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## How Could English Courts Recognize Shariah?

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## KEYNOTE ADDRESS

# HOW COULD ENGLISH COURTS RECOGNIZE SHARIAH?

JOHN R. BOWEN\*

### INTRODUCTION

Nowhere in Europe or North America is the legal system closer to “recognizing” Islamic judgments than in England. In his widely discussed February 2008 remarks, Archbishop of Canterbury Rowan Williams explored ways that the legal system might “recognise sharia.”<sup>1</sup> He observed that doing so would require “access to recognised authority acting for a religious group” and mentioned the Islamic Shariah Council, London, as such a body.<sup>2</sup> Despite the storm of media criticism that emerged in response to the Archbishop’s comments, Britain’s highest Justice, Lord Phillips, joined the Archbishop later that year in saying that English law should recognize certain elements of shariah since shariah seemed to be here to stay.<sup>3</sup>

These two addresses conveyed an authoritative stamp of approval, but did not clarify what it means to “recognise sharia.” Part of the confusion could have resulted from the Archbishop’s juxtaposition of commercial arbitration and family law. In England and Wales these two areas of law have very different degrees of openness to private dispute resolution.<sup>4</sup>

Commercial disputes are subject to resolution under the Arbitration Act 1996; few obstacles stand in the way of a religion-based body carrying out binding arbitrations of commercial disputes as long as a proper contract

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1. Dr. Rowan Williams, Archbishop of Canterbury, Archbishop’s Lecture at the Royal Courts of Justice, Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), available at <http://www.archbishopofcanterbury.org/1575> (to be published with commentary in GOD, ISLAM, AND ENGLISH LAW (Stephen Hockman et al. eds., forthcoming 2011)).

2. *Id.*

3. Lord Phillips of Worth Matravers, Lord Chief Justice of Eng. and Wales, Speech at the East London Muslim Centre: Equality Before the Law (July 3, 2008), available at [http://www.judiciary.gov.uk/Resources/JCO/Documents/lcj\\_equality\\_before\\_the\\_law\\_030708.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/lcj_equality_before_the_law_030708.pdf).

4. I owe this observation to Robin Griffith-Jones. Although for brevity’s sake I will be referring to “English law” in this paper, the relevant legal jurisdiction is that of England and Wales. Northern Ireland, and especially Scotland, have their own jurisdictions.

is drawn up in the presence of a lawyer. One such Islamic body, the Muslim Arbitration Tribunal (“MAT”), already carries out arbitrations; lawyers and religious scholars participate at these arbitration sessions.<sup>5</sup> The value of this approach has earned some official recognition: the Charity Commission for England and Wales, the government body responsible for ensuring that registered charities, including religious institutions, function smoothly, has called on the MAT to assist in resolving disputes over the administration of mosques.<sup>6</sup> The legal force of agreements arbitrated by the MAT, however, rests entirely on the contractual agreement between the two parties and not on any element of shariah, even in cases where an Islamic moral tone and Islamic arguments play a practical role in moving the parties toward agreement.

Family law is the area in which the majority of social and legal concerns have emerged, in response to the suggestion that private Islamic bodies may assume/adopt some of the functions that have historically been the domain of civil courts. In England the state retains an interest in marriage and divorce. Marriage must be registered to be recognized in law (despite beliefs to the contrary, there is no “common-law marriage” in England). Religious buildings may apply to become places for marriage registration (although as of 2011 few mosques had this status). Even when uncontested, divorce cannot be realized through private arbitration, but instead must involve the English legal system. More importantly, if marriage is a contract, “it is also a status.”<sup>7</sup> The state’s special interest in the welfare of children adds to the difficulty of delegating any element of family law to private religious bodies. Even when parties arrive at private agreements for a child’s residence and the division of marital assets, such arrangements may be challenged at any time in court. Public bodies, such as city councils, may also intervene if they suspect that the child’s interests are not being adequately protected, which may also lead to a court hearing.

Although some Islamic scholars have urged Parliament to create formal linkages between law courts and Islamic shariah councils, at present these councils do not have binding legal authority. Several of these councils

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5. See the excellent explanation of the Act by Robert Blackett, *The Status of Religious ‘Courts’ in English Law*, DECISIONS, DECISIONS: DISP. RESOL. AND INT’L ARB. NEWSL. (Howrey, Wash. D.C.), Dec. 2009, at 11–9.

6. Most notably the resolution of a mosque administration dispute in Waltham Forest in 2009. Conversations with Shamim Qureshi, District Judge in Magistrates’ Court in England (Oct. 2009). See CHARITY COMMISSION, INQUIRY REPORT: THE WALTHAM FOREST ISLAMIC ASS’N (June 28, 2010), <http://www.charity-commission.gov.uk/Library/wfia.pdf>. Also see MAT’s website for its procedures and for references to the Arbitration Act, *Arbitration Act of 1996*, MUSLIM ARBITRATION TRIBUNAL, <http://www.matribunal.com/arbact.html> (last visited May 31, 2010) and *Procedure Rules of Muslim Arbitration Tribunal*, MUSLIM ARBITRATION TRIBUNAL, [http://www.matribunal.com/procedure\\_rules.html](http://www.matribunal.com/procedure_rules.html) (last visited May 31, 2010). It is worth emphasizing that the MAT does *not* arbitrate in matters of Islamic divorce.

7. *Granatino v. Radmacher*, [2010] UKSC 42, ¶ 132, [2010] 3 W.L.R. 1367, 1404 (Baroness Hale of Richmond JSC).

exist; some act in quite informal ways, while others act with more established and publicized procedures. The most prominent council, the Islamic Shariah Council, London (the “Council”), has existed since 1982, has representatives in many large cities, and accepts requests for services in its central office in Leyton, eastern London. The Islamic scholars or councilors (as I shall call them) hold regular open sessions in which Muslims may come to ask questions about their personal or professional lives, to seek mediation of disputes (usually between husbands and wives), or to seek an Islamic divorce—an act entirely separate from civil divorce. When the Council deliberates in its monthly formal meetings, it focuses mainly on requests by wives to dissolve their marriages.<sup>8</sup> Their procedures resemble those at the other highest-profile councils.<sup>9</sup>

Currently, the main possibility for achieving legal “recognition” of Islamic law in England would be if civil courts were to take notice of, or even to enforce, some elements of an Islamic divorce proceeding—as we shall see, they already do take notice of these proceedings occasionally. Islamic divorce is a complex topic, however, not because the basic ideas are infinitely complicated, but because modern states have created positive-law versions of Islamic family law, and these Islamic legal systems now exist alongside long-standing traditions of Islamic legal scholarship and jurisprudence.

#### I. ISLAM AND FAMILY LAW IN THE BRITISH POST-COLONY

In debating and deliberating matters of marriage and divorce, Muslims and non-Muslims in England might refer to one of three distinct sources: texts of Islamic jurisprudence (*fiqh*), laws and legal practices of prominent Muslim-majority countries, and procedures followed in English Islamic shariah councils. On any given topic, one may derive quite distinct rules and procedures from each source, making “recognizing shariah” a complicated affair.

In the rest of this article, I will show how complicated such recognition would be, firstly, by setting out the range of possible understandings of “shariah” in the family law arena; secondly, by examining the workings of the major family-law shariah body (the Islamic Shariah Council, London);

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8. All information concerning the Islamic Shariah Council comes from my observations of sessions since May 2007 and conversations with the councilors and secretary. Additional information is available on the Council’s website, ISLAMIC SHARIAH COUNCIL, <http://www.islamic-sharia.org> (last visited May 31, 2010). The councilors call themselves “scholars” or “*ulama*,” more rarely “*qadi*” or “judges.”

9. Brief overviews of procedures at four councils are given in Samia Bano, *Islamic Family Arbitration, Justice and Human Rights in Britain*, 1 LAW, SOC. JUST. & GLOBAL DEV. (AN ELECTRONIC L.J.) (Dec. 6, 2007), [http://www.go.warwick.ac.uk/elj/lgd/2007\\_1/bano](http://www.go.warwick.ac.uk/elj/lgd/2007_1/bano). On the Ealing council, see Mohamed Manjee Keshavjee, Faculty of Law, Alternative Dispute Resolution in a Diasporic Muslim Community in the United Kingdom (2009) (Ph.D. dissertation, University of London, School of Oriental and African Studies).

and thirdly, by analyzing a recent civil case in which the judge recognized the civil-legal effects of Islamic judicial decisions. I draw from these analyses a strongly cautionary note: any form of “recognizing shariah” in English civil law would require lawyers, judges, and Islamic scholars to take cognizance of Islamic legal traditions, social practices in countries of origin, and current procedures in England’s shariah councils—for reasons that themselves derive from English contract law.

## II. ISLAMIC JURISPRUDENCE

Islamic jurisprudence (*fiqh*) provides the historical basis for the other two Islamic sources mentioned previously. In classical *fiqh*, individual Muslims have the capacity to perform a number of legal acts: they may marry, divorce, reconcile, make gifts, bequeath, and so on—without involving an authority.<sup>10</sup> Each act, when performed properly, has a legal effect, a *hukm*, a word often translated as “law.” For example, a valid marriage (*nikah*) occurs if, and only if, a man and woman who are not prohibited from marrying agree to marry, and marry before witnesses and with the consent of the woman’s legal guardian. In addition, the groom must give the bride a marriage gift, the *mahr*, sometimes called a “dower” in English. This gift may be a mere token or a considerable amount of cash and jewelry, depending on both the common practices in a particular society and on the wealth or status of the parties involved. The groom may pay some of it immediately and defer the rest; the deferred part might only come due if the husband either initiates a divorce or dies. In some Muslim societies—including parts of South Asia, from where many British Muslims come—relatives also contribute large sums of money to buy gold jewelry for the bride and groom. What happens to these gifts upon divorce can be a matter of some disagreement.

An Islamic marriage can be dissolved in several ways. A husband can divorce his wife in the procedure called *talaq* by uttering a divorce formula. He can take her back within a specified period, and he may repeat the entire process one more time, but the third time is final. If he divorces her and does not reverse his action, then any *mahr* that has gone unpaid is immediately due. In some societies (including much of South and West Asia), deferred *mahr* is often set at a high level. This debt serves to discourage a husband from divorcing his wife and to give her some leverage in marital bargaining.<sup>11</sup> Upon divorce, the divorcing husband must pay spousal maintenance. The mother maintains custody of young children, but the father must support all the children until such time as their mother remarries. Is-

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10. On the basic rules of Islamic marriage and divorce, see JUDITH E. TUCKER, *WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW* (2008). An authoritative analysis of shariah is to be found in WAEEL B. HALLAQ, *SHARĪĀ: THEORY, PRACTICE, TRANSFORMATIONS* (2009).

11. In other societies, such as much of Southeast Asia, women’s rights are stronger and *mahr* is lower.

lamic legal theory suggests that this system of rules creates balance between husbands and wives in their rights and duties.

If a wife asks her husband to divorce her, he will often do so only if she agrees to pay him something in return, usually any *mahr* she has received, and to forgo her rights to deferred *mahr*. This procedure is called a *khul'*; it can take place with or without the mediation of a scholar or a judge.

A wife can also demand that their initial marriage contract include a clause stipulating that if the husband does any one of a list of actions, such as deserting or mistreating her, then she can activate a *talaq*. The clause gives her the power to divorce, although in theory it is the husband who has done so. Many men refuse to sign such clauses.

Much about marriage and divorce in Islam is contractual and can be carried out without recourse to a judge. A judge may intervene, however, either to encourage a husband to divorce his wife or to dissolve a marriage deemed beyond repair, although doing so has been considered to be a regrettable step that should follow efforts to mediate and repair the marriage. Judicial dissolution or annulment, usually called *faskh*, thus represents a third major means of divorce, in addition to *talaq* and *khul'*. This judicial power does not limit or replace the capacities enjoyed by individual Muslims; rather, it adds an additional option to the Islamic repertoire of legal acts.

### III. MODERN ISLAMIC LAW

Today, the majority of Muslims live in countries with modern legal systems, which are the complex products of colonial imposition and extra- or post-colonial borrowing.<sup>12</sup> Colonial rulers found themselves caught in a tension between public interest and private sensibilities regarding family law. On one hand, they sought to create legal rules that could be administered relatively easily by judges and rulers. On the other hand, family law touches people's sensibilities directly; managing family life was far less of a priority to colonial administrators than extracting wealth and suppressing dissent. Rulers cautiously attempted to recognize native systems, and perhaps to "reform" or to "rationalize" them, but not to replace them altogether. Most post-colonial states have continued this process of gradual reform.<sup>13</sup>

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12. On modern Islamic family law systems, see TUCKER, *supra* note 10; LYNN WELCHMAN, *WOMEN'S RIGHTS AND FAMILY LAW: PERSPECTIVES ON REFORM* (2004); and, with special reference to the English legal environment, RAFFIA ARSHAD, *ISLAMIC FAMILY LAW* (2010).

13. In addition to the South Asia references provided in the next note, see ALLAN CHRISTELOW, *MUSLIM LAW COURTS AND THE FRENCH COLONIAL STATE IN ALGERIA* (1985); for a French example, and, for the Dutch in Indonesia, DANIEL S. LEV, *ISLAMIC COURTS IN INDONESIA: A STUDY IN THE POLITICAL BASES OF LEGAL INSTITUTIONS* (1973).

The British experience in colonial India is particularly relevant to matters of shariah and law in England today. British rulers decided to govern marriage affairs within each of the religious communities under their rule by the traditions and laws of those communities. As they extended legal recognition to more and more of the communities, they created a set of regulations for each one, which judges and administrators would apply.<sup>14</sup> This process resembled Britain's actions at home, as the government expanded the list of religious communities empowered to perform marriages. By the nineteenth century, Britain had accorded to Anglicans, Quakers, and Jews "at home" the right to regulate marriage in their own communities. Britain first recognized civil marriage in 1837 against this pre-existing background of religious marriages. Religious marriage rights were extended to others from an Anglican starting point; the extension was motivated by a policy of promoting toleration, not one of enforcing secularism.

An additional wrinkle to these British policies continues to reverberate across the subcontinent. Indian personal status laws were conceived not as merely positive law, the legal force of which would arise from their enactment, but as restatements of already existing practices. In theory these laws derived their authority and legitimacy from the "ancient traditions" that they were supposed to translate into a useable form. The laws were "digests" of material available elsewhere, not "codes" with the *ex nihilo* force of statutes.<sup>15</sup> A fiction—that law was a window into independently existing religious norms—continues to permit judges to directly inspect the ancient traditions to evaluate what they say and how they might be reinterpreted. The Shah Bano case, where a Hindu Chief Justice looked into the Qur'an to critique the existing Islamic code, is only the most famous instance.<sup>16</sup>

The duality of the jurisprudential theory behind personal status laws—legal form but a scriptural source—has allowed and encouraged religious scholars to create their own alternative tribunals. If state law simply restates pre-existing Islamic jurisprudence, there is no reason Islamic scholars or state-empowered judges should not be able to administer it as well.<sup>17</sup> In 1973, the new All India Personal Law Board proposed a model marriage

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14. On these processes of recognition and rule, see Nandini Chatterjee, *English Law, Brahma Marriage, and the Problem of Religious Difference: Civil Marriage Laws in Britain and India*, 52 COMP. STUD. SOC'Y & HIST. 524 (2010) and MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 237–58 (Rajeev Dhavan ed., 3d ed. 1997).

15. Chatterjee, *supra* note 14 *passim*.

16. Asghar Ali Engineer, *The Shah Bano Controversy* (1987).

17. A critical moment in the evolution of these practices occurred in 1933, when the leading Indian religious scholar Ashraf `Ali Thanawi called for the creation of local councils of scholars to give women religious divorces—to stop them from apostatizing in a desperate attempt to dissolve their marriages. Thanawi had been educated at the reform-oriented Deobandi madrasah in the scholarship of the dominant Hanafī Sunni Islamic legal school, but he also drew on the Maliki legal school to support his cause. The Deobandi scholars united in calling for legislation to establish these tribunals, and many religious schools created such schools on their own. See MUHAMMAD QASIM ZAMAN, ASHRAF `ALI THANAWI: ISLAM IN MODERN SOUTH ASIA (2008).

contract, which stipulated that couples bring marital disputes to a shariah court (*dar al-qada*) or its equivalent. In Pakistan, where “Islamization” has largely resulted from the efforts of Western-trained scholars and officials, unofficial tribunals have proved to be effective ways of regulating marital disputes (and of doing so with greater speed and lower costs), although more recently Islamic divorces have been “fast-tracked” within the state legal system.<sup>18</sup>

This set of ideas and institutions has carried over into the practices and approaches of South Asian Muslims who moved to England. These Muslims brought with them ideas and habits about personal status that had been developed under British rule of the Indies. They assumed that Muslims worked out matters of marriage and divorce among themselves, without the need for state intervention. Islamic scholars creating shariah councils in England drew from their own experiences in South Asia. In effect they brought colonial ideas of personal status back home to their legal source.

Different outcomes occurred in other post-colonial contexts. North Africans brought to France ideas and habits about civil law that were forged in colonial experience and reinforced by post-colonial judicial reform. Trained in, or at least accustomed to, the civil law tradition in which all law is positive, they assumed that marriage and divorce were public, not private contractual affairs, and that they were properly created through statutes and the judiciary.<sup>19</sup>

Matters were still more complicated because these two approaches stood in very different relation to their respective metropolitan legal systems. The ideas about marriage and divorce brought to France by North Africans matched French expectations because they added up to a shared acknowledgment of the supremacy of state law. “In Tunisia when you are divorced, you are divorced, period,” said one leading Islamic actor to me in Paris.<sup>20</sup> Law is law, so one sees no shariah councils in France today.

The ideas brought to England by South Asians, however, represented a sharp challenge to English ideas of a uniform English law. If Muslims handled marriage and divorce themselves, then the civil courts would, in effect, cede territory to them. Yet for some Muslims, doing so flowed from colo-

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18. On state Islamic tribunals in Pakistan and India, see Jeff A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT’L L. 759 (2004); Personal Communication with Jeff A. Redding, Assistant Professor of Law, St. Louis Univ. Sch. of Law (2010); and on non-state tribunals, see Jeff A. Redding, *Institutional v. Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems*, 6 J. ISLAMIC ST. PRAC. INT’L L. 1 (2010), available at <http://ssrn.com/abstract=1648945>.

19. See MOUNIRA CHARRAD, *STATES AND WOMEN’S RIGHTS: THE MAKING OF POSTCOLONIAL TUNISIA, ALGERIA, AND MOROCCO* (2001). Indonesia could have been the third major post-colonial case, but very few Indonesian Muslims moved to the Netherlands.

20. Interview with Hichem El Arafa (June 2009). On the French contrast to England on these issues, see JOHN R. BOWEN, *CAN ISLAM BE FRENCH? PLURALISM AND PRAGMATISM IN A SECULARIST STATE* (2010).



nial practices. “Why don’t they just let us take care of these matters,” said one Pakistani scholar to me in London; “after all, that’s what they did in colonial days.”<sup>21</sup> Understandably, English judges are reticent to take this step.

Buttressing such claims by Islamic scholars is the general English practice of supporting and regulating collective religious identities. Churches and synagogues may limit attendance at state-aided schools to members in good standing of the church.<sup>22</sup> Civil judges can refuse to complete a divorce process if the religious divorce entered into by the couple has not run its course.<sup>23</sup> Most recently, the new Supreme Court of the United Kingdom ruled that Orthodox Jewish methods of determining Jewish identity amounted to ethnic discrimination (because identity comes from a Jewish mother rather than one’s own practice).<sup>24</sup> So, efforts to grant legal legitimacy to judgments of shariah councils resonate with other areas of the English legal world.

This double set of post-colonial continuities—in treatment of religions and of personal status laws—made England a particularly likely place for debates about the possibility of recognizing elements of Islamic family law in a Western legal system. These debates arose because of institutional initiatives taken by Muslim public actors starting in the 1980s.

#### IV. ISLAMIC SHARIAH COUNCIL PROCEDURES

During the 1980s, community-based institutions for resolving disputes among Muslims gave rise to several broadly-based shariah councils, particularly in London and the Birmingham area. Today a handful of councils hold regular meetings and receive petitioners from throughout England and Wales. These councils generally acknowledge the legitimacy of each others’ judgments. They publish formalized procedures on their websites. In differing ways they combine open-ended advice and mediation sessions with formal deliberations on cases.<sup>25</sup>

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21. Interview with Suhaib Hasan (May 2008).

22. For the most recent government clarification of this policy, see *What Are the Changes to Faith Schools Under the New School Admissions Code?*, DEP’T FOR EDUC. (May 20, 2010), <http://www.education.gov.uk/popularquestions/schools/admissions/selectingaschool/a005508/what-are-the-changes-to-faith-schools-under-the-new-school-admissions-code>.

23. Based on the Divorce (Religious Marriages) Act, 2002, c. 27 (U.K.).

24. *R v. Governing Body of JFS*, [2009] UKSC 15 (appeal taken from Eng.). See Mark Hill, *What the JFS Ruling Meant*, GUARDIAN, (Dec. 21, 2009), <http://www.guardian.co.uk/commentisfree/belief/2009/dec/21/judaism-jfs-faith-schools-discrimination>.

25. This group of councils includes those at the Birmingham Central Mosque and Birmingham’s Green Lane Mosque, that in Dewsbury (Yorkshire), and those located in the London area in Ealing and Leyton. Each works in an independent way, but scholars at one presume that their counterparts at another follow proper procedures. There are also a number of other mosques that draw up divorce certificates, and countless clerics who offer advice. The largest council, in Leyton, also has members who act as regional correspondents, sitting in, among other cities, Bradford, Leeds, Rotherham, and Birmingham. Journalists and authors of independent reports on the phe-

The largest and oldest council, the Islamic Shariah Council, London, has an office in Leyton, in the eastern part of London. Most of its business relates to divorce. “[Ninety percent] of the marriages cannot be saved by the time they reach us,” said the Council’s registrar, but the councilors try to hear both sides of each dispute.<sup>26</sup> Young women, and to a lesser extent men, often fill the waiting room in the Leyton office until they can see one of the councilors, usually to discuss obtaining an Islamic divorce. Most had married only in Islamic fashion; those who had registered their marriage (or married abroad and then sponsored their spouse to enter the United Kingdom) also usually pursue civil divorce.

If a woman files for Islamic divorce, a Council representative will interview her, either at the Leyton office or, if she lives elsewhere in England, by someone near her home. The Council sends a letter to the husband, notifying him that his wife has filed for an Islamic divorce. He may or may not reply and may or may not show up for the joint meeting that the council usually proposes. The Council representative writes a report following each interview. A file is created, and it eventually reaches a formal monthly meeting. The councilors hold these monthly deliberations in the Islamic Cultural Center, located in the complex dominated by the Central London Mosque next to Regent’s Park. They review case files and, when they have enough information, give the wife an Islamic divorce.

In most of the cases decided at these formal meetings, both parties were born overseas, and in most cases either they were married abroad (usually in Pakistan or Bangladesh) or they were only married in an Islamic *nikah* ceremony in England. In many of these cases the husband was living overseas at the time of the Islamic divorce.<sup>27</sup> The councilors do not rule on the issue of child residence or the division of property, knowing that these matters will be determined in civil court if they are not agreed to by the parties. As of late 2010, they generally insist that the wife take four steps: begin civil divorce proceedings, provide proof that she and her husband have been separated for at least one year, assure the Council that the husband be able to see their children (if they have any), and, in some cases, return *mahr* already paid to her.

First, the councilors insist that the wife who petitions for an Islamic divorce also begin proceedings to obtain a civil divorce, in cases where the marriage was registered in the United Kingdom or conducted abroad.<sup>28</sup>

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nomena (few of whom seek to verify their claims) mistake these members for distinct “Islamic courts,” but in fact the formal judgments of divorce petitions are made in London. *See also* John R. Bowen, *Private Arrangements: Recognizing Sharīʿa in England*, Bos. REV. (Mar./Apr. 2009), <http://bostonreview.net/BR34.2/bowen.php>.

26. Interview with Atif Matin (May 2010).

27. A quantitative analysis of the Council’s case files is under way; statements about frequency or trends are based on analyses of about 200 cases from two periods.

28. The Council requires the civil divorce in the latter case because often one party had commenced proceedings to sponsor the residence of the other in the UK and thereby made their

Once a civil court grants the final divorce decree, the councilors will likely proceed quickly to grant the wife's request; they say that the marriage is over and little sense remains in prolonging its Islamic dimension. The councilors also wish to work in a way that complements the proceedings of the civil courts. They know of the existing collaboration between Rabbinical tribunals and family courts based on the Divorce (Religious Marriages) Act (2002), which allows civil judges to suspend divorce proceedings between the *decree nisi* and the *decree absolute* (which mark the two stages of a civil divorce proceeding) if there is an ongoing religious divorce. The law was motivated by the observation that even after a civil divorce some Jewish men refused to grant their wives religious divorces. Currently the law applies only to Jewish proceedings, and the issues facing Muslim wives differ from those facing Jewish wives. However, for some shariah councilors the passage of the law suggests that English courts someday might recognize their actions as having legal effect, and this idea leads them to value steps that would bring their own procedures closer to those followed by civil judges.<sup>29</sup>

Second, the councilors require that the two parties have been separated for one year, though some councilors urge that there be a two-year separation if the divorce is contested. As with the first requirement, this rule serves a practical function—a way to determine if the divorce request is serious. Couples must clear a lower bar for the Islamic divorce than the two-year and five-year separation periods required for most divorces in English law (depending on whether or not the respondent contests the divorce), but the shariah council rules follow the same logic as the English legal rule.

Third, if the children live with the mother, and the father has indicated that he has difficulty getting access to them, the councilors ask the mother to provide an affidavit stating that she will allow the father to see the children. Increasingly the mother swears to this undertaking in the presence of a solicitor. The councilors require the undertaking partly to converge with what they think a family court would do in these circumstances, and in part because they consider allowing both parties to see their children to be an Islamic norm. Some councilors believe that English family courts tend to give insufficient weight to the father's need to see his children and that consequently they should pay particular attention to this issue.

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marriage abroad known to UK authorities. The rule is intended to avoid future legal complications.

29. Often a mistaken parallel is drawn between the Rabbinical tribunals or Beth Din and the shariah councils. The Beth Din does not dissolve a marriage; it acts as a witness to a couple's decision to do so, much as does a shariah council in the case of a *talaq* or a *khul'* with the husband's consent. But a shariah council may also dissolve a marriage without the husband's consent, a power not held by the Beth Din. See THE CENTER FOR SOCIAL COHESION, THE BETH DIN: JEWISH COURTS IN THE UK (2009), available at [http://www.socialcohesion.co.uk/files/1236789702\\_1.pdf](http://www.socialcohesion.co.uk/files/1236789702_1.pdf).

Finally, the councilors may ask the wife to return any *mahr* that she has already received. Usually they propose that she give it to the Council for safekeeping and notify the husband that he may collect it. If he does not respond within six months, then the councilors return the *mahr* to her (or donate it to a charity upon the wife's request). Often the wife has also received jewelry. When gold jewelry is clearly part of the *mahr*, they require her to return it. Otherwise they make no ruling concerning its eventual disposition, on grounds that the jewelry and other goods given by one party to another around the time of the wedding obey local social logics of reciprocity and are not the responsibility of the Council.

The Council determines its own procedures and changes them over time as councilors develop consensus around a particular issue. For example, councilors have long considered the couple's prior separation to be a critical element in establishing the seriousness and thus the validity of the divorce request. In recent years they have tightened the documentation required in order to prove that the wife and husband had been separated for at least one year; by 2009 they were asking for written attestations from two people, each such attestation witnessed by two others. They justify this rule by invoking the rule's function, and by saying that when faced with multiple opinions from different schools of Islamic jurisprudence, the Council needs to establish a single, clear rule. As one scholar said, "We want them to have been separated for a year, so that we are not hasty." Councilors often review the differing opinions emanating from different Islamic legal schools before revalidating their own rule as a workable compromise.<sup>30</sup>

#### V. A PLURALISM OF "ISLAMIC LAW" SOURCES

Three sources for understanding the meaning of the expressions "shariah" or "Islamic law"—Islamic jurisprudence, modern laws, and council procedures—may not only give different answers to a question, but may also involve quite distinct ideas of "law." Islamic jurisprudence sets out the legal effects of actions Muslims might take: do this and you are married; do that and you are divorced. Each of these claims, that this action has that effect, is grounded in a text that is either the word of God or a statement or action by the Prophet Muhammad, along with scholars' interpretations of those texts.

Modern Islamic family laws contain rules for marrying and divorcing. These rules often confirm jurisprudential claims but, in transforming them into legal rules, they add conditions: do this before a state-appointed judge, pay this amount, sign this paper, and then you are divorced. These rules

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30. Interview with Suhaib Hassan (July 2010). There are various rules about separation prior to divorce that derive from the several legal schools, and the councilors often invoke these *madh-hab*-specific rules, but the procedural rule that they follow is motivated by the consideration described here.

draw on the revealed texts, but take their legal force from the processes that produce them as statutes or decrees.

Finally, English Islamic shariah councils offer potential clients a set of procedures that, if followed, will generate a document: do these things and we will take these steps, and then we may decide to issue you a divorce certificate that you can use to reassure legal authorities in Muslim countries. Each council determines its own procedures; they look to Islamic jurisprudence, to the legal and social practices in the most relevant Muslim-majority countries, and also to the juridical and practical realities of life in England in constructing these procedures. They may or may not offer an Islamic jurisprudential justification of any particular procedure. The council itself draws its legitimacy from the need for Muslims to have institutions that can meet their needs and prevent disorder.

In England, Islamic scholars, ordinary Muslims, and English judges might draw on a mixture of these sources. As in the case examined below, a judge might ask for expert testimony on “Islamic law,” by which the judge might mean the general rules of Islamic jurisprudence. Muslims, however, might enter into a marriage or divorce with assumptions about Islam that are based on the laws and customs of a particular country. Furthermore, if they seek an Islamic divorce through an Islamic shariah council in England, then they might come to see their case through the lens of the procedures set down by that council. It is in the play of these three kinds of law, each with its own source of authority, where confusion may reign.

This variety of sources and understandings should indicate how complex a matter it is to speak of English courts “recognizing” Islamic law, as the Archbishop did. If a judge seeks expertise, what is the object of the quest: Islamic legal theory, Muslim state practices, or new English-shariah creations?

## VI. WHEN SHARIAH HAS LEGAL EFFECTS: UDDIN v. CHOUDHURY

These are the issues presented in a recent case in which a judge recognized the legal effects of a shariah judgment. The case, *Uddin v. Choudhury*, was decided in the Court of Appeal for England and Wales, Civil Division, at the Royal Courts of Justice, on October 21, 2009.<sup>31</sup> The appeal was from a judgment rendered in the Central London County Court on March 20 of the same year and concerned gifts that accompanied an Islamic marriage, or *nikah*, carried out in 2003 in London. The appellant, Mr. Uddin, was the father of the groom; the respondent, Ms. Choudhury, was the bride.

Neither party disputed certain facts in the court proceedings. Both sets of parents had immigrated to England from Bangladesh, and they had ar-

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31. Transcript of *Uddin v. Choudhury*, [2009] EWCA (Civ) 1205, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1205.html>.

ranged the marriage in negotiations held between the two families. As usually is the case, each side gave gifts to the other, including the bride and groom and also relatives of each as recipients. These gifts included substantial amounts of gold jewelry. The marriage contract, the *nikah nama*, stated that the bride was due £15,000 as her *mahr* and that this was unpaid at the time of the *nikah*.

The relationship did not work out. The original plan was to register the marriage legally sometime after the Islamic ceremony, but this was never done. Nor, by admission of both parties, was the marriage consummated. The bride requested that the Islamic Shariah Council in Leyton dissolve the *nikah*. The husband agreed to this procedure on condition that his wife return both the jewelry that had been given to her and the portion of the *mahr* that had already been paid to her. She denied having received any *mahr*. In December 2004, the Council dissolved the marriage; the Council's records show that their decision contained no stipulations concerning jewelry or *mahr*.

The husband's father pursued the matter in civil court.<sup>32</sup> He claimed that the bride was obliged to return the gifts that were given to her and to return additional items of jewelry worth £25,000, which he claimed she had taken from his and his son's home near London during a visit shortly after the marriage. The bride filed a counterclaim in the civil court. She said that she was due the £15,000 *mahr* that was promised in the marriage contract and payment of which became due when the Council dissolved the marriage. One should keep in mind that this was an Islamic marriage contract and that the couple never had been married (or divorced) in the eyes of English law; the court case concerned obligations to pay, not the terms of a divorce settlement.

The judge appointed a single joint expert on the matter of shariah law (meaning that both parties accepted him as an expert). The judge asked the expert, the barrister Faiz ul Aqtab Siddiqi, to inform the court about the content of "shariah law"—not, notably, to explain Islamic practices as carried out in Bangladesh or at the Islamic Shariah Council. Siddiqi answered in a detailed brief, in which he made two major points. First, unless stipulated in the contract, the gifts given at or around marriage were gifts, pure and simple. Their possession was not contingent upon the success of the marriage and they did not have to be returned upon the marriage's dissolution. They were not part of the *mahr*, whose payment is related to the marital status of the couple. Second, the bride was due the *mahr*, to be paid in full, because the marriage had not been consummated and because this failure was not due to any refusal on her part. The judge of first instance considered these two points in making his decisions.

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32. He also initiated a civil suit against the Islamic Shariah Council for procedural irregularities, later dismissed.

The judge found that the gifts were gifts and need not be returned, and thus found against the claimant, the groom's father. The judge also ruled that the marriage contract was a valid contract and that the Islamic marriage ceremony had given it "legal effect."<sup>33</sup> The court could and would enforce the contract. He found for the bride in her counterclaim and awarded her the £15,000 in *mahr*.

The groom's father, Mr. Uddin, immediately appealed, and asked the appellate court to grant him time to prepare his case. The wheels of justice turned rather quickly and the appellate judge issued a decision in October 2009. The decision addressed the narrow question of whether the court would grant Mr. Uddin more time to prepare his appeal, but, in dismissing this petition, the appellate judge also affirmed the conclusions reached by the previous judge. He could not judge on the quality of testimony of the two sides, but he did hold that the original judge had correctly understood the expert testimony on shariah law, against Mr. Uddin's several claims to the contrary. He also ruled that the relevant matters of shariah law on gifts and *mahr*, were so clear that he did "not think there [was] a real prospect of [arguments on] those points succeeding on appeal."<sup>34</sup>

This case has generated some interest in the London legal community because it is one of the few reported cases in recent years to concern the intersection of Islamic judgments made in England and the legal system. It includes a number of important claims that are worth summarizing here.

First, the *mahr* became due upon divorce in this case because it was specified in the Islamic marriage contract to which the two Bangladeshi families agreed. The document was to be treated as a straightforward contract, to be taken at face value and to be enforced by civil courts. Second, the jewelry given at the time of the marriage constituted simple gifts, and gifts remain with the recipient unless otherwise specified in the marriage contract. The gifts did not need to be returned. Third, the couple's *nikah* "was a valid marriage under shariah law and that it was then validly dissolved by decree of the Islamic Shariah Council." In other words, the court recognized the Council's action as having a legal effect because it triggered the contractual agreement making the *mahr* due. "It was valid for the purposes of giving legal effect to the agreement which had been made about gifts and dowry."<sup>35</sup> It was unnecessary to inquire into the Council's ruling, and apparently no one asked further about it in court.

Implicit in the decision was a fourth claim as well, what we could call a meta-claim: something called "shariah law" applies to all Muslims and an expert can lay it out in the form of a list of general rules. The expert's statements were taken as matters of fact, much as would be another expert's

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33. *Uddin*, EWCA (Civ) 1205 at para. 11.

34. *Id.* at para. 13.

35. *Id.* at para. 11.

statements about the content of German or French law in a contract case involving foreign law. His testimony also evokes the way that in Muslim-majority countries in early modern times a *mufti* (expert on Islamic law) would have been asked to restate the law. The court expert in *Uddin*, like the early modern *mufti*, provided a set of empirical statements about what Islamic law said on the particular topic at hand.

Thus the court construed a number of important acts—giving jewelry to relatives, promising *mahr* to the wife, writing a marriage contract, dissolving a marriage—as having a clear Islamic content with an English legal effect. The judge ruled that the gifts stay where they are, the *mahr* comes due, the Islamic contract has English legal force, and the Islamic marriage was validly dissolved. In this sense the decision contains several acts of “recognition” of shariah law by the civil courts.

#### VII. IS A MAHR OBLIGATION A CONTRACT?

Each of these acts of recognition, however, merits some further analysis. Let us begin with the Islamic Shariah Council, the body whose dissolution of the marriage gave rise to these legal effects. The Council dissolved the Islamic marriage.<sup>36</sup> It treated the wife’s petition as a request for a *khul’*, which indicates that the wife initiated the divorce action and, according to their published rules, that she thereby gave up her right to unpaid *mahr* and was required to return any *mahr* already given to her. In this case the councilors believed the wife’s claim that the *mahr* had never been paid. (The husband told the Council that he had paid her the *mahr*; he changed his story in civil court.) The Council ruled that she had no obligation to pay anything to him, but neither was the husband required to pay the promised *mahr*.

The Council’s written judgment made no mention of any payments as conditions for the dissolution of the marriage. This absence of a ruling on *mahr* does not appear in the civil court account of what happened, which is not surprising. The judge would not have seen the relevant Council file, and even if he had, he would not have remarked on the *absence* of a stipulation for *mahr* payment. Instead, the judge heard the expert testimony, which indicated that *mahr* should be paid.

One could take the Council’s reasoning to support the claim made by Mr. Uddin (the husband’s father) in the civil suit, and summarized by the appellate judge, Lord Justice Mummery, in the following words: “[T]he bride was not entitled to claim the *mehar* or dowry in circumstances where she had, of her own free will, walked out of the marriage. He says that in those circumstances the dowry should not be payable.”<sup>37</sup> This claim corre-

36. The following section is based on conversations with the Council registrar, Atif Matin, May 12, 2010, and on analysis of the relevant case file at the Council.

37. *Uddin*, EWCA (Civ) 1205 at para. 12.



sponds to Council practices in most cases, but obligations to pay or to return the *mahr* depend on the nature of the divorce. If the councilors are satisfied that a couple did not consummate their marriage and for reasons *other than* the wife's refusal, they award the wife one-half the *mahr* due. In the case in question, however, the Council did not render a judgment about consummation because the parties presented conflicting claims. They treated the case as an ordinary *khul'* case and therefore did not award the wife any of the *mahr*.

The civil court did not recognize such a linkage between contractual obligations and the nature of the divorce. Lord Justice Mummery summarized, approvingly, the trial judge's findings:

Next he decided that, as evidenced by the marriage certificate, there was a properly agreed dowry or *mehar*, and he found, on the basis of the evidence given by Mr. Saddiqui, that that was a valid contract which, on the evidence he had heard, was enforceable by the court. There was no legal reason in the decided cases or in policy for refusing to enforce an agreement that the parties had made for the payment of the dowry. So he said that the counterclaim for the payment of that should succeed and there were no grounds for making deductions.<sup>38</sup>

In other words, English law ("decided cases or in policy") provided the relevant legal context for determining the husband's obligation regarding the *mahr*, and nothing in the law prevented considering the obligation to be a contract enforceable by the court.<sup>39</sup>

#### VIII. WHAT IS THE CONSIDERATION?

A contract must have consideration; something is promised in return for the execution of the contract. What is the consideration when a couple marries in Islamic fashion? Scholars have proposed two responses to this question. First, that the *mahr* is the consideration that makes the *nikah* a contract. This claim fits the ways in which some South Asian courts have ruled in disputes over *mahr*. It implies that the marriage itself is similar to a purchase of services, however, and for that reason some scholars reject it. They also claim that the *mahr* is not essential to the validity of marriage and thus is not consideration.<sup>40</sup>

Secondly, that the *mahr* agreement itself is the contract, and the Islamic *marriage* is the consideration: I agree to pay you a certain sum of

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38. *Id.* at para. 7.

39. The same position was argued by Ahmad Thomson, a solicitor who also advises the ISC, in a letter to the Charity Council in 2006 in response to their queries about the ISC's procedures. These queries had been sparked by complaints by Uddin to his MP.

40. Such is the position held by Pearl and Menski, who document the prevalence of this argument in South Asian legal circles but reject it on normative grounds. DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 178–79, 190–201 (3d ed. 1998).

money if we marry.<sup>41</sup> Such is the usual interpretation of one of the few reported English decisions concerning *mahr*, the 1965 case *Shahnaz v. Rizwan*.<sup>42</sup> The case concerned a Muslim couple married in India with a marriage agreement that stipulated payment of *mahr* upon divorce. The couple divorced in England and the wife sued for the *mahr* to enforce the contract. The judge ruled that “[u]nder Mohammedan law such right to dower, once it had accrued as payable, was enforceable by civil action and was regarded as an assignable proprietary right.”<sup>43</sup>

The *Shahnaz* way of framing the case insulated the *mahr* agreement against two objections: the marriage was potentially polygamous and thus (following the law at the time) could not be subject to English jurisdiction, and the agreement was a kind of ante-nuptial contract, not enforceable according to English law. In the words of the judge:

This right [to the *mahr*] is far more closely to be compared with a right of property than a matrimonial right or obligation, and I think that, upon the true analysis of it, it is a right *ex contractu*, which, whilst it can in the nature of things only arise in connection with a marriage by Mohammedan law (which is *ex hypothesi* polygamous), is not a matrimonial right. It is not a right derived from the marriage but is a right *in personam*, enforceable by the wife or widow against the husband or his heirs.<sup>44</sup>

#### IX. WHAT WERE THE PARTIES’ UNDERSTANDINGS?

If the *mahr* is a contractual obligation, however, and the consideration in *Shahnaz* was the Islamic *nikah*, then the implicit elements of the contract and the intentions of the parties would need to be read against the background of normal Islamic divorce proceedings. In English contract law, the probable intentions of the parties entering into a contract should be taken into account; in particular the parties must have intended the contract to be legally enforceable.<sup>45</sup> What understandings would the parties in *Uddin* have held of those proceedings? What would they have thought the material effects of dissolving an Islamic marriage would be?

Above, we discussed three possible sources for the parties’ understandings: the rules of Islamic jurisprudence, the procedures followed in the relevant Muslim-majority country, or the procedures followed in England shariah disputes. The parties to *Uddin* were of Bangladeshi background.

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41. Richard Freeland takes this view with respect to the English court decisions. Richard Freeland, *The Islamic Institution of Mahr and American Law*, 4 GONZ. J. INT’L L. 2 (2000–01), available at <http://www.gonzagajil.org/>.

42. [1965] 1 Q.B. 390 (Eng.).

43. *Id.* at 390.

44. *Id.* at 401.

45. The difficulty of deciding whether a couple intends to be so bound was pointed out in *Balfour v. Balfour* [1919] 2 K.B. 571 at 575 (Eng.), where a husband’s promise to pay his wife maintenance was considered not enforceable.

They might have brought an understanding to their marriage that any divorce initiated by the wife would be considered as a *khul'* and thus, following Islamic jurisprudence, would require her to abandon her claim to *mahr*. Or they might have known of Bangladesh's Muslim Family Laws Ordinance and subsequent court decisions holding that *mahr* contracts are enforceable as contracts regardless of the form taken by divorce proceedings.<sup>46</sup> Or, because the wife started Islamic divorce proceedings at the Islamic Shariah Council, she (at least) could be presumed to have agreed to abide by their procedures, which stipulate that she would not be paid *mahr* if the Council granted her a judicial dissolution.

Whichever set of rules was chosen as a point of reference, the result would be to embed the *mahr* contract in a set of shared understandings about Islamic marriage and divorce, whether these are derived from Islamic jurisprudence, state legal instruments, or the procedural rules followed by the Council. English contract law places great weight on such understandings, especially when the contract is among relatives, which renders them germane to judicial interpretations of the contract in question, the agreement to pay *mahr*.<sup>47</sup>

Moreover, the judge might have been expected to consider the parties' understandings at two distinct moments: at the time of the marriage and at the start of the Council proceedings. If at the time of her marriage, the wife had started from the framework of Islamic jurisprudence, perhaps based on advice from an Islamic scholar, she would have seen any eventual initiation of divorce proceedings as cutting off the possibility of receiving the deferred *mahr*. If, however, she had relied on the current law of Bangladesh, she might have presumed that an eventual divorce, initiated by either party, would have led her to receive the deferred *mahr*. At the time of initiating divorce procedures at the Council, the wife probably would have been required to sign a statement indicating that she understood that she would forgo the *mahr*.

This approach to the question—one that asks about the likely understandings the parties would have had of their agreement concerning *mahr* within one or another construction of Islamic law—would seem to best respond to the requirements for applying English contract law to a marriage-related promise between Muslim spouses. Asking this question would lead to examining the link between the rule of divorce and the rules for *mahr* repayment. The judges in *Uddin*, however, did not follow this logic. In effect they severed the link between the form of an Islamic divorce and the *mahr* obligations.

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46. The Muslim Family Laws Ordinance (Ordinance No. 8/1961) (Bangl.). See Pearl & Menski, *supra* note 40, at 373–82; Sultana Kamal, *Law for Muslim Women in Bangladesh*, 4 DOSSIER 4, 4–6 (Aug./Sept. 1988), <http://www.wluml.org/node/248>.

47. For this point made in a non-*mahr* case, see *Khan v. Khan*, [2007] EWCA (Civ) 399, [46] (Eng.). I thank Prakash Shah for pointing to the relevance of this case.

Two problems have emerged so far in our analysis of *Uddin*. One is the relationship between the *mahr* agreement and the form of divorce. If the contract's consideration is the decision to enter into an Islamic marriage, as I have argued above, then the set of rules that define that marriage and divorce are relevant to how or if the contract is to be understood and enforced. The second problem concerns the parties' intentions. If a judge enforced the *mahr* agreement as a contract, then the judge would wish to know the parties' understandings of that contract—whether it would be enforced in court, and under what conditions to expect payment of deferred *mahr*.

Why did the judges in *Uddin* not seek to link the status of the *mahr* agreement to the parties'—and especially the wife's—understandings about marriage and divorce? There are two possible reasons. First, the judge might have thought that making this link would bring the case into the terrain of prenuptial/ante-nuptial agreement. English judges are not bound to enforce ante-nuptial agreements, although they may and sometimes do take them into account in a divorce settlement.<sup>48</sup> If a *mahr* agreement can be separated from the marriage, then an order for its enforcement is less likely to be challenged. Although reported cases relevant to *Uddin* are few and far between, *Shahnaz* constructed *mahr* obligations as enforceable contracts that did not stand or fall with the acceptability of the marriage regime or the manner in which a divorce was carried out. (Indeed, in *Uddin*, there was no legal divorce at all because there had been no legal marriage.)

In the other generally cited English court decision on the matter, the 1973 case *Qureshi v. Qureshi*, the judge also awarded *mahr*. Because the husband admitted that if their divorce were recognized then the *mahr* would be due, the judge explained that he did not need to decide whether it was due as a simple contractual right or because of the wife's marital status.<sup>49</sup> He also said that the payment of the *mahr* would be a relevant consideration for a judge if he or she were asked to adjudicate the wife's claim for maintenance. Here the *mahr* obligation was treated not as an independent contractual matter but as part of the overall set of obligations flowing from the divorce. Although this decision is usually taken as having reaffirmed

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48. Amendments to the Matrimonial Causes Act, 1973, c. 18, § 24(1)(d) (Eng.), allow them to do so but do not treat those agreements as contracts. The recent Supreme Court decision in *Radmacher v. Granatino*, [2010] UKSC 42, [7] (appeal taken from Eng.), however, introduces as *obiter* the view that such ante-nuptial agreements are legally enforceable contracts, subject to the scrutiny of the court for their fairness.

49. [1972] Fam. 173 at 195. In the broader social and legal context at the time, the more important aspect of this decision was that extra-judicial divorces carried out in England by persons domiciled elsewhere could now be accepted, a decision subsequently rendered moot by the Domicile and Matrimonial Proceedings Act, 1973, c. 45, § 5, limiting legal effects of divorces carried out in England to those that occurred in English courts.

*Shahnaz*, it could be interpreted as merging *mahr* obligations into the overall divorce settlement, thus leaving them to the discretion of the judge.<sup>50</sup>

Second, the initial judge framed the questions put to the expert witness in terms of “Islamic law” rather than in terms of Bangladeshi practice or the procedures followed by the Islamic Shariah Council. Islamic law was treated as a species of foreign law, rather than as the wife’s and husband’s understandings of Islam. This approach matches that taken by many Muslim scholars, who urge that Islamic law be freed of the cultural elements that distort its true meaning. The expert witness in *Uddin* shares this view and indeed urges women to demand that their marriage contracts contain sufficiently specific conditions to allow them to initiate a divorce if the husband fails to fulfill one or another of the marital obligations. As a barrister, Faiz ul Aqtab Siddiqi emphasizes contractual clarity; as an educator at his Hijaz College in Nuneaton, he emphasizes education. Indeed, in explaining this emphasis to me, he said that “*Nikah* is a contract and should be entered into through education and not based on cultural background, for example on Pakistani or Indian ideas.”<sup>51</sup>

This approach, taking Islamic law as a set of contract-oriented rules, fits well both with English legal expectations that it is a kind of foreign law, and with efforts to purify Islam of cultural backgrounds. If, however, the judge does not then investigate the parties’ understandings of their contracts, particularly with respect to the effects of the mode of divorce on *mahr* obligations, the judge ignores the English as well as the Islamic approaches to contracts.<sup>52</sup>

#### X. ARE GIFTS TO BE RETURNED?

Mr. Uddin’s petition to the civil court concerned not the *mahr* but gifts of jewelry given pursuant to the marriage. The expert testimony declared them to be simple gifts, not to be returned. The testimony, however, was a restatement of “Islamic shariah”; it did not purport to describe the understandings and practices common in Bangladesh about marriage gifts. These understandings are complex and changing. In Bangladesh and elsewhere in South Asia, marriages include the exchange of gifts as well as payment of *mahr*. Both sides give gifts of jewelry and clothes, and expensive items of jewelry are supposed to be handed down to children.

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50. Such is Werner Menski’s interpretation of the current state of the law based on his experience as an expert witness and drawing on unreported cases. Werner Menski, *Immigration and Multiculturalism in Britain: New Issues in Research and Policy* (2002) (unpublished manuscript), available at <http://www.casas.org.uk/papers/pdfpapers/osakalecture.pdf>.

51. Interview with Faiz ul Aqtab Siddiqi, Principal, Hijaz College (Feb. 2010).

52. On this point I concur with Pascale Fournier in her comparative study of *mahr* in Western courts. Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24 INT’L J.L. POL’Y & FAM. 67, 78, 86 (Apr. 2010).

In Bangladesh the groom's side is increasingly likely to also demand a dowry from the bride, which could include requests that the bride purchase furniture for her husband's household, where she will live, and that her family buy jewelry to properly adorn her for the wedding. Though she wears the jewelry and it "theoretically" belongs to her, often the husband or his family will use it for subsequent marriages, so that, unlike the *mahr*, these gifts cannot be considered the bride's property.<sup>53</sup>

In practice, the disposition of these gifts depends on how the marriage turns out. If it lasts, the children may receive the gifts. Moreover, families who received gifts will be expected to reciprocate when the gift-givers marry off their children. Things are viewed differently if the marriage is of short duration, as was the case with the marriage in the *Uddin* litigation. As one prominent South Asian family lawyer explained to me in 2010:

There is an unwritten code that if the bride walks out early (with no children) she hands back all that she received from the groom's side. This is even more the case if the marriage is not consummated; all is returned to both sides. In an academic jargon you could say that this is a "constructive trust" and that the givers had "detrimental reliance" on the marriage. This is a way for the English courts to recognize this unwritten contract.<sup>54</sup>

Note that the logic of gifts and obligations invoked here is not one of Islamic law, nor is it written, and it is decidedly not the logic of a simple gift. It is a social logic in which gifts create obligations, to the givers as well as to the receivers. Mr. Uddin followed this logic when he argued that his son should receive the gifts. The judges saw things through an entirely different lens. They said that unless the marriage contract said otherwise, the gifts were simple gifts that the wife could keep.<sup>55</sup>

Now, there is an Islamic way of understanding the gifts that would support what the court said. It is one that distinguishes between shariah that can be applied in any society, on the one hand, and the practices and expectations found in South Asia (or in another region), on the other, and that considers the latter to be outside the competence of a shariah-based deliberative body. The issue is as follows: do the social and legal expectations of people coming from a particular part of the world have a bearing on how scholars sitting on a multi-ethnic Islamic council in London decide cases? Or, are these expectations rather matters of social rules and practices (*'urf*)? The meta-issue is: does *'urf* have relevance for shariah? The issue arises

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53. KATY GARDNER, *GLOBAL MIGRANTS, LOCAL LIVES: TRAVEL AND TRANSFORMATION IN RURAL BANGLADESH* 178–80 (1995); Shahnaz Huda, *Dowry in Bangladesh: Compromising Women's Rights*, 26 *S. ASIA RES.* 3, 249, 256 (2006).

54. Interview with Aina Khan, Head of Family Dept., Woodroffes Solicitors (Mar. 2010).

55. Perhaps I should emphasize at this point that my concern is not whether Mr. Uddin deserved to win the case, but whether the judges correctly grasped the issues surrounding the marriage and its payments.

frequently in the deliberations of the Council. In a case they considered on March 24, 2010, each party asked to be compensated by the other for expenses and gifts. One Pakistani councilor argued that the wife must return the gold jewelry given to her; another, from Saudi Arabia, did not see how jewelry was part of their discussion if it was not written down as *mahr* in the marriage contract. The discussions continued between the two councilors:<sup>56</sup>

Pakistani scholar (“P”): “All [gifts] must be returned, this goes to custom, all returned, ‘even a needle.’ When she claims her things, she should take her movables, immovables do not concern us. But gold always concerns the Shariah Council.”

Saudi Arabian scholar (“SA”): “How should we classify these gifts? Why should they be returned?”

P: “The custom (*urf*) is that the *mahr* is low but there is lots of gold. There was one wedding I celebrated of a doctor, and the gentleman asked me to write down one pound *mahr*, I was not happy: [I asked] ‘are you making a mockery of the wedding?’ I asked if they were giving gold, and they were, quite a lot, and I said they should put that as *mahr*.”

SA: “Yes, but what does *urf* do, does it consider this part of *mahr*?”

P: “Yes.”

SA: “No, our rule is that [only that] which is written in the *nikah nama*, you should give it back, it is our rule.”

P: “No it is not our rule, we go with *urf*.”

In this discussion, the issue was whether gold promised or given alongside an amount of money should be considered *mahr* and thus subject to the rules that apply to *mahr* in the case of a *khul'*, or considered outside the Council’s jurisdiction entirely. The issue resurfaced with respect to many other cases. P argued that the gold was *mahr* and that it would be better if people wrote it down as such, because often that which is explicitly *mahr* is laughably low. The amount is symbolic, he explained, and it is the gold that people intend to provide the bride with bargaining power in future negotiations with her husband. If you try to accomplish the objectives (*maqâsid*) of shariah, then you should consider the gold to be part of the *mahr*, he concluded.

SA countered that the councilors generally should restrict their judgments to that which is stipulated in the written contract as *mahr*. He argued that other gifts, like other property, fall outside the Council’s self-imposed jurisdictional limitations. In this case SA came to agree with P’s argument that the gold had been intended to be part of the *mahr*. His starting point, however, was that *mahr* is *mahr* and gifts are gifts, and gifts have nothing to do with the Council’s judgments. This also was the expert testimony to

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56. Transcript of Audio Tape (on file with author).

the civil court in *Uddin*, and as with SA's position, this argument reflects a view that seeks to place something called "shariah law" outside of any particular local set of social expectations.

If we can derive a consensus view from the above debate, it would be that for the Council, if *mahr* and gold gifts were clearly distinct at the time of the marriage, then the disposition of the gifts are not ruled upon by the Council because the Council only rules on the basis of shariah, not customary practices. Such would seem to be the case for the *Uddin* marriage, as there was a high *mahr* of £15,000; thus, it would be reasonable to say the gold jewelry did not enter into the *mahr*. This statement, however, would not decide the proper disposition of the gold, i.e., it would not decide between "gifts are gifts" and "gifts depend on the marriage." One could say that the gold was not part of the *mahr* but also argue that it should be returned. One cannot decide what to do with the gifts merely by consulting a generalized version of "Islamic shariah," as did the judge in *Uddin*.

If instead we turn to the *'urf* or customary practices and expectations of the society, then we could formulate a solution for *Uddin*. The marriage was short-lived and not consummated, so the parties would return all gifts. If the civil judges had wished to rule on the basis of shared contractual expectations, then they could have sided with Mr. *Uddin* and ordered the gifts returned. In either case, the judge's decision has little apparent base either in the understandings and practices of Bangladeshi Muslims or in the rules and procedures of the Islamic Shariah Council.

#### XI. HOW DOES ENGLISH LAW RECOGNIZE A VALID ISLAMIC ACT?

The civil court ratified the decision of the Council in asserting that the couple's *nikah* "was a valid marriage under shariah law and that it was then validly dissolved by decree of the Islamic Shariah Council." It was valid not because the ceremony was recognized in English law, "but it was valid for the purposes of giving legal effect to the agreement which had been made about gifts and dowry."<sup>57</sup>

How did the two judges reach this conclusion? They referred to the expert testimony given on Islamic shariah; but in his testimony, the expert, Faiz ul Aqtab Siddiqi, explained the major rules for divorce but did not evaluate the decisions made by the Islamic Shariah Council. (No one asked him to do so and the file would not have been available to him in any case.) It does not appear that anyone involved in the civil suit would have been in a position to comment on the validity of the procedures followed by the Council.

Indeed, on several dimensions parties may disagree as to what constitutes valid procedures. Solicitors in this and other cases may request the Council to direct all communication through them, on grounds that such

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57. *Uddin*, EWCA (Civ) 1205 at para. 11.



channels spare their clients undue stress and permit the solicitors to follow the case. In the eyes of the Council, however, Islamic law requires direct communication between the councilor and each of the parties. Councilors see themselves first as mediators, who must pose questions to each party. Even when solicitors object, councilors continue to engage in direct communication with the parties.

Questions about validity of an Islamic divorce coming from those parties can be easily dismissed as mere lawyers' tactic. Islamic scholars, nevertheless, reflect critically on how it is that their decisions to dissolve a marriage are valid. Recall the idea of a *khul'* divorce. Theoretically, a *khul'* happens when a husband divorces his wife upon her request and usually when she agrees to return or forgo her *mahr*. When a wife approaches the Council, a councilor generally tries to convince the husband to follow this route. If he refuses to do so, however, can a judge issue a *khul'* without the husband's consent? The issue divides Islamic scholars. Although the Council does precisely this, from time to time one of the councilors voices his own doubts about the procedure. Some argue convincingly that the majority of scholars across the four Sunni legal schools (the *madhhâhib*) did not recognize such "judicial *khul'*" and that issuing them today is a practical, unavoidable measure whose Islamic foundations are shaky. Such an argument holds equally for state-appointed Islamic judges elsewhere and for the Islamic Shariah Council.<sup>58</sup>

Given these debates and complexities, it is not completely evident that an English civil court can decide what counts as a "valid Islamic divorce" or what the parties are supposed to do with the *mahr* or gifts of jewelry based on shariah. There is no single set of rules and procedures to which judges can refer as comprising "Islamic shariah"—although one can easily find Islamic authorities who will say that their version of shariah has precisely this status. Although code books of Islamic law do exist—even the British wrote them in India—these books are only some among many artifacts and interpretations of law and morality that inform Islamic judges and scholars. For a civil judge to just "have a look" at what shariah law says is a perilous course as long as there is no agreed-upon general set of rules and procedures for all shariah councils in England.

Although Islamic scholars disagree on the content of shariah, most would agree that multiple answers can be considered legitimate if scholars make reasonable efforts to reach a decision based on knowledge of Islam. The divergences in the answers stem not only from different readings of texts and traditions, but also different "meta-ideas" about how one weighs Islamic jurisprudence, the laws and practices in Muslim-majority countries,

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58. Technically these disputes may concern the distinction between a *khul'*, as defined here, and an annulment or *faskh*. The distinction is important to the Council and will be taken up elsewhere.

and the procedures arrived at in England in attempts to adapt shariah to a new country.

#### CONCLUSIONS

I have argued that for cases stemming from Islamic marriage and divorce, English law already provides ways to integrate knowledge of social practices into the process of legal reasoning. If, as in *Uddin* and following the decision in *Shahnaz*, judges treat *mahr* agreements as contracts, then they are logically led to inquire as to the intentions of the parties and the consideration provided. *Mahr* agreements are contractual but they also are embedded in a set of social understandings and practices—as are *all* contracts. These understandings developed out of a shared Islamic jurisprudence but they have developed and diverged in today’s world, shaped by legislation in Muslim-majority countries and by procedural adaptations such as those found in England’s Islamic shariah councils.

English ideas of contract could also underpin recognitions of Islamic divorces as “valid,” to the extent that the parties to a religious divorce procedure sign affidavits agreeing to the terms of the procedure and the range of possible outcomes. In that case, to affirm validity would not be to compare what is said in “shariah law” and what happened in a particular shariah council hearing—a difficult and probably unnecessary task—but to see whether the council obeyed its own procedural rules.

There already are civil cases in which judges “recognize” in some way the procedures and rules attributed to shariah—*Uddin* is unique only in that it was reported. I have argued that there are two ways to think about what such recognitions mean. One way is to seek a universal set of rules that constitute “shariah law.” I have argued that this is a chimera. Not even Islamic legal systems, such as those in Pakistan or Bangladesh, enforce “shariah law”; they enforce statutes.

The second way, for which I argue, is to draw from English legal resources and common sense the categories and imperatives that respond to the legal matter at hand. What did the parties think they were doing? What are the standard ways in which gifts and *mahr* are given and when are they returned? How did the shariah council deliberate and decide the case? Are these procedures what the parties should have expected? In doing so the courts would not “recognize shariah” but analyze religious procedures—*nikah*, *mahr*, and *khul'*—into those components that have legal relevance: promises, expectations, and actions. Judges would then be on firmer ground.

