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# English Courts and Transnational Islamic Divorces: What Role for Personal Liberty of Muslim Women?

Ilias Bantekas\*

*English courts consider the validity of a talaq obtained abroad on the basis of the lex matrimonii, without examining whether the circumstance of the divorce, both factual and legal, offend English public policy. An anthropological inquiry into talaq obtained in most Muslim nations reveals that androcentric culture – as opposed to religious prescription as such – largely distorts the Quranic vision of this institution. This author suggests that English courts and the scholarly/religious community should entertain the notion of the contractual nature of nikah (marriage) in order to assess the consequences of the talaq. If a nikah is entered into without the wife's unequivocal consent or under duress from family members then, as a contract, it may be declared voidable by the courts; the wife, however, would retain the right to seek redress from such a voidable contract. Moreover, besides comity and reciprocity, there is no other legal impediment as to why English courts cannot employ the Human Rights Act to counter foreign talaq obtained in violation of the wife's fundamental human rights. This is particularly so where the wife repudiates the application of her personal law in favour of English family law, provided that this is done in a manner that does not expose her to accusations of apostasy.*

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## I. INTRODUCTION

English courts have traditionally had a hard time with Islamic law and Islamic traditions. Up until the early 1980s, their approach was characterised by a degree of suspicion and public policy<sup>1</sup> was often used to annul or prevent Islamic family law institutions or court rulings from being applied within the English legal system.<sup>2</sup> It is to be noted, however, that this was at a time when the notion of transnational family law, even within the European Union (EU), was not apparent. Moreover, the use of public policy was not meant to be used as a human rights defense to protect ‘victims’, but rather as a way of showing that the institution under attack was not acceptable in the English legal order. Nevertheless, the proliferation of transnational divorce disputes before English courts changed these antiquated attitudes. The legal profession had much to gain from this development and it is no wonder that London soon became the divorce capital of Europe. As a result, judicial attitudes towards *talaq* and other Islamic family law institutions altered rapidly. Since the 1990s, English courts were more than happy to accept jurisdiction over *talaq* disputes,<sup>3</sup> but more importantly, not only did they stop referring to public policy, they failed to identify blatant abuses of *talaq* to the detriment of women.<sup>4</sup> English courts thus investigated whether the *talaq* process applied by the male applicants was consistent with the law and practice of their personal law<sup>5</sup>—which in many cases was based simply on the pronouncement of the particular court issuing the *talaq*—without investigating whether the effects of the *talaq* were abusive and stripped

<sup>1</sup> See M. L. Novicoff, *Blocking and Clawing Back in the Name of Public Policy: The United Kingdom’s Protection of Private Economic Interests against Adverse Foreign Adjudications*, 7 NW J INT’L L & BUS 12, 15 (1985).

<sup>2</sup> See Law Commission for England and Wales, *Family Law. Report on Polygamous Marriages* (Law Com No 42, 1972) (Polygamy is illustrative of this approach, where English courts were unsure how to handle a practice lawful under the subjects’ personal law, but abhorrent under English law); see also Law Commission, *Private International Law: Polygamous Marriages—Capacity to Contract a Polygamous Marriage and Related Issues* (Law Com No 146, 1985); Prakash Shah, *Attitudes to Polygamy in English Law*, 52 ICLQ 369 (2003).

<sup>3</sup> See *Sekhri v. Ray* [2014] EWCA Civ 119 (holding a husband and wife were both legally domiciled in England, despite the fact that the couple had married in India and lived in Singapore since they married).

<sup>4</sup> See SECRETARY OF STATE FOR THE HOME DEP’T, THE INDEPENDENT REVIEW INTO THE APPLICATION OF SHARIA LAW IN ENGLAND AND WALES, 2018, Cm. 9560, at 6 (UK) (In England, for example, a *nikah* marriage, while valid under Islamic law is not recognized, or indeed registered); see also CATHERINE FAIRBAIRN, ISLAMIC MARRIAGE AND DIVORCE IN ENGLAND AND WALES, 2020, HC 08747, at 3 (UK) (In the event of the relationship collapsing, the wife has no claims to property or support).

<sup>5</sup> See generally JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS (3d ed. 2009).

the woman of most of her rights.<sup>6</sup> In other words, the courts gave no credence to the fact that the same set of circumstances would have been unacceptable under English law.<sup>7</sup> This stance is even more surprising because it took no consideration of the long-standing practice of the European Court of Human Rights (ECtHR) on the right to family life.<sup>8</sup>

The kind of abuse that this article intends to shed light on concerns the ability of Muslims—chiefly females—to forego their so-called personal law, namely Islamic law, in the event of a family dispute before a secular court.<sup>9</sup> While this may not be possible in a Muslim state, this is not the case in secular states. One’s (Muslim) personal law is not an immutable status; rather, it is a form of self-identification and personal self-determination that both the subject, as well as the courts, can bypass if said personal law causes unnecessary harm to the subject without its free and informed consent. This means that a Muslim should be able to bypass Islamic family and inheritance laws and institutions in favor of the forum’s secular laws, without, however, being deemed to have foregone their Islamic faith. English courts can protect such a person from being branded an apostate by emphasizing that the Islamic institution in question was abusive, and hence, ordinary English law was applicable in the case at hand. However, the ability to forego one’s Islamic personal law was a taboo topic not only in respect of English courts, but also of all European courts, out of fear of offending Muslim sensibilities. All this, hopefully changed through the ECtHR’s judgment in *Molla Sali v. Greece*. There, the applicant, a member of Greece’s Muslim minority of Western Thrace,

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<sup>6</sup> This is not to argue that English courts overlook abuses, but to highlight that there is a long line of precedent where remedial measures were taken in the face of injustice. *See e.g.* the doctrine of presumption of marriage where a *nikah*-only marriage was not registered in *Piers v. Piers* [1849] 2 HL Cas. 331, 9 ER 111; *Hayatleh v. Mofdy* [2017] EWCA Civ 70; *Serife Yigit v. Turkey* [2011] 53 EHRR 25 (the Grand Chamber of the ECtHR held that the absence of registration of a *nikah* marriage in Turkey was irrelevant for the right to family life under Art. 8 ECHR).

<sup>7</sup> Certain institutions that would be discriminatory under English law are generally acceptable because of long-standing tradition under Islamic law, which are not amenable to the abusive dictates of particular *qadis* or courts. By way of illustration, in Sunni law, the father is the guardian of the minor’s property, failing which this role is assumed by the paternal grandfather, while the mother possesses no such right). *See Imambandi v. Mutsaddi*, (1918) L.R. 45 I.A. 73 (India)

<sup>8</sup> *See* Ridwanul Hoque & Morshed M. Khan, *Jud. Activism and Islamic Fam. L.: A Socio-Legal Evaluation of Recent Trends in Bangl.*, 14 ISLAMIC L. AND SOC’Y 204 (2007) [India] (The questioning of Islamic family law has occurred before progressive courts of Muslim nations, particularly when felt to be in the interests of children).

<sup>9</sup> *See* Rajnaara C. Akhtar, *Unregistered Muslim Marriages in the UK: Examining Normative Influences Shaping Choice of Legal Protection*, PERSONAL AUTONOMY IN PLURAL SOCIETIES: A PRINCIPLE AND ITS PARADOXES 140 (Marie-Claire Foblets, et al. eds., 2019).

had concluded a will before a civil notary just before the death of her husband.<sup>10</sup> The will excluded the deceased's two sisters, who claimed that recourse to a civil notary was contrary to the personal (Islamic) law minority members under the 1923 Treaty of Lausanne.<sup>11</sup> The ECtHR emphasized that denying members of a religious community to exit the minority's legal constraints and resort to regular law has a discriminatory impact and further violates the right to self-identification.<sup>12</sup> The Court relied on international law to make the point that the protection offered by minority law did not have the effect of subjecting group members to a particular cultural or legal regime without their consent.<sup>13</sup> The purpose of this article is to demonstrate how existing English judicial practice has been inconsistent with *Molla Sali*, and in fact, has not only offended Muslim women in many cases, but did nothing to remove the abusive elements of *talaq* and harmonize it under English family law.<sup>14</sup>

Divorce in Islam takes three forms: (a) *talaq ahsan*, whereby the husband's repudiation of the wife occurs when she is not menstruating and he has not had sexual intercourse with her; (b) *talaq hasan*, which involves a thrice repudiation of the wife in periods consisting of at least three menstrual cycles, and; (c) *talaq bid'a*, which is variation of the second option whereby the thrice repudiation occurs in a single occasion.<sup>15</sup> The third type is generally dismissed by Muslim scholars as not only finding no place in the Quran but also for being in conflict with the spirit of Islamic law.<sup>16</sup> The regulation of *talaq* and its place in Islamic family law is by means of particular verses in the Quran and by a significant body of *hadith*

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<sup>10</sup> *Molla Sali v. Greece*, App. No. 20452/14 (Dec. 19, 2018), <http://hudoc.echr.coe.int/eng?i=001-188985>.

<sup>11</sup> *Id.* at ¶11.

<sup>12</sup> *Id.* at ¶157.

<sup>13</sup> *Id.* at ¶¶ 154-57.

<sup>14</sup> See *Nasreen Akhter v. Mohammed Shabaz Khan* [2018] EWFC (Fam) 54, [2019] 2 WLR 771 (Eng.) (The couple had concluded a nikah-only marriage, which was not registered. When the relationship collapsed the husband argued his spouse was not entitled to any support or part of the family estate because there was a "non-marriage." The London Family Court, and in particular Mr. Justice Williams, looked beyond the formalities and held that the *nikah* marriage was "void" for the purposes of Section 11 of the Matrimonial Causes Act 1973. By not declaring it a non-marriage, the spouse was not excluded from the family estate and her rights to family and private life under Article 8 of the European Convention of Human Rights (ECHR) were fully protected.)

<sup>15</sup> See MAAIKE VOORHOEVE, *FAMILY LAW IN ISLAM: DIVORCE, MARRIAGE AND WOMEN IN THE MUSLIM WORLD* (2012).

<sup>16</sup> See generally *Sharaya Bano v. Union of India* (2017) 9 SCC 1 (India) (The Indian Supreme Court dismissed *talaq bid'a* as unconstitutional because it violated Articles 13, 14, and 15 of the Indian Constitution); see also SALMAN KHRUSHID, *TRIPLE TALAQ: EXAMINING FAITH* (2018) (ultimately leading to the adoption of the Muslim Women (Protection of Rights on Marriage) Act in 2019).

(oral tradition). Even so, the requirement of the thrice utterance is not evident from a simple reading of the pertinent verse (sura al-talaq).<sup>17</sup> In theory, two witnesses are also required for the completion of the *talaq*,<sup>18</sup> but it is not clear whether their presence is required for all three utterances in the case of *talaq hasan*. Equally, there is no clear mention in the primary sources, especially in the Quran, as to whether the utterances need to be uttered to the wife or another person, or whether there is a requirement to receive notice of some sort prior to the registration of the divorce. The practice, of course, varies from school to school and from *Sunni* to *Shia*; this is also reflected in the statutory regulation of *talaq* in Muslim jurisdictions.<sup>19</sup> However, the spirit of the Quran is evident; the process is not meant to release the husband by any means and for his sole benefit but to respect and protect the person of the wife unless she has transgressed her marriage obligations. This spirit, as will be demonstrated in subsequent sections, is missing from the theory and practice of contemporary Muslim divorce laws, which have as a result bred a culture of abusive *nikahs* and *talaqs*.

The purpose of this paper is to shed some light on the recognition of foreign *talaq* by English courts. The examination of the pertinent law is undertaken with the aim of establishing and understanding the attitudes of the stakeholders, namely the spouses as well as that of the judges. Therefore, a significant part of this paper involves some degree of anthropological inquiry. This is necessarily subject to the limitation that the author does not have access to his subjects and has not spent time with a community of male and female divorcees in order to study their attitudes at the time of marriage or following their divorce. Nonetheless, from a methodological point of view, it is fortunate that the majority of judgments on *talaq*, maintenance and child custody involving Muslims with a foreign element have involved a thorough examination of the parties' lives and circumstances from the moment of the completion of the *nikah* contract to the pronouncement of the *talaq* and beyond. Hence, we are left with a historiography of the parties' relevant time periods, as well as substantial excerpts from their statements as to their social circumstances in these periods. These are important because they provide a fairly accurate picture of the cultural circumstances of both the *nikah* and the *talaq*, as well as the social status of women and men from a sociological and anthropological perspective. Religion, as will become evident, plays a very small part, if at all, in this analysis, precisely because the real contours shaping the *talaq* are quintessentially cultural. Given that the objective was to provide an

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<sup>17</sup> *Quran* 65:1.

<sup>18</sup> *Id.* 65:2.

<sup>19</sup> See DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* (3d ed. 1998).

overview of relevant practices the author limited himself to a sample of approximately fifteen representative cases. This by no means constitutes exhaustive research, nor do the outcomes provide universal truths,<sup>20</sup> which is in any event part and parcel of reflexive limitations inherent in the study of one human being by another.<sup>21</sup> The sample is largely limited to relatively young Muslim women married abroad and against whom *talaq* was equally pronounced abroad.

The first section of the paper identifies the treatment of foreign *talaq* by English courts, stressing their observance of Islamic law, irrespective if this would otherwise offend the forum's public policy.<sup>22</sup> We then go on to paint the parties' attitudes to the divorce and its surrounding circumstances. The picture that arises is that of a distinct *talaq* culture where men abuse their right to initiate divorce and take full advantage of male-centred laws and practices to effectuate divorce without, in many cases, even telling the wife. The wives, on their part, narrate their exclusion from the *talaq* process and those that played little part in their *nikah* explain the life and expectation of a woman in a traditional androcentric society. What is striking in the latter cases is the transformation of the wives' aspirations and livelihood following arrival and stay in England as compared to their former existence. The conclusion aims to employ the anthropological observations with a view to offering two interrelated suggestions. The first assumes the *nikah* in its original contractual form in Islamic law and presents it as such for the purpose of recognition and enforcement of the *talaq*. In this sense the *talaq* is nothing more than the possibility of repudiating a contract which both parties have accepted on the basis of (an assumed) party autonomy. Although the governing law will be that of the country where the *nikah* was completed, the courts of England and Wales will not be impeded in an assessment of the contract's fairness and should be able to import fundamental notions of justice and contract law to ascertain whether it is void or voidable. Moreover, human rights law (if not also public policy rules) should play a distinct role in the construction of foreign *talaqs* where the wife's role in the original marriage contract was minimal and the husband is given unlimited power by foreign local laws and practices to obtain a divorce.

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<sup>20</sup> Indeed, social sciences cannot produce universal and immutable truths. This is true of the socio-anthropological methods employed in this paper. In order to produce a holistic picture that is as little biased as possible, this author refers to an arranged marriage to which the husband was opposed, but this serves to confirm the general hypothesis. See *Sohail Babar v. Anika Anis* [2005] EWHC (Ch) 1384 (Eng.).

<sup>21</sup> KAREN O'REILLY, *ETHNOGRAPHIC METHODS* 17-18 (2d ed. 2012).

<sup>22</sup> Lucy Carrol, *Talaq in Eng. L.: Bare Talaqs, Proc. Talaqs and Pol'y Consideration in Recognition of Extra-Jud. Divorces*, 28 J. OF THE INDIAN L. INST. 14 (1986) [India].



## II. THE STATUTORY STANCE TO THE RECOGNITION OF FOREIGN *TALAQ*

Article 46(1) and (2) of the Family Law Act 1986 regulate the recognition of overseas divorce, annulment and legal separation in England.<sup>23</sup> The position is simple enough. A *talaq* obtained outside England is enforceable therein—and hence the parties may further seek ancillary relief or resolve other financial matters—if the *talaq* is effective under the laws of the country in which it was obtained (*lex matrimonii*). This is irrespective if it was obtained by means of proceedings<sup>24</sup>—whether judicial, religious or other—or by no proceedings whatsoever, as long as residency requirements are met, which need not concern us here. The focus, therefore, is not on the existence of proceedings leading to the pronouncement of divorce or other forms of legal separation, but rather whether the particular *talaq* is effective in the country obtained. Although, as will be seen later in this paper, English courts have clarified what constitutes effectiveness for the purposes of English law. The term should, in theory, be construed in a manner that renders a *talaq* operative, that is, of producing legal effects for the parties. This can certainly be achieved without a formal registration, especially where the existence of a *talaq* is typically demonstrated in the country obtained by means of oral testimony. Such an approach would be consistent with the flexible and to some degree informal nature of *talaq* under classical Islamic law, not to mention its practice in many Muslim nations, i.e. the utterance of divorce thrice to the spouse or relatives without the need for further formalities.

The fact that English courts have required some type of registration on the part of the parties as a prerequisite to recognition demonstrates that their focus is on legal certainty and formality as this is understood in western legal thinking—not on giving credence to all the particularities of *talaq* in its native legal context. In *Sulaiman v. Juffali* the husband argued that a bare *talaq* in Saudi Arabia did not require a process of registration being it is a matter solely between man and God.<sup>25</sup> In fact, the husband argued that the absence of an obligation to register *talaq* was part of Saudi legal practice and that the wife's argument to the contrary went against their culture and societal values.<sup>26</sup> In the later case of *H v. S*, the husband had failed to register his *talaq*, arguing that no such obligation existed.<sup>27</sup>

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<sup>23</sup> Family Law Act 1986, c. 55, §46 (UK).

<sup>24</sup> See *El-Fadl v. El-Fadl* [2000] 1 FLR (Fam.) 175 (Eng.) (it was accepted that, under Lebanese law, a *talaq* requires pronouncement before two witnesses, followed by registration; this was recognized as constituting a proceedings divorce in England).

<sup>25</sup> *Basma Sulaiman Al Sulaiman v. Walid Ahmed Al Juffali* [2001] EWHC 556 (Fam), [9]-[10], [2002] 1 FLR 479 (Eng.).

<sup>26</sup> *Id.* at [27]-[29].

<sup>27</sup> *H v. S* [2011] EWHC (Fam) B23 [32] (Eng.).

Acting upon expert evidence, the court was of the view that although Islamic law in Saudi Arabia did not (at the time at least) impose a registration requirement, in practice “this is unheard of”.<sup>28</sup> It went on to say that regulations increasingly require official proof of divorce, and as a result, unless proof of registration is furnished, the *talaq* is non-existent in England.

In most Muslim jurisdictions the registration of *talaq* or *nikah* (Muslim marriage contract) is not viewed as a legal requirement under the primary sources of Islamic law. This view has been expressed, for example, by the Pakistani Federal Sharia Court, emphasizing that oral evidence is sufficient for the determination of a *nikah* and that a requirement to register was un-Islamic.<sup>29</sup> The purpose of registration was relegated to filing purposes as a result. If this is true, then older cases, such as *Chaudhary v. Chaudhary*, which held that the mere announcement of divorce before witnesses did not amount to divorce proceedings under Article 46(1), and are contrary to Islamic law developments and construction in particular countries.<sup>30</sup> Such an approach therefore belies a desire for record-keeping, which is understandable, given that litigation otherwise would depend on unreliable oral testimony, requiring the translation of affidavits of people to whom the courts could not have access. This is no doubt, sound from a policy perspective, that justifies a departure from classical Islamic law. As the court went on to note in *H v. S*, there does not exist a system of law in the world that does not register divorces, as this would create a chaotic situation.<sup>31</sup>

As will become evident in other sections, English courts, in their determination of the validity of *talaq* obtained abroad, have not concerned themselves with questions of public policy, particularly whether the conditions by which the *talaq* was obtained would in this jurisdiction have offended the rights of women.<sup>32</sup> For a variety of reasons, although the Law

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<sup>28</sup> *Id.*

<sup>29</sup> *Allah Rakha v. Federation of Pakistan*, (2000) PLD (FSC) 1 (Pak.).

<sup>30</sup> *See Chaudhary v. Chaudhary* [1985] 2 W.L.R 350, [1985] Fam. 19.

<sup>31</sup> *See H v. S*, EWHC (Fam) at [60]-[61]; *see also NC v. Entry Clearance Officer* [2009] UKAIT 16 (Eng.) (holding on appeal that in the region of Kashmir, which is not subject to the 1961 Pakistani Muslim Family Law Ordinance, there was no requirement to register a bare *talaq*. Given that the husband and wife were both habitually resident in Kashmir when their *talaq* was obtained, this was found to be valid under § 46(2) of 1986 Family Law Act).

<sup>32</sup> *See N A v. M O T* [2004] EWHC (Fam) 471 [2] (Eng.) (courts looked at the wife’s disadvantaged position in the pertinent Muslim jurisdiction and examined the wife’s options for divorce under Iranian law. It held that if the wife wanted a divorce in Iran, she would have to negotiate the amount of the marriage portion she would have to forgo in exchange for her freedom. If the price was too high, she would be forced to remain married but in reality she would be separated. Ultimately, however, the court applied Iranian law

Commission had favoured that all *talaq* manifestly contrary to public policy be subject to discretionary stays by the courts, this view was rejected from the purview of Article 46.<sup>33</sup> Hence, the violation of fundamental rights and the disparity of the parties in the relevant process do not constitute impediments to the recognition of foreign *talaq*. Adherence to the spouses' personal law is considered paramount.<sup>34</sup>

Again, policy reasons suggest that non-recognition of a foreign *talaq* obtained in violation of fundamental human rights would in fact be injurious to the more vulnerable spouse.<sup>35</sup> A recognition of *talaq* is more female-friendly because it allows the wife to claim ancillary relief and child custody against the husband, which she might not otherwise be entitled to in the jurisdiction where the *nikah* and the *talaq* were obtained.<sup>36</sup> Practice before English courts certainly demonstrates that this outcome has materialised, although the majority of cases decided that not all women were destitute and at the sole mercy of abusive husbands.<sup>37</sup> Given that in the vast majority of cases the husbands are aware that they can easily obtain *talaq* in Muslim jurisdictions, whereas the *khula* is far more cumbersome for women,<sup>38</sup> they perceive this as a global advantage, being oblivious to the fact that the recognition of a foreign divorce in places such as England entails serious financial consequences.

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and did not seek to deviate from it in order to alleviate the wife's position); *See also Otobo v. Otobo* [2002] EWCA (Civ) 949, [2003] 1 FLR 192 (Eng.).

<sup>33</sup> *H v. S*, EWHC (Fam) at [29].

<sup>34</sup> *See El-Fadl v. El-Fadl* [2000] 1 FLR (Fam.) 175 (Eng.) (the court overturned an earlier ruling, emphasizing that it was not a proper exercise of discretion to refuse a divorce which was valid under the personal laws of both parties at the relevant time, as had been known to them for many years.)

<sup>35</sup> *See* Alberto H. Neidhardt, *Quis Custodit Ipsos Custodes? Personal Autonomy, Forced Marriage and the Inherent Jurisdiction in English Law*, PERSONAL AUTONOMY IN PLURAL SOCIETIES 140 (Marie-Claire Foblets, et al. eds., 2019).

<sup>36</sup> *See Re J (A Child) (Child Returned Abroad: Convention Rights)* [2004] EWCA Civ 417 [63], [2004] 2 FLR 85 (Eng.) (the court noted that if the decision was for the child to be returned to Saudi Arabia, this would have to be made conditional upon the father obtaining *talaq* in a sharia court. It was emphasized that this is because it would not be in the child's interests that the "mother be required to return as a wife.")

<sup>37</sup> A distinct exception is the case of *D B v. Z A et. al.* [2010] EWHC (Fam) 2175 (Eng.), which did not concern the determination of a *talaq* as such, but an illiterate Kurdish wife that was abused by her husband, who divorced her by means of *talaq* and had connections with the UK.

<sup>38</sup> The *khula* is not only difficult to obtain but exposes the wife to the risk of losing her marital property and depriving herself of maintenance. There are, of course, severe social implications to be taken into consideration.

### III. THE UTTERANCE OF THE *TALAQ*: THE PERSPECTIVE OF THE HUSBAND AND THE USE OF “CULTURE”

The courts have not taken a position on the utterance of the *talaq*, primarily because of the policy considerations cited in the previous section. Yet, for the purposes of this paper, the practice of the utterance raises interesting anthropological questions. The fact that all that is needed is a thrice utterance of divorce before a few witnesses provides men with a perception of cultural and legal superiority over women, and in the process, removes from them any sort of stigma associated with divorce.<sup>39</sup> This is further reinforced by the notion that *talaq* is a spiritual matter between man and God (although this argument is used sparingly), and so in turn, gives the impression that no social consequences for the male spouse arise from the *talaq*. Of course, one should not over-generalize, but must instead see the *talaq* from the perspective of the direct stakeholders, namely judges, the husband and the wife. As already stated in the introduction, this author has relied on a selection of cases in order to flesh out some anthropological observations. These observations in no way suggest a conclusive outcome and should not be interpreted as such.

The absence of something akin to equality of arms is evident in the practice of *talaq* in the Muslim world.<sup>40</sup> In *Sulaiman v. Juffali*, we discussed the husband’s claim that this was a matter between himself and God and not for the courts.<sup>41</sup> This reference by husbands to religion and culture, as a basis for dismissing the applications of their spouses for ancillary relief and other financial settlement, is prevalent in the vast majority of cases. In practice, this socio-religious dimension of the *talaq* has a direct impact on its regulation by the executive and the courts, which may be far removed from its original conception in the primary and secondary sources of Islam. In *H v. H*, the court revealed that although under Pakistani law the husband’s failure to register the *talaq* was fatal to its validity, the *talaq* was otherwise valid if the thrice utterance was never

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<sup>39</sup> There are of course notable exceptions. In *H v. H* [2007] EWHC (Fam) 2945 [74], [2008] 2 FLR 857 (Eng.), it was held that: “on my assessment of the husband I think it is unlikely that he would have entered a second marriage without divorcing his first wife. This is so in particular when he was going to continue living in the community where he was known. I do not consider that he would have run the risk associated with such a course.”

<sup>40</sup> See *N A v. M O T* [2004] EWHC (Fam) 471 [2(8)] (Eng.) (holding that although in “theory” the wife is entitled to seek a divorce, maintenance and financial rights, this is non-existent in practice. The burden of proof (essentially a breach by the husband of a term in the marriage contract) is very high for the wife to succeed in bringing *khula* action).

<sup>41</sup> *Basma Sulaiman Al Sulaiman v. Walid Ahmed Al Juffali* [2001] EWHC (Fam) 556 [27]-[29], [2002] 1 FLR 479 (Eng.).

made to the wife but to third parties instead.<sup>42</sup> Similar cases have arisen in the case law. In *Arshad v. Anwar*, the husband instituted *talaq* proceedings in England without notifying the wife or making an effort to obtain a registration while at the same time entertaining *talaq* proceedings in Pakistan without equally making any effort to notify the wife.<sup>43</sup> Clearly, the husband was under the perception, as well as legal advice, that obtaining a *talaq* was a mere formality which could be dispensed at ease. In the case at hand, the wife was unable, despite her best efforts, to even find out if a *talaq* had been obtained.<sup>44</sup> In *A v. L*, the spouses, originally from Libya, had been together for a long time (close to thirty years) and had raised a large family.<sup>45</sup> They spent their time between England and Egypt, with the husband conducting most of his business activities in Cairo and, as a result, spent substantially longer periods there than the wife, who remained in England during most of his business excursions.<sup>46</sup> The husband at some point became enamoured with a younger girl and began an affair, while at the same time abusing and belittling his wife.<sup>47</sup> While in Egypt, he pursued *talaq* proceedings without notifying the wife, although he claimed to have demanded a divorce over the phone.<sup>48</sup> The English court had no qualms arguing that the husband was dishonest and devious in obtaining *talaq* in Egypt.<sup>49</sup> Quite clearly, the husband's intention in obtaining a divorce in Egypt was in the knowledge that "the maintenance rights of the wife [in Egypt] are of a most restricted kind".<sup>50</sup>

In yet other cases, it was not even clear whether a *talaq* had been obtained, even though the husband claimed as much although he admitted not addressing his wife on the matter.<sup>51</sup> In this case, the wife was illiterate and was married off by her family, whereas in the situations described in the preceding paragraph, both spouses possessed some degree of education.<sup>52</sup> The relative ease by which men can obtain *talaq* is further reinforced by the ease they can shift through the requirements for *nikah*. In *Babar v. Anis*, a British man with Pakistani roots was forced by his family into marrying a Pakistani bride without his divorce in England

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<sup>42</sup> *H v. S* [2011] EWHC (Fam) B23 [38] (Eng.). As a result of its registration the *talaq* in question was recognized in England. *Id.* at [86].

<sup>43</sup> *Arshad v. Anwar* [2012] EWCA (Civ) 372 [4] (Eng.).

<sup>44</sup> *Id.* at [14].

<sup>45</sup> *A v. L* [2010] EWHC (Fam) 460, [2010] 2 FLR 1418 (Eng.).

<sup>46</sup> *Id.* at [6], [7].

<sup>47</sup> *Id.* at [40], [77].

<sup>48</sup> *Id.* at [11], [49].

<sup>49</sup> *Id.* at [79].

<sup>50</sup> *Id.* at [35].

<sup>51</sup> *See, e.g., D B v. Z A et al.* [2010] EWHC (Fam) 2175 (Eng.) (describing the closest thing to a *talaq* was a paper discussing compensation with the wife's thumb print on it).

<sup>52</sup> *Id.*

having become final.<sup>53</sup> This was common knowledge to the families of both spouses in Pakistan and when asked to sign the *nikah* certificate by the imam, the husband was not asked all of the twenty-one questions on the form, particularly whether he was currently married.<sup>54</sup> Everything was arranged by the parents and the imam in order to be convenient for their ultimate purpose.<sup>55</sup>

A notable characteristic in most of these cases is the claim of the husband that he was not particularly religious, yet adhering to the dictates of local culture, much of which is influenced by religious considerations.<sup>56</sup> In *DB v. ZA et. al.*, the father claimed to be a secular Muslim, but ultimately the court accepted that he, as well as his family, practiced honour killings.<sup>57</sup> In the same case, the maternal grandfather appears as an honourable elder who is respected in the local Kurdish society and who justifies a possible honour killing of his daughter based on the fact that he gave his word to the husband's parents that she be betrothed to him.<sup>58</sup> At the same time, however, there is significant evidence that the paternal grandfather had an affair with a younger woman who gave birth to a child but refused to marry her under pressure from his wife.<sup>59</sup> He never once made an attempt to see his illegitimate child and did not pay compensation to his mistress despite his promises to the contrary.<sup>60</sup> Yet, this is the same man who professes that honour killings are part of the Kurdish culture<sup>61</sup> and was intent on killing his daughter simply because she refused to be with a man that raped, abused and threatened to kill her.

This liberal invocation of culture by the male husbands discussed in these cases is emblematic of the fact that said "culture" is only meant to favour men. It pervades societies in all aspects and social relations.<sup>62</sup> Because male domination is more potently justified by reference to culture, these men do not feel the need to rely to any great degree, if at all, on religion. Indeed, they are quite aware that a strict interpretation of *talaq* under classical Islamic law would not provide them with the same liberties as under "culture",<sup>63</sup> which has in turn permeated the legal institutions of

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<sup>53</sup> *Sohail Babar v. Anika Anis* [2005] EWHC 1384 [4]-[9] (Ch) (Eng.).

<sup>54</sup> *Id.* at [59], [84].

<sup>55</sup> *Id.* at [81], [87]-[88].

<sup>56</sup> *See N A v. M O T* [2004] EWHC (Fam) 471 [2(n)] (Eng.) (the husband claimed he did not expect his Iranian wife to be a virgin because he was rather liberal having lived in England close to twenty years. The judge did not accept this claim.)

<sup>57</sup> *D B v. Z A et. al.* [2010] EWHC (Fam) 2175 [44] (Eng.).

<sup>58</sup> *See id.* at [62], [278].

<sup>59</sup> *Id.* at [257].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at [277], [278].

<sup>62</sup> *See generally id.*

<sup>63</sup> *See generally id.*

divorce in the pertinent nations. Another explanation for minimising the degree of their religious adherence is perhaps concerned with their perception of English judges as being disinclined towards Islam and Islamic law. They may well think that culture is neutral and therefore a more attractive proposition. No doubt, these cases clearly demonstrate that in local societies, where men dominate and dictate legal and social norms, the conditions for *talaq* will never really amount to a proceeding in the sense of Article 46(2) of the Family Law Act 1986, but a unilateral act that has legal effect on third parties, namely wives. A statement from the wife in *DB v. ZA et. al.*, as redacted by the judge, on life in her Iranian-Kurdish village is illustrative of this male-centred culture:

[She] describes coming from “a very orthodox Moslem background”. She too expresses a belief in God, but is not herself religiously observant. She speaks of being part of a household where the males can, in effect, do no wrong. They govern all that goes on in the house. Women have no rights. Strict conformity to “this cultural model” is required. She was uneducated whilst her brothers were schooled. She was barely allowed out of the home to mix in the local area, and not being schooled had no chance to forge friendships there. She alleges that her mother was the victim of the same autocratic methods within the household, and could not interfere when her father and her brothers required her to behave in a certain way.<sup>64</sup>

#### IV. JUDICIAL ATTITUDES TO CLAIMS OF MATRIMONIAL CULTURAL RELATIVISM

The husband in *DB v. ZA* produced a written document whereby he alleged that one of the terms of the divorce was that he was designated as his son’s carer.<sup>65</sup> He justified this on the basis that it would be expected in his culture because of the mother’s health issues and her behaviour towards the son.<sup>66</sup> He went on to argue that in any event his son would pass to him at the age of 7 as a matter of tradition.<sup>67</sup> The judge’s reaction to this statement is revealing of the difficulties in understanding what constitutes and feeds “culture” in societies traditionally associated with theocracy and male dominance in the western psyche. Wood J, thus stated:

This remark is of some interest, for it shows that despite his posture as a less than traditional member of his society, and with a belief in God but

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<sup>64</sup> *Id.* at [52].

<sup>65</sup> *Id.* at [237].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at [243].

not a belief in the Islamic religion or its observances, he is at heart deeply entrenched in the mores of his society.<sup>68</sup>

Wood J is at pains to comprehend how it is possible for a person not to be religious in a society that cherishes religious adherence, while at the same time fully observing that society's mores and culture. The husband's belief system is by no means incongruous. Culture is a complex phenomenon and scholars such as Geertz have viewed it as a web of shared meanings expressed through public communication, not in the sense of sharing the same knowledge and skills but in the sense that persons who in fact share a culture share a common world view that is expressed through common symbols and language.<sup>69</sup> Hence, religion may be merged into culture and become part of a shared view even though in its new, cultural, form it is different from its original religious underpinnings. Hence a person may observe religious rules without being religious because the rules in question are part of culture. This in fact demonstrates that in societies where men manipulate religious rules to their advantage, as is the case with *nikah* and *talaq*, said rules are hardly axiomatic or immutable. Rather, in a very implicit way they are not taken for granted by the principal enforcers, that is, men. In turn, it is obvious that immutability is afforded to cultural norms. This observation coincides with Bourdieu's distinction between *doxa* and opinion.<sup>70</sup> For Bourdieu, in order to assess whether the members of a group share or do not share common values one must distinguish that which is taken for granted by the group and which is beyond discussion (*doxa*), such as faith in God or unquestionable adherence to a political system, and things that are actively discussed among group members and are not therefore axiomatic (opinion).<sup>71</sup>

Family court judges in England are experienced and despite having entertained numerous *talaq* cases they allow the parties to produce expert opinions on Islamic law. The problem is that the strict focus of Article 46(2) of the Family Law Act on compliance with local legal formalities, which are in turn justified on Quranic grounds, does not allow judges to examine, as opposed to simply cite, the place of culture in spousal relations, other than as *obiter dicta*. But, of course, if culture was allowed to play a meaningful role in *talaq*-related proceedings the judges would be forced to apply human rights and public policy considerations in the relations between the spouses.

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<sup>68</sup> *Id.*

<sup>69</sup> See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1st ed. 1973).

<sup>70</sup> PIERRE BORDIEU, *OUTLINE OF A THEORY OF PRACTICE* 164-70 (Richard Nice trans., Cambridge University Press, 1977).

<sup>71</sup> *Id.*



There are of course some notable exceptions to this general trend, albeit the ultimate effect is limited. In *NA v MOT* the husband, a British-Iranian national went to Iran to marry and subsequently brought his new wife back to Manchester.<sup>72</sup> The marriage contract was drawn up and officialised in Iran, listing twelve possible grounds upon which the wife could seek a divorce from the husband.<sup>73</sup> As has already been mentioned in a previous section, given that obtaining a *khula* in Iran is exceptionally difficult, if the wife wished to be released from her marriage she would be forced to accept a considerable cut to her marriage portion, otherwise she would have to endure a non-existent marriage.<sup>74</sup> Upon accepting jurisdiction, as well as the particular terms of the *nikah*, the court emphasised that it was bound to take the cultural perspectives of the parties into consideration, but only with a view to pronouncing fair financial outcomes.<sup>75</sup> This is essentially an anthropological approach, which merits citation:

I also have to consider the cultural background of this case. . . . [A] factor when carrying out the court's function is to have regard to the parties' cultural mores. . . . [A]n English judge should give due weight to the primary cultural factors and not ignore the differential between what the wife might anticipate from a determination in England as opposed to a determination in the alternative jurisdiction, including that as one of the circumstances of the case. . . . Thus I will take into account the agreement which the parties reached and determine how the Iranian court would have been wont to deal with this case.

i. If the Husband had divorced the Wife by way of *talaq* or failed to give her a divorce at all, then, in my view, in Iran she would be entitled to retain the whole of her marriage portion.

ii. If the Wife wanted a divorce, because she does not have sufficient grounds in Iran, she would have been bound to enter into a negotiation in order to agree what percentage of her marriage portion, if any, she would sacrifice for her freedom.

I take these matters fully into account.<sup>76</sup>

The court's anthropological approach is limited as is undoubtedly its assistance to the wife. What the courts can, and ought to, do in such situations is apply the foreign law as this is found but import such an Islamic interpretation that favours an equitable result. This is particularly potent given that the theory and practice of *talaq* in the Muslim world is

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<sup>72</sup> *N.A. v. M.O.T* [2004] EWHC [2(i)-(j)] (Fam).

<sup>73</sup> *Id.* at [2(g)].

<sup>74</sup> *Id.* at [2(h)(11)].

<sup>75</sup> *Id.* at [6(f)-(g)].

<sup>76</sup> *Id.*

wholly divergent and there are very few scholars that would be prepared to defy the express provision of the Quran which forbids a man to unjustifiably and treacherously inflict a divorce on his wife, especially without sufficient maintenance and financial provision.<sup>77</sup> Some thought must also go into scholarly input with regard to the wife's contractual status in entering into the marriage contract, especially where this is repudiated unjustly and unfairly. Such a construction, however, requires consent among the judicial and academic communities in the UK, as well as an input from the entirety of the Muslim community in the country.

Unlike employment and immigration tribunals where judges have demonstrated stereotypical attitudes towards Muslim men,<sup>78</sup> this is not the case with the family courts.<sup>79</sup> The law in this area does not provide them with the freedom to question culture, let alone dismiss it. In those cases where the judges did discuss cultural issues it was solely from the perspective of a neutral observer and where some criticism of the inferior status of women was offered, this was always *obiter dicta*. As a result, the courts have not given us any degree of anthropological observation and of course it is not their job to do so. However, the Head of the International Family Justice unit,<sup>80</sup> currently Thorpe LJ, should perhaps engage in a study with a view to ascertaining the aspirations of weaker parties to *talaq* disputes settled in England and Wales, particularly where the *nikah* was based on an arranged marriage in which the wife had little input. Given that Brussels II<sup>81</sup> does not apply to Muslim divorces obtained outside the EU, English courts are not constrained by the particular dictates of this Regulation. There is no reason why the Human Rights Act and ECHR jurisprudence cannot inform *talaq*-related proceedings in England.

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<sup>77</sup> See Quran 65:1, 65:7-10.

<sup>78</sup> In *Abusabib v Taddese* [2012] UKEAT/0424/11/ZT, the plaintiff was a prominent Sudanese diplomat, a considerate family man, who was accused, along with his wife, by his Ethiopian nanny of serious crimes, including attempts at forced religious conversion. Despite character witness statements in his favour and a string of false statements by the nanny, in addition to what was evidently an attempt by her to secure asylum, successive employment tribunals refused to dispense justice in the case. No doubt, a Muslim, Sudanese, diplomat, male is perceived in the same light as the press paints Muslim diplomats and their entourage, especially from so-called pariah nations, without taking personal circumstances into consideration.

<sup>79</sup> *H v H* [2007] EWHC 2945 (Fam) (noting that the social stigma for bigamy was so acute in the husband's community that it is improbable that he would have assumed such a risk or course of action).

<sup>80</sup> *International family justice*, COURTS AND TRIBUNALS JUDICIARY, <http://www.judiciary.gov.uk/about-the-judiciary/international/international-family-justice> (last visited Oct. 12, 2021).

<sup>81</sup> Council Regulation 2201/2003 (Nov. 27, 2003), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003R2201> (last visited Oct. 12, 2021) (it is conveniently known as Brussels II or Brussels *Iibis*).

## V. THE ASPIRATIONS OF THE WIFE

It has already transpired that the aspirations of the wife are inconsequential to the impact of a *talaq* obtained abroad, even against her wishes or in the absence of her consent. To western lawyers the contractual nature of marriage and the possibility of a unilateral repudiation by the strongest party does not sit well with the very concept of marriage or the equality inherent in the principle of party autonomy in its application to contracts. It is assumed, for sound policy reasons, that irrespective of the equality and fairness of foreign *talaq* law, the wife was aware of the situation and her status from the outset. Hence, she is no worse off when she comes before an English court than when she was in the country where the *nikah* and the *talaq* were obtained. In fact, the subsequent remedies in England and Wales, in addition to the input from social services and social welfare, will ensure that her life is far better. We have also emphasised that despite the ease by which a *talaq* is obtained by males this may in fact turn out to be a blessing for the wife because it provides her with an opportunity to free herself from the shackles of a violent, uncomfortable and in many cases unwanted formal relationship.

The courts, although *obiter dicta* – except in cases that did not involve the recognition of a *talaq*, as with protection measures to avert honour killings – have not shied away from pointing out the inferior status of wives-to-be in many Muslim communities around the world. In *A v L* the court emphasised the restricted nature of maintenance rights affordable to women in Egypt, even though in the case at hand the husband had clearly committed adultery and had been abusive to his wife.<sup>82</sup> In *DB v ZA* the court accepted evidence suggesting that the wife's marriage had been part of an agreement between her father and another man, which although clearly a bad marriage, was a matter of honour for the father; hence the betrothed had no say in the matter.<sup>83</sup> In *J (A Child)* the judge was willing to accept that life for an educated, active, Muslim woman in Saudi Arabia must be very restrictive, even if her husband is westernised and liberal.<sup>84</sup> These are just a fraction of the cases where the courts have been at pains to emphasise the inferior status of women both culturally and from the perspective of equality of arms in *talaq* proceedings.

In all the cases where the wife was either a naturalised British citizen or had just established her habitual residence in the UK there is a clear trend. Whatever the cultural circumstances of the particular marriage, the parameters of the *talaq*, or the level of education in every case the wife

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<sup>82</sup> *A v L* [2010] EWHC 460 [35] (Fam).

<sup>83</sup> *DB v ZA* [2010] EWHC 2175 [62] (Fam).

<sup>84</sup> *J (A Child)* Application for Return of a Child to Saudi Arabia, Non-Convention Country [2004] EWCA [24] (Civ).

has sought to improve her personal situation. Despite being constrained by the limitations of the Family Law Act which relies on the parties' personal law, and hence advice would have been sought that reference to rights-centred English family law would be inapplicable, the wives are eager to demonstrate the injustice suffered from the male-dominated application of *talaq* in particular and Islamic family law in general. As a result, it is not far-fetched to claim that in the vast majority of cases wives perceive the *talaq* as an unfair and biased process, something which is further reinforced by the great difficulties inherent in obtaining a *khula*. Equally, relatively younger wives exhibit a desire to make profound changes in their lives upon coming to the UK. This has involved taking up primary, secondary or tertiary education, setting up their own business, finding independent employment (i.e. not having to rely on male maintenance) and to a very large degree breaking some of the bonds with patriarchal and socio-cultural structures associated with particular Muslim societies. To this one may add a relatively steady, albeit probably small, number of conversions to other religions, particularly evangelical Christianity and Jehova's Witnesses, although for obvious reasons there is very little data on the subject. The fact that the younger generation of non-British Muslim women against whom *talaq* has been sought in Muslim jurisdictions are making a conscious break with their culture is indicative of the view which suggests that several institutions and practices within the broader umbrella of the Sharia are anything but liberating for women. In all of the cases surveyed in this paper the female viewpoint, even if not expressly stipulated, has been that the practice of *talaq* (and for some also the *nikah*) and the manner with which it is allowed to exist is injurious to women.

The judiciary clearly identifies a problem between foreign *talaq* law and culture. This problem is quite pervasive in anthropological research and is not found exclusively in Muslim societies. It may be summed up as follows: Where the established mores and social institutions of a particular society are oppressive against one of its composite segments (religious or racial minorities, women, aliens, etc) they are preserved as culture only on account of the oppression and not because of a broader consensus. Of course, the vast majority of those born within an oppressive culture and who are unaware of the opposite side of the coin will seem to an external observer as though they relish their status.<sup>85</sup> This unfortunate state of affairs is often the paradigmatic argument in favour of cultural relativism in societies where the oppressed have no voice, no education and no opportunities. In the case at hand, the culture of *talaq* seems at peace with

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<sup>85</sup> No doubt, there are those who do not espouse this view and instead see no oppression of women within Islam or the use of sharia by men as a tool for oppression. See GABRIELE MARRANCI, *THE ANTHROPOLOGY OF ISLAM* (Routledge, 2008).

the Muslim world's universal culture, but this is only true within traditional Muslim societies (even those living in Western nations). When there is a departure from such traditional culture as a result of a *talaq* decided in the UK, with the wife now living there, the wife no longer supports the (male-centred) culture of *talaq* or its associated institutions.<sup>86</sup> This should serve as an indication that if the *talaq* is indeed viewed as a contract in English law, following its Islamic root, then the courts must offer some thought on the underlying principles of party autonomy and whether or not in many cases the wife is but a third party to such contract. This notion is analysed slightly more elaborately in the following section. Whatever the case, it is not wise to dismiss or ignore the intra-cultural clash in Islamic family law, particularly in the areas of marriage and divorce.

## VI. SOME SENSIBLE CONCLUSIONS ON THE BASIS OF HUMAN RIGHTS AND LAW OF CONTRACT CONSIDERATIONS

There is a clear trend in Europe and English courts in particular towards dismissing Islamic law as the governing law of contracts on the ground that it is not the law of a national legal system and that in any event it is far too indeterminate for the courts to consider.<sup>87</sup> This is also true to a large degree in the field of investment arbitration, despite the fact that conflict of laws rules have no application there. Although such interventions, both judicial and statutory, offend the cardinal principle of party autonomy, they are justified on the basis of legal certainty.<sup>88</sup>

In the case at hand, a *talaq* premised solely on Islamic law could equally be subjected to another governing law by the courts – assuming it

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<sup>86</sup> *Talaq* and related institutions could therefore be described in light of the theory of androcentrism. Perkins Gilman who studies this phenomenon as early as 1911 described it as a fixation on the male and masculine perspectives as the origin of all things and the basis of culture and history. In this context only masculinity is normative whereas everything else is described as other. See CHARLOTTE PERKINS GILMAN, *THE MAN-MADE WORLD: OR, OUR ANDROCENTRIC CULTURE* (Cosimo Inc., 2007).

<sup>87</sup> See *Beximco Pharmaceuticals v Shamil Bank of Bahrain* [2004] EWCA [48] (Civ) (justifying the outcome on the basis of Art 1(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which clearly states that it is applicable to “contractual obligations in any situation involving a choice between the laws of different countries”) (internal citations omitted).

<sup>88</sup> It is true that sometimes the courts go a bit too far in dismissing the parties' contractual desires, as was the case in *Jivraj v Hashwani* [2010] EWCA Civ 712 [28]-[29]. There, the Court of Appeal held that the appointment of an Ismaili arbitrator in the parties' arbitration clause was void because it constituted religious discrimination in the sphere of employment. The Supreme Court ultimately reversed this decision. *Jivraj v Hashwani* [2011] UKSC 40.

is regarded as a contract – but sole reliance on Islamic law as such is rare. Modern *talaqs* are generally obtained by reference to the laws and procedures of national systems of justice, irrespective of the fact that their primary source is Islamic law given that the *talaq* originates from the Quran. Yet, domestic family laws in Muslim nations as has been demonstrated in this paper are far more indeterminate than general Islamic law, where the pertinent regulation in the primary sources is undisputed. In some of the cases surveyed it was not even clear if a *talaq* had been pronounced, whereas in others the male party suggested that no formal requirements were required and without exception expert witnesses were invited in order to clarify the relevant laws. This in no way demonstrates legal certainty in the Muslim jurisdictions under consideration.

Clearly, English courts must at least entertain the possibility of examining the *nikah* as a contract, as this is its legal form in Islamic law and national laws. On this basis, the *nikah* may be interpreted just like any other contract, taking into consideration, of course, the financial and personal relationships that accompany it.<sup>89</sup> Just like any other contract, it is subject to a governing law and the general rules underlying contracts, including also their dissolution. English courts have exhibited their adherence to Islamic law in contracts governed either by concurrent English/Islamic law governing law clauses, or clauses governed by English law, albeit where the subject matter of the contract was Sharia-related.<sup>90</sup> Surely, where a party to a contract lacked the necessary volition (i.e. there was no assent on the part of the wife) this fails to produce any legal effects on account of being voidable. However, because of the sensitive nature of the marriage contract, especially on the vulnerable party, the wife should be given the opportunity to accept the terms of the contract in order to retain her married status, which is essentially the remedy afforded to the aggrieved party to a voidable contract. Alternatively, if she were to decide that the *nikah* should be declared void *ab initio* her marriage would be declared void (or voidable depending on the classification of the breach) retrospectively, but given that element of

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<sup>89</sup> See Ilias Bantekas, *Freedom of Religion in Transnational Contract and Commercial Transactions*, in PETER PETKOFF ET AL., *CHANGING NATURE OF RELIGIOUS RIGHTS UNDER INTERNATIONAL LAW* (Oxford University Press, 2013).

<sup>90</sup> In *The Investment Dar Co KSSC v. Blom Development Bank S.A.L.*, [2009] EWHC 3545 [2] (Ch.), the parties had entered into a *Wakala* (agency) agreement, which was governed by English law, although confusingly it was agreed that one of the parties would invest the sum deposited in a manner that was Sharia-compliant. The High Court ultimately held that the agreement was contrary to the Sharia because the investor was charging interest. See also *Sanghi Polyesters Ltd. v. The International Investor KCFC*, [2000] UKQB (Comm.), 2000 WL 389643; *Dana Gas PJSC v. Dana Gas Sukuk Ltd.*, [2017] EWHC 2928 (Comm).

compulsion<sup>91</sup> she would be entitled to particular terms of compensation and ancillary relief. Ordinary family law would regulate other matters, particularly in respect of parental responsibility. This suggestion is obviously a radical departure, which requires significant intellectual input from the scholarly and religious community, particularly whether it is deemed necessary for the wife to denounce her personal law – not her religion - in favour of the secular family law of England.<sup>92</sup>

To avoid such problems, the courts may alternatively construe the wife's personal law in light of human rights principles if Parliament is disinclined from allowing the courts to make public policy determinations. This by no means requires a radical departure of the nature described above and has pretty much been decided in *Molla Sali*.<sup>93</sup> The application of fundamental rights by the courts already constitutes an exception to the principle whereby local courts are not permitted to offend international comity by frustrating sovereign acts of foreign nations. If this were not so then all members States to the ECHR would be forced to accept all rights violations – from countries outside Europe – as valid and as a result one would not be able to afford asylum to those subject to persecution. This is clearly an absurd proposition. The House of Lords has authoritatively held that a woman was justified in seeking asylum in the UK as a result of discriminatory family laws in Lebanon derived from the sharia.<sup>94</sup> There is no question therefore that one's personal law in no way trumps the applicability of human rights and that such a determination by the courts is not viewed as offending the rule of comity. However, in order for this result to come about it is necessary for the wife to denounce her personal law in favour of the *lex fori*, which, as already noted, may create more problems for the wife both culturally and from the perspective of criminal

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<sup>91</sup> Depending on the legal system, the infliction of duress or threats may render a contract void or voidable. In English law, three forms of duress are recognized, each of which enable a party to rescind a contract on the ground that it has become void and hence the obligations contained in it are no longer enforceable. The type of duress that is relevant in this context is so-called 'duress of the person', although undue influence may also be applicable. See *Barton v Armstrong* [1976] AC 104 (where the plaintiff had threatened to kill the defendant if he refused to sell his shares in a company where the parties were joint shareholders); equally *Cumming v Ince* (1847) 11 QB 112 (contracts are deemed void where they encompass threats of restraint against one contracting party).

<sup>92</sup> Given that this may be construed in some quarters as apostasy, the choice of substantive law in such disputes (i.e. preferring English law over Islamic law) is not without grave consequences for the wife. The wife will of course denounce the statutory law of her country but because this will be grounded in Islamic law as such, accusations of apostasy may still be levelled, although in the opinion of this author they are wholly without merit.

<sup>93</sup> See *Molla Sali v. Greece*, App. No. 20452/14 (Dec. 19, 2018), <http://hudoc.echr.coe.int/eng?i=001-188985>.

<sup>94</sup> See *EM v Secretary of State for the Home Department* [2008] UKHL 64.

law (apostasy).<sup>95</sup> In such cases, the courts should adopt a common construction to Islamic family law which imports human rights notions without a need for the wife to denounce Islamic law as her personal law.<sup>96</sup> Although this will alleviate all of the aforementioned problems it will, most probably, open Pandora's Box that renders England and Wales the preferred matrimonial forum for dissatisfied Muslim wives across the globe. Hence, it is crucial that the implications of this proposal be studied carefully and that only the range of cases discussed here are allowed through. Such an experiment may actually provide the necessary impetus around the world for other nations to follow suit. Moreover, it is not unlikely that in time civil society in the Muslim world employ these developments in order to infuse more fairness in Islamic family law.<sup>97</sup>

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<sup>95</sup> This is no doubt a much-discussed issue but I will rely on primary sources. proclaimed that there is no compulsion in matters of religious belief, further supported by the contention as to the lack of worldly sanctions against disbelievers and apostates, save for those imposed by God in the afterlife. See Quran 2:256, 95:54, 47:25; see also Rudolph Peters & Gert J.J de Vries, *Apostasy in Islam*, (1976-77) 17 *Die Welt des Islams* 1.

<sup>96</sup> See Ilias Bantekas, *The Disunity of Islamic Criminal Law and the Modern Role of Ijtihad*, (2009) 9 *Intl Crim LR* 651; recent scholarship suggests that Islamic law has traditionally accommodated a variety of voices and that extremist ideologies have little, or no place in the history of Islamic thought. Eleni Polymenopoulou, *Caliphs, Jinns and Sufi Shrines: the Protection of Cultural Heritage and Cultural Rights under Islamic law*, (2022) *Emory Intl L Rev* (forthcoming).

<sup>97</sup> See Eleni Polymenopoulou, *Human Rights in the Six States of the Gulf Cooperation Council: From Vision to Reality*, (2020) 3 *Cardozo Int'l & Comp Pol & Eth LR* 929 (who argues that GCC states, all of which are exclusively Muslim, have conflated human rights norms in their so-called National Visions, thus effectively filtering out any extreme positions that may have been invoked on the basis of Islamic law).