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CROSS-CULTURAL INTERACTION BETWEEN ISLAMIC LAW AND OTHER LEGAL SYSTEMS

ISLAMIC FAMILY LAW AND ANGLO-AMERICAN PUBLIC POLICY

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I. INTRODUCTION

This Article discusses the response of the English judiciary and legislature to the differing expectations and norms of the Muslim community living in its midst. Although the emphasis is necessarily on the English experience, it is hoped that the problems and the reactions will have echoes on the other side of the Atlantic. England, perhaps more than the United States, enjoys an ecclesiastical entrenchment in historical terms. Little of this experience however should be left in the ongoing day to day reality of the administration of family law. This Article proposes that pluralism and diversity must be a central theme of modern English family law, as much perhaps as it is for American family law. The cases discussed herein will make apparent that this theme is not always the stated position of English judicial reasoning. One major area in which expectations and norms of the Muslim community clash with the host society is the issue of polygamy.

II. POLYGAMY

An English Court of Appeal decision, *Hussain v. Hussain*,[1] arose out of a petition by the wife for a decree of judicial separation. The marriage was solemnized in Pakistan according to the Muslim law of that country. The

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[1] [1982] 3 All E.R. 369.

husband, of Pakistani origin, had acquired a domicile of choice in England: the wife, at the time of the marriage, was domiciled in Pakistan. Referring the court to section 11(d) of the Matrimonial Causes Act of 1973, the husband answered the wife's separation petition by challenging the jurisdiction of the court to entertain the petition because, he alleged, the marriage was void from its inception. The Act states:

> A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say . . . (*d*) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (*d*) of this subsection a marriage may be polygamous although at its inception neither party has any spouse additional to the other.[2]

Believing that this section of the Act codified the common law rule,[3] academics and lawyers have perceived section 11(*d*) as preventing an English domicilary from contracting a potentially or actually polygamous marriage. Ormrod, L.J. speaking on behalf of the court in *Hussain*, has taken a different view of the law by accepting the argument submitted by the wife's counsel. Questioning the legislature's bias against polygamy, Ormrod, L.J. stated: "[I]t is difficult to conceive any reason why Parliament, in an increasingly pluralistic society, should have thought it necessary to prohibit persons whose religious or cultural traditions accept polygamy from marrying in their own manner abroad simply because they are domiciled in England and Wales."[4]

Ormrod, L.J. proceeded to contend that a marriage is not caught by section 11(*d*) of the Matrimonial Causes Act if it is not actually polygamous at its inception, and is incapable of actually becoming polygamous by virtue of the personal laws of the parties at the time it was entered into.

On the facts of *Hussain*, the husband was incapable of contracting a valid marriage while already married.[5] The wife, who was domiciled in Pakistan at the time of the marriage, could not marry another man while married to her husband under the laws of Pakistan. Thus, the marriage

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[2] Matrimonial Causes Act, 1973, ch. 18, § 11.

[3] *See* R(G)3/75 (an insurance case); Zahra v. Islamabad, [1979-80] Imm.A.R. 48; Morris v. Morris, (unreported) 22 April 1980 (cited in Bradley, *Duress and Arranged Marriages*, 46 MOD. L. REV. 499, 503 (1983); Nabi v. Heaton, [1981] 1 W.L.R. 1052. *See also* The Law Commission and Scottish Law Commission Working Paper, *Polygamous Marriages* (P.W.P., No. 83)(1982), cited in Bradley, *supra*, at 503; and the Scottish Law Commission C.M. 56 (1982)[hereinafter cited as W.P. 83 and C.M. 56].

[4] Ormrod, L.J., giving the judgment of the Court of Appeal in *Hussain*, 3 All E. R. at 372.

[5] *See* Matrimonial Causes Act, 1973, ch. 18, § 11(b). The Act states: "A marriage . . . shall be void . . . (b) that at the time of the marraige either party was already lawfully married . . . ."

was not polygamous at its inception and was valid under English law. The petition of the wife was restored to the list for a pronouncement of a decree of judicial separation.

Hussain is cited in the context of this paper because it is clear that the court was heavily influenced by public policy considerations. The judge stated at the end of his opinion that the consequences of adopting the argument advanced by the husband would have "widespread and profound" repercussions on the Muslim community in England.[6]

What is the policy consideration explicit from this judgment? Of paramount importance is the significance of domicile; respect for Muslim law or Muslim cultural values plays a smaller role. If the marriage actually had been polygamous, it would have been held void; likewise, if the wife had been domiciled in England and the husband domiciled in Pakistan, again the marriage would have been void. The Law Commissions have pointed out that the practical effect of the Court of Appeal decision in *Hussain* has been to interpret English legislation in such a manner that certain marriages contracted outside England are void when the woman is domiciled in England, whereas the very same marriage is treated as valid when it is the man who is domiciled in England. The policy factor underlying the decision was to "preserve the principle of monogamy for persons domiciled in [England]."[7] The practical effect is to produce a discriminatory situation. In any event, it may be queried: Why the concern for preserving this principle?

The Law Commissions have recommended repealing the potentially polygamous marriage concept. They believe, however, that the law should continue to prohibit English domiciliaries from contracting actually polygamous marriages. Even polygamous marriages that are valid because the persons concerned were domiciled in a country such as Pakistan, where marriages of this type are permissible, are given only restricted recognition. A clear example of this is evident upon studying the impact of polygamous marriages on social security benefits.

Consider the hypothetical case of a Pakistani national and domiciliary who many years ago married a woman in that country under Muslim law. Subsequently he married a second wife. This second marriage is actually polygamous. The husband did not divorce his first wife because of the social and cultural inhibitions which prevented him from doing so. He later emigrated to the United Kingdom where he took up employment, paying compulsory national insurance contributions.

Upon the husband's death, neither wife is entitled to claim the state widow's pension. This may be justified if both spouses remained in Pakistan, but why should the position be the same if the husband came to the United Kingdom with his second wife who lived with him as his sole wife? What possible policy factor prevents the payment of a widow's bene-

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[6] *Hussain*, 3 All E.R. at 372.
[7] *Id.*

fit to this person? Although the husband has paid the compulsory contributions and the first wife is living and has always lived out of the United Kingdom, the second wife's status cannot be remedied since the regulations insist on marriages which are monogamous.[8]

While issues involving polygamy may arise only rarely in the United Kingdom, such issues appear to have occupied the time of the Law Commissions on a number of occasions.[9] Nevertheless, polygamous marriages raise issues that illustrate the strains inherent in policy. Marriages contracted in Muslim form are potentially polygamous, and only a few Muslim countries have gone so far as to prohibit polygamous marriages. As Ormrod, L.J. claimed in *Hussain*, the court is anxious to uphold the monogamous nature of a marriage for those who are domiciled in England.[10]

The primary basis for court concern regarding polygamous marriages is the protection of the weaker members of the family unit. If such members require no such protection, as in the social security example, then it is unnecessary to uphold the traditions of monogamy. It may be queried whether this position toward polygamy is evidence that the Christian ethic still prevails and is enforced even over those who do not follow it.[11]

III. Questions and Problems

Of similar importance to the Muslim community living in the United Kingdom are the following issues: the position accorded to arranged marriages; the law on divorce; the enforcement of the dower and other aspects of the Muslim marriage contract; registration arrangements; alimony; the custody of children; and the succession rights of the Muslim heirs. These problems present themselves in many areas of interaction with the host community: social security, taxation, matrimonial rights, probate, immigration law, and employment law.

In England, a large body of case law has emerged which is concerned with the interaction of Muslim family law with the English legal system. A number of official bodies, including the Law Commission, have examined other areas in which Islam has impacted English law and its administration. Members of Parliament have occasionally addressed such concerns in response to communications with constituents detailing particular areas of difficulty.

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[8] Social Security and Family Allowances (Polygamous Marriages) Regulations 1975, S.I. 1975, no. 561.

[9] Most recently, issues involving polygamy have been addressed by the Law Commissions in 1982 in W.P. 83 and C.M.56.

[10] *See supra* text accompanying note 7.

[11] J. Robilliard, Religion and the Law 190 (1984).

IV. Bars to Remarriage

For some time, a number of members of Parliament have been collecting evidence of abuse by some Muslim husbands who, after an English divorce, refuse to divorce their wives by talaq. The wives in this position believe that they have not been properly divorced in accordance with their religion, and remarriage within the community is clearly difficult. The wives are vulnerable to blackmail by their husbands. In the debate on this problem in the House of Commons, the Minister of Parliment for one constituency in the North West of England referred to five incidents in his caseload by way of illustration.[12] In one case, the ex-husband demanded £5000 and the return of the wedding jewelry. In a second case, the man agreed to a religious divorce, only if he did not have to pay maintenance and the wedding jewelry was returned.[13] Mr. Leo Abse, a Minister of Parliment, proposed the insertion of a new clause in the Matrimonial and Family Proceedings Bill of 1984 while it was proceeding through the parliamentary stages. The clause read as follows:

> Where a petition for divorce has been presented to the court, either party to the marriage may apply to the court at any time before decree absolute opposing the grant of the decree absolute on the ground that there exists a barrier to the religious remarriage of the applicant which is in the power of the other applicant to remove.[14]

A further clause gives the court power to grant a decree absolute when exceptional circumstances make it desirable for the decree to be made without delay.

These clauses were modeled on a New York domestic relations statute that is substantially more forthright in its approach, stating:

> Any party to a marriage . . . who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that, he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce . . . .[15]

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[12] 1314 Hansard 925, 13 June 1984. An elaboration of this issue by this author is available in Pearl, *Recognition of the Talaq: A Postscript*, 43 CAMBRIDGE L.J. 248 (1984).

[13] Similar stories have arisen within the Jewish community where men refuse to go through a religious divorce (the ghett) which is solely within their power, thereby depriving a former wife of the opportunity of remarrying in a traditional synagogue. *See* Brett v. Brett, [1969] 1 All E.R. 1007.

[14] Matrimonial and Family Proceedings Bill, 1984. The bill is now the Matrimonial and Family Proceedings Act, 1984.

[15] N.Y. DOM. REL. LAW § 253 (Consol. 1984).

In England, the clause was withdrawn upon assurances by the government legal officer that it would consider the matter seriously if it were raised again. At the present time, the government is opposed to such an amendment primarily because of its views that the amendment would be wrong to prevent a marriage from being dissolved by a bar that is based on one rather narrow aspect of conduct, at a time when bars to divorce have been readily abandoned. The policy questions which arise in this context illustrate the balance which must be obtained between accommodating the particular difficulties of the Muslim community within the broader framework of a secular and uniform legal system. Necessarily, the Muslim community leaders have not been particularly forceful in supporting the change suggested by the parliamentarians.[16]

V. Arranged Marriages

The English legal system is also vexed by the problems associated with arranged marriages, common under Islamic custom. A recent English case, *Hirani v. Hirani*,[17] illustrates the issues that may arise. In this case, the judge of the Family Division of the High Court was presented with an undefended petition by the wife for a decree of nullity on the ground that she had entered into the marriage under duress exerted by her parents. The judge dismissed the petition and the wife appealed to the Court of Appeal. The facts of this case state that the wife was nineteen years old and living with her Hindu parents in England when she struck up a relationship with a young Indian Muslim, a Mr. Hussain. When the parents discovered this liaison they made immediate arrangements for her to marry a Mr. Hirani, a Hindu. Neither the woman nor her parents had ever seen this man, however, the parents pressured her to go through with a ceremony of marriage at a register office. The judge recalled the pressure the parents exerted upon their daughter to marry Mr. Hirani:

> You want to marry somebody who is strictly against our religion; he is a Muslim, you are a Hindu; you had better marry somebody we want you to, otherwise pack up your belongings and go. If you do not want to marry Mr. Hirani and you want to marry Mr. Hussain, go.[18]

The woman went through a civil marriage ceremony, and subsequently participated in a religious ceremony.[19] After the religious ceremony, she

[16] The Board of Deputies of British Jews had lobbied for the introduction of an amendment, slightly narrower in its scope than the clause which was debated.

[17] (1983), 4 F.L.R. 232 (C.A.).

[18] *Id.* at 233.

[19] Most Hindu, and indeed Muslim, marriages in England involve the participants in two ceremonies. The first ceremony takes place in civil form in a register office. The second purely religious ceremony takes place in the mosque or temple. By English law, the parties are man and wife after the ceremony in the register office. Invariably they will not com-

lived with Mr. Hirani for six weeks. She then left him, and went to Mr. Husain's house claiming to never have consummated the marriage with Mr. Hirani. She never went back to her husband's house. The trial judge was not without sympathy for the woman, yet he felt constrained to refuse the decree. He referred to the test which has been adopted in England by the appellate court in *Szechter v. Szechter:*

> [Has] the will of one of the parties thereto been overborne by genuine and reasonably held fear by the threat of immediate danger (for which the party is not himself responsible) to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock[?][20]

The trial judge argued that it was essential to find evidence of threats to life, limb, or liberty. He found no such evidence in this case, and he therefore refused the petition. The Court of Appeal in *Hirani* reached a different conclusion, and granted the decree which was asked. In doing so, the court appears to have abandoned the objective standard of fear as the appropriate test and returned to the subjective approach adopted in the cases in the nineteenth century. Ormrod, L.J. stated:

> The crucial question in these cases . . . is whether the threats, pressure or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual. It seems to me that this case . . . is a classic case of a young girl, wholly dependant on her parents, being forced into a marriage with a man she has never seen in order to prevent her (reasonably from her parent's point of view) continuing in an association with a Muslim

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mence living together as man and wife until the second ceremony is performed. This double procedure is necessary because very few mosques or temples are registered for the purposes of the solemnization of marriages under the Marriage Act, 12 & 14 Geo. 6 ch. 76, § 41 (1949). Mosques are normally not registered, in part because of problems relating to the marriage of foreign domiciled Muslims in an actually polygamous ceremony, and also because few mosques comply with the statutory requirement that they must be separate buildings.

[20] *Hirani* (1983), 4 F.L.R. at 234 *citing* Szechter v. Szechter, [1971] 2 W.L.R. 170, 180. In an earlier case involving the Sikh community, Singh v. Singh (1971), P. 226, counsel representing the wife had argued unsuccessfully that this test was too narrow. Her counsel had suggested that such a test "would impose artificial limitations in the law of nullity on the principle that the lack of consent makes a marriage void." In Singh v. Singh, the parties had not met before the marriage, and the wife's counsel had attempted to argue that "religious fear vitiated the marriage on the ground of duress." *Id.* at 229. The wife's counsel said: "It would be unrealistic of the law to say that if she married him when her father pointed a gun behind her back the marriage was void because her will was overborne by fear, but if she married him when her father stood behind her without holding a gun the marriage was valid, even though she was only going through the ceremony out of obedience to her father and because of his express wish and she had been brought up in a society where her father's wish had the force of law." *Id.* at 228. The Court of Appeal rejected this argument: "A sense of duty to her parents and the feeling of obligation to adhere to the custom of religion there may be, but of fear not a shred of a suggestion. Reluctance no doubt; but not fear." *Id.* at 233.

> which they would regard with abhorence. But it is as clear a case as one could want of the overbearing of the will of the petitioner and thus invalidating or vitiating her consent.[21]

Arranged marriages, as has already been suggested, involve just one admittedly important aspect—the problem of reconciling different cultural values within the framework of a secular and general law. Some would argue that no reason exists that requires the accommodation of these differing patterns and values. David Bradley, a Lecturer in Law at the London School of Economics, has maintained:

> The diverse and sometimes conflicting interests involved in the arranged marriage system include those of the second and subsequent generations exposed to two cultures, the immediate family including siblings, the wider kinship network and the ethnic group as a whole. Inevitably these cannot all be accommodated in a family law in which the prevailing ethic is individualism.[22]

Bradley suggests that the onus should be on those "with dual culture affiliations" to determine which system they wish to adopt in relation to marriage.[23] This formulation presents some difficulty: Can the parties be allowed to opt for British or American individualism instead of Islamic community mores? If so, what is the position when one person makes such an election and the partner does not do so? In any event, such an election is hardly likely to be freely made in either direction.

Peer pressure can often be very strong among the Asian youth, and may be as strong as the pressure from home. Once an individual has chosen to adhere to a particular marriage system, the courts are reluctant to interfere. It will certainly be difficult, if not impossible, for a man having made a choice to acquiesce in the cultural expectations of the community to later pray for relief in the spirit of individualism so as to obtain a decree of nullity on the grounds of duress.[24] One must ask whether this is a matter of cultural insensitivity or simply an acknowledgement that, having elected to fulfil the family expectations, the man cannot ex post facto rely on the differing expectations of the host community.

Thus, it is not a question of the wife in *Hirani* opting for anything. She simply had no choice. If an absence of choice is present, as there is in some cases, then the marriage will be set aside. The question is really not what choice did she make, but rather whether she had a choice or not.

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[21] *Hirani* (1983), 4 F.L.R. at 234. For a comment on this case see *Bradley, supra* note 3.

[22] Bradley, *supra* note 3, at 504.

[23] *Id.*

[24] *See* the Court of Appeal decision in Singh v. Kaur (1981), 11 Fam. 151, 152(A Sikh case) cited in Bradley, *supra* note 21, at 501.

Individualism is paramount.[25] Individualism, however, does not exclude individualized expectations, and public policy in England will respect and give effect to arrangements whereby a marriage solemnized in a register office will not be consummated prior to a subsequent religious ceremony. Thus, the party who prevents the second ceremony from taking place will be preventing the marriage from being consummated. That party will not be able to petition for a decree of nullity based on willful refusal to consummate the marriage because the other person has a valid defense. Furthermore, that person himself or herself will be guilty of willful refusal to consummate the marriage and a successful petition can be brought against him or her. Additionally, English courts have been willing to imply agreements of this nature from the surrounding circumstances of the register office marriage.[26]

VI. Divorce

The Muslim law of divorce presents most of the problems that have arisen; a brief description of the Muslim law institution of talaq is useful.[27] In the classical form, the talaq is the manner by which a man divorces his wife. It is unilateral and is not subject to inquiry by any outside person or committee. In certain circumstances if pronounced in a triple form, the talaq dissolves the marriage immediately on pronouncement. This form of talaq is often referred to by English judges as a "bare talaq." The talaq of this type is not enjoined in Islam, and is not available to the Shi'i Muslim community. One judge in pre-independence India, referring to the classical form of talaq followed by the majority Sunni community, called such an institution good in law although bad in theology. Restrictions have been placed on the power of the husband in many Muslim countries primarily to provide an opportunity for reconsideration.

In Pakistan and Bangladesh (although not in India), a 1961 ordinance makes it obligatory for the husband to inform both his wife and a local official of the pronouncement of the talaq. This official is placed under certain duties to attempt a reconciliation and the divorce is not effective until ninety days after he has been notified.

The United Kingdom has in recent years reacted to the large number of Muslims living in the country by enacting legislation which purports to lay down certain guidelines for the recognition of divorces of this kind.

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[25] *See Khusai ja Bi* (1968)(unreported) discussed in Pearl, *Immigrant Marriages: Some Legal Problems*, 2 New Community 67, 72 (1972), cited in Bradley, *supra* note 3, at 500 n. 11. In this case, a decree was granted to a Muslim girl who was married by her two brothers who placed an advertisement in the Urdu press in the United Kingdom.

[26] *See* Kaur v. Singh, [1972] All E.R. 292; Singh v. Kaur (1979), 7 New Community 275.

[27] This discussion is transcribed from a previous article by this writer. *See* Pearl, *supra* note 12.

The legislation is a little unclear and has been the subject of considerable case law. Of paramount importance is section 8 of the Recognition of Foreign Divorces and Legal Separations Act, 1971 (1971 Act). This law enables a court to withhold recognition of an otherwise effective foreign divorce when its recognition would be manifestly contrary to public policy.

An example of the operation of section 8 of the 1971 Act is the case of *Zaal v. Zaal*.[28] The facts in *Zaal* reveal that an English women married her husband, a Dubai national, in 1975 in Dubai under Muslim law. A child was born shortly afterwards. The family lived in Dubai but visited England regularly. In June 1978, while the wife was in England, the husband divorced his wife by talaq in Dubai. The talaq was of the "bare talaq" variety. The wife then petitioned for a divorce in the English courts. In his answer to her divorce petition the husband relied on the talaq divorce and sought a declaration that this talaq be recognized as dissolving the marriage. Bush, J. explained the policy issue before the court:

> Here was a young woman who entered into a marriage governed by Islamic religious laws and customs and who clearly knew of the dangers which might arise as a result of the ease with which a talaq could be pronounced. Further, it was her intention to live with her husband for the majority of their time together in a Muslim society.[29]

Notwithstanding this submission on behalf of the husband, the court rejected the argument and exercised its discretion to refuse recognition under section 8 of the 1971 Act.

> [I]t would manifestly be contrary to public policy to recognize the divorce. I have come to this conclusion on the restricted ground that what was done, though properly done according to the husband's own customary laws, was done in secrecy so far as the wife was concerned. The first this wife knew of it the deed was done and she was divorced in fact and in law and it was irrevocable and binding according to the law of the husband's state. No opportunity was given to enlist the aid of her's or the husband's relatives in repairing the breach. Common justice requires that some notice other than a casual threat ought to be given for so solemn a proceeding. It is this that in this case offends one's sense of justice and jars upon the conscience . . . .[30]

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[28] (1983), 4 F.L.R. 284.
[29] *Id.* at 289.
[30] *Id.*

Courts in England have been wary of exercising their discretion to refuse recognition under section 8 of the Act. Wood, J. conveyed this reluctance in his opinion in *Quazi v. Quazi*:

> [I]t is important that the courts in this jurisdiction should appreciate that we have living in our community persons who have a religion different from those with which we are familiar and with its particular devout customs, obligations and rights. I see nothing contrary to public policy in the recognition of . . . the talaq.[31]

In *Zaal*, where the petitioner was English (in contrast to *Quazi* where both parties were Pakistani), it may well have been correct for the judge to refuse recognition on public policy grounds. Bush, J.'s statement, however, is probably expressed too broadly. In a different context, Wood, J. has argued consistently that the "bare talaq" (as opposed to, for instance, the Pakistan talaq) should only be recognized in the United Kingdom when it is obtained abroad and is valid by the domiciliary laws of the parties. It should not be recognized simply because it is obtained in the country of nationality or habitual residence of either party.[32] This view has now been followed by the Court of Appeal in the case of *Chaudhary v. Chaudhary*,[33] where Oliver, J. said:

> In my judgment it must plainly be contrary to the policy of the law in a case where both parties to a marriage are domiciled in this country to permit one of them, while continuing his English domicile, to avoid the incidents of his domiciliary law and to deprive the other party to the marriage of her rights under that law by the simple process of taking advantage of his financial ability to travel to a country whose laws appear temporarily to be more favourable to him.[34]

This view proposes that distinctions between different forms of the talaq cannot really be drawn and justified due to the limited nature of reforms, in Pakistan, for instance.

A final matter in connection with the talaq which requires some com-

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[31] Quazi v. Quazi, [1980] A.C. 744, 782.

[32] The Recognition of Foreign Divorces and Legal Separations Act, 1971, ch. 53, §§ 2 - 5. The domiciliary connecting factor is retained by virtue of the Domicile and Matrimonial Proceedings Act, 1973, ch. 45, § 6. *See* Quazi v. Quazi, [1979] 3 All E. R. 897 (at first instance); Sharif v. Sharif (1980), 10 Fam. 216; Chaudhary v. Chaudhary (1983), 13 Fam. 177.

[33] [1984] 3 All E.R. 1017.

[34] *Id.* at 1033. This statement must now be read in the light of the new provisions in section 12 of the Matrimonial and Family Proceedings Act 1984, which enable the court to grant financial relief (maintenance, lump sum provision, transfer of property orders, etc.) when granting a decree and also when recognizing a foreign decree. On the other hand, if the foreign decree will not be recognized if it is a "bare talaq" (because it is not a "judicial or other proceedings" within the meaning of the Act) then distinctions will still have to be drawn between the Pakistani talaq and the talaq for instance in Dubai.

ment relates to a talaq pronounced in the United Kingdom where statutory provisions prohibit recognition. The Domicile and Matrimonial Proceedings Act, 1973 states: "No proceeding in the United Kingdom . . . shall be regarded as validly dissolving a marriage unless instituted in the courts of law of one of those countries."[35]

Notwithstanding the common law rules which have survived in section 6 of the 1971 Act which are based on domicile, section 16(2) requires that a nonjudicial divorce obtained abroad "shall not be regarded as validly dissolving a marriage if both parties to the marriage have throughout the period of one year immediately preceding the institution of the proceeding been habitually resident in the United Kingdom."[36] A divorce obtained in the country of habitual residence of either party is recognized as the exception to this provision under sections 2 through 5 of the 1971 Act. Section 16(2) of the Act clarifies a policy position which confines recognition of the talaq to those cases where the nexus of the parties is outside of the United Kingdom.

VII. American Cases

Similar problems to those arising in the United Kingdom occur from time to time in the United States. In *Shikoh v. Murff*,[37] the Pakistani husband, in an unsuccessful attempt to obtain residence entitlement, purported to divorce his Pakistani wife and marry an American national. The judgment recalls that he visited the spiritual head and national director of the Islamic Mission of America, Inc. for the propagation of Islam in Brooklyn, New York. The husband signed a document which declared that his marriage had been dissolved. The national director of this organization then appended to this document a declaration to the effect that by the authority vested in him in accordance with the laws of Islam and in conformity of the laws of the government of the United States of America, the husband and his wife were hereby divorced. The document was sent to the Consulate General of Pakistan in New York, and a copy was sent to the wife.

In proceedings arising out of the subsequent second marriage of the husband, and the unsuccessful application to adjust his status to that of permanent resident, the New York court refused to recognize the decree. The decision was based to a large extent on New York's state constitution which provides that a divorce shall not be granted "otherwise than by due

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[35] Domicile and Matrimonial Proceedings Act, 1973, ch. 18, § 11.

[36] For further information on this complicated subject, and in particular for a discussion of the so-called transnational talaq, see Pearl, *Recognition of the Talaq; Some Recent Cases*, 43 Cambridge L. J. 49 (1984); Pearl, *supra* note 12, commenting on R. Secretary of State for the Home Department, ex parte Fatima; R. v. Secretary of State for the Home Department, ex parte Bi [1984] 2 All E.R. 458.

[37] 257 F.2d 306 (2d Cir. 1958).

judicial proceedings."[38] The court undoubtedly believed that the actions of the husband before the national director of the Islamic Mission failed to constitute judicial proceedings. The divorce was rendered invalid.

A more recent case which dealt with a Pakistani divorce subsequent to the amendments introduced by the Muslim Family Laws Ordinance, 1961 is *Chaudry v. Chaudry*[39] heard before the Superior Court of New Jersey (Appellate Division) in 1978. Both parties in this case were Muslim citizens of Pakistan. The husband pronounced the talaq in New Jersey and filed the talaq with his consulate in New York. The consul informed the wife and forwarded a notice of the talaq to a district judge in Karachi. At this time, the official had the powers to summon an arbitration council under the provisions of the 1961 Ordinance to attempt reconciliation. The wife challenged the validity of the talaq in the Pakistani courts by way of a constitutional petition. The challenge was heard by two high court judges in Karachi and was dismissed.[40] Given those circumstances, the New Jersey court stated that the "principles of comity require that the divorce be recognized here."[41] The trial judge had relied on *Shikoh v. Murff*; the appellate court felt that this reliance was misplaced and proceeded to distinguish *Shikoh*:

> Unlike the facts in that case, here there was more than the mere declaration of divorce— talaq—before the Pakistan consulate in New York City. The divorce was actually confirmed by a court in Pakistan after being contested by the wife . . . . Under these circumstances, principles of comity require that the divorce be recognized here.[42]

The public policy of the state was not offended: the court emphasized that "predictability and stability in status relationships" was of fundamental importance.[43] An analysis of these two cases serves to emphasize that the talaq is not contrary to public policy. United Kingdom legislation follows a similar pattern. Indeed, policy requirements which support the recognition of the talaq include comity, stability, and predictability. However, the "bare talaq" is likely to be refused recognition unless there is a clear nexus between the parties concerned and the country where the talaq is pronounced. A "bare talaq" pronounced in the United States or in the United Kingdom is unlikely to be afforded recognition, primarily because of the absence of this nexus.

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[38] N.Y. CONST. art. I., § 9.

[39] 159 N.J. Super. 566, 388 A.2d 1000 (1978).

[40] Reported in 1976 PLD Karachi 416 as Mrs. Parveen Chaudry v. VIth Senior Civil Judge, Karachi. *See Chaudry*, 159 N.J. Super. at 575, 388 A.2d at 1004-05.

[41] *Chaudry*, 159 N.J. Super. at 576, 388 A.2d at 1005.

[42] *Id.*

[43] *Id.*

VIII. CONCLUSIONS

The judicial response to identified tensions resulting from cultural differences between Islamic and Anglo-American family law policies have been examined herein. Undoubtedly, in the United Kingdom considerable thought has been given by Muslim community leaders to the possibility of pressing for the introduction of the Shari'a law for Muslim observants. So far, such pressures have been resisted. Nevertheless, some bodies, i.e., the Churches' Committee on Migrant Workers in Europe (CCMWE)(Working Group on Islam), have been seriously examining the proposal in the context of a European initiative. Such proposals are based very largely on pluralism in cultural identity and the feeling that this phenomenon should be reflected in the legal system, especially in matters relating to the family laws.

In an unpublished 1984 work, the Working Group on Islam of the CCMWE refers to a number of strategems. One consideration suggested is the development of Shari'a courts. In the United Kingdom, precedents amongst the Jewish and the Catholic communities exist. Such religious courts could pass judgments in the family law area through which the contractual aspect of the submission to the jurisdiction would be binding on the parties. It would not release the parties from the obligation of obtaining the necessary secular change of status from the secular court. There would be circumstances when the Shari'a court decision would play no part in a secular decision: no custody court making a decision in the best interests of the child would follow a Shari'a court decision to award custody to the father in accordance with Islamic law precedent; no secular court deciding on alimony would pay any regard to a Shari'a court determination that alimony ends within a short time after the divorce has become irrevocable. Inheritance also would cause problems, and the secular probate court would pay regard to the domiciliary law rather than to the religious law. Thus, an intestate deceased's estate would be distributed according to the domiciliary law (as regards the movables) and the situs (as regards the immovables), regardless of the Muslim law; no adjudication from a Muslim judge could really change this position.

This Article has addressed a number of matters in which a conflict is present between the particular rule of Islamic law and the uniform law. In the final analysis, the courts from time to time have not been particularly sensitive to the needs and aspirations of the ethnic community. Nonetheless, public policy tends to operate from a "bottom line" perspective that can best be described as "offensive to the conscience."[44]

Case law appears to suggest that the conscience is more offended when the parties are domiciled within the United Kingdom (or perhaps also

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[44] *Compare* Cheni v. Cheni, [1965] P. 85 *with* Viswalingham v. Viswalingham, (1979), 1 F.L.R. 15.

United States) than when the domiciliary connection is elsewhere. The conscience is equally offended when the particular institution which is being pleaded appears to deny the other member of the unit an equal protection. Beyond this, one must hope that British and American judges and legislators would respect and be sensitive to the laws and customs accepted by many peoples of "deep religious conviction, lofty ethical standards and high civilisation."[45]

[45] Opinion of Sir Jocelyn Simon P. in Cheni v. Cheni, [1965] P. at 99. The parties concerned in *Cheni* were Sephardic Jews from Egypt, but the terminology used by Judge Simon P. can be equally applicable for the Muslim community.