular 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.

6 Implementation

Provided that these matters are 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 would no longer be 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. As with the *Divorce (Religious Marriages) Act 2002* provisions, this could be effected on a practical needs basis rather than being applied universally and blindly. In other words, for example, the enabling legislation could deal specifically with the Ecclesiastical courts, the Beth Din courts and the *Shari'a* courts, whilst making it possible for any other *bona fide* religious group to apply to the Lord Chancellor to make an order by way of statutory instrument that the group's religious courts should also be recognised as coming within the ambit of the enabling legislation. 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*.

7 Concluding Observations

The approach outlined above can be viewed simply as providing an effective mechanism for alternative dispute resolution for Muslims by means of religious mediation – which, as is the case with existing ADR systems, would lessen the strain on the main judicial system.

Alternatively, it can be regarded as a system of arbitration which applies principles acceptable to both parties – and to the law of the land.

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 United Kingdom: 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, may 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 and their procedures and personnel are well established. It would be relatively simple to recognise their decisions as being legally binding. The *Shari'a* Councils, although much younger, are already functioning to a limited extent – which in the areas outlined above and for the reasons given above, could and should be expanded.

Thus as regards the Muslims, clearly another major consideration is the training and selection of *qadis* – who would probably need to be bilingual, ideally trilingual (that is, fluent in Arabic, English and Urdu) – with a knowledge between them of all the *maddhabs*. This would mean that the various *Shari'a* Courts would have to be integrated and co-ordinated and it would be essential that their judges share a high standard of knowledge, training, competence – and hopefully wisdom.

Protocols would have to be established by statute in order to make it easier to ascertain which court should have jurisdiction to deal with a particular matter. The example of the Pakistan Protocol which has already been cited indicates that such protocols are possible and do work.

Just as the Employment Tribunal system was introduced to deal with a specific jurisdiction and has evolved over time, so also could the *Shari'a* Court system be initiated and developed, along with the other religious courts, each with its own particular personal law jurisdiction, each serving its own particular community.

In effect all that is being suggested is that the *Shari'a* Courts – together with any other already established or 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 either submitted to, or are subject to, their jurisdiction and they should be enforceable in the civil courts, exactly in the same way that an Arbitration Award which is made as regards parties who have agreed to submit to arbitration, or an award made by an Employment Tribunal, are 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 European Convention on Human Rights *Article 9* rights which the existing judicial system has up to now promised in theory but failed to deliver in practice.

8 The Relevant Articles and Protocols of the ECHR

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.

GLOSSARY OF ARABIC TERMS

ahlu'l-kitab : the 'people of the book', principally the Jews and the Christians whose religions are based on the Divine Books revealed to Musa (Moses) and 'Isa (Jesus), peace be on them; a term also used to refer to any other group who claim to be following a Divine Book revealed prior to the *Qur'an*.

akhira : what is on the other side of death; the world after this world in the realm of the Unseen.

al-ahkam al-khamsa : 'the five values', the categories of *fard* or *wajib*, *mandub*, *mubah*, *makruh* and *haram*.

'alim : a Muslim who has sound knowledge of the *Qur'an* and the *Hadith*, and accordingly of the *Shari'a* and the *Sunna*, and who puts what he or she knows into action.

Allah : The Lord of all the worlds and what is in them. *Allah* has ninety-nine Names all of which are from and within the One, *Allah*. *Allah*, the supreme and mighty Name, indicates the One, the Existent, the Creator, the Worshipped, the Lord of the Universe. *Allah* is the First without beginning and the Last without end. He is the Outwardly Manifest and the Inwardly Hidden. There is no existent except Him and there is only Him in existence.

amir : the one who commands, the source of authority in a situation; a military commander.

'anat : fornication (cf. *zina*).

baligh : someone who is an adult (cf. *bulugh*).

bi'l-marouf : according to reasonable usage, in a correct and commonly acceptable manner, with courtesy.

bulugh : the age of sexual maturity.

darar : damage.

deen : the life transaction, the way you live and behave towards *Allah*. It is submission and obedience to a particular system of rules and practices. Literally it means the debt or exchange situation between two parties, in this usage the Creator and the created, or as some say between the conditioned and the unconditioned, the limited

and the limitless, or the many and the One. *Allah* says in the *Qur'an* that surely the *deen* with *Allah* is *Islam*.

dhihar: see *zihar*.

dunya: this world, not as a cosmic phenomenon, but as it is imagined, inwardly and outwardly. It has been compared to a bunch of grapes which appears to be in reach but which, when you stretch out for it, disappears.

faqih: (plural *fuqaha*), a person learned in the knowledge of *fiqh* who by virtue of his knowledge can give a legal judgement.

fard: what is obligatory in the *Shari'a*. This is divided into *fard 'ayn*, which is what is obligatory on every adult Muslim; and *fard kifaya*, which is what is obligatory on at least one of the adults in any particular Muslim community.

faskh: cancellation, invalidation of a contract.

fatwa: an authoritative statement on a point of law.

fiqh: the formal study of knowledge, especially the practice of *Islam*. It is the science of the application of the *Shari'a*. A practitioner or expert in *fiqh* is called a *faqih*.

fiqh al-aqalliyat: 'jurisprudence of [Muslim] minorities', a new name for an old area of jurisprudence that used to be called *fiqh an-nawazil* – or 'jurisprudence of momentous events'.

fiqh an-nawazil: 'jurisprudence of momentous events', an area of *fiqh* covered mostly by the Malikis, which is concerned with the *fiqh* for Muslims living in a minority situation.

fuqaha: the scholars of *fiqh*, who by virtue of their knowledge can give an authoritative legal opinion or judgement which is firmly based on what is in the *Qur'an* and the *Hadith* and which is in accordance with the *Shari'a* and the *Sunna*.

hadd: (plural *hudud*), *Allah's* boundary limits for the lawful and unlawful. The *hadd* punishments are specific fixed penalties laid down by *Allah* for specified crimes which break these limits.

hadith: the written record of what the Prophet Muhammad said or did, may the blessings and peace of *Allah* be on him, preserved intact from source, through a reliable chain of human transmission, person to person.

hadith qudsi: the written record of those words of *Allah* on the tongue of the Prophet Muhammad, may the blessings and peace of *Allah* be on him, which are not a part of the revelation of the *Qur'an*, preserved intact from source, through a reliable chain of human transmission, person to person.

hakam: an arbiter.

halal: what is permitted by the *Shari'a*.

haram: what is forbidden by the *Shari'a*. Also *Haram*: A protected area. There are two protected areas, known as the *Haramayn*, in which certain behaviour is forbidden and other behaviour necessary. These are the areas around the *Ka'ba* in *Makka* and around the Prophet's Mosque in *Madina*, in which is his tomb, may the blessings and peace of *Allah* be on him.

hasan: an adjective describing a married person, from *hisn*, a fortress. A person who has become *muhsin* by marriage is subject to the full *hadd* punishment of death for *zina*.

hudud: (the plural of *hadd*), the limits. The boundary limits which separate what is *halal* from what is *haram*, as defined by *Allah*.

'idda: a period after divorce (3 menstrual cycles) or the death of her husband (4 months and 10 days) during which a woman must wait before marrying again.

ihsan: the inward state of the *mumin* who is constantly aware of being in the Presence of *Allah*, and who acts accordingly. *Ihsan* is to worship *Allah* as though you see Him, knowing that although you do not see Him, He sees you.

ijma': consensus, particularly consensus of the people of knowledge among the Muslims on matters of *fiqh*.

ijtihad: to struggle, to exercise personal judgement in legal matters. The faculty of deciding the best course of action in a situation, which is not expressly referred to in the *Qur'an* and the *Hadith*, and then choosing a course of action which is close to the *Sunna* and in accord with the *Shari'a*.

ila': a vow by a husband to abstain from sexual relations with his wife. If four months pass, it is considered a divorce (cf. *zihar*).

'ilm: (plural, *'ulum*) knowledge, science.

imam: (1) Muslim religious or political leader; (2) one of the succession of Muslim leaders, beginning with 'Ali, regarded as legitimate by the Shi'a; (3) leader of Muslim congregational worship.

iman: trust in *Allah* and acceptance of His Messenger, may the blessings and peace of *Allah* be on him. *Iman* grows in the heart of the one who follows the way of *Islam*. *Iman* is to believe in *Allah*; His Angels; His Books; His Messengers; the Last Day and the Fire and the Garden; and that everything, both good and bad, is by the Decree of *Allah*. Thus *iman* is the inner knowledge and certainty in the heart which gives you *taqwa* and *tawba* and the yearning to know more.

Islam: the Prophetic guidance brought by the Prophet Muhammad, may the blessings and peace of *Allah* be on him, for this age for the people and *jinn* who desire peace in this world, the Garden in the next world, and knowledge and worship of *Allah* in both worlds. The five pillars of *Islam* are the affirmation of the *shahada* (the affirmation that there is no god except *Allah* and that Muhammad is the Messenger of *Allah*); doing the *salat* (prayer); fasting during the month of *Ramadan*; paying the *zakat* (a tax on surplus wealth); and doing the *hajj* (the pilgrimage to Makka) if you are able.

jahiliyya: the time of arrogance and ignorance which precedes the time when the way of *Islam* is established as a social reality. Anyone who does not have wisdom suffers from *jahiliyya*.

ja'iz: permitted, another term for *mubah*.

Jannah: the Garden, Paradise, the final destination and resting place of the *Muslims* in the *akhirah*, once the Day of Reckoning is past. *Jannah* is accurately described in great detail in the *Qur'an* and in the *Hadith*.

Ka'ba: the House of *Allah*, in *Makka*, originally built by the Prophet Ibrahim, peace be on him, and rebuilt with the help of the Prophet Muhammad, may the blessings and peace of *Allah* be on him. The *Ka'ba* is the focal point which all Muslims face when doing the prayer. This does not mean that *Allah* lives inside the *Ka'ba*, nor does it mean that the Muslims worship the *Ka'ba*. It is *Allah* whom the Muslims worship, and *Allah* is not contained or confined in any form or place or time or concept.

kafir: (plural *kafirun*) the one who denies the Existence of *Allah* and who rejects His Prophets and Messengers, and who accordingly has no peace or trust in this life, and a place in the Fire in the next life. The opposite is believer or *mu'min*. Shaykh 'Abd'al-Qadir writes, '*Kufr* means to cover up reality: *kafir* is one who does so. The *kafir* is the opposite of the *mu'min*. The point is that everyone knows 'how it is' – only it suits some people to deny it and pretend it is otherwise, to behave as if we were going to be here for ever. This is called *kufr*. The condition of the *kafir* is therefore one of neurosis, because of his inner knowing. He 'bites his hand in rage' but will not give in to his inevitable oncoming death.' (*Quranic Tawhid*. Diwan Press. 1981).

khalif: the Arabic is *khalifa*, (pl. *khulafa'*); Caliph, someone who stands in for someone else, in this case the leader of the Muslim community, although it is sometimes used to describe the deputy of someone in a higher position of authority.

khatib: a speaker or orator; the one who delivers the *khutba*.

khul': a form of divorce initiated by the wife from her husband by giving him a certain compensation, or by returning back the *mahr* which he gave her.

khutba an-nikah: a speech delivered at the time of concluding the marriage contract.

kufr: disbelief, to cover up the truth, to reject Allah and refuse to believe that Muhammad is His Messenger, may Allah bless him and grant him peace.

li'an: mutual cursing, a form of divorce which involves oaths taken by the wife and husband when he accuses her of committing adultery and she denies it. They can never remarry after this.

madhhab: a school of law founded on the opinion of a *faqih*. The four main *madhhabs* now are the Hanafi, Maliki, Shafi'i and Hanbali schools. There are also *madhhabs* which have ceased to exist, for example, the Awza'i, Zahiri, Jariri schools and the *madhhab* of Sufyan ath-Thawri. The Shi'a also designate their *fiqh* as the 'Imami' or 'Ja'fari *madhhab*' after Ja'far as-Sadiq. Among the Shi'a, there are also the Akhbaris and the Usulis.

mahkama: court of justice, tribunal.

mahr: dower given by a husband to his wife on marriage. It can be immediate (*mu'ajjal*) and/or deferred (*muwajjal*).

mahram: a person with whom marriage is forbidden.

makruh: abominable, reprehensible but not unlawful in the *Shari'a*.

mamnu'a: what is prohibited in acts of worship in the *Shari'a*.

mandub: what is commendable, recommended.

masnun: *sunna*, referring to an act which the Prophet's early community performed regularly.

mubah: permissible, permitted; something for which there is neither reward nor punishment. Also called *ja'iz*.

mufside: what invalidates acts of worship in the *Shari'a*.

muhallil: a man who marries a woman who has been trebly divorced on the condition that he then divorce her so that her first husband can remarry her. Marriage solely for this purpose is not permitted.

muhsan: a person who has been married.

muhsana : the feminine of *muhsan*. As well as meaning a person guarded by marriage, it also refers to a chaste unmarried free woman.

muhsin : the Muslim who has *ihsan*, and who accordingly only gives reality to the Real, *Allah*. Only the *muhsin* really knows what *Tawhid* is. Shaykh ‘Abd’al-Qadir once said, “The difference between the *kafir* and the *muslim* is vast. The difference between the *muslim* and the *mumin* is greater still. The difference between the *mumin* and the *muhsin* is immeasurable,” not only in inward state, but also in outward action.

mumin : (plural *muminun*) the Muslim who has *iman*, who trusts in *Allah* and accepts His Messenger, may the blessings and peace of *Allah* be on him, and for whom the next world is more real than this world. The *mumin* longs for the Garden so much, that this world seems like the Fire by comparison and feels like a prison.

munafiq : (plural, *munafiqun*); a hypocrite, a person who outwardly professes *Islam* on the tongue, but inwardly rejects *Allah* and His Messenger, may the blessings and peace of *Allah* be on him, and who side with the *kafirun* against the *muminun*. The deepest part of the Fire is reserved for the *munafiqun*.

muslim : one who follows the Way of *Islam*, doing what is obligatory and avoiding what is forbidden in the *Shari’a*, keeping within the *hudud* of *Allah*, and embodying as much of the *Sunna* as he or she is able, through study of the *Qur’an* and the *Hadith* followed by action. A Muslim is, by definition, one who is safe and sound, at peace in this world, and guaranteed the Garden in the next world.

mustahab : what is recommended, but not obligatory, in acts of worship in the *Shari’a*.

mut’a : temporary marriage, which is forbidden in Sunni *fiqh*, but permitted in Shi’a *fiqh*; severance gift after divorce.

nafaqa : maintenance, adequate support (especially of immediate family).

Nar: the Fire of Hell, the final destination and place of torment of the *kafirun* and the *munafiqun* in the *akhira*, once the Day of Reckoning is past. Some of those Muslims who neglected what is *fard* in the *Shari’a* and who did grave wrong action without making *tawba* will spend some time in the Fire before being allowed to enter the Garden, depending on the Forgiveness of *Allah* – Who forgives every wrong action except *shirk* if He wishes. *Nar* is accurately described in great detail in the *Qur’an* and in the *Hadith*.

naskh : abrogation, annulment.

nawafil : what is voluntary in acts of worship in the *Shari’a*.

nikah : marriage.

nushuz : violation of marital duties on the part of the husband or wife.

qadhf : slanderous accusation; accusing a chaste person of fornication or a married person of adultery. Unless the accusation is supported by the testimony of four male witnesses, the penalty is eighty lashes.

qadi : (plural *qudat*), a judge, qualified to judge all matters in accordance with the *Shari’a* and to dispense and enforce legal judgements.

qadi al-qudat : the chief *qadi*, in charge of all other *qadis*.

qar’: (plural *quru’*), a term used in reference to *’idda* which either means becoming pure after a menstrual period, or the menstrual period itself. (See Qur’an 2: 228).

Qur'an: the 'Recitation', the last Revelation from *Allah* to mankind and the *jinn* before the end of the world, revealed to the Prophet Muhammad, may *Allah* bless him and grant him peace, through the angel Jibril, over a period of twenty-three years (beginning in 610 and ending in 632), the first thirteen of which were spent in *Makka* and the last ten of which were spent in *Madina*. The *Qur'an* amends, encompasses, expands, surpasses and abrogates all the earlier revelations revealed to the earlier Messengers, peace be on all of them. The *Qur'an* is by far the greatest of all the miracles given to the Prophet Muhammad by *Allah*, for he was illiterate and could neither read nor write. The *Qur'an* is the uncreated word of *Allah*. The *Qur'an* still exists today exactly as it was originally revealed, without any alteration or change or addition or deletion. Whoever recites the *Qur'an* with courtesy and sincerity receives knowledge and wisdom, for it is the well of wisdom in this age.

quru': the plural of *qar'*.

rajam: stoning to death.

sadaq: another word for *mahr*.

Shari'a: a road. The way of *Islam*, the way of Muhammad, may the blessings and peace of *Allah* be on him, the road which leads to knowledge of *Allah* and the Garden. Shaykh 'Abd'al-Qadir writes, 'It is the behaviour modality of a people based on the revelation of their Prophet. The last *Shari'a* in history has proved to be that of *Islam*. Its social modality abrogates all previous *shara'i* e.g. Navaho, Judaic, Vedic, Buddhist, etc. These *shara'i* however, continue until the arrival and confrontation takes place in that culture with the final and thus superior *Shari'a* – *Islam*. It is, being the last, therefore the easiest to follow, for it is applicable to the whole human race wherever they are.' (*Qur'anic Tawhid*. Diwan Press. 1981).

Shi'a: lit. a party or faction, specifically the party who claim that 'Ali should have succeeded the Prophet as the first *khalif* and that the leadership of the Muslims rightfully belongs to his descendant.

shighar: a forbidden form of marriage agreement whereby a man gave his daughter in marriage to another man who in return gave his daughter in marriage to him, without either of them paying any *mahr* to their respective brides.

shirk: the unforgiveable wrong action of worshipping something or someone other than *Allah* or associating anything or anyone as a partner with *Allah*, that is, to worship what is other than *Allah*, including your self, your country, your universe and anything it contains. *Shirk* is the opposite of *Tawhid*. *Allah* says in the *Qur'an* that He will forgive any wrong action except *shirk*. Shaykh 'Abd'al-Qadir writes, 'Idol-worship means giving delineation to the Real. Encasing it in an object, a concept, a ritual, or a myth. This is called *shirk*, or association. Avoidance of *shirk* is the most radical element in the approach to understanding existence in *Islam*. It soars free of these deep social restrictions and so posits such a profoundly revolutionary approach to existence that it constitutes - and has done for fourteen hundred years - the most radical rejection of the political version of idolatry, statism. It is very difficult for programmed literates in this society to cut through to the clear tenets of *Islam*, for the Judaic and Christian perversions stand so strongly in the way either as, rightly, anathema, or else as ideals. The whole approach to understanding reality has a quite different texture than that known and defined in European languages, thus a deep insight into the structure of the Arabic language itself would prove a better introduction to the

metaphysic than a philosophical statement. The uncompromising *tawhid* that is affirmed does not add on any sort of 'god-concept'. Nor does it posit an infra-god, a grund-god, even an over-god. Christian philosophers were so frightened by this position that when they met it, to stop people discovering the fantasy element in their trinitarian mythology they decided to identify it with pantheism in the hope of discrediting it. That they succeeded in this deception is an indication of how far the whole viewpoint has been kept out of reach of the literate savage society. Let it suffice here to indicate that there is no 'problem' about the nature of *Allah*. Nor do we consider it possible even to speak of it. No how, who, or what or why. It is not hedging the matter in mystery. It is simply asking the wrong questions. The knowledge of *Allah* is specifically a personal quest in which the radical question that has to be asked is not even 'Who am I?' but 'Where then are you going?' (*Qur'anic Tawhid*. Diwan Press. 1981).

Sunna: the form, the customary practice of a person or group of people. It has come to refer almost exclusively to the practice of the Messenger of *Allah*, Muhammad, may the blessings and peace of *Allah* be on him, but at the time that *Imam* Malik, may *Allah* be pleased with him, compiled *Al-Muwatta'*, meaning 'The Well-Trodden Path', there was no sense of setting the *Sunna* of the Prophet apart from the *Sunna* of *Madina*, so that the actions of its knowledgeable people were given even more weight than the behaviour of the Prophet related in isolated *Hadith*. The *Sunna* of the Prophet Muhammad and the first Muslim community of *Madina al-Munawarra* is a complete behavioural science that has been systematically kept outside the learning framework of this society.

Sunni: the main body of Muslims, who recognise and accept the first four *khalifs*.

tahlil: an intervening marriage contracted for the sole purpose of legalising re-marriage between a divorced couple (see *muhallil*).

talaq: divorce.

talaq al-ba'in: final irrevocable divorce.

talaq al-raji': a divorce which can be revoked (e.g. the first or second pronouncement).

taqlid: in reference to *fiqh*, it means the following of previous authorities and the avoidance of *ijtihad*.

taqwa: awe of *Allah*, which inspires a person to be on guard against wrong action and eager for actions which please Him.

tawba: returning to correct action after error, turning away from wrong action to *Allah* and asking His forgiveness.

Tawhid: Unity in its most profound sense. *Allah* is One in His Essence and His Attributes and His Acts. The whole universe and what it contains is One unified event which in itself has no lasting reality. *Allah* is Real. Shaykh 'Abd'al-Qadir writes, 'Our *Imam* said, "It is a meaning which obliterates the outlines and joins the knowledges. *Allah* is as He always was. *Tawhid* has five pillars: it consists of the raising of the veil on the contingent, to attribute endlessness to *Allah* alone, to abandon friends, to leave one's country, and to forget what one knows and what one does not know." His greatest statement on *tawhid*, which Shaykh al-Akbar has called the highest of what may be said on the subject is, "The colour of the water is the colour of the glass." Commenting on this Shaykh Ibn 'Ajiba said, "This means that the exalted Essence is subtle, hidden and luminous. It appears in the outlines and the forms, it takes on their

colours. Admit this and understand it if you do not taste it.” *Tawhid* is itself a definition whose meaning is not complete for the one who holds to it until he has abandoned it or rather exhausted its indications and abandoned it for complete absorption in the One.’ (*Qur’anic Tawhid*. Diwan Press. 1981).

ta’zir: deterrence, discretionary penalty determined by the qadi.

thayyiba: a woman who has been married.

‘ulama: the plural of *‘alim*. Those who know. The *Qur’an* states: “Those who know fear Allah.”

‘ulum: plural of *‘ilm*.

usul: fundamentals, essentials.

usul ad-deen: meaning *‘ilm usul ad-deen*, the science of the fundamental principles of the *deen* as distinct from other belief systems; the science of the tenets of belief. It can also be designated as *‘al-fiqh al-akbar*, ‘the greatest understanding’.

Umma: the body of Muslims as one distinct Community.

wajib: what is necessary, but not obligatory, in acts of worship in the *Shari’a*.

wakil: a person who is an authorised representative, agent or proxy.

wali: a guardian who is responsible for another person.

walima: a feast accompanying a wedding.

yamin: (plural *ayman*), oath. Oaths form a complimentary role to evidence in Islamic law. If a person is accused of an offence without the evidence of sufficient witnesses of good standing, he or she may swear an oath as to his or her innocence to avert punishment.

Yawm al-Akhira: the Day After – the end of the world, and thus the Last Day, when everyone who has ever lived will be given life again, gathered together, their actions and intentions weighed in the Balance, and their place in either the Garden or the Fire confirmed. *Yawm al-Akhira* is also referred to in the *Qur’an* as *Yawm ad-Deen*, the Day of the Life Transaction; *Yawm al-Ba’th*, the Day of Rising from the grave; *Yawm al-Hashr*, the Day of Gathering; *Yawm al-Qiyama*, the Day of Standing; *Yawm al-Mizan*, the Day of the Balance; and *Yawm al-Hisab*, the Day of Reckoning. That Day will either be the best day or the worst day of your life, depending on who you are and where you are going. The *Yawm al-Akhira* is accurately described in great detail in the *Qur’an* and in the *Hadith*.

zihar: an oath by the husband that his wife is like his mother’s back, meaning she is unlawful for him. It was a form of divorce in the *jahiliyya*, not permitted in Islam.

zina: unlawful sex, adultery, fornication (cf. *‘anat*).

