When ethnic minorities divorce in multicultural Britain: a survey of legal challenges with a focus on the south Asian experience

Anirudh Belle[1]

Introduction

Werner Menski begins his description of legal pluralism with the idea that "law is everywhere as a social phenomenon".[2] He bases the law on "cultural foundations" and criticises positivist state law of asserting (although unsuccessfully) its own legitimacy at the expense of culturally diverse legal epistemologies that surround it.[3]This paper, invoking Menski's articulation, focusses on those aspects of cultural diversity in law that deal with the practices of ethnic minorities. Within this field, itexplores divorcing patterns among ethnic minorities in England – with a special focus on South Asians – and the challenges that emerge when they interact with English law.

Divorcing patterns among ethnic minorities in England differ with English law on two broad levels. Firstly, divorces among these communities are typically regulated by religious or traditional customs. As Pearl and Menski point out, this underscores the important point that while the English system vests matters of family law in the state, many ethnic minorities – such as the Jews and Muslims – have historically not looked to the state for these concerns.[4] Secondly, on a procedural level, divorces in England "almost always involve obtaining dissolution from a competent court of law".[5] Ethnic minorities, more often than not, obtain divorces extra-judicially. These differences have led to tensions between the official law of the state and those of ethnic minority customs in England.

This paper pays special attention to tensions emanating from the South Asian experience with English law.Its argument is developed through three thematic sections. The first section

[1]Student, Jindal Global Law School, O. P. Jindal Global University, Sonipat.
[2]WERNER F MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA, 82-3 (Cambridge University Press 2) (2006).
[3]*Ibid.*
[4]DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW, 69 (Sweet & Maxwell) (1998).
[5]SEBASTIAN M POULTER, ENGLISH LAW AND ETHNIC MINORITY CUSTOMS, 98 (Butterworths) (1986).

explores a few problems English law faces domestically – i.e. from ethnic minority practices in England. In the second section, challenges from a conflict of laws perspective – i.e. where an overseas angle is involved – is detailed and evaluated. The third section, with the example of what is widely called the angrezishariat, looks into the possibility and challenges of a parallel legal realm among ethnic minorities. The final part of the paper concludes.

Context

Before 1857, the ecclesiastical courts determined the law on divorce.[6] Though decrees of nullity could be obtained, divorces were not available through the courts.[7] Starting with the Matrimonial Causes Act 1857, and through the 20th century, the English law on divorce began to liberalise. Onthe one hand, it acquired a more "secular" character, allowing the state to exclusively determine the law on divorce. On the other hand, the "grounds" for divorce were expanded and obtaining a divorce became relatively easier.[8] After the Second World War, and through the 1960s, England witnessed an increase in the number of divorces. It was widely felt that the law on divorce must provide for dissolution of the marital relationship on the simple ground that marriages had "irretrievably broken down".[9] The view was propelled by the recognition that marriages need not be sustained in law purely because partners are unable to prove one of the grounds needed to obtain a divorce.[10] Following recommendations from the Law Commission in 1966,[11] the Matrimonial Causes Act 1973, was enacted. This legislation states the present law on divorce in England. It has abolished the old grounds for divorce and has replaced them with a single ground – i.e. a marriage has irretrievably broken down.

Scholars have argued that the apparent "secularisation" of the divorce law is not total.[12] While this point may become apparent in some parts of this paper, it is perhaps significant to consider that the 1973 legislationwas enacted following recommendations of a group created by the Archbishop of Canterbury. Changes insociety's attitude towards divorce was felt

[6] JONATHAN HERRING, FAMILY LAW, 142 (Pearson 8) (2017).
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.,* 142.
[10] *Ibid.,* 143.
[11] *Reform of the Grounds of Divorce: The Field of Choice*, (Apr 15, 2018),https://s3-eu-west-2.amazonaws.com/lawcom prod-storage-11jsxou24uy7q/uploads/2016/08/LC.-006-REFORM-OF-THE-GROUNDS-OF-DIVORCE THE-FIELD-OF-CHOICE-REPORT-ON-A-REFERENCE-UNDER-SECTION-3le-OF-THE-LAW-COMMISSIONS-ACT-1965.pdf.
[12] *Prakash Shah, Distorting Minority Laws? Religious Diversity and European Legal Systems, in* Family, Religion and Law: Cultural Encounters in Europe, 1.

through the church's endorsement of this fact;[13]this reflects the particularly Christian ideal of society that arguably persisted in the minds of English lawmakers.

Ethnic minority divorces and English law: Challenges in the Domestic Sphere

The present English law on divorce

As the lex fori, the law on divorce that prevails in English courts is English law.[14] Section 1(1) of the Matrimonial Causes Act 1973 (hereinafter, "the MCA"), states that a divorce may be granted if it is proved that a marriage has irretrievably broken down.[15] Proof of breakdown can be made by establishing one or more of the following facts set out in Section 1(2): adultery, unreasonable behaviour, desertion (continuous, for two years), two years separation with consent, five years separation (no consent required).[16]n 1977, a new procedure of "undefended" divorce petitions was introduced. This procedure has effectively rendered divorces by mutual consent a reality. The procedure, briefly outlined, is as follows:[17](i) a petition for divorce is filed at the divorce county court; (ii) the petition is served on the respondent along with proposals for financial arrangements, care of children, etc.; (iii) a district judge (or court administrator) considers the documents briefly and in private; (iv) if the official is satisfied with the petition, a certificate to that effect is granted; (v) the truth of the petition is not examined (unless the respondent challenges it, thereby making the "undefended" petition into a "defended" petition); (vi) the judge may investigate the petition should she/he find any grounds for suspicion; (vii) a decree nisi is then pronounced; (viii) following certain conditions, which involve a short waiting period after the pronouncement of a decree nisi, a decree absolute is granted (on which the divorce takes legal effect). Probert has found that more than 98% of divorces in England today are undefended.[18]

Ethnic minority customs have presented unique problems for English courts. This section firstly looks at how concepts like "reasonable expectations" and "right thinking person" in Section 1(2)(b) are problematized in the context and customs of ethnic minorities; a segue is then made into English case law and its problematic engagements with ethnic minority customs. Next, problems regarding defences against divorce petitions are evaluated. The

[13]*Supra* note 6 at 143.
[14]DICEY & MORRIS, THE CONFLICT OF LAWS, 333, 336-7 (10) (1980).
[15]S. 1(2), Matrimonial Causes Act 1973, 1973 c. 18. (U.K.).
[16]*Ibid.*
[17]*Supra* note 13 at144-45.
[18]REBECCA PROBERT, CRETNEY'S FAMILY LAW, 54 (Sweet & Maxwell 5) (2003).

section ends by tracing where and how English law has dealt with the peculiar problem of recalcitrant spouses.

Construing "reasonable expectations" and the "right thinking person" in the ethnic minority context: challenges in recognising ethnic minority customs

Section 1(2)(b) of the MCA states the following to prove the irretrievable breakdown of a marriage: "that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent" (emphasis added).[19] In the leading case of *Livingstone-Stallard v. Livingstone-Stallard*, the court framed the test for this fact as follows:[20]

"would any right-thinking person come to the conclusion that this husband behaved in such a way that his wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and characters and personalities of the parties?"[21]

In *Ash v. Ash*,[22] the court confirmed that since the provision used the word "reasonably", the test for "behaviour" is necessarily objective – i.e. it is a judicially determinable fact. The court, however, stated, like in - the parties to the suit and their individual characteristics and backgrounds must be of material consideration.

In the context of ethnic minorities, the question which arises is who, specifically, is a "right thinking person" and what constitutes a "reasonable expectation"? Is he or she, as S. M. Poulter asks, "a white Englishman travelling on the Clapham omnibus or is he someone familiar with the customs of the parties in the particular case and thus probably, in origin at any rate, a member of the same ethnic minority community?"[23]Hitherto, this question has not been taken up in case law. Poulter, however, believes that courts will be prompted to strike a "balance", on "public policy grounds", between basic standards acceptable in England and customs authorised by the parties concerned.[24] As far as adjudicating on ethnic minority customs are concerned, a further question must be asked: have English courts demonstrated that they areequipped to judicially decide on customsover which they have no cultural or

[19]*Supra note 15.*
[20]Livingstone-Stallard *v.* Livingstone-Stallard, [1974] Fam. 47. (U.K.)
[21] O'Neill *v.* O'Neill [1975] 3 All. E.R. 289.
[22]Ash *v.* Ash, [1972] Fam. 135.
[23]POULTER, ENGLISH LAW AND ETHNIC MINORITY CUSTOMS, 104.
[24]*Ibid.*

contextual background? To answer this question, we turn to two contrasting judicial decisions.[25]

In *Devi v. Gaddu*,[26]an Indian couple, parties to an arranged marriage, resided with the husband's family. The wife instituted a complaint under the Matrimonial Proceedings (Magistrates' Courts) Act 1960, against the husband, alleging, inter alia, that she was assaulted by her mother-in-law. The Divisional Court refused to entertain the husband's assertion that a charge of cruelty cannot be laid against him for an act he had not committedpersonally. Normally, it would not be sufficient to rely on acts by third parties to establish cruelty by the respondent. In this case, however, the court gave merit to the customary context of the parties, namely, that the wife was living as part of the husband's extended family. It was not held to be a defence, therefore, that other members of the family, rather than the husband, had driven the wife out of the house. This is a relatively uncontroversial case.The court had engaged meaningfully with an ethnic minority custom.

Khan v. Khan[27]is a case in contrast. A husband had forbidden his wife from returning home if she attended a wedding celebration he did not approve of. The court held the husband to be under desertion and did not take account of the Indian custom that on the question of visiting relatives and friends, the wife must obey the husband.

Poulter views the decision in Khan as correct.[28] He argues, in broader terms, that to secure the "overriding public interest", there must be "limits" on the extent to which cultural diversity is accepted in England.[29] He asserts that "Cultural tolerance cannot become a 'cloak for oppression and injustice within the immigrant communities themselves'", and that "public policy" and "reasonableness" condition the court's acceptance of ethnic minority customs.[30] One resonates with Poulter's general proposition that manifestly oppressive customs must not be legitimated. This is particularly so in a legal system that has made great advances in gender equity, ensuring natural justice and so on.

However, English law does not appear to hold a coherent position towards Muslim law, in particular. It is troublesome that the state is reluctant to recognise Muslims as a "racial

[25]I*bid at*103-6.
[26]Devi *v.* Gaddu, (1974) 118 Sol Jo 579.
[27]Khan *v.* Khan, [1980] 1 All ER 497.
[28]*Supra* note 23.
[29]Hepple, Erika M Szyszczak, *The Limits of Legal, Culture and Religious Pluralism,* in Discrimination: The Limits of Law, 176 (Sebastian M Poulter).
[30]*Ibid.*

group" under the Race Relations Act 1996.[31] This has led many Muslims to feel differentially treated as against other ethnic minorities.[32]Carolyn Hamilton points out that the English legal system has been making several exceptions for certain Christian factions of "dissenters" and Jews, allowing them to do as their customs require.[33] Other well-known exceptions in English law include concessions towards Jews and Quakers in the Marriage Act 1949, on issues involving the solemnisation of marriage.[34]These considerations have not been extended to Muslims.[35] Underscoring differential treatment towards Muslims is not an argument for the automatic legitimation of their customs, even when these may seem repugnant to cherished and fundamental principles of English law. The argument, on the other hand, is for English law to seriously engage with Islamic customary practices, as Pearl suggests, and to develop a clear framework within which such practices are reasoned as acceptable or otherwise.[36]Pearl and Menski argue that the present position towards Muslim practices appears to be that certain customs are allowed "simply because there is no law against them".[37] The public policy grounds in common law can be pressed into force by courts to invalidate, overnight, practices which till such point had witnessed no conflict with the law. From a lawyer's perspective, this "wide discretion" the court wields "further complicates the difficult task of advising on the likelihood of recognition".[38]One hopes that English law moves further from Khanto adopt a more sincere and nuanced engagement with ethnic minority customs – particularly with hitherto unattended areas like Muslim practices. Not only will this make questions of recognition more navigable and predictable to British Muslims, it will also inculcate greater resonance among ethnic minority communities with the domestic legal order.

Defences against divorce petitions: challenges faced by ethnic minorities

Our attention now shifts to a special defence available in the MCA against a petition for divorce. Section 5 of the MCA, in cases involving five-years' separation as a fact to prove irretrievable breakdown, allows a respondent to successfully oppose the granting of a divorce

[31]TARIQ MODOOD, MUSLIM VIEWS ON RELIGIOUS IDENTITY AND RACIAL EQUALITY, 19 New Community, 513–519 (1993).
[32]*Ibid.*
[33]CAROLYN HAMILTON, FAMILY, LAW AND RELIGION (Sweet & Maxwell) (1995).
[34]*Supra* note 4 at 70.
[35]*Ibid.*
[36] David Pearl, *Legal Decisions Affecting Ethnic Minorities and Discrimination - No. 12*, 8 New Community, 146–153 (1980).
[37]*Supra* note 34 at 71.
[38]DAVID GORDON, FOREIGN DIVORCES: ENGLISH LAW AND PRACTICE, 121 (Aldershot) (1988).

decree if "grave financial or other hardship" can be proven to ensue from a divorce.[39] In granting this defence, the court must be satisfied, firstly, that not only will such "hardship" result, but also that in all circumstances it would be improper to dissolve the marriage.[40]

In a series of cases concerning Hindus, the court had considered the position taken by Hindu wives that "hardship" would be caused to them back in India should their husbands' divorce petitions succeed. The wives sought to use the defence in Section 5 of the MCA by arguing that religious and social attitudes to divorce in India will result in the divorced wife being ostracised and diminished in the eyes of her community. In *Banik v. Banik*,[41] the Court of Appeal found that this argumentcould possibly form a case under Section 5. However, when evidence was examined in *Banik v. Banik(No.2),*[42] the court found that though the divorced wife would be in a position where she could not remarry, she would not be a social outcaste, remaining, as she would, with her brother's family. Her defence, therefore, failed. It is important to consider that thesimilar attributes of"outcaste" and"inability to remarry" to a divorced wife were appliedwith contrasting effect in cases involving Jews (discussed in subsection 1.3). Like *Banik*, in *Parghi v. Parghi*,[43] a similar argument was defeated on grounds that the parties were Hindus who came from sophisticated and educated backgrounds; the wife, accordingly, was seen as unlikely to face social discrimination from a divorce. In *Balraj v. Balraj*,[44] the court rejected the hardship defence on separate terms. In this case, the wife was living in the outskirts of Hyderabad and the court admitted that the Kshatriya community to which she belonged would place her in an anomalous and undesirable position if she were a divorcee. The court, nevertheless, rejected her defence stating that her condition does not qualify as "grave" within the meaning of Section 5. The Court of Appeal affirmed this view. Poulter argues that even if the wife had established "grave" hardship, the length of separation between the parties (15 years) would still have led to the court rejecting her defence.[45]Rukat v. Rukat,[46] which involved a Roman Catholic wife from Sicily, followed this line of argument.

[39]S. 5, Matrimonial Causes Act 1973, 1973 c. 18. (U.K.).
[40]*Ibid.*
[41]Banik *v.* Banik,[1973] 3 All ER 45.
[42]Banik *v.* Banik (No.2),(1973) 117 Sol Jo 874.
[43]Parghi *v.* Parghi,(1973) 117 Sol Jo 582.
[44]Balraj *v.* Balraj,(1981) 11 Fam Law 110.
[45]*Supra* note 23 at 105.
[46]Rukat *v.* Rukat,[1975] Fam 63.

The decisions illustrated above are problematic. Firstly, as the next subsection will demonstrate, the hardship of a Jewish wife who is an agunah or a Muslim wife who is divorced through civil proceedings, but is refused a talaq divorce, is construed as more "grave"than it is for a Hindu woman under similar circumstances. As Derrett has rightly observed, a divorced woman is looked upon very unfavourably in many Hindu communities. She normally opts for divorce only if her married life is unbearable.[47] Further, dowry – a payment of sorts – is traditionally offered by the wife's father to the husband's family (regardless of the present law in India that bans this practice). The greed for dowry, as Poulter notes, is often so acute that young girls are often killed if their families do not fulfil exorbitant dowry demands from the bridegrooms' families.[48] When a divorce is granted, a wife is not entitled to get her dowry sum back. This often results in her being an added financial burden on her parent's family.[49] This can especially translate to a huge burden when the wife's family is poor. The court, in the above cases, appears to have taken a simplistic view of a Hindu woman's social context. The dissonant attribution of meanings in a hardship clause to different ethnic minorities suggests a certain arbitrariness in applying the law. It also betrays some insensitivity in resolving human suffering.

The unique challenge in undefended petitions

Another, though less examined, problem relates to a broader point which is not restricted to Hindu minorities. Broadly speaking, ethnic minority divorces in England, unless they dealwith a conflicts of laws situation, are not recognised in English law – i.e. if it is not conducted according to the stipulations of the MCA.[50] These divorce procedures are forced to involve the domestic legal framework if they seeklegalvalidation.According to Probert, around 98% of all legal divorces in England today are "undefended" (i.e. by mutual consent).[51] This process sits on the assumption that a divorce petition shall be taken as true if the respondent does not attempt to challenge it. Herring critiques this procedure as promoting a peculiar phenomenon of "divorce on demand".[52] The high legal fees implied in defending a

[47] J.D.M Derret, IV, *The Jewish Law Annual*, 237 (1981).
[48] *Supra* note 23.
[49] *Ibid.*
[50] *Ibid.,* 4.
[51] PROBERT, CRETNEY'S FAMILY LAW, 54
[52] *Supra* note 6 at 144-45.

petition, the reluctance of lawyers to be involved in defended divorce petitions,[53] and the lack of community legal services funding result in relatively few petitions being challenged.[54]Among ethnic minorities, this appears to be an easy route for one spouse to throw the other out of a marriage. In effect, divorce by mutual consent, does not appear to be very different from the unilateral repudiation of a wife by the husband in an Islamic talaq divorce (a phenomenon which English law has taken serious objection to).[55]Although this issue of undefended petitions has not invited much scholarly attention hitherto, it remains a challenge that needs to be addressed.

The problem of the recalcitrant spouse

Earlier in this paper, it was pointed out that ethnic minorities, should they seek a valid divorce in England, would have to obtain a judicial decree from a domestic civil court. Unfortunately, some British Muslims and Jews have utilised this requirement to decline a religious divorce, despite having obtained a civil divorce.[56] In such situations, the other party is not free to remarry and is subject to a "limping marriage" – i.e. he/she is divorced at English law but remains bound by the first marriage in his/her religious law.[57] In Jewish law, a wife in this situation is called agunah (a "chained wife") and her plight is well documented.[58] Any child she bears through a subsequent marriage will be mamzerim (loosely translated as "illegitimate", from Hebrew) in Jewish law.[59] Where the recalcitrant spouse is not religious and the other party is, the latter can be blackmailed, for instance, to obtain an advantage, financial or otherwise,and a religious divorce can be refused if these demands are not met.[60]

In *Brett v. Brett*,[61] a Jewish wife filed a petition for divorce, relying on her husband's cruelty. The husband, unlike his wife, was an unorthodox Jew. He refused to deliver a get to his wife in order to affect a Jewish divorce.[62]Phillimore L. J., of the Court of Appeal, took note of the

[53]KAVERIQURESHI, MARITAL BREAKDOWN AMONG BRITISH ASIANS: CONJUGALITY, LEGAL PLURALISM AND NEW KINSHIP (Palgrave Macmillan Studies in Family and Intimate Life), 185-212 (Palgrave Macmillan 1) (2016).
[54]*Ibid.*
[55]*Cross-Cultural Conflicts of Marriage and Divorce Involving South Asians in Britain, in* Cross-cultural family relations: Reports of a socio-legal seminar, 179 (Werner Menski, Prakash Shah).
[56]GORDON, FOREIGN DIVORCES: ENGLISH LAW AND PRACTICE, 46.
[57]*Supra* note 23 at 106.
[58]*Ibid.*
[59]*Ibid.*
[60]*Supra* note 56.
[61]Brett *v.* Brett,[1969] 1 ALL ER 1007.
[62]*Supra* note 56 at 36-45 (for a detailed description of the Jewish divorce procedure).

wife's difficult position as an agunah. The court utilised the maintenance order to persuade the husband to deliver the get. It ordered the husband to make a lump sum payment of £30,000; if the husband delivered the get within three months from the court's order, the final instalment of £5,000 from this amountwould be waived.

The decision in Bret featured a genuine attempt to resolve issues of a recalcitrant spouse. Itssolution, however, was problematic. Gordon reminds that one of the hallmarks of a Jewish divorce is that a get cannot be given under coercion or duress.[63] The husband in Brett was essentially forced to act.[64] Secondly, a husband may not have sufficient financial means at his disposal to pay.[65]Thirdly, should he have the means to pay, an obstinate husband may comply with the court's order and still refuse a religious divorce.[66]Lastly, as Poulter notes, much would also depend on the husband's subsequent imprisonment (i.e. should he fail to comply with the judicial order) being viewed as an appropriate possibility of last resort.[67]

In a later decision, the court viewed the Jewish marital contract (ketoubah) as antenuptial agreement.[68] In that case, the ketoubah contained certain clauses which required either party to comply with Jewish customs should an eventual divorce between the parties be sought. The court refused to order specific performance of the ketoubah'sterms, as public policy required that antenuptial agreements not be recognised. However, the option of making life difficult for the husband – i.e. till he delivered the get – was considered by the court. In the present case, such a possibility was couched on the court's discretion to refuse to hear the husband on his application for contact should he refuse to honour his commitment to the court in an earlier interim order. In *O v. O(Jurisdiction: Jewish Divorce)*,[69] the court, unlike in the previous case, upheld its jurisdiction to compel a recalcitrant husband to deliver a get. A decree nisi was not to be converted to a decree absoluteuntil the husband complied with Jewish divorce customs.

The law on this matter was finally clarifiedin the Divorce (Religious Marriages) Act 2002. Section 10A of the 2002 Act gave a court the power to delay the issuance of a decree *absolute* until a Jewish *get* had been delivered. Scholars have observed that this provision

[63]*Supra* note 56 at 47.
[64]*Ibid.*
[65]*Ibid.*
[66]*Ibid.*
[67]*Supra* note 23 at 109.
[68]N *v.* N(Jurisdiction: Pre-Nuptial Agreement) [1999] 2 F.L.R. 745.
[69]O *v.* O(Jurisdiction: Jewish Divorce),[2000] 2 F.L.R. 147.

meets with the requirements of the orthodox rabbinate.[70] Jewish responses, hitherto, have also been recorded as positive.[71]

Section 10A(1)(a)(ii) of the 2002 Act expands the application of the provision to non-Jewish religious customs – for instance, to Islamic talaq divorces. However, Menski suggests that the initiative "rests with British Muslims" to pursue the matter in English courts.[72]*Kandeel v. Hands*is a noteworthy case where a husband sought to stay divorce proceedings, under the 2002 Act, till a formal Islamic divorce had taken place. Tomlinson L.J., of the Court of Appeal, rejected this plea, describing the husband "as seeking to draw out these proceedings and delay matters as much as he possibly can for his own advantage".[73] This case demonstrates the sort of abuse the 2002 Act is open to, a challenge which may be of significance to English lawmakersin the future.

Broadly speaking, it seems unlikely that there is, or will be, strong agreement among British Muslims to use the 2002 Act. The reluctance could be attributed to the prevalence of more informal avenues of dispute settlementutilised by British Muslims today (which will be addressed in section 3 of this paper).[74] Nevertheless, outside the 2002 Act, the English courts appear capable of taking a more activist line for the benefit of Muslim wives. In *A v. T* (Ancillary Relief: Cultural Factors),[75] an Iranian wife was set to lose mahr(a mandatory payment owed to the wife) had her husband refused to pronounce talaq. The court proceeded to order that the husband either pronounce talaqwithin three months and pay a reduced mahramount, failing which he had to pay-up the full amount. This case is rather similar to Brett. It is less problematic than Brett to the extent that Islamic law does not forbid a talaq being pronounced under duress.[76] However, the remaining three problems cited above apply to this case as well. A v. T, therefore, articulates a position in English law that offers only a partial solution to the problem of recalcitrant Muslim spouses.

[70]*Supra* note 56 at 50.
[71]Shah, *Distorting Minority Laws? Religious Diversity and European Legal Systems,* 18-19.
[72]Erik Reeberg, Hanne Peterson*, Law, Religion and Culture in Multicultural Britain, in* Religion and Law in Multicultural Societies, 58-9 (Werner Menski).
[73]Kandeel *v.* Hands,[2010] E.W.C.A. Civ 1233.
[74]Menski, *Law, Religion and Culture in Multicultural Britain*, 58-9.
[75]A *v.* T (Ancillary Relief: Cultural Factors) [2004] EWHC 471 (Fam).
[76]*Supra* note 56 at 50 at 49-50.

Challenges in conflicts of laws cases

Conflicts of laws come into play when a case features a foreign element.[77] It was already noted that most ethnic minority divorce practices are affected extra-judicially. Challenges to English law revolve around a) whether it is permissible for English law to recognise divorces which, in adherence to customs of the parties, is affected extra-judicially, and b) under what circumstances would English law recognise divorces obtained abroad and which are based on customary practices?

Until 1971, the rules applicable to overseas divorces were governed by the common law. These rules recognised divorces applicable to the parties' domicile, even if they were affected in England.However, the husband's domicile was of prime importance. It was only since 1 January 1974 that a wife's domicile was held independent of her husband's.[78] Sections 2 and 3 of the Recognition of Divorces and Legal Separations Act 1971 (hereinafter, "RODLSA 1971"), introduced what is often called a "jurisdictional code".[79] This code recognised in the United Kingdom divorces that were obtained "by means of judicial or other proceedings" in England andin overseas jurisdictions where either party was a national, habitual resident, or was domiciled in (within the meaning of the word in international law). Section 6 of RODLSA 1971 retained the old common law rules of recognition. Section 8(2)(b) of the same Act enabled a court to deny recognition to divorces that were manifestly against public policy. The Domicile and Matrimonial Proceedings Act 1973 (hereinafter, "DMPA 1973"), was enacted as a response to the "liberal" judicial decision rendered in Qureshi v. Qureshi (discussed below) with a view to deny legal validity to any extra-judicial divorce affected in England. Through Section 16 of this Act, like RODLSA 1971, the common law rules of recognising overseas extra-judicial divorces were retained.However, itmodified the "jurisdictional code" by providing that if both parties were "habitually resident" in the United Kingdom for one year immediately preceding the institution of the divorce proceeding, an overseas divorce will not be granted. The present law on this subject is governed by the Family Law Act, 1986, which further tightens regulations on recognising extra-judicial overseas divorces. Relevant provisions of this Act are evaluated in this sectionafter offering an illustration and critique of the challenges faced by English law underthe earlier statutory regimes.

[77] *Supra* note 4 at 86.
[78] GORDON, FOREIGN DIVORCES: ENGLISH LAW AND PRACTICE, 55.
[79] *Supra* note 4 at 70 at 88.

Until 1857, divorces in England could only be obtained by an Act of Parliament. 17 years earlier, however, in *Moss v. Smith*,[80] Erskine. J., believed that a *get* delivered in London in 1833, provided the document of divorce was available, was sufficient to dissolve a Jewish marriage in English law. This case was curious as the opposing argument that a divorce could only be affected by an Act of Parliament was apparently rejected by him.[81] In R v. Hammersmith Registrar of Marriages, ex p Mir-Anwaruddin,[82] a Muslim man, domiciled in India, married an English woman and lived in England. He divorced her by pronouncingtalaqin England and sought a certificate and licence to marry again. This was rejected by the superintendent registrar and eventually by the Court of Appeal. The principal ground for this rejection was that "a monogamous English marriage to an English-woman could only be dissolved in England through the courts, i.e. in the usual English manner, regardless of the effectiveness of the talaq in the eyes of the parties' domicile".[83] A sense of the court's distaste towards talaq divorces, in general, is evident in Lord Brougham's insistence on the difference between "Christian" and "infidel marriages." The first case in the 20thcentury that recognised an extra-judicial divorce was *Har-Shefi v. Har-Shefi (No.2)*.[84]A Jewish marriage between an Israeli man domiciled in Israel and an English-woman domiciled in England was entered into in Tel Aviv. Subsequently, the marriage broke down and a Jewish divorce was affected at the Beth-Din in London. Pearce.J., upheld the validity of this divorce on the ground that it was valid under the law of the husband's domicile. Poulter finds that the judge was evidently moved the desire to avoid a limping marriage.[85]

Until the 1970s, the courts were far from consistent in their rulings. Some judgements resonated with Hammersmith's position and others with Har-Shefi. A high turning point was achieved in *Qureshi v. Qureshi*.[86] In this case, both parties were Muslims and had married in England. The husband, who was domiciled in Pakistan, divorced his wife as per the Muslim Family Laws' Ordinance (VIII) of 1961. The procedure, which he followed, required him to give notice to his wife and to the Pakistan High Commission in London of his pronouncement. The Commissioner at the High Commission acted as the official needed to facilitate reconciliation, as per the Ordinance's requirement, before the divorce could be

[80]Moss *v.* Smith,(1840) 1 Man & Gr 228.
[81]*Supra* note 23 at 110.
[82]R *v.* Hammersmith Registrar of Marriages, ex p Mir-Anwaruddin,[1971] 1 KB 634.
[83]*Supra* note 23 at 111.
[84]Har-Shefi *v.* Har-Shefi (No.2),[1953] P 220.
[85]*Supra* note 23 at 112.
[86]Qureshi *v.* Qureshi., [1972] Fam 173.

sanctioned. Simon. P. held the divorce as valid because it was effective under the law of the husband's domicile. Further, he listed five reasons for not applying his public policy discretion to invalidate the divorce.[87]This judgement has been celebrated as a desirable turning-point in English law. However, the legislative backlash against this judgement (discussed below) and the subsequent case of *Chaudhry v. Chaudhry*[88]made matters more complicated and problematic.

In *Chaudhry*, a "bare talaq" was distinguished from a "procedural talaq" (i.e. as seen in Qureshi). The former is different from the latter in that it constitutes a "simple" pronouncement of talaq without notification to an arbitral council or to the wife.[89] In*Chaudhry*, the husband was a national of Pakistan and had lived in Pakistan Occupied Kashmir before moving to England with his wife. Subsequently, he pronounced an oral talaq at a mosque in London and thereafter pronounced talaq again in Kashmir. The firstpronouncement was declared invalid in light of the changes brought to the law through the DMPA 1973 (i.e. in response to Qureshi). As for the second pronouncement, it was asked whether a bare talaq – which was legally accepted in India and Pakistan Occupied Kashmir – qualifies as "other proceedings" under the "jurisdictional code" discussed above. The court answered in the negative, refusing to recognise such "informal" proceedings as falling within what Parliament sought to validate.

This decision has been criticised widely. Poulter argues that this decision does very little to prevent limping marriages.[90] Pearl and Menskiargue that the tightening of recognition rules regarding extra-judicial divorces through DMPA 1973 and the Chaudhry decision "flatly contradict official legal assumptions of about how members of ethnic minority communities assimilate to and interact with the official laws of their new home".[91] They argue that such stringency on the part of English law has rendered Muslim forms of divorce, in particular, "legally invisible", forcing the Muslim minorities to approach their family disputes in alternate avenues which are outside the official English law.[92] Gordon observes that the sequence of developments in the run-up to the current 1986 Act reflect a strain of judicial

[87]*Ibid*., at 201.
[88]Chaudhry v. Chaudhry, [1984] 1 All ER 488.
[89]*Supra* note 23 at 119.
[90]*Supra* note 23 at 112.
[91]*Supra* note 4 at 96.
[92]*Ibid.*

intolerance, preserved particularly for the bare talaq.[93]Menski and Shah add by pointing out that even jurisdictions like Pakistan, which English law considers features a suitably "procedural" form of talaq, has validated forms of the bare talaq divorce.[94] This, they observe, English law appears to be unaware of.[95]Hamilton further suggests a possible prejudice against Muslim divorce customs. He observes that while Jewish divorces were considered valid, "public policy objections were raised, particularly in England, to Muslim talaq divorces."[96]

The Family Law Act, 1986

Part II of the Family Law Act, 1986, which is of relevance to our discussion, repealed the RODLSA 1971, as well as certain provisions of the DMPA 1973. Section 44(1) of the act retains DMPA 1973's bar on extra-judicial divorces obtained in England. The provision reads as follows:

"No divorce or annulment obtained in any part of the British Isles shall be regarded as effective in any part of the United Kingdom unless granted by a court of civil jurisdiction."

Pearl has argued that Section 44(1) does not change the position taken in the earlier statutory regime.[97]He gives the example of a Muslim man who pronounces a talaq in England and subsequently communicates it to an official in Pakistan. Such a divorce would be hit by Section 44(1). Pilkington, however, disagrees.[98] She gives weight to the word "obtained" and states that unlike the previous regime, the present Act focusses far more on where the divorce is obtained.[99]Since the pronouncement of talaq is followed by proceedings which are subsequently completed in Pakistan (i.e. under the 1961 Ordinance), the divorce is obtained in Pakistan. The divorce, therefore, falls out of Section 44(1)'s purview and is validated under Section 46 of the Act (discussed below).[100]Menski and Pearl see Pilkington's questions of "when (and therefore where) a transnational divorce is actually obtained" as important.[101] They argue that Pilkington's argument takes into account a procedural talaq (i.e. through the

[93] Gordon, Foreign Divorces: English Law and Practice, 94.
[94]Menski and Shah, *Cross-Cultural Conflicts of Marriage and Divorce Involving South Asians in Britain*, 178-9.
[95]*Ibid.*
[96]Hamilton, Family, Law and Religion, 103.
[97] Pearl, *Family Law Act 1986, Part II*, 39.
[98] M.P. Pilkington, *Transnational Divorces Under the Family Law Act 1986*, 37 International & Comparative Law Quarterly, 131–143 (1988)
[99]*Ibid*., 133.
[100]*Ibid*., 134.
[101]Pearl &Menski, Muslim Family Law, 100.

1961 Ordinance) and it therefore seems logical. However, if a "triple talaq" was pronounced according to practices valid in Pakistan Occupied Kashmir, the divorce takes effect immediately and it is therefore hit by Section 44(1).[102]

We turn to scholarly debates, and not to case law, because the recent statutory regimes, in their stringency, have discouraged ethnic minorities – particularly Muslims – from moving the courts.[103] They seem to prefer more unofficial means to resolve disputes.

While Section 44(1) possesses the problem of interpretation, subsequent examples from the 1986 Act, discussed below, are problematic in the outcomes they bear on ethnic minority communities.

Section 46 of the 1986 Act retains the earlier distinction between "procedural" forms of divorce – i.e. those obtained "by means of proceedings" – and those obtained "otherwise than by means of proceedings". McClean believes the latter – detailed in Section 46(2) – is a pointed reference to the bare talaq and certain Jewish forms of divorce.[104] Sections 46(1)(a)(b) and 46(5) of the 1986 Act refer to divorces obtained abroad "by proceedings". "Proceedings" refer to the Pakistani and Bangladeshi divorce procedure detailed in the 1961 Ordinance. Such overseas divorces, the provisions stipulate, will be recognised in the United Kingdom if, at the relevant date, the proceedings are valid in the country to which either party is a national, a habitual resident or is domiciled in. Pearl and Menski argue persuasively that sustaining the use of domicile and nationality as "connecting factors" is open to "abuse" in the long-term by British nationals "who have the financial means to move to the subcontinent for some time to 'arrange' their family affairs without supervision by any state legal system but claiming subsequent legal recognition of such arrangements".[105]

Section 46(2) introduces a tighter restriction on divorces like the baretalaq – i.e. obtained "otherwise than by means of proceedings". Such divorces will be recognised if the following conditions are met: (i) the country in which it was obtained deems it effective in law (this is arguably a departure from the holding in Chaudhry); (ii) at the relevant date, both parties were domiciled in that country (however, if only one of them was domiciled in that country, then the other must be domiciled in a country whose law recognises such a form of divorce);

[102] *Ibid.*
[103] Pearl &Menski, Muslim Family Law, 98-102.
[104] J. David McClean, Morris: The Conflict of Laws, 191 (Sweet & Maxwell 4) (1993)
[105] Pearl &Menski, Muslim Family Law, 98.

and (iii) "neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date."[106] (emphasis added). The last condition is of particular importance. In the previous statutory regime, only if both parties had been so resident would such divorces be denied recognition. However, Section46(2)(c) makes the rule more stringent. In effect, it is "designed to prevent easy circumvention of the rule that no extra-judicial divorce can be obtained in England".[107] The English and Scottish Law Commissions advised strongly against retaining the distinction between procedural and non-procedural divorces. Echoing Menski and Shah, scholars substantiate this assertion by pointing out that the distinction, arguably couched on the "procedural" understanding of divorces in Pakistan and Bangladesh, are flawed. These countries, for a long time now, officially recognise so-called "non-procedural" forms of divorce. The distinction, therefore, needs to be re-examined.

The backlash against Qureshi led to the present regime insisting that all divorces must be backed by documentary evidence – i.e. the divorce must be officially registered.[108] This creates an unfortunate situation for many ethnic minorities. The difficulty in obtaining documentation from countries like India, Pearl argues, is well-known and will create a severe "stumbling block" in the effort to gain legal recognition in England.[109]Menski and Shah point to Section 29 of the Hindu Marriage Act, 1955, in India. The provision prescribes an official procedure for divorce as well as a recognition (vide subsection (2)) of customary forms of divorce.[110] These customary divorces – prevalent among Hindu minority communities in Bangladesh and Pakistan as well – do not involve or result in official documentation. Though these divorces would be valid in the Indian subcontinent, they would be denied recognition in England. This is an unfortunate outcome of the present regime. It doesn't seem to serve a useful end.[111]

Lastly, Section 51(3) of the 1986 Act retains in the judge discretion to refuse recognition of a divorce on public policy grounds. A common target of this provision, under previous statutory regimes, has been the bare talaq. It has been found problematic because of its unilateral nature, often denying the wife an equal say in the matter. Pilkington, however,

[106] Section 46(2)(c), Family Law Act 1986
[107]McClean, Morris: The Conflict of Laws, 196.
[108]Menski and Shah, *Cross-Cultural Conflicts of Marriage and Divorce Involving South Asians in Britain*, 178-9
[109] David Pearl, *Family Law Act 1986, Part II*, Cambridge Law Journal, 35–38.
[110]Menski and Shah, *Cross-Cultural Conflicts of Marriage and Divorce Involving South Asians in Britain*, 178-9.
[111]*Ibid.*

believes this position is hypocritical.[112]She demonstrates, as this paper has in a previous section, that the modern form of undefended divorces in England facilitates the same sort of unilateral repudiation that the bare talaq is accused of. Analysing case law, she persuasively asserts that "saving" the British welfare state from the expense of legal proceedings is the primary motivation behind dismissing the bare talaq on public policy grounds.[113]

The introduction of the 1986 Act did not address the crucial concerns raised in the run-up to its enactment. In fact, as we have seen, it embodies them. The next section shows how outcomes like these have driven ethnic minority practices "underground".

Operationalising the "unofficial law"

English law, rather than negotiating itself through ethnic minority practices, has insisted on its own supremacy. While the goal of this project may have been to assimilate cultural diversity customs under the umbrella of English law, evidence suggest that this has been far from realised. Believing Muslims in England, for instance, have turned to a parallel realm to sort out their personal law matters, widely recognised asangrezishariat.[114]It is the experience of the angrezishariat that this section briefly explores. The intention is to understand through the Muslim example how an alternate legal possibility could take shape among ethnic minorities.

Masaji Chiba, the Japanese jurisprudent and legal pluralist, articulates a theory of legal pluralism that captures the scenario in England as one sees it today. English law would qualify as what he calls "official law", while shari'a forms the "unofficial law". This theoretical framework indicates how British Muslims continue to feel obligated to shari'a law, despite the existence of a state-run, enforceable legal system. This presses into motion "legal postulates", an ethical framework, which contains religious and culture specific concepts and notions.[115]As a result, rather than deserting their religious notions, British Muslims appear to have built requirements of English law into their religious structures.[116] Further, the word "angrezi" removes the concept from generic or prototypical models of

[112] Pilkington, *Transnational Divorces Under the Family Law Act 1986*, 137-8.
[113]*Ibid*., 139
[114]Pearl &Menski, Muslim Family Law, 74-5.
[115]Masaji Chiba, Asian Indigenous Law: In Interaction with Received Law, 6-7 (Routledge) (1986)
[116]*Ibid.*

Islam to one that speaks to theunique sensibilities of the prominently South Asian Muslim population in Britain.[117]

The angrezishariat, for all its promise,has received severe scrutiny for its treatment of women. In the context of divorce, where a husband pronounces talaq on his wife, under community pressure or out of her orthodox beliefs, the woman may acquiesce to the next step of affecting a divorce by mutual consent in a civil court. However, on her challenging the divorce (though in Islamic law her challenge is immaterial), one wonders how English law will approach her defence. Case law is silent on situations like these.[118]The experience of Hindu women using the hardship defence in Section 5 of the MCA (discussed in subsection 1.2 of this paper) suggests that a Muslim wife may not find much help from English law.Further, the problem of recalcitrant spouses in the Muslim context is a dark area. It is one which is scarcely explored in case law and into which studies are also scant.[119]

To uncover some insights, Pearl and Menski turn to forms of arbitration councils (or Shariah councils) – a prominent example being theMuslim Law (Shariah) Council (U.K) – which form a widely studied aspect of the angrezishariatstructure.[120] These councils aim to offer alternate dispute resolution forums to deal with conflicts of religious law among Muslims. KaveriQureshi points to a "broad church of academics", whoseviews she represents inBaroness Cox's call for a Bill to reign in the creeping of shariah councils into the jurisdiction of English law.[121] This "creeping" refers to the supposed lack of agency afforded to a woman in the reconciliatory processes of the council.[122]While she cites several academic studies that substantiate this view, she presents them with a sense of "caution".[123] She notes that equally compelling studies show how the council serves the important need oaf woman to "feel fully released from the marriage" by ensuring Islamic divorces are affected concurrently with its civil law counterpart.[124]After exploring the working and limitations of Shariah Councils in dealing with several forms of Muslim divorce, Qureshi observes that the supposed consistency and centralised functioning attributed to shariah councils are questionable. She further finds that the need and aspirations of Muslim women are articulated

[117]*Ibid.*
[118]Pearl &Menski, Muslim Family Law, 394.
[119]*Ibid.,* 397
[120]Pearl &Menski, Muslim Family Law, 396-8.
[121]Qureshi, Marital Breakdown among British Asians, 155-8.
[122]*Ibid.*
[123]Qureshi, Marital Breakdown among British Asians, ch. 6.
[124]*Ibid.*

in multiple areas, of which her identity as a woman and as a Muslim are only two important examples. She returns to Pearl and Menski's suggestion that the angrezishariat be viewed as a broad range, of which shariah councils are only a part. Time and further scholarship, in this case, will possibly reveal a more fuller understanding of the angrezishariat. As of now, it has demonstrated that it works, albeit as a work in progress.

Conclusion

It was found that phrases like "right thinking person" and "reasonable" expectations require English courts to move away from generic assumptions surrounding these terms and confront the unique contexts of ethnic minorities. Looking at case law and scholarly assessments on the subject, it was found that English law has not successfully risen to meet this challenge. Subsequently, a selection of cases involving Hindu women were considered. It was observed that the hardship defence in Section 5 of the MCA was applied rather inconsistently to their contexts (i.e. compared with Jewish and Muslim women, for instance). It was also seen that undefended divorce petitions in England have emerged as "divorces on demand". Both these conclusionswere made to demonstrate the sort of difficulties English law faces in making ethnic minority women more secure while they are subjected to domestic divorces laws. The last part of the section examined the problem of recalcitrant spouses. While English law was seen to have made significant strides in resolving this problem in a Jewish context, similar developments in the Muslim sphere were not noticed (in the official sphere, at least). The second section probed for challenges in conflicts of laws context. The runup to the Family Law Act 1986 was summarised and analysed. Thereafter, the present law on overseas divorce was critiqued and its unfavourable impact on ethnic minorities was detailed. The final section of this paper explored the development of the unofficial legal sphere, particularly through the example of the angrezishariat. Shariah councils, which form part of the angrezishariat, was examined and challenges regarding the treatment of Muslim women were briefly explored.

The conclusions that have emerged in this analysisreveal the range of problems English law experiences given the presence of different divorcing patterns among ethnic minorities. Whether English law will attempt to resolve these problems within its own realm is unclear. Of arguably greater significance, however, is the emergence of unofficial forums. As these forums develop, the limits of positivist state law may become more apparent. Confronting these limits may usher in a new approach to family law matters – an approach which is likely toaddresslegal pluralism with greater awareness and sensitivity.