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An Early Discussion on Islamic Family Law in the English Jurisdiction¹

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Background

In 1975 the Union of Muslim Organisations of the United Kingdom and Eire (UMO) called a conference in Birmingham to discuss the place of shari'a family law in England. In January 1977 the UMO, together with the Anglo-Conservative Society, held a further meeting, this time in the House of Lords. The meeting discussed a number of practical issues facing Muslims, in particular those relating to schooling. But the main item on the agenda was a demand for the 'domestication' of Islamic family law for Muslims in Britain.²

In 1975 the Muslim case for the demand had been formulated by Sheikh Syed M. Darsh, an Azhar-educated Egyptian who had recently been seconded by the Egyptian authorities to the Regent's Park Mosque in London:

When a Muslim is prevented from obeying this law he feels that he is failing a religious duty. He will not feel at peace with his conscience or the environment in which he lives.... They firmly believe that the British society, with its rich experience of different cultures and ways of life, especially the Islamic way of life which they used to see in India, Malaysia, Nigeria and so many other nations of Islamic orientation, together with their respect for personal and communal freedom, will enable the Muslim migrants to realize the identity within the freedom of British society. When we request the host society to recognize our point of view we are appealing to a tradition of justice and equity well established in this country. The scope of the family law is not wide and does not contradict, in essence, the law here in this country. Both aim at the fulfillment of justice and happiness of the members of the family. Still, there are certain Islamic points which, with understanding and the spirit of accommodation, would not go so far as to create difficulties in the judiciary system. After all, we are asking for their

application among themselves, the Muslim community, as our Christian brothers in Islamic countries are following in the family tradition and the Christian point of view. The Qur'an itself has given them this right.³

At the time, the UMO initiative attracted only fleeting interest in the media, and within the legal institutions there was no significant response. Dr Zaki Badawi, the then director of the Islamic Cultural Centre, part of the Regent's Park Mosque complex, while not supportive, decided to test popular demand. In English law there was no reason why someone could not write a will requiring that his or her property be disposed of according to Islamic principles. It just had to be clear as to which version of Islamic law (or shari'a) to use, so that there was no room for ambiguity. Such a will would be valid unless a relative contested it. Dr Badawi had a will form prepared by competent lawyers and made it available to worshippers. No one took advantage of the service.⁴ Perhaps this was not all that surprising, as the Muslim community in Britain, as in the rest of Europe, was at the time still relatively young of age. Only a decade later did questions of disposition of property at death start to become a practical issue for a growing number of people. Thus, we saw tensions begin to be recorded in France between the expectations of Algerians and the demands of French law with regard to the disposition of immovable property.⁵

At the time, evidence of Muslim demand for the application of Islamic family law was patchy and remained so until the end of the 1980s. A quick check through a few Islamic magazines published in Europe during the 1980s found little evidence of interest in the subject. *The Straight Path*, published in Birmingham from the Green Lane Mosque, and closely associated with the Ahl-i-Hadith movement, only mentioned an interest in Islamic family law in response to external events. During this same period, the question of Islamic family law did not feature in the pages of *Al-Fadschr*, published by the Shi'ite Islamic Centre in Hamburg, nor was it raised in the Dutch monthly *Qiblah*, published in The Hague. Even the journal of the network of German-speaking Muslims, *Al-Islam*, published in Munich, did not deal with the question, even though it regularly carried general articles about shari'a. In the late 1980s the UMO's initiative remained, to the best of my knowledge, the only one.

The impression was that the demand for implementation of Islamic family law for Muslims in Europe was usually only expressed by Muslim leaders when offered an opportunity to do so, or when reacting to particular events. Much attention was paid to the overarching role

of the shari‘a, but when interpreted in practical terms, the magazines concentrated on the core ritual practices (the ‘five pillars’), economic life and the ethics rather than the law of family life, especially as regards the position of women.

However, a Muslim ‘demand’ for the implementation of Islamic family law can be registered in ways other than direct expressions by leaders and in their media. Throughout this early period, it was clear that the practice of paying a dower, *mahr*, remained commonplace. English legal expertise suggested at the beginning of the 1980s that English law would condone it when it appeared in a Muslim marriage contract.⁶ Rude-Antoine, writing in the mid-1980s, indicated that over three-quarters of marriages between North Africans living in France involved payment of *mahr*.⁷ The recurring problem in Britain of so-called limping marriages (that is, where a civil divorce has taken place but the absence of a religious divorce prevents the woman from remarrying in a form acceptable to her community) was another indicator, as was the high proportion of Muslim marriages that were formalized both in civil law terms and in Islamic terms. The breakdown of marriages, in particular, was an early matter of concern. Unpublished research conducted in the Birmingham family courts in the early 1980s showed that four out of five divorce applications from parties with Muslim-sounding names were initiated by women, and the two most common grounds for divorce applications were the husband’s violence against the wife or his abandoning or deserting her.⁸

That there was a growing demand for some kind of shari‘a-related provision, or at least a perception that there was such a demand, was indicated by the formation in the early 1980s of the first two – rival – United Kingdom Islamic Sharia Councils, both located in London. These councils made themselves available to advise individuals on correct shari‘a solutions to personal and family problems and, if necessary, to issue a decision which, at least in the community if not in civil law, might have the weight of authority. There were also other, more visible indications that Muslims were expecting the institutions of the countries of residence to adapt to some of their religious requirements, other than those of family law. The issue that had been most common was that of access to halal food. Furthermore, English schools were in the main adjusting well to Muslim girls wearing some form of Islamically acceptable dress, while the question of the *hijab* in mainland Europe was still a few years off. Also, local governments in the United Kingdom were beginning to meet requests for burial facilities, and employers and local planning authorities were being faced with requests for prayer facilities.⁹

Seeking clarification

It was the question of family law in particular that contributed to setting the agenda for a three-year project which had been instigated by the Brussels-based Churches' Committee for Migrant Workers in Europe (CCMWE) to consider the significance of the shari'a for Muslim communities in Europe.¹⁰ The working group started work in 1983 and consisted of four members nominated by the CCMWE: Jan Henningsson (Sweden), Michael Mildenberger (West Germany), Jan Slomp (Netherlands), and myself (United Kingdom). Two Muslim members were invited to join the group, namely Syed Darsh (UK) and Mehdi Razvi (West Germany).

Given the limited resources of a European (Protestant) church network working in this field, the possibility of a study that would meet academic criteria was never considered. Instead, the project was conducted as a 'listening exercise' consisting of three parts: a questionnaire sent to interested 'experts' known to the members of the working group; a series of four seminars, two each at the Quaker Woodbrooke College, Birmingham, United Kingdom, and at the Evangelische Akademie, Arnoldshain, West Germany; and correspondence with invited religious and academic experts at the drafting stage of the final report. In this way, by the end, the exercise had involved a total of 95 individuals. Most were from Germany and the United Kingdom, but a few were also from France, the Netherlands and Sweden. They included not only Muslim and Christian religious leaders and scholars, but also practising lawyers and local and national government officials.

The first stage of the work was to draft a questionnaire to be sent to a number of significant Muslim individuals and organizations around Western Europe to get their views on shari'a generally and, more specifically, its family law dimensions. The questionnaire asked five questions:

- 1 What does shari'a mean for you personally?
- 2 What does shari'a mean for your community in this country?
- 3 What do you see as the function of shari'a in your home country and in the Muslim world generally?
- 4 Does your understanding of shari'a create problems for yourself and your community in this country? If so, which?
- 5 What contributions do you see shari'a making to European society?

The questionnaire was answered by sixteen persons, of whom eleven were Muslims from three different European countries (the United Kingdom, West Germany and the Netherlands) and originating from eight different Muslim countries, and with a variety of different back-

grounds and occupations. There is no space here to analyse the responses in detail,¹¹ but they covered a broad spectrum of views, ranging from those that required a comprehensive implementation of shari'a to those that suggested that it cannot apply in a non-Muslim environment such as that of Western Europe, or that shari'a needs a thorough rethink in relation to the modern world before any consideration of its implementation. Many of the respondents preferred to talk of shari'a as an ethical system rather than something with legal implications.

Worth noting is that none of the respondents wanted to define shari'a as a legal code, although the implications of some of the answers to the subsequent questions suggested that in an ideal world this might be close: shari'a to one respondent meant 'the Law of God which was revealed by Him to mankind through His Prophet and Apostle Muhammad in order to be observed by them in every time and place as any individual (or group) with faith in Islam as his (its) religion.' But others simply equated it with religion, giving 'the direction to life and formulating one's disposition'. Many of the respondents pointed out that the implementation of shari'a should take account of the context, and some particularly stressed the necessity of this in the context of modernity, not least in the minority situations of Europe: 'new *fiqh* has to be written for the Muslim countries themselves and much more so for Muslim minorities living now in non-Muslim countries.'

One response described the process of a growing consensus among the manifold Muslim community which ought to be brought about by concentrating upon the essentials of shari'a and carefully adjusting them to the new situation, according to methods provided by the Islamic tradition. Such processes may suffer from the confusion 'between the permanent divine law ... and the human elaboration' and, consequently, by 'some hasty and mistaken judgments' hinder the 'healthy mutual interaction with the society' of the host-country. It should be kept in mind that 'Islam indicates its basics and characteristics, but it does not meanwhile reject any other intellectual or social outcome which is not against its principles'. Moreover 'a clear distinction may be kept between the application of shari'a in a Muslim country and society, and its application among a Muslim community which lives as a minority in a non-Muslim country.' Accordingly, two answers emphasize that in such a case, shari'a can only be applied within a scope determined by the constitution and the laws of the host country. By contrast there is a group of Muslims (among them mainly converts) which 'will take the shari'a "lock, stock and barrel" ... and defying British law where they don't feel it is Islamic, e.g. marriage and divorce laws'.¹²

A significant concern was voiced by a number of the respondents who pointed to secularization as the big challenge; the 'real problem', however, is 'far more serious and fundamental'. Western Europe is increasingly becoming a 'non-religious and even irreligious society with norms which a Muslim finds difficult to comprehend, let alone accept'. This is a second level of problems that Muslims – as they remind us – share with their Christian brethren and sisters. 'The secular society emits values which a Muslim does not share or accept'.¹³

As a next step, the working group organized four seminars, two in Germany and two in Birmingham. The participants comprised Muslim and Christian intellectuals and community leaders, legal experts, and government officials. Given that the issue had been raised in the United Kingdom and at that time was not really exciting any interest outside the United Kingdom, the following account will be limited to the discussions at the two seminars that took place in Birmingham over two week-ends in February and September 1985. The first event was attended by about twenty people, who had been personally invited, while the second attracted thirty people following a public announcement. The first seminar focused on family law, while the second one looked at implications for legal institutions and processes, as well as at broad, practical issues of integration in a multi-faith society (including education and religious practice in the workplace) which I will not deal with further here.

Considering family law, this was examined in the first seminar under the standard headings of marriage, divorce, inheritance, and the maintenance and custody of children. The participants first surveyed the general principles of English law as it stood at the time and of the Islamic legal tradition, before going on to an item-by-item comparison. As an example, the participants compared the principles of the Hanafi tradition of divorce as it was being applied in Pakistan after the Muslim Family Law Ordinance of 1961, and the English Matrimonial Causes Act of 1973 (see Table 1). A similar exercise was conducted on the basic principles of marriage (see Table 2). They concluded that in general terms, there was little dispute in principle between the two sets of principles. But there remained two major tensions.

With reference to divorce, Muslim participants wanted the collection and evaluation ('due consideration') of the facts required by English law to be conducted by a Muslim panel for Muslim litigants. The panel, it was argued, could function under the existing law as an extension of the Family Division of the High Court. This was an option on which the non-Muslim participants were divided.¹⁴

In the case of marriage, it was the Muslim participants who were divided, in that some did not wish to give up the age of puberty as

being sufficient to enter into a marriage, while others, following the legislation of most Muslim countries, were happy to accept the minimum age set down in English law. The question of marriage guardians for women, required by the traditional shari‘a though under varying conditions depending on the school, was quietly ignored.

TABLE 1 *Grounds for dissolution of marriage*

England	Pakistan
<i>Grounds:</i>	
Irretrievable breakdown of marriage	Incompatibility
<i>Facts:</i>	
- unreasonable behaviour	- unreasonable behaviour
- adultery/intolerable	- intolerable
- desertion	- imprisonment for 7 years or more
- separation for 2 years (consent)	- disappeared for 4 years or more
- separation for 5 years	- husband's inability to maintain
<i>Grounds for nullity:</i>	
- physical/mental disorder	- physical/mental disorder
- lack of consent	- lack of consent
- under age	- under age

TABLE 2 *Conditions for marriage*

England	Pakistan
- free consent	- free consent
- sound mind	- sound mind
- public announcement	- public announcement
- witnesses	- witnesses
- age 16-18 (parental or court consent)	- age: puberty
- unmarried	- unmarried if woman: husband max. 4 wives
	- dower (<i>mahr</i>)

Interestingly, the issue of polygamy was not one that raised tempers. There was consensus among the participants that ‘polygamy is, of course, impermissible in English law.’ However, looking at the practice of English law relating to cohabitees (‘common law spouses’), the participants did ‘not feel the discrepancy between English and Islamic

family law in this regard is insurmountable.¹⁵ Other Muslim participants took the view that since polygamy is not obligatory in Islam, living in a system in which it is banned should not be a problem for Muslims.

A practical problem on both sides, Muslim and non-Muslim, seemed to be the general popular ignorance of the law of Islam. In the Muslim community this manifested itself typically in a popular equation of social custom, often very strongly held, with shari'a. What are often broadly perceived by the English population as strongly male-dominant practices are, as often as not, just as much in conflict with shari'a as they are with English law and expectations. A point made with some effect by the Muslim participants was that the application of Islamic family law to the Muslim community would lead to a major improvement in the actual social status of women within many Muslim communities. Of course, this is, on the whole, correct, but by European standards of gender equality it would be insufficient, as some basic distinctions and inequalities would be retained in the fields of divorce and inheritance.

The issue of how to introduce some form or other of shari'a into the English legal system revolved around two main approaches. For some Muslims, the nature of the shari'a as a total, integrated system based on sources divinely revealed makes it extremely difficult to accept anything other than a separate system of family law, with its own autonomous judiciary. Parliament's role would be to make the space in the country's law and to establish the necessary courts. But the specific content of the law could not be under the control of Parliament, nor could there be appeal to higher, non-Muslim courts. The system envisaged would be much like that which functions in countries like Lebanon, Syria and Israel, which still retain elements of the old Ottoman *millet* system, with its self-governing confessional communities. At the other extreme is the model of a continuing unified system, but with the law opened up in a number of directions so as to create a generally permissive legal context in which different groups could voluntarily live according to their particular wishes. An example could be the theoretically possible legalization of polygamy, within which framework a Muslim could, if he so wished, enter into a polygamous marriage.

Another view expressed by some Muslim participants looked to the contents of the law, rather than its theologically overriding nature. In their view it was possible to build on the identified convergence of legal principles and look to some method of building consideration of Islamic rules and expectations into the existing system of law. The concept of a tribunal became central in the discussions, although clearly,

different kinds of tribunal were intended by different participants. Some saw potential in distinct Islamic family tribunals before which Muslims could opt to appear. It was accepted by some, but not all, that the decisions of such tribunals could be subject to appeal into the general English system. Another view of such tribunals was one of a quasi-judicial body that would deal with cases with the purpose of presenting to the English family courts a settlement which takes into account consideration of Islamic rules. It was felt that one of the advantages of some form of tribunal was that it could be seen as a method to be utilized by other communities, such as Jews and Catholics, with a similar attachment to religious family law.

The possibility that a reform of the adversarial court procedures, which in the mid-1980s still prevailed in the family courts but were under discussion, was seen as providing a context in which some variation of the tribunal approach might become practicable. In a uniform system of family courts based on arbitration and reconciliation, a particular bench might be identified as Muslim, and parties could opt to appear before a bench of their choice. This might ensure that Muslim expectations were taken into account within a legal system that remained essentially unified.

Issues and implications

Despite the passing years, the discussion then, just as similar discussions now, raises a number of substantial questions. For a start, questions can be raised about the degree of consensus needed to be able to reach a unified Muslim family code. In fact, it depended on a number of assumptions: first, that the discussion of philosophical and ideological foundations was suspended; second, that both sides accepted the context of a plural and diverse society with room for all; and third, that the Muslim participants, although generally traditionalists, did not feel bound by the results of classical jurisprudence (*fiqh*) and were prepared to exercise their personal judgment (*ijtihad*) in the light of the current environment.

Some observers might argue that such assumptions by themselves contribute to making the results of no operational interest, because such assumptions will generally not be met in actuality. The second assumption, that of living together in a diverse society has, I would suggest, become broadly accepted, despite the recent attacks on multiculturalism from certain political quarters. The arguments today are more about concepts and ideological polemics than about the ordinary prac-

ticalities of everyday life in the cities. The third assumption, the Muslim readiness to use *ijtihad*, is one that has a sound classical foundation and is one of the key characteristics of most contemporary Islamic movements, even when they are of the more conservative kind.

More problematical is the first assumption, namely that the discussion of philosophical and ideological foundations of a unified Muslim family code is suspended. The apparent contradiction is between a secularized Europe, whose legislative and judicial processes are primarily empirical in nature and rest on the foundations of popular sovereignty (although the historical foundations are clearly Christian), and on the other hand an Islamic system which is founded on the revelation of the word of God in the Qur'an and on the guiding behaviour and sayings of an inspired prophet, a system in which the law rests on the sovereignty of God. In fact, I would suggest that the difficulty here is more apparent than real. Even though God is the sovereign lawgiver, his authority still has to be interpreted, and this is a human process. This issue lies at the very centre of much current Muslim discussion about the role of Islam in the state. The real difficulty is not to be found in the clash between secularism and divine sovereignty but in the question of the identity of the judicial authority and its legitimacy. This is a dimension of an area of Islamic thinking which has undergone a radical transformation in recent generations – and which is still contested.

This transformation can be briefly described as follows. In the classical tradition the shari'a and its institutions had been the primary field of confrontation between the political power and the Islamic authorities, the former in the shape of an often militarized state and the latter in the shape of the religious scholars, or *'ulama*, and their institutions. The conception that God was the lawgiver in a polity or community defined primarily by its shared religion was the focal point of public legitimacy. Early attempts by the political leadership in the shape of the Umayyad and then the early Abbasid caliphs to present themselves as the representatives of that divine legislative power failed. It was the *'ulama* who came to be accepted as those who held the authority to interpret, develop and refine the human understanding of the divine will. One of the most remarkable aspects of developments in shari'a in the modern period has been the extent to which the state has succeeded in gaining control of legislation, including family law. It has done this partly by manipulating the various instruments of power, hard and soft, and partly by pursuing the one technique that had traditionally been available, namely control over the incomes of the *'ulama*. In the modern period this has been done by co-opting them as judges and experts in family law in the now government-controlled courts and by spon-

soring training in the Islamic religious sciences, including law/*fiqh* in government-funded universities. In historical terms, this intrusion of the state in the field of shari'a is truly radical. This contributes to complications in Europe, where some Islamic tendencies will refuse to lend the state legitimacy, at least in core sectors of the shari'a such as family law, while others will seek to co-opt the official institutions to legitimize practices whose validity in the community rest on a reference to the shari'a.

Other significant changes have taken place in the practice and thinking of shari'a, all in one way or another related to that basic revolution. One is the culmination of a long process whereby the shari'a had been increasingly restricted to the domain of family law. However, there was a shift around the 1960s, when Islamic thinkers and movements began to try to regain ground. In various instances, one saw attempts to reintroduce aspects of shari'a beyond the family chapters, as is illustrated by the growth of Islamic banking and economics both in practice and as an intellectual discipline across the Muslim world and into the major international banking centres outside the Muslim world.¹⁶ In all of these innovations, the state has been an active partner. In some cases the political leadership has been the initiator, and in other cases the innovators have made what are often great efforts to get the state on board. In such an environment, it is the more radical-puritanical movements¹⁷ which have marked out their claims to legitimacy by distancing themselves from the state, reasserting the independence of Islamic teaching, above all the shari'a, from the control of the political authorities.

But these radical movements themselves also represent a revolutionary break with the classical tradition's division of the world into the 'territory of Islam' (*dar al-islam*) and the 'territory of war' (*dar al-harb*). Generally this division of the world lost its significance, except for possibly a symbolic dimension, in the course of the 20th century, as traditional Islamic states were first colonized and then replaced by modern national states (although the national substance of such states has tended to remain weak). In the classical tradition it was generally agreed that shari'a only applied in *dar al-islam* where there was a legitimate Islamic authority, and where there were Islamic courts that could adjudicate disputes in the correct manner and legitimately. This meant that when Muslims travelled outside the Islamic lands, they were no longer subject to shari'a, or at least not to those parts which had to do with human and social relations. If possible, the religious rituals were still to be performed, although a few voices suggested that even this was not necessary.

The main difference between the majority of Muslims and the minority of radical-puritans today is that the latter regard the modern state as irrelevant and lacking legitimacy.¹⁸ They have often discarded the traditional geographical distinctions of *dar al-islam/al-harb* and personalized them: *dar al-islam* is where they are, while *dar al-harb* is the fallen world around them.¹⁹ The authors of the CCME project report were perhaps being premature when they concluded that, 'Most Muslim leaders in Europe today regard the old concepts of *dar al-harb* and *dar al-islam* as outmoded and irrelevant.'²⁰ Although the terminology is mainly used in small, mostly politically extremist circles, elements of such thinking can be found more widely. With the shift from a territorial towards a personal paradigm, it has become possible to argue within the traditional Islamic frameworks that shari'a (or perhaps more correctly here, *fiqh*) potentially applies to Muslims wherever they are, thus making possible claims that Muslims in new minority contexts should also strive to practise the shari'a, not only in rite but also in other chapters. First and foremost, this includes family and personal status law, but also economic law – and, the hard-liners would argue, also in such areas as tort and possibly criminal law.

In the context of such a discussion, it is the authority under which a judicial process functions, rather than the substance of the law itself, which becomes a key consideration. This partly accounts for the internal Muslim disagreement in the 1985 seminars about the nature of a tribunal or a court that might be asked to adjudicate Muslim family law disputes. For some participants it was clearly not enough that the existing English family court system takes Islamic expectations into account. The court dealing with Muslim family disputes should itself be Muslim in its character and staffing. There was further disagreement on the matter of appeal among those who took this view, some insisting that an appeal either not be allowed or be allowed only to a higher Muslim tribunal. In fact, this view was probably also a reflection of the experience of Muslim family courts under British rule in India before 1947. Muslim family cases, like all other cases, could in those days ultimately be appealed to the Judiciary Committee of the Privy Council in London. There were instances of the higher courts in India, and of the Privy Council, either over-ruling a decision with reference to common law principles of equity or holding to a decision which was in effect a misunderstanding of rulings in the classical Hanafi tradition.²¹ Such unhappy results for Muslim scholars should be avoided, if possible.

Such lack of trust in the intent of European authorities can clearly be traced back to colonial experiences. The suspicions vary in strength and character in different parts of the Muslim world and are probably

stronger among, for example, Algerians than among Muslims from the Indian subcontinent. Basically this leads to the conclusion that European authorities cannot be trusted to consider Muslim practices fairly and correctly. This suspicion is mirrored from the European side. The implementation of Islamic family law is often interpreted as a political manoeuvre with a variety of purposes. There is little doubt that the demand for shari'a has been voiced from some quarters as part of an internal rivalry for leadership among the Muslim minorities. Equally there is little doubt that the demand is also part of the process of cultivating links between European Muslim communities and major foreign Muslim sponsors, some but not all of them being states.

The Discussion Continues

The seminars of 1985 and the project of which they were part have not lost their relevance. The issues that were identified then are still with us today:

- What is meant by Islamic family law?
- How compatible are shari'a family law rules with European practice?
- Who decides what Islamic family law rules are in a particular country?
- Who would be responsible for implementation?
- Who might be subject to it?
- How far is the demand driven by sectional interests?
- How do European democratic and human rights traditions deal with this issue, especially with regard to gender equality?

Most of these questions are far more technical than can be dealt with in the remainder of this chapter, but several of the other chapters in this volume touch on them. Let me here elaborate on the current disagreements among Muslims regarding the legitimacy of the authority seeking to implement family law.

Just as it was in England that the issue was first raised, so it is in England that it has remained most acute, and certainly where it has attracted most attention. Not long before the 1985 seminars were held, the first two UK Islamic Sharia Councils were established in London. They reflected both political and doctrinal differences, although a few of the members served on both councils. One represented a modernizing approach to the field and was an initiative of Dr Zaki Badawi, well-known for looking for constructive ways of integrating Islam into

the European environment. The other was sponsored by the Muslim World League, representing a line close to Saudi Arabia's Wahhabi version of Islam. Numerous anecdotal accounts indicate that they were primarily engaged with cases of women seeking an 'Islamic' approval of a divorce. Since then, there has been a multiplication of Sharia Councils and, in the most recent decade, also the innovation of the Muslim Arbitration Tribunal.²² Whereas the legal status of the decisions of the Councils is unclear, the Tribunal explicitly operates under English law, particularly the Arbitration Act of 1996. The issue of contention is the following.

Since an Islamically conducted marriage (*nikah*) has no legal standing in England, it follows in principle that such a marriage cannot be dissolved in the usual way through the family courts. In effect, it is up to the parties to decide how seriously to take their *nikah* if they decide to end the relationship. It appears that a majority of Muslim couples who get married in the civil process also get married by *nikah*. Among many of the Muslim cultural traditions, the civil marriage is regarded as something akin to an 'engagement' which only becomes a full marriage with the *nikah*.²³ It is with respect to this background that problems arise with divorce, as many will regard a divorce by the normal civil procedure to be inadequate. They will therefore want an Islamic divorce both for their own satisfaction and for the divorce to be recognized in the community. Traditionally such a divorce can be pronounced unilaterally by the husband (*talaq*), while the wife needs to go through some form of judicial process (*khul'*).

Different Islamic bodies have different views on this. According to research carried out at Cardiff University, the Birmingham Sharia Council accepts a civil divorce as valid and simply offers confirmation, if the parties so wish:

... the shari'ah Council regard the obtaining of a civil divorce as clear evidence of the parties' view that the marriage is over, and for the shari'ah Council, this is conclusive, such that it does not deem it necessary to grant a religious divorce to enable the parties to remarry under shari'a (although it will do so to reflect the parties' wishes for 'recognition' by the Council of the ending of their marriage).²⁴

This degree of accommodation is unusual. Much more common is the view that for a divorce to be valid in Islamic terms it needs to be conducted under an Islamic authority, particularly if it is initiated by the wife in the form of a *khul'*. This is stated unequivocally in a *fatwa* on the Internet:

I would like to affirm that the divorce issued by the civil court in response to the wife's request is neither a valid divorce nor legitimate marriage dissolution. This means that such a wife remains a wife and is not free to marry another man. Marrying another man while the original marriage is still in place is a violation of Islamic law and a crime.²⁵

The UK Islamic Sharia Council takes a similar view but is more careful in its invitation to Muslims to use its services:

The Council conducts Islamic divorces only: it does not conduct cases as part of the UK legal or judicial systems: for advice regarding a civil divorce, please consult a qualified, legal representative.²⁶

The Muslim Arbitration Tribunal (MAT), established in 2007, has set out to solve the problem of tensions between shari'a expectations and the English judicial process by seeking to operate under the terms of the 1996 Arbitration Act. Ultimately its decisions are therefore subject to the English courts, should a party be dissatisfied with the process or the result. The language used by the MAT is ambiguous. Its description of its procedures refers to 'the Tribunal'.²⁷ However, in a recent document on forced marriages it regularly uses the term 'Judges'.²⁸ It is also clear from this document that the MAT sees itself not just as a forum for Alternative Dispute Resolution,²⁹ but also a potential partner or advisor to the authorities in solving difficult problems, in this case forced marriages.³⁰ MAT has thus formally located itself under the ultimate judicial authority of the English (non-Muslim) courts. This lies close to the main option suggested by the participants in the 1985 seminars, namely an attempt to create a judicial forum, in the MAT case a quasi-judicial one, which would have Islamic authority while situated within the formal English system, although one step removed by seeking to function as arbitration. For the same reason, the MAT project is opposed by the various shari'a councils for theological reasons – MAT is simply not sufficiently independent of the non-Islamic state – although one is entitled to suggest that political rivalries also have a role to play.

But England is no longer alone in facing this challenge. In his recent study on Muslims in France, John Bowen refers to French Muslim debates about *halal* and *haram* marriages.³¹ At one end of the spectrum are those Muslims who refuse to have anything to do with 'kafir marriage' and live together solely with a *nikah*. At the other end of the spectrum is a practice pursued by many *imams*, also in Belgium, namely agreeing to perform a *nikah*, so long as a civil marriage has already been conducted³² – thus accepting to operate within the civil legisla-

tion. There is also evidence that a number of *imams* give in to parties who insist on having what they call a *halal* marriage, and then possibly going on to a civil marriage at some time later, a practice which carries a possible prison sentence for the *imam*. Some French Muslim scholars argue that the conditions for a valid French marriage are quite valid also in Islamic terms, so there should not be a problem – but again it is the question of whether the authority formalizing the marriage can be regarded as Islamically legitimate.

Recently conducted research in Denmark (unfortunately only in Danish) shows that these questions are also relevant there.³³ The most common practice in all generations and across the ethnic groups, according to this report, is that an Islamic marriage is conducted. Many of these are not formalized as valid civil marriages, although here there are substantial ethnic differences, with the absence of civil marriages being most common among Somalis and least among Turks. Dissolution of such *nikah* marriages, with or without an accompanying civil marriage, is usually conducted through some form of informal arbitration involving family members and/or an *imam*. This can be particularly difficult for women, especially in cultural contexts that are often very unhappy about divorce of any kind. This situation is encumbered by a Danish political-legal environment which is much more reluctant than that of England to countenance cultural flexibility in this area.

In conclusion, it could be argued that the tensions regarding the wish for some form of shari'a family law principles to apply among Muslims living in Europe are – yet another – consequence of Europe's past imperial adventures. The shift of political, legal and cultural primacy to the European imperial centres from the mid-18th century until the late 20th century contributed, firstly, to the freezing of the historically natural evolution of family law with changes in Muslim society and, secondly, to Islamic family law becoming the symbol *par excellence* of Islamic resistance to the imperial projects and their consequences. The arguments over the place of shari'a in Europe therefore have deep symbolic meanings associated with minority identities, which we can only hope to overcome during a long period of negotiation and trial and error.

Notes

- 1 An early version of some parts of this chapter have previously been published in my paper "Il diritto familiare nelle rivendicazioni dell'inserimento nei paesi europei", in J. Waardenburg (ed.), *I musulmani nella società europea*, Turin: Fondazione Giovanni Agnelli, 1994, pp. 79-89.

- 2 Pasha, Syed Aziz, 'Muslim family law in Britain', unpublished paper presented at a meeting at the House of Lords, 20 January 1977, p. 1.
- 3 Ibid, p. 2.
- 4 Based on the account given to me by the late Dr Badawi himself in 1980.
- 5 E. Rude-Antoine, 'L'héritage et les familles maghrébines en France', *Hommes et migrations*, 1097 (15 November 1986), pp. 34-42, originally published in Italian in *Sociologia del dritto*, 1 (1986).
- 6 D. Pearl, 'Islam in English family law', *Research Papers: Muslims in Europe*, 9 (March 1981), pp. 6-10.
- 7 Rude-Antoine, 'L'héritage', p. 41.
- 8 The research was conducted by one of my MA students for a thesis that was never completed. It was based on a survey of the court case files covering 1982 and 1983.
- 9 See J.S. Nielsen, 'Muslims in Britain and local authority responses', in T. Gerholm and Y.G. Lithman (eds.), *The new Islamic presence in Europe*, London: Mansell, 1988, pp. 53-77.
- 10 I was the rapporteur of the final report 'Islamic law and its significance for the situation of Muslim minorities in Europe', *Research Papers: Muslims in Europe*, 35 (September 1987). It was also published in German as 'Das islamische Recht und seine Bedeutung für die Lage der muslimischen Minderheiten in Europa', *Evangelische Pressedienst*, 34/87 (3 August 1987), and in French as 'La loi islamique et son importance pour la situation des minorités musulmanes en Europe', Brussels: Comité des églises auprès des travailleurs migrants en Europe, 1987.
- 11 This was done in an unpublished five-page paper by Michael Mildenerberger, dated 31 August 1983. The full file of all this material was never published but I have a copy in my personal possession.
- 12 Mildenerberger, p. 3.
- 13 Mildenerberger, p. 4.
- 14 See further below.
- 15 From the unpublished 'Report of a seminar held at Woodbrooke College, Selly Oak, 22-24 February 1985', p. 3.
- 16 In the United Kingdom, Islamic banking has gone into the retail market. See for example, the Islamic accounts at Lloyds TSB Bank: http://www.lloydstsb.com/current_accounts/islamic_account.asp, accessed 11 November 2011.
- 17 Here I refer particularly to those trends which are often referred to as Wahhabi or Salafi, rather than to political-radicals sympathetic to networks such as Al-Qa'ida.
- 18 In this, of course, they follow in a minority tradition within Islamic political thought that has often been opposed to the state, whether in the form of Kharijism and its successive 'rejectionist' cousins or in the form of the refusal of 'ulama' to take public employment.
- 19 This can be seen as a spiritualized and pietistic version of the political dualism of people such as Syed Qutb and Abu'l-A'la Maududi.
- 20 Nielsen, 'Islamic law and its significance', p. 19.

- 21 A classic example of this, in the area of gifts and endowments, is referred to in N.J. Coulson, *A History of Islamic Law*, Edinburgh: Edinburgh University Press, 1964, pp. 167-170. A similar situation prevailed in Bosnia-Herzegovina after it became a protectorate of Austria in 1878, see Fikret Karčić, 'Secular state and religion(s): Remarks on the Bosnian experience in regulating religion and state relations' in European Abrahamic Forum, *Religion and Secular State: Role and Meaning of Religion in a Secular State from Jewish, Christian and Muslim Perspectives*, Zürich: European Abrahamic Forum, 2008, pp. 15-25.
- 22 www.matribunal.com, accessed 28 November 2011.
- 23 For a similar understanding in France see John Bowen, *Can Islam be French? Pluralism and Pragmatism in a Secularist State*, Princeton: Princeton University Press, 2010, pp. 160f. For England see Samia Banno, 'Muslim women, divorce and Shari'ah councils in Britain' in Rubya Mehdi *et al.* (eds.), *Interpreting Divorce Laws in Islam*, Copenhagen: DJØF, 2012, pp. 259-288.
- 24 Gillian Douglas *et al.*, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts Report of a Research Study funded by the AHRC*, Cardiff University: Cardiff Law School, 2011, pp. 47f., accessed 28 November 2011 at <http://ssrn.com/abstract=1940387>. I am grateful for the steady feed of relevant information provided by colleagues on the mailing list 'Accommodation in Pluri-Legal Europe' (pluri-legal@jiscmail.ac.uk).
- 25 <http://www.islam21c.com/islamic-law/912-fatwa-a-civil-divorce-is-not-a-valid-islamic-divorce>, accessed 27 November 2011. The author, Sheikh Haitham al-Haddad, is a member of the UK Islamic Sharia Council but is here writing in his personal capacity, <http://www.islamic-sharia.org/about-us/about-us-4.html>, accessed 28 November 2011.
- 26 <http://www.islamic-sharia.org/how-it-works/how-the-isc-works-3.html>, accessed 28 November 2011.
- 27 http://www.matribunal.com/procedure_rules.html, accessed 1 December 2011.
- 28 <http://www.matribunal.com/downloads/MAT%20Forced%20Marriage%20Report.pdf>, accessed 27 November 2011. On its main page (see next note) it is more careful when it says that its 'arbitrators act like judges'.
- 29 The MAT explicitly associates itself with this concept; see http://www.matribunal.com/alt_dispute_res.html, accessed 27 November 2011.
- 30 <http://www.matribunal.com/downloads/MAT%20Forced%20Marriage%20Report.pdf>, especially section 6; accessed 27 November 2011.
- 31 John Bowen, *Can Islam be French? Pluralism and Pragmatism in a Secular State*, Princeton: Princeton University Press, 2010, pp. 158-165.
- 32 To conduct a religious marriage before the civil marriage is a criminal offence in Belgium, France and the Netherlands.
- 33 Annika Liversage and Tina Gudrun Jensen, *Parallelle Retsopfattelser i Danmark*, Copenhagen: SFI, 2011, also accessible at <http://www.sfi.dk/rapportoplysninger-4681.aspx?Action=1&NewsId=3144&PID=9267>.