A Marriage in Pakistan - A Divorce in Maryland

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Aleem v. Aleem[1] is a recent case from Maryland's highest court, the Maryland Court of Appeals. Husband and wife were married in Pakistan in a ceremony that complied with the Pakistan Muslim Family Laws Ordinance.[2] After three days, the marriage was registered. At the time of the marriage the husband was twenty-nine and the wife was eighteen. Both were citizens of Pakistan and domiciled there, although the husband was studying at Oxford University until shortly before the marriage. After the marriage, the husband returned to Oxford and in a little while his wife joined him there. The couple spent four years at Oxford to allow the husband to complete his studies.

In the subsequent divorce litigation in the courts of Maryland, neither the husband nor the wife attacked the validity of the marriage. If there had been no marriage, there was no need for a divorce. The marriage might have been vulnerable on the ground that the families had arranged the marriage—although in the opinion of the Maryland Court of Appeals there is no suggestion of coercion—or on the ground that the husband had a right to divorce by *talaq* and that in the marriage contract he had not delegated the same right to his wife, or on the ground of inadequate provision of mahr for the wife, it being limited to Pakistan Rs. 51,000, the equivalent of about $2500.

After completing his studies at Oxford, the husband obtained a job at the World Bank in Washington, D.C., so the couple moved to the United States and took up residence in the state of Maryland near Washington. They lived there for twenty years

and had two children, both citizens of the United States because born there. The parents remained citizens of Pakistan, although the wife obtained a U.S. permanent resident card.

After living in Maryland for twenty years, the wife filed for divorce in a Maryland court. It would appear that the husband answered the suit, not raising any objection to the court's jurisdiction. At some point, it is not clear when, the court issued an interim order for alimony and child support. At another time in this unfolding drama, the husband went to the Embassy of Pakistan in Washington and executed a *talaq* divorcing his wife. He did this before the Maryland trial court had an opportunity to issue a decree of divorce, much less make a distribution of marital property.

In the course of the Maryland Court of Appeals' opinion, the point is made, although its significance is not made clear, that by going to the Pakistan embassy, the husband sought to evade the consequences of divorce under Maryland law, including the requirement of a fair distribution of marital property. After all, the husband had not challenged the Maryland court's jurisdiction. Suppose that when the husband went to the Pakistan embassy, he was ignorant of the fact that his wife had filed for divorce and that he had never submitted to the Maryland court's jurisdiction. Would that have made a difference? Probably the husband considered going to the embassy equivalent to going to Pakistan, but even if he had flown to Pakistan for a few days to execute the *talaq*, it might not have affected the outcome.

What was really at stake in this divorce action was whether the wife could reach the husband's pension from the World Bank, valued at one million dollars, and his home in Maryland, valued at $800,000, or whether she was limited to the *mahr* stated in the marriage contract, which was Rs. 51,000. Under the Pakistan Muslim Family Laws

Ordinance, when a husband divorces his wife by *talaq*, he must notify the chairman of the Arbitration Board that has jurisdiction, and then there is a ninety-day waiting period before the *talaq* becomes effective.[3] But, as demonstrated by the behavior of both parties, neither wanted to be reconciled, and the function of the Pakistan Arbitration Board is confined to determining whether both parties want to be reconciled, so under the circumstances the ninety-day waiting period had no significance.

The Maryland Court of Appeals held that the wife on divorce was entitled to a fair share of the husband's property and not restricted to the *mahr* stated in the marriage contract. In other words, the Court applied Maryland law, rather than Pakistan law.

There is no discussion in the opinion of the Maryland Court of Appeals how Maryland treats antenuptial agreements in a purely domestic setting. In many states of the United States, the enforceability of an antenuptial agreement depends upon whether there was full disclosure of the assets of both parties and both fully understood their rights. Some states require that the antenuptial agreement be fair at the time of the signing of the contract, others require it to be fair at the time of the distribution of property. Because of the absence of a discussion of Maryland's treatment of antenuptial contracts generally, there is no way of knowing how far Pakistan's law fell short of Maryland's requirements.

In the course of the Maryland Court of Appeal's judgment, it condemned both the *talaq*, to which the husband alone was automatically entitled under Pakistan law, and the provision for *mahr* in the marriage contract, which the court clearly considered pitifully inadequate. It expressed this condemnation even though the wife before she signed the

contract could have insisted on a larger *mahr* and that the husband delegate to her the same right to divorce that he had.

The Maryland Court of Appeals' holding rested on two grounds: The first was a conflict with a provision in the Constitution of Maryland that there would be no discrimination on the ground of sex. It appears that the voters of Maryland had voted to ratify what was called the Equal Rights Amendment, which ultimately failed to secure the necessary three-quarters of the states for inclusion in the federal constitution, but it was accepted as an amendment to the Maryland state constitution. The second ground was that depriving the wife of a fair and equitable division of the husband's property would violate the "public policy" of the state of Maryland. Conflict with a state constitutional provision, the opinion of the Court of Appeals seems to suggest, is alone enough to contravene a public policy.

Part of the law of the United States, and so of every state, is the rule of comity, a part of private international law, which requires federal and state courts under certain circumstances to recognize the laws and judgments of the courts of foreign nations. This rule of comity is based upon respect for other sovereign nations and the applicability of their laws within their borders, and also upon fear of retaliation against the forum's own citizens: if Maryland does not recognize a divorce decree valid under Pakistan law, Pakistan may not recognize a Maryland divorce decree. No doubt each state of the federal union has wide discretion to take into account all the circumstances surrounding a marriage, a divorce and the division of property, but at the core there is a law of comity that under certain circumstances would entitle the husband to have the law of Pakistan applied and the contract upheld. Perhaps he even has a federal constitutional right to

have it applied. Suppose the couple had not lived in Maryland for twenty years and did not have U.S. citizen children, but had lived there only one year, or were only tourists. Under these circumstances, the husband might have a right under International Law to have Pakistan law applied under the principle of comity. In a Texas case[4] somewhat similar to the *Aleem* case, the Texas court likewise refused to recognize the husband's *talaq*, which took place in Kuwait, but in dictum remarked that it felt justified in applying Texas public policy because the husband had been living in Texas for some years.[5] I leave it to you to judge whether the Maryland Court of Appeals has violated the core of the law of comity by applying Maryland values and disregarding Pakistan's ideas about marriage, divorce and property under the circumstances of the *Aleem* case.

In this connection I call your attention to the fact that there is no conflict with any actual judgment rendered by a Pakistan court, because under Pakistan law, the husband need not go to any court, but has it in his power to divorce his wife without judicial intervention. In a New Jersey case,[6] the court held that comity required that a Pakistan divorce be recognized and a provision in the marriage contract be applied, under which the wife got only $1500. But in that case, there was an actual judgment of a Pakistan court, holding that the marriage contract should be enforced, a proceeding in which the wife, represented by counsel, had participated.[7]

My sense is that Professor Azizah Al-Hibri (who was present in the audience) would have mixed feelings about the Maryland Court's judgment in the *Aleem* case, based upon my reading of her illuminating articles.[8] On the one hand, she wishes to move the interpretation of Islamic law in a progressive direction and drive out all traces of patriarchy. At the same time, she wishes this to be done as a result of interpretation of

authentic Islamic sources—the Qur'ān and the hadith of the Prophet. She is against any neo-colonialist force-feeding of Muslim countries on Western ideas. Thus although the Maryland Court may have reached the right result from Professor Al-Hibri's point of view, I doubt she would approve the manner in which the Court reached its goal, which essentially consisted in preferring Maryland values and ideas of fairness to Pakistan law, which to a large extent reflects Islamic religious beliefs.

In the course of the Maryland Court's judgment, there is criticism that the wife has been deprived of due process. The Court seems to have in mind two distinct harms to the wife. The first is that by pronouncing his *talaq* in the Pakistan Embassy, the husband attempted to interfere with the procedure going on in the Maryland court which, if it had been allowed to run its course, would have given the wife an opportunity to introduce evidence and make legal arguments. If the *talaq* was recognized to effect a divorce, the Maryland trial court would have been deprived of jurisdiction under Maryland law to make a fair distribution of property. The second harm to the wife, the Court of Appeals suggests, is from the nature of the *talaq* itself: the husband has no obligation to inform his wife of what he proposes to do, and so she has no opportunity to present evidence or make argument that he should not divorce her or should increase her *mahr*. Of course in this particular case, as I observed earlier, each party seemed to be bent on divorcing the other, and the only issue was what law should apply to the distribution of the property.

There is a certain awkwardness in invoking the idea of "due process" in this case. In both federal and states' constitutions, the Due Process Clause acts only as a restraint on government, not on private actors. In general, private actors are free to include whatever provisions in their contracts they judge necessary to persuade the other party to

enter the deal. For instance, one party to the contract could authorize the other party to take some action adverse to the first party's interest without notice to the first party. Generally speaking, the fact that the law of contracts allows this would not qualify as "state action" to bring into play the constitutional requirement of due process. Where is the requisite state action in the *Aleem* case? The Maryland court would not have deprived the wife of due process by invoking the doctrine of comity to respect the law of Pakistan by recognizing the husband's *talaq*. And how did Pakistan deprive the wife of due process except by permitting the husband to divorce his wife without any judicial intervention? In addition, it would seem far-fetched to suggest that Pakistan should be bound by an American constitution.

Perhaps the Maryland Court misspoke when it invoked the idea of due process, and it should have refused to recognize the provisions of the marriage contract signed in Pakistan on the ground of unconscionability. The end result would have been the same as refusing to recognize the husband's *talaq* on the ground that it conflicted with Maryland's public policy. Of course this might have made even more stark the court's preference for American values over Islamic values. It would be interesting to see what the Maryland Court's reaction would be if Pakistan law conferred on both husband and wife the power to divorce by *talaq* without any notice to the other spouse. Then inequality of treatment would be out of the picture, but would there still be ground for complaint that the very procedure, or lack thereof, of the *talaq* did not afford notice to the other party of what was about to happen and provide an opportunity to present evidence and make argument, in other words lacked due process?

A cardinal principle of United States constitutional law is that an American court may not decide a religious question[9]: It may or indeed must decide what is religion for the purpose of applying the religion clauses of the First Amendment, which speak to the category of religion, but it may not give an answer to a particular disputed religious question within any specific system of religious beliefs. This prohibition relates not only to whether God exists, but what the founder of a *waqf* or trust meant by God, or what the legislature had in mind when it passed a statute that includes a religious term. The prohibition is based upon both the Free Exercise Clause and the Establishment Clause of the First Amendment. The fear is that if a court lends its authority to a particular answer to a religious question, it will alienate those who believe the question should be answered differently, and so inhibit the free exercise of religion, and also tend to establish a government-approved answer to the religious question, and so violate the nonestablishment principle. So if you are drawing up a Muslim marriage contract and want it to be enforced in an American court, you must avoid presenting that court with a religious question under Islamic law.

There is no mention of this problem in the *Aleem* judgment. Maybe the court thought it had avoided all disputed religious questions by seizing on the fact that the choice was whether the wife was to be given Rs. 51,000, or a "fair" amount of her husband's property, both seemingly secular facts, the first because it is a specified amount of money, and the second because under Maryland law it would be a secular idea of fairness with no reference to religion. The Maryland Court of Appeals may have been encouraged in this line of thought by a famous New York decision[10] in which the husband, although he had obtained a civil divorce from his wife, refused to give her a *get*,

which she needed from a Jewish religious point of view to be free to remarry. The New York court thought it could order the husband to appear before a specified religious tribunal, which in the marriage contract he had promised to appear before, without violating the prohibition against answering religious questions. But could the religious tribunal that the husband was required to appear before be identified without answering a religious question? Moreover is it possible to pluck out from a contract that is basically religious, a single issue and compel compliance with that without distorting the meaning of the contract? In the *Aleem* case, the opinion of the court is saturated with implicit answers to religious questions. The husband's right to *talaq* is no where stated in the marriage contract: it is simply assumed to exist. The Maryland Court thinks it knows what a *talaq* is, what its requirements are and when it may be exercised, all potentially disputed religious questions. It must assume this knowledge to be in a position to condemn the *talaq*. Likewise with *mahr*, prompt *mahr* and deferred *mahr*, this is basically a religious idea, including why it is to be paid and under what circumstances it is to be paid. The Maryland Court in the *Aleem* case certainly answered a religious question when it construed an Islamic marriage contract and stated, "There is no other express or implied waiver of any property rights of either party."[11] No Pakistan court has answered this question in the *Aleem* case, because we have no judgment of a Pakistan court. Perhaps if we had a judgment of a Pakistan court, there might be an argument that an American court can avoid answering religious questions by just accepting the answer of a Pakistan court to the religious questions.[12]

The Maryland Court apparently thought it could avoid the constitutional prohibition against answering religious questions by stating that it was just enquiring into

the law of a secular foreign state and by characterizing that law as secular law.[13] "Secular" in this context would seem to mean simply that the law is backed by power in this world, and not that the law does not rest upon and lend support to religious beliefs. For surely the Pakistan Muslim Family Laws Ordinance incorporates religious beliefs and assumes others, though it departs from Islamic law in certain respects. It departs from Islamic law by requiring the husband to notify the Arbitration Board of his *talaq* and by imposing a ninety-day waiting period on the effectiveness of the *talaq*. Whether the mere fact that an American court is interpreting the law of a foreign state exempts it from the prohibition against answering religious questions, because of the importance of comity, is an interesting question and part of the more general question of the extraterritorial application of the Religion Clauses of the First Amendment. At first blush, it would seem that the same dangers would be present in answering religious questions under foreign law as in the purely domestic situation: if these questions are answered, believers who disagree with the answer the court has given will be angered and alienated and feel the United States has aligned itself with a heresy.

As mentioned earlier, in the *Aleem* case we have no judgment of a Pakistan court giving an answer to the religious questions posed by Pakistan law. Thus the Maryland court was forced to do the best it could to understand Pakistan law, including its religious dimension. But suppose an American court is called upon simply to enforce a Pakistan court's decision and is itself not required to answer any religious questions. Suppose a Pakistan court has decided that the *talaq* delivered in the Pakistan Embassy in Washington was effective to sever the marital tie. That would seem to be a satisfactory answer to the prohibition against answering religious questions. But would it be a

satisfactory response to all concerns under the Religion Clauses of the First Amendment? For it remains a fact that an American court has put the power of an American government behind a judgment of a foreign court that in the final analysis rests upon a religious belief. Whether that circumstance will stir up the same adverse reaction among believers who do not accept the foreign court's answer to the question about their religion is an important issue.[14]

In the foregoing remarks about the *Aleem* case, admittedly sketchy, I hope I have persuaded you of the interest and importance of the issues I have touched upon.

Thank you for your attention.

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[1] Aleem v. Aleem, 947 A.2d 489 (Md. 2008).

[2] Pakistan Muslim Family Laws Ordinance, VIII of 1961.

[3] Pakistan Muslim Family Laws Ordinance, §7 (3).

[4] Seth v. Seth, 694 S.W.2d 459 (Tex. Ct. App. 1985).

[5] 694 S.W.2d at 463. See also Sherif v. Sherif, 352 N.Y.S. 2d 781 (Fam. Ct. 1974) (petition for maintenance of wife dismissed because she was no longer respondent's wife: parties were domiciled in Egypt at all crucial points in their marital history).

[6] Chaudry v. Chaudry, 388 A.2d 1000 (N.J. App. Div. 1978).

[7] But see Chaudhary v. Ali, 1994 Va. App. LEXIS 759 (nikahnama executed in Pakistan not enforceable in Virginia because did not comply with Virginia statute governing antenuptial agreements); Shikoh v. Murff, 257 F.2d 306 (2d Cir. 1958) (petition for adjustment of immigration status on ground husband had married a U.S. citizen: denied,

because husband was still married to his Pakistani wife, his filing of a *talaq* in Pakistan consulate in New York not being recognized).

[8] E.g., Azizah al-Hibri, Islam, Law and Custom, 12 Am. U. J. Int'l L. & Policy 1 (1997). See also the helpful article by Richard Freeland, Islamic Personal Law in American Courts, in Beyond the Exotic: Women's Histories in Islamic Societies 227 (Amira El-Azhary Soubol, ed. 2005).

[9] See, e.g., Jones v. Wolf, 443 U.S. 595 (1979).

[10] Avitzur v. Avitzur, 58 N.Y. 2d 108, 446 N.E. 2d 136, cert. denied, 464 U.S. 817 (1983).

[11] Aleem v. Aleem, 947 A.2d 489, 494 (Md. 2008).

[12] Akileh v. Elchahal, 666 So. 2d 246 (Fla. Ct. App. 1996), is the reverse of the Aleem case in the sense that the wife sought to enforce the amount stated in the marriage contract, executed in Florida, and succeeded. The case also raises the question whether you can pick out a secular term in a religious contract. See also Aziz v. Aziz, 488 N.Y.S. 2d 123 (Sup. Ct. 1985).

[13] Aleem v. Aleem, 947 A.2d 489, 491 n. 1 (Md. 2008).

[14] See Chaudry v. Chaudry, 388 A.2d 1000 (N.J. App. Div. 1978), cited supra, where a Pakistan court had upheld the effectiveness of the divorce.