Marriage in Pakistan – Divorce in Maryland -- A Sequel

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At the Karamah program a year ago, I gave a talk with the same title—"Marriage in Pakistan—Divorce in Maryland"—about the same case—*Aleem v. Aleem*[1]—just then handed down by Maryland's highest court, the Maryland Court of Appeals. I hope to approach this same case with more information and new insights into the enforceability of Islamic marriage contracts in American courts, and so I have called the talk I am going to give today a "sequel" to my earlier talk. I also plan to show you a video of the oral argument before the Maryland Court of Appeals and follow with an appraisal of the oral argument.

The facts are fairly straightforward. The couple was married in Karachi, Pakistan. Both were Pakistani nationals and remained so throughout the story. The husband was then a graduate student in economics at Oxford University, the wife had just graduated from secondary school. The families arranged for the couple to meet according to Pakistani custom. There is uncertainty as to when, under Pakistani law, the marriage was

complete: Was it when the marriage contract was signed, when the *rukhasati* ceremony was performed, or when the wife left the home of her parents and joined her husband? In any case, all of these contingencies transpired. In many respects the law of Pakistan incorporates the law of Islam. After the signing of the marriage contract, the husband returned to Oxford to continue his studies for a doctorate, and did not return to Pakistan for almost a year. When he came back to Pakistan, the *rukhasati* ceremony was performed and the wife left her parents' home and joined him in Oxford. They lived together in Oxford for four years.

The husband got a job at the World Bank in Washington, and so the couple took up residence in Potomac, Maryland, a suburb of Washington. They lived there for over twenty years under a diplomatic visa, since he worked for the World Bank. They had two children, citizens of the United States because born in the United States. The parents and the children returned to Pakistan from time to time. This bears on the question of whether the husband and wife should be considered domicilaries of Maryland, which is largely a matter of subjective intent: where one intends to make one's home.

But the marriage did not go well. Finally, the wife filed for a divorce in the Circuit Court of Montgomery County, a Maryland court of first instance. She filed for what is called a "limited divorce" under Maryland law, which may be the equivalent of a legal separation. The wife was not allowed to file for an absolute divorce because under Maryland law there is a waiting period during which the couple may change their minds. The husband responded to the suit by answering, filing a counter-claim and by filing a motion to dismiss the complaint. His motion was granted, but the wife was allowed to amend her complaint. Four months later, after the wife had filed her complaint for a limited divorce, the husband went to the Pakistan Embassy in Washington, which is part of Pakistan sovereign territory under International Law—the husband might have thought it was equivalent to going to Pakistan—and issued a triple *talaq* in writing, divorcing his wife. He caused this document to be served on his wife and also sent a copy to the chairman of the Arbitration Board in Karachi, which was required under Pakistan law, since the Board had jurisdiction over the marriage.

Three hearings were held in the Circuit Court over a period of two years. Each time the husband moved to dismiss the complaint, but the first two times the wife was

allowed to amend her complaint. Finally, after the third trial, the wife secured a judgment of absolute divorce, coupled with a division of marital property, which allowed her to reach the husband's pension at the World Bank, valued at a million dollars.

During all three hearings in the Circuit Court, the husband was not allowed to introduce evidence of the law of Pakistan or Islamic law, though the husband had brought an expert from London to deliver the testimony. The Court of Special Appeals, Maryland's intermediate appellate court, had held that even if the husband had been allowed to introduce this proferred expert testimony on the law of Pakistan and Islamic law, it would have made no difference under the holding of the Court of Special Appeals, and so was harmless error.[2] But the Maryland Court of Appeals, the highest court in the Maryland judicial hierarchy, in many parts of its judgment, supported its decision with expressions of opinion about the law of Pakistan. These expressions of opinion about Pakistani and Islamic law may well have been wrong in the light of the husband's proferred expert testimony. For example, the Court of Appeals opinion states: "Apparently, under Islamic law, where that Islamic law has been adopted as the secular law of a jurisdiction, such as Pakistan, a husband has a virtual automatic right to *talaq* . . .

but the wife only has a right to *talaq* if it is in the written marriage agreement. . . ." And again, "There was no other express or implied waiver of any property rights of either party." And again, "from the record in the present case, it appears that under Islamic law, which, albeit with certain modifications, has been adopted as the law of Pakistan, only the husband has an independent right to *talaq* . . . ."[3]

I want to criticize the Maryland Court of Appeals' decision on a number of grounds. In the first place, the Court of Appeals stated that the marriage contract conflicted with Maryland public policy, so that the Court refused to grant it "comity," which is usually due to the judgments and laws of foreign nations. The customary view is that the foreign law must conflict with a fundamental policy of the forum state. For instance, in a Maryland case, the Court of Appeals held that a judgment of libel rendered by an English court conflicted with Maryland's fundamental public policy because it tended to undermine the freedom of the press: the English law of libel does not impose upon the plaintiff the burden of showing actual malice or reckless disregard of the truth, even when a public figure is involved.[4] In the *Aleem* case, the case before the court, the Maryland Court of Appeals characterizes the situation as constituting a "stark

discrepancy" between the public policy of Maryland and the public policy of Pakistan, with its incorporation of Islamic law. In my view these policies are not so far apart. Maryland recognizes and enforces prenuptial agreements so long as there is full disclosure of the assets of both parties and there is no "overreaching" in the context of a confidential relationship.[5] It is conceded that in the present case neither spouse had any assets of his or her own at the time the marriage contract was signed, so there was nothing to disclose. When they were married, the husband's World Bank pension was far in the future, a mere possibility; he didn't yet have a job at the World Bank. Maybe both families had assets, but under neither the law of Maryland nor the law of Pakistani is that required to be disclosed. And the Circuit Court made no findings of duress or overreaching.

If it was feasible to draw a distinction between recent immigrant wives from Pakistan and wives who have been in the United States for a long time, there might be an argument in the former's favor. After all, if the wife were still in Pakistan, under Pakistani law the wife's natal family would be bound to support her. Under the Islamic law of marriage and divorce, it is as if the marriage never existed. But by the same token,

why could not the recent immigrant wife return to Pakistan, since under my hypothesis her ties to her natal family would still be strong? The long term wife who immigrated from Pakistan presumably has woken up to the facts of life in the United States and realizes she needs to support herself if the marriage is dissolved, by developing a career for herself. If she has been in the United States for a long time, perhaps her ties with her natal family are somewhat attenuated. In which category would the wife in the *Aleem* case fall? She has lived in the United States for over twenty years. It appears that she has a green card now, though she was still under a diplomatic visa when she filed for divorce. It may be that no such distinction is feasible between a recent immigrant and a long-term resident. It all depends on the facts and does not lend itself to a rule.

So far as concerns the parents' arranging the marriage, it is just a matter of degree and certainly not a basis for denying comity for a marriage contracted in Pakistan. I have found at least one Maryland case in which the bride's father played an important role in negotiating the marriage contract "in his daughter's best interest."[6] To demand an informed and entirely individualistic choice by the wife is unrealistic. In both countries, the United States and Pakistan, family information and influences play an important role.

Undoubtedly in Pakistan the families' interests predominate, but there is no reference in the opinion in the *Aleem* case that the families were of unequal bargaining power.

Furthermore, when the marriage was actually effected, as I said earlier, was uncertain—whether with the signing of the contract, with the *rukhasati* ceremony, which took place a year after the contract was signed, or when the bride left her parents' home. Under one hypothesis about Islamic law, the wife had plenty of time to think it over. But, as you recall, the husband was not allowed to put in expert testimony on Pakistani law or Islamic law to clear the matter up. How could the law of Pakistan conflict with a fundamental public policy of Maryland if the law of Pakistan was not known?

The parties used a standard form to embody their marriage contract and to express their intentions. This standard form would have alerted the wife or her family to many important issues. The form asked numerous questions, such as whether other provisions were made that were not included in the standard form, whether the husband had delegated to the wife the power of divorce, whether the husband's right of divorce was in anyway curtailed and whether there were any special provisions. The only provision that was specifically mentioned and filled in was the subject of *mahr*, a gift from the husband

to the wife out of respect. *Mahr* falls into two categories, *mahr* that is paid on the signing of the marriage contract, "prompt *mahr*," and *mahr* that is paid on divorce, "deferred *mahr*." In this case, all the *mahr* was deferred. If the parties were divorced, then the husband was obliged immediately to pay the deferred *mahr*, which in this case he did. This gives the wife a measure of security. The wife or her family could have insisted that the *mahr* be increased. I have come across a New Jersey case[7] in which the wife sued to enforce the deferred *mahr*, which was a substantial sum, and recovered. It was the reverse of the *Aleem* case, where the wife sought to reach her husband's pension at the World Bank. As it was, the parties in the *Aleem* case left it at 51,000 Pakistan rupees, the equivalent of 2500 US dollars.

Some of the sections of the standard form were filled in—for instance the name of the wife's *vakil*, meaning her adviser. Other parts of the standard form were left blank. We are not in a position to judge the significance of the document as the parties executed it, because the husband's experts on the law of Pakistan were excluded. All we have is the Maryland Court of Appeals' surmise that "there was no other express or implied waiver of any property rights of either party," without benefit of how the Pakistani courts

would have viewed the document. Under the circumstances, how can we say that the so-called "default rule" of Pakistan law undermines the fundamental public policy of Maryland? Indeed, I suggest that the use of the term "default rule" tends to obscure how close the law of Pakistan may be to the law of Maryland, so far as enforcing prenuptial agreements. The term "default rule" seems to imply an either/or choice.

The Maryland Court of Appeals introduces the subject of *talaq* with the statement that "While the nature of *talaq* is relevant to the issues here presented. . . ," but does not go on to explain precisely how the presence of a *talaq* provision renders the marriage contract regarding property unenforceable in Maryland.[8] It would seem that the presence of the *talaq* provision infects the whole marriage contract. Why should it not be considered separable? After all, the husband and wife might never have become divorced at all. In Maryland, such a prenuptial contract is enforceable, as I mentioned earlier, so long as there is full disclosure of the assets of both parties and no overreaching. It is a familiar arrangement to protect the assets of a wealthy husband or wife from the control of a second wife or husband. The Maryland court is fierce in its condemnation of the *talaq*: It is the husband's "sole prerogative" and violates the Equal Rights Amendment

that forbids discrimination on the ground of sex, which has become part of the Maryland Constitution. Under Islamic law, as I presently understand it, the wife could have insisted that the husband in the marriage contract delegate the right of *talaq* to her. But she did not, perhaps under pressure from her family, possibly because it was not the custom in Pakistan to include such a provision.[9]

It is suggested in the Maryland Court of Appeals' opinion that the husband by delivering the *talaq* in the Pakistan Embassy sought to evade or interfere with the suit that the wife had filed in the Montgomery County Circuit Court. The Court remarks that this would leave the way open to any husband to derail the Maryland process by going to an embassy or consulate of any country that makes the Islamic law of *talaq* part of its law, and so frustrate the right to the process that the wife is entitled to in the Maryland court. But the Circuit Court had not yet granted her an absolute divorce, but only a separation, and perhaps provided her with temporary maintenance and child support while the action for a limited divorce was pending. It is the case that when a *talaq* is delivered, there is no entitlement of the wife—unless such is specified in the marriage

contract—to any advanced warning that the husband is about to pronounce the *talaq*. So in that sense there is no process afforded to the wife.

If the law of Pakistan had been allowed to be introduced, it might have shown that half the value of the family house was hers—which had a value of $850,000—because she was listed as a co-owner. Islamic law has at least protected the property of women, so that the wife has full control of property titled in her name.

In my talk last year I addressed the question of whether United States courts are allowed to answer religious questions. The answer is that they are not, either by virtue of the Establishment Clause or the Free Exercise Clause, both contained in the First Amendment to the Constitution of the United States. The reason is that if the government puts its stamp of approval on one interpretation of religious doctrine or law, it will tend to "establish" that interpretation and to impede the "free exercise" of other competing interpretations. If we had a judgment of a Pakistani court, perhaps an American court could enforce the Pakistani court's judgment without reaching any religious question.[10] It is a fact of this world that the Pakistani court handed down this or that judgment, in the husband's or wife's favor.[11] But we have no such judgment in the *Aleem* case. We have

only the Arbitration Board, whose jurisdiction is limited to ascertaining whether the parties wish to be reconciled. The only further duty of the Arbitration Board is to let pass the ninety-day waiting period and declare the divorce final.[12] Might the Arbitration Board's declaration that the divorce is final, if it has a duty to issue such a declaration, be the equivalent of the judgment of a court?[13] The wife never took up her husband's offer to pay for her air ticket to Pakistan, so that she could make an appearance before the Arbitration Board or file a suit in the Family Court of Pakistan. Perhaps she could achieve both these results without herself going to Pakistan, by authorizing a Pakistani lawyer to appear on her behalf. We do not know whether the Pakistani Family Court has jurisdiction to invalidate the *talaq* or grant her some form of maintenance or alimony. We do not know this because the husband was not permitted to introduce evidence of the law of Pakistan.[14]

If we do not have a judgment of any Pakistani court or an equivalent decision by the Arbitration Board, by enforcing which an American court might avoid answering a religious question, all we have is the law of Pakistan, as surmised by the Maryland Court of Appeals, which to a considerable extent, although with some modifications, adopts the

law of Islam. I think we all would agree that the law of Islam is a religious law, since it was revealed to the Prophet. So all we have is the law of Pakistan, statutes, ordinances, and judicial decisions, which to a large extent incorporates Islamic law. The Court of Appeals of Maryland contends that it can avoid the prohibition against American courts' answering religious questions, when it couples the secular power of Pakistan with religion. I don't think that is possible: the same constitutional policy is threatened. If an American court undertakes to answer questions presented by Islamic law, at least in the absence of a Pakistani court judgment, many Muslims in the United States might disagree with the United States court's interpretation and consider it meddling in their religion, or indeed taking over their religion. The Islamicization process is constitutionally forbidden in the United States, although it may be constitutionally permissible in Pakistan.

One final point: the law of comity is part of the law of the United States, and so reviewable by the Supreme Court of the United States.[15] It is part of private international law. Doubtless the states have wide discretion to determine who is a "domiciliary" for their own purposes, and perhaps even to attach importance to their own public policy for the purpose of ascertaining whether comity is owed to the judgments and laws of another

nation. But there is a limit to a state's discretion, imposed by the law of comity, which I have said is part of the law of the United States.[16] I suggest that this limit has been reached and passed in the *Aleem* case,[17] if we leave aside the issue that American courts are forbidden to answer religious questions. Nowhere in the Maryland Court of Appeals opinion is there any discussion of the international relations implications of its decision. For instance, if Maryland does not recognize Pakistani marriage contracts and divorces, Pakistan may not recognize Maryland divorces. The fear of retaliation is one of the bases for the law of comity.

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

[2] The Court of Special Appeals was not entirely faithful to its assumption of the correctness of the husband's contentions about Pakistan law. E.g., "If the Pakistani marriage contract is silent, Pakistani law does not recognize marital property." 931 A.2d 1123, 1134 (Md. App. 2006) (quoted by the Court of Appeals in its opinion, 947 A.2d at 502.) The husband was not allowed to introduce evidence as to how the Pakistani courts would view the silence of the marriage contract.

[3] The husband might have waived the right to present expert testimony in the Maryland Court of Appeals by not pressing his point in that Court. But, on the other hand, he might have been justified in believing that the Court of Appeals would take the same position as the Special Court of Appeals, which assumed the correctness of the husband's proferred expert testimony in regard to the law of Pakistan. Only when the Maryland Court of

Appeals handed down its opinion did it become clear that the Maryland Court of Appeals did not accept the Special Court of Appeals' assumption.

Neither advocate before the Maryland Court of Appeals knew anything about the law of Pakistan, much less about Islamic law. They did not know anything about the system of Personal Laws, which still exists in Pakistan, so that the Muslim Family Ordinance, 1961, applies only to Muslims. This resulted in considerable confusion among the judges on the Maryland Court of Appeals. (See the videotape of the oral argument. 4-07-08, No. 108.)

[4] Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997).

[5] Cannon v. Cannon, 865 A.2d 563 (Md. 2005).

[6] Harborn v. Harborn, 760 A.2d 272 (Md. App. 2000).

[7] Odatalla v. Odatalla, 810 A.2d 93 (N.J. Super. Ch. Div. 2002).

[8] See also Maryland Court of Appeals statement, "these questions raise broader issues than questions limited to the Pakistani marriage contract." 947 A.2d at 491 n. 3.

[9]Chaudry v. Chaudry, 388 A.2d 1000 (N.J. App. 1978), a case very similar to the *Aleem* case, except that the husband delivered his *talaq* at the Pakistan consulate in New York,

and a Pakistan court had upheld the validity of the *talaq*. The New Jersey court denied equitable division of marital property and gave comity to the Pakistan court's judgment enforcing the marriage contract, even though the husband had divorced by *talaq*. In the course of its opinion, the New Jersey court remarked: "It also makes clear that the antenuptial agreement could have provided for the wife's having an interest in her husband's property, but no such provision was made. . . ." 388 A.2d at 1006. The court conceded that it might have made a difference if the wife had resided longer in New Jersey before returning to Pakistan.

[10] Malik v. Malik, 638 A.2d 1184 (Md. App. 1994): In this case, a Pakistani court awarded custody to the father, but the mother removed the child to Maryland. It took two years for the father to locate the child. The Maryland Court of Special Appeals remanded the case to the trial court with the instructions to determine whether the Pakistani court had applied the standard "the best interest of the child." It also indicated that a paternal preference would not necessarily be inconsistent with the best interest of the child. It also instructed the trial court to determine whether any aspect of the substantive law of

Pakistan or the Pakistani court's procedure were repugnant to Maryland public policy. On remand, the trial court determined that the Pakistani court had applied the standard "the best interest of the child," and that there was nothing in the substantive law or the procedure that the Pakistani court had applied that was contrary to Maryland public policy. The trial court's decision was affirmed on appeal. Hosain v. Malik, 671 A.2d 988 (Md. App. 1996). In the trial court, there was introduced copious evidence of the law of Pakistan and also certain aspects of Islamic law.

[11] See the *Chaudry* case, footnote 9 supra, where we also have a Pakistani court's judgment.

The same issue could arise if an American court is asked to enforce an arbitration award in which an Islamic tribunal has applied Islamic law. If the American court involves itself in judging the fairness of the award, it must apply a secular standard of fairness and avoid Islamic ideas of fairness.

[12] The Court of Special Appeals in its opinion states that the Shariat Bench of the Supreme Court of Pakistan has invalidated the 90-day waiting period. The Court of

Special Appeals may have had in mind Allah Rakha v. Federation of Pakistan, 2000 SD 723, 780-81, in which the Federal Shariat Court invalidated the 90-day waiting period as repugnant to the injunctions of the Qur'an: the period of *Iddat* should begin when the husband pronounces the *talaq*, rather than when the Chairman of the Arbitration Board receives the notice of the *talaq*.

[13] The Special Court of Appeals mentions the Arbitration Board's issuing a "Confirmation Certificate of Divorce." 931 A.2d at 1127.

[14] Whether the Circuit Court excluded expert testimony on the law of Pakistan because it would raise religious questions, I do not know.

[15] See the statement of the Supreme Court of the United States in Hilton v. Guyot, 159 U.S. 113 (1895), that the law of comity "is part of our law." See also McCord v. Jet Spray Int'l Corp., 874 F.Supp. 436 (D. Mass. 1994), holding that Belgian judgment should be enforced under the Massachusetts' version of the Uniform Foreign Money-Judgments Recognition Act, M. G. L. ch. 235 §23A, but citing numerous authorities that consider the question one arising under United States law.

[16] See the reference in Hilton v. Guyot to an international duty to grant comity to foreign judgments, 159 U.S. at 128.

[17] See Ackerman v. Levine, 788 F.2d 830, 841-45 (2d Cir. 1986), reversing in part the trial court's failure to give comity to a German court's judgment for a lawyer's fee, relying on Judge Cardozo's statement in Loucks v. Standard Oil Co., 224 N.Y. 99, 110-11, 120 N.E. 198 (1918): "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."