Articles

Limping marriages: a problem cured or hidden?

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This article analyses the problem of 'limping marriages' in the UK. With no reliable data, the focus is on Muslim women as research suggests some may be impacted more than others, arising from their need for a religious divorce. It is argued that the law on the recognition of overseas divorces, the Family Law Act 1986, lacks clarity, leading to unjust outcomes for some and has thus failed in its policy aim to protect women. An argument for reform is made based on the rationale underlying private international law: justice between parties.

A limping marriage

A 'limping marriage' is a marriage which is valid in one country but not in another.[1] Problems occur for some women who are unable to enter into new relationships, as the overseas divorce has not been recognised, thus leaving them in a limping marriage and often with no choice but to enter into a religious – only ceremony in the UK. Also, there are women who enter into a new relationship with a non-EU national, and then face difficulties when sponsoring their partner to join them in the UK, such as in the case of *Baig*,[2] discussed below. A number of cases also illustrate the problem of transnational divorces, where the steps of the religious divorce are begun in one country and completed in another, for example, the UK and then Pakistan or Israel.[3] This can also lead to a limping marriage.

The Family Law Act 1986 ('the Act') determines when a divorce obtained in a country outside the UK and the EU, which is legally valid in that country ('overseas divorce') can be recognised in the UK. The problem of limping marriages has arisen because the law has adopted an increasingly restrictive approach to the recognition of overseas divorces. In *Lachaux v Lachaux* [2019] EWCA Civ 738, it was submitted to the Court of Appeal that the Act was created to prevent limping marriages. This may have been the stated policy behind the legislation but it has had the reverse effect,[4] as the avoidance of limping marriages is 'primarily achieved by the recognition of overseas divorces rather than the non-recognition'[5].

The scale and impact of limping marriages

Pearl and Menski raised the issue of limping marriage over twenty years ago.[6] The scale of the problem for women in limping marriages (also referred to as *chained wives* or *anchored women),* has not been researched, so it is unclear which

1 AV Dicey and L Collins: *Dicey, Morris & Collins on the Conflict of Laws* (15th ed. Sweet and Maxwell, London, 2012) 1–044, 18–163
2 *Baig (Immigration – Validity of Pakistani Divorce) Pakistan* [2002] UKIAT 04229
3 *R v Registrar General of Births, Deaths and Marriages ex p. Minhas* [1977] QB 1 325, *R v Secretary of State For the Home Department Ex Parte Fatima* [1986] 2 FLR 294, *Berkovitz v Grinberg (Attorney-General Intervening)* [1995] 1 FLR 477.
4 D Pearl and W Menski, *Muslim Family Law*. London (3rd ed, Sweet and Maxwell, London, 1998), p 101
5 (n4) Moylan LJ para 173; Law Commission, *Private International Law: Recognition of Foreign Nullity Decrees* (Law Com No 137, 1984) paragraph 2.40
6 Pearl and Menski (n5)

communities are implicated and to what extent. However, research suggests Muslim women may be impacted more than others.[7] Caselaw on the issue has also mainly involved Muslim parties. The lack of recent cases in immigration law in particular, may suggest the Muslim community has rid itself of the problem of limping marriages.[8] With no data available, one can only speculate that this may be due to greater awareness amongst both the community and legal advisors. Or, more likely, the problem has shifted elsewhere and hidden itself as a result of the increasingly restrictive approach of the law towards overseas divorces over the decades.

In order to understand the impact of the law on Muslim women, it is necessary to understand the personal law context. There are a number of ways in which a Muslim couple can dissolve a marriage according to Muslim personal law (*sharia law*). A detailed explanation is beyond the scope of the article. In brief, dissolution can be extra-judicial, by agreement of both parties or by application to a sharia law body.[9] It is the extra-judicial method that has generated the most interest outside the Muslim community due to its unilateral effect and, in the case of the *bare talaq,* (husband pronounced, irrevocable divorce with no court involvement), the perceived prejudice against women.

There are three possible routes for women who are involuntarily stuck in limping marriages. Firstly, women may have terminated limping marriages by seeking a civil divorce in court, despite their uncertainty regarding the law, delays and concerns regarding costs,[10] before entering into a new relationship. Following this, they may have also sought a *khula* or mubarah (wife's application for a divorce) from a sharia council.[11] The increase in demand for sharia councils' services has been widely researched by Bano and others.[12] Home Office publication, *Report of the Independent Review into the Application of Sharia Law in England and Wales* found that nearly all of the petitioners in the sharia councils were women and over 90% were seeking a divorce.[13] This may relate in some cases to foreign divorces but without any data, again, this is not clear. The Home Office report did not investigate the use of sharia councils by women where there is a transnational element, despite a call in 2017 by a leading academic in the field for research on this issue.[14] Secondly, as mentioned above, women may be remaining in a limping marriage, as the overseas divorce in their view is a valid religious divorce and then enter into a religious-only marriage in the UK. This would mean loss of protection under civil law if the relationship were to break down (such as ancillary relief, property, child custody and inheritance rights). The Home Office report also failed to investigate what proportion of women using the sharia councils had not undergone a civil marriage and as a result were in unregistered relationships. In the absence of reliable data, the estimated figures show 75–80% of Muslim marriages in the UK being unregistered.[15] Finally, a number of women may be travelling to the relevant overseas country to finalise the divorce proceedings in personal law fora,

7 I Uddin, 'British-Bangladeshi Muslim women and divorce in the UK' (Unpublished paper, Middlesex University, 2018) 101. Uddin interviewed 27 British Bangladeshi Muslim women, of which 14 said they had undergone a transnational marriage, of which half said they travelled abroad to marry.

8 F Sona 'Defending the Family Treasure Chest: Navigating Muslim Families and Secured Positivistic Islands of European Legal Systems' in Shah, Foblets and Rohe, (eds.) *Family, religion and law: Cultural encounters in Europe* (Farnham: Ashgate, 2014) p.135

9 Pearl and Menski (n5) 283.

10 Uddin (n8) p 147

11 Sona (n9) p 135; Uddin (n8) 164, 234

12 S Bano, 'Sharia Courts in Relation to Divorce within the Muslim Community in Britain' (Unpublished paper, University of Warwick, 2003; I Uddin, (n10)

13 Home Office, *Report of the Independent Review into the Application of Sharia Law in England and Wales'*

13 (Cm 9560, 2018) page 5.

14 Shah P, 'South Asian Legal Systems and Families in Foreign Courts: The British Case' in: Garimella, Ramani and Jolly (eds), *Private International Law and South Asian States' Practice* (Springer, Singapore, 2017) 3–18, p.16

15 Uddin (n8) 44

but this has been found to be unpopular, with women citing fear and discomfort.[16] This would clearly also incur expense and time. Despite the restrictions of the law, Muslim women appear to be finding avenues, or 'navigation strategies'[17] that allow them to move on with their lives following divorce.

Development of the law

The position of the current law is best understood from a brief consideration of its development over time. Historically, in divorce matters, the common law considered the question of jurisdiction by reference to domicile.[18] Throughout the 19th and early 20th centuries, overseas divorces were recognised under English law applying these principles of private international law. The pinnacle of this 'liberal' approach came with the case of *Qureshi v. Qureshi*.[19] In this case, a *talaq* pronounced in England was recognised as valid where the husband was found to be domiciled in Pakistan.

The approach under the common law was then curbed by statute based on public policy grounds. The first statute, aimed to consolidate the existing common law into one, comprehensive statute for the entire United Kingdom,[20] was the Recognition of Divorces and Legal Separations Act 1971 ('the 1971 Act'). This implemented the Hague Convention on the Recognition of Divorces and Legal Separations 1970. During passage of the Bill, the Lord Chancellor said that a principal aim was to reduce limping marriages.[21] Section 2 stated that overseas divorces shall be recognised in the UK if obtained by 'judicial or other proceedings' in a country where either spouse is a national or habitually resident. This required formal proceedings, either before a court or another, impartial body recognised by the state for that purpose (such as the Union Council, in Pakistan). Section 6 preserved the common law grounds and accorded recognition to an overseas divorce if obtained in the country of domicile. However, s 8(2) gave the court discretion to refuse to recognise such a divorce on public policy grounds, if the other spouse had not been given notice of the divorce nor the opportunity to be involved in the proceedings. This effectively prevented recognition of the *talaq* where there was no court involvement or notice to the spouse. The House of Lords in *Quazi v. Quazi*[22] held that a talaq pronounced in Pakistan in accordance with the requirements of the Muslim Family Law Ordinance 1961 ('MFLO 1961'), was valid under of the 1971 Act as 'proceedings', as it included notification to the Chairman of the Union Council. The court took a pragmatic approach, in line with the policy behind the 1971 Act, focusing on the need to avoid limping marriages (per Lord Diplock).

Then followed another statutory provision, the Domicile and Matrimonial Proceedings Act 1973 ('the 1973 Act'). This restricted s 6 of the 1971 Act by adding that such a divorce would not be recognised if both parties were habitually resident in the UK (s 16(2)(c)).

The policy of law was to prevent 'talaq tourism' (British residents going overseas for the main purpose of securing a divorce) and to safeguard women's financial rights,[23] as illustrated in cases such as: *Chaudhry v. Chaudhry*[24] *(*where a *talaq* carried out in accordance with the law of Azad Kashmir was denied recognition), as reiterated by the

16 Ibid 159,162
17 Sona (n9) 116, 135.
18 *Armitage v Att. Gen* [1906] P 135; *Le Mesurier v Le Mesurier* [1895] AC 517
19 [1971] 1 All ER 325
20 Law Commission (n6) para 7.2
21 Hansard (HL), 16 February 1971, vol. 315, col. 483 (Lord Hailsham of St. Marylebone).
21 < https://hansard.parliament.uk/Lords/1971-02-16/debates/177baa4d-fe0a-4f27-bc81-4c32bc758ecf/RecognitionOfDivorcesAndLegalSeparationsBillHl> accessed 21.4.2021
22 *Quazi v Quazi* [1980] AC 744
23 (n9) p.134
24 *Chaudhary v Chaudhary* [1985] FLR 476

House of Lords in *Ghulam Fatima*.[25] Pearl and Menski noted the 'hostile' and 'offensive' tone of the court and predicted this would lead to British Muslims seeking resolution of family law matters through informal fora.[26]

The current law: The Family Law Act 1986

At a second reading of the Bill in the Lords, the Solicitor General stated that the policy of the proposed legislation was to counter the discriminatory effect of *talaq* and other extra-judicial divorce against women.[27] The Act came into force on the 4th April 1988. Part II amended the law on the recognition of overseas divorces by repealing the 1971 Act and repealing the relevant provisions of the 1973 Act. It introduced an effective blanket ban on the recognition of extra-judicial divorces in s 44(1), despite no such recommendation from the Law Commission. Also, the distinction between bare and procedural talaqs, established by caselaw, continued.[28] Section 44(1) reads:

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

Section 46 sets out the grounds on which a foreign divorce may be recognised under English law. Section 46(1) of the Act states that if a divorce is obtained overseas by 'proceedings' [which means judicial or other proceedings under s 54(1)], then in order for it to be recognised in the UK it must be shown that:

- it is effective under the law of the country in which it was obtained; and
- at the relevant date either party was habitually resident, domiciled in or a national of that country at the time proceedings were begun.

Under s 46(2), a non-proceedings divorce will only be recognised in the UK if:

(a) it is effective under the law of the country in which it was obtained; and

(b) at the relevant date

  (i) each party to the marriage was domiciled in that country; or
  (ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and

(c) neither party was habitually resident in the UK for a period of one year prior to executing the divorce overseas.

Many provisions echo the 1971 Act, such as s 51 which allows the court discretion to refuse recognition of a divorce if to do so would be 'manifestly contrary to public policy'. There is also discretion to refuse recognition of a 'proceedings' divorce if the other party has been deprived of notice or the opportunity to participate in the proceedings. Similarly, a non-proceedings divorce can be denied recognition under s 46(2) if official documentation as proof of the divorce is not produced.

Unfair outcomes in cases

The impact of the law on women is clear from some examples of caselaw in England and Wales, which illustrate the hardships faced. For example, through s 46(2)(c) quoted above , the Act aimed to further tighten *talaq tourism*), with the requirement for non-proceedings divorces that neither party should be habitually resident in the UK for a period of one year prior to commencing the divorce, applying to either party rather than both, as had previously been the case in the 1971 Act.

25 *R v Secretary of State For the Home Department Ex Parte Fatima* [1986] 2 FLR 294
26 Pearl and Menski (n5), p.390
27 HC Deb 24 October 1986 vol 102 cc1440–4 < https://api.parliament.uk/historic-hansard/commons/1986/oct/24/family-law-bill-lords#S6CV0102P0_19861024_HOC_22> accessed 14.02.2021
28 Pearl and Menski (n5) 98

This provision was considered by the Immigration Appeal tribunal in a starred determination in *Baig*.[29] Mr Baig was refused entry clearance in Pakistan, to join the sponsor, Ms Batti, in the UK as her spouse. The issue was whether Ms Batti's first marriage in Pakistan was validly dissolved under s 46 of the Act, having been carried out by the first husband pronouncing *talaq* over the course of a three month 'cooling off' period (*talaq al hasan*). The question was therefore whether Ms Batti was free to marry Mr Baig when she did. The Tribunal held that the talaq could not be recognised as the sponsor was habitually resident in the United Kingdom at all material times and 'proceedings' under s 46(1) of the Act were not followed, as no notice was given in accordance with the Pakistan MFLO1961. Mr Baig's appeal failed on the ground that Ms Batti, some 10 years after the talaq, was still married to her first husband and had, when marrying Mr Baig, committed bigamy and polyandry. This case, although correctly applying the current law, highlights the plight of women stuck in limping marriages, who genuinely believe they are divorced, unable to move on with their lives and faced with the stigma of being labelled a bigamist.

The effect of the tightening of the law also reverberated beyond *talaq*, as recognition was denied to a transnational Jewish divorce, a *get*, in *Berkovitz v. Grinberg*[30] where Wall J remarked as follows:

> 'If . . . there is a distinction to be drawn between a talaq and a get it is a distinction which Parliament must draw after a full public debate on all the questions of policy which arise. Accordingly, the question as to whether or not in an increasingly multi-racial and multi-ethnic society the refusal to recognise the transnational divorce can or should continue is a matter for Parliament and should not influence my interpretation of the Statute.'[31]

However, a lack of recent case law shows the issue of limping marriages or 'chained wives' appears to have abated for Jewish women. David Frei, a solicitor in this field, spoke at a faith seminar[32] of the Jewish community being a longer settled community in Britain compared to Muslims, and thus having 'ironed out' the problem of limping marriages.[33]

The constraints of the Act on judicial discretion was shown in *MET v HAT*[34] where the wife's claim for interim financial relief failed. This was due to s 12 of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984) which states a party can apply for financial relief if the marriage has been dissolved by 'judicial or other proceedings'. The court was satisfied that the husband's overseas *talaq* was valid under the requirments of s 46(2) of the 1986 Act – a 'non-proceedings' divorce, thus denying the wife the right to apply for financial relief as she also could not demonstrate a connection with the jurisdiction. Mostyn J (as he was then) remarked a follows:

> 'I would say, almost parenthetically, that it is a surprising state of affairs, given that the Act was brought into effect to deal with the unfairness which arose from the pronouncement of talaqs abroad which may or may not be proceedings divorces. But, be that as it may, that is Parliament's will as expressed in the Act.'[35]

29 (n2)
30 *Berkovitz v Grinberg (Attorney-General Intervening)* [1995] 1 FLR 477.
31 *ibid* [23] Wall J
32 A Gold and C Bowden ,'Difficulties Faced by Jewish and Muslim Women When Seeking A Religious Divorce' (*Family Law Week*, 20 July 2017 www.familylaw.co.uk/news_and_comment/difficulties-faced-by-jewish-and-muslim-women-when-seeking-a-religious-divorce#.WwL0C1Mvy9Y > accessed 14.02.2021
33 Frei also states that the Jewish community have utilized s 10A of the Matrimonial Causes Act 1973, inserted by the Divorce (Religious Marriages) Act 2002, which allows a party to apply to the court to stay grant of a divorce until a religious divorce is given by the husband. At the time of writing, this provision does not apply to Muslims.
34 *MET v HAT* [2013] EWHC 4247 (Fam), [2014] 2 FLR 692
35 *ibid* [11] Mostyn J

When the wife applied again for financial relief in *MET v HAT (No 2)*,[36] armed with a new expert's report, the same judge ruled a prior *talaq* by the husband, was a 'proceedings' divorce. The judge also utilised his discretion under s 51(3)(b) that the husband had produced no evidence of the claimed non-proceedings divorce, thus allowing a claim to be made by the wife for relief under the MPFA 1984. This case underscores the potential injustice caused by the Act, where outcomes can depend on firstly, the opportunity of parties to instruct an expert witness. Secondly, judges have to look at the internal standards of the countries where the divorce was obtained[37] contributing to a complication in the law in that overseas *talaqs* are now subcategorised according to the internal legal procedure of the countries in which they were obtained, resulting in, for example, 'Pakistani *talaqs*' (which are procedural) compared to non-procedural, or bare, *talaqs*, which are valid according to the law of some Muslim countries such as Sudan, the Gulf States and regions such as Azad Kashmir in Pakistan. Further, the laws of South Asian countries have developed in the decades since the Act,[38] which further strengthens the case for reform of English law, discussed below.

'Ill-informed' public policy

The underlying policy of the Act has been flawed. In 1984, the Law Commission criticised the courts' approach to the meaning of 'judicial and other proceedings' as restrictive and conflicting[39] yet, when the Act was passed, these findings were ignored. This has resulted in a lack of certainty, leading to a reversal in outcomes as in *MET v HAT (No 2)*[40] and *NC*[41] where in the latter case, reference was made to Pearl J's comment of the Act being based on 'rather ill-informed public policy'[42].

The problems faced by women who seek to re-marry as a result of the restrictive approach introduced by legislation has been argued to violate their rights to private and family life under Art 8[43] and the right to marry under Art 12 of the ECHR. In addition, Art 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women* echoes these provisions and requires States to 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations'.

There is a strong argument amongst judges and academics, that limping marriages, including those arising from transnational divorces, must be avoided as it is in the interests of justice, to do so. The rationale for the existence of private international law: justice between parties,[44] has been overlooked by successive legislation spanning decades and, it is argued, has potentially pushed the problem elsewhere.

The judicial questioning of the policy reason underlying the Act, indicate how tightening the law has allowed the courts little leeway and left parties with unsatisfactory outcomes. In contrast, the approach in EU States has been wider, some even argue, complicated,[45] with the courts applying foreign law and, in some cases, recognising foreign divorces to avoid limping marriages.[46] The approach in Europe is categorised by Rohe who identifies a

36 *MET v HAT (Interim Maintenance)* [2014] EWHC 717 (Fam), [2015] 1 FLR 576
37 K Alidadi , 'The Western Judicial Answer to Islamic *Talaq*: Peeking through the Gate of Conflict of Laws in the U.S. and Belgium' (2005) 5 UCLA Journal of Islamic and Near Eastern Law 1, p.43
38 Pearl and Menski (n5) p.98
39 Law Commission (n6), paras 52 and 6.10
40 (n35)
41 *NC* (bare talaq – Indian Muslims – recognition) Pakistan [2009] UKAIT 00016)
42 Judge David Pearl , 'The Application of Islamic Law in the English Courts' (Noel Coulson Memorial Lecture, Cornell University, 1995 < https://middleeast.library.cornell.edu/content/application-islamic-law-english-courts > accessed 21/02/2021
43 P Kruiniger, *Islamic Divorces in Europe: Bridging the Gap between European and Islamic Legal Orders* (1st edition, Eleven International Publishing, 2014) p.6
44 D McClean and V Ruiz Abou-Nigm, *Morris: The Conflict of Laws* (8th Ed, Sweet and Maxwell, London, 2012) 6–7
45 ibid 251
46 Alidadi (n36) 75–76.

'concrete' view as protecting women from limping marriages, and the 'abstract human rights approach' based on the principle of non-discrimination between genders. There is a strong argument for reform of the current law, by adopting the 'concrete' position as, as Rohe shows, this is surely a fair outcome for a woman who consents to recognition of an overseas divorce and is not forced to expend time and costs in applying for a civil divorce.[47] This sentiment is also reflected by Shah, who views the constraints on judges under the public policy grounds unhelpful – 'the judicial sense of justice based on an evaluation of the situation as judges might see it in individual cases is being substituted for a more rigid rule-based system which is likely to create more, not fewer, problems in practice'[48].

Suggestions for reform

Simplification of the law is required by removing the distinction between divorces undertaken through 'judicial or other proceedings' and those that are not. The lack of clarity of the term 'judicial or other proceedings' in s 54(1) has caused 'nothing but confusion'[49], since its introduction into domestic law through the 1971 Act. There appears to be no valid reason for the requirement for 'judicial or other proceedings' to continue. The confusion in the law means outcomes for the parties are uncertain and depend on the quality of legal representation and whether a party has the resources to instruct an expert witness. This is illustrated in the cases of *MET v HAT (No 2)* above, where the parties were wealthy, compared with *NC*[50] where the appellant stated an expert opinion was unaffordable and *Mohamoud v ECO, Abu Dhabi*[51] an unsuccessful appeal by the husband of a British Muslim woman, where the court did not have the benefit of expert evidence on the validity of a *bare talaq* in the UAE. The need for a more just approach is also supported by many who call for a more pluralistic approach to family law in order to attain 'situation-specific justice'[52]. This can be achieved foremost, by a return to case-by-case consideration which existed before the Act. A removal of the 'blanket ban' in the Act is required and a continuation of judicial discretion on public policy and fairness grounds. Each matter would be decided on a case-by-case basis, involving a balancing exercise as to whether it is in the public interest for a limping marriage to continue.

Conclusion

To conclude, the policy of the Act, to protect women from extra-judicial divorce, has clearly failed as some women wish to follow both secular and religious divorce laws. Despite having secured a civil divorce, women are seeking religious divorces from sharia councils.[53] With respect to foreign divorces, it is argued that the persistence of the problem of limping marriages is a stronger argument against the public interest than the potential gender discrimination resulting from a bare *talaq*. The Act has clearly created unfairness for women as the problem appears to have been pushed elsewhere and some women may, under the civil law, be stuck in limping marriages. At worst, they are labelled bigamists. The problem has been festering for decades; some groups, like the Jewish community, have found solutions. Others still suffer from a lack of recognition of the overseas divorce.

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47 M Rohe 'Family and the Law in Europe: Bringing Together Secular Legal Orders and Religious Norms and Needs' (n9) p.63–65

48 P Shah (n15) 7

49 S Nott, 'Judicial and Other Proceedings': The Story So Far' in International and Comparative Law Quarterly Vol 34 [1985] No. 4 838

50 (n40) para 11

51 UT(IAC), Unreported, OA/13118/2012, 29.11.13

52 W Menski, 'Plurality-Conscious Rebalancing of Family Law Regulation'; M Jänterä-Jareborg, 'Cross-border Family Cases and Religious Diversity: What Can Judges Do?' in Shah and others (n9)

53 (n8) 164, 234 Uddin's research found that eleven out of fifteen participants, who had undergone a civil divorce, desired/needed a religious divorce from the sharia councils.