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Muslim Alternative Dispute Resolution and Neo-*Ijtihad* in England

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Distrust of the official law and lack of respect for the law-maker provide important feedback effects for the reconstruction of Muslim unofficial law in Britain. Muslims have withdrawn from state institutions and developed their own methods of alternative dispute resolution which operate both on an official and unofficial level.[1] Thus, many cases do not come before the courts that is exactly in line with the traditional Muslim way of dealing with family matters outside the state interference.

Ijtihad is an activity, a struggle, and a process to discover the law from the texts and to apply it to the set of facts awaiting decision and this activity is a very important aspect of Islam regarding its dynamism and universality. Yet, for the centuries, due to the several reasons, the neglect of this dynamism or Muslims' inability to employ *ijtihad*, has left a number of problems unsolved and some questions unanswered in the Muslim socio-legal spheres. In our age, the existence of Muslims in non-Muslim environments has forced Muslims to resuscitate *ijtihad* in the face of new problems where Muslims have no longer been living in their safe Muslim Gemeinschaft environments to employ traditional Muslim law. They have had to solve their problems in totally new contexts. By employing *takhayyur*, Muslims in England have been exercising a neo-*ijtihad* in *darura* times. As is known, family life, and thus family law, is an important aspect of Muslim life and Muslims in England have reconstructed their Muslim family laws, albeit unofficially, to the effect of creating a 'Muslim legal pluralism'.[2] In this legally pluralist Muslim scenario, new *ijtihad*s have been

needed on the issues of marriage and divorce. In tune with the modern times, this time it is *ijtihad* committees (*shari'a courts* in our case) that exercise *ijtihad* not *mujtahid*s.[3] This paper focuses on such a *shari'a* court, the Islamic *Shari'a* Council. First, we need to look very shortly at the discussions surrounding the issue of *ijtihad*.

Neo-*ijtihad* and *takhayyur*

Islam demands full allegiance from a person, once he has chosen to embrace it. Law is an essential and a central part of a Muslim's religion. Thus, many Muslims in both Muslim and non-Muslim polities relate themselves to the *shariah* rather than to legislation of particular countries. *Shariah* is a source of legal pluralism in our age. Furthermore, legal pluralism inherent within Islam maintains such a legally plural society even within a Muslim environment. Law in Muslim understanding is a system of meanings and a cultural code for interpreting the world. It "represents an order which governs all spheres of life, in which... even the rules of protocol and etiquette are of a legal nature."[4] Scholars such as Lawrence Rosen thus conceive Muslim law as culture.[5] As Muslim legal pluralism is inevitable, even in non-Muslim spheres, regardless of any official non-recognition and as non-recognition does not make Muslim law disappear, discussions regarding *ijtihad* and *tajdid* will still be relevant wherever Muslims live.

Ijtihad is an activity, a struggle, and a process to discover the law from the texts and to apply it to the set of facts awaiting decision. There is no *ijtihad* within an explicit rule in the texts. In Islamic legal theory, *ijtihad* has been seen indispensable as it is "the only means by which Muslims could determine to what degree their acts were acceptable to God".[6]

Since culture must be conceived as law in Muslim understanding and life, any discussion of change, transformation or renewal inevitably would be intermingled with the discussions surrounding *ijtihad*. Thus, any new discourse is directly or indirectly a result of a new *ijtihad* and this does not

have to be in the field of 'law' only, as strictly defined and understood by legal modernity. That is why, especially after the decline of Muslim power and advance of the West and its hegemony, Muslim advocates of renewal and reformers have argued for a return to the right to exercise *ijtihad*[7] to facilitate reinterpretation and renew the Islamic heritage.[8]

Most of these responses in the late nineteenth and early twentieth centuries to the impact of the West on Muslim societies resulted in substantial attempts to reinterpret Islam to meet the changing circumstances of Muslim life. The purpose of *ijtihad* was a return to a purified Islam.[9] Modernists, revivalists and Muslim activists stress the dynamism, flexibility, and adaptability that characterized the early development of Islam. They argue for internal renewal through *ijtihad* and selective adaptation (Islamization) of Western ideas and technology. Several Muslim scholars have sought to demonstrate a clearer understanding of the origins and development of *shariah* that provides grounds for ongoing reinterpretation and renewal to meet the needs of changing Muslim societies.

Classical Muslim jurisprudence has provided room for choosing minority interpretations or another *madhhab*'s view to resolve a particular problem under the heading of *takhayyur* or *takhyir* or *tarjih*: Eclecticism, selection or preference from among the opinions of the different schools of law or the views of individual scholars within the schools.[10] *Takhayyur* refers to the right of an individual Muslim to select and follow the teaching of a *madhhab* other than his own with regard to a particular issue. It is originally an act of *taqlid*.

The modern-day Muslim scholars are of the opinion that under *darura* (necessity, a pressing difficulty) *takhayyur* is permissible (*halal, mubah*).[11] However, a majority of them emphasize that surfing is only halal if there is a condition of *darura*.[12] Injunctions of Islam are related to a great extent to the consciousness and psychology of individuals. In secular environments where Islamic

laws are not enforced by a state this is more so. Thus psychology is not a minor issue and must be thoroughly taken into account especially in the context of *takhayyur* when psychological comfort maybe disturbed. Definition of *darura* is a major issue in this regard.

Darura is a comprehensive concept that covers all *fiqh* rulings.[13] This concept developed within Islamic jurisprudence to facilitate and allow for actions which are normally forbidden.[14] Its existence can lift a prohibition or a compulsory act. When there is *darura*, a *mufti* may issue a *fatwa* in accordance with the ruling of a given *mujtahid* most suitable for the circumstance at hand.

To decide if *darura* exists is not arbitrary. There are certain borderlines and conditions to decide if it really exists.[15] If a vital interest needs to be protected, this condition is called *darura*. Vital interests as usually listed in *usul al-fiqh* maybe related to the following: religion (*din*), person (*nafs*), offspring (*nasl*), property (*mal*), or reason (*aql*). In such serious contexts there is a well-known legal maxim stating "necessity lifts prohibition" (*al-darura tubihu l-mahdhurat*). A strict definition of *darura* puts that a primary necessity is one of an emergency kind, where one's life or circumstance is threatened. An exception made to protect a 'vital interest' (*darura*) cannot exceed the minimum necessary to obviate harm to that interest. If there is no permissible alternative, *darura* exists. The condition of *darura* must be existent at the present time; a future possible *darura* condition has no legal weight.[16]

The dissolution of *madhhab* boundaries justified by a modified understanding of *takhayyur* can be observed in some Muslim countries' legislative attempts of modernizing their societies by restructuring Muslim laws. This right of individual Muslims was adopted in Muslim countries in draft legislation to justify the selection of one legal doctrine from among divergent opinions of the four Sunni *madhhab*s. *Takhayyur* has been the most notable basis for reforms especially in the family law field.[17] The Ottoman Family Rights Law (OFRL) of 1917 is the first official Muslim law whose

provisions have been derived from Islamic law without conformity to any particular *madhhab*.[18] In the Pakistani context, the Muslim Family Laws Ordinance (MFLO) of 1961 is another example. In the country, the locally prevalent forms of Islamic family law were reformed through a modern legislative process, either by subjecting some of the institutions of Islamic law to certain regulatory measures or by making use of *takhayyur* in drawing up a piece of legislation.[19] This usage of *takhayyur* departs from the traditional understanding in which *takhayyur* was the right of the individual Muslim in a specific case and not that of a government in legislating changes for all Muslims.[20]

Preliminary observations and anecdotal evidence suggest that today states in the official sphere and individuals, *fiqh* scholars and some institutions in the unofficial realm employ *takhayyur*. A close scrutiny of contemporary literature on Islamic jurisprudence and *fiqh* will show that one can now see many examples of *takhayyur*, *fatwa*s based on *takhayyur* and suggestions for its usage.[21] In the socio-legal sphere, by employing *takhayyur*, Muslim individuals, institutions and states navigate across official and unofficial laws. In other words, they surf on the inter-*madhhab*-net.

Unofficial Muslim laws in England

There are more than one and a half million Muslims in Britain. Islam is now the second religion of the country in terms of the number of adherents. As a result of the process of 'chain migration', it has become possible for Muslims to more or less reconstruct their traditional milieus in Britain. They are, thus, able to a considerable degree to avoid officialdom and set up internal regulatory frameworks.

There is no doubt that most Muslims see Islam as a comprehensive system of norms and laws that affect many if not all aspects of their daily lives. Most of them see Western society as aimless and rootless, marred by increasing vandalism, crime, juvenile delinquency, the collapse of marriages,

growing numbers of illegitimate children, and near constant stress and anxiety. They view Islam as the positive alternative.

In the English law context, Muslim law as a religious law can have the status of moral but not legal rules, in civil as well as in public law.[22] Muslims are therefore subject to the same rules as all other inhabitants of the country concerned.[23] As a result, although it has been established through the case law that members of Judaism and Sikhism are fully protected under the Race Relations Act, no such protection exists for other members of other faiths.[24]

As a result, there has been widespread alienation from the state among them. Lack of responsiveness of the English system to the expectations of Muslims "may to a very large extent have been responsible for the now commonly observed phenomenon of 'avoidance reaction"'.[25] Muslims, thus, try not to get involved with the official legal system whilst they are "expected to learn and follow the rules of English law as part of their adaptation process".[26]

In England, Muslims enjoy a relatively high degree of religious and cultural autonomy. They have adapted and continually reinterpreted their values and lifestyles for their new settings. Muslims in Britain, to borrow Ballard's phrase,[27] have tried to construct 'a home away from home (*desh pardesh*)' to be part of British society and to keep their culture. Laws and customs of Muslims are still alive. Thus, Muslims along with other ethnic minorities are not using the English legal system as they are expected to.[28] Research has shown that that many important disputes among them never come before the official courts.[29] Unofficial Muslim law has been applied in non-dispute situations of everyday lives of Muslims. Many disputes among Muslims in Britain are settled in the context of informal family or community conciliation.[30] Senior members of the families or community leaders take their place in informal conciliation processes. On this, Jones and Gnanpala write that:

> Ethnic minorities have understandably responded to the lack of appreciation of their customs by closing in on themselves and operating outside the traditional legal system. Assisted by the gradual development of organized networks of community and communications structures, focused around religious and community centers, ethnic minority groups have evolved self-regulatory obligation systems which are applicable and understandable to themselves. Senior members of the community or religious leaders are sometimes brought in to manage these obligations and regulatory procedures but there is also much informality and a search for 'righteousness' on a case-by-case basis. Over time, this process has resulted in the organic development of customs and specific personal laws of ethnic minorities in Britain, which may avoid official channels and the official legal processes. This can be seen in areas such as marriage, divorce, dowry, gift-giving, parental discipline, transfer of property and child care. Though customary arbitration procedures may not fit in with western legal system, their decisions are generally honoured and implemented through a mix of sanctions and ostracism.[31]

The existence of unofficial laws is starkly observable in the field of family laws, especially marriage and divorce issues of Muslims.

Unofficial *nikah* and *talaq* in England

Muslims, along with the other Asian communities, adapted to English law in such a way that concern for their traditional obligation systems has not been abandoned altogether. They managed to

build the requirements of English law into their traditional legal systems. At the same time they also see the necessity of following the *lex loci*. Now, a new hybrid unofficial law has been emerging as a result of the dynamic interaction between the English law and the Muslim law, which Pearl and Menski now refer to as *angrezi shariat*.[32] Muslims, consciously or not, developed this new hybrid rule system, which amalgamates the rules of Muslim law and of English law. Therefore, this new hybrid law has become the new Muslim law of the English soil.

Islamic law does not distinguish between civil and religious marriages. However, the state in England wishes to supervise the actual process of civil marriage in order to prevent fraud and. Should a religious ceremony take place in England without fulfilling the preliminary civil requirements, the official law will not recognise this marriage as legally valid. If a civil ceremony in an English register office is followed by a religious ceremony in an unregistered building, the religious ceremony does not supersede or invalidate the civil ceremony and is not registered as a marriage in any marriage register book.[33] In other words, the civil ceremony is the only marriage which English law recognises. An unregistered Muslim marriage will be void even if the parties knowingly and wilfully contracted the marriage.[34] However, it is not clear what the law's approach will be when the parties marry in this form believing that they are contracting a valid marriage according to both their religious tradition and English law.[35]

Until 1990, Muslims and other ethnic minorities could only marry in a register office or a registered building.[36] A registered building needed to be a separate building certified under the Places of Worship Registration Act, 1855 as a place for worship only. Thus, although Christians could use churches according to this rule, most Muslims could not have solemnised their marriages officially in a mosque or community centre and public places, since most mosques are not separate buildings but are cultural centres used for different purposes, such as community events and public

meetings; they are more like community centres and these places are not separate places for worship. However, an adjustment was made in easing the requirement that there must be a separate building in order for a place of worship to be qualified as a registered building. The Marriage (Registration of Buildings) Act, 1990 and the Marriage Act, 1994 are two recent amendments in the Marriage Act, 1949 that allow buildings to become registered as 'approved premises' where a valid registration can take place.

Some mosques, rather than having present an official of the local registry office at the ceremony, have sought recognition for one of their own officials to act on behalf of the registry. In such cases, a fully legalised marriage can be performed by a Muslim official according to both Muslim law and the English law, an interesting feature of plural legal reality.

Another problem regarding Muslim marriage is the attendance of the couple. According to Muslim law, a marriage is capable of being effected by an exchange of declarations between representatives (*wakil*) of the couple acting on their behalf. In Muslim ceremonies, one often finds the couple in separate rooms, making the declaration separately. Such marriages would not be valid under the English law, the bride and bridegroom have to attend in person and exchange their vows using a standard form of words.[37]

Solemnisation of marriages according to Muslim law was so evident that social scientists have started to observe this phenomenon among Muslims in Britain since 1950s. Earlier research in the late 1950s showed that Muslims in Britain had three types of marriages: the first is a legalised British marriage, the second is a Muslim form of marriage and the third is the relationship known as common-law marriage.[38] In these years, couples started to observe both English and Muslim laws, for two reasons. First, some Muslim couples formerly married by a registrar later, for religious reasons submitted to a *nikah* as well. Secondly, spouses who had a *nikah* only might ask that the

union be ratified by an official marriage as well, so as to safeguard the family's and prospective children's status. After an initial period of insecurity, when some unregistered Asian marriages in Britain had been abused, communities quickly learned the *lex loci* and constructed their new rules in these matters. Virtually all Asians have now 'learnt the law' and register their marriages in accordance with English law. Recent research has confirmed that "the registration ceremony of English law has been built into the customary 'Asian' patterns of marriage solemnisation in such a way that it constitutes something like an engagement in the eyes of the 'Asian' spouses and their families".[39] The spouses might be married under the official law, yet will not be counted as married in the eyes of the community and they will abstain from sexual intercourse till they get married religiously as well. Only after the religious marriage will they be able to consummate their marriages. Otherwise, their marriage would be regarded as sinful and illegitimate from a religious and cultural perspective. This indicates that it is the religious marriage that determines the nature of the relationship and is perceived as dominant; the official one is only seen as mere formality which is imposed by the state.[40]

Now, most Muslims in England register their marriage first because of concerns of *izzat*, knowing that the couple are not actually fully married till the completion of the *nikah*. In that way, they prevent the groom's possible abuse of the socio-legal situation of the Muslim minority by just walking away after the first night. It is obvious that there are some potential dangers of abuse at the expense of women in that type of marriage, since there is no recognition by the official authority.[41] If the man wants to leave and walks away, the woman would have no rights whatsoever before the courts under the official law. After losing her virginity, which is very important in Muslim culture, she would have to face difficulties in getting remarried. Even worse, if she has a baby from the previous relationship, the remarriage option would be more difficult.

The total picture is that, under this British Muslim law if a Muslim couple want to marry, they will actually marry twice. Thus, they meet the requirements of both Muslim law and the English law. In addition, they fortify the strength of *nikah* by incorporating official legal rules into their unofficial laws.

According to Muslim law, the state has nothing to do with marriage but in modern legal systems due to several reasons states claim authority to interfere and to supervise marriages.[42] At this point, a number of problems arise between the official law and unofficial Muslim law. Yet Muslims have reconciled these conflicting points by developing *angrezi shariat* rules. Hamilton writes that Muslim couples have become accustomed to marrying first in a civil ceremony, to ensure compliance with the with civil marriage laws, then attending at the mosque for a *nikah*.[43]

Marriage under Islam, in contrast to Hinduism, Sikhism, and Christianity, is not regarded as a sacrament but as a civil contract. Islamic law recognises divorces and makes some provisions for divorce in such circumstances. Although permitted, divorce tends to be strongly discouraged and disapproved of socially, and the families involved try to do all they can to improve the situation. Among Muslims divorce is seen as a last resort, to be adopted only when all other remedies fail.

In Muslim law, divorce can be obtained in a number of extra-judicial ways. *Talaq* is a unilateral repudiation by the husband, *khul* is the divorce at the instance of the wife with or without the husband's agreement and on the basis that she will forego her right to dower. *Mubaraat* is divorce by mutual consent. However, in English law there is merely one way of divorce which is through a decree granted by a court of civil jurisdiction on the ground that the marriage has irretrievably broken down.[44]

It has been laid down explicitly since 1973 that no extra-judicial divorce shall be recognised in English law.[45] Yet, it is becoming increasingly apparent that the traditional patterns of divorce have

not been abandoned by Muslims in England. Secular divorce is not regarded as sufficient to dissolve a marriage in the eyes of Muslims. Poulter summarizes the official position regarding *talaq*:

> …divorce by repudiation, in the Islamic world at any rate, is clearly discriminatory against the wives. Talaqs are however, countenanced by the Muslim faith and in so far as any improvement in the status of married women in this regard is concerned one must clearly look principally to the countries concerned for significant reforms. A start has been made in some of them, such as Tunisia, Pakistan and Bangladesh, but it would be presumptuous to imagine that English law can make a real contribution in this direction simply by denying validity to the small numbers of talaq divorces which might occur in this country. Even so, to authorise the pronouncement of talaqs here would seem to run counter to prevailing attitudes towards sexual equality in marriage and could well involve a violation of the UK's international obligations to respect human rights… On the other hand, refusal to authorise talaqs in England would not, it is thought, violate the religious freedom of Muslims since there is obviously nothing in Islamic doctrine which actually requires a man to put away his wife in this manner.[46]

In short, having married twice, Muslims have also learnt to divorce twice. This process is facilitated by the increasingly informal nature of English divorce law itself. Almost 98% of all divorces in English law are undefended and effected by means of what is called the 'special procedure'. This flexible procedure has allowed Muslims in Britain to maintain their customary procedures of divorce almost unmodified. Yet, the British state's hesitation to recognize the

socio-legal reality of Muslim legal pluralism has caused a number of problems for the community. These problems have paved the way for the emergence of the informal *shari'a* courts. The Islamic *Shari'a* Council (ISC) is such an example of the concerted efforts to face challenges by the life.[47]

Need for a new *ijtihad* and the *shari'a* courts

Inaction on the part of the state, while religious leaders recognized the gravity of the problem, had led to concerted efforts from within the Muslim communities to address certain practical issues. Having recognized that the official legal system has hesitated to solve their disputes in the context of Islamic family law, Muslims have established informal conciliation mechanisms. ISC literature clearly indicates the reluctance of the official law to recognize and solve their problems as the reason of its establishment:

> In the past, some Muslim organizations have called upon the legislative authorities in the UK to take into consideration the Islamic point of view in their legislation, but the response was disappointing indeed. The answer was clearly unequivocal: one country, one law![48]

On the establishment of the ISC, Shah-Kazemi writes that:

> According to the Shariah, every Muslim community, however small its size, must be regulated, as far as possible, by Islamic legal norms, appropriately interpreted and applied by the most knowledgeable scholars residing in the community. The phenomenon of Muslim Minority communities living in a non-Muslim land has its earliest precedent in the migration to Abyssinia of a gropu of Muslims at the behest of the Prophet himself. Thus, one finds the imam Abu Hanifa (d.

> 798 C.E.) specifying that in non-Muslim lands, Muslims are obliged to appoint a person to act as a guide in respect of religious issues, legal questions and social disputes. The establishment of the MLSC (*ISC*) falls under the category of 'public interest' (*maslahah*), its aim being to protect the five essential values stated above: religion, life, intellect, lineage, property… On this basis the MLSC is able not only act as a *Qadi* would in resolving disputes regarding the dissolution of marriage contracts, but it is also able to perform the advisory role that the *Qadi* offers by mediating in intra-familial and intra-community conflicts, as well as give opinions about formal rules governing the validity of such legal procedures as marriages and divorces.[49]

One of the areas that forced the Muslims in England to act is *talaq*. *Talaq* is still very important for the Muslim mind and for the community.[50] In both Islam and Judaism, in order to remarry, a woman must obtain a religious decree of divorce. Under Jewish law, the wife must obtain a *get*, in Islamic law, a religious divorce must be accomplished in one of the ways of *talaq*, *khul* or *mubaraat*. If the woman is not religiously divorced from her husband, it does not matter that she is divorced under the civil law, in the eyes of the community her remarriage will be regarded as adulterous and any possible offspring will be illegitimate since it is not allowed under the religious law. So, in reality, until the religious divorce is obtained, the civil divorce remains ineffective because one party is unable to remarry.

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law. So, in reality, until the religious divorce is obtained, the civil divorce remains ineffective because one party is unable to remarry. In that context, the main problem is the occurrence of limping marriages which are those marriages recognised in some jurisdictions as having been validly dissolved, but in other jurisdictions as still subsisting. Sometimes, capricious husbands divorce their wives officially but do not want to pronounce *talaq* or deliver the *get* to prevent the women remarrying.[51] The blackmailing of these unscrupulous husbands has led to some cases; knowing the value placed on a religious divorce by their wives, such men have used their power to grant or withhold divorce to negotiate favourable settlements on the issue of finance, property or relating to children.[52] Badawi highlights the problem of limping marriages among Muslims in Britain:[53]

> A common problem was that you get a woman seeking a divorce in the courts and obtaining it. She becomes, therefore eligible for re-marriage in accordance with the civil law, but her husband has not given her a talaq which is the prerogative of the husband within an ordinary contract of marriage so that the woman becomes unmarried according to the civil law but still married according to the Shari'a law. The man could remarry according to the civil law and according to Sharia law as well, since it is open to him to have a polygamous marriage.[54]

It has been largely accepted that limping marriages cause hardship to the women, and "the potential for great bitterness between the spouses".[55] The ultimate outcome is "acute misery and frustration".[56] It is abundantly clear that the state's non-recognition does not prevent the discriminatory practice.[57] This situation has led Muslims to reconcile their divorce problems themselves by establishing informal *shari'*a courts or bodies such as the ISC. There are many cases that are dealt with by unofficial Muslim legal mechanisms.[58]

One of the objectives of the ISC is "establishing a bench to operate as court of Islamic Shari'a and to make decisions on matters of Muslim family law referred to it".[59] The ISC is a quasi-Islamic court that applies Islamic rules to deal with "the problems facing Muslim families as a result of obtaining judgments in their favor from non-Islamic courts in the country, but not having the sanction of the Islamic Shari'a".[60]

A characteristic feature of the work of the ISC is its eclectic approach to Muslim law. It is not tied to any particular *madhhab* and is prepared to offer the parties the benefits of any *madhhab* which suits their particular need regardless of whether this conforms to the school prevailing in their country of origin, domicile, or nationality.[61] The Council's verdicts are "based upon rulings derived from the main four schools of thought together with other sources within the Sunni Tradition, as well as the Literalist School".[62] Scholars at the Council are from "all major schools of thought among the Sunnis".[63] The ISC Council has called upon the wider heritage of Muslim law to avoid the difficulties faced by Muslims. Sometimes, they have chosen minority interpretations or views to resolve a conflict by employing *takhayyur*.

The ISC interprets Muslim law according to the needs of the Muslim community in Britain.[64] For instance, if a woman seeks divorce, she must have a valid reason. Woman who wants divorce applies in writing to the Council. Then the Council tries to contact the husband 3 times at monthly intervals and advertise in a local newspaper. If they contact him they try to reconcile the situation if they fail to reconcile then they apply *khula*.[65] This divorce nullifies the Islamic marriage only. Obviously, *khula* right is not within the Hanafi *madhhab*.[66] If the husband is missing, or if the husband suffers certain physical defects, or when the wife embraces Islam but the husband refuses to do so after the waiting period being notified of the change, or when the husband ill treats the wife or fails to perform his marital obligations or does not maintain her, in spite of having the means to do

so, or when the husband does not or refuses to comply with the judge's order to divorce his wife for one of the mentioned reasons, then they grant her the divorce.[67] Most of these are not in Hanafi *madhhab* either. This is nothing but a new *ijtihad*, exercised in the face of the necessities and demands of dynamic Muslim life in England.

Conclusion

Muslims in England have not abandoned their religious laws in favour of the *lex loci* and found ways to reconstruct it under the conditions of *asr al-darura*[68], paving the way for a new Muslim legal pluralism and that the unofficial *shari'a* courts in England are now the places where new *ijtihad*s take place, showing the dynamic character of Muslims and their unofficial laws. Although nobody would flag it as such, the decisions taken by these *shari'a* courts exemplify modern *takhayyur* and new *ijtihad*, slowly paving the way for a new *fiqh* for the Muslim minority. Thus, forgetting about the simmering and heated discussions on the opening of the gate of *ijtihad*, in practical life under the conditions of *asr al-darura*, Muslims in England have been exercising *ijtihad*, maybe showing the irrelevancy of theoretical discussions.

The ISC case shows remarkably that a quiet process of legal restructuring is being achieved from within the community. This will inevitably have wider implications on the future of Muslim laws in Britain. While it would be alarmist to speak of a parallel Muslim court structure in Britain, there is much evidence that many disputes among Muslims are settled in the context of such unofficial community conciliation. These Muslim community agencies are well placed to resolve family problems through the process of counselling, mediation, and arbitration and could often be the first post of call for those in difficult. Indeed, the ISC asserts that although it is not legally recognised by

the authorities in the UK, it is already established, and is gradually gaining ground among the Muslim community.

It is asserted that in the age of specialization, the possibility of any individual possessing all the qualification of a *mujtahid* is doubtful, thus a collective group of *mujtahid*s become specialists in the required fields;[69] these committees should be consisting of scholars from different subject areas and consult on particular issues; the committees should also use all technological advance of the age, including computers, inter-net, CD-ROMs and so on.[70] Karaman underlines that this is already taking place.[71] In Gülen's view, normally, states should establish these committees as a service to society, giving the example of such a committee of the Directorate of Religious Affairs in Turkey.[72] Yet if a state fails to do this, Muslims should employ civil *ijtihad*.[73] Today, in the Muslim world it is possible to see some civil *ijtihad* activities.[74] New studies, researches, theses and academic products in the relevant fields made in the universities (such as International Islamic University Islamabad), research centers, pious endowments and charities are based on either individual or collective (*jamai*) *ijtihad* and these are civil as well.[75] As we saw, *shari'a* courts in England employ *ijtihad*.

Neo-*ijtihad* in England has five important aspects. First, it is exercised in a non-Muslim environment. Second, it is unofficial and not recognized by the state but tolerated to a certain extent. Third, new hybrid Muslim laws have been dynamically created in practical life situations. Fourth, the traditional Muslim laws are not disregarded or disrespected but re-interpreted. Thus, neo-*ijtihad* in England is neither modernist nor reformist but *tajdidi*. Fifth, *ijtihad* committees but not individuals exercise *ijtihad*.

It is important, at this point, to underscore that this socio-legal reality must be closely monitored both by Muslims scholars and the legal system to secure a healthy future for the Muslims

who are, definitely, here to stay. It is also scholars' duty to research the Muslim legal pluralism and its consequences in real life other than marriage issues and to develop a sociology of *fiqh*.

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NOTES

[1] David Pearl, *Family law and the immigrant communities*, Bristol: Jordan & Sons, 1986, p. 32.

[2] Literature on legal pluralism is highly rich, see for some examples, M. B. Hooker (1975) *Legal pluralism.* Oxford: Clarendon Press; John Griffiths 'What is legal pluralism?'. In: *Journal of Legal Pluralism.* V. 24 (1986) 1-56; H. W. Arthurs (1985) *Without the law: Administrative justice and legal pluralism in mid 19th-century England*. Toronto: University of Toronto Press; Masaji Chiba *Legal pluralism: Toward a general theory through Japanese legal culture*. (Tokyo: Tokai UP, 1989); Sally Engle Merry (1988) 'Legal pluralism'. In: V. 22 N. 5 *Law and Society Review*. 869-896; Sally Falk Moore (1978) *Law as process: An anthropological approach*. London et al: Routledge and Kegan Paul; Peter Sack (1986) 'Legal pluralism: Introductory comments'. In: Peter Sack and Elizabeth Minchin (eds) *Legal pluralism. Proceedings of the Canberra Law Workshop VII*. Canberra: Research School of Social Sciences, (Australian National University); Bouventura de Sousa Santos (1992) 'State, law and community in the world system: An introduction'. In: V. 1 *Social and Legal Studies*. 131-142; Jacques Vanderlinden (1989) 'Return to legal pluralism: Twenty years later'. In: N. 28 *Journal of Legal Pluralism.* 149-157.

[3] The Muslim world, under the influence of modernity, has long recognized that committees would be needed to solve Muslims problems rather than single able individuals. It was first Bediuzzaman Said Nursi, in very early twentieth century, to strongly underscore that the time was no longer the time of individuals but committees and communities to face the challenges posed by the sophisticated and complicated modern life.

[4] Murad Hoffman, *Islam: The Alternative* (Reading: Garnet Publishing, 1993), p. 126.

[5] Lawrence Rosen, *Bargaining for Reality: The Construction of Social Relations in a Muslim Community* (Chicago: University of Chicago Press, 1984); Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989). Before Rosen, Geertz, long before, have emphasized the same theme in his classical seminal works, Clifford Geertz, *Islam Observed*, (New Haven: Yale University Press, 1968); Geertz, *Interpretation of Cultures*, (New York: Basic Books, 1973); Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

[6] Hallaq, 'Was the Gate of *Ijtihad* Closed?', p. 33.

[7] See John L. Esposito, *Islam: The Straight Path*, 3rd ed., (Oxford: Oxford University Press, 1998), p. 83;.idem, 'Perspectives on Islamic Law Reform: The Case of Pakistan,' in *Journal of International Law and Politics*, Vol. 13, No. 2 (1980): 240; Hussain Hamid Hassan, *An Introduction to the Study of the Islamic law* (Islamabad: International Islamic University, 1997), p. 120; and Hayrettin Karaman, *Islamin Isiginda Gunumuzun Meseleleri* (Istanbul: Yeni Safak, 1996), p. 536. Menski provides a concise account of the issue of the purported closing of the gates of *ijtihad* and skillfully puts that

"The impression given was that there would be no more legal development in Islamic law. Western observers loved this, since it seemed to indicate that Muslims had restricted themselves to medieval states of knowledge and development. The modernists rejoiced: Islam was not able to handle the modern world, it would not be part of a global future. All of that has been challenged recently, not only by clever research arguments but by a plethora of new developments in Islamic law itself", Werner F. Menski, *Comparative Law in A Global Context: The Legal Systems of Asia and Africa*, (London: Platinium, 2000), p. 283.

[8] See Dale F. Eickelman, 'Inside the Islamic Reformation,' *Wilson Quarterly*, Vol. 22, No. 1 (1998): 89.

[9] Esposito, *Islam*, p. 125.

[10] Coulson 1964,135.

[11] See for instance, Beser 1991, 8, 10; Kurucan 1998, 8; Sa'ban 1996, 450; Hassan 1997, 345-347.

[12] Karaman 1999, 327-332; Karaman 1985a, 345; Zuhayli 1997, 1: 10-11; 1: 53; Beser 1991, 7, 8, 265, 266; Sa'ban, 450, 451; Gülen 1995, 295-286, 288, 309

[13] Zuhayli, 4: 326.

[14] Pearl and Menski 1998, 64.

[15] See in detail Zuhayli 1997, 4: 326-330.

[16] Zuhayli 1997, 4: 327.

[17] Anderson 1976, 48; Pearl and Menski 1998, 19-20.

[18] The *Majalla* can be seen as the first example of a modern legislative *takhayyur*. Even though the *Majalla* is the first official promulgation of large parts of shari'a by the authority of a modern state and resembles a civil code, it codified only the rulings of the Hanafi law. No inter-*madhhab takhayyur* was employed. Only an intra-*madhhab takhayyur* within *Hanafi* law was an issue at stake.

[19] However, tensions between traditionalists who believe that the reforms militate against the basic tenets of Islam and modernists linger on regarding many legal issues. The MFLO is a particularly clear to this controversy. The official law is widely perceived as being different from religious law and not accepted as the just law. This led to 'civil disobedience' that rendered the official law ineffective. There is, now, an observable gap between state law and popular practice. See Yilmaz 2002a.

[20] Occasionally the doctrine of one school or jurist is combined with another (talfiq). For the purposes of this study, I am not dealing with the notion of talfiq that advocates amalgamation of madhhabs and hybridization. On this, especially, Rida wrote extensively, see in detail, Rida 1974.

[21] For legitimacy of takhayyur, see Karaman 1992, 79; Karaman 1999, 327-332, 339, 346, 341; Sa'ban 1996, 443. In the cyberspace, questions on *takhayyur* also frequently take place, see for example, http://sunnah.org/msaec/articles/madhhab_issues.htm.

[22] See now in detail, Anthony Bradney, 'The Legal status of Islam within the United Kingdom', in Silvio Ferrari and Anthony Bradney (eds) *Islam and European Legal Systems*, Dartmouth et al: Ashgate, 2000), pp. 181-198.

[23] Waardenburg, J. [1991] 'Muslim associations and official bodies in some European countries'. In: W. A. R. Shadid and P. S. van Koningsveld (eds) *The integration of Islam and Hinduism in Western Europe*. Kampen: Kok Pharos Publishing. 24-42, 36.

[24] The Runnymede Trust (TRT) [1997] *Islamaphobia*. London: Runnymede Trust. Cited in *Q-News*, June 1997.

[25] Menski, Werner F. [1993a] 'Asians in Britain and the question of adaptation to a new legal order: Asian laws in Britain'. In: Milton Israel and Narendra Wagle (eds) *Ethnicity, identity, migration: The South Asian context.* Toronto: University of Toronto. 238-268, at 241.

[26] Menski, Werner F. [1993a] 'Asians in Britain and the question of adaptation to a new legal order: Asian laws in Britain'. In: Milton Israel and Narendra Wagle (eds) *Ethnicity, identity, migration: The South Asian context.* Toronto: University of Toronto. 238-268, at 243; Poulter, Sebastian M. [1986] *English law and ethnic minority customs*. London: Butterworths, 3-4; Poulter, Sebastian M. [1987] 'Ethnic minority customs, English law and human rights'. In: V. 36 *International and Comparative Law Quarterly*. 589-615, at 589-590.

[27] Roger Ballard (1994) (ed) *Desh pardesh: The South Asian experience in Britain.* London: Hurst & Co, 5. On this, see also, John Wolffe (1994) 'Fragmented universality: Islam and Muslims'. In: Gerald Parsons (ed) *The growth of religious diversity: Britain 1945*. V. London: Routledge. The Open UP. 133-172.

[28] Menski, Werner F. [1988] 'English family law and ethnic laws in Britain'. In: N. 1 *Kerala Law Times*, Journal Section. 56-66, at 58.

[29] Menski, Werner F. [1993] 'Asians in Britain and the question of adaptation to a new legal order: Asian laws in Britain'. In: Milton Israel and Narendra Wagle (eds) *Ethnicity, identity, migration: The South Asian context.* Toronto: University of Toronto. 238-268, at 253; see also Pearl, David and Werner F. Menski [1998] *A textbook on Muslim familys law.* 3rd ed. London: Sweet & Maxwell; Yilmaz, Ihsan [1999] *The dynamic legal pluralism and the reconstruction of unofficial Muslim laws in England, Turkey and Pakistan*. London: SOAS (Unpublished PhD thesis).

[30] Pearl and Menski 1998: 77-80

[31] Richard Jones and Welhengama Gnanpala, *Ethnic Minorities in English Law,* (Stoke on Trent: Trentham Books, 2000), pp. 103-104.

[32] Ibid: Ch. 3.

[33] Marriage Act, 1949, s 46(2); Qureshi v Qureshi [1972] Fam 173.

[34] R v Bham [1965] 3 All ER 124.

[35] Hamilton 1995: 42.

[36] Marriage Act, 1949, ss 12, 45(1).

[37] Marriage Act, 1949, ss 44(3), 45(1).

[38] Collins 1957: 160.

[39] Menski 1988b: 15; see also Hamilton 1995: 50.

[40] See also [Hiro 1991: 159]; Hamilton [1995: 74]; Menski [1993b: 8].

[41] In the Turkish context, this is seen as a widespread problem and both the public and the scholars are very much concerned with this issue. To some of them, this type of marriage is not Islamic, since it is hidden.

[42] Justifications for this vary: from the need for protection of the vulnerable, to the need for certainty and equality between men and women, and the need to ensure public morality, Carolyn Hamilton (1995) *Family, law and religion*. London: Sweet & Maxwell, 38. Moreover, rights of property and inheritance, the role of determination of validity, the welfare state's demands for the knowledge of the status of individuals to calculate entitlements are some other reasons.

[43] Carolyn Hamilton, *Family, Law and Religion*, (London: Sweet and Maxwell, 1995), p. 50.

[44] Family Law Act, 1986, s. 44(1); Matrimonial Causes Act, 1973, s. 1.

[45] Domicile and Matrimonial Proceedings Act 1973, s 16; see also Family Law Act 1986, s 44(1).

[46] Sebastian Poulter, *English Law and Ethnic Minority Customs*, (London: Butterworths, 1986), p. 124-125.

[47] Lucy Carroll (1997) 'Muslim women and 'Islamic divorce' in England'. In: V. 17 N. 1 *Journal of Muslim Minority Affairs*. 97-115.

[48] Union of Muslim Organisations of the United Kingdom and Eire (UMO) (1983) *Why Muslim family law for British Muslims?* London: UMO.

[49] Sonia Nurin Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah*, (London: Author, 2001), pp. 9-10.

[50] See also Bernard Berkovits (1990) 'Get and talaq in English law: Reflections on law and policy'. In: Chibli Mallat and Jane Connors (eds) *Islamic family law*. London. Dordrecht. Boston: Graham & Trotman. 119-146; Alan Reed (1996) 'Extra-judicial divorces since Berkovits'. In: V. 26 *Family Law*. 100-103; Schuz, Rhona Schuz (1996) 'Divorce and ethnic minorities'. In: Michael Freeman (ed) *Divorce: Where next?* Aldershot: Dartmouth. 131-157; Menski 1993: 9; Hamilton 1995: 118-120; Carroll 1997: 100; Menski, Werner F. and Prakash Shah (1996) *Cross-cultural conflicts of marriage and divorce involving South Asians in Britain*. In: Strijbosch, fons and Mari-Claire Foblets (eds) *Cross-cultural family relations. Reports of a socio-legal seminar*. Onati: International Institute for the Sociology of Law. 167-184.

[51] See Berkovits 1990; Reed 1996; Hamilton 1995.

[52] Hamilton 1995: 118-120; Schuz 1996: 150; Carroll 1997: 100.

[53] See now in detail, Shah-Kazemi, *Untying the Knot*, op. cit. On 11 April 1986, *the Guardian* reported that there were more than 1000 Muslims limping marriage cases, in Britain. Badawi [1995: 80] reports that in Amsterdam there were 750 Moroccan women in a position between marriage and divorce. The same problem also occurs among Jews [see in detail Berkovits 1990: 138-139; Reed 1996].

[54] Badawi, 1995, p. 77.

[55] Hamilton, 121.

[56] Reed 1996: 103.

[57] Schuz 1996: 141.

[58] Carroll underlines that the council claims to have dealt with more than 1150 cases, Carroll (1997) 'Muslim women and 'Islamic divorce' in England', 115; Zaki Badawi (1995) 'Muslim justice in a secular state'. In: Michael King (ed) *God's law versus state law: The construction of Islamic identity in Western Europe*. London: Grey Seal. 73-80; David Pearl and Werner F. Menski (1998) *Muslim family law*. 3rd ed. London: Sweet & Maxwell.

[59] Islamic Shari'a Council (ISC) (1995) *The Islamic Shari'a Council: An introduction*. London: ISC.

1995: 3-4.

[60] Ibid, 7.

[61] Sebastian M. Poulter (1998) *Ethnicity, law and human rights: The English experience*. Oxford: Oxford UP, 235; MIHI Surty (1991) 'The Shari'ah family courts in Britain and the protection of women's rights in Muslim family law'. In: V. 9 *Muslim Education Quarterly*. 59-63, at 63.

[62] ISC, *The Islamic…*, 7.

[63] Ibid, 5, 7.

[64] Detailed information on how the ISC functions as an Islamic court in action could now be found in Shah-Kazemi, *Untying the Knot*, op. cit., pp. 38-46.

[65] Ibid, 12-13, 17-18.

[66] The reason we highlight that these rulings are not based on the *Hanafi* school but was eclectically selected from other schools is that the majority of Muslims in Britain are from the Indian subcontinent and overwhelming majority of them are *Hanafis*. Even though, classical Muslim jurisprudence allowed individuals under necessity to follow for a specific issue another school which is called *takhayyur*, for centuries, this has not been applied for a number of reasons. Now, what the Islamic Shari'a Council is doing is that they are institutionalising this classical right of individual.

[67] ISC, *The Islamic…*, 5, 7, 12-13.

[68] The persistent existence of Muslim minorities voluntarily residing outside *dar al-Islam* challenged the dichotomous exclusive concepts of *dar al-harb* and da*r al-Islam.* As a result, an understanding of *dar al-ahd* (country of treaty, covenant), *dar al-aman* (country of security), *dar as-sulh* (country of truce), and *dar al-darura* (country of necessity) in which they could live their religions maybe with difficulty but peacefully has come into operation. Perhaps, in modern times, it is more precise to speak of *asr al-darura* (time of necessity) instead of *dar-al darura* as for Muslims, to a great extent, living under *darura* conditions has become the norm in the global village where there is maybe not a specific *darura* geography but the *Zeitgeist* for Muslims is a derivative of *darura*. The phenomenon of *darura* is not specific to non-Muslim countries as the juggernauts of globalization, capitalism, secularization and modernity are everywhere. Indeed, Zaki Badawi argues that Muslims are in minority in even most Muslim countries as the concept 'minority' in Islamic jurisprudence is related to power to implement *shari'a* in a given polity, Badawi 2000.

[69] Esposito 'Perspectives on …'. 243.

[70] Gülen, 'Interview with Fethullah Gülen'.

[71] Karaman, *Islamin isiginda...* 543.

[72] This committee tries to find answers to the questions put to them by people on contemporary issues in Turkey, such as working in Europe, *madhhab*s, using amplifier when reading azan, Friday prayer and work, dar al-Islam, fasting and traveling by train, stock exchange, tax, *halal* meat, marrying no-Muslim woman, *talaq*, court divorce, polygamy, nationalism, unemployment benefit, inflation, interest, customs tax, bribery, depositing money at a bank in non-Muslim countries, selling alcohol in a non-Muslim country, gambling in dar al-harb, strelization, plastic surgery, using perfumes, abortion, *ijtihad*, military service, Jahova's witnesses an so on, see TDV, *Gunumuz….*

[73] Gülen, 'Interview with Fethullah Gülen'.

[74] Karaman, *Islamin isiginda...* 542.

[75] Ibid, 543.