Cassandra Balchin 2009 cass@musawah.org

Divorce in classical Muslim jurisprudence and the Differences between Jewish and Muslim divorce

Muslim laws do not create 'chained women', and therefore the solution to the problems currently facing British Muslim women in divorce is not the same as for women from the Jewish community.

The Divorce (Religious Marriages) Act 2002 amended the main law on marriage in England & Wales, the Matrimonial Causes Act 1973 by inserting a new section 10A. This section gives the judge hearing a civil divorce case between a Jewish couple the discretion to delay the decree absolute until the husband and wife have first obtained the Jewish divorce, *Get*. Sometimes, people argue that it might be helpful for the same amendment to be applied to Muslims.

However, there are very fundamental differences between divorce under Islamic jurisprudence or Muslim laws and Jewish law. In Islam, there is no concept that a divorce is invalid if it is 'against the will of the spouse'. Muslim jurisprudence and the laws of the overwhelming majority of Muslim contexts recognise numerous grounds for women to initiate divorce *without* the husband's consent.

As the analysis below argues, any such amendment would reduce British Muslim women's rights to divorce to a level far lower than in other Muslim countries.

a) Classical jurisprudence

The Holy Qur'an, as well as Muslim jurisprudence's second source, the *Sunnah* or practices and sayings of the Prophet, do not spell out precise procedures for divorce. Hence, there are numerous possible interpretations. The four classical Sunni schools of Islam all offered very varied interpretations of procedure, and the grounds on which a woman could divorce her husband. I deliberately use the past tense because in most countries with a Muslim majority (and many with a substantial Muslim minority), family laws have now been codified, as discussed below.

Divorce in classical Muslim jurisprudence did not require the spouse's permission. A husband could unilaterally pronounce *talaq* without establishing grounds and courts were powerless to prevent the *talaq* even if it were entirely against the wife's wishes. Meanwhile, no matter whether the grounds were limited (as in the case of the classical Hanafi school) or generous (as in the case of the classical Maliki school), a wife could approach a third party - the court or *qazi* – with a request that she be divorced. Classical jurisprudence provides a variety of forms of divorce for women, only two of which required the husband's consent:

- *Mubarat*: a divorce by mutual agreement which can be initiated by either party to a Muslim marriage, on mutually agreed terms. Since this is mutual, it clearly requires the consent of both parties.
- *Khul'/khula*: a divorce initiated by the wife purely on the grounds that she 'cannot live within the limits of Allah' if she remains in the marriage. *Khula* arises from a story in which the wife of Qais bin Thabet approached the Prophet saying simply that she couldn't stand her husband. The story does not have the Prophet asking Qais bin Thabet to divorce her but instead after some discussion, the Prophet pronounces the couple divorced. However, classical jurisprudence tended to regard *khula* as something that required the husband's agreement.

- *Tafriq* and *fasakh*: these forms of court/*qazi*-adjudicated divorce involve a range of grounds such as desertion, cruelty, venereal disease, insanity, failure to maintain, and other grounds relating to the breaking of a condition (implicit or negotiated) to the marriage contract, or some basic fault with the contract (e.g., that the couple are related within the prohibited degrees, etc). Some were grounds that either party could use e.g., venereal disease or 'constant discord and strife' (*nizaa wa shiqauq* – i.e. incompatibility), while others were grounds that were available only to the wife, e.g., failure to maintain. For all grounds, the injured party was to approach the court/*qazi* who, upon examination of the evidence, would pronounce the divorce/termination of the marriage contract. Thus, divorce was perfectly possible against the will of the responding spouse.
- *Talaq tafweez*: This is the delegation by the husband of his unilateral right of *talaq* to the wife. He retains his right and extends it to his wife such that he empowers her to use his right to divorce herself. Since the husband has already in effect given his 'permission' by granting his wife this right in the marriage contract, she does not have to seek it again in the event that she wishes to initiate divorce. And since this right is parallel to *talaq*, she does not have to establish grounds, or even approach a court.
- There are myriad other forms, (*zihar, 'ila, ta'aliq*) but these are obscure. None required the other spouse's permission.

Muslim marriage is a contract, and not a sacrament. Contracts containing *talaq tafweez* date back at least to the 16th century in the Indian subcontinent. The topic is thoroughly discussed in the classical Hanafi texts in India and a whole chapter is devoted to this subject in the *Fatawa-e-Alamgiri* prepared during Aurganzeb's reign (1658–1707) and promulgated by imperial authority (see Carrol, L. & Kapoor, H. (eds.), *Talaq-i-Tafwid, The Muslim Woman's Contractual Access to Divorce*, Women Living Under Muslim Laws, 1996).

From the above, it can be seen that traditional Muslim jurisprudence is quite distinct from Jewish laws in that generally it did not require the spouses to consent to divorce in order for the divorce to be final. Classical Muslim laws also envisaged divorce initiated by the wife and it was the *qazi's* opinions, rather than the husband's, that were relevant, if at all.

b) Contemporary codified Muslim family laws

A period of codification of Muslim family laws took place roughly from the 18th century onwards, primarily in the Ottoman Empire and the Indian sub-continent during the colonial period, and in the post-colonial period in South-East Asia, North Africa and West Africa, and very recently in the Gulf States. Thus in most Muslim countries, and countries with a substantial Muslim minority such as Sri Lanka, it is not classical jurisprudence that governs the lives of Muslims but codified laws with related procedural laws and formal courts systems enabling implementation.

A detailed discussion of divorce provisions can be found in: *Knowing Our Rights: Women, family, laws and customs in the Muslim world* (2006), Women Living Under Muslim Laws. This book is the result of more than 10 years of research by lawyers, sociologists, human rights experts, and Islamic scholars in some two dozen Muslim contexts. It can be downloaded for free from: http://wluml.org/english/pubsfulltxt.shtml?cmd%5B87%5D=i-87-563155

Another excellent source, which provides texts and analysis of the family laws of the Middle Eastern countries not covered in *Knowing Our Rights*, is by Prof. Lynn Welchman (head of the Department of Law at SOAS): *Women and Muslim family laws in Arab states. A comparative overview of textual development and advocacy*, (2007) Amsterdam University Press
http://www.amazon.co.uk/Women-Muslim-Family-Laws-States/dp/905356974X/ref=sr_1_1?ie=UTF8&s=books&qid=1233161131&sr=8-1

In sum, these laws generally recognise the various forms of divorce available to Muslim women (and men) described above. The grounds have been expanded both through legislation and through case law, such that mental cruelty for example is now a recognised ground, and countries dominated by the Hanafi school (which classically had a restricted view of divorce) recognise numerous generous grounds. Thus, for the overwhelming majority of forms of Muslim divorce, there is no question of the need for the permission of the spouse.

c) Conservative and discriminatory interpretations applied in Britain

Aside from *mubarat*, which logically requires mutual agreement, *khula* is the remaining question. What is being applied in Britain by the 'Sharia councils' is an interpretation which fuses the worst aspects of a Hanafi Muslim tradition (that is no longer the law in Bangladesh, Pakistan or Egypt), with the worst aspects of traditions from non-Hanafi schools (which they counter-balanced with other provisions), to produce something that is uniquely discriminatory, uniquely British and that is unrecognisable for Muslims in contexts outside Europe. Thus, any suggestion that the 2004 amendment relating to 'chained women'/*agunath* in the Jewish community, be extended to British women in Muslim marriages would in effect solidify this discrimination and be entirely counter-productive.

In 1959 and reinforced by a 1967 case (*Bilquis Fatima vs. Najmul Ikram Qureshi* PLD 1959 West Pakistan; *Khurshid Bibi vs. babu Mohammed Amin* PLD 1967 SC 97), Pakistan ruled that the court has the power to grant a *khula* divorce, and the husband's consent is not relevant. This position also applies in Bangladesh, and is generally followed in India. Meanwhile in Bangladesh, thanks to the work of women's legal groups, *talaq tafweez* is now commonly inserted in marriage contracts, indicating widespread acceptance of women's autonomous right to divorce.

Thus in the countries which constitute the origins for the majority of Muslims in Britain *khula* no longer involves any question of the wife being 'chained' or lacking autonomy in divorce. Egypt, which is the home of Al Azhar, the Sunni world's greatest jurisprudential institution, adopted the same position through amendments in 2000. The rest of the Muslim world is now following this trend: for example, Algeria following amendments in 2005 removed the requirement of the husband's permission in *khula*. In the non-Hanafi countries of the Middle East and North Africa (except Hanafi Egypt), the harshness of the requirement that the husband's permission be sought for *khula* was made largely irrelevant since other forms of divorce, notably *nizaa wa shiqauq* (incompatibility) were more commonly accessed.

Despite all these developments, 'Sharia councils' in Britain tend to insist that (a) *khula* is the only form of divorce available to Muslim women, and (b) it requires the

husband's permission. From the above information, however, it is clear that neither of these holds true, especially for women from South Asia.

There is no logical explanation, apart from profound conservativism, a desire to control Muslim women's autonomy and a desire to ensure the Muslim community feels a continuing need for their existence, as to why 'Sharia councils' in Britain take this position, and why they condemn Muslim women in Britain to far lesser rights than their sisters in the rest of the Muslim world. Unfortunately, Muslim women in Britain are largely unaware of these facts.

There are additional differences between the Muslim and Jewish communities which would make any extension of the 2004 amendment to Muslims of questionable value. For couples either only married under civil law or married both under civil law and through a 'religious marriage' (*nikah*), a 'Sharia council' 'religious divorce' is not for example recognised in Pakistani law, which instead recognises a British *civil* divorce as a valid divorce between Muslims. There is a clear need for research to establish which Muslim countries, if any (and I would be surprised if they are many, if at all), would refuse to recognise a British civil divorce and would instead require a 'religious divorce' conducted by an unregulated 'Sharia council'. Islam does not have any central jurisprudential authority and therefore if British Muslims in a civil marriage choose not to accompany their civil divorce with a 'religious divorce' there is actually no authority to pronounce the children of any subsequent union *mamzerin*, etc. I would be astounded if ever a court in a Muslim country were to prosecute or in any way discriminate against a woman for not obtaining a 'religious divorce' if she has in fact obtained a legal divorce according to the country she resides in. Thus, Muslim women and Jewish women are not on the same footing in this regard. For Muslims who have only undergone a *nikah* in Britain, British law is irrelevant since they are not married in the eyes of the law.

Extending the 2004 amendment to Muslim women would have a number of negative effects. It would:

- Reinforce the minority and highly-conservative position held by some British religious authorities that women lack autonomy in divorce;
- Give women in Muslim marriages in Britain lesser rights than in other Muslim countries, which also does not match the reality of their lives as educated, often salaried, British citizens;
- Reinforce the authority of the most conservative individuals and institutions within the community, which would undermine the visibility and work of progressive Muslims and ultimately contribute to normalising extremism.

It is indeed an issue that 'Sharia councils' in effect enable Muslim husbands to hold their former wives to ransom. However, as explained in these pages, this is not the outcome of a legal requirement or the operation of codified Muslim laws. It is a matter of social opinion, and as such the solution should be social. 'Sharia councils' are (very) slowly shifting their practices to respond to the outrage that many Muslim women in Britain feel regarding the injustice to which they are being subjected during divorce. This pace would be greatly be accelerated not through concessions to the views of the 'Sharia councils' but through supporting the efforts of progressive Muslims to provide information about Muslim laws in other contexts to women and men in communities,

and to make visible the dynamic and positive developments taking place in Muslim contexts where the marital relationship is being increasingly based on a foundation of equality and justice.

d) Resources

Useful research on the issue of Muslim marriages and divorces in Britain has been conducted by Dr Samia Bano http://www.reading.ac.uk/law/about/staff/s-bano.asp who will soon be publishing her PhD research on 'Sharia councils'.

Also see the following policy research report regarding the problems arising from the non-recognition of Muslim marriages and divorces in British law specifically relating to inter-country cases:
http://www.wluml.org/english/pubsfulltxt.shtml?cmd[87]=i-87-507849

A campaign has been launched to ensure the registration of more mosques as places of civil ceremony, thus ensuring more women in Muslim marriages are brought within the ambit of the law. http://www.muslimparliament.org.uk/registration.htm . In 2008 a campaign was also launched to promote written marriage contracts, including the default right of talaq tafweez; see
http://www.thecitycircle.com/events_full_text2.php?id=521 and
http://www.muslimparliament.org.uk/MuslimMarriageContract.html