Al-Rahim Moosa and Denise HELLY

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# “An analysis of British judicial treatment of Islamic divorces, 1997-2009”

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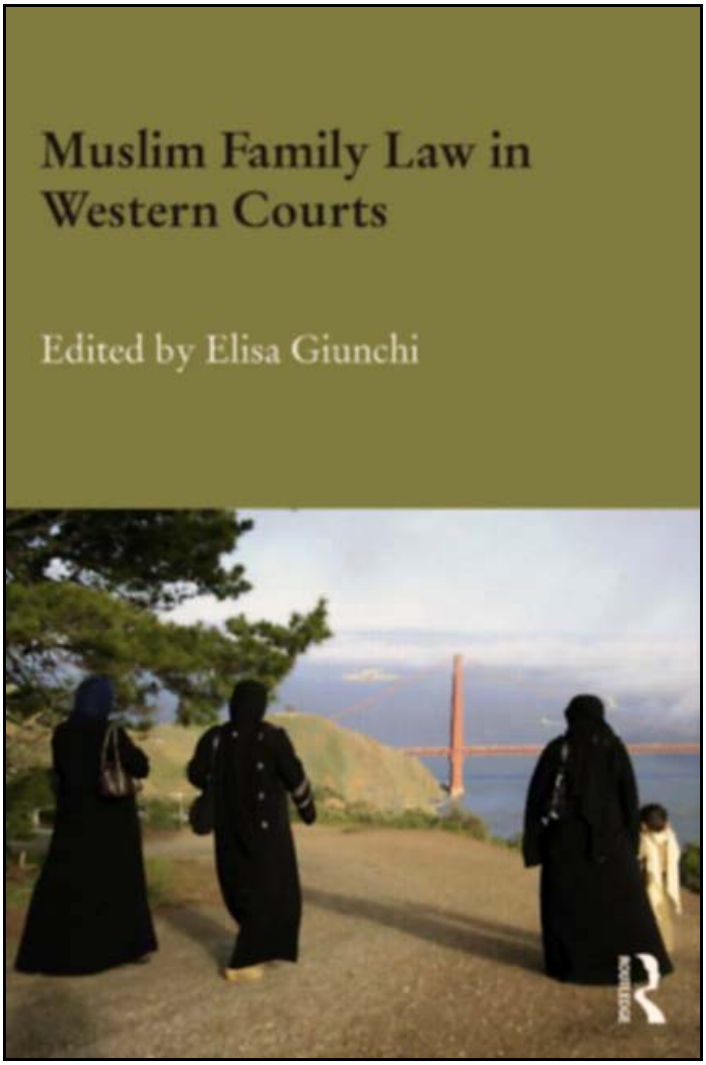


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## INTRODUCTION [1]

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The assertion of the primacy of state justice stems from the idea of an integral link between the state and the law. According to this idea, the law has no social reality other than that assigned to it by state laws - mainly national ones - and cannot be multifaceted. Yet, the multiplicity of norms, rationalities, and justice mechanisms in all societies, as well as the existence of international treaties on fundamental rights that put national laws into perspective, have been undermining this notion for more than 20 years. National laws, it seems, can no longer ignore other normative orders at the risk of contravening principles that have already been acknowledged : the dignity of actors, the legitimacy of their self-identification, and their necessary adherence to

[1] We would like to acknowledge the grant from SSHRC in 2007 for a research project entitled : Difference de valeurs et de normes. Des pratiques familiales musulmanes selon des juges au Canada, en Espagne et au Royaume Uni [Difference in values and standards : Muslim family practice according to judges in Canada, Spain and the United Kingdom]. The authors would also like to express their gratitude to Professor Werner Menski, School of Oriental and African Studies, University of London.

state authority. In this context, our goal is to analyze how judges view family norms and values adhered to by Muslims, specifically the approach of British judges to the recognition of Islamic divorces.

This article's central issue - the British recognition of Islamic divorces - is not a new one. With almost three million Muslims residing in the United Kingdom as of 2010, this issue is very familiar to British judges and policymakers. Indeed, some of the most important developments in the British recognition of Islamic divorces occurred in the early 1970s and 1980s, in the form of judicial decisions and legislation meant to clarify this area of the law. However, as recent case law suggests, the law lacks clarity for multiple reasons, one of which is the focus of this study.

The purpose of this study is to examine British judicial treatment of Islamic divorces through both a legal and anthropological lens. The cases considered, all from between the years 1997 and 2009, concern divorces obtained in Islamic jurisdictions under Islamic (shari'a) law. The focus is to assess how judges in British courts perceive Islamic law in their decisions of whether or not to recognize the validity of Islamic divorces. The cases are summarized as concisely as possible, with emphasis upon the facts most pertinent to the purpose of the study (i.e. those portions of the judgments that concern Islamic law, customs, and values). Before engaging in an analysis of the case law, a brief summary [2] of Islamic law and British law as they pertain to divorce [131] law is presented, followed by relevant legislation for British recognition of foreign divorces.

[2] Please note that British and Islamic family law(s) are summarized as they relate to the content of the chapter. Wider theoretical debates about how the Islamic and British divorce laws operate independently of one another are not within the scope of this chapter.

# THE ISLAMIC CONCEPT OF DIVORCE

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Under Islamic law, a man may divorce his wife by a pronouncement known as the *talaq*. Generally speaking, the *talaq* may be pronounced three separate times - after the first two times, reconciliation between the spouses is permissible should relations turn for the better, but upon the third pronouncement, the marriage is irrevocably terminated. In its classical form, the *talaq* is not meant to be subject to the enquiry of any external body or person (Pearl 1984). It is intended to be a personal decision arrived at through man's relationship with God. Certain countries preserve the validity of the unrestrained *talaq*, for example India, where a *talaq* pronounced three times successively [3] will render a marriage legally nullified (known as a 'bare *talaq').* However, many Islamic countries have subjected the *talaq* to various legal reservations with the effect of curbing a man's absolute power to divorce his wife unilaterally at whim. For example, in the Islamic Republic of Pakistan, the *talaq* is regulated by s. 7 of the MFLO (Muslim Family Laws Ordinance), which requires that the *talaq* be registered with an official of the local council and that the wife receive notice of it, both of which are not required under its classical interpretation.

A wife may petition for divorce in Islamic jurisdictions by pursuing a *khul'*. Unlike the unilateral right of a husband to issue a *talaq* to nullify a marital bond, in many jurisdictions, for example, Algeria and Singapore, the *khul'* must be agreed to by the husband. Alternatively, where a husband refuses to agree, a *khul'* may be obtained by the wife with the permission of a *qadi* [4] who may be empowered to overrule

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[3] A talaq recited three times successively is generally referred to as 'triple *talaq'* or *talaq-ul-bidat.*

[4] Generally, a *qadi* is considered the equivalent of a judge in the Islamic (shari'a) legal system.

the refusal of the husband in certain jurisdictions, for example, Egypt, Bangladesh, and Pakistan.

# THE BRITISH CONCEPT OF DIVORCE

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In contrast to the 'bare' or regulated *talaq* permitted under Islamic law, divorces in the United Kingdom (as well as marriages) are heavily regulated by legislation and the courts. Marriage and divorce in the UK result in significant legal rights and responsibilities, from financial to familial, and regulation of marital status is designed to administer these rights and responsibilities as objectively as possible (i.e. devoid of factors such as gender and religion insofar as they are irrelevant). Consequently, divorce law in the United Kingdom is governed by the Matrimonial Causes Act 1973 (MCA 1973), as amended, which requires the divorcing person to state one of the grounds for divorce under on the 'irretrievable breakdown of marriage' (MCA 1973 s. 1(1)) ; these are adultery, unreasonable behaviour, desertion, two-year separation with the consent of the respondent, and five-year separation.

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British law, both case law and legislation (and including family law), is influenced by the concept of 'reasonableness', a notion deeply embedded in the common law. Reasonableness gives legal effect to the ordinary conduct of human affairs, so that actions well outside the normal conduct of a 'reasonable man' cannot be justified in law. Though a concept that works relatively well within the jurisdiction where it was conceived, understanding 'reasonableness' against the philosophy and practice of entirely different jurisdictions, such as those under Islamic law, becomes far more complicated, as will be explored.

# THE RECOGNITION OF FOREIGN DIVORCES

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British recognition of foreign divorces is governed by ss. 44-54 of the Family Law Act 1986 (FLA 1986). Relevant provisions (which will be cited and referred to throughout) are paraphrased below :

i) s. 44 - no divorce will be effective within the British Islands unless granted by a court of civil jurisdiction

ii) s. 45 - the validity of an overseas divorce (that is, one obtained outside the British Islands) will be subjected to ss. 46-49 of the FLA 1986.

iii) s. 46(a) - the validity of an overseas divorce obtained by means of proceedings will be recognized if it was effective in the country in which it was obtained, and if either of the parties to the marriage were habitually resident or domiciled in that country when proceedings commenced.

iv) s. 46(b) - the validity of an overseas divorce obtained otherwise than by means of proceedings will be recognized if it was effective in the country in which it was obtained and, at the date it was obtained, each party was domiciled in that country or another country that would recognize the divorce as valid, and neither party was habitually resident in the United Kingdom for up to one year prior to the date it was obtained.

v) s. 51(3)(a) - the validity of a divorce obtained by means of proceedings may be refused recognition (i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken ; or (ii) without a party to the marriage having been given (for any reason other than lack of notice) such op-

portunity to take part in the proceedings as, having regard to those matters, the party should reasonably have been given.

vi) s. 51(3)(b) - the validity of a divorce obtained otherwise than by means of proceedings may be refused recognition if (i) there is no official document certifying that the divorce, is effective under the law of the country in which it was obtained ; or (ii) where either party to the marriage was domiciled in another country at the relevant date, there is [133] no official document certifying that the divorce is recognized as valid under the law of that other country,

vii) s. 51(3)(c) - refusal to recognize the divorce may be exercised if doing so would be manifestly contrary to public policy.

## *Methods used to acknowledge and/or recognize foreign law*

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This section considers cases where judges have acknowledged and/or recognized the validity and implications of divorces obtained under Islamic law, in accordance with the laws of the country where they were obtained.

In *Wicken*, [5] the wife, a Gambian Muslim, was validly married under Gambian law to her husband in 1989. A year later, she claimed he had sent her a letter of divorce that was effective to dissolve the marriage in that jurisdiction. She married another man in a civil ceremony of marriage in England two years later, in 1992, which was followed by a Muslim ceremony of marriage in the Gambia later that year. In 1996, the wife petitioned in England for a divorce from her second husband, to which the husband responded with a declaration of nullity on the grounds that the letter that had dissolved her first marriage was in fact a forgery, which he was told of by the first husband. Holman J. cites the relevant provisions of the FLA 1986, and categorizes this particular situation as falling within the definition of an overseas di-

5 *Wicken v Wicken* (1999) Fam 224.

vorce obtained 'otherwise than by means of proceedings', which leads to recognition only if 'effective under the law of the country in which it was obtained'. [6] The judgment then considers the evidence as to whether the wife was 'free to marry' in 1992, when her second marriage was contracted. Holman J. finds that the letter had been procured and delivered by the first husband. In discussing whether the letter of divorce was sufficient to be effective under Gambian Mohammedan law, he points to the various ways that a divorce can be obtained, such as via *talaq*, by letter of divorce addressed to the wife or her parent, or by a deputation sent to the parents of the wife. With regard to registration, Holman J., citing a *qadi* of an Islamic court in Gambia, states that it is not necessary for marriage or for divorce ; it simply serves as testimony to the execution of either a marriage or a divorce. In fact, 'most Gambian couples do not register their marriage or divorce'. Holman J. then addresses the issue of witnesses to the divorce, with experts from the husband's and wife's sides disagreeing over whether a divorce delivered by letter can be valid without witnesses. Holman J. references the *qadi* again, stating that in a situation where a woman claims to have been divorced by a letter but where that is denied by the first husband, the *absence* of two witnesses will result in her 'being returned to the former husband and the second marriage ... void'. Therefore, the husband submitted that in an Islamic court, according to what the *qadi* said, the divorce could not be held valid without the testimony of two witnesses to affirm it and, accordingly, that Holman J. could not hold whether it was effective without those testimonies. Holman J. replies as follows :

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> What the law of The Gambia requires is that in the event of a dispute in The Gambia the authenticity of the document be proved by the testimony of two righteous male witnesses. But the dispute is not in The Gambia. The dispute is here. Proof of authenticity is a matter of evidence rather than of substantive law and the relevant rules of evidence are those of England and Wales where the dispute arises and is being determined (the *lex fori)* rather than of The Gambia.

6 Section 46(2)(a) Family Law Act 1986.

Holman J. then looks at the evidence of the divorce alone, without testimony of two male witnesses, and finds that it did take place, further stating that it is possible that the *qadi* would come to the same conclusion, though via 'different forms of proof of authenticity'. Holman J.'s judgment concludes by contemplating a refusal to recognize the divorce due to lack of an official document (because it could not be produced at the proceedings) under s. 51(3) (b)(i) of the FLA 1986, but in rejecting that option, he states :

> One would hope that an English court is unlikely to deny recognition if it is satisfied as to the effectiveness of the divorce, etc. even though no certificate is forthcoming. If that is so, it is hard to see what real purpose this provision serves. [7]

As required by s. 1(3) (1) of the MCA 1973, Holman J. traces the petitioner's evidence comprehensively when coming to his decision. His judgment thoroughly accounts for Islamic law and custom (as seen by his consultation of the *qadi)* which ultimately influence his decision, and takes into account the various means by which a divorce can be obtained in The Gambia, including by letter, which is recognized as a valid means of divorce for the purposes of English proceedings. Although the authenticity of the divorce letter is subject to English evidential procedure (as opposed to the requirement for two righteous male witnesses in the Gambia), this is simply the procedure of the English judicial system and is effectively the only difference between an Islamic court and an English court in the context of this particular case. Thus, Holman J. in essence, substitutes English equivalent for the 'two male witness' requirement and finds that it would lead to the same outcome. Finally, Holman J. refuses to employ the provisions of s. 51(3)(b)(i) of the FLA 1986 (that is, to refuse the divorce because of the lack of physical proof of the divorce letter), which displays his willingness to look beyond the prescriptions of legislation that would otherwise deny an Islamic divorce that, in his eyes, had legitimately taken place.

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[7] Citing *Cheshire and North's Private International Law.*

The case of *El Fadl* in 2000 concerns similar issues. The husband and wife, both Lebanese, underwent a polygamous marriage in accordance with the local law of Lebanon in April 1981. In December 1981, the husband executed a *talaq* in accordance with Lebanese law, in the presence of two witnesses and registered with the shari'a court in Lebanon. The wife was not initially notified of the *talaq* by the husband or any other body, nor was this a requirement [135] under Lebanese law. Hughes J. is convinced that the wife came to know of the *talaq* by the end of 1987. The husband provided financial support for the next 16 years until withdrawing it in 1997, whereupon the wife brought a petition for divorce in England. The husband submitted that, having issued the *talaq* in 1981, there was no subsisting marriage to dissolve. The central issue for consideration in this case was whether the husband's *talaq* would be recognized in the United Kingdom, thereby leaving no marriage left to be dissolved under the wife's petition. Hughes J. was assisted in his judgment by a Lebanese lawyer, Mr Kabrossi, and an English barrister and expert on Islamic law, Mr Edge. Though representing the wife and husband respectively, both agreed that the rules applicable to *talaq* procedures vary across different Islamic jurisdictions. Therefore, Hughes J. states that it would not be appropriate to extract any generalizations from the rules that apply in Lebanon. He then compares and contrasts the Lebanese system of divorce with those of other jurisdictions, such as Pakistan, noting that the Lebanese *talaq* procedure requires it to be pronounced before two witnesses and registered with a shari'a court. He also notes that there is a parallel system in Lebanon for the civil registration of marriages and divorces, but neither the marriage nor the ensuing divorce were registered in this case, nor were there any legal ramifications for failing to do so - the only registrations were with the shari'a court that, in Lebanon, is responsible for all matters falling within the domain of personal status.

Hughes J. establishes that both husband and wife were domiciled in Lebanon in 1981 - when the *talaq* was issued - and then moves on to assess whether the *talaq* qualifies for recognition under English law. He comprehensively outlines the evolution of case law and legislation leading to the current provisions, in particular ss. 44-54 of the FLA 1986 and then marks the difference between divorces 'obtained by means of proceedings' (s. 46(1)) and those 'obtained otherwise than

by means of proceedings' (s. 46(2)). The latter provides for the recognition of divorces that are not obtained through judicial means (for example, the validation by a judicial organ of the state), which becomes a point of contention in the case at hand. Section 51 provides the grounds for refusal of recognition of an overseas divorce. For those divorces obtained via proceedings, the grounds include steps for giving notice to one of the parties not been reasonably taken (s. 51(3)(a)(i)), followed by a broader provision that captures reasons, other than lack of notice, that may inhibit one party's participation in the proceedings (s. 51(3)(a)(ii)). Where no proceedings took place, neither notice nor participation is a consideration at all - what is required is official documentation certifying that the divorce was valid in local law. Thus, the legislation appears to embrace different approaches to overseas divorces, including those without any judicial involvement. However, for divorces, both where there were proceedings and where there were no proceedings, there is a provision that allows the judge to exercise his discretion to refuse divorces that are 'manifestly contrary to public policy'.

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Hughes J. draws on the case of *Quazi v Quazi*, [8] which held that a divorce may be a proceedings divorce even though no judicial process is involved and where the proceedings do not involve any decision-making power as to the permissibility of a divorce. However, the subsequent case of *Chaudhary* v *Chaudhary* [9] (binding on *El Fadl)* held that a *talaq* that 'depended for its effectiveness solely upon the pronouncement in front of witnesses' would not constitute a proceedings divorce due to the lack of the participation of state machinery in the process. Therefore, Hughes J. finds *in El Fadl* that, despite the shari'a court having no judicial authority to decide whether a divorce had occurred, the presence of a court, judge, and clerk, alongside a duty to record formal declarations in a register, constituted proceedings for the purposes of ss. 46 and 51. With that established, Hughes J. engages s. 51(3)(a) to discuss refusal of recognition on the grounds of lack of notice and/or insufficient participation. He states :

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8 [1980] AC 744, [1979] 3 WLR 833, [1979] 3 All ER 897, HL.

9 [1985] Fam 19, [1985] FLR 476, [1985] 3 WLR 350, [1984] 3 All ER 1017, CA.

> It is plain to the English lawyer, or indeed layman, that a wife should be divorced without knowing it is contrary to all instinct. Even if such a wife cannot resist the divorce, she needs to know what has happened. First, she needs to know out of common humanity. Next she may be entitled to some form of maintenance. Thereafter, she may wish to enforce a marriage contract for deferred dowry, and, indeed, she may wish to marry again, or simply to know whether she is in peril of an accusation of adultery, with all that brings in Islamic countries. Notification after the event meets her needs, as does prior notice.

At first sight, Hughes J. appears to be refusing to recognize the divorce by considering it next to the British divorce procedure, and highlighting its relative inequities. However, in his decision to ultimately recognize the divorce, he finds that prior notice, as opposed to notice after the *talaq,* would have served no practical function to the wife ; her rights would remain the same regardless. Further, the *talaq* was the prescribed form of divorce in the country that both parties were domiciled - that is, both parties are taken to know the personal status laws that applied to them upon marriage (and subsequently in the event of divorce). He also qualifies his own stance on the decision by stating that even if he was wrong in his classification of this case, and that it was a divorce without legal proceedings, notice would, as stated above, not be a requirement under the appropriate legislation. As a result, he states, '[t]hat confirms my decision that recognition should not be refused on the basis of an *English-imposed requirement* for notice or participation which is wholly foreign to the law of the domicile of both parties' (emphasis added). The next issue considered is whether recognition of the *talaq* would be manifestly contrary to public policy. Counsel for the wife submitted that this type of *talaq* is neither regular, nor 'consistent with Muslim concepts of personal responsibility'. In essence, counsel was arguing that if the shari'a court had any ability to refuse the *talaq*, it would have done so. Hughes J. dismisses this [137] argument, stating that the correct question to ask is whether such a divorce is contrary to English public policy, not whether hypothetically it would be against Islamic public policy within that state. The judgment concludes with another hypothetical scenario - whether recognition of the divorce ought to be denied if the wife legitimately did not have notice at any point (though Hughes J. is

convinced she did). Hughes J. speaks to this issue by addressing the relationship between different types of jurisdictions more generally :

> I am satisfied that however much a unilateral divorce without notice may offend English sensibilities comity between nations and belief systems requires at any rate this much, that one country should accept the conscientiously held but very different standards of another where they are applied to those who are domiciled in it.

This case speaks extensively to two matters of historical significance concerning the recognition of Islamic divorces in the United Kingdom - first, whether a *talaq* constitutes proceedings or 'non-proceedings' for the purposes of English law and, second, the role that notice to the spouse subsequently plays in question of whether it should be recognized. With regard to the latter, Hughes J. makes it clear that despite how irreconcilable the failure to give notice may be with English standards, of seminal importance is the comity between nations and belief systems. For Hughes J., then, the domicile of the parties constitutes the most important aspect in the decision to recognize an overseas divorce, and if the domicile remains with the foreign country, any English-imposed requirements should not apply.

*Abassi v Abassi*, [10] an appeal case, concerned a couple of Pakistani origin, married in 1988. It is not explicitedly clear, but the presumption is that the couple was married in the UK and moved to Pakistan where the husband alledgedly issued as *talaq*. The wife presented a petition for dissolution of the marriage in the United Kingdom, which culminated in a *decree nisi* of divorce, but was not made absolute as the husband claimed the marriage had been dissolved via *talaq* much earlier, in 1999. The husband sought a declaration under s. 55(l)(d) of the FLA 1986, claiming that the divorce by *talaq* in Pakistan should be recognized as a valid foreign decree. The wife argued that there had been no valid *talaq* proclaimed in 1999 and, had there been, the documentation relied on by the husband was 'bogus, forged or otherwise improperly procured'. The Attorney General, along with experts consulted by him and those jointly instructed by both parties, agreed broadly that the *talaq* would qualify under Pakistani law, despite some

[10] (2006) EWCA Civ 355, (2006) 2 FL 415.

inconsistencies. In a course of action that was welcomed by counsel for the husband and opposed strongly by counsel for the wife, Wood J. ordered that validity of the *talaq* '[be deferred] to the Pakistani court [for] the determination of what was essentially a Pakistani issue'. The wife applied for permission to appeal against Wood J.'s decision to defer to the Pakistani court, on the ground that the decision was an improper exercise of the judge's discretion 'and that he [138] had placed too much emphasis on the availability or convenience of witnesses, all of whom were resident in Pakistan'. Thorpe L.J. begins deliberation on the case by first considering the details of the order to defer, particularly the undertakings given by the husband to the British court. He notes that they required the husband to pursue the matter expeditiously (within 28 days) and to give due consideration to a set of criteria in order to validate the divorce, including whether formalities for the divorce were complied with, whether the documents relied on were valid, whether notice of it was required, and, if so, if it was properly given to the wife. In accordance with the Matrimonial Clauses Act 1973, the order also recorded a concession made by the husband to provide due ancillary relief to the wife, regardless of the outcome of the case. [11]

Thorpe then considers the exercise of the judge's discretion. He notes that Wood J. took into account that both parties were of Pakistani origin and both had family in Pakistan, and that there would be grave repercussions for the wife if the British court too quickly allowed the husband's application. This would convey that she had been cohabiting for 'some years' with the husband under the same roof 'and holding herself out to be his wife' despite the husband's *talaq*. Thorpe L.J. also recalls Wood J.'s concern that, because much of the case dealt with issues of fact - evidential issues surrounding apparently fraudulent documentation presented by the husband - it would be far better for a court in Islamabad to deal with these issues, in particular because 'the judge would be familiar with the language, with the law and with the local customs'. Counsel for the wife also attacked Wood J.'s reliance on the availability of ten witnesses as support for the pronouncement of the *talaq*, in that none of them were used at trial to support the husband's contentions -indeed, all there had been were his

[11] In accordance with the HCA 1973.

statements alone, alongside the opinions of three experts. Thorpe L.J. dismisses counsel's argument that this should not have factored into Wall J.'s discretion, stating that 'once the reference to the ten available witnesses is fully explained', it would fall within the judge's discretion whether it should inform his decision. Finally, counsel for the wife submitted that there had been insufficient evidence before Wood J. as to 'the nature of the application that might be brought in Pakistan or the likely duration of Pakistani proceedings' as well as 'the wife's difficulties in participating in the Pakistani proceedings'. Thorpe L.J. dismisses this argument on the grounds that these concerns, if true, need not necessarily pave way to proceedings in the United Kingdom. There are alternatives available, such as adjourning proceedings for further investigation, or direct communication between London and Islamabad via a liaison judge to ensure a proper trial. In ultimately finding that the judge did not overstep his discretion, Thorpe L.J. comments on the changing nature of international family law proceedings :

> In an international family law case such as this, opportunities and practices which exist for the judge of today were simply not there for the judges of decades earlier... My final observation is that ... it is becoming [139] increasingly common to have regard to the sensible transfer by the court, acting on its own motion.

Thorpe L.J. comments directly on the strong relationship between the family law courts of the United Kingdom and the judges of Pakistan, stating that 'the collaboration between the two judiciaries has had its most obvious expression in the Pakistani protocol of January 2003' [12] which, Thorpe L.J. suggests, could have been used to facilitate collaboration in this case.

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[12] 'In January 2003, judges from Pakistan and the UK signed a "judicial protocol". This is an understanding between the two countries which aims to secure the return of an abducted child to the country where they normally live, without regard to the nationality, culture or religion of the parents. The judges agreed that the child's welfare is a priority and that the courts of the country where the child normally lives are usually in the best position to decide on matters of custody and where a child should live.' Full protocol available online at www.reunite.org (accessed 20 November 2013).

Wood J.'s decision to defer the case to the courts of Pakistan is the product of a careful balancing act between the need to acknowledge the cultural and social repercussions for the wife if the courts in Pakistan decide in the husband's favour, and the acceptance that given the case's complex evidential problems, it would be better dealt with in Pakistan. The undertakings by the husband to the British court at Wood J.'s behest are not intended to impose English criteria for the valid recognition of a divorce onto the Pakistan legal system. Rather, they are meant to ensure that the criteria for divorce under Pakistan's own family laws - the MFLO [13] - are validly met, primarily due to the fact that much of the wife's case concerns issues not of law, but of evidence, which she feels may be improperly handled by the Pakistani family law system. As Thorpe L.J. elaborates, advances in international family law proceedings have given rise to new means - the use of a liaison judge, for example - to address such concerns. The strong links between the two judiciaries that Thorpe L.J. refers to further show a confidence in the Pakistani legal system that it will yield the appropriate outcome, whatever that may be.

*K v K* [14] is the most recent case in the timeline of this chapter, and draws on cases prior to guide its decision. The husband and wife married in Pakistan and arrived in the United Kingdom in 1966. The wife petitioned for divorce in England in January 2004, which was met by an affidavit from the husband in August 2004 stating that he had divorced his wife via *talaq* in Pakistan in March 1987. He claimed he had delivered her notice personally in 1987, but the wife stated that she had never received it. A *decree nisi* [15] was granted in the UK in October 2004, which was met by a petition by the husband in 2005, giving rise to the current proceedings. The issue at substance is

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13 The MFLO 1961 is one of the central pieces of legislation governing family law in Pakistan. It is available online at http://www.unhcr.org/cgi-bin/texis/vtx/home (accessed July 1st 2014).

14 (2007) EWHC 2945 (Fam).

15 If a party to a marriage does not defend the other party's divorce petition, the party seeking divorce can apply for a decree nisi. A decree nisi is a conditional confirmation that the divorce can be granted (i.e., in practice, it means that the court cannot see any reason why the divorce cannot be granted). It will become a decree absolute after a certain time period (six weeks plus a day) during which the other party can bring forward any objections to the divorce.

whether the divorce took place as set out in the husband's affidavit. Sumner J. traces the relevant law under the FLA 1986, noting also that he has been referred to *El Fadl* to inform his decision. He highlights that it was not necessary for the wife in that case to have notice of the *talaq* in order for it to have effect, and that it would not be a proper exercise of discretion on the part of the judge to refuse a divorce that was valid by the personal law of both parties and that had been known to them for many years. The balance of the judgment explores whether the husband had obtained a proper divorce in accordance with Pakistani law, and whether he had served a copy of the divorce decree on the wife in 1987. Mr Edge (an expert in Islamic law) is consulted once again ; he explains that notice is required under the MFLO 1961 (which applies in Pakistan). Mr Edge concludes that a Pakistani court would accept that a [140] *talaq* had been proclaimed by the husband, with notice given to the Chairman of the Union Council (Union Councils are local government bodies in Pakistan) as required, effective in April 1988. About this, Sumner J. notes, importantly, that 'it was fatal to a valid *talaq* if there was no notice to the chairman. It was *not* fatal if there was no notice to the wife.' Sumner J. ultimately prefers the evidence of the husband to that of the wife, finding a stream of inconsistencies in her submissions, alongside evidence that the *talaq* had likely been declared. He takes into account a variety of considerations apart from those extracted from the evidence. These include a consideration that if the husband had not obtained a divorce, his second marriage in 1992 under shari'a law would have been considered adultery for which there were 'social and legal consequences ... and severe penalties'. Further, he finds that it would be unlikely for the husband to contract a second marriage without divorcing his wife '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.'

The judgment concludes with a consideration of past cases, first with a recitation of the findings in *Chaudhary* to the effect that 'proceedings' requires the involvement of some form of state machinery to be involved in the divorce process. Sumner J. also produces the statements of Lord Scarman in *Quazi* which states that any act(s) that lead to a valid divorce in a country where it was obtained would be capable of qualifying as proceedings within the British jurisdiction.

Finally, he reiterates the position of Hughes J. in *El Fadl* and finds that, in *K v K*, the situation is not irregular, and indeed ought to be valid for reasons affecting international relations :

> There are a great many people living in the UK from Pakistan and many move freely between both countries. Where there are as here close links to each country, it is important that marriages and divorces recognised by the country where they take place should be recognised in the other country unless there are good reasons for not doing so.

Sumner J. essentially follows the decision of Hughes J. in *El Fadl* when arriving at his decision, notwithstanding that the decision in *El Fadl* is not binding upon him. Taking into account the evidence of Mr Edge, he accepts that while the lack of registration would affect the validity of the divorce under Pakistan's MFLO, the lack of notice to the wife would not invalidate it, and applies this to the case at hand. He does note one particular difference between the facts in *El Fadl* and in the case at hand ; that is, in the case at hand the wife had been away from Pakistan for 25 years when the divorce occurred and her domicile was therefore likely to be in England. Yet, that said, Sumner J. elevates the fact that she was 'born, brought up and married in Pakistan to someone of the same background' above the location of her (likely) domicile, considering these aspects to be most important in his decision.

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## *Methods used to ignore, misapply or undermine foreign law*

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The following section presents cases where judges have ignored or misapplied Islamic laws, custom, and values in order to provide rulings that indicate a preference for, or the superiority of, British law.

In a case from 2002, *Sulaiman v Jujfali*, [16] the couple was domiciled in Saudi Arabia, where they were married in accordance with shari'a law in 1980. The wife filed a petition for divorce in England on 22 June 2001, which was followed by a bare *talaq* pronounced by the husband in England the next day. The *talaq* was registered with the shari'a court in Saudi Arabia on 26 June and the marriage was finally and irrevocably terminated in that jurisdiction. The husband applied to the UK court for an order to decide whether the marriage was subsisting or had been validly dissolved by his *talaq*. The wife submitted that the *talaq* executed by the husband was a paradigm of a 'non-proceedings divorce' and did not accord with s. 44(1) of the FLA 1986, which states that no divorce obtained in any part of the British Islands would be regarded as effective unless granted by a court of civil jurisdiction. Further, despite being registered with the shari'a court in Saudi Arabia, it had been 'obtained' within England and Wales, therefore the wife contended that it would not meet the criteria for an overseas divorce as per s. 45(l)(a) of the FLA. She also argued that the *talaq* did not amount to 'proceedings' - judicial or otherwise. The husband submitted that the *talaq* ought to be recognized because it was properly registered in Saudi Arabia and met all the necessary formalities required in that jurisdiction. It was effective and recognized in the society from which both parties came from, were nationals of, and domiciled in. It was argued that the wife took steps that were alien to the parties' culture and traditions. In reaching his judgment, Munby J. was assisted by two experts in Islamic law, Dr Al-Sawwaf and Mr Edge. Both stated that registration of the *talaq* is not a formal requirement in Saudi Arabia, and the presence of witnesses to testify to the pronouncement makes no material difference to its validity. Additionally, they clarified that the location of the *talaq* pronouncement under Islamic law is immaterial as well -'The validity of a divorce is ... a matter between man and God.' Munby J. turned to the relevant provisions of the 1986 FLA. Section 44(1) disallows any divorce obtained within the UK and not granted by a court of civil jurisdiction. Section 45(1) permits overseas divorces provided they meet the criteria listed in ss. 46(1) and (2), but Munby J. highlighted one particular section of s. 45(1) - that it needs to be 'obtained in a country outside the British Islands'. Therefore, despite having provided notice

[16] (2002) 2 FCR 427.

to the wife and registering the *talaq* with the shari'a court (which would normally meet the requirements of s. 46(1) or (2), depending on whether these acts are construed as 'proceedings' or 'non-proceedings'), the physical act of the pronouncement of the *talaq* needs to have taken place outside the British Islands. Therefore, preferring the statement of Dr Al-Sawwaf, Munby J. states that the effect of the *talaq* is to dissolve the marriage 'as soon as' the *talaq* was pronounced, devoid of any [142] participation or authorization of judicial authorities in the UK. Munby J. clarifies that, had this issue been regulated by common law as it had been prior to 1973, it is likely that the *talaq,* pronounced within the UK in this case, would have been recognized as a valid divorce. Section 16(1) of the Domicile and Matrimonial Proceedings Act 1973, ancestor to s. 44(1) of the FLA 1986, was meant to reverse the outcome of *Qureshi*, Munby J. explained.

Munby J. then supplements his decision by stating that it is not 'founded upon any lack of respect for the husband's religion or culture'. He clarifies his position as a 'secular judge ... sworn to do justice "to all manner of people", though religion 'is not the business of government or of the secular courts. So the starting point of the law is an essentially agnostic view of religious beliefs.' Munby J. refers to an extract of Sir Jocelyn Simon P. from *Qureshi* where he stated, 'the rule of foreign law under which the husband has proceeded has the authority of the holy scriptures of the common faith of himself and the wife', but Munby J. refuses to give effect to this 'informal divorce' on the grounds of policy that he was bound to follow.

Munby J.'s concluding comments regarding Islam and Islamic law are significant when placed into context. The judgment in this case was handed down on 9 November 2001, shortly after the beginning of the war in Afghanistan. The judgment also served to clarify for many Muslims across the country the legal status of a *talaq* obtained in England. It is notable that the triple (bare) *talaq* procedure was denied as an effective means of divorce within the United Kingdom despite the fact that both parties were domiciled within Saudi Arabia and that the divorce was registered with a shari'a court in the country of domicile. The judge's consideration seems to have prioritized the physical location where the divorce was 'obtained' above all else. This indicates that he considered the pronouncement of the *talaq* in Saudi Arabia as the equivalent of obtaining a divorce in the civil courts of England and

Wales, which then begs the question as to what purpose, if any, the registration of the *talaq* in the shari'a court of Saudi Arabia had on the overall case. Would the triple *talaq* have been validly recognized in the United Kingdom if the husband had taken an overnight flight to Saudi Arabia, pronounced it, and then returned the United Kingdom (presuming registration in the shari'a court also took place) ?

In *Na* v *Mot*, [17] a case from 2004, the husband and wife were both Iranian by nationality, Muslim, and bound by the code of shari'a law. The husband had lived in the United Kingdom since 1978. They married in Iran in 1998, with provision in the marriage deed for capital for the wife, which would be her property upon marriage and thereafter. They settled in the United Kingdom, but within weeks the wife moved back to Iran and began proceedings for divorce, seeking her marriage portion in its entirety. The Iranian court ordered the husband to pay the marriage portion, but based on evidence it would have been difficult for the wife to obtain a divorce *(khul")* according to Iranian law ; she would have instead needed the husband to grant her a *talaq* [143] to receive her full portion. The wife sought divorce proceedings in the United Kingdom instead, and claimed ancillary relief in the sum of the marriage portion she claimed to be entitled to. The wife's application was permitted, and the order of a lump sum (which was a fraction of the marriage portion) would have been granted if she had dropped all proceedings in Iran on the basis that the husband had granted a *talaq*, without which she would not have been entitled to the full amount.

An expert on the Iranian law of divorce, jointly instructed by the parties, highlighted that according to shari'a law as applied by Article 6 of the Iranian Civil Code, 'Iranian nationals remain subject to the laws of Iran in respect to matters of their personal status, even if they have gained a second nationality and are resident abroad', which suggested that Iranian courts would be unlikely to recognize an English divorce and any orders ancillary to it. Baron J. explains the difference between a *khul'* and *talaq* - specifically, the difficulties facing the wife in obtaining the former. Though the wife has a thorough set of protections in her marriage contract to obtain her marriage portion upon divorce, the husband must agree to the *khul'* and the courts must be shown that she has proven, to high standard of proof, one of the

[17] EWHC 471 (FAM), [2004] All ER (D) 238 (Mar).

grounds specified in her contract. Baron J. also lays out the consequences of not obtaining a *khul'*, which would be to live as a married, but separated woman - that is, with restrictions on her remarriage, physical relations, and freedom to travel. In the event that she were to obtain a *khul'*, it would be subject to renegotiation with the husband (again, who must consent first) and would likely result in a lesser amount than the marriage portion initially agreed to. Baron J. finds her motive for seeking a divorce in the UK to be to obtain a set of divorce conditions that would be more favourable than those under Iranian law. Likewise, the husband would not want to issue a *talaq* because doing so would require him to pay her the full sum of the marriage portion.

Baron J., when applying the law, acknowledges that the cultural background against which the case was set would be a decisive factor in his judgment. Baron J. refers to a prior case [18] where the application of s. 25 of the MCA 1973 called for the judge to :

> give due weight to the primary cultural factors, and not ignore the differential between what the wife might anticipate from determination in England as opposed to determination in the alternative jurisdiction, including that as one of 'the circumstances of the case'.

He accepts that if the wife did not secure a religious divorce, her 'long-term prospects are bleak', and that even upon its success, she would have to start anew in England or Tehran.

Baron J. orders the husband to grant the wife a *talaq* and to pay the wife slightly over half of the stipulated marriage portion, arriving at that figure by accounting for the husband's wealth and the period of time for which the husband and wife cohabited. He orders the husband to pay this portion [144] within 28 days ; if he did not, the wife would be entitled to the full amount stipulated in the original marriage contract, all contingent upon her dropping proceedings in Iran.

Baron J.'s judgment exhaustively traces all relevant aspects that need to be considered under Islamic law, drawing particular attention to the legal ramifications for the wife in her attempt to obtain her

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[18] *Otobo v Otobo* EWCA 2002.

promised marriage portion through the Iranian judicial system. In his decision, Baron J. effectively engineer the relevant Islamic legal mechanisms to work in the wife's favour in order to create an outcome he considered appropriate, but one that would not, it seems, be served by the courts in Iran. His decision elevates the cultural aspects of being a Muslim wife in Iran over the religious decrees of the Islamic legal system. While the decision visibly serves the needs of the wife who would have had no other recourse, it must be noted that the decision contradicts the value system of the country in which the wife married, along with the code that was intended to bind the parties to the marriage under Islamic law regardless of their physical locations and nationality.

Our analysis concludes with the 2005 case *Duhur-Johnson* v *Dakar-Johnson*. [19] The husband and wife, both Nigerian, married in Nigeria before coming to England. The wife issued an English divorce petition based on his unreasonable behaviour and received permission to proceed despite the husband's failure to acknowledge the petition. When the *decree nisi* was about to be pronounced, the husband interrupted proceedings to declare that he had already obtained a divorce in Nigeria, based on the wife's unfaithfulness while they lived there (as well as unreasonable behaviour, such as 'going to nightclubs and other such matters'). The husband did not inform the wife of the Nigerian divorce when they met the year before to discuss child support. Further, the husband did not inform the Nigerian court or his lawyers in Nigeria that the wife had any connection - residence or otherwise - with England ; therefore the bailiff in Nigeria was unable to serve the wife's notice of the Nigerian proceedings. The Nigerian court instead ordered substituted service, pasting the petition to a property where the wife supposedly lived, and proceeded to grant the divorce in the wife's absence. The husband sought a stay of the English divorce, arguing that the English court was bound to recognize the Nigerian divorce as a valid overseas divorce.

The husband's case for recognition of the Nigerian divorce relied on s. 46(1) of the FLA 1986. The Attorney General (AG), intervening on behalf of the wife, submitted that no decision on that point could be made in the absence of expert evidence pertaining to Nigerian law.

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19 [2005] 2 FLR 1042.

The AG further submitted that even if the Nigerian decree is effective under Nigerian law, it should have been refused according to s. 51(3) of the FLA on the basis that the husband had not taken reasonable steps to notify the wife of the Nigerian proceedings. Mr Richardson QC (sitting as a Deputy High Court Judge) accepts that s. 46(l)(a) binds him to acknowledge overseas divorces, but only if they were effective in the jurisdictions in which they had been obtained. In order to [145] do so, evidence of that effectiveness is required, evidence that he did not have before him. Notably Mr Richardson choses not to adjourn the case in order to obtain that evidence, seeking to decide the case by reference to s. 51(3) alone. He refers to *El Fadl, Wicken,* and to *D* v *D* (a case outside of the time period considered in this chapter) to guide his decision. In *D* v *D,* a Ghanaian divorce questioned in the English courts was held to be ineffective due to the interpretation of s. 53(l)(a), which states that a divorce may be refused 'without such steps having been taken for giving notice of the proceedings'. In that judgment, Wall J. states that what constitutes 'reasonable steps must be a matter of fact in each case' and that, technically, it could be possible for a divorce to be permitted *without* such reasonable steps. However, this is subject to 'English standards of reasonableness, having regards to the nature of overseas proceedings'. The same point is found in *El Fadl* where Mr Richardson highlights Hughes J.'s comments stating that the lack of notice to a wife was 'contrary to all instinct' and that she needed to know 'out of common humanity'. Again, Mr Richardson points to the 'wide judicial discretion' that could be used to refuse recognition under s. 53(l)(a).

Mr Richardson observes that the 'nature of the proceedings in the High Court of the Delta State of Nigeria is very similar to divorce proceedings in this country' and that 'what is utterly clear is that the Nigerian procedure ordinarily requires notice of the proceedings to be given to the other party'. He accepts that the Nigerian court and lawyers did attempt to serve notice on the wife. Therefore, he categorizes the Nigerian court's decree as a 'pro-ceedings'-style divorce, which may have been recognized had the Nigerian court not been misled by the husband when he failed to inform the court that the wife may have been resident in England. Mr Richardson concludes that the divorce should not be recognized because the Nigerian court had been critically misled by the husband's failure to inform the court about the wife's

residence in England. This is a technical matter of procedure, required under s. 53(l)(a), that was not met. Had it been met, and had the husband taken those reasonable steps, it seems likely that Mr Richardson would have recognized the overseas divorce. In fact, he highlights that the Nigerian court system was familiar to English lawyers, and was one that, like the British system, required notice to be served on the spouse. Ultimately, his judgment incorporates the evidence that was lacking in the Nigerian court proceedings, and therefore arrived at the decision that the Nigerian court would have had if it had not been misled.

Additionally, Mr Richardson speaks broadly on the issue of overseas divorce recognition. His intention in referring to the *El Fadl* case is to convey the fundamental role that notice plays in British divorce proceedings, and he emphasizes that judges are equipped with wide discretion to refuse recognition where, in an overseas divorce proceeding, reasonable steps to notify are not taken. However, he subjects these steps to English standards, an approach that was *not* advocated by Hughes J. in *El Fadl*. Hughes J. focused on the [146] 'comity between nations' as preferable to any attempts to 'impose' English standards onto the legal procedures and philosophies of other jurisdictions. While one cannot presume the approach Mr Richardson would have taken if he had presided over a case such as *El Fadl*, it seems as though the wide judicial discretion enjoyed under s. 51(3)(a) would have been exercised with more favour towards British legal procedures than those of the foreign jurisdiction.

# CONCLUSION

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Although this chapter has placed the above cases within two categories - the acknowledgement and/or recognition of foreign laws, and the ignorance, undermining, and/or misapplication of the foreign laws - the individual judgments reveal very different means by which to achieve each end. Therefore, for judgments that ultimately respect le-

gal pluralism and strive to move away from the 'positivist centrality' [20] of the British legal standard, the question of *how* the judgment will arrive at such an outcome remains difficult to predict. The lack of consistency in approaches to the recognition of Islamic divorces can be attributed to multiple reasons. In a comprehensive report compiled by Women Living Under Muslim Laws (WLUML) (2006) [21] the following reasons were identified :

- The lack of knowledge regarding the law on the part of all actors.
- The lack of clarity in the law of the country of origin.
- Mutual mistrust between the British legal system and Muslim communities subject to that system.

Such reasons have always characterized the dynamics of overseas divorce recognition and transnational family law issues more generally - the period that this chapter covers, 1997-2009, is only a small segment of a much longer history plagued by the same issues. However, judges now have plentiful access to resources to better educate themselves and to inform their decisions with regard to foreign laws. As British law constantly evolves, so should British legal academics, policymakers, and judicial authorities acknowledge the inherently pluralistic nature of Islamic law(s) and that a universally just outcome can be achieved through either, if not both, lenses. Consequently, greater dialogue between traditionally opposing legal systems becomes ever more important in order to exchange ideas with the ultimate goal of coming closer to this universally understood notion of justice. This is particularly relevant for the higher courts, as precedent

20 While legal positivism has several meanings, most of its followers would accept two basic propositions. First, the definition of 'law' should not depend on questions of moral validity. Second, law should only be identified in terms of tangible formal provisions, such as legislation, case law, and customary traditions. As a result, positivists refuse to incorporate any moral assessment in their definition of law (Menski 2006 : 152).

21 Women Living Under Muslim Laws 2006 : 2.

in judgments serves not only to set the stage for subsequent cases, but also has an impact on relations between countries.

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**Fin du texte**