

ARBITRATION CONFERENCE

Regents Park Mosque

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“Applying Islamic Fiqh in UK Arbitration Law”

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Introduction

- At present Muslims in the UK face hardship in that their personal law is not recognised by the secular civil courts. Marriages and divorces conducted in accordance with the *Shari‘a* of Islam are, for example, 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 for Muslims, 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.
- If a Muslim dies intestate, his or her estate is not distributed in accordance with the *Shari‘a* of Islam but in accordance with the rules of intestacy. This leads to difficulties as regards the entitlement to and ownership of shares in the deceased’s estate.
- As regards commercial transactions generally, Muslims are often obliged to follow practices and accept terms in their contracts which are contrary to the *Shari‘a*.
- In other words, Muslims find themselves following a *deen* which is not Islam.
- One way of overcoming these difficulties will be to incorporate Muslim personal law into UK domestic law.
- Another way to apply Islamic *fiqh* in a practical way is by introducing it into civil legal transactions by way of arbitration.
- Both of these approaches will be greatly facilitated by establishing *Shari‘a* courts whose *qadis* are conversant with the four main *madhhabs* (if they are Sunni) or with *Jafari fiqh* (if they are Shi‘a).
- Here is a vision of the future to bear in mind as we deal with the present :

Shari‘a Courts – and their Foundations

- There is nothing to stop the Muslims in the United Kingdom establishing their own *Shari‘a* courts and using them to regulate their personal affairs and settle civil disputes, provided they do so voluntarily. The Jewish community established their *Beth Din* courts in the United Kingdom centuries ago and use them regularly.
- In fact the various UK *Shari‘a* Councils are the precursors of what will eventually become *Shari‘a* courts, *insh‘Allah* – but they need to be improved and unified.
- Since the Muslims in the UK have not yet had the courage or common sense to choose a leader and to give *bay‘a* to hear and obey “in accordance with the *Sunna* of Allah and the *Sunna* of the Prophet, may Allah bless him and grant him peace, in what I am able”, there is a lack of co-ordination and a lack of unity amongst the various Muslim communities in the UK.

- This disunity will not be remedied by creating an umbrella organisation which seeks to represent affiliated Muslim organisations but does not follow the Sunna.
- The media are exploiting this disunity by attacking one Muslim organisation one week and another Muslim organisation another week, encouraging Muslims not to have a good opinion of their fellow Muslims and not to belong to any organisation.
- The cure for this disunity is simply to follow the Sunna as regards governance.
- The office of Shaykh'ul-Islam of the British Isles – recognised in the 19th century by Queen Victoria and by the leader of the Sunnis and by the leader of the Shi'as – still exists but remains vacant at present.
- Once the office of Shaykh'ul-Islam of the British Isles has been filled, insh'Allah, it will be possible to unify the Muslim community in the UK – by the Muslims giving their oath of allegiance to him or to an Amir appointed by him – and to then organise the affairs of the Muslims in accordance with the Shari'a and the Sunna, in action as well as in word.
- It will then be possible to agree on when Ramadan begins and ends, on who should collect the zakat and to whom it should be distributed.
- As regards the zakat on wealth, it will be the responsibility of the Shaykh'ul-Islam to guarantee the quality of the gold dinar (equivalent to 4.25 grams of 22 carat gold) and the silver dirham (equivalent to 3.0 grams of sterling silver) – in which all traditional fuqaha agree zakat *must* be paid.
- It will still be possible to use the coin of the realm and paper money as fulus – in which all traditional fuqaha agree zakat *cannot* be paid.
- The relationship between the gold dinar and the silver dirham was established by sayyedina 'Umar, may Allah be pleased with him : 7 gold dinars must be equivalent to 10 silver dirhams.
- The relationship between the gold dinar and silver dirham with fulus will naturally find its own level in the market place. Experience shows that since the time of the Prophet Muhammad, may Allah bless him and grant him peace, up until now, the price of a sheep has always been a gold dinar and the price of a chicken has always been a silver dirham.
- It will also be possible to unify and organise today's Shari'a Councils as proper Shari'a courts – and to ensure that the qadis appointed for them (by virtue of the authority of the Shaykh'ul-Islam) have sufficient knowledge and wisdom to judge correctly. Allah says in the Qur'an that the 'ulama' are the ones who fear Allah.
- The Shari'a courts will be able to deal with virtually all disputes which arise in Muslim personal law. This means that they will not only be dealing with matters of marriage and divorce – but also with matters of inheritance and matters of trading and commerce.
- The Shari'a courts will not be in a position to impose the hadd punishments.
- Clearly this process will take time, but it is necessary if the Muslims are to have proper Shari'a courts.

- History demonstrates that the muminun have established the deen in every age – and that only the munafiqun assert that what Allah has commanded is impossible. Nafi‘ reported that ‘Abdullah ibn ‘Umar visited ‘Abdullah ibn Muti‘ in the days at Harra in the time of Yazid ibn Mu‘awiya. Ibn Muti‘ said, “Place a cushion for Abu ‘Abd’ar-Rahman,” but he replied, “I have not come to sit with you. I have come to you to tell you a hadith which I heard from the Messenger of Allah, may Allah bless him and grant him peace. I heard him say, ‘Whoever withdraws his hand from obedience will have no excuse when he stands before Allah on the Day of Judgement, and whoever dies without having bound himself by an oath of allegiance will die the death of one belonging to the days of the Jahiliya.’” (*Sahih of Imam Muslim: 766.4562*)
- Bearing this vision of the future in mind – not as a dream, but as a goal – we can now consider what can be done in the meantime at a practical level :

Incorporation of Muslim personal law into UK domestic law :

- The recognition of Muslim personal law by UK domestic law has been considered elsewhere (see <http://www.wynnechambers.co.uk/pdf/AMSS-ATNotes220204.pdf> and <http://www.wynnechambers.co.uk/pdf/UMO060304.pdf> for example) and proposals have been presented to the government.
- The Home Office was recently requested to consider these proposals once again, in the wake of the London bombings in July 2005, since their implementation would be a positive means of combating extremism.
- Once Muslim personal law has been recognised by UK civil law, this will mean that in the event of a Muslim party to a dispute refusing to abide by a qadi’s judgment, the civil courts will nevertheless recognise that judgment as a binding decision which is enforceable in a UK civil court.

Applying Islamic Fiqh in UK Arbitration Law

- It is possible right now for two Muslims who have a dispute to voluntarily agree that it should be settled in accordance with the Shari‘a and that they will accept and submit to the judgement of a particular ‘alim or Shari‘a Council.
- Human nature being what it is, however, what happens if one of the parties does not wish to keep to this agreement? How can the ‘alim or Shari‘a Council enforce the judgement, 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 judgement 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 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.

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 to appeal and the procedures involved have therefore to be contained within the arbitration agreement.

- Marriage Contract (Nikah) :

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 khulla 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 or deferred or both, are usually included in the marriage contract.

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 an appropriate religious court 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 :

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 the arbitration agreement signed before a Shari'a Council hearing as outlined above.

However, the marriage contract cannot be used to oust English law – so, 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 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 while still complying with the Shari'a.

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

Conflict of Laws :

- As we have just seen, 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 differences between the two.

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 the 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.

Concluding Observations

- There is scope at present 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.
- 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.
- The vision of the Muslims in the UK should be to progress from 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 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 by English law.
- The approach outlined above can be viewed simply as providing an effective mechanism for alternative dispute resolution for Muslims by means of religious arbitration – which, as is the case with existing ADR systems, would lessen the strain on the main judicial system.
- Although there are some who assert that it would not be possible to have a plurality of laws being applied simultaneously in the UK, in fact this is already the case : England, Scotland, Wales and Northern Ireland already have their own laws as well as having shared laws.
- All that is being suggested is that Shari'a courts should be given an enhanced status by the English legal system. Their decisions should be recognised as binding on the parties who have submitted to their jurisdiction and enforceable in the civil courts.
- This means that Shari'a courts would complement and assist the existing secular courts, but not supplant them – and in the process assist in securing the *European Convention on Human Rights Article 9* rights assured by the *Human Rights Act 1998* – which the existing judicial system has up to now promised in theory but failed to deliver in practice.

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

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

- (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

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

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

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

Article 1 of the *ECHR* states:

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

Article 13 of the *ECHR* states:

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

Article 14 of the *ECHR* states:

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