THE ACCOMMODATION AND REGULATION OF ISLAM AND MUSLIM PRACTICES IN ENGLISH LAW

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1. INTRODUCTION

Although it is indisputable that Muslims have been in Britain for centuries now,[1] it is the events of the recent past that has increasingly focussed attention on the presence of what is now one of Britain's largest minorities. Like numerous other religious minorities in the United Kingdom, Muslims have established themselves and largely conduct their religious and cultural practices within the confines of English law. The aim of this article is to investigate how English law deals with Islam and the regulation, recognition and accommodation, if any, of certain Muslim practices, such as religious divorces and marriages and the establishment of places of worship. The article does not aim to be comprehensive in its coverage of all the issues raised by the Muslim population in the United Kingdom, especially the criminalisation of certain political activities which some Muslims consider to be religious obligations, but simply attempts to analyse how in some respects British Muslims regulate their activities and how a parallel but non-recognised legal system is now in operation and the extent to which English law makes provision for British Muslims and their practices, beliefs and needs.

The lack of a question on religion prior to the 2001 census exercise[2] has ensured that figures as to Britain's current Muslim population and their background are difficult to ascertain accurately.[3] Estimates tend to vary between one and three million, out of a total population of approximately 58 million.[4] A Muslim population of approximately 1.35 to 1.5 million is the most widely accepted figure.[5] This population is composed of individuals who originate from all parts of the Muslim world. Despite the fact that approximately 60 per cent of British Muslims were born in the United Kingdom, their diverse geographical and ethnic background has ensured that all of the major schools of Islamic jurisprudence and sects, as well as many cultural and social practices which are practised on supposedly religiously ordained grounds, have had to be addressed by the British legislature and courts.[6] In many senses this presents a unique problem for those states which have been the hosts to the Muslim

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[1] The discovery of Muslim coins from the 8th Century in Britain is used to support the argument that Muslims traders first visited the (now) United Kingdom in the early centuries of Islamic expansion.

[2] The results of this, as of 31 March 2002, have not been released.

[3] I am here referring to persons of Muslim families or those who identify themselves as Muslims.

[4] These figures are routinely cited. Even at the higher end of the spectrum, this represents less than 5 per cent of the population.

[5] M Anwar, *Muslims in Britain: Demographic and Socio-Economic Position*, available at http://www.primarycareonline.co.uk/human effect/muslim/chap1again.htm accessed 7 October 2001.

[6] Adherents of the four major *Sunni* schools of jurisprudence, as well as *Shia*, *Ismaili*, *Wahabi* and *Ahmedhi* populations, among many others, are all resident in the United Kingdom.

diaspora. The intertwining of diverse cultural and religious practices, some followed supposedly in the name of Islam, have ensured that many European states, including Britain, have had to deal with a diverse range of problems which many of the states of origin have not had to face. Female circumcision and forced marriage are two practices which are practised in various sectors of the Muslim population which are considered acceptable and in some cases obligatory by some Muslims and simultaneously repugnant to Islam by others. Although Islam, as practised, is not monolithic in any part of the world or state where it is the predominant faith, it is the states which have been the recipients of Muslim immigrants who have had to deal with the broadest diversity of Islamic views and practices. Within the United Kingdom it is more accurate to refer to the Muslim communities or population, as opposed to the Muslim community. The establishment of religious and community centres on sectarian, ethnic or political grounds, for example, is testament to the current vibrancy and diversity of the Muslim population in Britain, as well as the divisions and internal politics of the United Kingdom *ummah*.

The common issue facing many European states, however, has been how to accommodate and make provision for now substantial populations whose cultural practices and religions they may previously have encouraged the demonisation of, especially during the colonial era. Different states have attempted to strike the balance in different ways, utilising various policies and approaches in taking into account what is acceptable to the state and population at large, important to the individual and his or her own identity and what minimum standards must be complied with.[7]

2. THE GENERAL APPROACH OF ENGLISH LAW TO MINORITY RELIGIONS, INCLUDING ISLAM[8]

English law, for its part, has not been able to deal adequately with cultural and religious diversity within the United Kingdom. No one approach to this issue is discernible, not least because it is the product of years of accretion and differing policies and objectives, and thus a piecemeal approach exists which has been described as 'inconsistent, haphazard and uncoordinated'.[9] Over the last thirty to forty years, British governments have adopted a number of different approaches towards its ethnic minorities, which has also in the main been commensurate with approaches towards religious minorities. Cultural pluralism, multi-culturalism and non-discrimination can all be cited as the approach being adopted or promoted by the government of the day. Cultural pluralism is widely regarded as the approach that the law has currently adopted[10] but it is arguable that with the giving of further effect to the European Convention on Human Rights (ECHR) by the Human Rights Act 1998 and the current government's emphasis on 'multi-culturalism', the approach is now primarily, although not exclusively, one of non-discrimination between the various religious

[7] For discussion of the approaches taken in European Union member states, see R Potz (ed.), *Islam and the European Union*, and S Ferrari and A Bradney (eds.), *Islam and European Legal Systems* (Aldershot, Dartmouth, 2000).

[8] This section draws in part upon U Khaliq and J Young, 'Cultural Diversity and Human Rights in English Law' (2001) 21 Legal Studies, 192.

[9] D Pearl and W Menski, *Muslim Family Law* (Sweet and Maxwell, London, 1998), p 70.

[10] Roy Jenkins when Home Secretary is often credited with making this policy explicit in a speech in 1966. This has been continued by subsequent administrations. Also see generally S Poulter, *Ethnicity, Law and Human Rights: The English Experience* (OUP, Oxford, 1998), pp 17–29, who, at pp 59–65, distinguishes seven policy options: suppression; invalidity (simply not recognising validity of acts); exclusion (of minorities from the UK); laissez faire; non-discrimination; specific differential treatment; and state-funded differential treatment. For a treatment of many of these issues from a political theory perspective, see B Parekh, *Rethinking Multi Culturalism: Cultural Diversity and Political Theory* (Macmillan, London, 2000).

and cultural groups in the United Kingdom, coupled with an emphasis on a multicultural Britain. The approach adopted has not been confined to the freedom to follow one's own cultural and religious beliefs within the law, which Article 9 of the ECHR would in any case require, but has been extended to the modification of the general law positively to accommodate the practices of certain cultural and religious groups. Individuals may be exempted from the requirements of the general law,[11] but the accommodation of difference may extend to the establishment of a different regulatory regime to meet the *obligatory* requirements of a religious community.[12] These measures are more than simply the passive tolerance of freedom of religion; they go further in granting exemptions, on religious grounds, from certain policies. This tolerance has its limits, however, and does not extend, for example, to formally allowing members of the Rastafarian faith to smoke marijuana, which some consider obligatory.[13]

Accommodation, where there is a direct collision between the values of the dominant culture or religion and those of minority cultures or religions, where it exists, is most easily achieved through legislation. Outside the legislative and political processes, religious diversity must be protected by individual claims against the infringement of rights and freedoms. In English law, respect for different beliefs and cultural practices is to some extent based on the autonomy of the individual. The Human Rights Act 1998 systematises a liberal rights-based approach and puts a statutory duty on the judiciary to enforce Convention rights. Freedom of conscience and religion, the right to respect for private and family life, freedom of association and of expression are the rights most likely to be relevant to individuals seeking to protect religious differences from the impact of general legal norms. However, these rights have their limits. They may be restricted for the protection of the rights of others and the prevention of various sorts of damage to individuals, the social order and the state. Section 13 of the Human Rights Act 1998 requires, however, that 'particular regard' be paid to the importance of the right to freedom of thought, conscience and religion when court decisions are taken affecting the exercise of that right by religious organisations. It is clear that the provision extends beyond the established Church,[14] although what effect it will have in practice remains to be seen. The basic point to be made is that English law, as it stands, reflects a certain tolerance towards minority cultural and religious practices within the United Kingdom, but that this has its limits. The increasing emphasis, after the enactment of the Human Rights Act 1998, must be on non-discrimination against minority faiths but not necessarily equality with the majority one.[15]

[11] For example, the Road Traffic Act 1988, s 16(2), and the Employment Act 1989, s 11, exempting Sikhs on motor cycles or on construction sites from wearing protective headgear.
[12] For example, the Sunday Trading Act 1994, s 1(1), Sch 1, para 2(2)b, and Sch 2, Pt II (paras 8–10), which subject the opening of Jewish-owned shops on Sundays to different regulations from other shops. See more generally J Montgomery 'Legislating for a Multi-Faith Society: Some Problems of Special Treatment' in B Hepple and E Szyszczak (eds.), *Discrimination: The Limits of Law* (Mansell, London, 1992).
[13] The UK government has, however, now announced its intention to consider reclassifying cannabis from a Class B to a Class C drug, although this is not due to the arguments of the Rastafarian community.
[14] See Hansard HC 20 May 1998 col. 1020.
[15] For a very interesting perspective on these issues, see the 14th periodic report submitted by the UK under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination, CERD/C/299/Add.9, 2 December 1996. On the general scope of Article 9, see the discussion in C. Evans, *Freedom of Religion Under the European Convention on Human Rights* (OUP, Oxford, 2000), reviewed at pp 405 of this issue.

3. MUSLIMS AND ENGLISH LAW: SOME PRACTICAL ISSUES

3.1. *Ritual Slaughter*

The ritual slaughter of livestock by Muslims in Britain is illustrative of the positive accommodation, as referred to above, which the British legislature has been prepared to make to accommodate the religious minorities who are resident in the United Kingdom. The exemption of ritual slaughter from the general legal scheme for the slaughter of livestock has in recent years been increasingly controversial. Islam is very clear in the stipulation that it is prohibited, in normal circumstances, to consume the meat of certain animals. This extends not only to swine but also animals such as those which are carnivorous or which scavenge. Those that it is permissible to eat must be ritually slaughtered. The practice of ritual slaughter, which for Muslims is obligatory, entails the slicing of the carotid arteries and both jugular veins but not the spinal cord across the underside of the neck, with a very sharp knife by rapid, uninterrupted action while reciting a prayer. This should result in the relatively quick death of the animal. It is also considered good practice, although not obligatory, to slaughter under running water to assist the flow of blood. The exact rationale behind the practice is probably rooted in the fact that blood was perceived as the conduit for diseases and thus, in a very hot climate, removal of the blood was considered to ensure that it was less likely to result in illness upon consumption and also maintain its freshness for longer.

A current issue in many countries where Islam is a minority faith is that the obligatory method of slaughter is considered to be inhumane in comparison to gassing or the utilisation of electrical bolts. Doctrinal splits, among Muslims, as to the permissibility of electrical bolts or other stunning methods prior or subsequent to slaughter has ensured that there is no clear approach that the legislature can adopt. For this reason the approach, in the United Kingdom, has been to take a non-interventionist stance. The law on slaughter is currently contained in the Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 1995/731. Schedule 12 contains the provisions for slaughter by a religious method which extends to ritual slaughter by both Muslims and Jews. The general legal scheme which is contained in Schedule 5 of the regulations requires animals to be killed by stunning, electrocution, gassing or in certain cases decapitation. All such methods would render meat *haram* as opposed to *halal* for Muslims, and it would not be capable of being classified as *kosher* for followers of the Jewish faith.

The exemptions which exist are not recent, and the first piece of English legislation concerned with regulating the slaughter of livestock permitted ritual slaughter for followers of both faiths.[16] As Poulter notes, the Slaughter of Animals Act 1933 is an early example of the phenomena of 'specific differential treatment' in English law in accommodating minority religions. The current legislation, however, highlights the relative sophistication of the regulation and provisions concerning *kosher* as opposed to *halal* meat. Part IV of Schedule 12 refers to the Rabbinical Commission for the Licensing of *Shochetim*, i.e., the body which regulates those who can lawfully slaughter meat which is to be deemed *kosher*. No similar provision exists for *halal* meat. What is more astonishing is that this is still the case in the aftermath of a massive scandal in the early 1990s, concerning the widespread and systematic fraudulent labelling and selling of *haram* meat as *halal*. This resulted in no action from the legislature to strengthen the supervision of the system. The only action taken was the establishment of various bodies, such as the World Islamic Foundation, by parts of

[16] Slaughter of Animals Act 1933. Prior to this provision was on a local basis and was only made for *shechita*.

the Muslim population. These bodies exist specifically to provide some sort of scrutiny to ensure that meat labelled as *halal* is indeed slaughtered correctly. Some slaughterhouses, however, prefer to associate themselves with the United Kingdom Islamic Mission, which is an umbrella group of mosques and community centres and has a broader ambit of activities, and have certificates issued by that body certifying that the meat they produce is *halal*. The level of scrutiny and inspection undertaken by any of these bodies is not clear. The legislature for its part has taken a non-interventionist approach, allowing exemptions on religious grounds and then leaving it up to the religious groups in question to ensure that the slaughter is in accordance with religious doctrine. It is not difficult to sympathise with the approach adopted. The fundamental problem for the Muslim and Jewish populations, however, has been that abuse of the system has provided those groups who oppose the practice, on the grounds of compassion to animals, with ammunition to abolish the exemption.

It is difficult to find up-to-date statistics as to what percentage of the British population is opposed to religious slaughter. A 1983 study put the figure at 77 per cent.[17] How that figure was arrived at is unclear. What is clear, however, is that no mainstream political party in the United Kingdom is committed to abolishing the exemption, due to pressure from animal rights and welfare groups. Although a number of attempts have been made in private Bills to challenge the exemption, none to date has been successful. This is despite the fact that scientific evidence has usually considered the practice to be less humane and more distressing to animals than other methods of slaughter.[18] No statistics exist as to how many Muslims and also members of the Jewish faith solely eat *halal* or *kosher* meat. It is likely, however, that most adherents of the Jewish and Islamic faiths in the United Kingdom, regardless of whether they themselves solely eat such meat, are supportive of the continuing exemption that the law provides. The freedom to ritually slaughter, however, does not mean that the law enforcement agencies and groups opposed to ritual slaughter will not utilise the law to bring actions where they feel it is not being complied with. The law requires, for example, that when livestock is being ritually slaughtered for the purposes of *halal* meat, the resultant meat will be for the consumption of Muslims. Thus a successful prosecution has been brought against a Muslim slaughterman where he was asked by an RSPCA inspector, wearing a large crucifix, to ritually slaughter meat for him. As the meat was clearly not for the consumption of Muslims, the slaughter technically breached the requisite legislation by not coming within the exemptions and the slaughterman was charged accordingly.[19]

It is interesting to note that no application has ever been brought, as far as is known, to the European Court of Human Rights or the now defunct Commission of Human Rights challenging the failure of a state party to it, for not making provision for such meat.[20] As an obligation, as opposed to an activity which is religiously permissible, it is probable that a claim under Article 9 of the ECHR (freedom of thought, conscience and religion), possibly in conjunction with Article 14 (prohibition of discrimination), challenging laws which outlawed religious slaughter, would be suc-

[17] M Duffy, *Men and Beast: An Animal Rights Handbook* (London, 1981) at p 41 cited by S Poulter, *Ethnicity, Law and Human Rights: The English Experience* (OUP, Oxford, 1998), p 134.

[18] See in particular Farm Animal Welfare Council, *Report on the Welfare of Livestock When Slaughtered by Religious Methods* (London, 1985). There is of course scientific evidence which claims it is no crueller than other methods: see for example the work cited at http://pages.britishlibrary.net/smb/halal.htm accessed 18 October 2001.

[19] *Malin's v Cole and Attard* [1986] CLY 89.

[20] To date this is almost certainly the case as no EC legislation on the issue has made such provision.

cessful. Although the court would take into account the margin of appreciation enjoyed by the state, the evidence of the case-law suggests that, as any Council of Europe country which abolished such provision is out of step with the vast majority of other states party to the Convention, the court would deem such action an interference with protected rights. Similarly the Human Rights Committee of the International Covenant on Civil and Political Rights 1966 is likely to the take the same approach, following its General Comment 22 on Article 18, which protects the freedoms of thought, conscience and religion.[21] The Covenant, however, only binds the United Kingdom in terms of international obligations, due to the dualist approach it adopts to international treaties and the fact that it has not been incorporated into domestic law. It also can not provide an individual with a remedy if his or her rights are breached, as the United Kingdom is not a party to the Optional Protocol which provides the basis for individual petition.[22]

3.2. *English Law and the Establishment and Administration of Mosques*

In Islam the mosque probably has a role more central and fundamental to the Muslim communities established around them, than churches enjoyed even prior to the increasingly secular nature of many societies. The mosque, however, is not important in the sense of births, deaths and marriages as the church may be now. There is no formal initiation ceremony in Islam, and mosques often have a non-existent role in marriage where the formal wedding contract, the *nikah*, can in Islam, as in canon law, be formally entered into and agreed almost anywhere. It does, however, play an important role in death, where a congregation meets to offer prayer prior to burial. The mosque has historically been central to the creation of a Muslim identity. The coming together for prayer on as many of the five times per day as is possible and especially on a Friday, has been vital in creating a sense of community and unity throughout Islamic history. Like the church, in many respects, it has also been central in the provision of religious education.

The incentive for the provision of a religious centre of worship for Muslims, as for other religious minorities in the United Kingdom, has been strong. The first purpose built mosque there dates from 1889, when the *Shah Jehan Masjid* in Woking was built. An earlier mosque was opened in Liverpool in 1887, although this was not purpose built. As one would expect, Muslim populations, upon becoming established in various parts of the United Kingdom, have attempted to build or establish mosques to serve that population. While the population in a geographical area has numerically been relatively small, private dwellings have often been used through the good will of an owner, as a mosque of sorts. At a certain point the population has often been able to buy either a private dwelling or another building, often disused churches or synagogues but also light industrial units, and convert those. It is only where a substantial population has become established that the local Muslim body has been able to build and afford a purpose built mosque, and on occasion this has been through outside funding and donations. As noted above, there are various communities within the Muslim population and there are also communities within what external observers would perceive to be a community. For this reason it is perfectly possible to find in the same city or town a purpose built mosque(s), various conversions and numerous private dwellings where either certain groups come together for

[21] See more specifically on this issue, P Cumper, 'Freedom of Thought, Conscience and Religion' in D Harris and S Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, Oxford, 1995) p 359. Furthermore Article 26 would provide a basis for a claim under the International Covenant on Civil and Political Rights 1966.

[22] The UK is of course also obliged to submit reports to the Human Rights Committee detailing its compliance.

prayer or private individuals, for reasons of personal piety, engage in religious instruction. It has been calculated that there are in Bradford, for example, (a city whose Muslims comprise 10 per cent of the total population of approximately 400,000) four purpose built mosques and fifty conversions alongside numerous private dwellings where religious instruction is engaged in.[23] Estimates as to the number of mosques in the United Kingdom vary between 1,500 and 6,000. Due to the different methods of classification it is difficult to know the exact figure.[24] What is clear, however, is that compared to these estimates relatively few mosques are recognised as places of worship under the terms of the Places of Worship Registration Act 1855 and the Marriage Act 1949 as amended. As of December 2001, 635 buildings were certified for Muslim worship in England and Wales under the 1855 Act, of which 124 were also registered for the solemnisation of marriages under the 1949 Act.[25] Bradney has argued that it is difficult to see how the registration of buildings under the 1855 Act is legal, due to the stipulations of that Act, in particular that it must be a place of public religious worship.[26] Whether this is correct or not, it is clear that a not insignificant number are now so registered.

The setting up of mosques and other minority religious places of worship has played a central role in the efforts of these religious minorities to establish themselves in the United Kingdom. For many minority communities it has been, psychologically at least, a form of arrival. Conversely for elements of the majority population it has confirmed their fears that 'outsiders' were and are increasingly pushing them out. In terms of symbolism, the conversion of a church to a mosque, for example, is profoundly significant to those opposing the establishment of minority religious groups on a geographic or national basis.[27] Although the most controversial project with regard to the building of a religious minority's place of worship concerned the building of a *mandir* by the Hare Krishna Movement in Hertfordshire, British Muslims have, along with other religious minorities, regularly complained of impediments and obstruction by local planning authorities and residents in the obtaining of permission and siting of a place of worship.[28]

The law in this area is almost entirely regulated by two pieces of legislation. The first, the Town and Country Planning Act 1990, regulates the building of new places of worship and also where there is 'any material change in the use' of an existing building.[29] In any application the local authorities, who are the competent bodies in this regard, must have regard to 'the provisions of the development plan, so far as material

[23] 'Islam and the West—Bridging the Gap' East West—http://www.mra.org.uk/fac/lead.html.
[24] For example the Charity Commissioners, as of 28 October 2001, only have 124 mosques registered as charities. This figure is vastly under-representative due to the different nomenclatures used when registering charities and not all establishments register themselves.
[25] These figures were provided by the Registrar General and are correct as of 20 December 2001. The Marriage Act 1949 has been subsequently amended on numerous occasions, most importantly by the Marriage (Registration of Buildings) Act 1990.
[26] A Bradney, 'The Legal Status of Islam within the United Kingdom' in S Ferrari and A Bradney (eds.), *Islam and European Legal Systems* (Aldershot, Dartmouth, 2000), p 184. On this point, see also C Hamilton, *Family, Law and Religion* (Sweet & Maxwell, London, 1995), p 48.
[27] The Church in Wales, among others, previously imposed a restrictive covenant that if the building was sold it could not be used for religious purposes by a non-trinitarian church. This restriction has now been removed.
[28] Although quite dated see on this point, H Hodgins, 'Planning Permission for Mosques—The Birmingham Experience' Research Paper 9, Centre for the Study of Islam and Christian-Muslim Relations, University of Birmingham, 1981. On the Hare Krishna *mandir*, see S Poulter, *Ethnicity, Law and Human Rights: The English Experience* (OUP, Oxford, 1998), ch. 7. It is worth noting that the system is generally considered to be cumbersome, expensive and overly bureaucratic.
[29] Town and Country Planning Act 1990, s 55(1).

to the application, and to any other *material* considerations'.[30] Once a new building or conversion has been approved for religious purposes, then there are advantages in having it registered under the Places of Worship Registration Act 1855, in particular, the fact that it is exempt from local rateable charges and also does not have to register separately under the Charities Act 1993. The major concern for Muslims and other religious minorities, however, has not been with registration but with obtaining the requisite permission to establish a mosque or other place of worship in the first place.

Applications for places of worship come within the standard application procedure for planning permission. The local authority can either accept, reject or propose amendments and changes to the application. In determining the 'material considerations' of an application, the local authority will have regard to a number of issues. The views of local residents and the environmental consequences of such a project are important considerations, with the impact upon noise and traffic being of primary importance. Issues such as demand for such a centre, other provision or centres within the area or locality and the aesthetics of the proposed building or conversion will also be taken into account. Where an application is made for a domestic dwelling in a residential area to be converted into a place of worship, it is clearly of legitimate concern to local residents. The proposed conversion will have a significant impact upon parking, traffic and noise especially during *Ramadan* and on other Muslim holy days such as *Eid* and also for Friday prayers. It is also likely to lead to a marked increase in traffic and noise where a mosque is used for *Qur-anic* classes, which tend to run in the period after school during the week. It is more difficult to be sympathetic to such concerns, however, where the building in question is already or has until recently been in use as either a church or synagogue. It is unlikely to lead to any significant increase in noise or traffic than that which already exists. Aesthetically the only changes that are usually made is the removal of the cross, if there is one, and a new placard above the entrance. Muslims and other religious minorities, primarily Hindus and Sikhs, have consistently considered, however, that local authorities place impediments in the way of their application at every stage of the process, no matter what the nature of the application, i.e. purpose built or conversion. On contacting the chair-persons for five mosques in different parts of the United Kingdom, Cardiff, North London, Luton, Kingston-upon-Hull and Bradford, similar experiences were related by each. The same experiences were also recounted by chair-persons for two Sikh *gudwaras* and three Hindu *mandirs*.[31] Although this limited selection cannot claim to be representative, it does highlight some widely-held views among minority religious communities. It may be that the difficulties in gaining planning permission can be explained by the fact that the application procedure under the Town and Country Planning Act 1990 is not a simple one. On the other hand, it may not be so easy to explain. Racism and xenophobia may play a role. The most clear example of this is in areas with small religious minority populations. An application for a disused church to be converted into a mosque in Chichester in 1996, for example, a city with a very small ethnic minority population, was vociferously opposed by local residents and rejected by the local authority despite being

[30] *Ibid.* s 70(2). There is no one definitive case stating what 'material' considerations are, although the issue has been discussed on numerous occasions: see among others, *Cambridge City Council v Pearse* (1993) 8 PAD 281, *David Wilson Homes v South Somerset District Council* [1994] JPL 721, and *Cooper v Secretary of State for the Environment* (1996) 71 P & CR 529.

[31] The *gudwaras* were in Luton and Cardiff respectively and the *mandirs* in Southampton, Luton and Neasden. Interviews were carried out in person or by telephone in July and August 2001. I am grateful to all those who assisted in this respect. The areas covered are not fully representative or indeed comprehensive but range from those with proportionally large ethnic minority populations, such as Luton and Neasden, to those with proportionally smaller populations such as Cardiff and Southampton, to areas such as Kingston-upon-Hull where the population is proportionally very small.

supported by the Bishop of Chichester and almost all of the local church establishment. The environmental impact was negligible, but local residents were very vocal in their opposition to a mosque being established and it was clearly this 'material consideration' which was given the most weight in the determination.[32]

One of the most surprising aspects of the planning process, however, is that there are so few reported cases where an association or individual has sought judicial review of the local authority's refusal to grant approval of an application for a mosque.[33] Those cases which do exist are concerned with breaches of the conditions attached to the granted permission.[34] The difficulty in challenging such acts may lie in the fact that the criteria and stipulations for seeking judicial review in English public law are not always easy to comply with. From this it can be argued that either the perception of minority religious groups is unbalanced or in the alternative that local authorities may well place impediments in the way of the application process but a compromise is eventually arrived at, which is broadly acceptable to all, resulting in relatively few judicial challenges. It is more likely to be the latter. To take an example where purpose built mosques have been completed, it is noticeable that some do not have a *minar* (minaret) in the traditional style one would find in many parts of the Muslim world. It is likely that some local authorities have been prepared to accept a dome but not necessarily the *minar*. Furthermore, where *minars* have been built, it is a rare practice to have calls to prayer from the *muezzin*,[35] even where the mosque is in a mostly Muslim area, as is the case with the central mosques in Bradford, Luton and Birmingham. Some exceptions have been made for Friday afternoon prayers only, but for a *muezzin*'s call to be permissible for prayers which take place prior to sunrise, as is common throughout the Muslim world, would almost certainly be beyond the current realms of permissibility. Even if such an application were made and granted it would be open to an individual to bring a claim for nuisance in tort or indeed to utilise the principle in *Hatton v United Kingdom*[36] to bring a claim utilising Article 8 (respect for private and family life) and Article 1 of the First Protocol of the ECHR (protection of property) to challenge the legality of the local authority's decision.

The other reported legal disputes which have arisen are mostly with regard to the administration of mosques. With the exception of those single-faith Muslim schools which have now obtained 'voluntary aided status',[37] Muslim religious establishments in the United Kingdom have to be run from private funds. As a consequence they have sought to register themselves as charities under the Charities Act 1993, which repealed and consolidated various earlier statutes relating to the law of charities.[38] The Charities Commissioner maintains a register of all registered charities, and any bodies which are not registered, by law, are not charities. So long as any mosque or other Muslim institute, trust or undertaking complies with the statutory definition of a charity and exists to serve the furtherance of causes recognised as charitable,

[32] For general discussion, see S Bell and D McGillivray, *Environmental Law* (Blackstone Press, London, 5th edn., 2000), pp 293 *et seq*. The incident is recounted in *Islam and the West—Bridging the Gap*, http://www.mra.org.uk.fac/aug98/lead.html.

[33] The Town and Country Planning Act 1990 does not allow for this, but see *R v Hillingdon London Borough Council, ex parte Royco Homes Ltd.* [1974] QB 720, [1974] 2 All ER 643, [1974] 2 WLR 805, DC. See also *Rochdale Metropolitan Borough Council v Mohammed Din* (1989) 4 PAD 529, which is one of the few judicial review cases in this field, involving challenge to a refusal to grant planning permission.

[34] See, for example, *R v Ealing London Borough Council, ex parte Zainuddin* [1994] EGCS 130.

[35] Or more accurately a public address system.

[36] Judgment of the ECHR, 2 October 2001.

[37] See discussion *infra*.

[38] See generally on this issue *Halsbury's Laws of England*, vol 5, CHARITIES (Butterworths, London, 1999.) Also with regard to religious charities, see P Edge and J Loughrey, 'Religious Charities and the Juridification of the Charity Commission' (2001) 21 Legal Studies, 36.

then it can be registered by the Charities Commissioner. It is the duty of the trustees of the establishment to apply for registration, and as far as mosques and religious educational establishments are concerned are obliged to do so if they wish to take advantage of the benefits of that status.[39] Of the religious establishments contacted with regard to the question of planning permission, as discussed above, most were registered charities. The essential fact is that the Charities Commissioner has registered a wide variety of trusts as charities which aim to advance Islam. Thus undertakings which exist to teach the *Qur-an*, allow for prayer meetings, pay for the maintenance or purchase of buildings to be used as religious centres, among numerous other purposes, have in conformity with the Charities Act 1993 registered themselves.[40] The legal disputes concerning mosques which have arisen in this context have primarily been with regard to the powers of and presence of certain persons on the board of trustees for example,[41] and also whether an Imam is an employee of a mosque[42] and whether or not his decisions are subject to judicial review.[43] Issues such as these have had to be resolved within the principles and confines of employment legislation and public law, although the courts have referred extensively to legal disputes concerning the established Church.

3.3. *English Law and Muslim Cemeteries*

As with mosques, the provision for cemeteries for religious groups in the United Kingdom is determined by local authorities, although on this occasion under the terms of the Local Government Act 1972.[44] Due to the fact that local authorities are responsible for the provision of cemeteries at a time when cremation is the majority practice and the restrictions and demands on land usage are acute, similar problems have been experienced as in the application of planning permission for mosques. Local authority politics and regional circumstances play a major role. Some authorities such as that in Kirklees in the north of England, where 10 per cent of the population is Muslim, have made extensive provision to accommodate the requirements of Muslims, such as same-day burial, ritual washing facilities and the preparation of graves according to Islamic principles.[45] Similar provision has also been made, elsewhere, for members of both the Muslim and Jewish communities. Both religions stipulate clear guidelines for burial and the preparation of graves and that adherents of those faiths should be buried separately from those of other faiths. British Muslims have thus utilised the precedents, *vis-à-vis* the practices of local authorities for British Jews, as a basis for their requests.

Although there are no clear edicts to the effect of when burial should take place, most Muslims attempt to ensure burial as speedily as possible. This can cause problems both with regard to the legal formalities to be followed upon death and in ensuring speedy burial at the cemetery. There have been significant problems and concerns with coroners, for example, not being available over Bank Holiday weekends, thus

[39] There are exceptions to this, in particular, those which are registered under the Places of Worship Registration Act 1855. The consequence of registration is that the annual reports do not have to be submitted to the Charities Commissioner although the accounts are still subject to review, if the Commissioner so decides.

[40] This information is derived from the Charities Commissioner's database, http://www.charity-commission.gov.uk/.

[41] See *Sharif v Hamid* [2000] SCLR 351.

[42] See *Birmingham Mosque Trust v Alavi* [1992] ICR 435.

[43] *R. v Imam of Bury Park Mosque, Luton, ex parte Sulaiman Ali* [1992] COD 132.

[44] By the Local Government Act 1972, s 214, local authorities replace the burial boards under the Burial Acts 1852 to 1906.

[45] See, for example, the submission by Kirklees Metropolitan Council to the House of Commons Select Committee on Environment, Transport and Regional Affairs, 8th Report, 2000.

delaying burial. Only in some geographical areas have these concerns been addressed.[46] With regard to commercial enterprises which arrange funerals, however, many have been quick to provide facilities for Bank Holiday and weekend facilities to accommodate the needs of the clientele.[47] It is not always economical, however, for local authorities to employ 'stand-by' staff in case of emergency burial. Thus while the private sector provision often exists, there is often none in the public one. In cases where such provision does exist, there is usually an additional charge for such a service.

The provision of cemeteries has also been problematic for some British Muslims. There is evidence to suggest that, despite the fact that there are far more Muslim cemeteries than there were in the past, some local authorities are still refusing to make provision for separate Muslim areas.[48] Some authorities consider, for example, that the requirement that Muslim graves face towards Makkah takes up more space than they have, as this is not the normal layout of their cemeteries.[49] Where provision has been made for Muslim areas, however, facilities for bathing and cleansing of the body, according to Islamic edicts, have usually also been provided.

In those cases in which requests for Muslim cemetery areas have been declined, there often, but not always, has been a very pressing problem of space. A recent House of Commons Select Committee on Environment, Transport and Regional Affairs Report on Cemeteries[50] has highlighted and discussed the very real problem of accommodating not only Muslim graves, but also the fact that cemeteries in the United Kingdom are finding it increasingly difficult to accommodate those who wish to be buried, and not just British Muslims and Jews. The choice of burial has become a minority preference. The compulsory use of a new grave for more than one person may have to be seriously considered.[51] The practice of opening existing graves and re-using the space by putting both the old and new coffin into the space is also a serious alternative. The Select Committee considers that the preference to be buried should be respected.[52] It may not, however, be possible to accommodate the further preferences of religious minorities. It is almost certain that sections of both the Jewish and Muslim populations will vociferously oppose some of the proposals. This is likely to be an area of future contention. In particular, Article 9 of the ECHR (freedom of thought, conscience and religion) is likely to assist applicants challenging any failure to allow followers of both Islam and Judaism the right to bury their dead as they wish. Article 9 may not extend to making provision for separate areas in all cemeteries but it is likely to encompass the right to be buried as required on religious grounds. Although there are no cases directly on this point the now defunct Commission of Human Rights in the past has hinted at this.[53] This has also been implied in a decision of the Chichester Consistory Court in *Re Durrington Cemetery*.[54] Here the request to grant a faculty permitting the deceased's re-interment in a Jewish cemetery was upheld with reference to Article 9 of the Convention,

[46] Luton, Bradford and Leicester are notable examples.
[47] The Co-Op, for example, in almost all areas with a substantial Muslim population now provides such a service.
[48] M Wolfe, 'Muslim Death in England and the Constraints Encountered', a paper presented at the 3rd Conference of the Association of University Departments of Theology and Religious Studies, June 2000.
[49] *Ibid.*
[50] House of Commons Select Committee, 8th Report 2000.
[51] *Ibid.* Most graves can take more than one body. The reference here, however, is to the compulsory use of one grave for bodies from different families, as opposed to use by one family.
[52] *Ibid.* para. 14.
[53] See *X v Germany* App. No. 874/179, 24 Eur. Comm. H.R. Dec. Rep. 137 (1981).
[54] *Re Durrington Cemetery* [2001] Fam 33, [2000] 3 WLR 1322, Chichester Cons Ct (Hill Ch).

although the Human Rights Act 1998 was not in force at the time. Although the Convention point was not determinative of the outcome of the case, it is interesting to note that the principle that seems to have been applied is that religious views concerned with burial must be respected, if there is not to be a breach of Article 9. Although, as noted above, Convention jurisprudence may not be as clear as the judgment in *Re Durrington Cemetery* seems to imply, if the government did limit the right of religious minorities to bury their adherents as they consider obligatory then a very credible challenge could be mounted utilising Article 9 either on its own or in conjunction with Article 14.

3.4. *Muslim Family Law and English Law*

English family law has on numerous occasions had to address the validity of family relations conducted according to Islamic beliefs.[55] The question for English courts and the legislature has, as noted above, been to what extent it considers some customary or religious and legal practices, both in this country and abroad, to be acceptable to it and valid in the light of the values that it seeks to promote and protect. It is also clear that the British Muslim population has not sought to shed its diverse cultural and religious practices. This applies most extensively in the sphere of family life. Certain commentators have argued, for example, that an *Angrezi shariat* (literally English Islamic jurisprudence), has now developed in this sphere.[56]

The diverse views and practices on what Islam requires and the extent to which it is complied with by British Muslims in the sphere of family law is not simple to explain or quantify. It is a common practice among some British Muslims, for example, to consider the civil registration of a marriage under English law to be tantamount to the *nikah* (marriage contract) and thus removing the need to 'solemnise' it in a religious form. Others, however, only have a *nikah*, and in the event of marital breakdown obtain a *talaq* (religious divorce) without reference to any court or legal authority either Islamic or 'civil', but according to how they understand their rights and duties. In the absence of any form of registration of the marriage, according to the procedure, formalities and stipulations prescribed by legislation, such marriages would be declared void if circumstances were to lead to the intervention of United Kingdom judicial bodies.[57] Other British Muslims utilise both civil and religious procedures and accordingly have rights and obligations under both systems. As a result of these various practices, there are many relationships which are recognised as valid according to Islamic principles, but which may exist outside of the recognition of English law.

English law has had to deal with the validity of *nikahs* and *talaqs* obtained both elsewhere and in this country. With regard to where 'conflict of laws' issues have been raised, the situation is primarily dealt with by the courts and legislature on the basis of domicile and the validity of a *talaq*, for example, in the jurisdiction where it was obtained. If an individual is domiciled in the United Kingdom, then a *talaq* obtained abroad is not valid in the United Kingdom and thus could lead to the invalidity of any subsequent marriage entered into either in the United Kingdom or abroad, for the purposes of English law, even if it is recognised as valid in other jurisdictions.[58] Similarly polygamous marriages entered into either in the United Kingdom or

[55] Many early cases date from the era of empire.
[56] D Pearl and W Menski, *Muslim Family Law* (Sweet and Maxwell, London, 1998), at p 74.
[57] Nor is it likely to be recognised for other purposes such as probate, for example.
[58] See generally the discussion in S Poulter, *Ethnicity, Law and Human Rights: The English Experience* (OUP, Oxford, 1998), and also J Murphy, 'Rationality and Cultural Pluralism in the Non-Recognition of Foreign Marriages' (2000) 49 ICLQ 643.

abroad by those domiciled in the United Kingdom are not valid in the United Kingdom although they will be in certain other jurisdictions. [59]

What, however, of the increasingly common situation where there is an entirely 'domestic situation' where both parties are domiciled in the United Kingdom? Do English courts recognise a 'simple *nikah*', obtained in this country, as a valid marriage? The answer is dependant on the formalities complied with and the capacity of the parties to enter into a valid marriage. All other things (such as capacity to enter into marriage according to English law and consent) being equal, a valid *nikah* according to Islamic law is not recognised as a valid marriage under English law, unless it has been conducted by a religious minister in a place of worship recognised as such[60] and registered by the Registrar General for the solemnisation of marriages under the Marriage Act 1949.[61] A *nikah* conducted by a religious minister or anyone else, as is perfectly permissible in Islam, elsewhere would not be recognised as valid.[62]

The situation with regard to religious divorces is different. There is now a substantial number of mosques which are registered under the Places of Religious Worship Act 1855 and the 1990 Act and which have 'religious courts' attached to them. These bodies may grant religious divorces, i.e. the *talaq* to either party in accordance with Islamic principles, or at least their understanding of it.[63] The *talaq*, however, is only recognised as a valid termination of marriage for the religious law in question.[64] Religious divorces are usually of importance to the parties in question, as it recognises the validity of the termination according to rules and regulations which are important both spiritually to them and more broadly in the context of social and community respectability.[65] The *sharia* courts attached to various mosques in Birmingham, Dewsbury, Bradford, and London, among many others, do not come within the scope of the definition of bodies which can grant a valid divorce for the purposes of the English law.[66] This is despite the fact that bodies that are similar in nature and constitution, but located abroad, can grant a valid divorce, for the purposes of English law, under the principles and practices adopted regarding conflict

[59] Comprehensive discussion of these issues and the approach of English law is beyond the scope of this article. See the studies by P North and J Fawcett, *Cheshire and North's Private International Law* (Butterworths, London, 1999, 13th edn.) pp 704 *et seq*; D McClean, *Morris: The Conflict of Laws* (London, Sweet and Maxwell, 2000, 5th edn.) pp 237 *et seq*; and N Lowe and G Douglas, *Bromley's Family Law* (Butterworths, London, 1999, 9th edn) pp 48 *et seq*. The relevant provision with regard to potentially polygamous marriages outside the United Kingdom is the Private International Law (Miscellaneous Provisions) Act 1995, s 5.

[60] I.e. under the Places of Worship Registration Act 1855.

[61] Marriage Act 1949, s 41 (amended by the Marriage Acts Amendment Act 1958, s 1(1), and the Marriage (Registration of Buildings) Act 1990, s 1(1)). As to the solemnisation of marriages in registered buildings, see the Marriage Act 1949, s 44.

[62] Although certain other buildings can now be registered, this would not make a difference as such marriages cannot be religious in nature: Marriage Act 1949, s 46B(4) (added by the Marriage Act 1994, s 1(2)).

[63] Contrary to widespread belief, Islam does provide women with the right to a *talaq*, although cultural and customary practices have in effect limited its recognition in many instances.

[64] With regard to the *get* in Jewish law, see J Conway, 'New Provisions for Jewish Divorces' [1996] *Family Law* 368, and M Freeman, 'Is the Jewish *Get* Any Business of the State?' (2001) *4 Current Legal Issues: Law and Religion* (OUP, Oxford, 2001). The basic position is identical in both cases. It is worth noting that in *Serif v Greece* (2001) 31 EHRR 20, para. 50, the court recognised that the European Convention on Human Rights does not oblige states to give legal effect to religious weddings and decisions of religious courts.

[65] For a fascinating study of the work of the Muslim Sharia Council London (MSCL), see S Shah-Kazemi, *Untying the Knot, Muslim Women, Divorce and the Sharia* (Nuffield Foundation, London, 2001).

[66] The Family Law Act 1986, s 44(1), stipulates that only courts of civil jurisdiction (i.e. usually county courts and the High Court) can grant a divorce.

of law situations.[67] *Talaqs* obtained in the absence of reference to any body will clearly not be recognised.

The fact that English law does not recognise *talaqs* obtained, in accordance with Islamic principles, in the United Kingdom is primarily due to policy considerations.[68] Although the concept of 'public policy' is exceptionally nebulous in judicial determinations concerning this area of law,[69] the immediate *talaq* as obtainable in practice by men, in certain schools of jurisprudence, can leave women without the protection of the law and few if any property rights. There is also the added complication of the acceptability of the different practices being adopted and the possible recognition and non-recognition by the English courts of different types of divorce as valid under Islamic jurisprudence. For this reason English law has adopted a pragmatic approach dependent upon the reliance of English law and procedures for the obtaining of a legally valid divorce for those domiciled in the United Kingdom. The validity or invalidity of *talaqs* under Islamic law is for bodies with competence in those matters to determine. Furthermore a study by Shah-Kazemi suggests that most Muslims who use religious courts are reconciled to the dual systems where religious divorces are obtained under or following one procedure and civil divorces under another.[70]

English courts have also not been prepared to enforce the rights of divorced women as recognised by religious courts in matters not regulated or recognised, as such, by English law. Thus the concept of *mahr*, which is a sum payable by the husband to the wife and awarded by a religious court, was not considered to be enforceable by English courts upon their religious divorce, even though religious courts, which lack an enforcement mechanism, had considered its payment a religious obligation upon the husband.[71]

In the context of marital breakdown and the custody of children, English law has very clearly not allowed the Islamic premise that the father is usually (but by no means always) the legal guardian, with the custody of any children, up to a particular age, awarded to the mother. English law has not, to the same extent as Islam, distinguished between guardianship and custody and made almost automatic assumptions as to who will undertake which role in what circumstances. English courts have strictly worked within the confines of legislation which considers that the best interests of the child are paramount both upon marital breakdown and concerning the child's upbringing.[72] A different issue, however, is whether the religious

[67] For an extensive discussion, see D Pearl and W Menski, *Muslim Family Law* (Sweet and Maxwell, London, 1998), pp 277 *et seq*.

[68] The 1996 Family Law Act, s 9(2), which dealt with the Jewish *get*, was very careful in ensuring that it did not award it legal recognition for the purposes of English law. This provision has not yet come into force, although a Bill before Parliament at the time of writing, the Divorce (Religious Marriages) Bill, if it comes into force, will essentially make provision to allow a court to require the dissolution of *any* religious marriage before granting a civil divorce.

[69] See the discussion in J Murphy, 'Rationality and Cultural Pluralism in the Non-Recognition of Foreign Marriages' (2000) 49 ICLQ 643.

[70] S Shah-Kazemi, *Untying the Knot, Muslim Women, Divorce and the Shariah* (Nuffield Foundation, London, 2001). This is analogous to the situation faced by many members of the Jewish and Catholic faiths as well, for example.

[71] See for example the discussion by A Hasan, 'Islamic Family Law in the English Courts' [1998] Family Law 100.

[72] Children Act 1989, s1(1). In a case involving a dispute between a Muslim father and a nominally Christian mother the father sought to have an order prohibiting the mother from obstructing the circumcision of a child in her custody. The court held, however, that the best interests of the child would not be served by a circumcision, even though it is compulsory for Muslim males and the lineage in Islam passes through the father: *Re J (a minor)* [2000] 1 FLR 571.

courts also deal with the question of child custody. Most, such as the Muslim Law (Shariah) Council in London have a very deliberate policy of not getting involved in custody matters, although they are prepared to assist in mediation. Custody was determined by the English courts where Muslim women, who have sometimes relied upon religious bodies to grant them a religious divorce, have then applied for a civil divorce. There is no research on what percentage or proportion of Muslim women consented or complied with Islamic law principles as to the custody awards made before such courts. If representations were made to an English court to this effect, i.e. the mother wished custody to be awarded on the basis of Islamic principles, the English courts would probably consider this as a factor, although it is questionable how much weight would be attached to it. In those cases where there has been no marriage or divorce, for the purposes of English law, i.e. there has been a non-registered 'simple *nikah*' and subsequently *talaq*, it is difficult to know what practices are followed and whether the parties in question adopt Islamic principles or not.

3.5. *Islamic Religious Obligations and English Labour Law*

Islam as practised by many British Muslims and the obligations it may impose, in particular, with regard to fasting during *Ramadan* and daily and Friday prayers are prima facie not compatible with normal working practices in the United Kingdom. The issue of Muslims within the workforce and the questions of the compatibility of daily prayer, observance of *Ramadan* and the taking of leave to coincide with religious festivals have arisen in the context of the work of United Kingdom employment tribunals. The basic starting point is that devout Muslims are obliged to pray five times a day, although it is perfectly permissible for these not to be performed at the prescribed times, and can be deferred to a later time during the day. Of a more obligatory nature is the Friday or *jumah* prayer. Attendance at a mosque is compulsory for Muslim males of good health, if at all possible. Furthermore, fasting between sunrise and sunset during the month of *Ramadan* is obligatory for the fit and healthy, although there are a significant number of recognised exceptions to the obligation. Before embarking on discussion on this issue, it is worth bearing in mind that provision to take account of the above obligations varies significantly between countries in which Islam is the predominant faith. No one approach towards these religious obligations has been universally adopted.

In the context of the United Kingdom, it is worth remembering that some employers, who have a large number of Muslim employees, have made adjustments in break and lunch times and in allowing holidays to accommodate religious observance. This has almost entirely been as a result of compromise between employers and employees. Challenges to a lack of adjustment in working practices to accommodate such requests, where they are forthcoming, have been in the context of the laws on racial discrimination. With the exception of laws which apply only in Northern Ireland, there is no law in the United Kingdom which prohibits discrimination on the grounds of religion. In any case the laws on racial discrimination, the Race Relations Act 1976,[73] apply only in the context of employment and receipt of services and not more generally. The United Kingdom government has refused to ratify Protocol 12 to the European Convention on Human Rights, which would oblige it to extend the prohibition on discrimination, on among other grounds religion, to all rights already protected, to all parts of the United Kingdom.[74] The European Union has adopted a Framework Directive on Discrimination which provides a general

[73] The scope of the Race Relations Act 1976 has been amended by the Race Relations Amendment Act 2000, although it is does not affect its scope for our purposes.
[74] On this issue and the government's reasoning, see U Khaliq, 'Protocol 12 to the ECHR: A Step Forward or a Step Too Far' (2001) Public Law 457.

framework which is to be implemented in legislation by December 2003 and requires equal treatment in employment and occupation on the grounds of 'religion or belief, disability, age or sexual orientation'.[75] Furthermore, Directive 2000/43/EC adopted in June 2000 and to be implemented by July 2003 enacts the principle of equal treatment between persons irrespective of race and ethnic origin.[76] While the latter will require some amendment to legislation, it is the former which will fundamentally affect the manner in which English law applies in this sphere. The requirement that laws on discrimination extend to the grounds of religion will afford protection to British Muslims who are discriminated against on the basis of their faith, something which to date has largely been absent.

Until such legislation comes in to force, however, no protection exists against direct discrimination on the grounds of religion. The Race Relations Act 1976 is concerned with protecting members of a 'racial group' from discrimination on 'racial grounds'.[77] Thus while Sikhs and members of the Jewish community have been afforded protection on these grounds, Muslims have not.[78] A number of employment tribunals have held, for example, that Muslims do not come within the terms of the Act unless they have been discriminated against on the basis of their race or national origin.[79] Thus prohibiting the taking of holidays to coincide with *Eid*, for example, is only caught by the Act to the extent that those affected must primarily be of a particular race or racial or national origin, in which case it is an example of indirect not direct discrimination.[80]

One of the clearest cases to the effect that a failure to make adjustments to accommodate prayers, for example, in certain circumstances is not prohibited by domestic law is *Ahmad v Inner London Education Authority*.[81] The question in this case was concerned with the terms and conditions in the employment contract. As no allowance was made in the contract for Mr Ahmad to be 45 minutes late each Friday afternoon, so as to allow attendance for Friday prayers, it was held by the majority that Article 9 of the European Convention on Human Rights does not entitle absence from work for the purpose of religious worship.[82] The decision in this case fundamentally turned upon the contract of employment that was in existence, and the fact that the employee had not advised his employers, at the time employment was offered, that he wished to attend a mosque every Friday.[83] The consequence of the decision seems to be that in the absence of a contractual term being inserted at the time of negotiation, the law will not consider claims by Muslims to allow time off work to attend Friday prayers. In another case, however, it has been held that a Muslim who was not allowed to attend Friday prayers was indirectly discriminated against on the basis of race. In this case, however, the working day and breaks were not strictly defined and the working day lasted between 12 and 13 hours. Furthermore the request was apparent from the commencement of employment. In these

[75] Directive 2000/78, EC (OJ 2000 L 303/16), art 1.
[76] Directive 2000/43, EC (OJ 2000 L 180/22).
[77] Race Relations Act 1976, s.1(1)(a). The terms are defined in s 3(1).
[78] The authoritative approach, which has been widely criticised, is in *Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 1 All ER 1062, [1983] 2 WLR 620, HL.
[79] See for example, *Nyazi v Rymans Ltd*, EAT 16/88 unreported.
[80] See *Hussain v J.H. Walker* [1996] IRLR 11. Also see on this point Case 130/75 *Prais v EC Council* [1976] ECR 1589, [1976] 2 CMLR 708, [1977] ICR 284, ECJ.
[81] *Ahmad v Inner London Education Authority* [1978] QB 36, [1978] 1 All ER 574, [1977] 3 WLR 396, CA.
[82] Scarman LJ (as then was) strongly dissented, Lord Denning and Orr LJ concurred.
[83] The case was dismissed by the European Commission on the grounds that the application was manifestly ill-founded: Application 8160/78 *X v United Kingdom* (reported as *Ahmad v United Kingdom*) (1981) 4 EHRR 126.

circumstances the discrimination on the grounds of race was indirect and also unlawful.[84]

Time off work for *Ramadan* has not arisen directly, but it is likely that courts and employment tribunals would have to consider the issue on the basis of indirect racial or national discrimination and the exact nature and terms of the contractual relationship. With regard to the wearing of the *hijaab* at work, it should be noted that there have been relatively few reported cases on this issue.[85] It may be possible to argue, however, that in a case of indirect discrimination, restrictions on its use may be objectively justifiable. In a case involving a Sikh and a company's policy prohibiting beards, the indirect discrimination was considered to be objectively justifiable on the grounds of hygiene.[86] It may be possible to draw an analogy here and argue that a refusal to allow the *hijaab* may be justifiable on health and safety grounds, for example, if it has a tendency to unravel and machinery is being operated. No such cases have to date been reported. In one case an employer has been found indirectly guilty of racial discrimination on the ground that the company failed to protect from pejorative comments a Muslim employee who wore a *hijaab* at work.[87] In these cases it is clear that race is being used to protect against religious discrimination in an attempt to fill a clear void in the law.

3.6. *Islamic Education and State Schools*

One of the more controversial and heated debates in the United Kingdom involving the Muslim population has been the issue of Muslim schooling.[88] The call from certain sections of the Muslim population to allow the establishment of 'Muslim schools' which are funded by the state had consistently been denied until 1998, when the (then) Education Secretary David Blunkett agreed to two Muslim independent schools, Islamia Primary School in North London and al-Furqan in Birmingham, receiving state funding. Prior to this British Muslims who had sought a Muslim education for their children had to pay for them to be educated at one of sixty independent schools,[89] i.e. schools not funded by the state although they are obliged to comply with certain minimum standards as set and defined by the legislature.[90] The issue for many British Muslims has been one of equality. State funded single-faith schools are a common feature of British education. There are currently over 4,800 Anglican, 2,100 Roman Catholic, 30 Jewish and 28 Methodist schools which receive state funding.[91] Considering that the Muslim community is substantially larger than some of these other groups, it is surprising that it has taken so long to obtain such provision. Many groups which have been established solely to lobby for attaining government funding have consistently argued that the lack of agreement for funding

[84] *Yassin v Northwest Homecare Ltd.* 25 January 1993, Case No. 19088/92.
[85] For a discussion on the *hijaab* and schools, see S Poulter, 'Muslim Headscarves in School: Contrasting Approaches in England and France' (1997) 17 OJLS 43.
[86] *Singh v Rowntree Mackintosh Ltd* [1979] ICR 554, [1979] IRLR 199, EAT.
[87] *Khanum v IBC Vehicles Ltd*, (unreported), (1998).
[88] For a more general discussion, see the excellent piece by M Parker-Jenkins, 'Equality before the Law: An Exploration of the Pursuit of Government Funding by Muslim Schools in Britain' (1999) 1 BYU Education and Law Journal 119.
[89] This is the most widely quoted figure. Estimates of 80 do exist.
[90] Independent schools are not defined by the Education Acts but are simply schools which meet certain regulatory standards and do not fall into any of the categories that receive any form of funding from the state. Those Muslim schools that do receive state funding now are classified as having 'voluntary aided status'. For amendments to earlier legislation, see the Schools Standards and Framework Act 1998, s 140, Sch. 30.
[91] I am grateful to the Department of Education for these figures.

was due to an inherent *Islamophobia*.[92] The fear has supposedly been that an 'Islamic' education would lead to increasing segregation in society between Muslim and non-Muslim groups. The justification given by funding bodies has been one of a failure to meet requisite standards or a surplus of places in local (usually non-religious) schools already receiving funding.[93] In a society, however, that is multi-cultural, discrimination whether real or imagined against one religious group has led to a significant amount of resentment within it. Either no single faith schools should be permitted, or, in more limited cases, no non-established faith groups should be permitted to establish schools. In the case when non-established faith schools have not only been established but also received funding to that effect, the perceived exclusion of one group would clearly lead to resentment within it. The awarding of state funding to the two schools, however, has gone some way towards improving the situation, although it is likely that ill-feeling regarding this issue will continue to exist for the time being.

It should be noted, however, that while demand for single-faith Muslim schools clearly exists, the majority of British Muslims do not wish their children to be sent to such schools.[94] A survey on this point found limited support amongst first and even less amongst second generation British Muslims for separate faith schools. The major question and concern was the quality of the education. An ability to study their 'own' language and also the ability to mix and socialise with children of other cultures and religions, to interact and be comfortable with non-Muslim society were all considered to be of importance, and it was felt that single-faith schools may not provide this.[95] The fact that only 20 per cent of British Muslims would send their children to single-faith schools, however, did not mean that widespread support for the principle did not exist.[96]

The basic statutory regulation in the United Kingdom is established by the Education Acts 1944 to 1998. Within that system all schools, with some limited exceptions which are not relevant here, must comply with the 'national curriculum'. Religious education is part of the basic compulsory curriculum[97] and it, in particular, is to reflect that the religious traditions in Great Britain are in the main Christian, while taking account of the teaching and practices of the other principal religions represented in Great Britain.[98] Collective worship is also to reflect the fact that the principal faith of the United Kingdom is Christianity, although exceptions do exist in certain cases where, for example, the religious background of the majority of

[92] This argument has been based upon the premise that schools of a similar standard and with similar facilities, established by different faith groups, have received state funding at the same time that applications from Muslim schools were denied. See, for example, the various discussion forums at http://www.muslimmedia.com and M Parker-Jenkins, 'Equality before the Law: An Exploration of the Pursuit of Government Funding by Muslim Schools in Britain' (1999) 1 BYU Education and Law Journal 119. The notion of *Islamophobia* was extensively discussed and its existence first widely highlighted in Runnymede Trust, *Islamophobia: A Challenge for Us All* (Runnymede Trust, London, 1997).

[93] For an unsuccessful attempt by governors of the Islamia school to challenge the decision denying it funding, see *R v Secretary of State for Education and Science, ex parte Islam* (1992) The Times, 22 May.

[94] Reported cases exist where Muslim parents, for example, have successfully sought judicial review of the refusal of a non-Muslim publicly funded single-faith school to admit their child. See e.g. *R. v Governors of the Bishop of Challoner Roman Catholic School, ex parte C* (1991) 3 Education and the Law 212.

[95] T Modood *et al*, *Changing Ethnic Identities* (Policy Studies Institute, London, 1994), Ch. 4.

[96] *Ibid.*

[97] Schools Standards and Framework Act 1998, s 69.

[98] Education Act 1996 s 352 (1)(a), read with the Schools Standards and Framework Act 1998, s 69, Sch 19. This does not apply to schools of a religious character, which are discussed *infra*.

pupils is likely to make this inappropriate.[99] The manner in which the determination that collective worship and the extent to which religious education should or should not primarily be Christian in nature, has on the whole been uncontroversial. The various Education Acts have between them established and subsequently amended the role of the Standing Advisory Committee on Religious Education (SACRE). Each Local Education Authority (LEA) has been obliged to establish such a body which provides advice and support on the religious content of the syllabus within the LEA area. The support and advice given, however, depends on the quality of the information supplied by the LEA officer whose job is to keep the SACRE informed of local and national developments. SACREs have two particular responsibilities. The first is that it can require the LEA to review its 'agreed syllabus for religious education'. The second is that SACREs can consider requests from schools to lift the legal requirement to hold an act of collective worship of a broadly Christian character. Such requests have to date, however, primarily come from schools with a large number of pupils from a non-Christian religious background. If the SACRE considers that this is appropriate, in the context of the school, it can then grant a determination for five years which is renewable upon application. The exact nature of collective worship in such schools is then determined by the school and its governors, taking into account the religious make up of the school and the views of the SACRE.[100] Other than in cases where Muslims form a majority of the pupil population, Islam is thus only likely to form a relatively small component of the various aspects of religious education and worship in state maintained schools of a non-religious character.

In state schools, however, where there is a substantial Muslim population, various bodies such as the Muslim Educational Trust (MET), provide the expertise to assist in 'Islamic Studies' lessons under the terms of the Education Act 1998.[101] Thus, for example, the MET participates and assists in such classes in the majority of schools, where their expertise is required, in the English Midlands. As noted above, for some Muslims, however, the current provision has proved unsatisfactory as it does not and has not reflected the fact that they wish their children to be instructed and taught the fundamentals of Islam more extensively than the current system allows and in a structured educational environmental. The demand has existed, therefore, for schools with provision in Islamic studies, for the timetable to be structured to take account of prayer and a general emphasis on Islamic ethics and values. The first such school, the London School of Islamics, was established in 1981. Such schools provide the scope for subjects such as Arabic and the general ambience of an Islamic environment, which some parents have been seeking.

The provisions regarding religion in schools, as discussed above, apply to non-religious schools maintained by the state only. Thus independent schools, which the overwhelming majority of Islamic /Muslim schools are, do not have to comply with this aspect of the legislation. Those that are maintained by the state, however,[102] such as the Islamia School in Brent, are permitted under the Education Act 1998 to opt out of the general legislative requirements and engage in religious instruction and collective worship according to the tenets of Islam.[103] An issue that is apparent, however, not only in state-maintained Muslim schools but also in independent schools is that Islam is not monolithic and views and interpretations differ significantly. To

[99] Schools Standards and Frameworks Act 1998, s 70, Sch 20.
[100] *Ibid.* Sch 20.
[101] Previously under the Education Reform Act 1988, ss 25, 26.
[102] To date they are all voluntary schools, i.e. they have been established privately but have been brought in to the state sector.
[103] Schools Standards and Frameworks Act 1998, Sch 19, para 4, and Sch 20, para 5.

what extent the views of which sects or school of jurisprudence are represented in these schools is unknown. Islamic jurisprudence or *usul ul-fiqh*, after all, covers an extremely broad spectrum of interpretations.

4. CONCLUSIONS

A substantial British Muslim population is, in historical terms, a relatively recent phenomenon. English law has, in accordance with its doctrines and approaches to non-established faiths, not granted Islam or any organisation associated with it any special protection. The law has, however, on occasion made for Islam, as well as other faiths, specific provision to take account of certain obligatory practices. Ritual slaughter is the most obvious example. British Muslims, like adherents of other minority faiths, have to utilise the existent legal regime and comply with the procedures that are in force to establish places of worship, for example. The general law is also utilised by the courts as and when they are faced with issues regarding the ability to challenge the activities of *imams*, for example. While the law has on the whole been successful in allowing Muslims to associate, this is not the case in other regards. The lack of a comprehensive, let alone basic, provision outlawing discrimination on the basis of religion is a substantial shortcoming of the current legal regime. This is especially so when *Islamophobia* has been shown to be widespread in much of society. Discrimination law in the United Kingdom has been shown to be inadequate in many regards, requiring fundamental overhaul.[104] The coming into force of the framework EC Directive on discrimination will go some way to improving the situation. There is, however, substantial scope for flexibility of protection in the terms of the Directive and, until implementing legislation is drafted, it will not be known which approach the United Kingdom will adopt. In other respects, increasing provision is being made for the Muslim population in the United Kingdom and the situation is far better than it has been in the past. The provision of *imams* who now work in the prison service to attend to the spiritual well-being of incarcerated Muslims is just one example.[105] English law's traditional liberty-based approach, even after the enactment of the Human Rights Act 1998, has ensured that British Muslims can by and large conduct their personal relations in a manner compatible with their diverse understanding of the obligations it imposes. This has resulted, however, in a formally unrecognised and unregulated quasi-judicial system coming into existence, to which a substantial number of British Muslims now have recourse, working alongside the formal legal system. This is especially so in the case of family relations. While English law may not have made many formal accommodations for British Muslims it has, by and large, certainly not hindered them practising their faith either.

[104] See the comprehensive report by R Hepple, M Cousey and T Choudhury, *Equality a New Framework* (Hart, Oxford, 2000).

[105] See the fascinating study by B Spalek and D Wilson, 'Not Just Visitors to Prisons: The Experience of Imams who Work inside the Penal System' (2001) 40 Howard Journal of Criminal Justice 3.