Family Law, minorities and legal pluralism: Should English Law give more recognition to Islamic Law?

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Origins of Law
It is believed by Muslims that Islamic Law is made up of the following:

• Principles and codes of living established according to the Mind of God, the Creator of the Universes.

• The traditions of the companions of Prophet Muhammad p.b.u.h. are encapsulated through common consensus (Ijma).

• The decisions of the renowned Jurists in the established Schools of Law, namely Hanafi; Maliki; Shafi; Hanbali and Jaafri, set a precedent in accordance with the application of the human mind (Qiyas), with the possibility of renewed interpretation (Ijtihaad) according to societal changes. Ijtihaad guaranteed a process of dynamic and contemporary application.
English Law

English Law is based on the codes and principles according to the mind of man. Derived from books of statute at the Houses of Parliament, or by way of precedent. These laws are constantly changing according to the values that prevail amongst society at any given time.

The modern secular political state remains defensive over the application or imposition of any forms of ‘religious Laws’. Therefore any attempt to establish even a dialogue for the accommodation of religious laws in a secular state is not only met with resistance but outrage.
“if we are to think intelligently about the relations between Islam and British law, we need a fair amount of ‘deconstruction’ of crude oppositions and mythologies, whether of the nature of Sharia or the nature of the Enlightenment.”
In answering the question “To what extent should English Law accommodate Islamic Law;
The answer would have to be in three parts.

1. Firstly, there are examples where English Law has been historically influenced by Islamic Law.

2. Secondly, there are certain aspects of Islamic Law that can and do sit very well within the framework of the ADR mechanism under the regime of the current Arbitration Act 1996.

3. Finally, recognition can only be advanced through a process of dialogue, discussion and interaction between those that are the proponents of both these legal disciplines. The dialogue of the inter-law body could produce profound outcomes in order to enrich the substance, process and the outcomes found in English Law.
Historical Influences and Interactions

• The rule of law is without doubt a fundamental and integral aspect of any legal system, the strongest guarantee of administering justice and the means to protect the institutions of government and protect public and individual freedoms.
A glance at Islamic history will make it clear to any objective observer that both the theory and practice of the rule of law as understood today had already been established in the seventh century by the rightly guided Caliphs as derived from Islamic Law. Whilst there is no absolute proof to this connection, one cannot overlook the similarities in the theories articulated by Montesquieu and later by Dicey relating to these concepts and Islamic Law.
The Holy Quran States:

• “So judge (O Muhammad) between them by what God has revealed and do not follow their vain desires, but beware of them lest they turn you away from some of what God has sent down to you.” (Quran 5:49)

• “…And let not the hatred of others dissuade you from justice. Be just, that is nearer to piety; and fear God. Verily, God is well acquainted with what you do.” (Quran 5:8)

• “…And if you judge (O Muhammad), judge between them with justice. Verily, God loves those who act justly.” (Quran 5:42)

• “Verily, Allah commands you to make over the trusts to those entitled to them, and that when you judge between people you judge with justice.” (4:58)
The Holy Prophet Muhammed p.b.u.h. Stated:

- “If a judge gives a judgment using his best judgment and is correct, then he receives a double reward (from God). If he uses his best judgment but makes a mistake, then he receives a single reward.” (Reported in Sahih Ahmed)

- “Whoever Allah tests by letting him become a judge between people, should treat them justly in the way he looks at them, the way he speaks to them, the gestures he makes to them and the place where he makes them sit.” (Reported in Baihaqi)
Other areas of influence include the laws relating to: trusts, agency, land, contract, trial by the jury and even presumption of innocence.

Law of Trusts:
The parallels between Islamic Law and English Common Law can be observed in the law of trusts and charitable endowments (waqf). Islamic Law requires that every waqf has a settler, trustee and beneficiary.
In an article by Mukul Devichand, he suggests that the Inns of Court may have been “modelled” on Muslim ideas about Islamic schools of law.
Criminal Law
The jury system did not come into force until the Crusades.

• Islamic Jury: The precursor to the jury trial was the *Lafif*, a body of twelve members drawn from the *neighbourhood* and sworn to tell the truth, who were bound to give a unanimous *verdict*. which was found in classical Islamic Maliki jurisprudence, developed between the 8th and 11th centuries in North Africa and Islamic Sicily.

• According to Professor John Makdisi, "*no other institution in any legal jurisdiction studied to date shares all of these characteristics with the English jury.*"
Criminal Evidence Act 1898
The defendant could not give evidence on his own behalf in criminal trial.

Criminal Justice Act 2003
This piece of legislation made it easier to place the defendant's bad character before the trial court.

In Islamic Law this was allowed 1400 years ago. Muslims have always believed that a person’s character is important in understanding the defendant’s potential tendencies towards the offence committed.
Islamic Law

• Islamic Law allows for a reduction or mitigation of sentence due to compensation or forgiveness by the victim.
• In Islamic Law the victim may accept money as damages for the wrong committed if they so chose.
  – Murder; the family of the victim can opt for monetary compensation from the offending party as opposed to the offender being punished by capital punishment.
  – This view of the victims family in murder cases is being piloted in certain Crown courts in this county. It is a common idea in the USA and EU but Islam has allowed it for 1400 years.
Family Law
In the realm of family law there has been significant conceptual movement in English Law in the last fifty years. Marriage is generally in all jurisdictions regarded as sacrosanct. The essence of it is regarded as both spiritual and contractual. There is now a greater attention in many Western legal jurisdictions to view the contractual aspect of the marriage with greater focus.

The Americans are gearing towards a contractual marriage by way of a pre-nuptial agreement.
Islamic Law – Marriage

• Islamic Law recognises both parties as separate legal entities with reciprocal responsibilities under the ‘contract of marriage.’

• This incorporates certain implied terms, which are maintenance by the husband of the wife with food, clothing and shelter in accordance with her standard of living prior to marriage.

• Both parties are bound by a set of obligations
• The bride can stipulate what her Mahr (dowry) should be and whether it needs to be paid at the time of the ceremony or after marriage. This is enforceable under Islamic law. Currently English law does not accommodate this concept and a Muslim wife upon divorce may not be able to enforce her rights under the contract.

English law does not recognise an Islamic marriage ceremony celebrated within this jurisdiction.
Muslim women are often seen as the victims and the worst off in the application of Shariah Law. This is as a result of an influence of certain cultural practices which raise eyebrows even amongst Muslim jurists, and do subjugate the rights of women in society.

These cultural practices have to be distinguished from Islamic Legal principles. Upon examining such practices and their roots, one can maintain that there are no Islamic legal principles that subjugate the rights of women.
Muslim Arbitration Tribunal (MAT)
An example of the second aspect of interaction can be found in the example of the establishment of the Muslim Arbitration Tribunal (MAT).

- MAT was created in 2007 to deal with dispute resolution within the Muslim community in England and Wales.

- It complies fully with the *Arbitration Act 1996* and so it operates within the English law and not as an alternative legal system in this country as some parts of the media suggest.
• MAT offers the Muslim community the regular benefits of arbitration supplemented with the expertise to have decisions made according to their faith.

• Both the legal and Islamic scholar members of the tribunal have to produce a joint written judgment, which is then given to the parties.

• The governing body of MAT has a disciplinary function over its panel members, again similar to many other disciplinary bodies.
Need For MAT

• Historically, because there have been problems in the Muslim community in the UK which could not be resolved through the civil courts, a number of Sharia councils sprung up to resolve these matters.

• An example is the religious marriage and divorce which is not recognised by the English law. A man could divorce his wife through the family Court but decline to issue a religious divorce. Consequently he was free to re-marry but the wife was constrained by her religious law and was stuck in what we describe as a limping marriage.

• The only way to resolve the problem for her was to issue a religious divorce by a Sharia council.
Role of MAT in forced marriage cases:

• The policy of MAT is not to take a passive role in purely dealing with Arbitrations. It plays an active role in dealing with underlying causes to the problems of society.

• MAT produced a report entitled “Liberation from Forced Marriages” MAT has described the increasing numbers forced marriages as a ‘crisis’ in the Muslim community that needs to be dealt with.
• MAT takes a strong view against forced or coerced marriages. In Islam, full consent of both parties is required before a valid marriage can take place. Thus MAT welcomes the introduction of the Forced Marriage Act 2007.

• The Governing Council of MAT has felt that additional protective measures should be considered.

• MAT has a sizeable female representation on its arbitration panel.

• Over 80% of our applicants are female
The recent judgement of Lord Hope in the case of EM (Lebanon) v Secretary of State for the Home Department [2008] AER (D) 206 has not been helpful.

- He described the appellant as a fugitive from Shariah law as opposed to being a fugitive from Lebanon. The appellant was a lady who did not even take her case to a court in Lebanon to have the case tried. Instead the English court was told that her child would be taken away from her and given to her divorced husband at the age of seven years. There was no evidence of what the Lebanese Court would have actually decided.

- It was not even considered that Lebanon is not actually an Islamic country.

- In this case Shariah law was described as being ‘created by and for men in a male dominated society.’ This is the first time there has been a suggestion that Muslims believe that ‘God is a man who lived amongst us’.
In the matter of inheritance law there is a lot of controversy in the media accusing Islamic Law of unfairness. The classic example is always given of a daughter inheriting half as much as her brother.

In Islam the testator cannot write his spouse and children out of a will as one can in English law. They will inherit their shares whether or not there is a written will. In an Islamic will, the testator can bequeath up to one third of his estate (to anyone including his daughter) and the rest is distributed according to Shariah law (under which the daughter inherits again).
Mosque disputes

- As mosques are usually registered as charities, such cases inevitably involved the Charity Commissioners leading to cases ending up in the High Court with expensive litigation.

- Today the High Court or the Charity Commission could direct the parties to have the matter settled by expert Islamic and legal arbitrators.
The third aspect of interaction between the two legal disciplines would be one of discussion, dialogue and bridge-building.
Glossary

• Ijma (common concensus)
• Qiyas (human mind)
• Ijtihād (renewed interpretation)
• Waqf (charitable endowment)
• Mahr (dowry)