Sharia in the West

Whose law counts most?

Finding an accommodation between Islamic law and Western legal codes is difficult. But there are some ways forward

ANY Western politician, judge or religious leader desiring instant fame or a dose of controversy has an easy option. All you need do is say "sharia" in public.

Sharron Angle, a Republican candidate for the Senate, proved the point when she suggested that Frankford, Texas, and Dearborn, Michigan, were both subject to a sharia regime, as a result of the "militant terrorist situation" that existed in those places. Critics retorted that Frankford, after its absorption by Dallas, no longer existed as an administrative unit. Dearborn's mayor, Jack O'Reilly, tartly told her that his town's 60 churches and seven mosques were flourishing happily under American jurisdiction. But for some tea party fans, she was guilty at worst of slight exaggeration.

Less weirdly, but just as controversially, Archbishop Rowan Williams, leader of the world's 80m Anglicans, will never be allowed to forget saying in February 2008 that some accommodation between British law and sharia was "inevitable". Lord Phillips, then England's senior judge, drew equal ire by adding that sharia-based mediation could have some role as long as national law held primacy.

It is easy to see why the word sharia has emotional overtones, especially today. The appalled reaction to the case of Sakineh Ashtiani, an Iranian woman who has been sentenced to death by stoning for adultery, has stoked a global campaign for her acquittal. The sentence was suspended last month, but her fate looks dicey. She could still face execution on a murder charge.

Such cases reflect only one part of sharia: the system of corporal and capital punishments such as stoning for adultery, death for murder or apostasy (abandoning Islam), whipping for consuming intoxicants or the cutting off of a hand for theft. Muslims themselves disagree over how, if at all, these penalties should be practised in the modern world. Tariq Ramadan, a prominent European Muslim thinker, caused a furore in 2003 when he suggested that stoning and other physical punishments should be "suspended". Hardline Islamists regarded that as backsliding. Nicolas Sarkozy (then the interior minister, now the president of France) pointed out that the formulation could imply a future resumption of physical punishment.

Horrifying as these punishments might be to modern sensibilities, there is no prospect of their exercise in any Western country. Muslims living in the West may (as has sometimes happened) take the "law" into their own hands by killing an apostate. But that counts as murder pure and simple.

Where sharia poses genuine dilemmas for secular countries with big Muslim minorities is not in the realm of retribution but in its application to family matters such as divorce, inheritance and custody. English-speaking countries boast a strong tradition of settling disputes (commercial or personal) by legally binding arbitration. This already includes non-secular institutions such as longstanding rabbinical tribunals in Britain and many other countries, or Christian mediation services in North America. Now Islam-based outfits are entering the market.

Perhaps inevitably, the procedures and general ethos of Muslim mediation are very different from those of a secular court. Many of Britain's 2m or so Muslims come from socially conservative parts of South Asia, such as rural Kashmir. The practice of sharia-based family law both reflects and to an extent mitigates that conservatism. A network of sharia councils—whose two main founders come from purist schools of Islam, the Deobandis and the Salafis—has offered rulings to thousands of troubled families since the 1980s. Much of their work involves women who have received civil divorces but need an Islamic one to remarry within their faith. The councils can overrule a husband's objections. Few would decry this. But the woman may well also forfeit her *mahr* (marriage settlement). Critics call that unfair. They also complain that, when faced with domestic violence, these councils merely administer a scolding or prescribe an "an- ▸▸

ger-management" course, rather than the safe house and prosecution that the state-run system should offer.

Still, British sharia arbitrators may alleviate a peculiarly British woe. Some Muslim Britons contract an Islamic marriage (but not a civil one) and then fail to confer on the bride the marriage settlement that would be obligatory in say, Pakistan. If the union sunders, such men then escape their obligations under both English law and Pakistani custom. The councils advise against such deviousness.

A rival set-up, the Muslim Arbitration Tribunals, now offers dispute resolution in half a dozen British cities. Founded in 2007 by followers of the Barelvi school of South Asian Islam, they are less strict than the Deobandis. But when asked to divide up an intestate's assets, they follow Islamic law, giving daughters half as much as sons. The tribunals say they operate under the Arbitration Act of 1996. That makes rulings binding once both parties have given authority to the arbitrator.

In Canada legislation framed with secular arbitration in mind but used by religious courts is a hotter issue than in Britain. In 2003 a Toronto lawyer, Syed Mumtaz Ali, proclaimed an "Islamic Institute of Civil Justice" and urged Muslims to use it. The province of Ontario reacted in 2005 by stripping religious tribunals (including Jewish and Catholic ones) of legal force. It also stiffened rules on arbitrators' qualifications and record-keeping. Quebec tightened its law too.

That has not stopped devout Canadian Muslims from seeking religious guidance on family and personal matters. As Harvey Simmons, a York University professor, wrote last month: "Because religious arbitration now takes place mainly outside the scrutiny of the Ontario courts, there is no way to tell whether women are being treated well or badly by informal religious arbitration."

In the United States both secular and religious arbitration are firmly established, operating under a Federal Arbitration Act that gives robust standing to the procedure but also allows the parties to counter-appeal to ordinary courts on certain grounds (though America's church-state separation stops courts hearing arguments about doctrine). Christian and Jewish arbitration is well-organised. The Muslim variety is lower-key and less formal, but so far not (barring outbursts from tea-partistas like Ms Angle) especially controversial.

The legal and political systems in continental Europe are most prescriptive and leave little room for cultural exceptions, at least in theory. But knotty issues of Islamic family law have arisen in courts all over Europe. Many residents of France and Germany remain citizens of their native countries. Courts usually deal with foreign passport-holders in the light of their home countries' law, while also upholding the principle that outcomes must not violate "public order" (ie, outrage local opinion).

One tricky issue is polygamy. French law explicitly outlaws it, and denies second wives the right to join their husbands in France (though if a second wife dies, her children are sometimes allowed to join their French-based father). Another is a form of divorce known as *talaq* in which a man simply renounces his wife. That has no standing in French or German law, but when both parties to a failed marriage freely testify that a *talaq* has taken place in some Islamic country, European courts have been forced to acknowledge the fact.

When high legal principles clash with a quite different social reality, the results are inevitably messy. Islamic rules on religiously mixed marriages have harsh consequences for many couples in Italy, for example. Islam prohibits Muslim women from marrying non-Muslim men (the reverse, however, does not apply). Italian marriage rules require a woman from Algeria or Egypt, say, to obtain her embassy's consent, which is likely to be refused unless the would-be husband converts (or "reverts", in Islamic parlance).

In most parts of Europe migration has made sharia a pressing issue. But in one European region, by a quirk of history, a community with deep local roots lives under Islamic family law. This is northern Greece, where a Muslim community of at least 100,000 was allowed, under the 1923 Lausanne treaty, to retain cultural autonomy, including widespread jurisdiction over family matters for local muftis.

Nothing stops a Greek Muslim from going to the state courts, but communal pressure impels most people to settle family affairs through the muftis. The community, which is sensitive to perceived slights from the state, would react badly to any change. "People see sharia as their cultural right and they would be angry if it was taken away," says Ali Huseynoglu, a doctoral student from northern Greece. "If Muslim tribunals are starting in Britain, it would be odd to abolish sharia in a place where it has been applied since Ottoman times." ■

Islam's legal lexicon

How to speak sharia

Telling the fard from the fatwa

LITERALLY the "path" or "path to water", sharia is a catch-all term for Islamic codes covering everything from social mores to crime. Based on the Koran and the sayings attributed to Muhammad, as well as the work of *ulema* (Muslim scholars), it is clear and strict in some matters (such as family law) and fluid and evolutionary in others (such as commerce). It comprises five main schools of interpretation (four Sunni and one Shia). In Muslim lands sharia courts are overseen by a *kadi* (judge) who will have studied both *fiqh* (legal interpretation) and how to apply *qiyas* (analogy).

Fiqh classifies behaviour into one of five categories: *fard* (mandatory), *mustahabb* (advisable), *mubah* (neutral), *makruh* (inadvisable), and *haram* (prohibited). *Huddud* refers to the corporal and capital punishments that are laid down in traditional Islamic law for certain offences, including death by stoning for adultery. However, *fatwa* (ruling or opinion), contrary to popular opinion in the West, refers to theological, not legal, pronouncements in which one or more scholars opine on some pressing issue (the subjects of recent *fatwas* have ranged from questions of personal hygiene to the ethics of suicide-bombing).

Nikah (an Islamic marriage) usually requires an imam to officiate and must involve a *mahr* (marriage settlement) conferred on the bride. It may end in a *Talaq*: this usually means a unilateral invocation of divorce by the husband. *Khula* is a divorce granted by a judge at the wife's request.

Those were the days, m'learned friend

Baffling? Perhaps. In a well-worn English legal anecdote a judge asks a lawyer acting for a thief from Yorkshire: "Is your client familiar with the principle of *Nemo dat quod non habet* (nobody gives away what he does not possess)?" The apocryphal answer is: "Indeed, m'lud, in Barnsley they speak of little else." Fewer lawyers know Latin now, but in Yorkshire towns the relationship between, say, *mahr* and *talaq* is increasingly well understood.