Intellectual Discourse

Volume 27 Number 2 2019

International Islamic University Malaysia
http://journals.iium.edu.my/intdiscourse/index.php/islam

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Volume 27 Number 2 2019

Intellectual Discourse is a highly respected, academic refereed journal of the International Islamic University Malaysia (IIUM). It is published twice a year by the IIUM Press, IIUM, and contains reflections, articles, research notes and review articles representing the disciplines, methods and viewpoints of the Muslim world.

Intellectual Discourse is abstracted in *SCOPUS, ProQuest, International Political Science Abstracts, Peace Research Abstracts Journal, Muslim World Book Review, Bibliography of Asian Studies, Index Islamicus, Religious and Theological Abstracts, ATLA Religion Database, MyCite, ISC* and *EBSCO*.

ISSN 0128-4878 (Print); ISSN 2289-5639 (Online)

http://journals.iium.edu.my/intdiscourse/index.php/islam
Email: intdiscourse@iium.edu.my; intdiscourse@yahoo.com

Published by:
IIUM Press, International Islamic University Malaysia
P.O. Box 10, 50728 Kuala Lumpur, Malaysia
Phone (+603) 6196-5014, Fax: (+603) 6196-6298
Website:http://iiumpress.iium.edu.my/bookshop

Intellectual Discourse
Vol. 27, No. 2, 2019

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Intellectual Discourse, 27:2 (2019) 555–575

ISSN 0128-4878 (Print); ISSN 2289-5639 (Online)

A Critical Analysis of Islamic Council of Europe: From a Juristical and Islamic Legal Maxim Perspective

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Abstract: Muslims living in England are living in a predicament. On the one hand, they have to face the reality that the laws governing the family institution are secular in nature. This poses a threat to their identity and freedom of religion. On the other hand, they are commanded by Islam to settle their disputes according to its laws and principles. However, this is unrealistic, simply due to the fact that the only recognized legal system in England is the English Law. To circumvent this situation, certain Muslim scholars and communities have established quasi-judicial courts, acting in the capacity of mediators, counsellors, arbitrators and even judges, in order to settle marital disputes. These courts, known as Shariah councils, provide a modern approach to alternative dispute resolution, whereby Muslim families and individuals can have their disputes resolved amicably. It was also set up as a response for Muslims to adapt to life under the English secular laws in which they live in, that do not afford them the right of having a SharÊ‘ah-based institution. One such Shariah council offering a modern approach to settling marital disputes amicably is the Islamic Council of Europe. The researcher conducted an in-depth interview with the said council and was able to collect a couple of arbitrational cases and analysed them in order to give a better understanding into its inner workings, its structural set-up and operation. Hence, this paper aims to critically and juristically analyse them from an Islamic legal maxim perspective while taking the Muslim minority context into consideration.

Keywords: Islamic Council of Europe, Muslims, England

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Abstrak: Umat Islam yang bermastautin di negara England berada dalam keadaan kesukaran dan belengu. Mereka terpaksa akui undang-undang yang merangkumi isu kekeluargaan yang berunsur sekular. Sudah pasti ini akan menimbulkan ancaman terhadap identiti mereka dan kebebasan beragama. Sebaliknya, mereka sebagai umat Islam dituntut untuk menyelesaikan segala pertikaian mengikuti Quran dan Sunnah. Walaubagaimanapun, ini adalah sesuatu yang tidak realistik, kerana hanya sistem undang-undang Britain yang diakui di negara itu. Untuk mengelakkan pertikaian ini, sesetengah ulama dan masyarakat Muslim di sana telah menubuhkan mahkamah kuasi-kehakiman, yang diberi kuasa untuk menjadi pengantara, kaunselor, penimbang tara dan juga hakim, untuk menyelesaikan masalah masalah perkahwinan. Mahkamah yang dikenali sebagai Majlis Syariah, menyediakan cara penyelesaian kaedah moden sebagai cara alternatif menyelesaikan masalah perkahwinan. Di mana mereka boleh menyelesaikan masalah mereka secara baik dan aman. Majlis ini juga memainkan peranan menolong mereka mengadaptasi kehidupan di bawah undang-undang sekular di England yang tidak membenarkan hukum Syariah dijalankan. Salah satu perbadanan berkenaan adalah Islamic Council of Europe. Penyelidik telah menjalankan interbiu secara teliti dengan Majlis ini dan telah mendapatkan dan menganalisa beberapa kes timbang tara yang menunjukkan selok belok struktur dan operasi kes kes tersebut. Oleh itu,

Kita Kunci: Majlis Islam Eropah, Muslim, England

Introduction

Muslims in Britain today trace their origins from all over the world, being described as the most ethnically diverse community (Office for National Statistics 2013), however, the majority of them trace their origins to India, Pakistan and Bangladesh (Abbas 2011, 44). According to the 2011 Census, 68% of Muslims living in England and Wales are from Asian background, with Pakistanis and Bangladeshis making up 38% and 15% respectively (Office for National Statistics 2013). This is due to the fact that the *1948 Nationality Act* gave citizens of former British colonies the right of free movement to and from Britain, and therefore the West Indians and South Asians dominated the immigrant stream (Abbas 2011, 44). However, with the rise of racial discrimination and resentment towards Muslim migrants, Britain introduced several bills from the period of 1960's to 1980's in order to restrict such migration (Julios 2008, 92-94 & Bowen 2016, 11). As a result of those bills, the migrant settlements became more permanent and family-

oriented (Abbas 2011, 48). In fact, according to Censuses that have been conducted since 1950, Muslim population has seen a healthy and steady growth (Kettani 2010, 157).

Although Muslims are a minority in England, yet the Muslim population is larger than any other non-Christian faith combined, hence, making it the second largest religion after Christianity (Ali 2015, 16-17). According to the 2011 Census, there are about 260,000 Muslim married households with dependent children and over 77,000 Muslim single parent families with dependent children. These are consistent with the cultural and religious values Muslim communities adhere to when cohabiting outside of marriage. Additionally, the percentage of married couples is much higher than that of a single person household, confirming further that the shift to a family-oriented household is becoming more prevalent than ever before. Furthermore, one in three families with dependent children are single-parent ones. It might be said that due to this high ratio of single-parent to two-parent household with dependent children, the need for Masjids and Imams offering counselling and arbitration services is at an all-time high.

According to the Office for National Statistics (2013), 76% of the Muslim population live in just four regions: London, West Midlands, the North West and Yorkshire and The Humber, with London having the largest population, more than 1 million Muslims. Based upon this statistic, the researcher has chosen, for the analysis of arbitration cases, a Sharī‘ah council in East London, as it best reflects the overall Muslim population in England.

Islamic Council of Europe

The Islamic Council of Europe, henceforth ICE, was founded and established by Dr. Haitham al-Haddad shortly after he left ISC in 2015. It is located in the East London Mosque, although it is not a part of the Mosque or its services. The East London Mosque was established in 1910, making it the oldest Mosque in the heart of the East End. By default, the council is situated in the heart of the Bangladeshi community that typically follows the *Ḥanafī* school of law. According to al-Haddad (2018):

> We are located in one of the most heavily Muslim populated communities in the whole of the U.K. The Masjid that we

> are situated in, although not part of our council, is one of the biggest and busiest Masjid in the whole of the U.K. The Bangladeshi community here are *Ḥanafī* although they are not that strict.

There are mainly four council members working at ICE with an additional two on a need only basis. They all work from council premises with an average of 15-25 hours per week. Ranging in age from 40-55 years old, they all have extensive involvement in their community in the form of Islamic advisors, educators and *Da'wah* (proselytization). Although there is no formal method of applying or requirement to be a council member of ICE, individuals are chosen based upon the above criteria. When asked what kind of training do council members receive and if they have any formal degrees in Islamic arbitration, al-Haddad (2018) replied:

> Normally they are Islamic advisors, involved in *Da'wah*, or involved in teaching. So they are much involved in the Islamic community since they are already serving their community in various capacities. We have two types of training. First we have a preparatory training that is required to join and which is specific to this type of job. And second we have on-going training. The minimum we require is that they are tested, examined that they have enough knowledge, experience and wisdom to perform the job. The presence of a formal degree is an advantage. These tests or examinations are done by other council members in an oral form whereby they are given a scenario and it is determined how they will solve such a case.

The knowledge each council member has that is deemed 'enough' is subjective and vague, especially since there is no criteria that is stipulated. Additionally, none of the council members hold the qualification of a *muftī*, even though they give *fatwā* on the validity of certain divorce cases. Al-Haddad (2018), clarifying the stance of ICE when asked whether they adjudicate, give *fatwā* or only give advice, states:

> We adjudicate. But we give *fatwā* on the validity of divorces. Sometimes a client have obtained a *fatwā* with regards to their divorce but they come to me for a second opinion and that is what I mean by we give *fatwā* on the validity of their divorces.

In their defense they do have a consultative body amongst themselves that meet weekly for deliberations and to review their work. Additionally, what they lack in having a formal *muftī* is made up for al-Haddad›s extensive studies and training in the field of Muslim family arbitration in Saudi Arabia and the U.K. He has worked as an arbitrator, dealing and resolving cases of divorce, *khul'*, *faskh*, child custody, distribution of inheritance and financial disputes, since 2003. In fact, al-Haddad's expertise in Muslim family law is so widely accepted that, according to him, even expert legal counsels and English courts may ask for his opinion on a particular marital issue. During the June 2017 Grenfell Tower fire, in which 42 Muslims were killed, al-Haddad claimed that his expertise in the sphere of marriage was sought after by lawyers and the courts. Additionally, during an interview with the Sharee Council of Dewsbury (2018), the researcher was informed that they consult and seek al-Haddad's expert opinion on complicated marital disputes. It is probably due to al-Haddad's extensive expertise and knowledge surrounding Muslim family law that there is a growing demand for his adjudication. On average they receive around 70 cases per month with over 400 cases in 2017 alone. And this, according to him, is due to the "level of trust amongst the people" (Al-Haddad 2018).

Al-Haddad, along with other Sharī'ah councils in England, tried to create an umbrella body that can act as an appeals council. He (2018) states:

> There is no formal appeal. We tried at the Islamic Sharia Council to form an umbrella body. One of its aims was mainly to act as an appeal body. We wanted the clients, who may have a complaint against our decision or not agree with our decision, to formally raise the issue with this umbrella body. And the various council bodies would agree to such an appeal. But right now it is in the initial stages.

The need for having such an umbrella council is primarily driven by three factors: 1) to give a chance to disputants to seek a second opinion, especially given that many were given erroneous verdicts that had devastating consequences, 2) to have a formal process for appeals without the fear of negative repercussions and/or backlash to both the disputants and any of the councils involved, and 3) to have a diplomatic and systematic approach towards reviewing and possibly overturning the verdicts of other Sharī'ah councils. Such a process would indeed

meet the Islamic objective of dispensing justice while preserving the integrity of disputants and harmony amongst Sharī'ah councils. During the Prophet's (Peace Be Upon Him) time, the Muslim community used to appeal a decision that was made by a Companion of the Prophet (PBUH), acting as a judge, to the Prophet (PBUH) himself. Moreover, the *Khulafā' al-Rāshidīn*, the Umayyads and the Abbasids all had put in place a judicial apparatus, known as the court of *Maẓālim*, along with certain steps that a litigant can take to appeal the decision a judge made. Sometimes even the Caliph himself would intervene and reverse the decision if he found a breach of justice. Based on this the scholars have stated that it is possible to appeal the judgment of a *qāḍī* and stated when it could be nullified and appealed and laid down certain Islamic legal maxims to that effect (Coulson 1964, 122, Kamali 1994, 19, Power 1992, 316, & Schacht 1964, 189).

Based on this principle, if the adjudication of the arbitrator is not in agreement or goes against the basic principles and laws of the Sharī'ah then that can be grounds for an appeal. This is according to a legal maxim that states: «A ruling is repealed that opposes the (Islamic legal) text(s) and *ijmā'* (scholarly consensus)" (*yunqaḍ al-ḥukm al-mukhālif li-l-naṣṣ wa al-ijmā'*) (Al-Zuḥaylī 2006, 394, & Kamali 1994, 25). Some of the scholars such as al-Qarāfī (1998, vol. 4, 40) from the *Mālikī* school of law even went further and said that if the judgment by the *qāḍī* goes against an apparent (*jalīyy*) analogical reasoning (*qiyās*) which is safeguarded from any ambiguity or contradiction then that also can be a grounds for an appeal. In Anglo-American terminology this would be interpreted as a means for an appeal based on the grounds of law and not based on the grounds of facts (Masud, Peters & Powers 2006, 31).

Furthermore, verdicts and adjudication given that are based on false testimony, forged documents/evidences or even insufficient information then such decree is non-binding Islamically. For this reason Islam has given an opportunity for an appeals to disputants who may feel that this was the case. According to a legal maxim, "Re-examining the truth is better than persistence in falsehood" (*murāja'at al-ḥaqq khayr min al-tamādī fī al-bāṭil*) (Kuwait Encyclopedia of Fiqh 1995, vol. 33, 338). The reason that the truth must be re-examined and sought after is that any contracts that is based on falsehood is rendered void and hence, non-binding (Al-Zarqā 1998, vol. 2, 664). Additionally, it is further supported by another maxim: "Contracts are valid by default

until an anomaly is proven" (*al-ʻuqūd aṣluhā al-ṣiḥḥah ḥattā yuthbit al-fasād*) (Al-Subkī 1991, vol. 1, 253). And in the case of arbitration an arbitrator may have rendered his ruling based upon a false pretense, due to false testimonies, lack of evidences or qualification or any other valid reason(s) and therefore, will render his ruling void and non-binding.

Al-Haddad takes a more classical, principled and textual approach on certain issues that are in stark contrast to other Sharīʻah councils interviewed. For example, he makes a clear distinguishment between an Islamic marriage/divorce contract and that issued by the civil courts. Elaborating on this al-Haddad (2018) explains:

> One of the basic principles I follow is that I do not consider civil contracts to be Islamically legal contracts. That is because these are two separate and different types of contracts which have different consequences and serve different purposes. For example, if a woman seeks a divorce from her husband through the civil courts then this divorce is not legally binding according to the Sharīʻah. The only time it would be Islamically legal is if the husband was to intend the divorce in front of the civil courts. As for the objectives, then these two contracts are also different. The Islamic *nikāḥ* contract serves the primary purpose of making sexual relations permissible. Whereas the civil marriage contract, well at least in the European countries, is for tax purposes and other such financial issues. So we look very closely to a case where a couple come to us for the dissolution of marriage based upon the fact that the civil courts has issued a divorce but no such pronouncement of *ṭalāq* was given by the husband.

This unique stance of al-Haddad seems to be in compliance with several legal maxims, the most important of which are:

1. 1. "Matters are judged by their motives/objectives" (*al-umūr bi-maqāṣidihā*) (Al-Suyūṭī 1983, 8, & Ibn Nujaym 1999, 23). If a divorce case is brought by the wife against her husband then his appearance is not necessarily a confirmation of his approval of the divorce proceedings. Even if he was to pronounce, write and sign off on the divorce papers then this would still not constitute a divorce as long as he did not initiate the proceedings and/or intend to divorce her.

2. 2. Coercion voids a contract" (*al-ikrāh yubṭil al-'aqd*) (Al-Zuḥaylī 2006, 625). According to this maxim if a man is somehow forced to divorce his wife through intimidation, either by the wife or the legal system, then the divorce is not given effect or consideration. Even if he pronounces, writes and signs off on the divorce papers then one would need to look at his intention and/or if he was coerced or not.
3. 3. "Statement should not be ascribed to one who is silent" (*lā yunsab ilā sākit qawl*) (Al-Zarqā 2012, 309). If a wife is seeking divorce through the civil courts and the husband is silent throughout the procedure without uttering the words of divorce then their marriage is still Islamically binding. Just because the civil courts issued a divorce does not constitute an Islamic divorce, especially if he is silent and/or absent throughout the proceedings.
4. 4. "A person will be held responsible for his confession" (*al-mar' mu'ākhadh bi-iqrārih*) (Kuwait Encyclopedia of Fiqh 1995, vol. 33, 338 & Al-Zuḥaylī 2006, 574). This maxim restricted and limited to the above first two maxims. A divorce is counted and binding only if a man intends to divorce his wife in the civil courts and is not coerced into doing it.
5. 5. "The fundament is the continuation of marriage" (*al-aṣl baqā' al-nikāḥ*) (Ibn al-Qayyim 2012, vol. 1, 270 & Ibn Taymiyyah 1987, vol. 3, 264). According to this maxim, if a civil divorce is sought after and finalized by the wife then the marriage between her and the husband is still continuous unless it is established that he intended to divorce her in the civil courts without any coercion. Thus, it is not permissible for her to remarry unless the husband initiates and intends to divorce her.
6. 6. "The presumption of continuity of the status quo" (*Al-aṣl baqā' mā kān 'alā mā kān*) (Al-Suyūṭī 1983, 51, & Ibn Nujaym 1999, 49). If a couple contracted a marriage according to an Islamic ceremony then it would be continuous until they dissolve the marriage according to Islam. It would be inconsistent that the marriage contracted is initiated according to Islamic law but then dissolved through a procedure other than an Islamic one.

7. 7. "If the leaders are non-Muslims it is permissible for the Muslims to establish a group and appoint a judge by their consent" (*law kān al-wulāh kuffāran yajūz li-l-muslimīn iqāmat al-jamā'ah wa yasīr al-qāḍī qādiyan bi-tarāḍī al-muslimīn*) (Ibn 'Ābidīn 1992, vol. 2, 144). This maxim was coined by the *Ḥanafī* jurists which the researcher deems fit in the context of Muslim minorities living in the West. It is not a valid reason for one to leave being adjudicated by the *Sharī'ah* and resorting to the secular English laws. The reason for this is that appealing to civil courts in order to dissolve a marriage according to secular laws may be considered disbelief (*kufr*) if it is done willingly and one is content with it (Al-Ṣāwī 1994, 13).

Due to the absence of an Islamic government, and hence an Islamic judge, Muslims in the West are not compelled to follow the legal rulings of the Sharī'ah, especially when it comes to marriage and divorce contracts. This had led many Muslims, especially men, fleeing from their Islamic obligations as husbands and fathers. For example, according to the researcher's own research as well as other academic researchers, one such failure in obligation Muslim husbands have failed in is in the case of a 'limping marriage' (Bano 2012, 15 & Rutten 2013, 102-104). In order to solve this dilemma al-Haddad considers his position to be more than just an arbitrator, mediator, and/or marriage counselor. He considers himself to be an Islamic judge, whose ruling is Islamically, if not legally, binding. Al-Haddad (2018) explains the reason for this by saying:

> The other principle I follow is my position acting in the capacity of a judge and not just an arbitrator. The reason for this is because for an arbitrators' decision to be Islamically binding on both the parties, consent must be given by both of them initially. But what if the husband refuses to give me permission to adjudicate between him and his wife, shall I leave his wife being stuck in a marriage that she wants to dissolve or get out of? Therefore, we don't consider ourselves to be mere mediators or arbitrators, which require the permission of both the parties in order for our award to be Islamically binding, but as judges who have the authority to make a decision when the defendant refuses to attend or recognize our legitimacy. The wife wants to arbitrate and

> seek a solution to her marital problems but the husband is refusing and is keeping her in a 'hanging marriage' situation.[1] So our legitimacy comes from Islam and will not let anyone take advantage by running away from their responsibility due to the fact that we are not 'official' judges appointed by a head of state or government body.

While a plaintiff, here, the wife, cannot be forced into litigation, the defendant, the husband, can be forced to answer the claim against him. This basic principle of *qaḍā'* has been outlined by several legal maxims, and it seems that al-Haddad is adhering to those basic principles. One of the legal maxims outlining the procedures of litigation is that, "The plaintiff is one who is not forced to litigation" (*al-mudda'ī man lā yujbar 'alā al-khuṣūmah*) (Al-Marghīnānī n.d., vol. 3, 154). This applies to a woman, both before and during a claim, who may have raised her case with an arbitrator about her 'limping marriage'. Just like it is her right whether to seek a settlement for her 'limping marriage', it is also her right not to seek it, be forced to seek it and/or continue with her litigation.

Similarly, the jurists coined another sub-maxim relating to the plaintiff concerning initiating a litigation case stating, "A ruling is not to be given except with a request from the plaintiff" (*lā yaḥkum illā bi-ṭalab min al-mudda'ī*) (Al-Bahūtī 1996, vol. 3, 514). If a woman is seeking a settlement for her ‹limping marriage› case then that is her right which no one has the authority to take away. This will prevent unnecessary meddling from a Sharī'ah council into a couple›s marital affairs as well as those who seek to negatively portray the Sharī'ah councils tasked with litigating marital cases. In order for a litigation to proceed the defendant must be present. However, in a case where a defendant refuses to respond then the scholars coined a maxim stating, «A defendant is one who is forced to answer the claim (made against him/her)» (*al-mudda'ī 'alayh man yujbar 'alā al-khuṣūmah*) (Al-Zu'bī 2008, 97). If a defendant fails to appear in person or through correspondence, then according to the *Mālikī*, *Shāfi'ī* and *Ḥanbalī* jurists

1 Al-Haddad uses a 'hanging marriage' which is synonymous to a 'limping marriage'. The researcher will continue to use 'limping marriage' in order to be consistent with what has become a known terminology amongst other academicians and researchers.

the *qaḍī* can pronounce a verdict against him, provided that the plaintiff has presented sufficient and valid evidence (Masud and et al 2006, 22).

Furthermore, a case where the husband initially responds and/or appears before the Sharī'ah council and subsequently refuses to abide by the proceedings then he is still subjected and bound by whatever verdict may come out as a result. According to the *Shāfi'ī*, (Al-Māwardī 1972, vol. 2, 380), *Ḥanafī* (Ibn al-Hummām n.d., vol. 5, 500), and some of the *Ḥanbalī* (Ibn Qudāmah 1968, vol. 11, 484) jurists it is not a requirement for the consent of any of the litigants to be continuous throughout the proceedings. In other words, if any one of the disputants refuses to collaborate and/or continue with the arbitrational proceedings, then any ruling that comes as a result of it would still be valid and binding. The Shāfi'ī scholars even coined a maxim stating, «It is not permissible to void the ruling of a judge after he has adjudicated» (*lā yajūz naqḍ ḥukm al-ḥākim ba'd al-ḥukm*) (Al-Nadwī 2013, 250).

Whatever capacity al-Haddad assumes, whether that of an Islamic *qāḍī* or a mere marriage counselor/arbitrator/mediator, it is unlikely that his, or any other Sharī'ah councils›, award verdict will be enforceable in the court of law. It is up to individuals and disputants whether they want to enforce the verdict(s) handed down to them or not. However, given the fact that the demand for Sharī'ah councils› work is ever increasing it can only be assumed that people normally follow the councils› decisions. According to al-Haddad almost 100% of his arbitration award is accepted and followed by disputants that come to him.

Divorce Case Study #1

This was a case that was filed by both couples seeking a verdict to the husband's pronouncement of *ṭalāq*. Both husband and wife were having a heated argument that included; shouting, exchanging harsh words, and use of profanity. The husband ended the argument by pronouncing, "I give you first *ṭalāq*, second *ṭalāq*, and third *ṭalāq*". He placed his hand on the Qur'ān in order to show the seriousness of his words. When seeking *fatwā* from the Sharī'ah council, they asked him, «Do you understand and know the procedure for divorce in Islam»? The husband replied, «I believe in order for a divorce to count, it must be said three times, otherwise it is of no consequence». The wife believed *ṭalāq* needed to be pronounced once, then wait, twice, then wait, and then third time for it to occur.

The council deliberated as a panel and after a couple of weeks from the date of receiving the application, decided with the following verdict:

> In this case it is deemed that the occurrence of *ṭalāq* is counted as a single *ṭalāq*, due to the belief of the husband that this, to pronounce *ṭalāq* three times, is the method to issue *ṭalāq*. Due to this the couple can continue their marital life with the knowledge that one revocable *ṭalāq* has been issued and only one more revocable *ṭalāq* remains.

It can be argued that one the reason the Sharī'ah council issued the above verdict may be due to the fact that the husband was ignorant of the procedure of divorce and, hence, the consequences of issuing three divorces in one sitting. If he was to be held liable for his three divorces, which results in an irrevocable separation between the husband and wife, then this will bring undue and unwarranted hardship on the couple. In order to thwart this hardship from them then one of the *major/universal legal maxims* can be applied, and that being: "Hardship begets facility" (*al-mashaqqah tajlib al-taysīr*) (Al-Suyūṭī 1983, 76, & Ibn Nujaym 1999, 64). One of the seven reasons this legal maxim can be applied towards is in the case of ignorance (*al-jahl*) (Al-Suyūṭī 1983, 77-80, & Ibn Nujaym 1999, 64-70).

Defining what constitutes ignorance some of the scholars said it is, "To believe in something with certainty that is in disagreement to what it actually is" (Al-Zabīdī 1987, vol. 28, 255). In order for ignorance to be used as an excuse one must be living in a non-Muslim country in which there is no easy access to a scholar, unlike those who live in a Muslim country in which access to them is readily available. Ignorance may also be about a ruling/matter that the common Muslim has no access to, since those matters/rulings are known to specialists in the field. It may also be used in an *ijtihādic* and/or dubious matters that may be interpreted in several ways (Al-Zarqā 2012, 161 & Ibn Nujaym 1999, 261-262).

It is clear, from the admission of both the husband and wife, that he was ignorant of the ruling on how to issue a proper divorce, and that issuing three in one sitting constitutes an irrevocable separation, according to all four major schools of law (Ibn Rushd 2004, vol. 3, 84, Al-Māwardī 1999, vol. 10, 117-118, Al-Ramlī 1984, vol. 7, 8 & Al-Sarakhsī 1993, vol. 6, 57). Moreover, he exercised his *ijtihād*,

however wrong it may be, on a matter that may be deemed dubious to the common person. Because he assumed, according to his limited *ijtihādic* capabilities, that the appropriate manner in issuing a divorce is three times, his assumption will bear no legal ruling against him. This is according to a legal maxim that states: "No consideration is given to a wrong assumption" (*lā 'ibrah bi-l-ẓann al-bayyin khaṭa'uh*) (Al-Suyūṭī 1983, 157, & Ibn Nujaym 1999, 134). When mentioning this legal maxims, some of the scholars mentioned that if a person issues a divorce based on a (faulty) *fatwā* then the divorce would not materialize (Al-Zarqā 2012, 357 & Al-Zuḥaylī 2006, 179). Lastly, because they live in England, which is a predominantly non-Muslim country, it is conceivable that they were limited and/or had very minimal access to scholars or Sharī'ah councils in their immediate vicinity. This would qualify their grounds for claim of ignorance.

It can also be argued that the council delivered the above verdict for the greater good of the family and to ward off any potential harm that results in a divorce. This, especially since the couples were married since 2005 and had two daughters, ages nine and six.[2] Hence, preventing harm is an essential principle that every Sharī'ah council must take into consideration, especially when it deals with the protection and preservation of the Muslims' lineage (*al-nasab*). For this reason, jurists coined a legal maxim stating: "Harm is to be prevented to the extent that is possible" (*al-ḍarar yudfa' bi-qadr al-imkān*), which can be applicable in the above situation (Al-Zarqā 2012, 207 & Al-Zuḥaylī 2006, 208). To deflect the harmful effects that a broken family, especially when children are involved, may have is one of the main objectives of the *Sharī'ah* and should be taken into consideration, as the Sharī'ah council so did.

On the other hand, one may argue that the couple's may not have been truthful about their ignorance with regards to the ruling of a triple *ṭalāq* and that they used ignorance as a means to stay married together. Such an argument may be considered without merit, especially given the fact that they were the ones who approached the council to seek their ruling rather than being forced to. They could have chosen not to seek their adjudication and, instead, chosen to stay 'married' with

2 The year the case was brought to the SharÊ'ah council was on 3 September, 2018. Based upon this date, the researcher is basing their children's age.

or without their verdict, especially since the Sharī'ah councils have no legal jurisdiction in England over their marital affairs. Additionally, supposing that the married individuals were untruthful in their ignorance pretext, then that is something the Sharī'ah council cannot be held liable according to Islamic judicial proceedings. According to the legal maxim: "A *qāḍī* adjudicates based on the obvious and Allah takes care of the secrets» (*yaḥkum al-qāḍī bi-l-ẓāhir wa-Allāh yatawallā al-sarā'ir*), if an arbitrator issues a verdict based on the facts presented, then his ruling would be considered valid and binding, both legally and religiously (Al-Nadwī 2013, 111 & Al-Zuḥaylī 2006, 881).

Marriage Annulment (faskh) Case #2

This is a case that was filed by a woman against her husband in order to seek a divorce from a Sharī'ah council. In her application she states:

> On February 3rd, 2016, my estranged husband told me that he thinks, "it is best for us to go our separate ways". This came as a shock to me. When I asked him what his reason was, his response was that "he respects me too much to tell me". He then proceeded to pack up his bags and left without a backward glance. I did not ask for a divorce and he never gave me one then. I then proceeded to let my family and his family know. Multiple efforts were made to have him come and sit down for mediation, and after a few months, he finally agreed. After the sit down he left and chose to never come back again or be a part of our lives. He does not call or visit us or his child, nor does he support us financially. The reason I am seeking a divorce (through your council) is because it has been one year since he left. He hasn't given me a divorce and I cannot wait any longer for him. The divorce is to make it official and so I can have in my possession a divorce certificate and continue to move on with my life.

Although the wife had approached other Imams and Masjids for a solution to her dilemma, she could not get a definite answer. She then approached the said Sharī'ah council, which opened an investigation into her case in May 2017. One of the first things they did was to contact the husband to get his version of the story but, after multiple attempts through phone calls, e-mails and mailed letters, they were unsuccessful in reaching him. This is in order to determine the accuracy/inaccuracy of the wife's claim against her husband. Such a procedure is in accordance

with the maxim stating: "A defendant is one who is forced to answer the claim (made against him/her)" (*al-mudda'ī 'alayh man yujbar 'alā al-khuṣūmah*) (Al-Zu'bī 2008, 97). This sub-maxim is one of the most important principles, because a hearing cannot proceed without a defendant. However, in this case the defendant is inaccessible, due to which the wife is left in 'limping marriage' situation. In such a case, the *Mālikī*, *Shāfi'ī* and *Ḥanbalī* jurists stated that a *qāḍī* can still proceed with the hearing and even pronounce a verdict against the defendant, provided that the plaintiff has presented sufficient and valid evidence (Masud and et al 2006, 22).

In order to proceed without the defendant, the council asked for witnesses to come before the council in order for her claim to be substantiated. Altogether, three witnesses were brought; her grandfather and two local Imams, all of whom were familiar with her case. The first to appear and give testimony was her grandfather, who claimed that she has been divorced. Upon cross-examination the grandfather said he is basing it on her statement only. In Islamic judiciary, just like any other judicial apparatus, impartiality on the part of witnesses is of utmost importance. This is due to the fact that testimonials given by witnesses have a great degree of influence on a judge›s decision (Al-Māwardī 1972, vol. 2, 58). For this reason, some scholars, such as Imām al-Shāfi'ī (1961, 600) stated that:

> The testimony of witnesses should be carefully considered: if we detect a certain bias or an excessive interest in the person on whose behalf they are testifying, we do not accept their testimony. If they testify regarding a difficult matter beyond their ability to comprehend, we do not accept their testimony, for we do not believe that they understand the meaning of that to which they have testified. We do not accept the testimony of...witnesses who make many errors in their testimony.

According to al-Khaṣṣāf (1978, vol. 2, 101), the testimony of father and son cannot be used for each other due to the strength of blood ties. The same can be extended to grandfathers and grandsons. Accordingly, the testimony of the grandfather should not been taken into account when reaching a verdict of *ṭalāq*. It may be for this reason that the council requested and/or were provided with two additional witnesses. It is highly unlikely that more witnesses were requested and/or provided solely on the basis that the more witnesses' one provides the more

strength it gives to the case. A greater number of witnesses would not lend additional value to the argument brought by any of the litigants in a lawsuit (Schacht 1964, 193). The only exception would be in the case involving adultery, then the testimony of four witnesses of just character is required (Qur'ān, *al-Nūr*, 4).

Thus, it can be safely assumed that the reason an additional two witnesses were requested and/or provided is due to the bias that may be present by the grandfather (plaintiff-witness) for his granddaughter (plaintiff). When two additional witnesses, two Imams, were presented before the Sharī'ah council, they also claimed that the husband had divorced his wife, but stated that the husband declared, "it is over". After taking testimonials from the three witnesses over the phone, they were required to send written and signed statements to the council. Although written testimonies have always been looked at with disfavor by judicial practice, nevertheless it may have been requested for documentation and future reference purposes (Coulson 1964, 173 & Tyan 2010, 253). Subsequent to the receipt of their written and signed testimonials, the council then proceeded to deliberate as a panel. Thereafter, the council issued a divorce to the wife on the 21st of December, 2017 and with an effective date of 3rd February, 2016.

In the absence of the husband confirming his unequivocal divorce, it appears that the said council based their verdict on the statement of the wife who claimed that the husband stated to her, "it is best for us to go our separate ways". This was further corroborated by the testimony of the witnesses who confirmed that he said, "it is over". Such implicit (*kināyah*) words given by the husband cannot be taken to mean that a divorce has taken place. Rather, there must be other elements that must be looked at. One such element is, according to the *Ḥanafī* jurists, whether the husband intended divorce by uttering such implicit words. If so, then divorce would have taken effect (Ibn Nujaym n.d., vol. 3, 322 & Ibn al-Hummām n.d., vol. 4, 4). This is according to two legal maxims that state: «An implicit (word) is in need of an intention» (*al-kināyah taftaqir ilā al-niyyah*) (Al-Suyūṭī 1983, 42, & Ibn Nujaym 1999, 20), and "Clear words are affirmative and not in need of intentions, and vague words are not affirmative except with an (accompanying) intention" (*mūjib al-lafẓ yuthbat bi-l-lafẓ wa lā yaftaqir ilā al-niyyah, wa muḥtamal al-lafẓ lā yuthbat illā bi-l-niyyah*) (Al-Nadwī 2013, 149 & Al-Zuḥaylī 2006, vol. 2, 798). However, in this case the husband

is unavailable for questioning, in order to determine his intent behind those words, which makes for this opinion ineffective.

On the other hand, according to the *Shāfi'ī* (Al-Rāfi'ī 2002, 57) and some of the *Ḥanbalī* (Al-Sharbīnī 1968, vol. 4, 227) jurists, they consider implicit words, such as ‹breakup› (*firāq*) and 'separate' (*sirāḥ*), to be explicit in nature, since they were mentioned in the Qur'ān to mean divorce. Since the husband used the word 'separate' in his initial conversation, then according to them an explicit divorce has taken effect. Still it can be argued that the exact word 'separate' has not been corroborated with the testimonial of the witnesses who claimed that he said "it is over".

It is the opinion of the researcher that the council had looked at another element in order to determine the exact intention behind the husband's implicit words; circumstantial evidence. The fact that the estranged husband left his wife immediately after uttering the words "it is best for us to go our separate ways" and/or "it is over", depending on whose version one takes, is a confirmation itself that he intended divorce. Because his action of leaving her and not returning for almost two years is an embodiment of his words, it cannot be taken to mean anything else except for divorce. According to Ibn Taymiyyah (1996, 342) the objective(s) of a person words and actions should be taken rather than the obvious. Elaborating on this, he explains:

> Consideration is given to the meaning and objective of words and actions. If a person's words differ in their expression but the meaning is one then the ruling is the same. And if the words are similar but the meaning differs then the ruling differs (i.e. according to the meaning). Similarly to actions, if the (outward) appearance/pattern differs but the objective is the same then the ruling is one (i.e. according to the objective).

The statement of Ibn Taymiyyah can be said as according to a legal maxim, that states: "Implicit (words) supported by circumstances is similar to explicit (words)" (*al-kināyah ma' dalālat al-ḥāl ka-l-ṣarīḥ*) (Ibn al-Qayyim 2012, vol. 1, 323). What this means is that looking at supporting circumstances will take the position of one›s intention behind such implicit words (Ibn Taymiyyah 1986, vol. 8, 386). Consequently, the verdict reached by the council seems to be in agreement with the

objectives and wholesomeness of the *Sharī'ah*, which is to deliver a verdict that can result in the welfare and good (*maṣlaḥah*) for the wife and ward off evil/harm (*mafsadah*) from her.

Conclusion

In this research article, the researcher presented the findings of his field research of the Islamic Council of Europe. Its administrative structure, council members and procedural guidelines/principles were presented to the reader with an exhaustive analyses from the researcher. Moreover, the researcher presented arbitration cases from the said council and a comprehensive breakdown was rendered according to the principles of Islamic judiciary and legal maxims. It can be concluded with great confidence that the analyses presented in the application of Islamic legal maxims in Muslim family arbitration by the said council, deserves praise and appreciation for the most part. Although there is certainly room for development and improvement on the part of the above council, nonetheless they should be taken as an exemplar model by others in the West, who aspire to serve their communities with an alternative dispute resolution. Last but not least, the above analyses of the researcher can, in return, be critically analyzed by those who wish to improve the system further.

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In This Issue

ISSN 0128-4878 (Print)

ISSN 2289-5639 (Online)

ISSN 0128-4878
2289 5639