MUSLIM SOUTH ASIAN WOMEN AND CUSTOMARY LAW IN BRITAIN

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COMMUNITY AND THE LAW

Liberal political theory operates according to the principles of individual choice, personal freedom and religious toleration, grounded in the notion of individual rights. Within this tradition group rights are viewed with suspicion and seen as inherently dangerous and oppressive if they fail to acknowledge conflict and diversity within the group. Recently, however, liberals have begun to argue that group interests may, in fact, be accommodated within the framework of individual rights.[1]

This raises a number of important conceptual and theoretical questions regarding the relation between individual and group rights, how these are to be distinguished and how clashes between individual and group rights may be reconciled. Embedded in these is the key question of what makes a community a community of rights. Does the state, in granting individuals the right to enjoy their culture, have an obligation to foster that culture and ensure its survival?

One kind of critique of liberalism comes from 'communitarians' who argue that liberalism has failed to encompass the concept of 'community' adequately within its analysis of rights. These critics claim that liberalism, by assuming that the individual exists prior to a community, fails to capture the reality of human experience. According to Christian Bay,

Liberals have persistently tended to cut the citizen off from the person; and they have placed on their humanistic pedestal a cripple of a man, a man without a moral or political nature, a man with plenty of contractual rights and obligations perhaps, but a man without moorings in any real community, a drifter rather than a being with roots in species solidarity.[2]

By contrast with liberals, communitarians aim to place the individual within a community, seen to play a defining role in identity formation. According to Sandel, the introduction of 'community' into the liberal conception of rights enhances self-consciousness and individual identification with a wider subjectivity of, ‘participants in a shared identity, be it family, community, class or nation', through a sense of participation and engagement with others).[3] Belonging is central to the communitarian ideal. Human beings are defined as being socially interdependent, connected over their life course through complex social networks. People as subjects are continuously 'made' through their engagement with their society and its institutions).[4] 'Community' thus provides a sense of social selfhood and identity, a moral biography embedded in the 'story of those communities from which 1 derive my identity'.[5] What we are or are able to become depends to an important extent on the wider community in which we live.

The limitations of the 'communitarian' approach lie in its failure to address the issue of difference and diversity within a group. For Hirsch, the communitarians fail to acknowledge the negative dimensions of community:[6]

... [b]oth homogeneity and moral education can be politically dangerous in several ways: by encouraging the exclusion of outsiders; by encouraging indoctrination or irrationalism; by compromising privacy and autonomy.

The notion of community constructs boundaries that involve processes of exclusion as well as inclusion. The development of the individual thus becomes dependent upon the community yet this fails to recognise that individual and group rights may diverge.

The issue is, therefore, how a theory of cultural minority group rights may include recognition of difference, including gender difference, within groups. The principle of recognition may open a Pandora's box, as Van Dyke points out, 'from which all sorts of groupings might spring, demanding rights'.[7] To avoid this proliferation of 'groups' claiming 'recognition', Fiss identifies two characteristics of a social group that differentiate it from 'mere aggregates': its 'entity' and its interdependence. By entity he means that the group has a distinct existence and identity apart from its members, and that individuals derive their sense of well being, status and identity from their membership in the group.[8]

A similar definition might serve to define 'community'. Communities nest within one another: local, national, global. They also intersect: British Muslims belong to the global Muslim umma, for example. Britain as a national community has its own specific legal system, but Britain is also a member of the international community that recognises transcendent human rights. Recognising religious/cultural practices in English law may contravene individual rights as defined by the United Nations Human Rights Charter and other conventions. Indeed, the recognition of a 'cultural/religious' practice may be regarded by some individuals as a 'right', and by other members of the same community as a means of oppression. Britain has no written constitution but is a contracting party to two main conventions which set out the rights of minority groups: namely, the 1953 European Convention on Human Rights, including its protocols, and the International Covenant on Civil and Political Rights. Article 27 of the International Covenant on Civil and Political Rights declares:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[9]

The legitimacy of these conventions has been recognised by Parliament as obligatory in English law.[10] The Human Rights Act 1998 based upon the European Convention of Human Rights is to be enshrined into English law very shortly.[11]

THE LAW AND MINORITY RIGHTS

The relationship between the law and the rights of minority groups in Britain is both complex and problematic. Lacey points out that a 'legal commitment to formal equality is insufficient to guarantee the fair treatment of groups which have suffered a history of prejudice and discrimination'.[12] Moreover, anti-discrimination law has a limited scope in a racist and sexist society. Discrimination, she argues can only be redressed through political action in a world in which white, male and middle-class people have privileged access to the law.[13]

Concepts such as 'equality of opportunity' are seen by activists as 'ideologically loaded', providing limited de facto protection for members of minority groups. However objective or neutral the apparatus of the law may appear, its implementation will always reflect the norms and values of society. The Race Relations Act 1976 outlaws only those types of acts that it defines as 'racist'. It is significant, therefore, that the meaning of the term ‘racism' is constantly being expanded in the UK in response to new precedents.[14]

Critiques of the 'discourse of rights' highlight its individualistic, competitive and anti-social character, and deconstruct its supposed neutrality and objectivity in order to expose its substantive preconceptions and the ways in which it systematically favours certain kinds of interest.[15] Thus the law operates to maintain the hegemony of privileged and established elite.

The public/private dichotomy in English law remains central to constructing the boundaries within which the free practice of cultural customs and religious beliefs is deemed acceptable. The law seeks not to intervene in matters that it defines as belonging to the private domain. As Lacey points out, however, this avoidance is not politically innocent as the law tends to intervene selectively in the regulation of the 'private' domain.[16] For many years, for example, it was reluctant to intervene in cases of domestic violence, often leaving women in the dangerous situations documented by Southall Black Sisters among Asian women.[17]

CULTURAL PLURALISM IN ENGLISH LAW

There are an estimated 2.75 to three million people from ethnic minority backgrounds in Britain, approximately 4.5 per cent of the population. The 1991 census, although it did not contain a 'religious' question, revealed that 640,000 originated from Pakistan and Bangladesh[18] and about 50,000 from the Middle East.[19] In the absence of research, the extent to which Islamic law is practised in Britain remains uncertain.

English law is based on a liberal notion of universal neutrality. The Race Relations Act 1976 aimed to promote equal opportunities and to eliminate discrimination in employment, housing, education and the provision of goods and services. The legal system has over time recognised certain other demands of ethnic minority groups. For example the Shop Act 1950 exempted Jews from Sunday trading laws. The Slaughterhouses Act 1979 allows the slaughter of animals for the purpose of obtaining kosher and halal meat for the Jewish and Muslim communities. Furthermore since 1976, a Sikh with a turban may ride a motorcycle in Britain without wearing the otherwise compulsory crash helmet: Motorcycle Crash Helmet (Religious Exemption) Act 1976[20] In addition, voluntary-aided religious and denominational schools are funded by the state, as are army chaplains and university theology faculties.

The courts have also ruled on what is defined as an ethnic and racial group. For example in Mandla v Dowell Lee[21] a Sikh boy was excluded from carrying any religious symbols in school. Lord Denning argued that Sikhs were not racially distinguishable from other Asians. The House of Lords, however, took a wider view of 'ethnic minority' and seven criteria, including a common religion, were established. Thus the headmaster was found guilty of indirect discrimination under the Race Relations Act 1976, and Sikh children are allowed to carry religious symbols in school. It is important to note that under the Race Relations Act 1976, Jews, Sikhs and Gypsies are defined as ethnic groups but Muslims, Hindus and Afro-Caribbeans have so far been excluded. The proposed revision of the Act includes a section on religious discrimination for the first time.

Poulter argues that, given liberal principles, we must be clear about the limits of cultural pluralism 'which need to be imposed in support of the overriding public interest in promoting social cohesion' (1992: 156).[22] This view is shared by Lester and Bateman who warn that cultural tolerance must not become a 'cloak for oppression and injustice within the immigrant communities themselves' nor must it endanger the integrity of the 'social and cultural core' of English values as a whole.[23]

Providing provisions for ethnic minority groups seeking to practise religious customs and practices has raised the question of the need for ‘special treatment'. This is because, as Montgomery argues, 'Provisions providing for formal equality may result in greater restrictions of the freedom of minority groups than is

experienced by the majority'.[24] Such restrictions must be viewed in the fight of the legal commitment to protect rights of religious freedom that make it necessary to devise special rules for particular groups. But does recognising a group right mean compelling all members of the group to partake of the right in question, even against their will?

Montgomery outlines four different types of group rights. The first is where individuals acquire rights by virtue of their membership of the group, once membership is established. This principle has been applied in English law to Quakers and Jews, for example, who are allowed by the Marriage Acts 1949-86 to solemnise marriage acts. Their special privileges date from 1753 and they are not subject to the Marriage Act regulations.[25] English domestic law makes no concessions, however, to other religions or customs, apart from Christianity.

The second type of a 'group right' recognises a 'private' space in which 'a self-contained parallel system of rules would operate.[26] The Ottoman Empire operated with a plural system according autonomy to religious groups or dhimmis to manage their family law internally. Drawing on this tradition some sections of the Muslim community in the UK would like to claim legal autonomy in matters of family law, to enable Islamic law to be applied in the 'private' sphere of family relations. If this claim were accepted in Britain, a different system of personal laws would govern Muslim citizens from those applied to the community at large. But this would raise the issue of how to deal with those individuals who do not wish to conform to the traditional customs of their communities.

Clearly, such a group right is problematic if it is based on the exclusive recognition of a single common identity for all the members of the cultural and religious minority. As Montgomery points out, support for such a right rests on a number of assumptions. First, the group must have some discrete identity that enables its members to be distinguished from outsiders. Second, the group must be essentially homogeneous in respect of its desire for the special treatment. Third, not only must the group generally want special treatment, but also the treatment must be of a nature, which creates liberties that can be exercised by all. The claim for an exclusive or territorially based separate personal law system remains problematic since the cultural boundaries of groups are rarely unambiguous. This is because, as Verman points out, 'Individual people are likely to feel part of one group in some contexts and of another in relation to different issues'.[27] Boundaries are more easily defined when minorities are concentrated territorially, as is the case with indigenous minorities. A further option, which has been adopted in India, is to create two parallel systems of personal law: customary/religious and civil and allow all citizens the right to choose between them.

The third type of group right is a dispensation or entitlement allowing members of the group, as a collective body, to act in a way which would otherwise be unlawful. For example, section 19 of the Sex Discrimination Act 1975 allows qualifications and authorisations to be withheld from one sex 'for purposes of organised religion' in order to comply with the doctrines of that religion or avoid offending the religious susceptibilities of a significant number of its followers.

Finally, the fourth type of group right is a right permitting some individual members of a group to have special privileges deriving from that membership. For example, both the Jewish and Muslim communities have designated members of the community who have the right to slaughter animals differently from the rest of society. Furthermore Muslim girls have been allowed to wear headscarves to school, contravening the school uniform. A similar dispensation exists for Jewish schoolboys to wear religious caps. Prior to changes to the law, Muslims and Jews were exempt from Sunday trading prohibitions.

Clashes between individual and group rights, then, are most likely to occur when full autonomy is granted to a 'community', as was the case in the Ottoman Empire, or under colonial indirect rule. Figgis underlines the paradox that group rights are, on the one hand, powerful in challenging state hegemony and acting to

restrict state power; but, at the same time, they also may restrict individual freedoms, as collective decisions and values cannot be guaranteed to coincide with the individual concerns of certain group members.[28]

Despite his strong advocacy for an active and transformative multiculturalism, Parekh is critical of calls for autonomous group rights from different religious groups.[29] He believes that Britain cannot allow separate legal systems for different communities without violating the fundamental principles of common citizenship and equality before the law. The law, he points out, has evolved and accepted cultural differences in case law without violating these principles. For example, in R v Bibi[30] the Court of Appeal reduced the imprisonment of a Muslim widow, found guilty of importing cannabis, from three years to six months. The grounds for this were, inter alia, that 'she was totally dependent on her brother-in-law and was socialised by her religion into subservience to the male members of her household'.[31] In R v Bailey[32] and R v Byfield[33] the moral codes of men brought up in the West Indies were taken into consideration in sentencing them for having sexual intercourse with girls under the age of 16. Again in Malik v British Home Stores[34] the Court ruled that in appropriate circumstances Asian women might wear trousers at work, even though other women might not.

THE RECOGNITION OF SOUTH ASIAN AND MUSLIM CUSTOMARY LAWS IN ENGLISH FAMILY LAW

It has been argued that in a multicultural and heterogeneous society a commitment to cultural diversity and pluralism in the area of family life is essential. The contention is that the law should uphold and support a diversity of family arrangements whether or not they are reflective of differences in race, culture or religion.[35] Joseph Raz, who argues that, echoes this 'the phenomenon of a multicultural society goes beyond mere toleration and non-discrimination. It involves recognition of the equal standing of all stable and viable cultural communities existing in a society'.[36] Raz suggests that we need a radical policy of liberal multiculturalism that would transcend an individualistic approach but would at the same time 'recognise the importance of unimpeded membership in a respected and flourishing cultural group for individual well-being'.[37] A redefinition of society would mean there would no longer be majority and minority groups but rather a 'plurality of cultural groups each of equivalent worth.' He accepts that some cultures or some features of them may be unacceptable to the society as a whole, because of their oppressive aspects. Even Raz and Bainham, however, fail to consider the need to take into account power imbalances in the institution of the family: who determines what is considered acceptable or unacceptable behaviour within the institution of the family?

The issue of arranged marriages is a crucial case in point. A basic condition of a legally valid marriage is that it should be a voluntary union, a principle upheld in Singh v Singh[38]. A marriage may be voidable on the grounds of lack of consent. The courts take the view that the cultural traditions of those ethnic groups in which arranged marriage is practised must be respected. A number of cases, however, have examined the issue where pressure to marry has been exerted by parents. In Singh v Kaur,[39] a reluctant Sikh bridegroom protested about his arranged marriage to a young woman in India. That led to a series of arguments with his parents. The court, however, rejected his petition for nullity on the grounds that the evidence of pressure fell far short of the threat to 'life, limb or liberty', then thought to be necessary to vitiate an apparent consent. Ormond LJ argued that the practice of arranged marriages could not be undermined in the Asiatic and other communities. In Hirani v Hirani,[40] however, a 19-year-old Hindu girl succeeded in her petition for nullity. In order to prevent her association with a young Muslim man her parents had forced her into marriage and threatened her with eviction if she failed to go through with the ceremony. Ormond LJ judged this to be:[41]

a classic case of a young girl, wholly dependent on her parents, being forced into marriage with a man she has never seen in order to prevent her (reasonably from her parents' point of view) continuing an association with a Muslim which they would regard with abhorrence.

The judge, applying the principle of true consent, allowed the young woman to reject a cultural practice she considered oppressive.

Likewise in Islamic law marriage is a contract between consenting parties in the presence of witnesses.[42] Unlike the civil law, however, Muslim law does not recognise a marriage between a Muslim woman and a non-Muslim man. It does, however, recognise polygamy, prohibited under English law. According to Islamic law, men can take up to four wives, even if they rarely do so, with clear repercussions for internal familial power relations.

Problems of power inequalities within the family are also evident in the case of divorce. Under Islamic law, for example, a divorce can be obtained in a number of different ways: through talaq (unilateral repudiation by the husband), khul (divorce at the instance of the wife with her husband's agreement, and on condition that she will forego her right to the mehr (dower) and ubara'at (divorce by mutual consent). In the present, revised English family law there is only one way to obtain a divorce, on the grounds that the marriage has irretrievably broken down, after a two-year separation where the decree is made absolute. The question of recognition of a unilateral divorce (talaq) has been the subject of considerable litigation, culminating in the House of Lords judgment in Quazi v Quazi.[43] Lord Justice Wilberforce held that:

(a) No talaq which is pronounced in England will be valid in England regardless of the domicile of the parties and also regardless of whether the husband goes abroad to an Islamic country to appear before the Arbitration Council as laid down by the Muslim Family Ordinance 1961.[44]

(b) If both the parties are habitually resident in UK for more than one year, the English courts will not recognise a talaq pronounced anywhere other than the country of nationality or of domicile of the parties. If only one party, or neither party is habitually resident in the UK for this period, then a talaq pronounced in a third country (other than the country of the nationality) will be treated as valid in England only if it is valid by the law of the domicile of both parties.

(c) there is a residual power to refuse recognition of a talaq otherwise valid under the provisions of the Recognition of Foreign Divorces and Legal Separations Act 1971. The discretion operates broadly within the framework of public policy grounds (the House of Lords in Quazi v Quazi[45] considered this discretion would be exercised very rarely.).

After a divorce, Islamic law only obliges a husband to support his wife during the three-month period of idda during which she is precluded from.[46] The husband does have to pay her any deferred dower, however, and the English courts have been prepared to order the payment of such dower.[47].

Thus we see that religious/cultural traditions can be practised within the private sphere of the family as long as they do not conflict with liberal legal principles of 'equality before the law' and 'common citizenship'.[48] However, 'personal religious legal systems' (for example, Islamic legal systems) are not recognised in their extremity as legitimate under English law. Indeed, they are currently critiqued by a growing number of Muslim women scholars and activists.[49] Personal laws are defined as 'customs' which, like English common law, are allowed as long as they do not conflict with English statutory law. Thus Muslims can get married in an Islamic way as long as the marriage is registered with the state. For Muslims in Britain, then, voluntary adherence to Islamic Shari'a law and the setting up of Muslim courts on the model of Rabbinical courts is likely to be the preferred solution for those seeking to pursue a fully Islamic way of life.[50]

HONOUR AND SHAME: THE IMPLICATIONS OF RECOGNISING SOUTH ASIAN CUSTOMARY LAW

Women in South Asian communities may be affected by the operation of customary personal laws within the legal system in several different ways. As Anthias and Yuval-Davis have argued, women play a central role in the symbolic reproduction of 'community' and its survival.[51] The law singles out women: 'On the one hand, women, like men are members of the collectivity. On the other hand, there are always specific rules and regulations which relate to women as women'.[52] Furthermore, the role of women among Asians is of paramount importance to those who control communal boundaries, as women are often seen as carriers of the 'collective honour' of the 'community'.

The notion of 'izzat' or family honour acts as an important ideological force controlling and limiting women's options and choices within the family structure. It acts as a powerful tool to dictate acceptable standards of behaviour and, like all personal laws everywhere, controls male and female sexuality through the mechanisms of marriage and divorce. For men, the ability to control their wives' and daughters' conduct denotes self-respect, masculinity and conformity to the standards of group behaviour. The role of women as preservers of family honour means that much depends on their willingness to increase the honour of the family through compliant obedience. They are liable to 'lose' this role and thus shame the family by 'disgraceful' public conduct, exposing their husbands 'failure to exercise proper patriarchal control'.[53] Hence, for women an implicit danger in the operation of customary personal laws in South Asian communities is that such an emergent code may seek to legitimise the discourse of izzat. Indeed, it may be granted a localised legal backing, with women being the subjects most detrimentally affected by such a development.

DEMANDS FOR ISLAMIC PERSONAL LAWS IN BRITAIN

Islamic family law is referred to as personal law. Some voices within the Muslim community in the UK demand that a 'personal regime of law' be adopted for the Muslim community as a whole within the area of family law.[54] Demands for the introduction of some form of Islamic personal laws were first made public by the Union of Muslim Organisations in 1972 at a conference held in Birmingham.[55] This was later reiterated, in 1975, by a number of religious leaders who argued that Muslims must not be prevented from fulfilling their religious duty by obeying non-Islamic laws. The issue, therefore, was one of apparent conflict of laws between two different legal systems. With reference to family law provisions of the Shari'a, the Imam of the Regents Park mosque in London, Sheikh Syed A Darsh, argued that:[56]

When a Muslim is prevented from obeying his law he feels that he is failing to fulfil a religious duty. He will not feel at peace with his conscience or the environment in which he lives and this will lead to disenchantment.

For Darsh, Islamic family law provisions are wide in scope and do not contradict English law as 'both aim at the fulfilment of justice and happiness of the members of the family'.[57] The Regents Park mosque remains central in promoting Islamic affairs in Britain. Its self-appointed Shari'a Council meets regularly to discuss family law issues, acting as a mediator between couples and interpreting Islamic disputes, as do many other ulama (Islamic scholars) throughout Britain. Islam is not a centralised religion like the Catholic Church, and religious authority ultimately derives from reputation for scholarship and sound judgement.

In the light of this, the first issue, that of the recognition of Islamic family law in Britain, raises the question of what exactly is meant by the 'Muslim community'. Muslim communities in Britain are diverse, originating from many different parts of the world. The majority of British Muslims, however, come from the Indian subcontinent, most notably from Pakistan, Bangladesh and India. The majority is concentrated

in the North of England and the West Midlands, where many were originally employed in the textile industries.[58]

At present it remains unclear which Muslim communities or representatives are calling for the recognition of Islamic personal laws in Britain and what is meant by 'recognition'. There has been debate both at Islamic conferences and seminars, yet such calls are made by Islamic magazines and newspapers such as Q News and The Straight Path often only in reaction to external events such as the Rushdie affair and the Gulf War. Nielsen points out that it is only the Union of Muslim Organisations which has made this claim with any regularity. Above all, there is no evidence that such calls are coming from members of the communities themselves rather than from religious activist members of Muslim political parties in Britain. We know little about the extent to which Islamic family law is observed in practice (for example in matters of divorce) and if this generates a conflict of laws between the two legal systems.

SOUTH ASIAN CUSTOMARY LAW

Menski's research into this area and his preliminary findings suggest the emergence of new laws in Britain, which he defines as 'Angrezi' (English) law, with Asians settled in the UK combining the demands and obligations of customary law and English law concurrently.[59] According to Menski, Asian Muslims in Britain, for example, have not simply given up Islamic law but combine Islamic law and English law to form 'Angrezi Shari'a'. He describes a three-fold process generated by internal conflicts within Asian communities and leading, as mentioned, to the creation of 'British Asian Laws in Britain'.

The first stage occurred at the time of migration. At this stage ignorance of the legal system meant that customary practices continued to be observed. For example, up until 1970 many Asians did not register marriages and this later resulted in huge matrimonial disputes. Subsequently, however, Asians learnt to adapt to English law - but rather than abandon their customary traditions, they built the requirements of English law into them. The result has been that new British Muslim, Hindu and Sikh law, unique to Britain, has emerged, differing in some important aspects from the Indian, Pakistani or Bangladeshi laws and customs. This was the second phase, which created the corpus of precedent law Menski labels 'Angrezi' law. The third stage in this process might involve abandoning ethnic customs and religious personal laws altogether, and practising only state law, but this has not happened and is, indeed, unlikely to happen in the foreseeable future in the case of most Muslims.

Menski argues that English family law must take into account these developments, as failure to do so can result in a misdirection of cases by the judiciary.[60] He remains critical of English lawyers who are not aware of such changes and cites the case of Kaur v. Singh[61] to illustrate the problems caused when an English judge is misled about facts pertaining to an Asian marriage. In this case, the wife managed to obtain a decree of nullity by convincing the judge that it was the husband's duty among Sikhs to make the necessary arrangements for the religious marriage ceremony. The husband was thus held guilty of wilful refusal to consummate the marriage. This afforded the wife an easy exit from an unwanted legal marriage that she had entered into because she did not realise that the legal validity of a marriage in English law arises at the point of registration of that marriage. Menski's work is valuable as he demonstrates the ways 'Angrezi' law operates in Britain. For example, if a Muslim couple want to marry they will have a nikah (contracting ceremony) and at the same time register the marriage in accordance with English law. Menski argues that if the operation of Hindu, Muslim and Sikh concepts of law within the legal framework of English law is not properly understood, this will lead to distrust of the law among ethnic minority groups, with serious implications for the legal system.[62]

Another important area of concern is lack of definition of 'Hindu', 'Sikh' or 'Islamic' law'? In the case of Islam, the Shari'a law is subject to interpretation by different religious leaders and communities. There is no one comprehensive Islamic legal system but varieties exist according to ethnic or religious

backgrounds. For example, the Islamic personal laws observed in the Indian subcontinent vary greatly from those that operate in Iran or Iraq. There are two main groups of Muslims in Britain, Sunni and Shi'a Muslims, and the practice of Islam within these groups varies in accordance with the different Shari'a schools of thought. There are also many class and sectarian divisions, however, operating according to different Islamic codes of laws; for example, Ismaili Muslims are part of the wider Shi'a group but practice distinct laws applicable only to them. It is therefore difficult to speak of 'Islamic family law' in Britain when it varies so widely according to ethnic and sectarian affiliation. Nielsen notes that the discussion of Islamic family law in Britain in the Muslim magazines centres on the ethics of the subject rather than the law.[63] This means that the general principles highlighted in these texts are based on human relations. According to one interpretation, custom is dependent on place, time and circumstances; others regard the role of religious leaders as crucial in defining current Shari'a practice.

Muslim feminists, such as Leila Ahmed, argue that there is a fundamental tension in Islam between its ethical or spiritual vision of sexual equality and the unequal hierarchies contained in family laws, instituted in early Islamic society and perpetuated over time by those holding power.[64]

Two important issues must be considered here: first, the extent to which there is compatibility between customary or religious family laws and English statutory law; and, second, the authority and jurisdiction for applying the law. The extent to which South Asian personal law is compatible with English law raises the fundamental question of how two legal systems that draw their legitimacy from opposing sources can operate in conjunction. English law is based upon liberal legal principles of popular sovereignty delegated to Parliament. In the case of Islamic law, Poulter points out that there are a number of Muslim obligations which run counter to international human rights law, such as the practice of polygamy, the right to unilateral male divorce, and under-age marriage. At the same time, although Islamic law is in theory based on divine revelation, the interpretation of the law is delegated to the ulama, the learned scholars (even if some Islamists dispute their authority) who may apply it to fit particular contexts. In a sense, then, both Islamic and English law evolve through interpretation and are responsive to current exigencies.

In the past Muslim groups have come together during Islamic conferences to consider how Shari'a law may be recognised in Britain. The publication by the Lord Chancellor of an 'Interdepartmental Review of Family and Domestic Jurisdiction' brought together a group of English practitioners and Muslim religious leaders in Birmingham in 1990 to discuss how the judicial system might go some way towards meeting Muslim wishes.[65] The discussion centred on procedures for divorce and child custody. It was concluded that neither a separate legal system nor separate legislation were necessary, but a proposal was put forward that religious authorities should take part in the legal process.

Hence, the issue of who interprets Shari'a law and decides which Islamic personal laws should be recognised within the legal system is an important area of concern. As highlighted previously, Muslim communities are neither homogeneous nor based around fixed notions of Islamic law. Both the ethics and principles of Islamic law are subject to debate and controversy. Clearly, no one religious leader or religious body in Britain can define which personal laws should become operative in regulating the UK Muslim community. The centrality of women's role within the family and Islamic family law means that different Muslim leaders may define concepts of female roles and status in more oppressive - or more tolerant and liberal - ways, even within the framework of the Shari'a. In the extreme case of legal pluralism of the Ottoman type, this could lead to unlawful female oppression.

Islamic law, like other South Asian religious and customary corpuses of law, defines the position of women in relation to marriage, divorce, child custody, dowry and inheritance. Communal autonomy in matters of personal law would mean that Asian and Muslim leaders would be given legal backing to control female sexuality. It would allow them to define not only the way in which women must behave within the community but who belongs to the community, thereby controlling its boundaries. This would

also raise the issue of what constitutes a Hindu, Sikh or Muslim, since many Asians in Britain define themselves in ethnic terms as secular, rather than stressing a religious identity.

CONCLUSION

The debate as to whether Britain should adopt a pluralist legal system to accommodate the practice of South Asian or Islamic customary personal laws must be approached with great caution. Within the English legal system the rights of minority groups have been defined through anti-discrimination legislation. At present the cultural rights of minority groups are recognised and protected in English law as long as they do not violate national and international human rights law. We have seen that this may present problems in the case of South Asian personal laws. The law must also take into account the heterogeneity of South Asian and Muslim settlers in the UK and the many different varieties of religions they practise. Clearly, no single authority can define South Asian personal law, and individuals, in line with liberal principles, would have to be able to opt for a court of their choosing. The danger of a rigid pluralism is evident: it would encourage the creation of separatist politics, ghettoising minority communities outside the mainstream legal system and thus defining them as the 'other'. As a result, instead of enhancing the rights of South Asians or Muslims in Britain, it would serve to curtail their rights and to segregate groups from one another.

The recognition of customary personal laws could limit the autonomy of religious and ethnic minority women, as it would seek to enhance and legitimise their role as 'symbolic reproducers of the community' and allow for more control of their sexuality.[66] It may mean the shifting of state regulation to the private domain, thereby giving religious leaders greater power to dictate acceptable patterns of behaviour. The citizenship rights and duties of Asian women as British citizens would thus be undermined by a strictly pluralist arrangement. The adoption and recognition of communal personal laws may indeed, prove detrimental not only to women but to all members of the community as the concept of 'equality before the law' may no longer be applicable to them. Such a move would involve freezing cultural and religious boundaries according to criteria (ideological, social) which are set, defined and accepted by the current British judiciary. This would lead to a reduction of cultural and religious diversity, dynamism and pluralism, rather than enhanced integration.

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Endnotes:

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