

**Britain's Religious Courts:
Marriage, Divorce and Civil Law**

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**Findings 3:
The Relationship between the Courts, Society and Civil Law
A Response by Ahmad Thomson**

Introduction

I would like to thank everyone involved in this research project for their careful, balanced and informative research which has been conducted against the backdrop of the current judicial trend to implement human rights law in such a way as to secularise some of the basic practices of any religious group wishing to protect their religious ethos – which human rights law is in fact ostensibly meant to protect!

I have learnt a great deal from this research, which has saved me the time I simply did not have to conduct the research myself!

Although the current research has been conducted mainly within a modern context, clearly the present forms of religious courts in the British Isles are the product of a lengthy historical process, which can perhaps be summarised briefly as follows:

Christian Communities:

Unitarian Christianity first arrived in the British Isles during the first or second century CE and was gradually displaced by Trinitarian Christianity during the fourth and fifth centuries CE, with the Synod of Whitby in 664 officially deciding that Roman Christianity was superior to Celtic Christianity on the grounds of the assertion that St Peter had been given the keys to the kingdom of heaven in Rome.

After the Reformation and creation of the Church of England in 1534 by King Henry VIII, there were various power struggles between the Roman Catholic and Protestant Churches in the British Isles – but both communities had their courts and both greatly influenced the content of the law of the land, even when it came to what oaths had to be legally sworn, or were legally recognised.

Jewish Communities:

The first Jews are said to have settled in England along with William the Conqueror and there is still preserved in the archives of Westminster Abbey, for example, a deed executed in Lincoln in 1271 which refers to an English Beth Din of that time.

When King Edward I expelled the Jews from the British Isles in 1290, those who wished to remain were obliged to convert to Christianity and – rather like their contemporary *conversos* in Spain and Portugal, could only keep their religious practices and traditions alive in secret.

In 1656, the Jews were officially permitted back into the British Isles by Oliver Cromwell and since then the Jews, both Sephardi and Ashkenazi, have moved from the status of being denied just about every civic right except the duty to pay taxes to becoming well established, influential and valued members of society.

Muslim Communities:

Although the presence of a significant number of Muslims in the British Isles is a relatively new phenomenon – one of the longer term consequences of *firstly*, the European slave trade and then *secondly*, the European colonisation of traditional Muslim lands – perhaps one of the most significant albeit largely ignored historical events was the appointment in 1894 of William Abdullah Quilliam as the Shaykh al-Islam of the British Isles by Sultan Abdalhamid II, the last effective khalif of the Muslims who was deposed in 1909. This appointment was recognised by Queen Victoria and by the law of the land.

As the khalif's representative, Abdullah Quilliam would have been authorised to establish one or more Shari'a courts in the British Isles to deal with Muslim personal law matters – while recognising that as a British subject he was obliged by the Shari'a to abide by the law of the land – and to appoint suitably qualified Muslim judges to deal with these matters.

In the absence of a Muslim khalif, the position of Shaykh al-Islam of the British Isles today remains vacant – and as the research has revealed, various modern Shari'a Councils have been formed recently out of the growing need to have them, rather than as the result of any appointment made by a recognised ruler of the Muslims.

In the absence of an appointed Shaykh al-Islam of the British Isles, the various Shari'a Councils that exist today (and therefore excluding the ones invented by Civitas) are not unified as regards the manner in which they have come to be established, although of course they are unified insofar as they follow and implement the guidance contained in the Qur'an and the Sunnah of the Prophet Muhammad, may the blessings and peace of Allah be on him.

The researchers have, in the current modern context, correctly identified “the distinctly de-centralised nature of religious authority in Islam” – but it should be pointed out that this situation is not based on the traditional teachings and practices of Islam, but rather on a temporary state of affairs which has been the consequence of the temporary removal of the Muslim khalifate in 1924.

It should be remembered that the Prophet Muhammad, blessings and peace be on him, said that this matter began as a prophecy and a mercy (referring to himself); and would become a khalifate and a mercy (referring to the rightly guided khalifs); and would become a khalifate and a tyranny (referring to those later khalifs who abandoned the guidance of Islam); and then towards the end of time would become a khalifate and a mercy once again – indicating that in time the true khalifate will be re-established, however much the current prime minister of England doth protest!

Only God knows how and when this will take place, so this response is based on the world as it is at present – and not on the past, nor on prophecies about the future.

The need for religious courts

The existence of different religious courts in the British Isles for almost two millenia confirms the existential need for them. If history is to repeat itself, one would expect the Muslim personal law courts to become in time as well established as the Christian and Jewish personal law courts, with similar recognition being granted to them – hopefully without any interim thirty years wars or banishments from the realm!

Anyone who believes in God and the Last Day and the Next World wishes to live in obedience to God's commands – and to order his or her life in accordance with God's guidance – not only in order to be pleasing to God, but more significantly to avoid the Fire and to enter the Garden in the next world. Although the fundamental beliefs are virtually the same, the detail does vary from one community to another – and even within different branches of each community – and this is why each faith community needs its own court to assist its own members.

The interaction between religious courts and the legal system

Although it is in the nature of things that not everyone believes in God and the Last Day and the Next World, given that such religious beliefs are such a powerful and all-pervading element in society, establishing harmonious interaction between the various religious personal law courts and the predominantly secular legal system is not only sensible, but also essential to the well-being and stability of society.

As the research confirms, none of the religious courts desire the mafia status of having a code of practice which is out-lawed. They all wish to be in-lawed – that is to function within the law of the land.

There are various bad opinion tanks – they cannot really be described accurately as 'think' tanks – who seek to brand anything to do with the Shari'a of Islam as extremist and terrorist in nature, even to the point of blatantly inventing 'evidence' to support their claims, as well as discussing their imagined 'threat' in terms of Muslims conspiring to overthrow the state and inflict Shari'a law on everyone whether they want it or not, but this kind of speculation is narrow, blinkered and misconceived.

I welcome the essentially positive approach of the researchers who have recognised from their actual research – and not from projecting pre-conceived ideas onto the mirror of existence – that each religious community simply wishes to be self-governing in their respective personal law matters without imposing their beliefs or practices on those who are not members of their respective communities.

Given this recognition, the researchers have accordingly sought to establish, in the light of current practice, what degree of further reasonable accommodation of the different religious personal law courts is possible in our modern multi-cultural, multi-faith society.

The assessment of what would constitute further reasonable accommodation has been directed mainly towards the Muslim personal law courts – partly because the Christian and Jewish personal law courts in the British Isles have in fact already enjoyed reasonable accommodation for several centuries; partly because most people have not studied Muslim personal law and either fear or are intrigued by the unknown; and partly because the foundations of Islam are less amenable to human interference and are therefore regarded by some, whether rightly or wrongly, as being more likely to be ‘problematical’.

This is because the content of Muslim personal law is still strongly connected to the original revelation of the Qur’an and the established Sunnah of the Prophet Muhammad, blessings and peace be on him – which remain unaltered in spite of various attempts during the last fourteen centuries to re-form them. It has simply not been possible to re-define the teachings of Muhammad in the same way that the teachings of Moses and Jesus, blessings and peace be on them, came to be re-defined once they were transmitted outside the Tribe of Israel, for whom they were intended, and into Europe.

For this reason the way of Islam entails above all a direct transaction between a person and his or her Creator, rather than being a manifestation of a socially defined religion which to a greater or lesser extent has in some way become disconnected from its divine origins and is therefore more prone to being secularised when expedient.

Reasonable accommodation

The issue that underlies consideration of what constitutes reasonable accommodation is whether or not it is possible for different jurisdictions to peacefully co-exist and indeed interact, even though their sources and foundations may be very different. Can a secular system of law which neither accepts the existence of God nor the authority of divine revelation – although it recognises the right of people to believe in such matters – actually accommodate the jurisdiction of a religious personal law court which is based on such beliefs, for the benefit of those who hold such beliefs, especially when such accommodation will not adversely affect anyone else who does not hold such beliefs?

Even if a secular system of law can make such an accommodation, is this not the thin end of a thick wedge, some will argue, in the sense that it may open the door to the all or nothing brigade who would prefer to extend the jurisdiction of the religious court to all matters concerning the regulation of society, including not only commercial and criminal law matters, but also administrative and governmental matters?

In response to which, it can be argued as follows:

Almost every group in society – whether it be, for example, the conservatives, or the communists, or the anarchists, or the eco-warriors or the Muslims – would love everyone else to think and believe the same as them.

Even almost every group whose members worship God believe that they more than any other group are doing God's will – whether it be, to use Arabic terminology, the *yahud* (the ones who say, we are the rightly guided), or the *nasara* (the ones who say, we are the ones will be saved), or the *muslimun* (the ones who say, we have submitted to the will of God – we hear and we obey).

Almost every group in society recognises, however, that everyone will never be the same. Differences are in the nature of things, however anyone believes these things have come into existence.

In a parliamentary democracy, laws are amended, or made, or eliminated by elected members of parliament who represent the people who have chosen them. Ultimately whatever reasonable accommodation is enacted has to be sanctioned by laws made by parliament. It is therefore highly unlikely that any worst fear scenarios are going to be recognised and legalised by parliament.

In other words, unreasonable accommodation is highly unlikely.

My own personal view, which is but one of many, is that in the sphere of religious personal law, reasonable accommodation would constitute the recognition of not only the jurisdictions but also the decisions of the different religious personal law courts by the legal systems of the British Isles – and I say 'systems' because already there are differences between the English, Welsh, Scottish, Northern Ireland, Republic of Ireland and Channel Islands jurisdictions.

In practical terms this would mean that any marriage or divorce recognised by a religious personal law court as being valid would be recognised as a valid marriage or valid divorce by these main legal systems. This would then eliminate the common practice of *either* having two marriages (religious and civil) and, in the event of divorce, two divorces (religious and civil), *or* having only a religious marriage and, in the event of divorce, only a religious divorce – neither of which would be recognised as valid by the civil law, with all the legal consequences that this entails.

Such reasonable accommodation would in turn mean that the law of bigamy would have to be amended. This is because the Muslim *nikah* contract cannot contain the current civil wording of “to the exclusion of all others”, since a Muslim man is permitted by the Shari'a of Islam to have up to four wives, provided that he can maintain them and their children.

Although the European Jewish and Christian communities have come to accept this legal limitation, it does not derive from the original teachings of Moses and Jesus, peace be on them – as attested, with reference to both the Old and New Testaments, by amongst others the renowned English poet, John Milton.

As regards ancillary relief in divorce proceedings, it is suggested that this would be a matter of recommendation to the parties by the religious personal law court – while enforcement would have to remain within the jurisdiction of the main legal systems.

Matters of inheritance should also be governed by religious personal law courts. For example, the estate of a Muslim who dies without leaving a valid will should be automatically distributed in accordance with the Shari'a – or, at the very least, a Muslim should be able to complete a simple statutory declaration confirming this preference and thereby excluding automatic application of the intestacy rules.

In order to facilitate such reasonable accommodation, what remains to be done?

As regards the Christian and Jewish religious personal law courts, it is suggested that in fact very little needs to be done. Their respective religious personal law courts already have established procedures, criteria and safeguards which have been applied for centuries. They have already enjoyed reasonable accommodation for some considerable time. All that remains is for them to enjoy a more direct recognition by the main legal systems of what they already recognise.

As is clear from the historical analysis with which this response began, the current (and therefore excluding the imagined) Muslim personal law courts in the British Isles are in a different situation and condition entirely. Not only are they relatively 'young', but also as already noted they have come into being from the bottom up, rather than from the top down. None of them have been established in accordance with directions emanating either from the Shaykh al-Islam of the British Isles (who has not yet been appointed), or from the acknowledged leader of the Muslims of the British Isles (who has not yet been recognised). They are local or regional organisations, some with branches, which have been formed at a grass-roots level, simply because they are needed.

It follows therefore that for a realistic reasonable accommodation of the jurisdiction of Muslim personal law courts by the main legal systems in the British Isles, there is prior internal administrative work that needs to be done by the Muslim communities:

Firstly, it would be helpful for the main Muslim personal law courts to unite under one umbrella organisation. This should be possible in a way that it would not be possible, for example, for the Roman Catholic and Protestant religious personal law courts to unite under one umbrella – or for the Sephardi and Ashkenazi Battei Din to unite under one umbrella.

It is, however, unlikely that the Sunni and Shi'a religious personal law courts could unite under one umbrella, because there are some major irreconcilable differences between them, both in terms of what marriages are permitted (for example, the Shi'a permit temporary (*muta*) marriage) and also they apply different rules of inheritance – whereas in contrast, although there are some variations between the four traditional Sunni *madhhabs* (schools of jurisprudence), these can easily be accommodated under one umbrella along with the more recent Islamic modernist 'pick and mix' *madhhab*.

Secondly, although the criteria and procedures which the various Muslim personal law Shari'a Councils apply and follow are broadly based on the Qur'an and the Sunnah, it would help if these could be standardised as much as possible – without of course either re-defining or limiting the broad parameters permitted by the Shari'a.

If these two preliminary steps can be taken, preferably sooner rather than later, then it would make it far easier for Parliament to understand exactly what it would be reasonable to accommodate – and accordingly after due consideration and debate to enact such accommodation.

Conclusion

The researchers have noted in particular that the Shari'a courts recognise that, "Muslims in Britain have an obligation according to the shari'ah, to abide by the law of the land in which they are residing," and in general that the religious personal law courts, "have recognised the boundaries of their remit in relation to civil divorce processes on the one hand, as well as their very significant religious role in the administration of religious law on behalf of their faith community, on the other."

As the colourful history of the development of English law illustrates, however, the law of the land is not written in stone. It is capable of changing with the times. It has enjoyed a many centuries old tradition of absorbing and benefiting from the best (and sometimes not quite the best) legal principles and practices from a multitude of "overseas" jurisdictions originating from the north and east, including those of the Celts, the Saxons, the Vikings, the Jutes, the Angles, the Romans and the Normans, as well as those of the Jews, the Christians and the Muslims.

There is currently a recognition that as regards religious personal law courts, a change in the law would enable and enhance the "just and constructive relationship between Islamic law and the statutory law of the United Kingdom" to which the Archbishop of Canterbury referred in his talk given on the 07 February 2008. In principle, the "transformative accommodation" of certain aspects of the Shari'a, especially Islamic personal law, as a "supplementary jurisdiction" is increasingly being recognised as positive, necessary and inevitable.

This response has sought to indicate, in a little more detail, what could perhaps be accepted as being practically capable of being reasonably accommodated.

I believe that the English legal system will not be weakened but rather strengthened and invigorated by the fresh inclusive transfusion which is envisaged, especially once people realise that minority faith groups are seeking only the liberty to apply their respective religious personal law in the conduct of their own personal affairs within their respective communities on a voluntary basis – and not to impose it on everyone in the country as a whole whatever their beliefs or ways of life may be.

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