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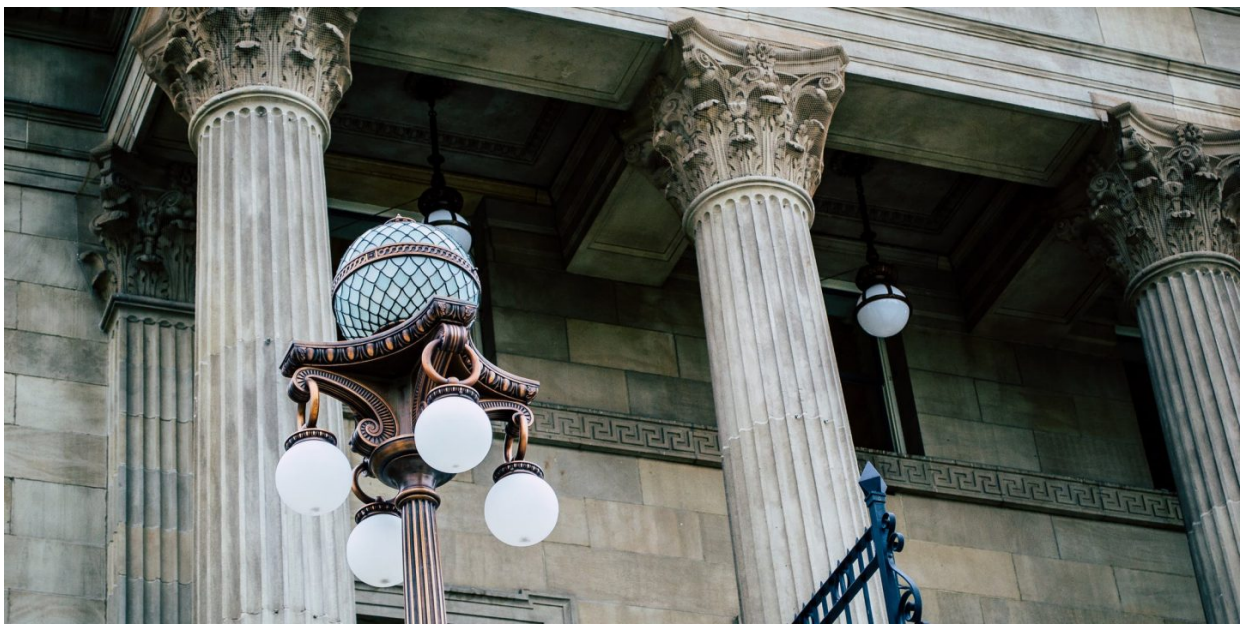

The Role of English Courts in Serving its British Citizens, and the Islamic Law

Farzana Khan *April 19, 2022* *Islamic Law* *0*

Introduction:

Given that Britain has 'at least 85' councils[1] dealing with Sharia principles, none of which are courts of law, this article explores whether there is a case for fully-fledged Sharia courts in Britain. First, focus will be given to the very nature of Islamic Law: its sources, developments, legal positions for Muslim minorities in non-Muslim states, and second, to what extent the countries that claim to have established such courts have actually managed to uphold Islamic principles.

Applying these findings in the British context and the role of the English courts in dealing with Islamic matters, this article will find that neither Islam mandates nor is there any need for such courts in Britain.

Islam as a faith often at odd with British ways of thinking:

Islam is no different to other religions in its complexity, nurturing many different and often conflicting interpretations about its inherent normative practices.[2] Islam is primarily based on five pillars, yet that bedrock overflows into all aspects of Muslim lives, individual and collective. Unlike modern nation states, Islamic vision is one of a totality: Muslims are invited to sanctify each aspect of their lives.[3] In Britain, this can seem at odds with our modern ways of living, especially since Europe witnessed the overthrow of divinely ordained absolute monarchy as of the enlightenment. People saw themselves very much as the children of reason: 'to be free', as Voltaire wrote, 'implies being subject to law alone'.[4]

What is Sharia and its nature and why can it be problematic for British courts?

Lord Bingham who served as a Chief Justice of England and Wales as well as Senior Law Lord of the United Kingdom, quoted in his famous book:[5] 'law must be accessible, so far as possible… predictable'.[6] By virtue of its very nature, Islamic law falls short in its predictability since Sharia is neither a product of legislative authority nor case law. Its sources of legal methodology are the Quran[7] and Sunnah (examples of the Prophet) – contained in reports known as the Hadith. Otherwise it is applied via consensus of the great jurists, by analogy, followed by other factors in critical reasoning such as 'public interest' and custom. Since Hadiths tend to vary on reliability of transmission and explicitness of meaning, jurists are constantly faced with the challenges to reach a definitive answer to the discrete and precise meaning, and consequently a ruling of what is intended by God. Ultimately, Muslims do not have a single Sharia book and the rulings do not emanate from a

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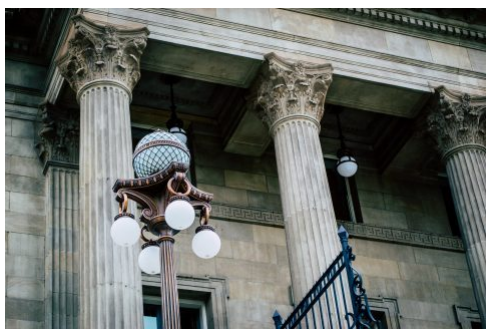

The Role of English Courts in Serving its British Citizens, and the Islamic Law

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concrete set of sources either. Ultimately, the result is a diverse, complex and rather dynamic legal tradition. Hence, it could be said that this very nature of Sharia is incompatible with nation-statehood where a single codified system is crucial to its uniform application. Also, the fact that sharia itself is open to interpretation leaves room for inconsistent application. Unsurprisingly, there is reluctance in modern jurisdictions to support the application of Hudud punishments as those high evidentiary standards cannot be satisfied. British scholar Timothy Winter observed that Sharia courts in Nigeria and Pakistan that choose to carry out such punishments have essentially created some kind of legal monster due to an appalling hybrid between poorly understood relics of Anglo-Mohammedan law, aspects of common law and bits of the Sharia as interpreted by Saudi Arabia.[8] This is why, I couldn't agree more, when Mayada Serageldin found a tiny number of British Muslims who intend to establish 'Shari'a Zones' in pockets of Waltham Forest and Tower Hamlets are not only misrepresenting the British Muslim population but possibly following their religion wrongly.[9] Although what seems to be interesting here is the lack of knowledge and ignorance to be the common ground between Muslim extremists and the far-right but for Muslims such wrong representation of their own faith is much more problematic not only because it feeds into the sheer rise of islamophobia but also the fact that it is inaccurate when 'early Muslim jurists have already provided precise details as to how Muslims should be able to lead a practicing life living in no-Muslim lands'.[10]

Challenges to Sharia in its application throughout history and the British context:

Historically, Sharia has shown profound variations in its transition from the Ottoman to the colonial and post-colonial era in reconciling the two systems namely Sharia with nation-statehood. The same problem applies today in the 're-actualisation' of Sharia based on western legal models.[11] As Sharia does not fit into any of the three categories of law i.e. national, international or universal,[12] it is unsurprising that in the modern world, Islamic Law exists primarily within the context of nation states. Hence, it is down to the nation-state that enforces its reform.[13] British Muslims are, therefore, in no different a situation than those living in Muslim countries. Perhaps, this is why, Professor Rob Gleeve found a British school teacher (Ahmed v UK) to be selective in asserting his right to be allowed to attend Friday prayers, despite the fact that that same Muslim teacher continues to live in 'the land of the unbelievers' (dar al-harb), contrary to the command of the classical jurists.[14] But my reasoning is: as the call by classical jurists to migrate to an area where God's laws can be followed (dar al-Islam) is irrelevant,[15] since no such area exists (including Muslim countries which exist as nation-states), this entire concept (living in dar al-harb vs the call to migrate to dar al-Islam) appears to be a fiction. Hence, Gleeve's rhetoric unfortunately aligns more with the constant pouring of abuse on Muslims by the right-wing media: 'take it or leave the country'. Of course, the ignorance of Muslims in conceiving their own faith as demonstrated by the school teacher in Ahmed does not help the situation either.

Another major challenge for the establishment of Sharia courts in Britain is the diversity among Muslims. For example, Sunnis have four schools of thoughts. Comparatively, Shias have three but each school has its own distinctive method of deriving law,[16] whilst each one is valid. Availability of different schools engenders 'forum shopping'.[17] Perhaps, the feasible solution for British Muslims is Büchler's reference to the British Empire which allowed different religious communities to exercise their own personal laws, resulting in the coexistence of different family laws.[18] Nevertheless, when the Archbishop of Canterbury called for 'interactive pluralism' (as long as it doesn't conflict with state laws),[19] it caused huge uproar. The then London Mayor, Boris Johnson, found the prospect of Islamic Law running parallel to UK law 'absolutely unacceptable'[20] despite stating the presence of 26 bishops in the House of Lords and the recognition of Jewish courts. Setting aside these inconsistencies, Sharia is found to be 'discriminatory for child custody cases,' especially where domestic violence is involved.[21]

As far as Islam is concerned, for Muslims, however, minority Sharia (fiqh al-aqalliyyat) brings non-negotiable obligations towards religious duties (ibadat), for instance, praying, fasting but not the same towards contractual matters such as marriage, divorce and so on. As Muslims are free to exercise ibadat in the UK as much as anywhere else, for instance in secular France (with the exception of French ban on all religious symbols including headscarf notably), their religious duties are neither being violated,[22] nor is there any need for Sharia courts.

Family Issues: Dower, Marriage and Divorce:

For Muslim minds, as Yalmaz finds, family issues are closely associated with religion, to be controlled by Islamic Law[23] but English law already provides platforms for cases arising from Islamic marriage and divorce.[24] Shahnaz v. Rizwan[25] established mahr (dower) obligations as enforceable contracts irrespective of the acceptability of the marriage.[26] Uddin[27] also allowed the bride to retain her mahr despite having only the nikah (Islamic marriage) ceremony. This shows the extent to which courts are ready to recognise Islamic Law as long as it does not contradict English law.[28] Interestingly, what we have is, Muslim legal plurality where some mosques sought recognition for one of their own officials

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to act on behalf of the registry, allowing a fully legalised marriage to be performed according to both laws: Muslim and English.[29]

The refusal to recognise Islamic divorce, on the other hand, can cause British law to create a 'limping marriage' phenomenon while the wife is divorced under religious law.[30] Sharia councils are, hence, helping women when they are divorced under official law yet cannot remarry until divorced under religious law. It is also about saving women from husbands who wait until the official divorce procedures have been completed before blackmailing the wife to negotiate favourable settlements[31] in exchange for religious divorce. Thus, despite the frequent calls to ban these councils from Lady Cox,[32] Francois-Cerrah is right to consider outright bans to be counterproductive as these are the mediums via which Muslim women exert pressure on their husbands.[33]

Dress Code & Human Rights:

Following the recent approach of English judges[34] in trying to find out whether long covering (jilbab) was required by Islamic Law in order to decide whether Begum's exclusion from Denbigh High school was unlawful, it is increasingly likely that judges will have to consider in the future whether certain issues are required by Islamic Law or not as more cases come to court under Article 9 of the Human Rights Act 1998.[35]From the Islamic perspective, English judges are acting like qadis (Muslim judge) as they are consulting experts (muftis).[36] One can argue that this effort made by the judges to serve Muslims according to Islamic legal ruling nullifies the separate need for sharia court.

Polygamy:

Polygamy shows obvious conflict[37] between Muslim and English law: a man domiciled in England can only have one wife at a time, voiding foreign polygamous marriage. To some Muslims, the earlier Quranic verse permitting polygamy has been abrogated by the later verse: 'you are never able to be fair and just between women'. Perhaps, like all three Abrahamic faiths,[38] the problem is that Islam, at its core, is gender-neutral and yet obscured by a several century-long tradition of male-dominated interpretation.[39] UK judges, nonetheless, tend to take a rather pragmatic approach, as the first wife retains all the rights whereas the court considers the second wife as a cohabitee, which may seem unfair on the onset.

Seemingly warranted case for Islamic tribunals as opposed to Sharia court:

Setting aside the unwarranted case for a Sharia court, I still believe, the voluntary choice for citizens to comply with specific schools of Islamic legal principles should still be allowed via non-binding[40] Islamic tribunals, just like tribunals of any faith. Dr. Mustafa Baig from the University of Exeter, brings one such analogy in the context of USA[41], where he pinpoints the very fact that American law provides for freedom of contract and dispossession of property upon death, therefore, Muslims should be free to write marriage contracts and will to implement the understanding of their faith just as Catholic Christians and Jews. After all, as claimants, all they want is an application of American law, just as Jews claimants following Halakhic law and Catholic observing Canon law. Ultimately, Muslim claimants should be free to channel their disputes to Islamic tribunals just like claimants directing their disputes to private arbitrators. In Britain, small businesses, Muslim or non-Muslim, already found Islamic tribunals to be cost-effective, resulting in their rapid growth. [42] However, granting legal recognition is a step too far in my opinion, as shown by The Law Society who finally withdrew their guidance on Sharia compliant wills.[43]

Conclusion:

Taking into consideration the sacred sources of Sharia, its numerous interpretations, its tension with codification and consequently with nation statehood which many argue to be compatible and not problematic at all, the diversity among British Muslims as well as unequal treatment of women due to patriarchal misinterpretation, this article negates the case for a full-blown British Islamic court. After all, neither Islamic Law mandates nor advocates such a court; English courts have been active in serving Muslim populations in issues arising out of Islamic principles.

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